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TABLE OF CONTENTS

RECENT DEVELOPMENTS

Katherine Cook

Australian Law Reform Commission completes inquiry into the incarceration rates of Indigenous Australians

On 22 December 2017, the Australian Government received the Australian Law Reform Commission's final report on the incarceration rates of Aboriginal and Torres Strait Islander peoples.

The government announced this inquiry in October 2016 to examine the factors leading to the disturbing over-representation of Indigenous Australians in our prison system and to consider reforms to the law.

This report is the culmination of nearly a year's intensive work on a complex and important issue. The Australian Law Reform Commission consulted widely and released a discussion paper in July of this year.

The Australian Government sincerely thanks the Commission for its report and will now carefully consider the recommendations.

We will work with Indigenous Australians, state and territory governments, the legal profession and the wider community to develop solutions for this complex issue.

The final report will be tabled in Parliament and released publicly in 2018.

<https://www.attorneygeneral.gov.au/Media/Pages/Australian-Law-Reform-Commission-completes-inquiry-into-the-incarceration-rates-of-Indigenous-Australians-22-December-2017.aspx>

New Solicitor-General for Victoria appointed

The Andrews Labor Government has announced the appointment of Kristen Walker QC as the Solicitor-General for Victoria.

Ms Walker replaces outgoing Solicitor-General, Richard Niall QC, who has been appointed as a Judge of the Court of Appeal.

Ms Walker is one of Australia's most distinguished advocates and legal scholars, recognised around Australia as a leading expert in constitutional, administrative and human rights law.

Ms Walker has appeared regularly in the High Court, the Court of Appeal, the Supreme Court and the Federal Court in cases involving constitutional, administrative and human rights law. Prior to her appointment as senior counsel she often appeared as junior to the Solicitors-General for Victoria and the Commonwealth.

Ms Walker has frequently advised the Victorian and Australian Governments on constitutional, statutory interpretation and administrative law issues.

From 2011 to 2012, Ms Walker was legal adviser to the high-profile Independent Inquiry into the Media and Media Regulation, conducted by Ray Finkelstein QC.

Ms Walker is a Principal Fellow at the University of Melbourne, where she has lectured in constitutional, administrative and international law, and written advocacy, since 1994. She was an Adjunct Professor at Columbia University Law School in New York from 1998 to 2000 and a visiting professor at the University of Arizona, James E Rogers College of Law, in 2004. Ms Walker was an associate to Sir Anthony Mason, Chief Justice of Australia, from 1993 to 1994.

Ms Walker was admitted to legal practice in 1993, signed the Bar Roll in 2004 and was appointed senior counsel in 2014. She holds a Bachelor of Laws (Honours) and Bachelor of Science from the University of Melbourne, where she won the Supreme Court Prize for best law graduate.

She also holds a Master of Laws from the University of Melbourne and a Master of Laws from Columbia Law School, New York, where she studied as a Fulbright Scholar.

<https://www.premier.vic.gov.au/new-solicitor-general-for-victoria-appointed/>

Ombudsman releases report into Immigration's processing of applications for Australian citizenship by conferral

Commonwealth Ombudsman, Michael Manthorpe PSM, has released a report on the Department of Immigration and Border Protection's processing of applications for Australian citizenship by conferral.

The report looks at delays in the department's handling of citizenship applications that require enhanced identity and integrity clearance checks.

Last year, the Ombudsman's Office received an increase in complaints from people who had lodged applications for citizenship by conferral and had waited, in some cases, over 18 months for an outcome.

'The report makes four recommendations aimed at improving the quality of information available to delegates in the Australian Citizenship Instructions (ACIs) in order to achieve greater certainty and timeliness in complex identity and character assessments', Mr Manthorpe said.

The department is currently revising its ACIs to improve guidance to delegates. The department has also worked to reduce the total number of citizenship by conferral applications it has on hand for processing.

'The department has achieved a reduction in the overall number of cases under consideration, although we have also seen an increase in the number of applications where a decision has not been made for over two years. The department still has work to do to ensure timely management of these complex cases', Mr Manthorpe said.

The department has accepted the Ombudsman's recommendations. The Ombudsman's Office will continue to work to monitor the implementation of the recommendations in the report.

<http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2017/18-december-2017-ombudsman-releases-report-into-immigrations-processing-of-applications-for-australian-citizenship-by-conferral>

Which small businesses have mandatory data breach reporting obligations?

From 22 February 2018, the Notifiable Data Breaches scheme (NDB scheme) will require a wide range of organisations to report data breaches that are 'likely to result in serious harm' to the individuals whose personal information is affected by the breach. They will also be required to notify the Office of the Australian Information Commissioner.

The NDB scheme applies to organisations that already have obligations to secure personal information under the *Privacy Act 1988* (Cth). Generally, this does not include small businesses that have a turnover of $3 million a year or less.

However, there are a few exceptions. Organisations that fall under the following categories will have mandatory data breach reporting requirements, regardless of their size:

- health service providers (including, for example, private hospitals, day surgeries, medical practitioners, pharmacists, allied health professionals, gyms and weight loss clinics, childcare centres and private schools);
- organisations that trade in personal information;
- credit reporting bodies;
- credit providers;
- employee associations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth); and
- organisations that opt into being covered by the Australian Privacy Principles under s 6EA of the Privacy Act.

The NDB scheme will also apply to small businesses in these categories that are based overseas if they have an 'Australian link'.

Tax File Number (TFN) recipients (which is any person in possession or control of a record with TFN information) will also need to comply with the NDB scheme in relation to their handling of TFN information. This means that, if TFN information is involved in a data breach, a TFN recipient will be obligated to meet the requirements of the NDB scheme.

Organisations that are not covered by the NDB scheme are encouraged to use the information in our guidance on notifying individuals under the scheme to create or review their data breach response plans.

Being transparent when a data breach occurs is central to meeting community and consumer expectations. Ninety-four per cent of Australians believe they should be told when a business loses their personal information. Informing individuals about a data breach is one step that organisations can take to demonstrate that they take their responsibility to protect personal information seriously.

And, as a practical measure, notifying individuals at risk of harm can provide them with the opportunity to reduce their chances of experiencing harm. For example, individuals can resecure compromised online accounts. This can reduce the potential impact of a data breach overall.

<https://www.oaic.gov.au/media-and-speeches/news/which-small-businesses-have-mandatory-data-breach-reporting-obligations>

Australian Human Rights Commission: time to rebuild the structure of Closing the Gap

Australia is a long way short of closing the gap by 2030 and needs to rebuild the foundations of the strategy as a matter of urgency.

The Close the Gap Campaign welcomes the news that there has been an improvement in several closing the gap targets; however, only meeting three out of seven targets for such a critical national priority is no cause for celebration.

Close the Gap Campaign Co-Chair and Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO, said the strategy needs a major recommitment to make the accelerated progress needed.

'After 10 years of closing the gap work, we all expected to be further ahead than just managing to meet three out of seven targets', Commissioner Oscar said.

'This is a national shame. In 2018, it is still a fact that our people live nearly a decade less than non-Indigenous peoples in this country.'

Last Thursday, the Close the Gap Campaign released a highly critical review of the last 10 years of COAG's Closing the Gap Strategy.

The federal government is currently leading a refresh process of the Closing the Gap Strategy.

Close the Gap Co-Chair and Co-Chair of the National Congress of Australia's First Peoples, Rod Little, says the refresh process is the last chance to get government policy right in order to achieve the goal of health equality by 2030.

'The analysis of the campaign is that the strategy will not work, or only partially work, if governments fails to resource it and stick to the plan.'

'All Australian governments must return to the first principles and commitments of the Close the Gap Statement of Intent — first signed in 2008. This was an ambitious, landmark and human-rights based compact that we hold governments to', said Mr Little.

The campaign welcomed reports of the success of economic targets relating to Indigenous procurement, which is indicative of the value of targeting setting. Government must continue to be held accountable to national headline targets.

The government is yet to provide any direct response to the health recommendations provided by the campaign last week. For example, Aboriginal Community Controlled Health Organisations (ACCHOs) must be supported to expand much further. It is well established that ACCHOs are best placed to deliver culturally safe health services, which cut unnecessary hospital admissions and lift access across the health system.

There were some detailed and considered recommendations made by the campaign in its review launched on Thursday, 8 February. We look forward to a detailed response to those recommendations from federal, state and territory governments.

The Close the Gap Campaign Review called for the following:

- A new strategy must be co-designed with Aboriginal and Torres Strait Islander health leaders and be underpinned by agreements negotiated between federal, state and territory governments and Aboriginal and Torres Strait Islander health leaders.
- The building blocks of a new strategy must include national funding agreements, implementation plans and clear accountability.
- Maternal and infant health programs and a focus on addressing chronic disease must be retained and expanded.
- Strategy targets must be retained and inputs for good health must be measured. State and territory governments should also report on targets in relation to their jurisdiction.
- The National Aboriginal and Torres Strait Islander Health Plan Implementation Plan should be fully costed, funded and implemented — and focus on identifying and filling health service gaps.
- The strategy should work to an overarching health infrastructure and housing plan that works to build the right physical environment for health to flourish.

<https://www.humanrights.gov.au/news/media-releases/time-rebuild-structure-closing-gap>

Recent decisions

A tribunal hearing conducted in a manner giving rise to reasonable bias

Sharma v Minister for Immigration and Border Protection [2017] FCAFC 227 (North, Logan and Charlesworth JJ) (22 December 2017)

On 23 December 2013, the appellant (Abhishek Sharma) was granted a TU-573 Higher Education Sector visa (the 573 visa) to study a Masters of Commerce (Professional Accounting) (the Masters course). Following the grant of his visa, he failed several subjects in the first semester.

On 1 July 2014, the appellant applied for a TU-572 Vocational Education and Training Sector visa (the 572 visa). On 25 July 2014, following the advice of a migration agent, the appellant obtained a new enrolment to study commercial cookery, which was a subject for which the 572 visa could be obtained.

On 29 July 2014, the appellant's enrolment in the Masters course was cancelled by the education provider.

On 14 August 2014, a delegate of the Minister for Immigration and Border Protection refused the appellant's application for the 572 visa. The delegate found the appellant had not satisfactorily explained why he made such a significant change in direction within such a short time. Consequently, the delegate was not satisfied that the appellant was a genuine applicant for entry and stay in Australia as a student.

On 5 September 2014, the Department of Immigration and Border Protection notified the appellant of its intention to consider cancelling the 573 visa that was linked to the Masters course under s 116(1) of the *Migration Act 1958* (Cth). Section 116(1) of the Act gives the Minister the power to cancel a visa if the Minister is satisfied that the holder has not complied with the condition of the visa. In this case, appellant had not complied with the condition to remain enrolled in the Masters course.

In late September 2014, the appellant enrolled in a Bachelor of Accounting course, which was a qualifying course for a 573 visa.

On 1 October 2014, the Minister's delegate cancelled the appellant's 573 visa.

The appellant applied to the then Migration Review Tribunal for a review of the Minister's decision to cancel his 573 visa. On 29 January 2015, the Tribunal conducted a hearing of the review application. He was assisted by a new migration agent, who was present at the hearing.

At a very early stage of the hearing, shortly after it commenced at 10:06 am, the Tribunal member suggested that the appellant might be making up a story and not answering the member's question. During the hearing, the Tribunal member repeatedly interrupted the appellant before he could finish or elaborate on his evidence.

At 4:49 pm on the same day as the hearing, the Tribunal affirmed the decision to cancel the appellant's visa. The reasons for the decision ran to 31 paragraphs.

The appellant sought judicial review in the Federal Circuit Court. The Federal Circuit Court dismissed his application.

The appellant then appealed to the Full Federal Court (the Full Court). The sole ground of appeal was that the Federal Circuit Court erred in failing to find that the decision of the Tribunal was affected by procedural unfairness in the form of apprehended bias.

The Full Court opined that apprehended bias is shown if a fair-minded lay observer might reasonably apprehend that the decision maker might not bring a fair and impartial mind to the making of the decision: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6] (Gleeson, McHugh, Gummow and Hayne JJ).

The Full Court found that, in determining whether the Tribunal member's conduct might be indicative of a mistaken but nonetheless open state of mind, a reasonable observer would form an impression based upon the accumulative effect of hearing as a whole. The Full Court held that the numerous instances in which the Tribunal member peremptorily shut down the appellant's evidence, when considered accumulatively, support a conclusion that a fair-minded observer might reasonably apprehend that the Tribunal might be unwilling to listen to and deal with the evidence in fact given by the appellant. It is not necessary to demonstrate that the observer would reach a settled conclusion that there was an unwillingness to listen: it is sufficient to show that the observer might apprehend that the Tribunal had that state of mind.

Moreover, the Full Court held that the observer may have regard not only to the words said by the Tribunal but also to the tone of voice in which the words are expressed. In that respect, the audio recording of the hearing does not support an inference that the Tribunal was merely mistaken in its view of the evidence. To the contrary: the conclusion that a reasonable observer might apprehend bias on the part of the Tribunal member is only reinforced by the demeaning and dismissive manner in which the Tribunal dealt with the appellant from a very early juncture in the hearing.

The Full Court also noted that some light may also be thrown on the issue by noting the unusual speed in the delivery on Tribunal's reasons. The reasonable lay observer might also regard that circumstance as providing some explanation for the way the hearing was conducted.

The Full Court held that the Federal Circuit Court erred in failing to hold that the hearing in this instance was affected by apprehended bias. The appeal was allowed, the orders of the Federal Circuit Court were set aside, the decision of the Tribunal was set aside and the application was remitted to the now Administrative Appeals Tribunal to be determined in accordance with law.

When is a factual error a failure of a Tribunal to conduct its statutory review function?

SZTSC v Minister for Immigration and Border Protection [2017] FCA 1032 (Greenwood J) (4 September 2017)

These proceedings concerned an appeal to the Federal Court from a decision of the Federal Circuit Court, by which that Court dismissed an application for judicial review of a decision of the Refugee Review Tribunal.

On 5 December 2013, the then Refugee Review Tribunal affirmed a decision of the delegate of the Minister for Immigration and Border Protection not to grant the applicant a Protection (Class XA) visa under the *Migration Act 1958* (Cth).

Before the Tribunal, the appellant claimed to be a Hazara Shia born in 1982 in Afghanistan. In 1989 he moved to Kabul and resided in Marak during winter. The appellant claimed, among other things, that his house in Kabul was attacked at night and the attackers fired shots at the house. However, in its reasons for decision, the Tribunal found that the applicant was '68 years old'. The Tribunal also stated that the fact the appellant 'had not made any claim that he has ever previously been harmed or threatened in Kabul *supports my findings*' that he was not owed protection obligations by Australia.

Before the Federal Court, the appellant contended that the Tribunal fell into factual error when considering his individual circumstances by observing that the appellant was 68 and had not made any claim that he had previously been harmed or threatened in Kabul (the incorrect facts). However, as this ground was not raised before the Federal Circuit Court, the Federal Court need first to decide whether the appellant ought to be given leave to rely upon grounds of appeal raising questions which were not raised before the Federal Circuit Court.

The solicitors for the Minister contend that leave to rely upon the new ground ought to be refused, as the appellant had failed to demonstrate that the proposed new ground had 'clear merit': *Vaux v Minister for Immigration* (2004) 238 FCR 588 (*Vaux*).

The Federal Court opined that leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* [1982] HCA 33. The practice of raising arguments for first time before appeal courts has been particularly prevalent in appeals relating to migration matters. A court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, leave should generally be refused (*Vaux*). Several contextual things should be noted about migration matters and the application of the principles governing leave to rely upon grounds of appeal where matters were not raised before the primary judge (*Vaux*). For example, in migration matters applicants often suffer from language difficulties and the ability to obtain legal advice.

In this case, although the appellant had the same pro bono lawyer in the Federal Circuit Court, the ground the appellant sought to rely upon in the Federal Court concerning the errors in the Tribunal's decision was introduced on the recommendation of counsel, who was

only engaged for this appeal. As such, the Federal Court was satisfied that the new ground arose because his counsel appreciated there was an issue as to whether the Tribunal failed to discharge its statutory review functions.

The Federal Court was further satisfied that the appeal had 'clear merit'. The Federal Court found that, on the basis of incorrect facts, the Tribunal reached a conclusion that it could not be satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Afghanistan, there was a real risk that he would suffer significant harm; thus, Australia does not owe protection obligations to the appellant.

The Federal Court further found that, in proceeding in this way, the Tribunal failed to discharge the statutory review function required of it and had fallen into jurisdictional error. Sometimes this is said to be a 'constructive failure' to discharge the review function. However, that term is inappropriate in this case, because there was an *actual* failure to discharge the statutory review function and thus jurisdictional error arose.

When is an FOI application an abuse of the right of access?

Adelaide, City of, 2017/11142 [2018] SAOmbFOI 3 (8 January 2018)

On 6 October 2017, the applicant sought access to documents under the *Freedom of Information Act 1991* (SA) (the FOI Act) relating to any certificate issued by the City of Adelaide (the agency) under the *Expiation of Offences Act 1996* (SA) (the EO Act). Section 13 of that Act requires agencies that issue expiation notices to provide certificates to the Fines Enforcement and Recovery Officer (the FERO) if they wish that officer to take action to enforce payment of fines. This was the 15th application made by the applicant in the previous 13 months in relation to a single parking fine issued by the agency.

On 31 October 2017, the agency's chief executive officer, Mr Goldstone, wrote to the applicant advising him that he had decided to refuse to deal with the application under s 18 of the FOI Act on the basis that it was part of a pattern of conduct that amounted to an abuse of the right of access conferred by that Act.

On 3 November 2017, the applicant sought external review of the decision by the South Australian Ombudsman under s 39 of the FOI Act.

The issue for the Ombudsman was whether the agency has demonstrated that the agency's opinion — that the application was part of a pattern of conduct that amounted to an abuse of the right of access — was arrived at on reasonable grounds.

On 30 November 2017, the Ombudsman issued his provisional determination. Subject to the receipt and consideration of submissions from the parties, he proposed to confirm the agency's determination.

In response to the Ombudsman's provisional determination, the applicant contended that his application under the FOI Act was not just for documents related to his parking fine; rather, he sought any document the agency held that amounts to a determination by the FERO for the purposes of s 13(1)(a) of the EO Act. However, the Ombudsman found this was not clear from the wording of his application to the agency. As such, the Ombudsman concluded that it was reasonable for the agency to have interpreted the most recent application as only focusing on the certification process for the applicant's parking fine.

The Ombudsman concluded that it was reasonable for the agency to have formed this opinion and confirmed the agency's determination that the application was part of a pattern of conduct that amounted to an abuse of the right of access. In reaching his conclusion the Ombudsman took the following into account:

(1) This application was the 15th made by the applicant to the agency in a period of 13 months.
(2) Each of the 15 applications constituted requests for access to documents relating to the enforcement of a single parking fine issued to the applicant by the agency.
(3) Ten of the 15 applications constituted requests for access to documents relating to the certificate provided to the FERO.
(4) The requests appear to have been intended to assist the applicant to establish that the FERO had been taking enforcement action against expiation notice recipients without requiring agencies to comply with s 13 of the EO Act.

ADMINISTRATIVE REGULATION-MAKING: CONTRASTING PARLIAMENTARY AND DELIBERATIVE LEGITIMACY

Andrew Edgar*

While it is clear that administrative regulations can control matters that are morally or politically controversial, the processes by which they are made in Australia do not generally require transparency or public participation — the primary features of deliberative democracy. This aspect of Australian law is similar to other Westminster-based parliamentary systems. This article compares regulation-making processes in Australia with regulation-making in the United States — a system that is recognised by administrative law scholars as being focused on deliberative democracy. The purpose of the comparison is to highlight the distance between Australian regulation-making systems and a system based on deliberative democracy principles and to develop an understanding of the regulatory contexts in which such deliberative systems could be established in Australia.

Deliberative democracy and administrative law

Australian governments make laws on matters involving moral disagreement. Some examples include religious welfare services in public schools,[1] prevention of cruelty to animals,[2] and regulation of abortion-inducing drugs.[3] Governments also make laws on matters involving social and economic issues whereby business practices are controlled in order to achieve public benefits. Common examples of this form of regulation include controls on land uses for environmental and public health purposes,[4] limiting fishing entitlements to protect species that are at risk[5] and controlling the sale of products for consumer health and safety purposes.[6]

Most people would expect that, in the Australian constitutional system, decisions involving such moral and political judgments would be made by parliaments and by way of public debate. However, all of these examples concern laws in the form of regulations — a form of law that generally can be made in Australia and comparable Commonwealth countries without transparency or public participation. If no public consultation is carried out by government officials, members of the public are unlikely to know that a regulation is being made until it is operative. If, at this point, they disagree with it, they will need to seek out a member of Parliament to engage parliamentary processes to disallow the regulation or start lobbying for it to be repealed or amended.

Public debate is a fundamental characteristic of parliamentary law-making, but it is not recognised in law as an essential feature of administrative regulation-making — a form of

* *Andrew Edgar (BA, LLB (Macq), PhD (Syd)) is an associate professor at the Sydney Law School, University of Sydney.* *Drafts of this article were presented at the Constitutional Deliberations Conference, Australian National University Public Law Weekend, on 1–2 October 2015 and at the Legal Processes and Human Rights Workshop, Macquarie University Research Centre for Agency, Values and Ethics, on 26 April 2016. Thanks to the participants at those events for their feedback. Thanks in particular to Rayner Thwaites and the anonymous reviewers for comments. Any errors are the author's own. This article was also published in the Melbourne University Law Review, volume 40 (2017).*

law-making referred to by Professor Jerry L Mashaw as involving '[m]icropolitics'.[7] The lack of enforceable transparency and public participation laws for administrative decision-making conflicts with developments in political theory in the last 30 or so years that focus on transparency, public debate, and reasons — that is, processes that facilitate deliberative decision-making — as necessary conditions for the legitimacy of laws. While legal and political theorists (liberals,[8] pragmatists,[9] neo-realists[10] and legal positivists)[11] are engaged in ongoing debate regarding deliberative democracy's philosophical basis, scope and content, its procedural framework is generally accepted.[12]

The question for this article concerns the extent to which deliberative forms of legitimacy have been adopted in administrative law doctrine in regard to regulation-making. To answer this question I will compare an overtly deliberative administrative law system of regulation-making — the system in the United States (US) (to be referred to as the 'US deliberative model') — with the primary features of Australian regulation-making systems (to be referred to as the 'Westminster parliamentary model'). Both models accept that legislatures can delegate authority to administrators to make regulations and that courts in judicial review proceedings can ensure that particular regulations are consistent with the provisions of the empowering Act. However, the two models differ in regard to additional controls. These differences are significant for their contrasting assumptions regarding the legitimacy of regulations.

Australian regulation-making systems focus on parliamentary control of regulations. They enable review of particular regulations by parliamentary committees and disallowance by Parliament. There is, therefore, the possibility of parliamentary debate regarding the social and economic issues inherent in regulations. However, it must be recognised at the outset that parliamentary supervision of regulation-making is limited in practice. It has long been recognised that parliamentarians have little time or energy for such review,[13] and parliamentary regulation review committees focus on technical matters rather than the policy-based issues that arise in disagreement on social and economic grounds.[14] Nevertheless, parliamentary control of regulations provides the essential additional criterion for the legitimacy of regulations in Australia.

The US deliberative model, on the other hand, focuses on transparency, public participation and reasons that add up to a system recognised by leading scholars as being consistent with the fundamentals of deliberative democracy.[15] As will be examined in the various sections of this article, deliberative processes for making regulations are recognised in US constitutional law and play a prominent role in legislation that controls regulation-making processes and judicial review principles. Accordingly, the US deliberative model makes deliberative processes an essential additional criterion of legitimacy along with legislative authorisation.

The important point of difference between the two systems is that, while the Australian parliamentary model includes methods for holding administrators accountable for their regulations to Parliament and the courts, there is nothing in the model that requires open deliberation by regulation-makers. It is not required by general regulation-making legislation or judicial review standards. Judicial review standards are focused instead on ensuring that administrators stay within the scope of power granted to them by the Parliament. Regulation-making legislation in the US does require open deliberation, and the courts have administered these laws in a manner that ensures the elements of deliberative decision-making are carried out.

My focus in this article is to draw out the connections between public consultation processes and conceptions of legitimacy inherent in two different, but related, public law systems. This is intended to highlight the distance between Australian regulation-making systems and a

system based on principles of deliberative democracy and to better understand the organising principles of Australian regulation-making systems. It focuses on the different ways in which the two systems allocate sites for political debate and deliberation.

The article starts with an overview of aspects of Australian public law in order to contrast regulation-making systems with other features of constitutional law and administrative law that enable and require transparency and public participation in government decision-making. It then compares the primary features of the general regulation-making systems in Australia and the US — the constitutional principles, the general regulation-making legislation, judicial review standards, and principles regarding access to judicial review. The purpose is to highlight how these features have evolved in Australia to reflect Westminster parliamentary principles and how the US deliberative system differs from it.

There are, however, exceptions in Australia, which are examined in this article. Parliaments can establish the basic features of a deliberative regulation-making system under specific statutes; for example, by legislation that empowers administrators to make regulations such as environmental plans.[16] I briefly examine examples of such mandatory public consultation provisions and identify some common characteristics.

Regulation-making in Australia: between constitutional and administrative law

While Australian administrative law regarding regulations is not directed towards enhancing deliberation, other aspects of Australian public law do play such a role. The High Court has developed the implied freedom of political communication to ensure openness, participation and accountability of government to the people.[17] This has been understood to safeguard debate about political matters and thereby facilitate the basic elements of deliberative democracy in regard to parliamentary processes and decision-making.[18] Accordingly, constitutional law plays an important role in establishing the conditions for deliberative decision-making.

Australian administrative law has also developed a set of procedural requirements directed to deliberative decision-making. Procedural fairness is judge-made law that imposes procedural requirements for decision-making by administrative officials. It requires administrators to disclose adverse information and give the affected person a reasonable opportunity to be heard in relation to such information.[19] More recently, the High Court has developed a requirement for the decision-maker to respond in their reasons to the specific argument made by the person affected.[20] This form of responsiveness rounds out the dialogue between the decision-maker and the person affected. The decision-maker is required to disclose crucial information, give the person an opportunity to make arguments and also respond to such arguments in their reasons for the decision. It makes administrative decision-making a two-way exercise by which the affected member of the public contributes to the particular decision. Accordingly, it is specifically directed towards ensuring deliberative decision-making.

However, procedural fairness has limits that result in it not being applicable to political decisions — the decisions with which deliberative democracy is primarily concerned. Procedural fairness applies to administrative decisions that affect a person directly and individually and not to political or policy decisions that affect the public generally,[21] as is the case for administrative regulations.[22]

The form of procedure that would enable administrative regulations to be made in a deliberative manner is referred to as public consultation.[23] It involves public notice of a proposed regulation and an opportunity for members of the public to lodge a submission. It

requires submissions to be considered and preferably responded to in the administrator's reasons for decision. In Australia, the Commonwealth and state legislation that controls administrative regulation-making generally includes *unenforceable* public consultation provisions.[24] This means that there is no legal significance if administrators fail to carry out a public consultation process or conduct a poor-quality public consultation process. This is similar to the laws in comparable Commonwealth countries where process requirements for administrative regulations are not included in general regulation-making legislation but are included instead in unenforceable policy documents.[25] On the other hand, there is a highly developed system of legal requirements for public consultation for administrative regulations in the US (referred to there as 'notice and comment'). Accordingly, while US administrative law provides enforceable process requirements for the making of administrative regulations, in Commonwealth countries comparable to Australia the generally applicable legislation that controls regulation-making does not.

When parliaments in Australia have included mandatory public consultation provisions in specific regulatory contexts as an exception to the general regulation-making legislation, the courts have had to accept the role of supervising deliberative process. The case law on enforcement of mandatory public consultation provisions makes clear that courts can ensure that information in a public notice is accurate and detailed enough for a member of the public to decide whether to participate[26] and that submissions provided by members of the public are considered by the decision-maker.[27] Courts can require a new round of consultation when substantial changes are made to a proposal after the initial consultation process is held.[28] In these ways, Australian courts have enforced public consultation rules when they are included in legislation as mandatory requirements and have ensured a basic minimum of deliberative decision-making. Of course, courts cannot carry out such a role for administrative regulations when the consultation requirements are expressly unenforceable.

The lack of generally applicable, enforceable rules requiring transparency and public participation in Australia is particularly concerning when it is considered that administrative regulations have become the most prevalent form of legislation. For example, from 1992 to 2011, the Commonwealth government made between 1546 and 3004 administrative regulations each year[29] compared with between 84 and 264 Acts of Parliament.[30] The amount of regulations has also increased in recent years. Whereas from 1985 to 1990 the Commonwealth government made between 855 and 1352 regulations each year, between 2004–2011 and 2013–2015 over 1800 regulations have been made each year.[31] This suggests that administrative regulations have become the primary form of law-making in Australia. Scholarship from comparable Commonwealth countries indicates that this is not only an Australian phenomenon.[32]

The fork in the road: constitutional principles

Constitutional laws regarding delegation of law-making powers by parliaments to administrators provide a convenient starting point, as they establish the organising principles for administrative regulation-making systems. Although delegation of regulation-making power is permissible in both the US and Australia, there are important differences between them in regard to the controls they impose on such delegation. These differences are highly significant for administrative law principles and processes applying to regulation-making. They played an important role in the primary Australian case regarding delegation of law-making power to administrators: *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*[33] (*Dignan*).

Dignan involved a challenge to a regulation-making power concerning the employment of transport workers. The regulation-making power in the relevant Act was very broad and the regulations made according to it had raised substantial political disagreement.[34] The

applicant challenged the provision in the Act granting power to make regulations for breaching the separation of powers in the *Constitution*. The High Court rejected the challenge.

Justice Dixon, and to a lesser extent Evatt J, understood the options for resolving the issues as involving a choice between US and Westminster parliamentary approaches to delegation of law-making powers.[35] Justice Dixon understood the US non-delegation principle as ensuring that the scope of power delegated to an administrator is limited.[36] The principle is commonly referred to as the 'intelligible principle'[37] and it requires the provision delegating legislative power to include parameters. On the other hand, Dixon J understood the Westminster parliamentary approach as allowing very broad delegation of regulation-making powers. Although Dixon J accepted that 'logically or theoretically' the *Constitution* made Parliament the exclusive repository of law-making power,[38] he accepted that the Westminster parliamentary approach was right for Australian law due to 'the history and usages of British legislation and the theories of English law'[39] and because the High Court had effectively adopted it in earlier cases.

Consistently with this understanding of administrative regulations, the limits on delegating regulation-making powers in Australia are minimal — requiring only that the delegating provision of the Act be within a head of power under s 51 of the *Constitution*[40] and that Parliament not abdicate its law-making power by establishing an institution with general law-making power.[41]

The justices in *Dignan* explained how administrative regulations are understood within the Westminster parliamentary constitutional framework. Justice Dixon stated that in this model particular regulations rely on the empowering legislation for their efficacy not only at the time a regulation is made but also in a continuing sense.[42] Justice Evatt echoed this view and based it on parliamentary supremacy: that Parliament is not limited in its ability to delegate regulation-making power and retains control over the regulation that is made through its power to invalidate the Act or the regulation.[43] Australian constitutional law scholars have stated that the High Court's decision in *Dignan* understates the limits on delegating regulation-making power that could be derived from the separation of powers in the *Constitution*.[44] Nevertheless, the High Court has not added to the criteria initially set out in *Dignan* for the delegation of regulation-making powers and, accordingly, it is appropriate to understand that case as establishing the constitutional principles by which regulation-making systems in Australia have developed.

Accordingly, Australian constitutional law is relatively permissive in regard to parliaments granting powers to administrators to make regulations. The emphasis is on parliamentary authorisation and potential ongoing control over particular regulations. Constitutional law does not require, or 'prod',[45] procedural requirements for administrative regulation-making. The US non-delegation principle does include such processes, albeit as secondary requirements that have been brought to light in recent scholarship. While the US non-delegation principle has only been applied to invalidate legislation in two cases, and those two cases were decided as long ago as 1935,[46] the principles developed in the non-delegation cases provide important conceptual background to administrative law principles for regulation-making.

The US non-delegation principle's primary feature is the just-mentioned 'intelligible principle', which requires that the legislation that delegates regulation-making power to administrators includes standards that guide administrators when they exercise the power.[47] The intelligible principle establishes an important role for administrative law litigation. If called upon, courts can determine whether particular regulations comply with the standards included in the statutory power to make regulations.[48] Importantly, however, the US non-delegation principle

includes an additional requirement. Recent scholarship has shown that the early non-delegation case law in the 1920s and 1930s included not only the intelligible principle but also a requirement for administrators to make particular statements when exercising powers granted to them. Professor Stack highlights that, in these cases, the US Supreme Court determined that administrators must make an express statement in the administrative order or record that statutory conditions — those that are necessary for the constitutional validity of the Act — are satisfied for the administrative action relevant in the case.[49] The Court insisted that it could not presume that findings regarding such conditions had been made by the administrator.[50] Professor Stack examines how this requirement influenced the Supreme Court's non-delegation cases and subsequently-developed principles of US administrative law — in particular, administrators' obligation to provide reasons, established by *Securities and Exchange Commission v Chenery Corporation*.[51]

The US non-delegation principle contributes to deliberative decision-making to an extent. The cases do not expressly extend to requiring public participation procedures for administrative regulation-making.[52] That would be inconsistent with due process principles that require procedures for administrative action affecting a small number of people on individual grounds but not for general determinations.[53] The significance of the US non-delegation principles for my purposes is that, unlike the High Court's approach in *Dignan*,[54] they enable a role for courts to review the legality of, and require an express justification for, the exercise of delegated authority.

Accordingly, the High Court's decision in *Dignan* to continue with the approach taken by English courts to delegation of regulation-making powers placed Australian law on a different path from US law. The implication of the High Court's decision in *Dignan* is that Parliament is the primary place for control of regulation-making, at least to repeal the particular regulation or the legislation on which it is based. This aspect of *Dignan* is consistent with what Professor Paul Craig refers to as the concept of 'parliamentary monopoly' inherent in AV Dicey's account of administrative law — that '[a]ll governmental power should be channelled through Parliament in order that it might be subject to legitimation and oversight by the Commons' and that 'all real public power [is] concentrated in the duly elected Parliament'.[55]

On the other hand, the US non-delegation principle is designed to limit the scope of administrators' law-making authority and provide a role for courts in supervising the exercise of such powers. Professor Peter Strauss explains it as establishing a system that encourages administrators to acknowledge that they are obliged 'to demonstrate to the courts that they have legal authority for their actions, that they have followed required procedure, that they can justify the conclusions they have reached in terms of the information presented to them, and so forth'.[56] In this way, the US non-delegation principle prods administrators to make regulations in a manner that can be justified legally and by relevant information. Additionally, some US administrative law scholars have understood the non-delegation principle as having connections with subsequent administrative law developments that I will examine below. The connection is that, while the non-delegation doctrine has been under-utilised since the 1930s, the courts subsequently compensated by way of administrative law doctrine by increasing their supervision of regulation-making procedures.[57]

It is, therefore, significant for the development of Australian regulation-making systems that Dixon J — and, to a lesser extent, Evatt J — perceived the issue in *Dignan* as a choice between Westminster and US models of constitutional law and decided to take the Westminster path. This path focuses on Parliament providing administrators with authority to make regulations with minimal additional constitutional constraints. US constitutional law includes constraints and provides an important role for the courts in administrative law

proceedings. In the next sections of the article I explain the primary features of Australian regulation-making systems in order to highlight how they differ from the equivalent features of the US deliberative model.

Regulation-making legislation

The Australian legislation that provides the general controls on regulation-making focuses on Parliament as the primary supervisor of administrative regulation-making. If public consultation requirements are included in such legislation, the provisions generally make clear that they are not judicially enforceable requirements. This is an important contrast with the equivalent legislation in the United States — the *Administrative Procedure Act*, 5 USC (1946). While that Act does not establish all the characteristics of a deliberation-focused system of regulation-making, it provides a basic framework that supports it.

The primary features of Australian regulation-making legislation are publication and commencement requirements for final regulations, tabling of regulations in Parliament and scrutiny by parliamentary committees.[58] These features can be understood as providing a procedural framework by which Parliament can supervise regulation-making. In this way, these Acts support the Westminster-based principles accepted in *Dignan*[59] as a matter of constitutional law.

Some Australian jurisdictions also include public consultation provisions in these Acts.[60] However, the provisions are designed to make clear that consultation is not mandatory. Whether consultation is carried out or not is controlled by an administrative official, typically the relevant Minister.[61] It is common for Australian regulation-making legislation to expressly state that non-compliance with consultation provisions does not lead to invalidity of the regulation[62] — a signal to the courts that breach of these process requirements will not lead to a remedy invalidating the regulation.[63]

The discretionary nature of the public consultation provisions in Australian regulation-making legislation does not conflict with the constitutional principles expressed in *Dignan* and, as explained at the beginning of this article, it is similar to comparable Commonwealth countries. Regulation-making legislation in such countries does not usually include public consultation requirements; instead, there are guidelines for consultation provided in policy documents.[64] While public consultation was included as a mandatory requirement in 19th century United Kingdom legislation,[65] the provisions were not reproduced in the Act that replaced it — the *Statutory Instruments Act 1946*, 9 & 10 Geo 6, c 36[66] — and, as explained in the previous paragraph, they have also not been adopted in current Australian legislation.[67] Public consultation in Westminster parliamentary systems is regarded as an optional extra at the government's discretion. It may be acknowledged in Australian regulation-making legislation, but it does not rise to the level of an enforceable legal requirement. Most importantly, the result is that in general there is no role for courts to supervise public consultation processes.

In the US, the Administrative Procedure Act contributes to the deliberative nature of the regulation-making system through its notice and comment provisions. Under these provisions, notice of the proposed regulation is required to be published in the federal register,[68] interested persons are given an opportunity to make submissions, and regulations are required to include reasons in the form of 'a concise general statement of their basis and purpose'.[69] The notice and comment provisions are recognised by US scholars as essentially based in administrative law but having constitutional law significance. They allow courts to avoid determining whether such procedural requirements are required by constitutional law, and constitutional principles have inspired the courts' approach to enforcing the provisions.[70] Most importantly, the notice and comment provisions are recognised as establishing a

framework for deliberative decision-making — a process for debate about the content of regulations.[71]

Australia's regulation-making Acts focus instead on parliamentary supervision. This makes sense in a Westminster parliamentary system, where Parliament is recognised as having a monopoly on political power. Accordingly, whereas in the US a member of the public is generally entitled by law to participate in regulation-making processes, in parliamentary systems a member of the public will have to rely on government practices for there to be a consultation process.

Grounds of judicial review

The judicial controls applied to administrative regulations are fundamentally different under the two models. As will be explained in this section, the Australian Westminster parliamentary system has an instrumental focus. In this system, the courts do not review regulations for compliance with court-developed principles of procedural fairness,[72] and the courts rarely test administrative regulations against otherwise commonly applied administrative law grounds of review, such as the failure to consider relevant matters.[73] Instead, courts test the challenged regulation in instrumental terms — that is, whether the regulation is a legally permissible means for achieving statutory purposes. On the other hand, the standards applied by US courts in their review of administrative regulations are commonly understood to establish a deliberation-based model.

In this section, I outline how these two approaches to judicial review of regulations are influenced by differences in the two constitutional systems. The High Court's acceptance of the Westminster parliamentary path in *Dignan*[74] has led to a very different set of judicial review standards from those which apply according to the approach taken in the US.

The instrumental approach to judicial review of administrative regulations applied by Australian courts can be seen in the grounds of review applied by the courts. Courts test regulations by asking whether they are consistent with the primary Act. The provision in the primary Act delegating power to make regulations is interpreted to enable regulations to be made for a particular, either express or implied, purpose.[75] This is made clear in *Shanahan v Scott*,[76] where the High Court stated that a regulation-making power in a primary Act 'will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends'.[77] Australian courts commonly test the consistency of administrative regulations with the primary Act by determining whether the regulations have been made for an improper purpose,[78] involve means for achieving the statutory purpose that are inconsistent with the means permitted by the Act,[79] or are an attempt to extend the field of operation of the Act rather than fill in the details.[80]

When Australian courts are requested to go beyond testing whether regulations are consistent with the empowering Act in this way, and instead rely on grounds of review such as unreasonableness or uncertainty, there have been attempts by the courts to conceive such grounds in instrumental terms. For example, Dixon J in *Williams v Melbourne Corporation*[81] said of the applicant's challenge to a by-law on the ground of unreasonableness that the High Court had not treated unreasonableness as a separate ground of invalidity.[82] Instead, Dixon J reviewed the regulation according to instrumental reasoning: whether the by-law was a reasonable means for achieving the statutory purpose.[83] Similarly, when an administrative order was challenged in the High Court on the ground of uncertainty in *King Gee Clothing Co Pty Ltd v Commonwealth*,[84] Dixon J would not accept that this was a separate ground of review and instead understood a requirement for certainty to be implied in the provision delegating the relevant power.[85] These cases highlight

that Australian courts favour methods of reviewing regulations that can be framed in terms of compliance with the primary Act. Instrumental reasoning has been favoured by the courts in order to present such review as involving mere enforcement of the primary legislation rather than the imposition by courts of additional criteria.

While judicial review of administrative regulations in Australia commonly occurs according to instrumental reasoning, this does not mean it is necessarily a restrained form of review. The courts can read the empowering Act and the regulations in a fine-grained manner to determine whether it is an authorised means for achieving the statutory purposes.[86] This is closely related to the concept of parliamentary monopoly in Westminster-based systems. The courts in these cases can closely examine whether administrators have gone beyond the scope of the power granted to them by the primary legislation. If so, the administrators are regarded, in Professor Paul Craig's terms, as usurping Parliament's monopoly on public power.[87]

Professor Craig has also suggested that the general lack of procedural review of regulations in Westminster parliamentary systems can be explained by such procedures implying that regulation-making involves a form of non-parliamentary politics — an implication that would undermine Parliament's purported monopoly on public power.[88] Although it is difficult to know precisely why Australian courts have not imposed procedural fairness obligations on the making of administrative regulations,[89] I would offer a different reason for such reluctance. Australian courts may be reluctant to extend procedural fairness to administrative regulation-making because it would involve imposing controls on administrative regulation-making beyond the instrumental terms that courts usually apply to the task of reviewing regulations.[90] Justice Dixon may have been able to characterise the unreasonableness and uncertainty grounds of review in instrumental terms, but it would be implausible to see enforceable procedures in that way. Courts usually understand procedural fairness as being court-developed — that it involves 'common law notions of justice and fairness'[91] and that 'the justice of the common law will supply the omission of the legislature'.[92] It is also difficult to imply consultation procedures into regulation-making powers when general regulation-making legislation in Australia imposes procedures for commencement, publication and tabling of regulations in Parliament but expressly stops short of establishing enforceable public consultation requirements.[93] Accordingly, while a number of scholars have argued for procedural fairness to be extended to regulation-making,[94] the courts have not done so.

To be clear, Australian courts have no reluctance to apply mandatory public consultation requirements when they are included in primary legislation,[95] but, of course, such provisions are not included in general regulation-making legislation. I will examine the significance of their inclusion in sector-specific legislation (for example, environmental legislation, public health legislation et cetera) below.

The grounds of review applied by the US courts to administrative regulations have a different focus. In brief terms, the courts have developed the requirement for public notice of administrative regulations in § 553(b) of the Administrative Procedure Act to require agencies to disclose the information on which the proposed rule is based.[96] The requirement in § 553(c) of the Act that the agency includes with their regulation 'a concise general statement of their basis and purpose' has been interpreted very broadly by the courts. The courts require agencies to consider and respond to significant comments lodged by members of the public.[97] The classical statement of this requirement was made in *Automotive Parts & Accessories Association Inc v Boyd*[98] by Judge McGowan that the administrator's reasons 'will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did'.[99] The apparent purpose of this form of judicial review is to provide an accountability mechanism directed to protecting and

enhancing participation of members of the public in regulatory processes.[100] Public law scholars in the United States have expressly linked the Administrative Procedure Act's notice and comment requirements and the related case law with the constitutional non-delegation principle[101] and deliberative democracy principles.[102]

Accordingly, judicial review of administrative regulations in the US has a different focus to such review in Australia. The Australian courts' approach is consistent with the Westminster parliamentary model that was adopted by the High Court in *Dignan*. The overtly instrumental approach that has influenced the key Australian cases requires courts to keep a close eye on administrators' attempts to expand their powers beyond the confines of the primary Act but seems to have disabled courts from imposing the procedural requirements that are applied in other administrative law contexts.

On the other hand, the approach to the Administrative Procedure Act provisions that US courts have adopted is directly focused on deliberative principles. This is due to the combination of prompting by the constitutional non-delegation principle (which, as explained above, gives constitutional significance to requirements to provide reasons), enactment of the Administrative Procedure Act with its notice and comment provisions, and the development of participation-based judicial review standards. Professor Richard Stewart, a leading scholar of the US developments, sums up these developments as meaning that '[t]he judiciary is the vital cockpit' in this deliberative conception of administrative law.[103]

Access to the courts

Administrative law scholarship in the US has also emphasised that laws regarding access to the courts and the timing of judicial review litigation have particular relevance to the courts' ability to supervise administrators' deliberative practices. In particular, this scholarship identifies a paradigm shift in the 1960s and 1970s in which standing and justiciability principles were broadened in a manner that enables the courts to supervise public participation in administrative regulation-making processes.[104] While Australian law in these areas has also been liberalised since this period, it has not occurred to the same extent. This has important consequences for the courts' ability to supervise administrative regulation-making in a manner that ensures deliberative decision-making.

It is helpful to start by examining the connection between principles regarding access to the courts and the stakeholders in regulatory debates. Traditional judicial review principles enable proceedings to be brought to challenge regulations that are being enforced against the plaintiff or when the plaintiff is clearly at risk of enforcement. Standing laws guarantee access to the courts for these plaintiffs, sometimes referred to as 'regulated persons'. On the other hand, there are beneficiaries of regulatory laws who seek to enhance the purposes of the Act such as protecting the environment, public health and safety, and national and local heritage and cultural matters. They may seek to bring judicial review proceedings on the ground that they were not given fair treatment in the regulation-making process. There are, however, difficulties for these potential plaintiffs. Their interests are less likely to match the courts' understanding of interests that satisfy standing requirements. Additionally, their complaint about the unfairness of the regulation-making process will arise at the time regulations are made rather than when they are enforced. According to traditional judicial review principles, these difficulties mean they are unlikely to be granted access to the courts.

Australian standing and justiciability laws in regard to challenges to administrative regulations are based on traditional judicial review principles. They limit the courts' jurisdiction by reference to a regulation's actual or likely harm to a person's individual rights and interests. Challenges to administrative regulations can be brought by way of a collateral challenge — that is, when a person is alleged to have breached the regulation and the

person defends the action by claiming that the regulation is invalid. Many of the landmark Australian cases are of this kind.[105] There is no question in such cases that the regulation applies directly to the defendant; they have been singled out by officials for enforcement. Declaratory relief is the primary remedy when regulations are challenged in proceedings not involving a collateral challenge.[106] The general principles for declaratory relief require the plaintiff to have a real or sufficient interest in the subject matter of the litigation.[107] The case must have practical consequences for the plaintiff and must not raise hypothetical questions.[108] Challenges to regulations may be made prior to enforcement of them by officials,[109] although the plaintiff will need to show that their freedom of action is affected by the challenged law or that they are at risk of it being enforced against them.[110]

Both kinds of proceeding — collateral challenges and applications for declarations according to the just-mentioned limits — protect the interests of individuals and organisations that are regulated by the relevant regulation. The common justification for limiting judicial review in this manner is that it is a method of restricting courts from interfering with political decision-making.[111] Accordingly, in the absence of legislation that extends standing, the general principles of Australian law are consistent with traditional judicial review principles. Members of the public with property or commercial rights and interests restricted by a regulation will have a sufficient interest to bring proceedings according to Australia's general judicial review principles. When Australian law includes enforceable public consultation requirements, these stakeholders are entitled to bring proceedings claiming that such processes were not properly carried out.[112]

Access to the courts for stakeholders with beneficiary interests is more difficult. Their primary concern will be that the administrator has insufficiently pursued the public welfare purposes of the relevant legislation. But, of course, they are not at risk of enforcement or having their freedom of action affected by the regulation as is required for standing rules regarding regulations. According to Australian judicial review principles, the beneficiaries would not be in a position to challenge administrative regulation-making processes, even when such procedural requirements are included in legislation.

Standing laws in the US shifted in the 1960s and 1970s to move beyond the traditional limits. These laws include a range of technicalities that are unnecessary to examine here.[113] The significant point is that US standing laws are sufficiently flexible for beneficiaries to be granted standing to argue that the challenged regulations or decision has not gone far enough to promote the public welfare purposes of the particular legislation. For example, the interests that are accepted by the courts extend to 'aesthetic, conservational, and recreational' matters,[114] thus enabling standing for beneficiaries of environmental laws. While beneficiaries may regularly gain access to the courts,[115] the US Supreme Court has recognised that they are more likely than regulated parties to have difficulty establishing it.[116] Administrative law scholars highlight that there are continuing tensions between acceptance of, and resistance to, standing for such plaintiffs that are played out in the cases in argument relating to technicalities within standing doctrine.[117] Accordingly, while standing has been extended to enable a broader range of persons to engage the courts to review administrative regulations than under traditional judicial review laws, standing-related issues still regularly arise in the cases.

Judicial review in the US also includes greater flexibility in regard to the timing of judicial review proceedings. The landmark case is *Abbott Laboratories v Gardner*[118] (*Abbott Laboratories*). In that case, the Supreme Court held that a regulation that had not been enforced could be reviewed by the Court, as the regulations had legal status and affected the applicants.[119] The case is regarded as establishing a pragmatic rather than formal approach to the timing of judicial review.[120] The result of *Abbott Laboratories* is that challenges to notice and comment processes for making regulations can be brought when

regulations are made rather than when they are enforced.[121] The change marked by *Abbott Laboratories* is commonly recognised as being an essential feature of the US regulation-making system.[122] It allows regulated parties and beneficiaries to bring proceedings at the time the regulation is made, thus enabling argument regarding the regulation-making process from both sides of regulatory debates.

The expansion of access to the courts through extended standing and the acceptance of pre-enforcement judicial review of regulations in the US have been understood as involving fundamental change to the nature of judicial review of administrative action. Professor Peter Strauss has referred to it as shifting the court's function to 'protect[ing] the integrity of political processes'.[123] The important point is that deliberation-enhancing forms of judicial review require development beyond the limits set by traditional judicial review laws. The developments in the US highlight that extended standing and flexibility in regard to the timing of judicial review are important steps in the change to a deliberation-enhancing system of judicial review.

Exceptions: mandatory public consultation requirements

While general regulation-making systems in Australia have the characteristics examined above, they do not apply to all regulation-making processes. It is always possible for legislation to include mandatory public consultation requirements for regulations and to even up access to the courts. Such systems are worth examining, albeit in a brief manner here, to identify features common to the adoption of such provisions. They provide some indication of when we can expect such provisions to be included in regulatory legislation.

The environmental planning legislation in New South Wales is a good example of an exception to the Westminster parliamentary norm. It establishes a regulatory system designed for public participation that can be supervised by the courts. In particular, the *Environmental Planning and Assessment Act 1979* (NSW) includes mandatory public consultation requirements for making local environmental plans.[124] The courts have interpreted these requirements in a purposive manner to ensure that public notices of new plans are not misleading,[125] that submissions lodged by members of the public are considered[126] and that a new round of public consultation is conducted if substantive changes are made to the proposed plan.[127] Accordingly, New South Wales environmental planning legislation and its interpretation by the courts go a long way toward establishing a system that enables and ensures deliberative regulation-making. The courts have not, however, gone as far as the US courts by requiring administrative officials to respond to the major issues raised in the submissions.[128] Nevertheless, the case law indicates willingness to enforce mandatory consultation provisions in a manner that supports the purpose of facilitating discussion between government and members of the public prior to making administrative regulations.[129]

The public participation system established by the *Environmental Planning and Assessment Act 1979* (NSW) has additional important features. The Act includes an open standing provision[130] and a three-month time limit on bringing proceedings to challenge planning rules.[131] These provisions enable New South Wales courts to review plan-making processes without considering whether the applicant's interests are affected or whether the applicant is at risk of the particular planning rule being enforced against them, which, as was shown above, would otherwise be required. The nature of the applicant's interests and whether or not the applicant is at risk of enforcement of the plan against them are irrelevant to judicial review of local planning rules.

There are two aspects of the system worth emphasising. The first is that the *Environmental Planning and Assessment Act 1979* (NSW) establishes a framework on which the courts

have been able to build a set of deliberation-focused principles. These principles have been drawn from the provisions of the Act and the purposes of the provisions as understood by the judges. The laws that would apply if the provisions had not been enacted would point in the opposite direction — that is, there would be no participatory requirements and great uncertainty about access to the courts. Accordingly, it must be recognised that deliberation-based regulation-making systems are likely to require legislation that includes mandatory public consultation provisions and provisions that extend access to the courts.

The second point is that the provisions establishing mandatory consultation, open standing and pre-enforcement judicial review apply to administrators in the New South Wales planning system that are to a large extent outside of the state-level Westminster parliamentary institutions. That means that the incentives influencing regulation-making legislation identified by leading administrative law scholars do not apply in this context. These scholars have highlighted that the lack of enforceable public consultation provisions in general regulation-making legislation in Westminster-based democracies is due to the reluctance of governments, which largely control the legislature in such systems, to impose controls on themselves.[132] In such systems, the governmental incentives are to minimise controls on discretionary administrative powers.

However, in the New South Wales planning system, local councils have the primary responsibility for making the local plans that are subject to the mandatory consultation requirements.[133] These councils are established by legislation as a particular branch of government. While the *Environmental Planning and Assessment Act 1979* (NSW) identifies the Minister for Planning as the official who ultimately makes local plans,[134] that power has been delegated to local councils.[135] The provisions relating to local plans in the Act provide an exception that helps to prove the general rule. The reluctance to impose mandatory transparency, participation and accountability provisions on Westminster parliamentary insiders is just not relevant to plan-making by local councils.

On the other hand, the general reluctance to impose such requirements comes into play again for state-level plan-making by the Minister. The provisions of the *Environmental Planning and Assessment Act 1979* (NSW) for these plans make public consultation discretionary. The Minister is 'to take such steps, if any, as the Minister considers appropriate or necessary' to publicise a proposed state plan and 'to seek and consider submissions from the public'.[136] Accordingly, the Act establishes the key legal elements of a deliberative decision-making system for plan-making conducted by officials outside of the ministerial responsibility system but for plan-making inside that system; such a legal framework is regarded as unnecessary.

This distinction made by the *Environmental Planning and Assessment Act 1979* (NSW) seems to be consistent with the way enforceable consultation provisions are included in Commonwealth legislation. Table 1 below sets out Commonwealth authorities that are granted regulation-making powers subject to enforceable public consultation provisions.[137] Each of them is formally classified as a 'statutory agency' or 'body corporate' by their enabling legislation, which distinguishes them from departments of state for which Ministers are responsible. This gives these authorities a degree of independence from the general system of ministerial responsibility, although Ministers may be granted statutory powers to issue directions to them[138] or may be required to accept or approve regulations made by such authorities.[139]

Table 1: Commonwealth authorities with regulation-making powers subject to enforceable public consultation provisions

Authority	Type of administrative regulation	Mandatory consultation provisions
Australian Communications and Media Authority	Australian content standards	*Broadcasting Services Act 1992* (Cth) s 126
	Numbering plans for carriage services	*Telecommunications Act 1997* (Cth) s 460
Australian Fisheries and Management Authority	Fisheries plans of management	*Fisheries Management Act 1991* (Cth) s 17
Food Standards Australia New Zealand	Food regulatory measures	*Food Standards Australia New Zealand Act 1991* (Cth) ss 55–65
Great Barrier Reef Marine Park Authority	Zoning plans and plans of management	*Great Barrier Reef Marine Park Act 1975* (Cth) ss 32C, 39ZB, 39ZE
National Health and Medical Research Council	Regulatory recommendations and guidelines	*National Health and Medical Research Council Act 1992* (Cth) ss 12–13[140]
Murray-Darling Basin Authority	Basin plan	*Water Act 2007* (Cth) ss 42–43
Repatriation Medical Authority	Statements of principle	*Veterans' Entitlements Act 1986* (Cth) ss 196B, 196E–196G
Reserve Bank of Australia	Access regimes and designated payment system standards	*Payment Systems (Regulation) Act 1998* (Cth) ss 12, 18, 28[141]
Sydney Harbour Federation Trust	Trust land plans	*Sydney Harbour Federation Trust Act 2001* (Cth) ss 29, 30

The mandatory public consultation provisions for regulation-making by these authorities are exceptions to the discretionary public consultation provisions included in the general, federal regulation-making legislation — the *Legislation Act 2003* (Cth).[142] The provisions of these Acts indicate that enforceable consultation provisions may be regarded as suited to regulation-making by authorities that are a step removed from Westminster parliamentary systems of accountability. In such contexts, governments may see the benefit of a legal

framework for political discussion through public consultation processes. It must be noted, however, that the provisions in Table 1 do not include provisions that extend standing and enable pre-enforcement review. Accordingly, the beneficiaries of these laws will have difficulty accessing courts to enforce public consultation provisions. The enforceable public consultation provisions in these Commonwealth Acts are therefore an important, but not a sufficient, step towards a deliberative regulation-making model.

To summarise this section of the article, there are two points that I want to highlight in relation to the legislation that provides exceptions to the norm of discretionary public consultation arrangements for regulation-making. The first is that the development by New South Wales courts of deliberative norms for plan-making is facilitated by enforceable public consultation provisions and also by provisions that extend standing and enable pre-enforcement judicial review. This indicates that the legal developments that have facilitated deliberative regulation-making in the US as a matter of judicially developed public law require legislative foundations in Australia. The second point is that the prominent examples of enforceable public consultation provisions suggest that they are likely to be imposed for regulatory systems administered by independent agencies rather than Ministers with departmental support. This indicates that governments may seek to control regulation-making powers through enforceable procedures when the regulation-making agency is separated from the system of ministerial responsibility.

Conclusion

While some aspects of Australian public law have evolved in recent decades to ensure transparency, public participation and reasons for government actions, the general systems for regulation-making in Australia are focused on parliamentary control rather than engagement with the general public. That means that members of the public are reliant on government authorities to voluntarily facilitate public debate for proposed regulations that are morally, socially or economically controversial or are reliant on members of Parliament to raise it there. The primary features of our regulation-making systems base the legitimacy of regulations on the parliamentary authority provided by the legislative provisions that empower administrators to make them and the potential for parliamentary control. The major features of Australian law regarding regulations — constitutional law reflected in *Dignan*, state and Commonwealth general regulation-making legislation, principles of judicial review, and rules of access to the courts — all give primary significance to parliamentary authority and control.

This is very different from the regulation-making system in the US, which has developed in a manner that makes an agency's direct deliberation with members of the public a condition of the legitimacy of administrative regulations. As examined in this article, deliberative processes play some role in the US's constitutional principles regarding delegating regulation-making power and have a major part in statutory and judicially-developed administrative law doctrine.

The exceptions in Australia — the statutes that provide for mandatory public consultation processes — suggest that greater need for enforceable provisions is recognised when regulation-making power is delegated to statutory agencies that have a degree of independence from ministerial control. This indicates that, when examining regulation-making in Westminster systems, there is a need to take into account the difference between empowering Ministers to make regulations and regulation-making by statutory agencies. In addition, it should be recognised that, for public consultation to be supervised by courts in a fair manner, consideration should be given to extending standing and providing for pre-enforcement review.

Accordingly, deliberative regulation-making systems in Australia's Westminster-based framework have to be established by legislation. Our constitutional law does not require it, courts have not established the procedural framework for it and parliaments are likely to be reluctant to facilitate it in areas in which Ministers have control.

Endnotes

1 See, for example, *Williams v Commonwealth* (2014) 252 CLR 416.
2 See, for example, *Prevention of Cruelty to Animals Regulation 2012* (NSW).
3 See, for example, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50.
4 See, for example, *Paull v Munday* (1976) 9 ALR 245; *South Australia v Tanner* (1989) 166 CLR 161.
5 See, for example, *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.
6 See, for example, *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.
7 Jerry L Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press, 2012) 294.
8 See, for example, Joshua Cohen, 'Deliberation and Democratic Legitimacy' in Robert E Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (Blackwell Publishers, 1997) 143–5.
9 See, for example, Elizabeth Anderson, 'The Epistemology of Democracy' (2006) 3 *Episteme: A Journal of Individual and Social Epistemology* 8, 13–15; James Johnson, 'Arguing for Deliberation: Some Skeptical Considerations' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press, 1998) 161, 173–7; Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (Routledge, 2000).
10 Jerry L Mashaw, 'Public Reason and Administrative Legitimacy' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 11.
11 Tom Campbell, 'Legal Positivism and Deliberative Democracy' (1998) 51 *Current Legal Problems* 65.
12 See, for example, Campbell, ibid; Misak, above n 9, 153–4; Mashaw, above n 10, 13–18.
13 See, for example, Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27 *Public Law Review* 18, 22–4; Senate Select Committee, Parliament of Australia, *The Advisability or Otherwise of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, International Relations, Finance, Private Members' Bills* (1930) ix [14]–[15]; Jack Beatson, 'Legislative Control of Administrative Rulemaking: Lessons from the British Experience?' (1979) 12 *Cornell International Law Journal* 199, 211–12.
14 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 64 [3.10].
15 Mashaw, above n 10, 13–18; Cass R Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29, 61–3, 85; Richard B Stewart, 'US Administrative Law: A Model For Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63, 73–5.
16 See, for example, *Environmental Planning and Assessment Act 1979* (NSW) ss 35, 57, 123.
17 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–9 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–50 (Brennan J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 551–2 [28]–[30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 571 [104] (Keane J); *McCloy v New South Wales* (2015) 325 ALR 15, 28 [45] (French CJ, Kiefel, Bell and Keane JJ). See also Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13, 21–2, 27.
18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571. See also Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 59–60; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 609.
19 See, for example, *Kioa v West* (1985) 159 CLR 550; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161–2 [29]; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591–2.
20 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ).
21 *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J), 619–21 (Brennan J), 632–3 (Deane J).
22 *Re Gosling* (1943) 43 SR (NSW) 312, 318 (Jordan CJ).
23 See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 17–18; Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38 *Melbourne University Law Review* 709, 722, citing John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) ch 1; Cynthia Farina et al, 'Democratic Deliberation in the Wild: The McGill Online Design Studio and the Regulation Room Project' (2014) 41 *Fordham Urban Law Journal* 1527, 1534–5, 1567.
24 I will explain the provisions that establish this below.
25 For the United Kingdom, see Cabinet Office, *Consultation Principles: Guidance* (14 January 2016) Gov.UK <https://www.gov.uk/government/publications/consultation-principles-guidance#history>; Paul Craig,

Administrative Law (Sweet and Maxwell, 7th ed, 2012) 454 [15-019]. For Canada, see Treasury Board of Canada Secretariat, Government of Canada, *Cabinet Directive on Regulatory Management* (2012) <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>; John Mark Keyes, *Executive Legislation* (LexisNexis, 2nd ed, 2010) 198–9. For New Zealand, see Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual 2008* (2008) 92–3 [7.40], 99 [7.85]–[7.86]; RI Carter, RM Malone and JS McHerron, *Subordinate Legislation in New Zealand* (LexisNexis, 2013) 98.

26 See, for example, *Scurr v Brisbane City Council* (1973) 133 CLR 242, 252 (Stephen J).

27 *Tickner v Chapman* (1995) 57 FCR 451, 463–4 (Black CJ); *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 281, 284 (Finn J).

28 *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA).

29 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 415–16.

30 Chamber Research Office, Department of the House of Representatives, *House of Representatives: Legislation Statistics* (7 December 2016).

31 Evans and Laing, above n 29, 415–16; Office of Parliamentary Counsel, *Annual Report 2014–15* (2015) 45.

32 Richard Cracknell and Rob Clements, 'Acts and Statutory Instruments: The Volume of UK Legislation 1950 to 2014' (Standard Note SN/SG/2911, House of Commons Library, Parliament of the United Kingdom, 19 March 2014); Andrew Green, 'Regulations and Rule Making: The Dilemma of Delegation' in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2nd ed, 2013) 125, 126; Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 8.

33 (1931) 46 CLR 73.

34 See GS Reid, 'Parliament and Delegated Legislation' in JR Nethercote (ed), *Parliament and Bureaucracy: Parliamentary Scrutiny of Administration — Prospects and Problems in the 1980s* (Hale and Iremonger, 1982) 149, 154–5; Stellios, above n 18, 203–4.

35 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 89–102 (Dixon J), 114 (Evatt J).

36 Ibid 94 (Dixon J).

37 *JW Hampton Jr & Co v United States*, 276 US 394, 409 (Taft CJ) (1928).

38 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101.

39 Ibid 102.

40 Ibid 101.

41 Ibid 95–6.

42 Ibid 102.

43 Ibid 118.

44 Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69 *Parliamentary Affairs* 269, 274, 280–3; Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 48–9; G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 186–7.

45 For an argument that constitutional law should prompt reform of regulation-making process see Appleby, above n 44, 280–3.

46 *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corporation v United States*, 295 US 495 (1935). See also Peter L Strauss, *Administrative Justice in the United States* (Carolina Academic Press, 3rd ed, 2016) 46.

47 *JW Hampton Jr & Co v United States*, 276 US 394, 409 (Taft CJ) (1928); *Panama Refining Co v Ryan*, 293 US 388, 429–31 (Hughes CJ) (1935); *ALA Schechter Poultry Corporation v United States*, 295 US 495, 530, 541–2 (Hughes CJ) (1935).

48 Strauss, above n 46, 46; Laurence H Tribe, *American Constitutional Law* (Foundation Press, 3rd ed, 2000) vol 1, 985.

49 Kevin M Stack, 'The Constitutional Foundations of *Chenery*' (2007) 116 *Yale Law Journal* 952, 982–9; *Wichita Railroad & Light Co v Public Utilities Commission (Kan)*, 260 US 48, 58–9 (Taft CJ) (1922); *Mahler v Eby*, 264 US 32, 42–5 (Taft CJ) (1924); *Panama Refining Co v Ryan*, 293 US 388, 431 (Hughes CJ) (1935).

50 *Wichita Railroad & Light Co v Public Utilities Commission (Kan)*, 260 US 48, 57–9 (Taft CJ) (1922).

51 318 US 80, 94–5 (Frankfurter J) (1943). See also *Citizens to Preserve Overton Park Inc v Volpe*, 401 US 402, 418–20 (Marshall J) (1971); Mashaw, above n 10, 15; Peter Cane, 'Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia' (2015) 48 *Israel Law Review* 309, 320–1.

52 For an argument that the cases do extend in this way, see Evan J Criddle, 'When Delegation Begets Domination: Due Process of Administrative Lawmaking' (2011) 46 *Georgia Law Review* 117, 170–6.

53 *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445–6 (Holmes J) (1915).

54 (1931) 46 CLR 73.

55 PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 20–1.

56 Strauss, above n 46, 48.

57 Kathryn A Watts, 'Rulemaking as Legislating' (2015) 103 *Georgetown Law Journal* 1003, 1043, 1049–51; Gillian E Metzger, 'Ordinary Administrative Law as Constitutional Common Law' (2010) 110 *Columbia Law Review* 479, 490–4.

58 Pearce and Argument, above n 14, chs 2–3.
59 (1931) 46 CLR 73.
60 *Legislation Act 2003* (Cth) s 17; *Subordinate Legislation Act 1989* (NSW) s 5(2); *Subordinate Legislation Act 1992* (Tas) s 5(2); *Subordinate Legislation Act 1994* (Vic). The states and territories without consultation provisions are Australian Capital Territory (*Legislation Act 2001* (ACT)); Northern Territory (*Interpretation Act 1978* (NT)); South Australia (*Subordinate Legislation Act 1978* (SA)); Queensland (*Statutory Instruments Act 1992* (Qld)); and Western Australia (*Interpretation Act 1984* (WA)).
61 *Legislation Act 2003* (Cth) s 17; *Subordinate Legislation Act 1989* (NSW) ss 5(2), 6; *Subordinate Legislation Act 1992* (Tas) ss 5–6; *Subordinate Legislation Act 1994* (Vic) ss 8–9, 12F.
62 *Legislation Act 2003* (Cth) s 19; *Subordinate Legislation Act 1989* (NSW) s 9; *Subordinate Legislation Act 1992* (Tas) s 10. Note that lack of consultation may need to be explained by the rule-maker in an explanatory statement: see, for example, *Legislation Act 2003* (Cth) s 15J(2)(e).
63 Note that some general regulation-making Acts indicate that supervision of consultation processes is a matter for parliamentary committees: see, for example, *Legislation Review Act 1987* (NSW) s 9(2)(b); *Subordinate Legislation Committee Act 1969* (Tas) s 8(1)(ab); *Subordinate Legislation Act 1994* (Vic) s 21(1)(j).
64 See above n 25 and accompanying text.
65 *Rules Publication Act 1893*, 56 & 57 Vict 1, c 66. For the history of this Act see Sir Carleton Kemp Allen, *Law and Orders*: *An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* (Stevens and Sons, 3rd ed, 1965) 98–9.
66 That means that, in the same year that public consultation provisions were dropped from general regulation-making requirements in the United Kingdom, they were introduced in the US by the Administrative Procedure Act.
67 It is worth noting that equivalent provisions were included in early Australian legislation but repealed in 1916: *Rules Publication Act 1903* (Cth) s 3, repealed by *Rules Publication Act 1916* (Cth) s 3.
68 Administrative Procedure Act § 553(b).
69 Ibid § 553(c).
70 Metzger, above n 57, 489–93. See also Criddle, above n 52, 177–9.
71 Cass R Sunstein, 'Deliberative Democracy in the Trenches' (2017) 146(3) *Daedalus* 129.
72 *Re Gosling* (1943) 43 SR (NSW) 312, 318 (Jordan CJ); *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J) 619–21, (Brennan J), 632–3 (Deane J).
73 Pearce and Argument, above n 14, 173–5 [12.9].
74 (1931) 46 CLR 73.
75 Pearce and Argument, above n 14, 315 [20.1].
76 (1957) 96 CLR 245.
77 Ibid 250 (Dixon CJ, Williams, Webb and Fullagar JJ).
78 See, for example, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.
79 See, for example, *Paull v Munday* (1976) 9 ALR 245, 251 (Gibbs J).
80 *Shanahan v Scott* (1957) 96 CLR 245, 253–4 (Dixon CJ, Williams, Webb and Fullagar JJ).
81 (1933) 49 CLR 142.
82 Ibid 154.
83 Ibid 155.
84 (1945) 71 CLR 184.
85 Ibid 195–7.
86 See, for example, *Paull v Munday* (1976) 9 ALR 245; *Evans v New South Wales* (2008) 168 FCR 576.
87 Craig, above n 55, 20–3.
88 Craig, above n 25, 8–9 [1-007].
89 See Andrew Edgar, 'Judicial Review of Delegated Legislation: Why Favour Substantive Review over Procedural Review?' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 189, 196–200.
90 See also DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 488–9.
91 *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J). See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).
92 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194; 143 ER 414, 420 (Byles J).
93 See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 450–2 [7.230].
94 See, for example, Geneviève Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217; Galligan, above n 90, 491; GJ Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569.
95 See Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209.
96 *Portland Cement Association v Ruckelshaus*, 486 F 2d 375, 392–4 (Judge Leventhal) (DC Cir, 1973); Richard J Pierce Jr, *Administrative Law Treatise* (Wolters Kluwer, 5th ed, 2010) vol 1, 582–4; Strauss, above n 46, 322.

97 *Perez v Mortgage Bankers Association*, 135 S Ct 1199, 1203 (Sotomayor J) (2015); *Department of Natural Resources and Environmental Control (Del) v Environmental Protection Agency,* 785 F 3d 1, 11, 14–16 (Judge Randolph) (DC Cir, 2015). See also Pierce, above n 96, 594.
98 407 F 2d 330 (DC Cir, 1968).
99 Ibid 338.
100 Stewart, above n 15, 74–5. See also Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Rethinking Judicial Review of Expert Agencies' (2015) 93 *Texas Law Review* 1681, 1720–1.
101 Stack, above n 49, 962–3, 992–6; Criddle, above n 52, 175–9.
102 Mashaw, above n 10, 13–18; Sunstein, above n 15, 61–3, 85.
103 Stewart, above n 15, 75.
104 Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1669–70; Jerry L Mashaw and David L Harfst, *The Struggle for Auto Safety* (Harvard University Press, 1990) 157–63; Peter L Strauss, 'Revisiting *Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community' (1992) 39 *UCLA Law Review* 1251, 1258–60.
105 See, for example, *Shanahan v Scott* (1957) 96 CLR 245; *Paull v Munday* (1976) 9 ALR 245; *Foley v Padley* (1984) 154 CLR 349.
106 Pearce and Argument, above n 14, 402 [26.3].
107 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 626–7 [19-175]–[19-180].
108 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 76 [64] (Bell J), 90 [112] (Gageler J), 123 [235] (Keane J), 152 [350] (Gordon J).
109 See, for example, *Evans v New South Wales* (2008) 168 FCR 576, 585–6 [28]–[35]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 357. See also Aronson and Groves, above n 93, 894–5 [15.140].
110 *Kuczborski v Queensland* (2014) 254 CLR 51, 61 [6] (French CJ), 87–8 [99] (Hayne J), 107 [178] (Crennan, Kiefel, Gageler and Keane JJ), 133 [283] (Bell J); *Croome v Tasmania* (1997) 191 CLR 119, 127–8 (Brennan CJ, Dawson and Toohey JJ), 138–9 (Gaudron, McHugh and Gummow JJ); Pearce and Argument, above n 14, 410–11 [26.11].
111 Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 227–9; Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 29; Mashaw, above n 7, 306.
112 See, for example, *Tickner v Chapman* (1995) 57 FCR 451, 467 (Burchett J); *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 267 (Finn J).
113 See, for example, *Spokeo Inc v Robins* (US Sup Ct, No 13-1339, 16 May 2016) slip op 5–10 (Alito J); Richard J Pierce Jr, *Administrative Law Treatise* (Wolters Kluwer, 5th ed, 2010) vol 3, ch 16.
114 *Association of Data Processing Service Organizations Inc v Camp*, 397 US 150, 154 (Douglas J) (1970), quoting *Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F 2d 608, 616 (Judge Hays) (2nd Cir, 1965).
115 See, for example, *Friends of Animals v Jewell*, 824 F 3d 1033, 1040–2 (Judge Edwards) (DC Cir, 2016); *Environmental Integrity Project v McCarthy*, 139 F Supp 3d 25, 36–8 (Judge Moss) (DC Cir, 2015).
116 *Lujan v Defenders of Wildlife*, 504 US 555, 562 (Scalia J) (1992).
117 See, for example, Jeffrey S Lubbers, *A Guide to Federal Agency Rulemaking* (ABA Publishing, 5th ed, 2012) 370–1; Strauss, above n 46, 429–39.
118 387 US 136 (1967).
119 Ibid 151–2 (Harlan J).
120 *United States Army Corps of Engineers v Hawkes Co Inc* (US Sup Ct, No 15-290, 31 May 2016) slip op 7 (Roberts CJ); Richard J Pierce Jr, Sidney A Shapiro and Paul R Verkuil, *Administrative Law and Process* (Foundation Press, 4th ed, 2004) 200.
121 See, for example, *Automotive Parts & Accessories Association Inc v Boyd*, 407 F 2d 330, 334 (Judge McGowan) (DC Cir, 1968); *Portland Cement Association v Ruckelshaus*, 486 F 2d 375, 392–4 (Judge Leventhal) (DC Cir, 1973).
122 Mashaw and Harfst, above n 104, 157, 268–9 n 13; Strauss, above n 104, 1260. See also Lubbers, above n 117, 407.
123 Strauss, above n 104, 1259.
124 *Environmental Planning and Assessment Act 1979* (NSW) s 57.
125 *Homeworld Ballina Pty Ltd v Ballina Shire Council* (2010) 172 LGERA 211; *El Cheikh v Hurstville City Council* (2002) 121 LGERA 293.
126 *South East Forest Rescue Inc v Bega Valley Shire Council* (2011) 211 LGERA 1, 32–7 [127]–[150] (Preston CJ).
127 *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA); *Save Little Manly Beach Foreshore Inc v Minister for Planning [No 3]* [2015] NSWLEC 77 (8 May 2015).
128 See Edgar, above n 95, 220–2.
129 See, for example, *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91, 101–2 (Rolfe AJA); *Canterbury District Residents & Ratepayers Association Inc v Canterbury Municipal Council* (1991) 73

LGRA 317, 320 (Stein J); *Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88–9 (Priestley JA). See also *Scurr v Brisbane City Council* (1973) 133 CLR 242, 251–2 (Stephen J).

130 *Environmental Planning and Assessment Act 1979* (NSW) s 123.

131 Ibid s 35.

132 Susan Rose-Ackerman, 'Policymaking Accountability: Parliamentary versus Presidential Systems' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 171, 176–8; Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 316. See also Aronson and Groves, above n 93, 405–8 [7.50]; Edgar, above n 13, 26–30.

133 But note that the Minister may direct other officials to have that role: *Environmental Planning and Assessment Act 1979* (NSW) ss 54, 57.

134 *Environmental Planning and Assessment Act 1979* (NSW) s 59.

135 Department of Planning and Infrastructure (NSW), 'Delegations and Independent Reviews of Plan-Making Decisions' (Planning Circular, PS 12-006, 29 October 2012); Minister for Planning and Infrastructure (NSW), *Instrument of Delegation*: *Environmental Planning and Assessment Act 1979*, 14 October 2012.

136 *Environmental Planning and Assessment Act 1979* (NSW) s 38.

137 It should be noted that there are exceptions to the pattern highlighted in the table. For example, regulations made by departmental officials rather than independent authorities may be subject to mandatory consultation provisions (see, for example, *Therapeutic Goods Regulations 1990* (Cth) pt 6 div 3D sub-div 3D.2) and regulations made by independent authorities may be subject to unenforceable consultation provisions (see, for example, *Civil Aviation Safety Regulations 1998* (Cth) reg 11.295; *Corporations Act 2001* (Cth) ss 901J, 903G).

138 See, for example, *Australian Communications and Media Authority Act 2005* (Cth) ss 14–15; *National Health and Medical Research Council Act 1992* (Cth) s 5E.

139 See, for example, *Great Barrier Reef Marine Park Act 1975* (Cth) s 35C; *Sydney Harbour Federation Trust Act 2001* (Cth) s 31; *Water Act 2007* (Cth) ss 41, 44.

140 See also *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265.

141 See also *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300, 417–18 [548]–[554] (Tamberlin J).

142 *Legislation Act 2003* (Cth) ss 17, 19.

DISPUTING THE RESOLUTION: WHY THE AUSTRALIAN COMPLAINTS AUTHORITY WILL BE SUBJECT TO JUDICIAL REVIEW

Dr AJ Orchard*

On 9 May 2017 the Treasurer announced the establishment of a new external dispute resolution (EDR) scheme for the Australian financial services industry.[1] Based on an Ombudsman model, the Australian Financial Complaints Authority (AFCA) will operate from 1 July 2018 as a single EDR scheme (a one-stop shop) to handle all financial complaints, including those involving superannuation.[2] Legislation establishing the new EDR framework was introduced in the Senate on 14 September 2017.[3]

One of many questions that arise in respect of the proposed new scheme is whether it will be subject to judicial review. This question is important given that a court exercising its right of judicial review would consider decisions of the scheme to determine if there has been:

- illegality;
- irrationality; or
- procedural impropriety.[4]

In this article the law in respect of judicial review and the breadth of its application in light of the decision in *R v Panel on Take-overs and Mergers; Ex parte Datafin plc*[5] (*Datafin*) will be reviewed. This article also considers whether the principle from *Datafin* applies in Australia and, more specifically, whether it will apply to the new EDR scheme.

The development of the *Datafin* principle

Historically, the principles of judicial review applied, as a matter of statutory interpretation, 'to enforce the will of the representative legislature'.[6] However, the law has developed significantly in this area, with the decision in *Datafin*[7] representing something of a landmark in that development.

The principle from *Datafin,* put simply, is that a decision of a private body that was not made in the exercise of a statutory power may be amenable to judicial review if the decision is, in a

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*[**Editorial comment:** Readers should note on 5 March 2018 the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017 received Royal Assent. It is now the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Act No 13 of 2018). The text and footnotes which refer to the Bill and to proposed changes to the Corporations Act 2001 (Cth) should be read in light of the successful passage of the legislation.]*

practical sense, made in the performance of a 'public duty' or in the exercise of a power which has a 'public element'.[8]

Datafin was a significant decision in respect of judicial review in England. Before *Datafin* judicial review was available 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority'.[9]

However, in *R v Criminal Injuries Compensation Board; Ex parte Lain*[10] (*Lain*), the House of Lords extended those subject to judicial review beyond those exercising legislative power to those performing a public duty. In that case Lord Parker CJ commented:

> We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.[11]

The limitation that the availability of review did not extend to bodies of a private or domestic nature was stressed by Diplock LJ, who said that decisions of those bodies fall 'within the field of private contract and thus within the ordinary civil jurisdiction of the High Court supplemented where appropriate by its statutory jurisdiction under the Arbitration Acts'.[12]

In *Council of Civil Service Unions v Minister for the Civil Service*[13] (*CCSU*), the House of Lords applied *Lain* to extend the supervisory jurisdiction of the Court to the situation of a person exercising purely prerogative powers.

Prior to these decisions, 'the *source* of the power (whether in statute or the prerogative) was determinative of whether the power was public'.[14] However, these decisions, and particularly *Datafin*, made it clear that, at least in certain circumstances, regard can be had to the *nature* of the power to determine whether it is sufficiently public to attract judicial review.

In *Datafin*[15] the Court of Appeal clarified that statutory interpretation is not the only basis upon which the right to judicial review is enlivened. In determining whether the body making the decision being challenged is subject to judicial review, the Court noted that the source of the power is not the sole test to determine whether a body is subject to judicial review. That said, Lloyd J recognised that sometimes the source of the power is determinative. His Honour noted that if the source of the power is legislative then the body exercising the power will be subject to judicial review. At the other end of the scale, his Honour noted that, where the source of the power is contractual, the body exercising the power will not be subject to judicial review.

Justice Lloyd went on to state:

> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other [citation omitted].[16]

The effect of the decision is that a body exercising a public law function or whose decisions have public law consequences may be subject to judicial review, despite the source of its power not being legislative. At the other end of the scale, Lloyd J was equally satisfied that decisions based on contractual power would not be subject to judicial review.

In England, the principle from *Datafin* now seems well accepted. It has been approved by the House of Lords in *YL v Birmingham City Council*[17] and applied by the Court of Appeal.[18] Indeed, Spigelman CJ noted as early as 1999 that, in addition to the Panel on Take-overs and Mergers (which was the body considered in *Datafin*), other private bodies that had been found to exercise public power (so as to be amenable to review) included the Law Society, the Bar Council, the Advertising Standards Authority, a product accreditation committee in the pharmaceutical industry and a service provider regulatory committee of telecommunications companies.[19]

Accordingly, the courts in the United Kingdom have recognised at least an additional basis for judicial review — a common law basis which depends upon a consideration of the nature of the power being exercised and the functions of the body exercising it. Essentially now, rather than ensuring that the exercise of a power is consistent with the legislative intent, judicial review seeks to ensure that powers of a public nature are exercised properly, respecting principles of natural justice and avoiding abuse of power.[20]

Datafin does not mean that every decision of a private body exercising a possibly public power will be reviewable. In *R v Insurance Ombudsman; Ex parte Aegon Life Assurance Ltd*[21] (*Aegon Life*), the House of Lords considered the situation of a decision made by a private industry-based dispute resolution service. The principle Rose LJ distilled from *Datafin* can be summarised as follows:

> a body whose birth and constitution owed nothing to any exercise of government power may be subject to judicial review if it is woven into the fabric of public regulation or into a system of government control or if but for its existence a governmental body would assume control.[22]

In *Aegon Life* the Court found that, as there was no trace of government underpinning and because the jurisdiction of the Ombudsman was dependent upon a contractual relationship, decisions of the scheme were not susceptible to review.

The various factors identified by Rose LJ show that there is not one simple test that can be applied to determine if a particular decision may be the subject of judicial review. This highlights the issue identified by Spigelman CJ when he said:

> The characteristics of decisions by private bodies which render them of a sufficiently public character to attract judicial review have not been reduced to a simple test. Perhaps they cannot be. One can anticipate a series of factual situations arising for judicial decision which will clarify the basic principle.[23]

Datafin in Australia

Before turning to the question of the application of the *Datafin* principle to AFCA, the general question of whether *Datafin* applies in Australia must be considered.

While Kyrou J seems firm in his view that the *Datafin* principle applies at least in Victoria,[24] the reception of *Datafin* in Australia has been 'fairly cautious'.[25] Aronson[26] refers to the comments of Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[27] to the effect that the development of the common law in this area has been retarded by the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Justice Finkelstein suggests more generally that the Australian courts have not been as 'liberated' as their English counterparts[28] and goes on to agree with the comments of Kirby J[29] and Aronson[30] and the view of Mantziaris[31] to the effect that the development of the common law has been retarded in this area.[32]

After providing a comprehensive summary of the relevant cases in Australia that have considered the application of the *Datafin* principle,[33] Kyrou J notes that *Datafin* has been referred to with apparent approval in a series of cases[34] and has been cited without any positive assertion about its applicability in others.[35]

A review of relevant Australian authorities in respect of *Datafin* with particular reference to the circumstances of EDR schemes is instructive. In *Minister for Local Government v South Sydney City Council*,[36] Spigelman CJ apparently accepted the application of the *Datafin* principle when His Honour said:

> In my opinion, the common law basis for the duty to accord procedural fairness is reflected in the cases which extend the duty to the exercise of prerogative powers … It is also the basis for the extension of the principles of judicial review to private bodies which make decisions of a public character.[37]

In *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No 2)*[38] (*Masu*) Shaw J commented that 'the preponderance of Australian authority indicates that [*Datafin*] is applicable in the country'[39] and went on to find that decisions of the Financial Industry Complaints Service were amenable to judicial review in accordance with the principle.

In *D'Souza v Royal Australian and New Zealand College of Psychiatrists*,[40] Ashley J held that a decision of the college was not reviewable. His Honour noted that *Datafin* has yet to receive endorsement by the High Court and that it has not been applied in Australia in circumstances where the relationship between the parties was contractual. In fact, Ashley J went so far as to say:

> In my opinion, the answer is that on the present state of Australian authority certiorari is not available in respect of a decision of a body whose powers derive only from private contract.[41]

This is of relevance to EDR schemes given the contractual nature of the jurisdiction of those schemes. Of course, a contractual source of power does not necessarily indicate a consensual submission to jurisdiction — Australian financial services licensees will be required to be a member of AFCA and so enter into a contractual relationship with that scheme.[42] So, while there is a contractual relationship, the jurisdictional basis cannot be said to be consensual.

In *Grocon Constructors Pty Ltd v Planit Joint Venture [No 2]*[43] (*Grocon*), Vickery J was satisfied that the Full Court had approved and applied *Datafin* and that the adjudicator's determinations in that case were amenable to certiorari because the adjudicator performed functions of a public nature. Justice Vickery specifically referred to *The State of Victoria v The Master Builders Association of Victoria*,[44] in which the Victorian Court of Appeal relied upon *CCSU* and *Datafin.*

However, in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[45] (*Chase*), the Full Court of the New South Wales Supreme Court considered *Grocon* and Basten JA disagreed that the Full Court of the Victorian Supreme Court had approved or applied *Datafin*. In fact, Basten JA (with whom Spigelman CJ agreed) suggested that there is an absence of authority in Australia as to whether *Datafin* applies and that the High Court had not yet supported the application of the principle.

Subsequently, in *CECA Institute Pty Ltd v Australian Council for Private Education and Training*,[46] Kyrou J took issue with Basten JA's obiter observations in *Chase* and noted that no Australian decision (before *Chase)* had cast doubt on the applicability of *Datafin* in

Australia. Justice Kyrou considered *State of Victoria v Master Builders' Association of Victoria*[47] to be sufficient authority for the applicability of the *Datafin* principle in Victoria.

The Victorian Court of Appeal had a further opportunity to consider the issue of the applicability of the principle in *Mickovski v Financial Ombudsman Service Ltd*[48] (*Mickovski*). However, the issue was not determined, with the Court stating:

> the clear implication of the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd* and of the observations of Gummow and Kirby JJ in *Gould v Magarey* is that we should avoid making a decision about the application of *Datafin* unless and until it is necessary to do so. In this case, we do not consider that it is necessary to do so. For, assuming without deciding that *Datafin* has some operation in this country, we agree with the judge that it could not have applied in the circumstances of this case. Taken at its widest, it is doubtful that the principle has any application in relation to contractually based decisions and, even if it does, we agree with the judge that the public interest evident in having a mechanism for private dispute resolution of insurance claims of the kind mandated by s 912A is insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element in circumstances where FOS' jurisdiction was consensually invoked by the parties to a complaint.[49]

This case is a decision in respect of the Financial Ombudsman Service (FOS) — a current EDR scheme. The Court referred to the consensual invoking of FOS's jurisdiction and by referring to 'the parties' seems to suggest that both parties agreed to their dispute being considered by FOS. In fact, the licensee is required to be a member of FOS and it is then the member's customer that unilaterally decides whether FOS will consider the dispute. The jurisdiction is not consensually invoked by the parties as, for example, in the case of an arbitration agreement. This distinction is important for reasons discussed below.

Mickovski has been considered subsequently. In *Bilaczenko v Financial Ombudsman Service*[50] Mansfield J considered submissions that *Mickovski* was erroneously decided. His Honour held that the contentions did not present an arguable case as they did not address in any critical way the analysis of the Court in *Mickovski*.

In *Colonial Range v Victorian Building Authority*[51] Vickery J considered *Datafin* and relevant Australian authorities (including *Mickovski)* which had considered its application in Australia. His Honour came to the conclusion that he was not required in the particular case to decide whether the appointment of a surveyor fell within the *Datafin* principle or whether that principle was applicable in Australia. However, his Honour did comment that, since *Datafin,* the appointment of a surveyor may be open to judicial review and was 'not necessarily immune from such a process because it is a decision of a "private" body as opposed to that of a "public" body, or by reason that the decision in question was contractually based as opposed to being founded in a statute'.[52]

While it is true to say that the High Court has not yet delivered a definitive decision on the applicability of the *Datafin* principle in Australia, there are nonetheless a number of relevant decisions from that Court.

In *Forbes v New South Wales Trotting Club*[53] (*Forbes*), Murphy J, when considering a decision to exclude a patron made by a trotting club, noted:

> When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purposes for which it is conferred and with due regard to the persons affected by its exercise. This generally requires that where such power is exercised against an individual, due process or natural justice must be observed.[54]

However, the decision in *Forbes* was made on the basis of proprietorial and contractual rights and thus the need to decide whether a more general right of judicial review was available was avoided.

In *Attorney-General (Cth)* v *Breckler*[55] Kirby J referred to *Datafin* with apparent approval. Again, however, the Court avoided a decision on the issue in finding that the relevant relationship in that case was contractual.

The issue was also raised in the High Court in *Neat Domestic Trading Pty Ltd v AWB Ltd*.[56] The majority in that case held that review was not available, as the relevant decision was not made under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, in his dissenting judgment, Kirby J again cited *Datafin* with approval.

The *Datafin* principle is now well entrenched in England and has apparently been accepted as part of the law in Victoria.[57] While the High Court has not yet expressed a definitive view on the application of *Datafin,* and other courts have questioned whether it does apply, there does not appear to be any decision in the High Court or elsewhere in which it has been held that the principle does not apply.[58] Indeed, there are comments by Murphy J[59] and Kirby J[60] in the High Court suggesting support for the application of the principle. Ultimately, there is a strong basis for considering that the *Datafin* principle applies in Australia.

The remainder of this article proceeds on the basis that the principle from *Datafin* does apply in Australia.

The ambit of the application of *Datafin*

Assuming that *Datafin* does apply in Australia, it is important to determine when the power is in fact sufficiently 'public' to be reviewable.

Cane and McDonald suggested that the question is perhaps only answerable by normative stipulation and commented that 'a public function is one which *should* be considered public and *should* be subject to judicial review'.[61]

Such a normative stipulation is not particularly helpful. However, two tests can be distilled from approaches taken by the courts. These are the 'but for' test and the 'regulatory integration' test.

'But for' test

Simply stated, the 'but for' test suggests that a power will be public if it is exercised by a body carrying out a function which, if not exercised by that body, would be exercised by the government.

In *R v Disciplinary Committee of the Jockey Club; Ex parte His Highness the Aga Khan,*[62] (Jockey Club), Farquharson LJ[63] and Hoffman LJ[64] applied a 'but for' test to the effect of whether, in the absence of the non-government body exercising the power, the government would undertake the function. Campbell[65] suggests there may be some support for this approach from the comment of Donaldson MR in *Datafin* to the effect that:

> No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law.[66]

There are difficulties associated with such a test. It provides no criteria by which it can be determined if the government would in fact exercise the function. The test effectively requires judges to make a hypothetical decision about the government being willing to act before it makes available the protection of judicial review. Not only will that not always be clear but also the situation may change depending on the political views of the government in power.[67] Perhaps because of these vagaries, the test has not been widely adopted.

Regulatory integration

The regulatory integration test considers the extent to which the function being considered operates as 'a key plank of a regulatory structure which includes government decision-makers'[68] or whether the function is underpinned by a statutory provision in such a way that the body exercising it can be said to be woven into the fabric of government.[69]

This test was referenced by Kyrou J, who was able to identify a number of features from English cases that suggest the presence or absence of the requisite public element on the basis of the integration with a governmental scheme as follows:[70]

- whether the body was constituted by an Act of Parliament or established by a public body;[71]
- whether there is statutory authority for the function of the private body;[72]
- the extent of control over the function of the private body by a public authority;[73]
- the extent to which the acts of the private body are enmeshed in the activities of a public body;[74]
- the degree of public funding of the function of the private body;[75]
- whether the function of the private body is subject to democratic accountability;[76]
- whether the private body, in performing the function, is subject to an obligation to act only in the public interest;[77]
- whether the function of the private body constitutes the provision of a public service;[78]
- whether the function of the private body constitutes the control of access to a place to which the public has a common law right of access;[79]
- whether the private body has stepped into the shoes of a public body, in the sense that it performs the same functions as had previously been performed by the public body to the same end and in substantially the same way;[80] and
- whether the sole source of the private body's power is a consensual submission to jurisdiction.[81]

The regulatory integration test was applied in *Masu*[82] to find that the decision of an EDR scheme was amenable to judicial review. In that case, Shaw J found that the following factors meant that the scheme was exercising a power of a public nature and so was subject to judicial review:

- the federal government was responsible for appointing a substantial proportion of the members of the board of FICS
- the federal government was involved in the appointment of two-thirds of any panel appointed by FICS to hear a complaint
- the scheme was constituted in compliance with the policy statement issued by the federal government
- that scheme was established under the umbrella of a regulation made by the Australian executive government under statute
- failure to comply with a decision of FICS could result in the federal government cancelling a licence and exposing the licensee to prosecution if it continued to conduct a business.[83]

Given the identified shortcomings of the 'but for' test and the lack of any obvious shortcoming with the application of the regulatory integration test, greater reliance upon the regulatory integration test is preferable.

Conclusion on the ambit of *Datafin*

Ultimately, even on the assumption that *Datafin* applies in Australia, it is not entirely clear in which circumstances it will apply to allow judicial review. The difficulty associated with determining its application was perhaps best summarised by Scott Baker LJ in *R (Tucker) v Director General of the National Crime Squad*:

> The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances … The starting point, as it seems to me, is that there is no single test or criterion by which the question can be determined.[84]

Application of *Datafin* to AFCA

In the previous section the ambit of the *Datafin* principle was considered. Whether AFCA will be subject to judicial review on the basis of *Datafin* can now be considered. To determine that question, it is necessary to consider the characteristics of the new scheme.

From the government's consultation paper and the exposure draft of the supporting legislation, the essential elements of the new scheme can be summarised as follows:

- AFCA will be a single dispute resolution scheme handling all disputes arising in the financial industry, replacing FOS, the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).[85]
- AFCA will be based on an Ombudsman model and will be established by industry as a company limited by guarantee.[86]
- The new scheme will operate under a co-regulatory framework. This means that, while the AFCA board will make its own decisions regarding funding, staffing and dispute resolution processes, it must comply with legislative and regulatory requirements,[87] directions[88] and mandatory referral requirements.[89]
- While most operational aspects of AFCA will be based on private law (contractual) arrangements, some compulsory powers will be provided in respect of superannuation disputes.[90]
- AFCA may be authorised by the Minister and all financial firms and regulated superannuation firms must be members.[91]
- The constitution of AFCA must include a provision enabling the Minister to appoint the Chair and fewer than half of the directors of AFCA within the first six months of its operation.[92]

In considering whether AFCA will be subject to judicial review (on the basis of the *Datafin* principle), it is useful to consider more carefully the nature of those schemes, taking into account the principles set out above as identified in *Masu*[93] and by Kyrou J.[94]

The *Masu* approach

First, in respect of the *Masu* points:

- The Minister may appoint the Chair and half of the directors of AFCA in the first six months.[95]
- The government will not be involved in the appointment of Ombudsmen or panel members who determine disputes.
- AFCA must be constituted in compliance with the requirements for authorisation.[96]
- AFCA will be authorised by the Minister under the *Corporations Act 2001* (Cth).[97]
- Failure to comply with a decision of the EDR schemes must be reported to the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), or the Commissioner of Taxation.[98]

The Kyrou approach

In respect of Kyrou J's distilled principles, factors counting against AFCA being subject to judicial review include the fact that AFCA will not be constituted by an Act of Parliament or established by a public body, will receive no public funding, will not be subject to broad democratic accountability and will not control access to any place. Moreover, the source of the scheme's power is, primarily, a contractual power, although whether the power is truly consensual is somewhat questionable given the statutory underpinning of the regulatory system.

On the other hand, factors in favour of AFCA being amenable to judicial review include the fact that it will have statutory recognition, will be authorised by the Minister, will have compulsory powers available for superannuation disputes[99] and will be subject to strengthened regulatory oversight by ASIC.[100] In essence AFCA will provide a public service and act only in the public interest to provide a dispute resolution service which, if not so provided, would leave consumers no choice but to have their disputes considered by the Court or relevant statutory-based tribunal.

The preponderance of these various factors suggest that AFCA will be subject to judicial review.

Contractual basis of jurisdiction

One specific issue raised above is that, traditionally, bodies exercising contractual jurisdiction are not subject to judicial review.[101] It has been argued that 'even if the principle in *Datafin* is accepted in Australia, it would not apply to the schemes as their jurisdiction is derived from private contract and they are not performing public functions'.[102]

The starting point in considering this issue is *Jockey Club*.[103] In that case, the Court of Appeal, in considered whether the Jockey Club was subject to judicial review, held that a body that did not owe its existence to the exercise of government power could nonetheless be subject to judicial review if it was woven into the fabric of public regulation or system of government control or regulation or if it was a surrogate organ of government.

However, the Court specifically excluded those bodies whose powers derived from contract. Indeed, Sir Thomas Bingham MR said:

> I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an

> injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.[104]

Lord Justice Hoffman noted the potential conflict between the principle from *Datafin* to the effect that a private body may exercise public functions such as to be the subject of judicial review (considering the nature of the power) and the concept that a body with a contractual basis for jurisdiction cannot be the subject of review. He said:

> In *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302 this court decided that the National Greyhound Racing Club Ltd was not amenable to judicial review notwithstanding that it controlled the greater part of the dog racing business in much the same way as the Jockey Club controls horseracing. The club was held to be a purely domestic tribunal because the source of its power lay in contract and nothing else. The case was decided before *Reg v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815 and did not consider whether, notwithstanding the lack of any public source for its powers, the club might de facto be a surrogate organ of government. I would accept that, if this were the case, there might be a conflict between the principle laid down in *Ex parte Datafin Plc* and the actual decision in *Law's* case [1983] 1 WLR 1302 which required a re-examination of whether *Law's* case still governed the present case. I would also accept that a body such as the Take-over Panel or IMRO which exercises governmental powers is not any the less amenable to public law because it has contractual relations with its members. In my view, however, neither the National Greyhound Racing Club Ltd nor the Jockey Club is exercising governmental powers and therefore the decision in *Law's* case remains binding in this case.[105]

Hoffman LJ seemed to accept that a private (contractually based) body could be subject to review but that it would need to be a 'surrogate organ of government'. That said, His Lordship was not satisfied in that case that the Jockey Club could be said to exercise government powers.

In *Aegon Life*,[106] Rose LJ derived from the comments of Sir Thomas Bingham and Farquharson LJ in *Jockey Club* that 'judicial review should not be extended to a body whose powers derive from agreement of the parties and when effective private law remedies are available against the body'.[107] Rose LJ went on to comment:

> Furthermore, when Sir Thomas Bingham MR spoke of the Jockey Club not being 'woven into any system of governmental control' I do not accept that he was thereby indicating that such interweaving was in itself determinative. On the contrary a substantial part of his judgment and that of Farquharson LJ is devoted to the negative implications as to judicial review if the body's power was derived from consent. I do not accept that their judgments or that of Hoffmann LJ, or those of the members of the court in *ex parte Datafin*, can be construed as contemplating that such a body as the IOB, even if it became interwoven into a governmental system would be susceptible to judicial review.[108]

Lord Justice Rose therefore found that if the basis of the jurisdiction was contractual then even being woven into a governmental system did not subject the body to judicial review:

> In a nut shell, even if it can be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. In the light of all these factors, the IOB is not in my judgment a body susceptible to judicial review.[109]

This clear statement was followed in *R (Mooyer) v Personal Investment Authority Ombudsman Bureau*[110] (*Mooyer*) by Newman J. In respect of the voluntary jurisdiction of the Authority, Newman J concluded that:

> [the relevant body] is not exercising governmental powers and is providing a voluntary arbitration service and not governmental regulation of the industry;
>
> the case, far from being distinguishable from *Aegon Life*, is more clearly an example of an exercise of consensual jurisdiction, for the decision is not binding upon the claimant or any third party.[111]

Again, this is a relatively clear statement — a body exercising a consensual jurisdiction is not the subject of judicial review.

However, the position may not be quite as straightforward as it at first appears. While in the *Jockey Club* case the Court found that the Jockey Club was not subject to judicial review, Hoffman LJ noted that, if a body was exercising government powers, it would still be amendable to public law despite having contractual relations with its members.

Lord Justice Farquharson, in considering the issue as to whether a lack of genuine consensuality may affect the broader principle, said:

> Mr Kentridge has referred to the lack of reality of describing such a relationship as consensual. The fact is that if the applicant wished to race his horses in this country he had no choice but to submit to the club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality.[112]

But this concept of consensuality has a limit. For example, in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachmann*[113] (*Wachmann*), it was submitted that the jurisdiction of the Chief Rabbi was exercised only in respect of those who chose to be a member of the United Hebrew Congregation — there was no obligation on anyone to be such a member.

Justice Simon Brown noted that private or domestic tribunals may be excluded from judicial review on the basis of consensually submitting to jurisdiction:

> As it seems to me, the exclusion from judicial review of those who consensually submit to some subordinate jurisdiction properly applies only to arbitrators or 'private or domestic tribunals:' see *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302. Certainly I know of no other bodies held exempt from judicial review on this particular ground. Perhaps, however, it is artificial to regard this as a wholly distinct ground; perhaps rather it shades into consideration of whether the body in question is fulfilling an essentially public duty and its decision is one having public law consequences.[114]

In these comments Simon Brown J found not just that domestic or private tribunals with consensual jurisdiction may be excluded from judicial review but also that the issue of consensuality may not be a separate ground but may be one consideration in respect of the question as to whether a body is of a sufficiently public nature so as to satisfy the *Datafin* test.

Ultimately, and importantly, Simon Brown J rejected the strict application of the contractual argument in this case and said a person pursuing a vocation had no choice but to accept the jurisdiction. This therefore meant that a decision of the Chief Rabbi could be subject to judicial review. In so doing, Simon Brown J effectively found that a lack of true consensuality meant that the 'contractual' basis for exclusion from judicial review did not apply.

This was not an issue in either *Aegon* or *Mooyer*, as in both of those cases the parties subject to the jurisdiction genuinely chose to be members of the scheme for commercial or competitive reasons. There was no statutory or regulatory requirement to be a member.

In Australia, in respect of AFCA, it is submitted that the position is different from those considered in *Aegon* or *Mooyer* and is more akin to *Wachmann*. First, bodies the subject of the jurisdiction of the EDR scheme do not voluntarily choose to be members of a scheme — there will be a legislative requirement that they submit themselves to a scheme's jurisdiction.[115] This is a significant inroad into the suggestion that the jurisdiction is consensual. If it is the nature of the power being exercised that determines whether a body is subject to judicial review (*Datafin*) and if a private (contractually based) body may be

subject to judicial review (Hoffman LJ in *Jockey Club)* then this would be a strong factor in finding that EDR schemes are subject to review. Their members do not subject themselves to the jurisdiction consensually but, rather, pursuant to legislative requirement.[116]

Secondly, while Farquharson LJ stated in *Jockey Club* that a person had a choice whether to join and that they were not obliged to race horses, there appears to be a limit to such a concept. Clearly, Simon Brown J did not accept that in respect of the 'choice' to be a rabbi in *Wachmann.* In fact, Simon Brown J commented:

> So far as the Bar and universities are concerned, once the exclusive visitorial jurisdiction has been invoked and exhausted, the court can review the visitor's decision; it does not decline such review on the footing that those aggrieved chose rather than were compelled to go to the Bar or university.[117]

There is a clear parallel with those pursuing financial services activities. The fact that such entities (or those that operate them) choose to pursue a financial services licence rather than being compelled to do so should not mean that judicial review is not available to them.

It is submitted that there is also a clear distinction in respect of those that choose to pursue a sport or pastime such as racing and so submit themselves to a jurisdiction compared with those pursuing a vocation (as a rabbi in *Wachmann)* or profession (as alluded to by Simon Brown J) who, by nature of pursuing that vocation or profession, are required to submit to a jurisdiction.

However, the view of the Court of Appeal in *Mickovski* cannot be overlooked. In that case the Court commented:

> The [FOS's] power over its members is ... still, despite the Act, solely derived from contract and it simply cannot be said that it exercises government functions. In a nut shell, even if it can be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. In the light of all these factors, the [FOS] is not in my judgment a body susceptible to judicial review.[118]

These comments are, of course, obiter dicta, with the Court specifically noting that it would not decide whether *Datafin* applied in the case. Moreover, the comments were made after limited analysis of the law in the area and with reference to a very limited number of relevant authorities. The limited reasoning of the Court is not persuasive and, it is submitted, is somewhat inconsistent in one respect.

On the one hand, the Court did not regard as significant the difference between the optional nature of the scheme in *R v Insurance Ombudsman Bureau* and the mandated requirement of membership of EDR schemes. So the consensual aspect did not appear to be significant at that point.

On the other hand, the Court considered that the 'ultimately determinative' issue was the fact that the public does not have to use FOS and could instead sue insurers in the Court. That is, submission to the jurisdiction was consensual (derived from contract) and so excluded from the operation of *Datafin.*

This approach does not seem consistent in that it does not consider consensuality to be significant in respect of the firm's membership of the scheme but does consider consensuality to be significant in respect of use of the scheme by the consumer.

Moreover, even though there seemed to be some concession that FOS may have been woven into a government system, it was argued that the fact that the power was derived

from contract and that there was only a remote public law sanction supporting decisions meant that FOS was not subject to judicial review. A number of issues arising from this can be addressed:

- Membership of an ASIC approved EDR scheme, and therefore submission to its jurisdiction, is not consensual — it is currently mandated by federal legislation[119] and will be in the future.[120] As Malbon comments with reference to FOS as an EDR scheme, 'thus, the Australian government provides a mandatory system of access to justice in the consumer marketplace — a system that is fully funded by industry'.[121] Instead, while the jurisdiction is contractual, it is not truly consensual and so decisions may well be subject to judicial review if the decision-maker is enmeshed in the regulatory/government system.[122]
- The other aspect of consensuality touched on by the Court was in respect of the 'choice' by consumers to use the EDR service as opposed to suing in court. With respect, this does not truly reflect reality in that using the courts to resolve disputes is not a genuine alternative for many, if not most, consumers. The barriers to using the courts were made clear in the recent *Access to Justice Arrangements* report published by the Australian Productivity Commission.[123] The Commission noted the factors that caused unnecessary cost and delay in using the courts[124] and the insufficient loss to an individual to justify the cost and noted instead the practical and proportional alternative offered by an Ombudsman scheme.[125] The vast majority of those consumers do not have a real choice to use the courts — only AFCA will be available.

  Of course, consumers also have a choice as to whether to accept the final decision of a scheme and such a decision only becomes binding if the consumer so chooses.[126] Again, however, in most cases such a 'choice' is illusory, as the alternative for the consumer in pursuing their rights elsewhere (through the courts or relevant tribunal) is, for the same reasons stated above, not a genuine option.

- The Court of Appeal in *Mickovski* also suggested that any public law sanction in support of the EDR scheme is very remote. That is not necessarily so. ASIC Regulatory Guide 165 makes it clear that, if the licensee ceases to be a member of an EDR scheme, it must inform ASIC,[127] in which case the licensee is not meeting its licence obligations and may face action from ASIC.[128] Moreover, the failure of an Australian Financial Services Licensee to be a member of an EDR schemes as required by s 912A of the *Corporations Act 2001* (Cth) renders the licensee subject to suspension or cancellation of the licence[129] and potentially for prosecution for a general contravention of the Act.[130]

Taking all of these factors into account, and given the brief analysis in *Mickovski* leading to the obiter comments, it is submitted that, if the issue was properly ventilated and considered by a court in the future, *Mickovski* would not serve as a strong authority for EDR schemes not being subject to judicial review and may not be followed.

In essence, it is submitted that the Court was correct in *Masu* in finding that the EDR scheme was subject to review, on both a legal and a conceptual basis.

Judicial review: conclusion

On the basis of the foregoing analysis, it seems likely that when provided with the opportunity the High Court will decide that the *Datafin* principle applies in Australia to extend judicial review to bodies of a public nature or which perform public functions.

Whether AFCA would be subject to judicial review in accordance with that principle is a more difficult question. Certainly on the principles identified in *Masu* and by Kyrou J the schemes

seem sufficiently 'public' to be subject to *Datafin*. Moreover, in the only case in which the issue has been directly considered, the Court held that one of the schemes was in fact subject to judicial review.[131]

However, the fact that the jurisdiction of AFCA will be based on contract creates some doubt, particularly in light of the English authorities considered above. But, while the jurisdiction may be based in contract, it is not truly consensual given that financial services firms are required by regulation to submit themselves to the jurisdiction of an EDR scheme.[132] Thereafter the firm has no choice as to whether the customer invokes the jurisdiction of the relevant EDR scheme. In this regard, the situation is vastly different to that of a purely consensual contractual jurisdiction, such as in the case of arbitration pursuant to an arbitration agreement. Some doubt may also arise given the position of the consumer who is free to choose to pursue their dispute other than through the EDR schemes and may even choose not to accept the final decision. While recognising these issues, which could be the subject of further specific research, it is submitted that they are not sufficient to alter the conclusion that EDR schemes are likely be found to be subject to judicial review.

The jurisdiction of AFCA in respect of dispute resolution can also be contrasted 'with the activities of Jockey Clubs and rabbis, which are areas that governments have rarely sought to regulate'.[133] Indeed, in recent significant reports, reference has been made to the significant role EDR schemes play in the justice system (filling 'an important gap in the civil justice landscape, providing a mechanism for resolving low value disputes'[134]) and in the financial sector (with 'the importance of continuing to have an adequate consumer dispute resolution system'[135] noted). Such a significant dispute resolution jurisdiction that would otherwise need to be provided by some form of government intervention is more likely to be subject to judicial review.

Given the significant public function proposed for AFCA, it is submitted that the courts, when the question arises, are likely to find that AFCA is in fact subject to judicial review.

Endnotes

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purely voluntary (as Adams himself notes). This in itself represents a clear distinction to the current EDR schemes. Ken Adams, 'Judicial Review of Claims Review Panel's Decisions' (1997) 8 *Insurance Law Journal* 1.

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GRAHAM AND THE CONSTITUTIONALISATION OF AUSTRALIAN ADMINISTRATIVE LAW

Leighton McDonald*

The contemporary administrative state sits at the heart of Australia's working (small 'c') constitution. Government power is exercised predominantly through the exercise of administrative — rather than legislative or judicial — power. For this reason administrative law necessarily carries constitutional significance. Despite this significance, Australia's written *Constitution* provides almost no express guidance about how administrative institutions should be constituted or the character of the legal norms that guide administrative decision-making.[1] Although bureaucratic government developed earlier than is sometimes supposed, the administrative state was not at the forefront of the minds of those who debated and drafted the written *Constitution*.[2]

Nevertheless the *Constitution* has left profound marks on Australian administrative law for many years. These marks could, perhaps, be most clearly seen in the bifurcated institutional structure for the adjudicative review of administrative actions created in the 1970s. For reasons associated with the separation of judicial power (held to be an implication of structural features of the *Constitution*), the function of merits review has been conferred on tribunals rather than Commonwealth courts.[3] Recent reports that administrative law is being 'constitutionalised' do not therefore mark an entirely new phenomenon.[4]

Having said that, when the High Court was provoked[5] into plumbing the depths of s 75(v) of the *Constitution*, the constitutionalisation of administrative law not only intensified but also changed direction. Influence has moved from broad institutional questions (what functions may be conferred on particular institutions) to the nature and content of the legal norms of administrative law. One manifestation of this pivot is the renewed emphasis given to conceiving the legality/merits divide in Australian law through the prism of the separation of judicial power doctrine.[6] But the most prominent and direct point of interaction between the *Constitution* and the normative content of Australian administrative law is to be found in the context of s 75(v). Here, the rebadged 'constitutional remedies' are no longer thought to entrench a *mere* jurisdiction but to also entrench what was described, in *Plaintiff S157/2002 v Commonwealth*[7] (*Plaintiff S157*), as the 'minimum provision of judicial review'. In this way, *Plaintiff S157* has become the emblem of the latest constitutionalisation of administrative law.

Graham v Minister for Immigration and Border Protection[8] (*Graham*) was handed down almost 15 years after *Plaintiff S157* and confirms two things: that the High Court meant what it said when it identified an entrenched minimum *provision* of review; and that working out the content of that minimum provision will keep Australian administrative and constitutional lawyers occupied for some time to come.

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In commenting on *Graham*, this article briefly considers how the Court conceptualised the notion of the entrenched minimum provisions of judicial review in *Plaintiff S157*, focusing on the work done by judicial silence as well as utterance. Next, it describes the impact of *Plaintiff S157* to the successful constitutional challenge mounted in *Graham*: that the impugned decisions were compromised by a provision that infringed s 75(v).[9] Finally, it asks whether any general lessons can be learned from *Graham* about how the entrenched minimum provision of review is to be understood. Although the article concentrates on the majority, reference will also be made to Edelman J's puzzling dissent in his High Court administrative law debut.[10]

The significance of *Plaintiff S157*

In *Plaintiff S157* the High Court declared that s 75(v) introduced into the *Constitution* an entrenched measure ('provision') of judicial review, installing the judiciary at the apex of a system of legal accountability. The Court did not invalidate the infamous *Migration Act 1958* (Cth) privative clause for inconsistency with this constitutional baseline. Although there was a patent conflict between the terms of the privative clause and the terms of s 75(v) of the *Constitution*, the Court engaged in some fancy, albeit familiar, footwork to avoid this conclusion.[11] However, the Court was explicit (indeed, it could not have been clearer) that its *entire* approach was underpinned and framed by constitutional fundamentals that have a 'real and substantive' operation.[12] The Court's message was that, just as its constitutional function to review administrative action could not be evaded by the blunt force of a privative clause, neither could it be subverted by more subtle forms of legislative drafting. As in some other areas of constitutional law, substance should not yield to form.

The problem, however, was that, although the Court's language was strident, it studiously avoided specifics. In particular, very little was said about the substantive principles that mark out the boundaries of the minimum level of review. Prior to *Plaintiff S157*, s 75(v) was often said to only confer a jurisdiction, meaning that it did not entrench any substantive principles (or 'grounds') which would give the court power to grant the named remedies (prohibition, mandamus and injunction).[13] But if, as the Court insisted in *Plaintiff S157*, its entrenched original judicial review jurisdiction was a matter of substance, not form, then the implication is that the idea that s 75(v) confers a *mere* jurisdiction must be jettisoned. For this reason, *Plaintiff S157* has become a central part of the Court's developing approach to understanding what exactly is entrenched by s 75(v).[14] The Court could have relied on the familiar language of 'jurisdiction' but chose, rather, to speak of a minimum *provision* of judicial review.[15] The Court seemed (quite clearly, in my view) to be insisting that there are *some* substantive principles entrenched by s 75(v) despite offering very little guidance about content of those principles (which was not necessary to resolve the case at hand).[16] Indeed, the Court expressly stated that s 75(v) of the *Constitution* 'limits the powers of the Parliament or of the Executive to avoid, or *confine*, judicial review'.[17]

Of course, the Court did try to cash out the content of the minimum provision of judicial review by reference to the concept of jurisdictional error. The Parliament, it explained, cannot deprive the court of its constitutional jurisdiction to enforce the legal requirements that limit and condition a decision-maker's power. And, as previously held, the 'constitutional writs' are available only in cases of jurisdictional, as opposed to non-jurisdictional error.[18]

An entrenched provision of review for jurisdictional error may sound like a substantive principle. But it is not.[19] Very soon after *Plaintiff S157*, it became clear that classifying an error as 'jurisdictional' is ultimately a question of statutory interpretation, meaning that Parliament has control over what jurisdictional requirements are imposed.[20] Although reliance on the concept of jurisdictional error provided the Court in *Plaintiff S157* a neat way to neuter the privative clause, it offers no intellectual resources to resist 'plenary provisions'

— that is, provisions which alter the law that confers administrative powers so that those powers are not subject to any meaningful restraints or jurisdictional requirements.[21] If such clauses are interpreted according to their terms, review — although it remains available — is invariably rendered ineffective. That, then, was the core problem left unsolved in *Plaintiff S157*. Perhaps, in some cases, much heavy lifting can be done through statutory interpretation to imply limits into clauses that are, on their face, plenary provisions.[22] At some point, however, such strategies may become disingenuous and raise questions of integrity.

Holding the line

In *Graham*, the plaintiff (Mr Graham) and applicant (Mr Te Puia), both citizens of New Zealand, each challenged a decision made by the Minister to cancel their visa. In both cases, the Minister had exercised his power under s 501 of the *Migration Act 1958* (Cth) on the basis that he 'reasonably suspected' the person did not pass the 'character test' and that he was 'satisfied' that the cancellation was in the 'national interest'. In both cases, the Minister's reasons pointed to an association between the visa holder and a bikie gang.

As noted above, my focus will be the constitutional challenge mounted on the basis of s 75(v). The provision challenged was not the Minister's substantive power of cancellation but a secrecy provision relied upon in the course of making the substantive decisions. Section 503A(2) of the Migration Act (the 'secrecy provision') prevented the Minister from being forced to divulge information relevant to a cancellation decision to any person or to any court if:

(a) that information had been communicated by a law enforcement or like agency; and
(b) it had been communicated on the condition that it be treated as confidential.[23]

In the plaintiff's case, the Minister's reasons indicated his suspicion that the character test was not met and satisfaction that cancellation was in the national interest was based in part on undisclosed material (though substantial objective facts were also available to establish the first criterion).[24] In the applicant's case, the Minister's suspicion that the person did not pass the character test relied exclusively on undisclosed information.

A six-judge joint judgment concluded that the secrecy provision struck at the 'very heart of the review for which s 75(v) provides'.[25] The Court stated the applicable principle in this way: a 'provision must be invalid if, and to the extent that, it has the legal or practical operation of denying to a court exercising jurisdiction under or derived from s 75(v) the ability to enforce the limits which Parliament has expressly or impliedly set on the decision-making power which Parliament has conferred on the officer.'[26]

This statement affirms the approach in *Plaintiff S157* — namely, that the function of s 75(v) is to enforce *jurisdictional* requirements that condition an officer's powers or duties (that is, those legal obligations imposed with the intention that they must be observed).[27] Further, as in *Plaintiff S157*, the *Graham* majority was at pains to emphasise that the 'question of whether or not a law transgresses' the constitutionally protected measure of judicial review 'is one of substance, and therefore of degree'.[28]

According to the majority, the practical effect of the secrecy provision was to deny the Court the ability to fulfil its function of making a determination about whether or not legislatively imposed conditions of, and constraints on, a lawful exercise of power had been observed. The constitutional problem was that the provision imposed a 'blanket and inflexible limit' on the Court's capacity to even look at material which was, by definition, relevant to its review task — irrespective of the importance of the undisclosed material in a particular case.[29] As the Minister could base a decision in whole or in part on the protected information, the

secrecy provision could operate 'to shield the purported exercise of power from judicial scrutiny'.[30] The Minister's powers were framed in highly discretionary terms, but the fact that the Court could not require the 'undisclosed information' to be adduced in evidence left it in the dark as to whether the preconditions for the exercise of power were based on decisions which were reasonably reached on the material that was considered.[31] Thus, it was not the breadth of the discretion as such but, rather, its effect on any subsequent judicial review application that worried the Court.

The majority was unpersuaded by the argument that the operation of the secrecy provision had an analogous operation to the common law principle of public interest immunity at the time of federation. And, over the vigorous protestations of Edelman J, the majority responded that the application of public interest immunity never entirely foreclosed the ability of the courts to have access to material over which public interest immunity had been claimed.[32] Relatedly, the Court distinguished a number of cases where the constitutionality of secrecy clauses had been upheld on the basis that the provisions in question did not prevent courts from having access to the evidence upon which a decision was based (even if that information could not be disclosed to an affected individual or other person).

Thus, although the *Graham* majority did not shed further light on the substantive principles of review entrenched by s 75(v), the application of the core ideas articulated in *Plaintiff S157* demonstrates a continuing and robust commitment to them.[33] *Graham* provides a practical example of a possibility mooted in *Plaintiff S157*: a provision which does not directly remove jurisdiction to grant the constitutional writs but hollows out the exercise of that jurisdiction to the extent that judicial review falls short of the baseline implied by the notion of an entrenched minimum provision of review.

Graham's **lessons**

What, if any, general lessons can be learned from the reasons in *Graham* about the entrenched minimum provision of review?

As noted above, the reasons of the majority emphasise that the Court will examine closely provisions which in substance, if not form, operate to erode its jurisdiction. In his dissent, Edelman J questioned the legitimacy of the 'entrenched minimum provision of judicial review', emphasising that its existence derived from a recently discovered constitutional *implication*. His Honour opined that this implication did not even form part of the *ratio decidendi* in *Plaintiff S157*.[34] Perhaps, however, the fact that the majority did not deign to respond to these strong doubts indicates not the fragility of the principle but, rather, how deeply *Plaintiff S157* has embedded into Australia's constitutional landscape.

Although Edelman J is self-consciously 'historical' in his method, his dissent also contains faint traces of a Dworkinian interpretive approach — proceeding on the basis that newly recognised legal principles must 'fit' (to an unspecified extent) past cases and 'established constitutional doctrines'.[35] Only an emaciated minimum 'content' of judicial review, his Honour's line of thought runs, can fit the legal data. In contrast, the majority openly concede that it will not always be easy to draw lines between provisions that go too far and those that do not. Consider, in this context, Edelman J's claim that the majority position would produce 'intolerable inconsistencies' with *Plaintiff M61/2010E v Commonwealth*[36] (*Plaintiff M61*).[37] In *Plaintiff M61*, the Court upheld a no-consideration clause (one means for the conferral of a broad or plenary power). But the Court's brief and guarded reasons in *Plaintiff M61* should not, perhaps, be thought to suggest that *all* such provisions will receive a constitutional tick. If the question of whether a clause limiting review is constitutionally permissible is one of substance *and degree*, this conclusion is not surprising. (In)consistency between *Graham* and *Plaintiff M61* (or any other case) will thus in part lie in the eye of the beholder. The

majority in *Graham* appear to have assumed (they do not respond to the inconsistency charge) that the availability of declaratory relief in the unusual circumstances of *Plaintiff M61* meant that the impugned clause posed a lower threat of arbitrariness than that presented by the secrecy provision.

Justice Edelman also included an extended discussion of the 'limited content of judicial review at Federation' as a part of his argument for a tightly confined approach to the content of the minimum provision of judicial review.[38] He argued that the correct approach to determining the essential content of an implication is 'historical' insofar as 'common law decisions prior to, and at the time of, Federation … form part of the context from which the meaning of the *Constitution*, and the content of its implications can be derived'.[39] Without trespassing into debate on the preferable interpretive method for understanding the Australian *Constitution*, an administrative lawyer might perhaps be permitted to wonder whether this historical strategy — at least in this context — is akin to an attempt to close the stable door when the horse is fading from sight. Justice Edelman himself emphasises how the contemporary bases for the availability of the 'constitutional writs' would be largely unrecognisable to the framers. Even the phrase 'jurisdictional error', which now sits at the centre of thinking about s 75(v), would probably not have been well understood.[40] Indeed, one wonders how Edelman J's historical approach is to be reconciled with the broader doctrinal developments in Chapter III jurisprudence (of which *Plaintiff S157*, *Kirk v Industrial Relations Commission*[41] and, now, *Graham* form an important part). Like it or loathe it, the Chapter III edifice is a judicially built construction that reflects a reoriented conception of the Court's constitutional authority.[42] Justice Edelman's 'ahistorical' epithet may be applied to many elements of these developments. Viewed in this context, the implication of a minimum provision of judicial review might be said to be one of the least controversial elements in the High Court's reorientated approach to judicial power.

To the extent that *Graham* involved a statutory provision which did not purport directly or indirectly to expand an administrator's jurisdiction or power (*à la* a no-invalidity clause), it was a relatively easy case. The Court was able to apply the entrenched minimum provision without elaborating its content. That is to say, it was possible to fall back on the mantra that the function of review is to enforce jurisdictional requirements — no less and no more. At the conclusion of its reasons, the majority observe that 'matters of substance and degree which may or may not result in the invalidity of a statutory provision affecting the exercise of a court's jurisdiction under s 75(v)' need not further be analysed in the case before the Court.[43] For this reason, the problem left unresolved in *Plaintiff S157* remains — but so does the Court's insistence that s 75(v) raises matters of substance and degree.[44]

Interestingly, one of Edelman J's rejoinders to the argument that the secrecy provision was apt to 'stymie' the content of judicial review provided for by s 75(v) emphasised that judicial review would be available for compliance with the statutory preconditions for any application of the secrecy provision.[45] The relevant conditions were that the information:

(a) is communicated to an authorised officer;
(b) by a gazetted agency;
(c) on a condition that it be kept confidential; and
(d) is relevant to an exercise of specified powers under the *Migration Act 1958*.

Such review would, however, in all but the rarest cases leave the substantive exercise of power immune from challenge[46] and runs the risk of creating what have been referred to as 'grey', as opposed to 'black', holes in the law. Whereas a black hole is created by a decision that is unreviewable, a grey hole represents a decision that is subject to review of a type extremely unlikely in practice to provide any practical remedies. David Dyzenhaus has plausibly suggested that grey holes may present a more insidious problem than do black

holes.[47] A legal black hole represents a clear gap in *legal* regulation and thus the potential need for an alternative accountability mechanism may be more readily revealed. In contrast, it can be inferred from the majority's reasoning that the content of the minimum provision of review is unlikely to be satisfied by the legislature providing for *de minimis* jurisdictional limits.[48]

Conclusion

What, then, does *Graham* tell us about the constitutionalisation of the norms of Australian administrative law? In general, it confirms that jurisdictional error is the go-to concept for expressing the legal norms that constrain the exercise of administrative power.[49] Perhaps ironically, however, when it comes to elaborating the minimum provision of review, an argument offered in Edelman J's dissent is most revealing of its content. That argument is useful insofar as it identifies an unhelpful line of inquiry.

Justice Edelman characterises the problem posed by the secrecy clause as being analogous to the express legislative removal of an unreasonableness 'ground of review'. Here Edelman J suggests that the idea that all grounds are entrenched is implausible.[50] Even natural justice may be excluded, and entrenching particular grounds would entail a very large transfer of power to the courts.[51]

Justice Edelman presents strong reasons for concluding that the minimum provision is unlikely to be found in the idea that some of the traditional grounds of review, developed by judges but subject to statutory modification and ultimately abrogation, are hardwired into the *Constitution*. But these arguments do not inexorably show that the notion of a minimum *provision* of review is incoherent or incompatible with established doctrine. An alternative response to these arguments is that new principles will be necessary to determine when a provision impermissibly limits the legal operation or practical efficacy of the Court's constitutional review jurisdiction.[52] However, because the Court can often rely on creative statutory construction to provide adequate levels of review, it may be some time yet before these principles are fully articulated.

Endnotes

1 In this respect, Australia's written constitution is not unusual: Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (2010) 125.

2 Compare Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (2016) 3 ('The administrative state is the inescapable subject of contemporary legal theory.')

3 Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee*, Parliamentary Paper No 144 (1971) (the Kerr report) ch 4.

4 Here I use 'constitutionalisation' broadly — consistently with the Australian literature — to refer to the various influences of constitutional ideas on the development of administrative law, along with instances where it has been held that doctrinal propositions of administrative law are mandated by the *Constitution*. Note, however, that the term is sometimes freighted with a particular set of political objectives, such as the elevation of norms associated with 'liberal-legal constitutionalism': see Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (2010) 47–69.

5 By the winding-back of statutory sources of judicial review in migration matters — a process which commenced in earnest in the 1990s. See Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

6 See Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 166–7.

7 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

8 [2017] HCA 33.

9 A separate challenge based on an alleged inconsistency between the impugned provision and the constitutionally protected institutional integrity of Chapter III courts was unanimously dismissed.

10 Justice Edelman's dissent has also been described as 'powerful': Lisa Burton Crawford, 'The Entrenched Minimum Provision of Judicial Review and the Limits of "Law"' (2017) 45 *Federal Law Review* 570.

11 The basic interpretive argument relied upon in *Plaintiff S157* had been deployed in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
12 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511–12.
13 If there is no basis for the grant of a remedy then jurisdiction will subsist in an inutile form.
14 See, for example, Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45 *Federal Law Review* 519, 537–8; Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463; and Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14. Contrast Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81, where it is argued that *Plaintiff S157* should not be read so as to dislodge the view that s 75(v) entrenches a mere jurisdiction. See also Lisa Burton Crawford, 'Expanding the Entrenched Minimum Provision of Judicial Review? *Graham v Minister for Immigration and Border Protection*' (2017) 28 *Public Law Review* 277.
15 To speak of a 'minimum jurisdiction of judicial review' would, it seems to me, have been an odd locution. That phrase adds nothing to the obvious point that s 75(v) entrenches the jurisdiction it confers.
16 This reading of *Plaintiff S157* is not, in my view, undermined by the implausibility of the Court's own brief suggestions about where to look for substantive principles. For compelling critique of those suggestions, see Bateman, above n 14, 492–500.
17 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [104] (emphasis added).
18 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
19 McDonald, above n 14, 18. See also Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) ch 7.
20 For a discussion of these developments, see Bateman and McDonald, above n 6, 170–2.
21 See Bateman, above n 14, 466–8.
22 One possible vehicle for such work is the principle of legality. Perhaps ironically, leaving all the work to avoid plenary clauses to non-constitutional modes of legal reasoning may also lead to *Hickman*esque strategies — strategies that many have assumed (typically, with great relief) would be swept away by *Plaintiff S157*. For discussion of interpretive strategies for avoiding some types of plenary clauses and their limits, see, for example, McDonald, above n 14, 30–2; and Crawford, 'Who Decides the Validity of Executive Action?', above n 14, 95–7.
23 An agency was covered by this provision if a 'gazetted agency': *Migration Act 1958* (Cth), s 503A(1). A total of 42 Commonwealth, state and territory statutory authorities had been gazetted, along with government departments and agencies from 285 countries: *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [51].
24 Ibid [23].
25 Ibid [65].
26 Ibid [46].
27 See ibid [43]–[44].
28 Ibid [48].
29 Ibid [50], [64].
30 Ibid [53].
31 Ibid [59].
32 This dispute raises not only a debate of legal history but also a dispute over how, and in what sense, history is relevant to the interpretation of a written *Constitution*. See Helen Irving, 'What is History, Again?' on AUSPUBLAW (5 February 2018) <https://auspublaw.org/2018/02/what-is-history-again/>.
33 Post-*Plaintiff S157*, the Court had previously invalidated a provision for inconsistency with s 75(v) on only one occasion. See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, where inflexible time limits for bringing applications for review were held to prevent the Court from exercising its entrenched jurisdiction.
34 One lesson that could be drawn from this observation is that the *ratio*/*obiter* distinction is not always a reliable guide to discerning what is of significance in the development of the law.
35 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [94], [85]. The traces are faint insofar as the judgment is silent on the extent (if any) to which the requirement of fit may be adjusted in light of questions of justification — a question central to Dworkin's own controversial approach. See Ronald Dworkin, *Law's Empire* (1986) 225–75.
36 (2010) 243 CLR 319.
37 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [99].
38 Ibid [112] ff.
39 Ibid [95].
40 As explained by Gageler, above n 5, 95–6, the term rose to prominence in the 1990s.
41 (2010) HCA 1; (2010) 239 CLR 531.
42 See Peter Cane, *Controlling Administrative Power: An Historical Comparison* (2016) 232.
43 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [65].
44 Contrast Crawford, 'Expanding the Entrenched Minimum Provision of Judicial Review?', above n 14, 288 ('the decision does not reveal newfound constitutional constraints on the scope of executive power that Parliament can confer'). Crawford contends that the basis for the decision in *Graham* was not that the

secrecy provision was inconsistent with s 75(v) per se but, rather, that the exercise of judicial power was impaired (in circumstances where s 75(v) authorised it to be used). This explains, she suggests, why the legislation was held invalid in its application to both the High Court and Federal Court. Even if one were of the view that the separation doctrine provides a more sensible analytical foundation than s 75(v) for the outcome in *Graham*, a number of difficulties confront Crawford's interpretation of the majority reasoning. Not only are the Court's analysis and conclusion framed by reference to s 75(v) but also the Court disavows reliance on the (basic or extended) separation of judicial powers doctrine: see *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [29]–[37]. Further, if the real problem was inconsistency with the nature of judicial power (because the provision unduly burdened its exercise), there is, as Crawford notes, an absence of any explanation of the point: ibid 285. Finally, an alternative explanation of why the provision was invalid in its application to the Federal Court is available (albeit not clearly articulated by the majority). A possible principle could be formulated this way: where the Parliament confers on the Federal Court a jurisdiction intended to be equivalent s 75(v) jurisdiction (as s 476A(2) of the *Migration Act 1958* appeared to be), that conferral of jurisdiction will be invalid if it cannot be exercised conformably with the entrenched minimum provision of review. Such a principle would not undermine the capacity of Parliament to confer less than the full scope of jurisdiction under s 75(v) on the Federal Court if it so chooses — as noted in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [47], referring to *Abebe v Commonwealth* (1999) 197 CLR 510.

45 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, [169].

46 In relation to (d), it can be asked: how would review be possible at all in circumstances where the Court is prohibited from receiving the information?

47 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 42.

48 Such limits are considered by Bateman, above n 14, 503.

49 Jurisdictional error has become a proxy for an approach to the identification of the operable legal norms of administrative law which focuses on statutory purposes and specifics, see Bateman and McDonald, above n 6.

50 See, to similar effect, McDonald, above n 14, 18; and Bateman, above n 14, 480.

51 Justice Edelman's scepticism that the 'rule of law' ideal (let alone the very concept of law) might provide a sure foundation from which substantive doctrinal principles can be derived has been shared by a number of commentators: see McDonald, above n 14, 19, 26; Bateman, above n 14, 493; and Crawford, above n 10.

52 The most developed attempt to undertake this task is Bateman, above n 14.

PLAINTIFF S195-2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Robert Orr QC*

Plaintiff S195-2016 v Minister for Immigration and Border Protection[1] (*Plaintiff S195*) is a very short decision by the High Court, but one which addresses an interesting question: does Commonwealth executive power extend to actions which breach the laws of a foreign country? In *Plaintiff S195* the relevant Commonwealth executive power was to enter into arrangements with Papua New Guinea (PNG) in relation to people who were 'unauthorised maritime arrivals' in Australia and transferred there but whose treatment was held by the PNG Supreme Court to be in breach of the right in the PNG Constitution not to be deprived of personal liberty. Iceberg-like, there are a number of interesting issues below the surface of this decision which are worth noting.

Executive power

Administrative law is full of cases concerning the exercise of highly prescribed statutory powers. Often less considered is the exercise of general executive power, at the Commonwealth level under s 61 of the *Australian Constitution*, where there is no, or little, legislative source.

The usual taxonomy of types of executive powers are set out in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[2] (*Plaintiff M68*) concerning the arrangements with Nauru for people who were 'unauthorised maritime arrivals' in Australia and transferred there, which is in a sense a sibling to *Plaintiff S195*. There, Gageler J drew on the categorisation offered by Brennan J in *Davis v Commonwealth*[3] of:

(1) statutory (non-prerogative) power or capacity;
(2) prerogative (non-statutory) power or capacity, generally unique to the executive government; and
(3) capacity which is neither statutory nor prerogative, but a bare capacity or permission to engage in actions and transactions, and is typically shared with ordinary citizens subject to the same law that applies to those citizens.[4]

There are a number of issues about this terminology and, while there is not time to dwell on these, I mention one because it was the subject of discussion at the seminar at which this talk was given. The reference to prerogative non-statutory powers nonetheless needs to recognise that the source of these powers at the Commonwealth level is generally seen to be s 61 of the *Constitution*, but the source is not legislation made under the *Constitution*. Similarly, for the Australian Capital Territory, where the seminar was held, the source is s 37 of the *Australian Capital Territory (Self-Government) Act 1998* (Cth).

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In recent years, issues concerning non-statutory executive power have arisen in a number of cases — in particular, concerning what the prerogative non-statutory powers and capacities extend to, which executive acts require legislation, and how these powers and capacities relate to legislation. Although not sourced in legislation, these powers sit within a complex constitutional and legal landscape which can be relevant to them. These laws can be Commonwealth, state or territory, international or, the focus of this case, those of another country.

Some of the areas in which these issues have arisen are:

- Commonwealth spending and contracting, in *Williams v Commonwealth*[5] in 2012 and *Williams v Commonwealth [No 2]*[6] in 2014;
- withdrawing from treaties, in the decision concerning 'Brexit' in the United Kingdom in 2017;[7]
- Commonwealth actions in stopping people coming to Australia, and taking them elsewhere, in *Ruddock v Vardalis*[8] (Tampa case) in 2001 (concerning non-statutory power) and *CPCF v Minister for Immigration and Border Protection*[9] in 2015 (concerning principally statutory power); and
- the Commonwealth's involvement in regional processing centres overseas, in Nauru in *Plaintiff M68* (which began as the exercise of a non-statutory power but which was then supported by retrospective legislation), and in Manus, PNG, in *Plaintiff S195* — the case that is the subject of this article.

These cases concerned contentious political issues and underlying constitutional tensions. They, and the developments they consider, demonstrate a desire by executive governments to exercise non-statutory executive power quickly and without recourse to legislative processes. They also demonstrate some concern by the courts in relation to the exercise of such powers and, in particular, the articulation of a requirement for legislation in some cases. They also demonstrate a recognition by executive governments of these judicial concerns and requirements and of the difficulties in exercising such non-statutory powers arising from uncertainties as to their reach and the absence of a clear statutory framework.

Plaintiff S195 concerned the Commonwealth's role in removing people who were 'unauthorised maritime arrivals' in Australia to Manus Island in PNG and the treatment of those people there. As the High Court noted, this involved the exercise of both non-statutory and statutory executive powers by the Commonwealth:

- Non-statutory powers were involved in the entry by the Commonwealth into a Regional Resettlement Arrangement with PNG; a related memorandum of understanding in relation to the transfer of persons to PNG and their assessment and settlement in PNG; and a related administrative arrangements document.[10]
- Statutory powers were also involved under ss 198AB (designation of regional processing country) and 198AD (taking unauthorised maritime arrivals to a regional processing country) of the *Migration Act 1958* (Cth).[11]
- Some statutory powers were retrospectively conferred by s 198AHA of the Migration Act in relation to entry by the Commonwealth into the Broadspectrum contract. Section 198AHA was added to the Migration Act in 2015, with effect from August 2012, and was the primary basis of the consideration in *Plaintiff M68*, the case concerning arrangements in Nauru. It provided for the Commonwealth to take action in relation to regional processing functions, including exercising restraint over the liberty of a person.[12]

PNG Constitution

Plaintiff S195 began as a broad challenge to Australian Government activities in relation to the Manus regional processing facility but was narrowed to a consideration of the effect of the decision of the PNG Supreme Court in *Namah v Pato*[13] (*Namah*).

Unlike the *Australian Constitution*, the PNG Constitution has an extensive 'bill of rights'. Section 42 provides that 'no person shall be deprived of his personal liberty' except in specified circumstances. In *Namah* the Court held that the Manus regional processing centre deprived people of their personal liberty.[14] Section 42 contains a range of exceptions. The most relevant was paragraph (g), which allows deprivation of liberty 'for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes'. The PNG Supreme Court held in *Namah* that people taken to PNG from Australia and detained there did not fall within this exception.[15]

A new exception, paragraph (ga), had purportedly been added recently to s 42 of the PNG Constitution. That paragraph allowed deprivation of liberty 'for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country … that the Minister … in his absolute discretion, approves'. This had passed through the general constitutional amendment process by Parliament (in ss 13 and 14 of the PNG Constitution). But it had not been made in accordance with the constitutional requirements for a law that qualified a 'qualified right', which included s 42 (in ss 38 and 39). The Court in *Namah* held that these additional requirements applied to a law to amend the PNG Constitution by adding a further exception to the right to personal liberty in s 42, resulting in a significant further entrenchment of this and other such rights' provisions in the Constitution, and the PNG Supreme Court held therefore that this amendment was invalid or not effective.[16]

It is interesting to note that the Court in *Namah* held that, even if paragraph (ga) of s 42 of the PNG Constitution had operated, it would not itself empower executive action. Rather, some statutory basis was needed. This seems to arise from the nature of s 42(ga), which simply sets out an allowable exception to the right, and perhaps from the general principle that support for such a coercive executive power requires legislation.[17]

The PNG Supreme Court in *Namah* ordered that both the Australian Government, which was not a party to the proceedings, and the Papua New Guinea Government 'shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention'.[18] Such actions were taken, requiring the movement of the relevant people to facilities which did not involve such detention.

It is interesting to note that, whilst the *Australian Constitution* does not have a 'bill of rights' or express provision protecting personal liberty, it contains principles which perform a similar function. Non-statutory executive power in times of peace does not support detention; there is a need for a head of power for any Commonwealth legislation doing so; and any such statutory power is limited by judicial power principles as discussed in in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[19] (*Lim*), which allowed laws providing for executive detention related to the expulsion and deportation of aliens. This principle is in similar, but not identical, terms to the s 42(g) exception in the PNG Constitution. Indeed, Higgins J in *Namah* referred to the Australian High Court decision of *S4/2014 v Minister for Immigration and Border Protection*[20] in discussing the migration-related exception to the right to personal liberty in s 42(g) of the PNG Constitution.[21] Despite their structural differences, both the PNG Constitution and the

Australian Constitution allow some form of detention for the purposes of preventing unlawful entry and effecting lawful removal of a person from the country, but, as the Court in *Namah* discussed, the treatment of persons considered there was for a different purpose.

Does the PNG Constitution limit Commonwealth executive power?

In a single judgment by Kiefel CJ and Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ, the High Court held in *Plaintiff S195* that none of the actions challenged were beyond Commonwealth executive power because of *Namah*. The Court noted that the plaintiff could marshal no authority to support its case that the actions were beyond Commonwealth power because of the PNG Supreme Court decision.[22]

And the Court noted that the plaintiff made no attempt to anchor its argument to the text or structure of the *Constitution*. The Court said that the course of authority 'leaves no room for doubt that neither the legislative nor executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country'.[23] This puts such foreign laws in the same position as international law — indeed, the decision noted *AMS v AIF*,[24] where it was stated that the '*Constitution* and its provisions are not to be construed as subject to an implication said to be derived from international law'.[25]

Are Commonwealth activities in PNG otherwise regulated?

Notwithstanding the ease with which the High Court held that PNG law did not take Commonwealth government actions outside its non-statutory and statutory executive power, it is a different question whether the Commonwealth government is subject to the law of PNG when it is operating there. The High Court stated that whether action taken by a Commonwealth officer in another country complies with the domestic law of that country or with international law may have legal consequences.[26]

But the High Court noted that the arrangements entered into contained provisions specifically providing for their implementation to comply with PNG law.[27] Further, the definition of 'arrangement' in s 198AHA(3) of the Migration Act (see s 198AHA(5)) included something which is not legally binding, and s 198AHA(3) stated that the provision is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.[28] That is, in neither the arrangements nor the legislative provisions concerning them was there any suggestion that they were not to be subject to the law of PNG, even if that was a possibility.

The decision in *Namah* assumed, not surprisingly, that the PNG Government was subject to PNG law and, in particular, s 42 of its Constitution. It also assumed that the Commonwealth government was subject to s 42 and participated in the detention, noting that the Commonwealth was not a party to the proceedings and there was no consideration by the PNG Supreme Court of foreign state immunity issues.

It is also a different question whether the Commonwealth government is subject to the *Australian Constitution* and Australian laws when operating in PNG. Leaving aside the executive power issue, there was no broad challenge on this basis in *Plaintiff S195* but significant consideration in *Plaintiff M68* — the case concerning the Nauru arrangements. There it was held that any statutory power — relevantly, s 198AHA of the Migration Act — needed to be within Commonwealth constitutional power and the judicial power principles set out in *Lim*. The majority of the Court held that it was — in particular, because s 198AHA was supported by the aliens power[29] and detention in Nauru was under the laws of Nauru administered by the executive government of Nauru, to which the *Lim* principle concerning custody by the Commonwealth did not apply.[30] In *Plaintiff S195* the Court noted this earlier

finding upholding the constitutional validity of s 198AHA, and the even earlier finding upholding ss 198AB and 198AD,[31] and did not reconsider these decisions.[32]

In relation to non-statutory executive power, only Gageler J in the majority in *Plaintiff M68* dealt with this in any detail. He held that procurement by the Commonwealth of detention on Nauru, which is how he characterised the situation, was beyond Commonwealth executive power unless authorised by legislation.[33]

Justice Gageler in *Plaintiff M68* also addressed related questions in more detail and held that the lawfulness of actions under Australian law does not determine whether the action falls within executive power but that the existence of executive power has no effect on the civil or criminal liability of the government under Australian law.[34] In *Plaintiff S195* the Court also noted that whether action taken by a Commonwealth officer in another country complies with Australian law applying extra-territorially may have legal consequences and that, in particular, some express or implied limitation imposed by a law enacted by Parliament may have a bearing on 'statutory authority or executive capacity'.[35]

Working out the effect of Australian laws on the exercise of Commonwealth executive power can raise a range of issues. If it is a Commonwealth law, it is necessary to assess the law's operation and relationship to the relevant executive power, including whether the law intends to bind the Commonwealth government, whether it affects or extinguishes the relevant executive power, and whether it intends to operate overseas. If it is a state law then, in addition to assessing the law's operation and whether it intends to bind the Commonwealth government and to operate overseas, it is also necessary to consider the operation of s 109 of the *Constitution* and principles of intergovernmental immunity.

Therefore, whilst it is now clear that a foreign law does not of itself limit Commonwealth executive power, it is these related issues as to the operation of foreign, Commonwealth and state law on the exercise of Commonwealth executive power which are often difficult to resolve.

Endnotes

1 [2017] HCA 31 (17 August 2017).
2 (2016) 257 CLR 42, [132], within a discussion at [129]–[136].
3 (1988) 166 CLR 79, 108.
4 *Plaintiff M68* (2016) 257 CLR 42, [132], [135].
5 (2012) 248 CLR 156.
6 (2014) 252 CLR 416.
7 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; (2017) 2 WLR 583.
8 *Ruddock v Vardalis* (2001) 110 FCR 491.
9 (2015) 255 CLR 514.
10 [2017] HCA 31, [14].
11 Ibid [15].
12 Ibid [16].
13 (2016) SC 149. The *Namah* decision includes a judgment by Higgins J (at [75]–[119]); a judgment by Kandakasi J (at [3] and [5]–[74]), which agrees with the judgment of Higgins J but expresses full reasoning; and judgments by Salika DCJ (at [1]), Sakora J (at [2]) and Sawong J (at [4]), which all agree with the reasons of Kandakasi J and Higgins J.
14 Ibid [74] (Kandakasi J), [80] (Higgins J).
15 Ibid [39], [74] (Kandakasi J), [80] (Higgins J).
16 Ibid [54], [74] (Kandakasi J), [97], [119] (Higgins J).
17 Ibid [56] (Kandakasi J), [98] (Higgins J).
18 Ibid [74] (Kandakasi J).
19 (1992) 176 CLR 1.
20 (2014) 253 CLR 219.
21 (2016) SC 149, [80]–[81].

22 [2017] HCA 31, [20]. A comment by Murphy J in *A v Hayden* (1984) 156 CLR 532, 562 was not referred to by the Court.
23 Ibid.
24 (1999) 199 CLR 160, [50].
25 It has been accepted that a statute of the Commonwealth or of a state is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established rules of international law: see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.
26 [2017] HCA 31, [20].
27 [2017] HCA 31, [7], [8], [9], [10], [25]. The High Court also stated that the PNG Supreme Court did not hold that the entry by PNG into the arrangements was beyond its power, noting that the arrangements provided for compliance with PNG law ([25]).
28 Ibid [26].
29 (2016) 257 CLR 42, [42] (French CJ, Kiefel and Nettle JJ).
30 Ibid [34]–[41] (French CJ, Kiefel and Nettle JJ).
31 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28.
32 [2017] HCA 31, [2].
33 (2016) 257 CLR 42, [175].
34 Ibid [181].
35 [2017] HCA 31, [20]–[21].

FEELING THE HEAT: CHALLENGES FOR 21st CENTURY TRIBUNALS

Gary Humphries*

There is no question about it — Australian tribunals are under pressure right now. Getting stuck into tribunal members has become something of a spectator sport lately.

I will return to the subject of the political context of tribunals later. My comments here are a miscellany of issues we all need to think about. They touch on the context within which tribunals must remain effective. The chief element of that context, in my opinion, is a phenomenon witnessed throughout much of the developed world: a decline in public trust in all of our social institutions (including banks, the police, the church, political parties, courts and tribunals). There is therefore a need for those working in tribunals to demonstrate both relevance and credibility to our actual customers (that word is controversial in this context, but I use it deliberately) and our potential customers — the broader public who may never use us but whose wellbeing as citizens is nonetheless linked to our effectiveness.

We need to remind ourselves about the impact our work has on this 'broader public'. Doing our job well goes beyond simply delivering justice to those who come through our doors. As the Administrative Appeals Tribunal (AAT) Deputy President Bernard McCabe (in his paper at the 2016 AIAL conference on economy and efficiency in tribunal decision-making) pointed out, effective tribunals promote social harmony.[1] The expectation that intra-communal disputes can be resolved informally, cheaply and quickly helps to head off conflict before it starts or soon afterwards. The decisions made by tribunals provide templates for acceptable behaviour to others in analogous situations or, as DP McCabe put it, 'good processes that reinforce shared norms reduce the need for complex negotiation and contingency planning' in our society.[2]

However, that whole process becomes more complicated when the queues to enter tribunals get longer, when the means of interaction with them are seen as inconvenient, even inhibiting, and when there is more contest over what those 'shared norms' actually are.

This *shifting ground* on which tribunals stand is our biggest challenge — quite apart from the perennial challenges of doing more with less and delivering justice to more frequently self-represented litigants.

Let me deal with a range of particular challenges in turn.

Developments in technology offer an ever-present challenge. The suggestion that tribunals should be looking over the horizon for future technological change is wrong — that change has already come over the horizon and passed us and we now need to catch up with it. For

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the foreseeable future tribunals will be chasing new technologies rather than the other way around.

I cannot comment on technological uptake in all Australian tribunals, but I can comment on the AAT. It is only relatively recently, for example, that we have adopted online lodgement technology for applications and, although summonses can now be served online, they can still only be returned in hard copy.

We are quite a distance from being able to take full advantage of IT innovation. It is still not possible, for example, for a witness to give evidence by Skype or for a party to appear by email or text. I predict that such vehicles will be commonplace in the future as the obvious flexibility these platforms offer is taken up.

We have the related challenge of creating flexible/adaptable hearing spaces in tribunals and learning to share those spaces appropriately. The Canberra Registry of the AAT is located in Moore Street in the city centre. The street is short — just two blocks — but I know that at least four separate suites of quasi-judicial hearing rooms exist in buildings on that short street, belonging to four separate government instrumentalities. There is ample opportunity for using the spaces more flexibly; indeed, the AAT is presently exploring how it might do so with another Commonwealth instrumentality.

But these developments are small beer. The really big technological frontier is in online dispute resolution and online justice.

In 2015 the UK Civil Justice Council released a paper entitled *Online Dispute Resolution for Low Value Civil Claims*.[3] The council's chair, Lord Dyson, said:

> There is no doubt that online dispute resolution (ODR) is an area with enormous potential for meeting the needs of the system and its users in the 21st Century. Its aim is to broaden access to justice and resolve disputes more easily, quickly and cheaply. The challenge lies in delivering a system that fulfils that objective.[4]

The report recommended establishing Her Majesty's Online Court (HMOC) — a three-tier service dealing with civil claims under £25,000. Tier 1 of HMOC will provide online evaluation. This facility will help users with a grievance to classify and categorise their problem, to be aware of their rights and obligations and to understand the options and remedies available to them.

Tier 2 of HMOC should provide online facilitation. To bring a dispute to a speedy, fair conclusion without the involvement of judges, this service will provide online facilitators. Communicating via the internet, these facilitators will review papers and statements and help parties through mediation and negotiation. They will be supported where necessary by telephone conferencing facilities. Additionally, there will be some automated negotiation tools, which are systems that help parties resolve their differences without the intervention of human experts.

Tier 3 offers online judges — full-time and part-time members of the judiciary who will decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading. This process will again be supported, where necessary, by telephone conferencing facilities.

The paper foreshadows two major innovations. The first is that some judges should be trained and authorised to decide some cases (or aspects of some cases) on an online basis.

The second is that the state should formally fund and make available some online facilitation and online evaluation services for early-stage dispute resolution.

The paper makes clear that the concepts are not new, technologically speaking. For example, innovators in this field include eBay (where 60 million disagreements between traders are resolved every year using online dispute resolution (ODR)) and the Civil Resolution Tribunal of British Columbia (which already implements a concept similar to that proposed in the paper).

Lord Dyson places emphasis on the fact that ODR would be linked to judicial decision-making — specifically, this is not online legal advice; this is online justice.

ODR represents an important philosophical development which Australian tribunals must heed. For our part, we need to anticipate what the paper's authors call the 'fluoride moment' — the realisation that taking action earlier in the chain of dispute causation will cause many fewer problems to occur later in the chain. All of us who work in tribunals realise the truth of that and that our system presently focuses resources on resolving full-blown disputes, at a stage where often parties are already entrenched and embittered. Higher costs are the inevitable outcome of that focus.

The philosophical transformation the paper is seeking is represented diagrammatically in Figure 1 below.[5]

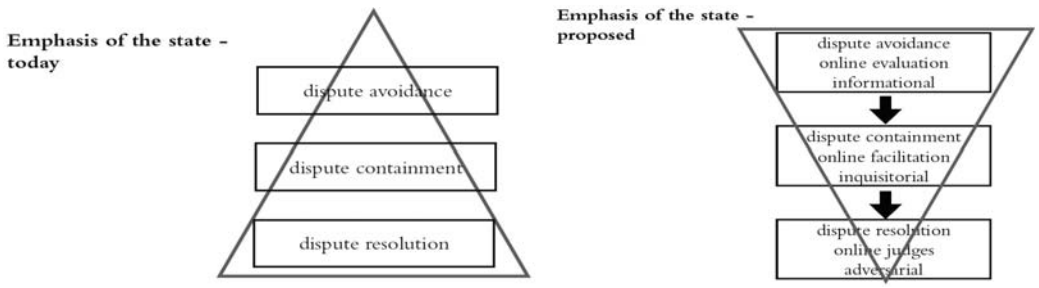

Figure 1: Civil Justice Council's proposed approach for the state

Source: Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims*

The message here is that we should be focused, obviously, on the fence at the top of the cliff rather than the ambulance at the bottom. I believe active intervention by a *court-linked* (or, in the Australian context, perhaps a *tribunal-linked*) online service can prevent many disputes from reaching the bench. For this reason the report recommends resourcing Tier 1 (which is not presently well resourced by courts or tribunals) on the basis that the more is spent here, the less is spent at the last tier.

There are a few further points to note. At Tier 1, the broad idea of online evaluation is that the first port of call for users should be a suite of online systems that guide users who think they may have a problem. It is expected that being better informed will frequently help users to avoid having legal problems in the first place or help them to resolve difficulties or complaints before they develop into substantial legal problems. At Tier 2, outcomes are not binding, but facilitation is considered helpful to resolve disputes. The concept of online facilitators was borrowed from the UK's financial ombudsman service, where facilitators dispose of 90 per cent of the office's workload, passing only 10 per cent of cases to adjudication. A fee applies to access Tier 2.

At Tier 3, online judges decide cases mostly on the papers (but telephone conferencing is possible). Their decision is binding. Again, a fee is charged, but it is lower than the equivalent fee for a physical hearing.

The paper's proposals are not yet far advanced in Britain, but I have no doubt such ideas will present themselves with greater insistence as time goes by. If the service is trialled in Australia, it would be logical to start with tribunals.

Something bearing resemblance to the Tier 1 proposals is in fact being trialled by the AAT presently in the context of applications for review in the General Division of applications dealing with disability support pensions.[6]

One more technology issue is worth discussing here: evidence captured electronically and then presented to tribunals.

Tribunals already have to deal routinely with the question of admissibility of covert video surveillance, generally in the context of workers compensation claims. This is a vexed issue, where the default position at the AAT is that such evidence may not be tendered. However, the march of technology is such that more and more evidence of this character will be offered in future. Every phone is already a device for capturing video or still footage and sound recordings; increasingly, citizens are, I predict, likely to use those devices to protect their rights. So the clash between the adducing of evidence going, say, to a witness's credibility and privacy considerations will occur more frequently over time. The response of tribunals will need to be more sophisticated as that challenge develops.

The changing face of expert evidence is another challenge. As an online society we have unprecedented access to information — apparently there is no scintilla of human knowledge, no matter how esoteric, that cannot be accessed online. This has implications for tribunals receiving expert evidence.

Once upon a time some evidence was delivered as holy writ. A senior surgeon pronouncing on the course of a disease or a learned professor expounding on a chemical process held great authority; such people were largely untouchable as witnesses. Now, such evidence is eminently challengeable and is, in fact, more frequently challenged as litigants empower themselves with alternative sources of knowledge. Tribunals must get better at understanding and adjudicating disputes over the weight to be accorded to highly technical evidentiary material.

The 2016 decision of the UK Supreme Court in *Kennedy v Cordia (Services) LLP*[7] provides some valuable insights into how tribunals should be handling this issue, particularly where the expertise being advanced is 'out of the mainstream'.

Miss Kennedy had a fall at work while using an icy footpath. Expert evidence was called to determine whether she would have been less likely to fall if she had been wearing anti-slip attachments on her footwear. The Court made some detailed commentary on admissibility and how courts should go about policing the performance of an expert's duties.

Some categories of witness expertise are well established, such as when an engineer describes how a machine works or how a motorway is built or when a police officer with the relevant experience and knowledge describes the quantities of drugs people tend to keep for personal use rather than for supply to others. When giving skilled evidence of factual matters, the expert draws on knowledge that is not derived solely from personal observation or its equivalent. In the case of anti-slip footwear attachments, the Court observed that a

much less established and professionally supervised body of knowledge was being drawn upon.

Reference was made to *R v Bonython*,[8] where the Court was addressing opinion evidence. Four considerations which govern the admissibility of skilled evidence were cited:

(i) whether the proposed skilled evidence will assist the Court in its task;
(ii) whether the witness has the necessary knowledge and experience;
(iii) whether the witness is impartial in their presentation and assessment of the evidence; and
(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

Again, I predict that these considerations will be receiving fuller judicial attention and further development as the frequency with which they must be addressed increases.

Even in cases where more 'conventional' experts provide opinion, a different challenge is knocking on our door: how to deal with the growing tendency for there to be 'professional' applicants'/plaintiffs' witnesses and respondents'/defendants' witnesses. Particularly in workers compensation, it is not unusual to find the views of doctors who routinely appear for claimants to be dramatically at odds with those of doctors who routinely appear for insurers. This polarisation of medical opinion, seemingly driven by who is commissioning the opinion, is concerning. Again, tribunals (and courts) will need to develop strategies to address this in the 21st century.

I suspect that this problem will be best addressed by a rethinking of the professional ethical framework in which doctors (in particular) work so that it is easier for courts and tribunals to identify 'outriders'. It will also be necessary, in future, for experts to articulate more fully their philosophical/disciplinary reference points in areas of technical dispute — matters that have not traditionally been well explored in the forensic context.

Embracing our inner public servant

The next challenge is driven by both the cost and the complexity inherent in our system of administrative review. Tribunals will need to anticipate and manage a changing relationship with those whose decisions we review.

The AAT is technically part of the executive, not of the judicial arm of government. One of our (unarticulated) goals is to improve the quality of executive decision-making, albeit from a quasi-judicial distance.

But that role has a consequence for government decision-makers that can be as unhelpful as it is corrective. Chris Wheeler, Deputy Ombudsman for New South Wales, has written an interesting article in which he gives the decision-maker's perspective of administrative review.[9] He argues that, particularly after the High Court's decision in *Minister for Immigration and Citizenship v Li*[10] (*Li*), the role of administrative review is far more pervasive in public administration than it was originally envisaged to be. He says:

> 'jurisdiction creep' has now reached the extent that there are few aspects of administrative decision-making (in the exercise of a statutory power) that could not, in one way or another, potentially be brought within the scope of judicial review.[11]

Li, it will be remembered, widened the interpretation of *unreasonableness* in respect of executive decision-making. Whatever its judicial logic, it has added to the headache for decision-makers in casting decisions which will withstand administrative review.

Wheeler argues that this penetration has been unsettling, because administrative review judgments are written *by* lawyers *for* lawyers, and they often leave at-the-coalface public servants little the wiser about what they need to do to avoid error.

A good example of this problem in the workers compensation jurisdiction arises from the High Court's recent decision in *Comcare v Martin*[12] (*Martin*). This decision overturned by implication the earlier guiding authority of *Hart v Comcare*[13] (*Hart*), which held that, if an employee's psychological injury was significantly contributed to by an employer's reasonable administrative action, the employer could take advantage of the exemption in the Act to deny compensation.

Martin has now clarified that the reasonable administrative action in question must be action *without which the employee would not have suffered their injury*. For lawyers, this decision restores a certain logic to the reasonable administrative action exemption which *Hart* had taken away. For a review officer in the bowels of Comcare, however, the decision presents something of a nightmare: it will be significantly more difficult, in most cases, to identify what particular strand of administrative action was so pivotal that the employee would not have suffered their injury had it not occurred, particularly when the medical evidence is vague on this point. As is so often the case, the lawyer's satisfaction is the layperson's torment.

The phenomenon Wheeler describes — the growing burden of administrative review precedent on the public service — is almost certainly real. Growing uncertainty leads inexorably to growing cost — a matter about which governments of all descriptions are highly sensitive. I forecast that this phenomenon will lead over the next decade to a change in the relationship between administrative reviewers and administrative reviewees; governments will undoubtedly find it cheaper if tribunals *guide* rather than *correct* their servants.

Tribunals may find their role shifting from that of examiner to that of tutor to some extent, say, by giving declaratory rulings (in the same style, perhaps, as the Australian Taxation Office's provision of private rulings to taxpayers) to guide administrative conduct in areas where problems loom. Such a development might be seen by purists as compromising the quasi-judicial nature of tribunals, but the need for governments to be more 'efficient' is likely to trump that concern.

I mentioned previously the political environment in which tribunals operate. A necessary consequence of the freedom of cyberspace is that courts and tribunals, like all public institutions, will be subject to critical comment ranging from the sober and considered to the venomous and bizarre. Administrative Appeals Tribunal (AAT) members will have been troubled by the recent name-calling in the press, but the truth is that, in future, we will be lucky if such criticism comes mainly from moderated sources such as professional journalists. More likely it will come from a range of critics encouraged by the freedom of expression the internet fosters. The question we face is: how do we deal with this?

Once upon a time first law officers were the chief defenders of judicial decisions. Their voice substituted for the bench's traditional silence. Of course, those days are long gone; ministers and politicians (first law officers included) are more likely to be leading the assault than defending the judicial barricades.

This comes back to the deeper problem identified at the beginning of my remarks: the decline of public trust in the institutions of civil society. What is conspicuous in this phenomenon is that it is easier to tear down than to build up — that is, few are taking the time to shore up and restore that eroding trust, and courts/tribunals are particularly at risk here because of the longstanding tradition that they do not enter the marketplace to stand up for particular decisions they have made. Moreover, with the probable exception of heads of jurisdiction, no-one is charged with the task of 'selling' their purpose/mission to a sceptical public.

The logical response to this challenge, I believe, is this: if no-one is tasked to do this then we — tribunal members, staff and stakeholders — must do it.

The flip side of being philosophically abandoned by the political process is that we can and do have more autonomy to articulate the value of our role to an uncertain community. We must take responsibility for the way our customers and our potential customers see us.

This process must operate at two levels. First, as Deputy President McCabe said last year, tribunal members must step up to being leaders of their institutions, contributing expertise and direction to the mission of those bodies. Although legislation vests responsibility for a tribunal in its head of jurisdiction, I have seen few dictators in those roles; an active and contributing tribunal membership is an asset to jurisdictional leaders seeking better ways of connecting with the community they serve.

Just as members must demonstrate professionalism and intellectual rigour in the hearing room, so too they should be active in supporting similar values at other stages in the process of administrative review, particularly alternative dispute resolution and registry processes.

As DP McCabe noted:

> 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.[14]

Secondly, tribunals and their members must be better prepared to contribute to public debate about their role. Few Australians retain relevant memories of the period before the *Administrative Appeals Tribunal Act 1975* (Cth), when a citizen aggrieved by the decision of a public servant essentially had to grin and bear it. The revolution that was administrative review has lost a bit of its spark, but that can be revived.

When unrepresented applicants appear in my tribunal, I always take the time to explain the philosophical basis on which an outsider can step in and overrule the decision made by a public servant. I hope to impart a sense of empowerment to the applicant that this process represents, even if they ultimately leave the tribunal empty-handed. Clearly, the many citizen-critics who have sunk their boots into the tribunal recently (many of whom have suggested there is no need for such a review body) are the very kinds of people most likely to need the power to challenge an officious bureaucrat and could do with a reminder of how valuable such a concept is.

At the other end of the spectrum to the 'soft sell' — reminding customers that we make decisions according to law, that the decisions are enforceable and that the process deserves respect — is the need to be firmer with those who cannot be persuaded. To the best of my knowledge, all Australian tribunals have contempt provisions — the AAT's are in s 63 of our Act — but they are rarely used. In an increasingly rough-and-tumble environment, the proper place of such a resort needs to be considered if tribunals are to adopt a more assertive positioning of themselves in the public debate about justice.

The recent experience of the Victorian Supreme Court threatening contempt proceedings against three government ministers is a salutary reminder that pushing the envelope can occasionally be worthwhile.

Endnotes

1 Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40.
2 Ibid 41.
3 Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015).
4 Ibid 3.
5 Ibid 17–18.
6 Administrative Appeals Tribunal, *Disability Support Pension (DSP) Interview Tool for Community Workers* (21 December 2017) <www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution/disability-support-pension-dsp-interview-tool-fo>.
7 [2016] UKSC 6.
8 (1984) 38 SASR 45.
9 Chris Wheeler, 'Judicial Review of Administrative Action: An Administrative Decision-Maker's Perspective' (2017) 87 *AIAL Forum* 79.
10 [2013] HCA 18.
11 Wheeler, above n 9, 84.
12 [2016] HCA 43.
13 [2005] FCAFC 16.
14 McCabe, above n 1, 43.

FAILURE TO GIVE PROPER, GENUINE AND REALISTIC CONSIDERATION TO THE MERITS OF A CASE: A CRITIQUE OF *CARRASCALAO*

Jason Donnelly*

In *Carrascalao v Minister for Immigration and Border Protection*[1] (*Carrascalao*), the Full Court of the Federal Court of Australia (FCA) (Griffiths, White and Bromwich JJ) unanimously found that the Minister for Immigration and Border Protection failed to give 'proper, genuine and realistic consideration to the merits' before deciding to cancel the visas of two non-citizens on 'national interest' grounds under s 501(3) of the *Migration Act 1958* (Cth).

This article offers a critique of *Carrascalao* in two respects. First, despite correctly demonstrating that the Minister did not globally engage in an active intellectual process in cancelling the visas of two non-citizens, the Full Court paradoxically went to some lengths to demonstrate that the Minister had engaged in an active intellectual process in justifying why the other judicial grounds of appeal should be dismissed. Arguably, this led to a judicial decision that is internally inconsistent and illogical in a broad context. Secondly, this article offers a close critique of the reasoning of Griffiths, White and Bromwich JJ in dismissing several of the other grounds of appeal raised in the judicial review applications (as related to procedural fairness and construction of the s 501(3) national interest statutory power).

In light of the preceding, this article has two main objectives. First, it explores a fundamental difficulty of a court finding that a decision-maker has failed to give 'proper, genuine and realistic consideration to the merits' of a particular case — the difficulty being 'inconsistency or illogicality of reasoning in disposing of other judicial grounds of appeal'. After particularising this fundamental difficulty, the article will then demonstrate that the Full Court of the FCA offended against this identified difficulty in *Carrascalao*. Secondly, moving beyond the fundamental difficulty theme, the article subsequently provides a broader critique of *Carrascalao*. Although it is concluded that the final orders reached in the case were correct, this article argues that the reasoning process in several aspects of the judgment are open to respectful criticism.

Background

On 14 December 2016 at 4:15 pm, the Full Court of the FCA ordered that decisions of the Minister to cancel visas held by Mr Carrascalao and Mr Taulahi be set aside.[2] The Full Court further ordered that both non-citizens be released from immigration detention immediately.[3]

Later in the evening on 14 December 2016 — at 7:37 pm and 7:43 pm — the Minister received two batches of material electronically in the Minister's office in relation to both

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Mr Carrascalao and Mr Taulahi.[4] The material totalled approximately 370 pages in the case of Mr Carrascalao[5] and 330 pages in the case of Mr Taulahi.[6]

Purporting to consider the two 'sets of material' regarding the non-citizens, the Minister cancelled Mr Taulahi's visa at 8:18 pm and Mr Carrascalao's visa at 8:25 pm.[7] Both decisions were purportedly made by the Minister under s 501(3) of the Migration Act, which permits the Minister (acting personally) to cancel or refuse the visa of a non-citizen if the Minister reasonably suspects that the person does not pass the character test and is satisfied the refusal or cancellation is in the national interest.[8]

Both non-citizens challenged the Minister's cancellation decisions on the basis that, given the shortness of time in which the Minister could have reviewed the material before him, he could not have given proper, genuine and realistic consideration to the merits of the two matters (Ground 1).[9] Justices Griffiths, White and Bromwich agreed, holding that 'there was insufficient time for the Minister to engage in the requisite active intellectual process' in exercising the important statutory power under s 501(3) of the Migration Act.[10]

The Full Court found that '43 minutes' represented an insufficient time for the Minister to have engaged in an active intellectual process which the law required of him in respect of both the cases which were before him.[11] Accordingly, the Minister's decisions to cancel the visas of Mr Carrascalao and Mr Taulahi for a second time was set aside.[12]

Inconsistency or illogicality of reasoning

The provenance of the expression 'proper, genuine and realistic consideration' derives from Gummow J's judgment in *Khan v Minister for Immigration and Ethnic Affairs*.[13] There, his Honour was addressing the ground of judicial review relating to the exercise of a discretionary power in accordance with a rule or policy without regard to the merits of a particular case. Justice Gummow said that the delegate was required to 'give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy'.[14]

In *Carrascalao*, having found that the Minister failed to give proper, genuine and realistic consideration to the merits on each visa cancellation decision, the Full Court emphasised that its decision related 'exclusively to the process surrounding the Minister's decisions and not to the merits' of the decisions.[15]

In other words, the Minister's visa cancellation decisions were 'entirely spoiled' because he had failed adequately to consider the individual merits of each case as a *matter of procedure*. The clear implication of a court making such a finding is that the same court subsequently would be restrained from making other judicial findings (in the same case) that the decision-maker had adequately considered the 'merits' of a case.

For example, in finding that a Minister did not give proper, genuine and realistic consideration to the merits of A's case because of a lack of time to consider, it would be *illogical* or *internally inconsistent* to find that the same Minister did adequately consider B, C, D and so on (assuming those latter matters fall within the scope of A's case) — this is because, once a 'global' finding is made that a decision-maker failed to give proper, genuine and realistic consideration to the merits of a particular case, it betrays logic to say the decision-maker sufficiently considered 'various aspects' of the decision (especially without clear evidence tendered in the appeal proceedings).

The preceding implication identified was contravened by the Full Court in *Carrascalao*. Having found that the Minister failed to give proper, genuine and realistic consideration to

the merits of both Mr Carrascalao's and Mr Taulahi's cases on procedural grounds,[16] that should have been the end of the matter. However, owing to judicial duty, the Full Court proceeded to rule on the balance of judicial review grounds pleaded in the case.

Somewhat paradoxically, in addressing other judicial review grounds of appeal raised by the two non-citizens, Griffiths, White and Bromwich JJ subsequently went to relatively great lengths to 'justify' that the Minister had adequately considered various matters in making his visa cancellation decisions.

First, both non-citizens argued that the Minister had failed to give proper, genuine and realistic consideration (or have regard to) the representations and information provided to him by the respective solicitors of both non-citizens (Ground 2).[17]

In his statement of reasons in relation to Mr Carrascalao's case, the Minister indicated that he had 'considered' Mr Carrascalao's representations.[18] Mr Carrascalao argued that this aspect of the Minister's decision was 'no more than lip service'.[19]

In dismissing Ground 2, the Full Court indicated that they were not persuaded that the Minister gave 'mere lip service' to Mr Carrascalao's material.[20] Justices Griffiths, White and Bromwich further pointed out that the Minister 'was entitled to have regard to the Department's summary of the material'.[21] In dismissing this ground of appeal,[22] the plain implication is that the Minister did adequately consider Mr Carrascalao's representations.

Secondly, both non-citizens contended that the Minister fell into jurisdictional error in 'failing to consider' whether it was in the national interest to make a decision without affording them natural justice (Ground 3).[23] Significantly, Griffiths, White and Bromwich JJ collectively found that the Minister had adequately turned his mind to this question:

> The Minister's statements of reasons in both cases contain an express statement that information before him 'raised concerns that were of such a serious nature that the use of [his] discretionary power to cancel [the applicant's visa], without proper notice, is in the national interest' … Fairly read, we consider that the Minister did consider whether it was in the national interest to make a decision without affording natural justice to either Mr Taulahi or Mr Carrascalao.[24]

Consequently, in finding that the Minister had 'undertaken proper consideration', Ground 3 was rejected in both cases.[25]

Thirdly, both non-citizens argued that the cancellation decisions of the Minister were infected by jurisdictional error as being both unreasonable in a legal sense and lacking rationality (Ground 4).[26] Both non-citizens broadly argued that there was 'no reasonable basis' for the Minister to reach the state of satisfaction that it was in the national interest to cancel their visas.[27]

Mr Carrascalao specifically contended that the Minister did not disclose in his statement of reasons why it was in the national interest to cancel the visa of a person suspected of having a past membership with a criminal organisation and having a criminal record.[28]

Mr Taulahi argued that it was not open for the Minister to cancel his visa in the national interest because the Minister suspected that he was 'previously closely involved with a group which the Minister suspected was previously, or is currently involved in, criminal conduct'.[29]

Despite upholding Ground 1 on the basis that the Minister 'did not engage in an active intellectual process' in determining whether or not to exercise powers under s 501(3) of the

Migration Act, in dismissing Ground 4, the Full Court went to some lengths to justify that the Minister had actively engaged in an intellectual process in applying that statutory power:

(1) The court found it was reasonably open to the Minister to form a view that removing Mr Taulahi (a past senior officeholder at the Lone Wolf OMCG) was reasonably related to the national interest in preventing, detecting and disrupting organised crime.[30]
(2) It was open to the Minister to take a broader view in forming the opinion that it was in the national interest in targeting organised crime to remove from Australia such a former senior officeholder as an OMCG.[31]
(3) The Minister adopted a 'guarded view' about Mr Taulahi's prospects of extricating himself from gangs and leading a law-abiding life.[32]
(4) The Minister's finding that the quantity and variety of media reports was sufficient to ground a reasonable suspicion that the Lone Wolf OMCG had been and is involved in criminal conduct was reasonably open.[33]
(5) The considerations which the Minister found fell within the scope of the 'national interest' criterion (for the purposes of s 501(3) of the Migration Act) were entirely permissible.[34]

Fourthly, Mr Taulahi further argued that, for a person to fail the character test under s 501(6)(b) of the Migration Act, the person had to have some 'subjective connection' in the sense of awareness or participation, with the relevant suspected criminal conduct (Ground 7).[35]

In rejecting Ground 7, the Full Court pointed out that the Minister had actively addressed this argument:

> we consider that the Minister made findings, which were reasonably open to him, that such a subjective connection existed here. The Minister found that Mr Taulahi had held positions of authority in the Lone Wolf OMCG, namely as State President and Sergeant at Arms. He also found that he reasonably suspected that the Lone Wolf OMCG has been and is involved in criminal activity …[36]

Fifthly, Mr Taulahi further contended that the Minister had erred in his construction and application of the phrase 'group … involved in criminal conduct' for the purposes of s 501(6)(b) of the Migration Act.[37] Mr Taulahi argued that the Minister erred in failing to distinguish between the involvement of the group in criminal conduct and the involvement of individuals other than in their capacity as members of the group in such conduct (Ground 8).[38]

In rejecting Ground 8, the Full Court found that the Minister had made sufficient findings that adequately dealt with this ground of appeal:[39]

(1) The Minister found that Lone Wolf OMCG members are alleged to have committed serious criminal conduct.
(2) Several media articles depicted law enforcement raids on Lone Wolf OMCG chapters and club houses which are alleged to have uncovered commercial quantities of drugs.[40]

In *Carrascalao*, Griffiths, White and Bromwich JJ posed the central question in relation to Ground 1 was whether the two non-citizens had 'established that the Minister did not engage in an active intellectual process in determining whether or not to exercise his power under s 501(3)' of the Migration Act.[41]

The Full Court found that the Minister did not engage 'in an active intellectual process' in applying s 501(3), because there was 'insufficient time' for the Minister to consider all the material that related to both non-citizens. With respect, the reasoning of the Full Court in relation to Ground 1 is both logically sound and reasonably open. The clear inference was

that the Minister could not possibly have considered over 700 pages in the space of 43 minutes and make not one but two significant visa cancellation decisions in the national interest.

However, having made that decision to uphold Ground 1, it makes 'no logical sense' for the Full Court to subsequently demonstrate that the Minister engaged in an *active intellectual process* to justify dismissing the other grounds of appeal. The Full Court found that the Minister did properly consider Mr Carrascalao's representations.[42] The Full Court found the Minister made specific factual findings that properly supported the invocation of the 'national interest' criterion in s 501(3) of the Migration Act.[43] The Full Court found that the Minister correctly construed the statutory ambit of the 'national interest' criterion in s 501(3) as a matter of law.[44] The Full Court found that the Minister made ample factual findings that disposed of Grounds 7 and 8.[45]

In essence, having found that the Minister did not engage in an active intellectual process in making the visa cancellation decisions for procedural reasons, it makes little logical sense to demonstrate an opposite conclusion on that point with respect to substantial grounds of appeal.

Critical analysis of other aspects of the judgment

Quite independent of the apparent 'illogicality' or 'inconsistency' in the reasoning process of the Full Court already outlined, there are other aspects of the decision in *Carrascalao* which warrant closer consideration. Arguably, the following matters demonstrate some further misgivings about aspects of the reasoning of Griffiths, White and Bromwich JJ.

Minister acting personally

The Full Court pointed out that s 501(4) of the Migration Act expressly mandated that the power under s 501(3) 'may only be exercised by the Minister personally'.[46] For Griffiths, White and Bromwich JJ:

> [This strict procedural requirement reflects a legislative intention] that the power be exercised at the highest level of government, having regard to the national interest considerations and the absence of an obligation to provide natural justice.[47]

In other words, because of the national interest considerations involved and lack of procedural fairness rule, a decision of that kind should be made 'at the highest level of government' (that is, by a Commonwealth Minister acting personally). The difficulty with this logic is that, under s 501(2) of the Migration Act, delegates of the Minister can take into account a 'national interest' criterion in cancelling the visa of a non-citizen on character grounds.[48] Natural justice does apply under s 501(2).[49]

Discrete aspects of material

Somewhat curiously, the Full Court found that the inferences it had drawn in relation to the Minister's consideration of the 'entirety of the material' relating to Mr Carrascalao were not open to be drawn in relation to the 'discrete and relatively small amount of material provided by Mr Carrascalao's instructing solicitors'.[50]

In other words, the Full Court was not persuaded that the Minister did not have regard to the material provided on Mr Carrascalao's behalf by his instructing solicitors. However, given the very short time in which the Minister had to 'consider' Mr Carrascalao's case, there could be

no logical way for the Full Court to know whether the Minister had regard to the 'discrete and relatively small amount of material provided by Mr Carrascalao's instructing solicitors'.

Natural justice

Both judicial review applicants contended that the Minister fell into jurisdictional error in failing to consider whether it was in the national interest to make a decision without affording them natural justice (Ground 3).[51] Both non-citizens contended that this duty arose under s 501(3) of the Migration Act so as to:

(a) minimise encroachment on fundamental rights to procedural fairness and to personal liberty;[52]
(b) give effect to the purpose of s 501(3) as reflected in the Minister's second reading speech;[53] and
(c) give effect to the principle of legality.[54]

The short answer to this ground of appeal is that the Minister was not required to afford the two non-citizens natural justice, as the rules of procedural fairness are expressly abrogated under s 501(3) of the Migration Act. In that context, there is no room for the principle of legality to take effect.

Somewhat oddly, however, the Full Court disposed of Ground 3 by finding that the Minister 'did consider' whether it was in the national interest to make a decision without affording natural justice to both non-citizens:

> The Minister's statements of reasons in both cases contain an express statement that the information before him 'raised concerns that were of such a serious nature that the use of his discretionary power to cancel [the applicant's] visa, without proper notice, is in the national interest' ...[55]

There are two difficulties with this reasoning.

First, it seeks to demonstrate that the Minister did engage in an active intellectual process (which, of course, is contrary to the reasoning adopted by the Full Court in relation to upholding Ground 1).

Secondly, although it was correct to reject Ground 3, the Full Court failed squarely to engage with the submissions of the non-citizens in relation to this ground of appeal. For example, the Full Court made no findings about the principle of legality and its relationship with s 501(3) of the Migration Act. Further, the Full Court ignored the submission made by the two non-citizens about the apparent statutory purpose of s 501(3) being limited to an 'emergency power'.

Construing the national interest criterion

The non-citizens contended that the Minister misconstrued the meaning of the 'national interest' by adopting an impermissibly confined conception of that expression, including by proceeding on the basis that the phrase did not include the best interests of the child (Ground 4(c)).[56]

In other words, the non-citizens argued that the Minister misconstrued the 'national interest' criterion in s 501(3) of the Migration Act. Consequently, the Full Court was required to construe the statutory scope of the 'national interest' criterion in s 501(3). In undertaking this process, two aspects of the Full Court's reasoning are open to question.

First, in seeking to demonstrate the broad scope of the 'national interest' term, the Full Court indicated that it was similar to the 'public interest' expression.[57] In an attempt to outline what was meant by the 'national interest' concept, the Full Court made reference to the High Court of Australia decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[58] (which considered the 'public interest' expression).

The difficulty here is that it is far from clear that the statutory expression 'national interest' is in fact similar or analogous to the term 'public interest'. For example, in *Wong v Minister for Immigration & Multicultural & Indigenous Affairs*,[59] Tamberlin J expressly held that the 'national interest' expression is to be differentiated from the notion of 'public interest', which can embrace, among other matters, local, regional and municipal concerns.[60]

A number of other cases in Australia have expressly found that the term 'national interest' is different from the 'public interest' concept.[61] Accordingly, in construing the 'national interest' criterion under the Migration Act, the Full Court should have avoided examining jurisprudence related to the 'public interest' expression (given the apparent differences between the two concepts).

Secondly, Griffiths, White and Bromwich JJ found that it was unnecessary to determine all the issues of principle raised by the judicial review applicants as to the correct construction of the 'national interest' and whether it encompasses the best interests of the child.[62]

The Full Court found that it is a matter for the Minister to decide, on the merits of any particular case, what national interest factors are engaged in that case.[63] Expressed at that level of generality, it is a matter for the Minister to decide what national interest considerations are relevant. However, it should be recalled that reliance on an unexplained label such as 'national interest', divorced from any notions of protection of the Australian community, could not provide an example of a necessarily lawful exercise of the s 501 discretion.[64] The Full Court did not appear to show, with respect, an appreciation for this latter important point.

Further, it is a little peculiar that the Full Court found that it was a matter for the Minister to decide, 'on the merits of any particular case', what national interest factors would become engaged.[65] This is because, in upholding Ground 1, Griffiths, White and Bromwich JJ had already found that the Minister failed to give proper, genuine and realistic consideration to the merits of each case in making his cancellation decisions.

Conclusion

In many ways, *Carrascalao* is an important decision on several fronts.

First, the case demonstrates that a decision-maker must give proper, genuine and realistic consideration to the merits of each case. In that context, as *Carrascalao* shows, the court will be open to examining the full set of circumstances leading up to a decision to determine whether proper consideration was given.

Secondly, *Carrascalao* plainly demonstrates that even the Minister, purporting to exercise a 'national interest' statutory criterion personally, can have such an important decision set aside if the appropriate process is not followed. In many ways, *Carrascalao* represented an extreme example (in that it is fairly clear that any decision-maker would struggle to consider 700-plus pages properly in under an hour).

Thirdly, *Carrascalao* arguably demonstrates a level of internal inconsistency or illogicality in the reasoning process of Griffiths, White and Bromwich JJ. On the one hand, the Full Court

correctly determined that the Minister could not have engaged in an active intellectual process in cancelling the visas of the two non-citizens. Nevertheless, on the other hand, the Full Court went to some length to demonstrate that the Minister had engaged in an active intellectual process in seeking to justify why the other grounds of appeal pleaded in the judicial review applications should fail.

There are repeated references in the decision to the fact that the Minister 'did consider' relevant matters related to the two non-citizens.[66] The Full Court emphasised that the Minister had acted reasonably in exercising the s 501(3) power under the Migration Act.[67] However, these latter findings are difficult to maintain in circumstances where the Full Court otherwise found that the Minister did not engage in an active intellectual process in determining whether or not to exercise powers under s 501(3) of the Migration Act. The paradox is clear.

Endnotes

1 [2017] FCAFC 107.
2 *Taulahi v Minister for immigration and Border Protection* [2016] FCAFC 177.
3 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [2].
4 Ibid [123].
5 Ibid [86].
6 Ibid [68].
7 Ibid [126].
8 Ibid [4].
9 Ibid [2].
10 Ibid [128].
11 Ibid [129].
12 Ibid [166].
13 *Khan v Minister for Immigration and Ethnic Affairs* [1987] 14 ALD 291.
14 Ibid 292.
15 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [132].
16 Ibid [120].
17 Ibid [133].
18 Ibid [134].
19 Ibid [136].
20 Ibid [138].
21 Ibid.
22 Ibid [139].
23 Ibid [140].
24 Ibid [142].
25 Ibid [143].
26 Ibid [144].
27 Ibid.
28 Ibid [145].
29 Ibid [146].
30 Ibid [147].
31 Ibid [148].
32 Ibid.
33 Ibid [149].
34 Ibid [158].
35 Ibid [24].
36 Ibid [161].
37 Ibid [25].
38 Ibid.
39 Ibid [163].
40 Ibid [162].
41 Ibid [35].
42 Ibid [138].
43 Ibid [142], [147]–[149].
44 Ibid [147], [158].
45 Ibid [161]–[165].
46 Ibid [56].
47 Ibid.

48 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256 [74] (Kiefel and Bennett JJ).
49 Jason Donnelly, 'Challenging *Huynh*: Incorrect Importation of the National Interest Term via the Back Door' (2017) 24 *Australian Journal of Administrative Law* 99, 101.
50 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [138].
51 Ibid [140].
52 Ibid.
53 Ibid [141].
54 Ibid.
55 Ibid [142].
56 Ibid [150].
57 Ibid [156].
58 (2012) 246 CLR 379.
59 [2002] FCA 959.
60 Ibid [34].
61 *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 [42] (Cowdroy, Reeves and Jagot JJ); *South Australia v O'Shea* (1987) 163 CLR 378, 411 (Brennan J); *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 560–1 (Hayne J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 504 (Kirby J); *Singh v Minister for Immigration & Multicultural Affairs* [2000] FCA 1426 [67] (Emmett J).
62 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [158].
63 Ibid [158].
64 *Tanielu v Minister for Immigration and Border Protection* [2014] FCA 673 [152] (Mortimer J).
65 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [158].
66 Ibid [142], [149].
67 Ibid [147]–[149].

SEEING THE FOREST FOR THE TREES: STATUTORY INTERPRETATION AND THE NEW FOREST STEWARDSHIP COUNCIL (FSC) AUSTRALIA NATIONAL STANDARDS

Daniel Goldsworthy*

Human-induced transformations of the functioning of the earth and its ecological processes pose a real and immediate global challenge. This necessitates regulatory responses that collectively steer societies towards preventing, mitigating and adapting to local and global environmental change. This must be done within the normative concept of sustainable development.

Non-state, market-driven (NSMD) governance systems, such as the Forest Stewardship Council (FSC), have emerged in response to the perceived failure of nation states to secure meaningful global environmental governance.[1] These private multi-stakeholder initiatives provide constitutive and regulative rules that prescribe the behaviour of specific actors.[2] Their interactions and engagement with forests are shaped though market recognition of the value of the certification scheme, such that consumers of forest products may drive meaningful environmental change through the ability to discriminate and choose between products and brands that engender sustainable and ethical environmental management. The FSC represents an avenue through which civic participation can drive corporate social responsibility and achieve desirable environmental outcomes, from the local to the global.

But who are the individuals that determine, interpret and enforce NSMD parameters that constitute the responsible, ethical and sustainable use of a community's natural resources, such as forests? FSC Australia is likely to release its first national Forest Stewardship Standard before the end of 2017,[3] after many years of development and consultation. This is significant for both Australia and for the FSC internationally. Australia is the only country in the world that is at once both a sovereign nation *and* an entire continent and, as such, it is uniquely placed to effect meaningful national, regional and, subsequently, global change with respect to forest management.

This article will examine the new set of challenges FSC Australia will inevitably face regarding the interpretation of its own national standard and explore the institutional arrangements that render its board of directors final arbiters of its own regulatory instrument. The words of the standard and their precise meanings will be crucial to its application and will be 'replete with words that are easy to state, fascinating to discuss, difficult to interpret but critical to apply'.[4] Consequently, the article will consider interpretive challenges through the legal lens of statutory interpretation and the various techniques available to FSC Australia's board of directors in giving meaning to the standard, the decisions of which will

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affect many, as 'across the pool of sundry interest, the ripples of affection may widely extend'.[5]

Private global environmental governance

Private governance institutions exist in a range of contexts, but few have gained such prominence among activists and academics as the FSC.[6] It has been 25 years since the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Rio Conference), which was characterised by a failure of nation states to achieve meaningful consensus on the sustainable and responsible management of the world's forests.[7] In response to this failure, several global NGOs, including Greenpeace, World Wildlife Fund, Friends of the Earth, retailers, trade unions and indigenous interest groups, established a certification scheme seeking to achieve what nation states could not. This development sought to sidestep the issue of state sovereignty by 'rejecting State-centred intergovernmental negotiations altogether, turning instead to the marketplace to address global forest deterioration by developing and demanding *global* standards with *prescriptive* requirements'.[8] The result was the formation of the FSC — a multi-stakeholder NSMD certification scheme with a unique corporate governance structure.

FSC is often viewed as a model multi-stakeholder initiative and represents an avenue through which civic participation can drive corporate social responsibility and achieve desirable environmental outcomes. Before a product can be labelled as FSC certified, each step in the supply chain must be independently audited against the FSC standards to ensure that no uncertified materials have entered the supply chain. As FSC attempts to utilise market forces to drive coherent global action and change, it is imperative it maintains an ethical governance framework for global stewardship that facilitates responsible management of one of the world's key natural resources.

How such an organisation attempts to reconcile governance challenges across interrelated and integrated systems of formal and informal rules, rule-making systems and actor networks at all levels of human society (from local to global) within the normative context of sustainable development is a fascinating consideration. Consequently, the development of a national standard has been arduous. These standards seek to capture and develop the rights, duties and obligations of a diverse range of stakeholders. With a multitude of competing interests at play, interpreting and applying the provisions of the standards becomes a critical matter.

The Forest Stewardship Council: a unique governance structure

Forest certification systems were some of the first of what are now widespread global efforts to turn to the market to address key global challenges.[9] Such challenges, and subsequent market responses, include fisheries depletion and management (Marine Stewardship Council), sweat shop labour (Social Accountability International and the Fair Labour Organisation), workers' rights, and the negative ecological and social effects of global coffee production (Fair Trade Coffee).[10]

In recent years, rise in NSMD governance systems whose purpose is to develop and implement environmentally and socially responsible management practices is becoming ever more prominent, in the favouring of non-traditional governance systems over government. These systems and their supporters turn to the market's supply chain to create incentives and force companies to comply with environmentally and socially responsible management practice.[11] Within a neo-liberal context, it is thought that market-based devices are one of the most effective and efficient ways to shift industry practices and regulate the negative environmental impacts of deforestation. FSC certification provides market incentives and is

designed to offer manufacturers a competitive advantage and thereby increase market access.

It is suggested that the real power of the FSC governance network, and related global governance networks, is in bringing private organisations, groups and companies together with civil society to foster non-hierarchical dialogue in addressing certain goals.[12] Through its tripartite chamber system, constitutional governance of FSC ensures checks and balances at the local, national and international level. As one commentator has remarked, 'on paper or in practice, no other forest certification scheme rivals the Forest Stewardship Council (FSC) for the sophistication and complexity of governing arrangements'.[13]

The governance structure of FSC Australia follows the standards set by FSC International, with members split into three distinct chambers and directors being drawn equally from each. Part of FSC's sophistication involves the international General Assembly (GA), which represents economic, environmental and social interests across its three chambers, governing the direction of the FSC globally. Each chamber has equal voting power and there is a 50 per cent quorum for global north and south representation. Additionally, there is the limitation that individual votes (as opposed to organisational votes) can constitute no more than 10 per cent of the vote of a respective chamber. The GA elects a global board of directors that mirrors this tripartite structure, with each director having tenure for three years.

The regulative rules of the FSC can be categorised into three different types or standards. First, global forest management standards, which form the basis for national and regional standard development; secondly, chain of custody standards prescribing detailed rules along the production chain; and, thirdly, standards for the accreditation of independent auditors and certifiers.[14] The FSC has 'combined a complex global democratic architecture with a deep deliberative process to promote dialogue, equality and transparency' between members and stakeholders.[15]

An Australian Forest Stewardship Standard

After a deep deliberative process and considered engagement over three years, FSC Australia has seen significant progress in the development of its national standard. The standard will represent the centrepiece of FSC regulation in Australia, prescribing the requirements for FSC certification.

In December 2016, the Standards Development Group (SDG) agreed on a draft to be submitted to FSC International. While the group was unable to reach consensus on three important areas relating to workers' rights, riparian definitions and representative sample areas, their approval of the balance of the standard represents a substantial achievement. The standard was lodged with the FSC International's Policy and Standards Unit (PSU) in March 2017. PSU advised that it would not mediate or choose between options but would substitute the applicable International Generic Indicators (IGIs) where national SDGs are unable to reach accord. This position further underscores FSC's emphasis on garnering consensus to ensure legitimacy. Accordingly, in May 2017 the international PSU requested that FSC Australia's SDG further engage to reconsider these issues where no consensus was achieved. The earliest that the draft standard may be considered by the international PSU is October 2017. Thereafter, the FSC approval and implementation process for national Standards can take between 12 and 18 months.

Given the FSC, and similarly situated organisations, have eschewed traditional state-centred authority in favour of market-driven mechanisms, a question arises as to how these organisations ensure they operate in a way that safeguards members, stakeholders and broader community interests. Furthermore, how do the decision-makers within such

frameworks balance and reconcile competing interests, expectations and demands? Operating within the limits of its conferred power, any robust decision-making undertaken by a board will necessarily be guided by, and derive its legitimacy through, the principles of statutory interpretation.

Conflicting duties and constraints

FSC can make good claims to legitimacy in terms of its institutional arrangements, though such arrangements do result in potential competing duties and obligations both within and to the organisation. Such duties will inescapably come to exert influence on the way directors interpret the standard at the centre of the organisation.

Fiduciary duties

Directors have at once both an individual and a collective fiduciary duty to act in the best interests of the company. Under the *Corporations Act 2001* (Cth), directors are required to act in good faith and for a proper purpose;[16] act with care and diligence;[17] avoid improper use of information;[18] avoid improper use of position;[19] and disclose certain interests.[20]

Although the FSC Australia board of directors seemingly operates autonomously, it is FSC International that permits FSC Australia the use of its trademark under contractual obligation and in compliance with the requirements of FSC International's network procedures and instruments. Therefore, it is conceivable that what the best interests of FSC Australia are may in certain circumstances default to the interests of FSC International, as it is certainly in the best interests of FSC Australia to retain the use of the very trademark at the core of the entire certification scheme. This is further overlaid at the local level by the fact that directors of the board are popularly elected from within their respective chambers, so there is a perceived representative mandate also to act in the best interests of the chamber from which one is elected. Chamber politics may not always accord with what is in the best interests of the company.

In short, directors' duties to FSC Australia are complicated, with competing interests and potential conflicts, and tensions may arise where one must individually and collectively take account of additional international and chamber obligations. Given its institutional arrangements, what is in the best interests of FSC Australia may or may not align with the interests of the respective chambers and of FSC International. This is an institution purposely conceived to embed conflict within its structure, to foster rigorous debate and dialogue and to ensure mutually beneficial outcomes across a diverse range of stakeholders. Herein lies the major source of FSC's legitimacy.

At first instance, it is the independent auditors who are empowered (and required) to apply the standards to the forest managers and the supply chain, from forest to product, and to ensure compliance. Any requests for clarification or appeals regarding this process, particularly where there is ambiguity in interpretation of the standard, must be considered by the board. In this way, the board of directors may be analogous to a Court of Appeal, reviewing the earlier decision of an auditor, applying the standards to the facts and proffering an outcome. The board will need to consider whether it only entertains disputes or appeals of process, or whether it is also a forum that renders advisory opinions. Furthermore, the board will need to consider whether the decisions or pronouncements it makes in this context are binding on all future interpretations or whether they are simply persuasive in character and only applicable to the interested party seeking resolution.

To such a process, theories of statutory interpretation will provide guidance to a board with a broad mandate, where it exercises decision-making power within the normative framework of sustainability, all the while navigating competing duties and obligations.

The key of statutory interpretation

'*All meanings, we know, depend on the key of interpretation.'*

– George Elliot.

The standard itself offers limited guidance with respect to its own interpretation. It considers the 'Language used in the Standard' and draws distinction between terms such as 'shall', 'should', 'may' and 'can'.[21] In various indicators and annexures throughout the standard, the terms 'where applicable', 'where appropriate' and 'where possible' are used as variables.[22] In such instances, the burden of proof falls to the organisation asserting compliance with the standard to 'provide sufficient rationale for any activities or measures deemed not to be relevant and that omission does not impinge on The Organisation's ability to fulfil the relevant Criterion'.[23]

Beyond the limited guidance contained in the standard, the rules of statutory interpretation become instructive for the board. The modern approach to statutory interpretation in Australia was set out by McHugh JA,[24] stating that where the purpose of 'a statute and the means of its achievement is not stated, they can only be ascertained by examining the statute as a whole'.[25] The ordinary meaning of the words in the statute will indicate what the purpose and means of the Act are. Therefore, first the grammatical meaning should be adopted. However, where there is ambiguity, the 'mischief rule' allows a court to use a purposive approach to 'give effect to legislative intention … which the legislature cannot always foresee but must have intended to deal with'.[26]

Furthermore, the *Acts Interpretation Act 1901* (Cth) provides guidance with respect to statutory interpretation, and the board might deem it necessary to be guided by these or similar principles where there are disputes about construction or interpretation of the standard. This Act requires that, where such an ambiguity arises, the purposive approach should be employed.[27] Where it is necessary to confirm the interpretation or to resolve an ambiguity or absurdity, extrinsic material may be utilised.[28] The caveat regarding such extrinsic materials is that they should only be relied upon in confirming the ordinary meaning of the text conveyed by statute[29] or to remedy a manifestly absurd or unreasonable construction of those words taking an ordinary or purposive approach.[30]

How the FSC Board *chooses* to interpret the standard where ambiguities arise will be instructive. As one former American jurist famously quipped: 'what is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean?'[31] The various techniques that frame certain interpretive exercises may provide guidance to those responsible with giving life to the provisions of the standard. Michael Kirby has stated that:

> The basic principles governing statutory interpretation … involve deriving meaning from close consideration of the text, context and purpose (policy) and any contested provisions. But the process is an art, not a science …[32]

And, as with all art, engagement is a subjective experience. Ascertaining meaning from the standard's text in light of its object and purpose will ensure a construction of the standard firmly rooted in the document. Nevertheless, FSC Australia will face inevitable and unavoidable interpretive challenges.

A living tree

Given the objects and purposes of FSC and of its standard, it would be remiss to not indulge this analogy. Commenting on the *Australian Constitution*, Kirby J stated that it 'is a living tree which continues to grow and provide shelter in new circumstances to people living under its protection'.[33] Sir Anthony Mason has pointed out that the living tree analogy is repeatedly referred to in Canada and 'can be guaranteed to bring a Cheshire cat-like grin to the face of any Canadian lawyer or law student whenever it is mentioned'.[34] Kirby J further suggests that such an instrument 'is constructed in … a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the current understanding of those concepts and purposes'.[35] Similarly, given that the standard is situated within the normative framework of broad concepts such as sustainability and stewardship, current but also evolving developments in scientific knowledge and understanding will come to inform a proper and purposeful interpretation.

A somewhat similar justification permitting interpretive leniency is the distinction rendered between the connotation and the denotation of a word or phrase. Chief Justice Barwick succinctly captured the distinction when he held:

> The connotation of words employed … does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words.[36]

This distinction is useful where scientific advances not contemplated when the standard is finalised will nonetheless come to affect the interpretation of a word or concept. The chief concern then may be whether an expanded interpretation, rendering a concept within the denotation of the word, accords with the overarching and prevailing considerations of sustainability and stewardship. Herein lies the distinction propounded by Dworkin between a concept and a conception.[37] Although one may be able to entertain various contested concepts or views, it is through attempting to reconcile those with broader conceptions and frameworks that we may elucidate which concept most coheres or, indeed, is the 'best fit'.[38] Such concepts must be subject to the developments of scientific advancement, such that words and phrases be given their denotation — lest they risk being ineffectual.

In recognising the need for certain instruments to 'contain propositions wide enough to be capable of flexible application during changing circumstances',[39] the High Court has upheld the validity of legislation under s 51(xviii) ('copyrights, patents of inventions and designs, and trade marks') as extending to recognise the patenting of certain plant varieties.[40] Of this justification, Callinan J said the validity of the legislation under s 51(xviii) concerned 'change, not so much in meaning as in scope'.[41] So too, in this way, the FSC Australia board may recognise and seek to justify certain interpretive decisions by virtue of the distinction between connotation and denotation. This distinction will remain important the longer the national standard continues to operate in light of changing circumstances, scientific developments and changing community and stakeholder expectations.

The legs of a (FSC certified) chair

It is argued that certain interpretations are least contested when they are the clear product of established interpretive methods.[42] Conversely, interpretation is most vulnerable to challenge when it is not the clear product of such methods or is inconsistent with one or other of them.[43] In a board environment characterised by conflict, directors would regard highly the need to detail and justify any interpretative rationale as well as the basis upon which a particular outcome is derived. It may be, too, that certain interpretations, such as those firmly rooted in text and doctrine, render certain decisions more impervious to challenge than arguments utilising other modes or interpretive rationale.

In addition, it may be that a combination of techniques is mutually reinforcing. To that end, philosopher John Wisdom employed the analogy of the legs of a chair, in that, 'although no single argument, taken by itself, might be either necessary or sufficient to support a conclusion, the arguments, in combination, could be taken to do so'.[44] The eminent legal scholar Julius Stone accepted that this combinatorial reasoning was equally applicable to the legal reasoning of courts, comparing such reasoning to 'the legs of a chair, not the links of a chain'.[45] In the same way, the board may be empowered by drawing upon perceptible comparisons of multiple interpretive justifications to support a particular construction and outcome.

Leeways of choice

Where interpretive construction yields more than one logically sound, coherent and justifiable outcome, how is the board to preference one valid outcome over another? Stone insisted that, in the judicial context at least, decisions of this type entail creative value choices. This is not, he contended, because judges are somehow seeking to subvert authoritative legal materials such as statutes but because that is precisely what such decisions require. The inevitability of choice arises from what Stone called 'categories of illusory reference'.[46] These categories of illusory reference include ambiguities, indeterminacies, logical circularities and contradictions, and alternative starting points when engaging in statutory interpretation.[47] Interpreting the provisions within the standard presents this challenge and, consequently, this inevitability necessitates a choice in value attribution by directors required to make a determinative interpretation. How the board will 'choose' to engage with and interpret the standards will be instructive. This rationale is evident through comments made by one of Stone's famous law students:

> the notion that a word of the English language has a single, objective and scientific meaning that has only to be discovered has gradually given way to a more candid recognition of the choices that face those who interpret the written law and the way in which values and policy considerations can influence the making of those choices.[48]

Chomsky proposes that, in fact, language itself is 'a process of free creation; its laws and principles are fixed, but the manner in which the principles of generation are used is free and infinitely varied. Even the interpretation and use of words involves a process of free creation'.[49] The fact that the standard is written in ordinary language provides no absolution to the difficulty of interpretation.

> The bulk of the law is written in ordinary language, however, which is incurably open to indeterminacy. It gains meaning through interpretation, but it cannot dictate which interpretation it will receive. So, and consequently, with law.[50]

Stone insisted that, in appellate judgments on disputed points of law, legal conclusions were rarely compelled by legal premises. On the contrary: the materials systematically left open 'leeways of choice' within which judges had to decide, whether consciously or not, by 'advertence to factors of justice and social policy, transcending any mere syllogistic relation to or among rules of law formally enounced [sic] in the available case'.[51] Similarly, the board will continue to be called upon to function as a somewhat quasi Court of Appeal, hearing disputes arising through the application of the standard by auditors and certifiers — those responsible for applying the standard at first instance. How its directors unconsciously or unknowingly exercise certain 'leeways of choice' will likely be guided by broader policy considerations.

Community impacts and the ripples of affection

The emergence of alternative models of global environmental governance, such as NSMD initiatives, necessitates consideration of the implications of 'governance without government' and to the accountability of key decision-makers. Outside the bounds of more traditional notions of deliberative democratic process, how such an organisation is properly to recognise and take account of its members, stakeholders and broader societal and community interests is an interesting challenge.

In remarking on the standing requirement that a person must have an interest that is affected by the decision, Brennan J said of the test of 'interests ... affected' under the enabling Act, that:

> [A] decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of 27(1).[52]

Justice Brennan did not propose that any ripple of affection would be sufficient to support an 'interest ... affected'[53] and in the same way the FSC Australia board will need to turn its mind to the sundry interests of broader stakeholders and the wider community as potentially being affected by such determinations. Since interest is a matter of degree of intensity,[54] the real question is not just whether the plaintiff has an interest but inquiring into the 'extent' of the plaintiff's interest[55] to determine whether the interest is sufficient[56] and not 'too remote'.[57]

More and more, these decisions will be made by decentralised, networked regulatory models playing an ever more prominent role in governing allocation, utilisation and management of resources. We are at the confluence of several societal and technological forces, including global interconnectivity, big data and decentralised decision-making combining to empower civic participation in new ways. Decentralised models respond effectively to these forces, 'connecting all producers and consumers to one another, allowing them to exchange information freely and make decisions independently'.[58] In an era of escalating big data, structures that can utilise these forces to capture the demands of a multiplicity of stakeholder interests, synthesise massive amounts of data and information and then meaningfully respond to these inputs will continue further to advance concepts of effective governance. In the domain of global environmental policy and regulation, such decentralised systems will outperform centralised systems where access to and synthesis of large data flows is imperative.

Conclusion

As a governance network, FSC members and stakeholders share information, knowledge, environmental goals and what those goals entail. This means they coordinate effectively, improving the processes and outcomes of the environmental policies they pursue. Moreover, knowledge sharing and collaboration enables the FSC network to deal with complex and interrelated issues.[59]

Decisions made by the FSC board, and similarly mandated boards, will continue to guide the framework through which networked stakeholders and communities collaborate, inevitably bearing upon the management of natural resources and environmental outcomes.

However, in order for such organisations to have continuing relevance, organisational decision-makers must secure and retain the trust of stakeholders and the broader community. This will only be achieved through transparency of process as well as an explicit

consideration of the interpretive justifications rendered for a decision that is made, ensuring legitimacy and consistency of outcome.

Through the interpretation of the constitutive and regulatory instruments of such organisations, directors play an acute role in shaping the way communities interact and engage with natural resources, including forests. In a world being characterised more and more by decentralised, collaborative and networked governance processes, those actors (such as the FSC board) that retain important decision-making roles that shape global environmental policy are required, inevitably, to see the forest for the trees.

Endnotes

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