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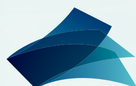

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Recent developments

Katherine Cook

New ACLEI Commissioner appointed

Commonwealth Attorney-General Christian Porter is pleased to announce that Ms Jaala Hinchcliffe has been appointed to lead the Australian Commission for Law Enforcement Integrity (ACLEI).

Ms Hinchcliffe is currently the Deputy Commonwealth Ombudsman, a position she has held since November 2017.

From 2015 to 2017, Ms Hinchcliffe was an Assistant Secretary in the Department of Parliamentary Services, and held senior executive positions in the Office of the Commonwealth Director of Public Prosecutions from 2007 to 2015.

Her appointment comes at a key time for ACLEI — the agency responsible for detecting, investigating and preventing criminality and corruption in Commonwealth law enforcement agencies.

'I congratulate Ms Hinchcliffe on her appointment and I am confident she will be a strong and diligent leader in the Morrison Government's ongoing efforts to prevent corruption within the public sector', the Attorney-General said.

Ms Hinchcliffe commences her appointment on 10 February for a period of five years.

The Attorney-General also acknowledged the valuable work of outgoing ACLEI Commissioner, Mr Michael Griffin AM, and thanked him for continuing in the role until Ms Hinchcliffe's commencement.

<https://www.attorneygeneral.gov.au/media/media-releases/new-aclei-commissioner-appointed-7-february-2020>

Report on the current state of immigration detention facilities

The Commonwealth Ombudsman, Michael Manthorpe PSM, has published a report about his Office's activities in overseeing immigration detention during the first half of 2019.

This report summarises the Commonwealth Ombudsman's oversight of immigration detention facilities during the period from January to June 2019. It draws on observations from the Office's inspections of immigration detention centres during the period as well as other aspects of its oversight, including handling of complaints and preparation of assessments of the circumstances of people in long-term detention.

This Office has conducted inspections of immigration detention facilities since 2011. Previously the Office has shared its observations directly with the department, the Australian Border Force (ABF) and their service providers and published a summary in the Ombudsman's

annual report. This report marks the first instance in which the Ombudsman has publicly released a report regarding his Office's activities in overseeing immigration detention.

In 2018 the Ombudsman's Office was made the National Preventive Mechanism (NPM) with responsibility for inspecting places of detention under the control of the Commonwealth, in line with the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), which Australia ratified in 2017. The Office is also the NPM Coordinator for Australia. In this capacity, the Ombudsman has decided to commence regularly publishing information about the Office's work in oversight of immigration detention. From 2021 the Office will also commence inspecting places of detention operated by the Australian Defence Force and the Australian Federal Police, and we intend to prepare similar reports on the results of those inspections.

During the period covered by the report, the Office conducted inspections of immigration detention facilities in Brisbane Qld, Adelaide SA, Perth WA, Northam WA, Villawood NSW and Melbourne Vic. These inspections were undertaken using the Ombudsman's own motion powers under the *Ombudsman Act 1976*.

The report outlines concerns the Office has about the facilities within modular high-security compounds in immigration detention facilities. These concerns have been communicated to the department and the ABF, and the relevant facilities will continue to be a focus of inspections.

The report also highlights the Ombudsman's concerns with respect to the very long duration of detention of some detainees.

The Office will continue to monitor these issues and report on progress in future reports.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2020/report-into-the-current-state-of-immigration-detention-facilities>

Commonwealth Ombudsman publishes report on the readiness of Australia to implement OPCAT

The Commonwealth Ombudsman, Michael Manthorpe PSM, has published a report which provides a comprehensive and contemporary overview of Australia's readiness to implement the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT is an international treaty designed to strengthen protections for people in situations where they are deprived of their liberty and potentially vulnerable to mistreatment or abuse.

OPCAT requires the establishment of a system of independent monitoring for places of detention. Independent monitoring includes consideration of conditions, practices and treatment that could amount to cruel, inhuman or degrading treatment or punishment.

OPCAT also provides for visits by the United Nations Subcommittee on Prevention of Torture (SPT) as a further safeguard of protections for people in places of detention. The SPT recently announced it will visit Australia in the coming months.

The report examines the work of 55 existing Commonwealth, state and territory inspection and oversight bodies as part of a baseline assessment of OPCAT readiness. The report also discusses what effective implementation should look like.

A critical obligation arising from OPCAT is the establishment of a system of regular preventive visits by independent bodies, known as National Preventive Mechanisms (NPMs). When Australia announced its ratification of OPCAT in December 2017, it exercised its discretion to delay the establishment of its NPMs for three years. All jurisdictions need to nominate NPMs to enable Australia to comply with the requirements of OPCAT. We have now passed the mid-point of the three-year period, yet so far only the Commonwealth and Western Australia have nominated NPMs.

While the report highlights that there are existing inspection and oversight bodies in all jurisdictions, it also describes that there are gaps in oversight, scope, resourcing and in some instances a lack of genuine independence in the inspecting bodies in various jurisdictions. The report therefore serves as a baseline against which to track progress over time.

‘The next critical step is for jurisdictions that have not done so to nominate NPMs’, Mr Manthorpe said. ‘This is more than a technical, bureaucratic requirement. Over time, all jurisdictions will need to address the gaps between the current state described in the report and what OPCAT requires. I look forward to working with all jurisdictions on this important endeavour.’

The report complements the work being done by the Australian Human Rights Commission (AHRC), led by Human Rights Commissioner, Edward Santow. While the AHRC’s work has focused on engagement with civil society, the Ombudsman’s report is based on engagement with and self-assessment by the entities that currently have a role in oversight and inspection of places of detention.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2019/commonwealth-ombudsman-publishes-report-on-the-readiness-of-australia-to-implement-opcat>

Email highlighted as a key risk for data breaches

Malicious or criminal attacks including cyber incidents remain the leading cause of data breaches involving personal information in Australia, with almost one in three breaches linked to compromised login credentials, a new report shows.

This includes phishing attacks which caused at least 15 per cent of data breaches notified to the Office of the Australian Information Commissioner (OAIC) from July to December 2019.

The OAIC’s latest *Notifiable Data Breaches (NDB) Report* warns organisations about the risks associated with storing sensitive personal information in email accounts.

Australian Information Commissioner and Privacy Commissioner, Angelene Falk, also highlighted the risk of harm to individuals whose personal information is emailed to the wrong recipient (9 per cent of all breaches).

'The accidental emailing of personal information to the wrong recipient is the most common cause of human error data breaches', Commissioner Falk said.

'Email accounts are also being used to store sensitive personal information, where it may be accessed by malicious third parties who breach these accounts.

'Organisations should consider additional security controls when emailing sensitive personal information, such as password-protected or encrypted files.

'This personal information should then be stored in a secure document management system and the emails deleted from both the inbox and sent box.'

Personal information stored in email accounts can include financial information, tax file numbers, identity documents and health information, which can be exploited by malicious actors who gain access to inboxes.

In other key findings of the report:

- 537 data breaches were notified to the OAIC during the reporting period, a 19 per cent increase on the previous six months
- malicious or criminal attacks (including cyber incidents) accounted for 64 per cent of all data breaches
- human error remained a key factor in data breaches, causing 32 per cent of NDBs
- health service providers remained the leading source of NDBs over the six-month period, notifying 22 per cent of all breaches. The OAIC has jointly developed an action plan to help the health sector contain and manage data breaches and implement continued improvement
- finance is the second highest reporting sector, notifying 14 per cent of all breaches
- most data breaches affected less than 100 individuals, in line with previous reporting periods.

Commissioner Falk said the NDB scheme is now well established as an effective reporting mechanism.

'There is now increasing focus on organisations taking preventative action to combat data breaches at their source and deliver best practice response strategies', Commissioner Falk said.

'Where data breaches occur, organisations and agencies must move swiftly to contain the breach and minimise the risk of harm to people whose information has been compromised.'

Read the Notifiable Data Breaches Report for July–December 2019 at <oaic.gov.au/notifiable-data-breaches-report-july-december-2019>.

The health sector data breach action plan was developed with the Australian Digital Health Agency, Australian Cyber Security Centre and Services Australia. It can be downloaded at <oaic.gov.au/data-breach-action-plan-for-health-service-providers>.

<https://www.oaic.gov.au/updates/news-and-media/email-highlighted-as-a-key-risk-for-data-breaches/>

South Australian Court of Appeal to commence sittings in 2021

South Australia's new dedicated Court of Appeal is set to begin operations at the start of next year, Attorney-General, Vickie Chapman, announced.

The move follows last month's announcement that eminent barrister Mark Livesey QC has been appointed to the new Court.

'Establishing a new Court of Appeal will help deliver efficiencies in the Supreme Court, by allowing appeals to be heard by a dedicated group of judges in a standalone court', Ms Chapman said.

'By commencing the new court at the start of next year, there will be time to establish the necessary practices and procedures to support the court, and finalise accommodation details.'

Attorney-General Chapman said she had been in ongoing discussions with the Chief Justice on the possible makeup of the new Court and other operational issues ahead of the 1 January start date.

'I have been continuing talks with the Chief Justice about how the new Court of Appeal will operate, with due consideration of likely workload levels and other operational concerns', Ms Chapman said.

'Additional funding has been allocated for an extra Judge, to ensure that there are sufficient resources in place to allow for the operation of both divisions.

'With this in mind, it has been determined that the new Court of Appeal will consist of five judges, while seven judges will remain within the General Division of the Supreme Court.

'The Chief Justice will be able to preside over matters in either jurisdiction as needed.'

Ms Chapman said she was continuing to consult with the Chief Justice, with further appointments to be made in the coming months.

'This is a significant reform and I look forward to announcing the appointment of the remaining judges who will oversee the new Court's functions.'

<https://www.premier.sa.gov.au/news/media-releases/news/court-of-appeal-to-commence-sittings-in-2021>

Queensland Human Rights Act commences on 1 January 2020

Historic human rights legislation came into force on 1 January 2020, further enhancing the protections for Queenslanders in their dealings with public entities.

Acting Attorney-General and Minister for Justice, Dr Anthony Lynham, said the commencement of Queensland's *Human Rights Act 2019* meant public entities had a specific obligation to act and make decisions compatible with human rights.

'From today, Queenslanders will no longer have to rely on a patchwork of protections when they believe their freedom, equality or dignity is being challenged by a public entity', he said.

'Instead they will have access to a momentous piece of legislation — one that protects their human rights when interacting with public entities.

'This includes the state government, local government, public service employees and other organisations performing public work.

'It's a significant step towards a human rights-based approach to government planning, policy and service delivery.'

The Human Rights Act protects 23 human rights:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- taking part in public life;
- property rights;
- privacy and reputation;
- protection of families and children;
- cultural rights generally;
- cultural rights — Aboriginal people and Torres Strait Islanders;

- right to liberty and security of person;
- humane treatment when deprived of liberty;
- fair hearing;
- rights in criminal proceedings;
- children in the criminal process;
- right not to be tried or punished more than once;
- retrospective criminal laws;
- right to education; and
- right to health services.

Dr Lynham said the newly established Queensland Human Rights Commission, which replaces the Anti-Discrimination Commission, would administer the new *Human Rights Act*.

'The Queensland Human Rights Commission will also have the power to receive and conciliate human rights complaints', he said.

For more information about the *Human Rights Act 2019* and the Queensland Human Rights Commission, visit <www.qhrc.qld.gov.au>.

<http://statements.qld.gov.au/Statement/2020/1/1/queensland-human-rights-act-commences-today>

Major step towards a streamlined, single tribunal for Tasmania

Elise Archer, Attorney-General:

I am pleased to announce that, for the first time in Tasmania, a single tribunal will be established to streamline services and improve access to justice.

The Tasmanian majority Liberal government is committed to establishing a single civil and administrative tribunal. This important reform has been discussed by governments over many years, but we are getting on with making it happen.

Tasmania is currently the only state that does not yet have a single tribunal and, as the Attorney-General and Minister for Justice, I have driven this significant reform to establish the Tasmanian Civil and Administrative Tribunal (TasCAT), confident that it will deliver a more client-centric focus particularly for our protective jurisdictions.

TasCAT will also assist to promote alternative dispute resolution programs and provide greater consistency in decision-making, while enabling seamless service delivery to clients.

A significant amount of work will be undertaken in 2020 to deliver a new single tribunal for Tasmania.

The first step is the establishment of the new physical space for the co-location of the first tranche of tribunals to come under the new TasCAT umbrella.

It is expected that Tasmania's Resource Management and Planning Appeal Tribunal, the Guardianship and Administration Board, Workers Rehabilitation and Compensation Tribunal, Asbestos Compensation Tribunal, Motor Accident Compensation Tribunal, Anti-Discrimination Tribunal, Forest Practices Tribunal, Health Practitioners Tribunal and Mental Health Tribunal will be the first to be co-located at the new Barrack Street facilities in Hobart.

These facilities are currently being specially fitted out for the needs of the new single tribunal and its broad range of clients.

We are working closely with Tasmania's current tribunals and their stakeholders to ensure they are consulted through this transition phase.

In coming months, legislation will be brought before state Parliament to formalise the single tribunal arrangement.

The new single tribunal is expected it to be operational by the second half of this year.

<http://www.premier.tas.gov.au/releases/major_step_towards_a_streamlined,_single_tribunal_for_tasmania>

Vale Robert Todd

Allan N Hall AM*

I have been asked to write about Robert Todd, my friend and colleague for more than 40 years who made an immeasurable contribution to the development of administrative law in Australia. It is an honour for me to do so.

I first met Robert in September 1978, when he arrived in Canberra to take up his appointment as the second full-time Senior Member of the newly established Commonwealth Administrative Appeals Tribunal (AAT). I was the first full-time Senior Member, having been appointed at the beginning of that year.

Robert's qualifications for this appointment were exceptional. He graduated from the University of Melbourne in 1954 with an Honours degree in Law. He then went on to further legal studies at Wadham College at the University of Oxford, where he graduated with a Bachelor of Civil Law degree. He was called to the Bar in the UK by the Honourable Society of the Middle Temple.

Robert returned to Australia in 1957 and was admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria. For a short time he worked as a solicitor, but from September 1958 until 1971 he practised as a barrister at the Melbourne Bar. The high point of his career as a barrister was when he appeared as junior counsel to the Solicitor-General of Victoria in applications for special leave to appeal to the Privy Council in the UK in two constitutional cases. He served as a member of the Victorian Bar Council from 1964 to 1968 and as Legal Secretary to the Medico-Legal Society in Victoria from 1965 to 1972.

From 1971 to 1978, Robert was a member of the Taxation Board of Review No 2 in Melbourne, where he gained invaluable experience in reviewing decisions of the Commissioner of Taxation.

Whilst it was clear that Robert was well qualified for his appointment to the AAT, I knew nothing about him personally and, as we would be working closely together, I was faintly apprehensive as to whether we would be compatible, both at the personal and professional levels. All apprehension swiftly disappeared.

Little did I know that Robert was undergoing the same pangs of uncertainty when he first met me. However, as he later explained, his trepidation lasted 'all of a few seconds', and thus began one of the most enjoyable and lasting friendships and one of the most satisfying and rewarding professional relationships of my life. In our retirement years, we often commented on how fortunate we had been to have shared so much in common, particularly our commitment to making the AAT a success.

Robert and I had the great privilege of serving, during the first three years, under the inspirational leadership of then Justice Gerard Brennan and later under the strong leadership of Justice Daryl Davies, the second President of the AAT.

* Allan N Hall AM (LLB (Syd)) is a former Deputy President of the Commonwealth Administrative Appeals Tribunal.

In those early days of the AAT, Robert and I were engaged in a great deal of ground-breaking decision-making as new areas of public administration were progressively opened up for the first time to external review before the Tribunal. We were conducting hearings all around Australia, although the Tribunal was initially based in Canberra.

In 1982, Robert and I were appointed as the first full-time Deputy Presidents of the Tribunal — a position that Robert held until his retirement from the AAT in 1993.

In discharging his frequently onerous duties, Robert brought his impressive legal knowledge to bear, together with an elegance of expression in writing his decisions that bore witness to his great love, and command, of the English language. As those of you who knew him well can attest, Robert frequently sprinkled his conversation, and his writings, with apposite quotations from the plays of William Shakespeare and other major literary works. Throughout his career on the AAT, Robert strove to achieve the highest standards that he could in everything he did.

Robert was held in the highest regard by all those with whom he came into contact during his time on the AAT. In the conduct of hearings, he was courteous and respectful in manner and expected those who appeared before him to conduct themselves in similar fashion. He was a firm believer in the rule of law as the foundation of a fair and well-ordered society. He was scathing towards those who suggested that, in upholding these principles, the Tribunal was ‘too legalistic’.

Following Robert’s death, I contacted Sir Gerard Brennan and Justice Ian Thompson, the first full-time Senior Member of the AAT and later the first full-time Deputy President of the AAT, in Melbourne. I record their tributes.

Sir Gerard described Robert as ‘a true gentleman and a fine lawyer. He will be sadly missed by a loving family and by friends who held him in affectionate respect. You and Robert each contributed enormously to the establishment and development of the AAT’.

Justice Thompson had this to say: ‘I remember Robert ... as a sagacious and helpful colleague and shall always do so. I always respected his opinions. However, his death means one less link with the happy past. The Tribunal then was vibrant; you and Robert as the first non-judicial Deputy Presidents set a high standard for those of us who followed.’

In 1989, whilst still serving as a Deputy President of the Commonwealth AAT, Robert was appointed as the President of the newly created ACT AAT — a position he held until his retirement from both tribunals in January 1993.

Following his retirement, Robert took up a part-time appointment as President of the Legal Aid Commission (ACT) — a position he held until 1998. Between 1992 and 1994, he served as President of the Australian Institute of Administrative Law — an association he and I helped to found in 1989.

In 1994, in recognition of his outstanding services to the development of administrative law in Australia, Robert was made a Member of the Order of Australia — an honour he richly deserved.

There were other governmental committees on which Robert served in his post retirement years, on top of which, from 2001 to 2007, he held the important position of chairman of the Health and Welfare Ethics Committee of the Australian Institute of Health and Welfare.

In the lead-up to the 1999 Australian Republic Referendum, Robert participated in two eight-week courses that I presented for the University of the Third Age (Canberra) explaining the constitutional background to the proposed changes to a republican form of government. He delivered an excellent paper outlining the constitutional issues facing the states in the event that the referendum was successful.

In the midst of all these activities, Robert somehow found time to pursue other interests that were very close to his heart. He was a strong supporter of the Friends of the National Museum of Australia Inc, which was determined to have a national museum established of which all Australians could be proud. Robert served as the Public Officer of the Friends in 1994 and then as Vice-President from 1995 to 2000.

During this time, he worked in close association with the then President of the Friends, Winifred Rosser, in lobbying federal and ACT politicians for support in establishing the museum, preferably on the Friends' preferred site at Yarramundi (although, to their sorrow, that was not to be). The history of this epic struggle is well documented in the book *Not Without a Fight* by Louise Douglas and Roslyn Russell. It brought a wry smile to my face when I read that Winifred Rosser was reported as saying that she and Robert 'complemented each other's style'. As she explained, she was 'certainly the passionate saleswoman and Robert was the one who dotted the i's and crossed the t's'. (p 76).

Finally, it would be remiss of me not to mention Robert's literary and theatrical interests. After his retirement, he made a careful study of the life and times of Harry 'Breaker' Morant and presented public lectures on the fairness of his trial and conviction for murder. He also indulged his theatrical flair by presenting several performances (in appropriate period costume) of entertaining readings from the famous novel *The Life and Opinions of Tristram Shandy* by Laurence Stern.

Robert lived an incredibly full and productive life, much of it in using his considerable legal skills in service to the Australian community. He was a man of whom his much-loved wife and daughters can justly be proud.

To conclude my brief comments about Robert's remarkable life, I cannot do better than adopt the quotation from Shakespeare's *The Tragedy of Hamlet, Prince of Denmark* that his family used in Robert's death notice.

Polonius, the Lord Chamberlain to the King of Denmark, is offering advice to his son, Laertes, on how best to live a good and balanced life. It is timeless advice that, to me, epitomises the way in which Robert conducted his own life:

> This above all — to thine own self be true,
>
> And it must follow, as the night the day,
>
> Thou canst not then be false to any man. (Act 1, Scene 3, lines 78–80)

Robert will always be remembered as a fine gentleman, a loving husband, father and grandfather, a distinguished lawyer and a good friend.

The prerogative: Boris and the 'girly swot'

Robert Lindsay*

The exercise of executive prerogative powers plays a central role from time to time in a nation's life, yet often the exercise of those government powers goes unnoticed until a constitutional issue erupts, fanning the flames of factionalism. This article discusses those moments in a nation's history where application of prerogative powers has influenced the evolution of political debate. This has occurred recently both with Britain's 2016 referendum to part from the European Union and the two notable Supreme Court cases, in which 11 judges sat, which followed that referendum.

The Brexit case (No 1)

In January 1973, the United Kingdom (UK) became a member of the European Economic Community (the EEC). In December 2015, the UK Parliament passed the *European Union Referendum Act*, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union (the EU). Thereafter, ministers of the Crown announced that they would bring UK membership of the EU to an end, which raised the question whether a formal notice of withdrawal could lawfully be done by ministers, pursuant to prerogative powers, without prior legislation being passed in both Houses of Parliament and assented to by the Queen.

The government (the Ministers) argued that withdrawal from the EU could take place in the exercise of prerogative powers and did not require prior legislation to be passed for this to occur. A challenge was raised by two applicants, Gina Miller and Deir Dos Santos, against the Secretary of State, contending parliamentary legislative approval was necessary. The proceedings were heard before the Chief Justice; the Master of the Rolls; and Lord Justice of Appeal, who ruled against the Secretary of State in a judgment.[1] The Ministers took the matter on appeal to the Supreme Court, which sat the full bench of 11 judges and which in January 2017 found, by a majority of eight judges to three, that the Ministers' appeal should be dismissed.[2] The case reviewed existing prerogative powers and the relationship between domestic law and international legislation. It also raised constitutional issues.

The EEC treaties and UK statute law

The Ministers' case was based on the existence of well-established prerogative powers of the Crown to enter into and to withdraw from treaties. It was argued that Ministers are entitled to exercise prerogative powers in relation to withdrawal. In January 1972, Ministers signed a *Treaty of Accession*, which provided that the UK would become a member of the EEC and would accordingly be bound by the 1957 *Treaty of Rome*, which was the main treaty in relation to the EEC. A Bill was then laid before Parliament which received the royal assent when it became the *European Communities Act 1972* (the 1972 Act) and the following day

* Robert Lindsay is a barrister at Sir Clifford Grant Chambers, Perth.

1 *(R) (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (3 November 2016).

2 *(R) (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

ratified the Accession Treaty on behalf of the UK. Section 2(1) of the 1972 Act provided that:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …

Section 2(2) of the 1972 Act authorised and designated Ministers to make regulations for the purpose of implementing EEC (now EU) community obligations.

In the past 40 years, over 20 treaties relating to the EU were signed on behalf of Member States and, in the case of the UK, by Ministers. One of those treaties — the *Treaty of Lisbon* — inserted Article 50, which provided that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. A Member State which decides to do so notifies the European Council of its intention, which will result in the European Council negotiating and concluding an agreement setting out the arrangements for withdrawal. The European Treaty shall cease to apply to the State from the date of entry into force of the withdrawal agreement or, failing that, two years after notification unless the European Council unanimously agrees in conjunction with the Member State to extend that period. Once notice is given it cannot be withdrawn. Where notice is given, the UK has embarked upon an irreversible course that will lead to EU law ceasing to have effect in the UK so that the EU treaties will cease to apply.

International law and the 1972 Act

The general rule is that power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts. This principle rests on the so-called dualist theory, which is that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign States have effect in international law and are not governed by the domestic law of any State — that is, treaties are governed by other laws than those which municipal courts administer. The second proposition is that, although they are binding on the UK in international law, treaties are not part of the UK law and give rise to no legal rights or obligations in domestic law.[3]

Although Ministers do in principle have an unfettered power to make treaties which do not change domestic law, it had become standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they are ratified to enable parliamentary objections to be heard.

The 1972 Act authorised a dynamic process by which, without further primary legislation and without any domestic legislation, EU law not only became a source of UK law but also takes precedence over all domestic sources of UK law, including statutes. However, consistent with the principle of parliamentary sovereignty, this 'unprecedented state of affairs' only lasts so long as Parliament wishes, and the 1972 Act could be repealed like any other statute.[4]

3 Ibid [55].
4 Ibid [60].

EU law may take effect as part of the law of the UK in three ways. First, the EU treaties themselves are directly applicable by virtue of s 2(1), and some of the provisions of those treaties create rights and duties which are directly applicable in the sense that they are enforceable in UK courts. Secondly, s 2(1) provides that the EU treaties are to have direct effect in the UK without the need for further domestic legislation. Thirdly, s 2(2) authorises the implementation of EU Law by delegated legislation. This applies mainly to EU directives which are required to be transposed into national law.[5]

The majority considered that, although the 1972 Act gives effect to EU law, the 1972 Act is not itself the originating source of that law. It is only the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law as an independent and overriding source of domestic law.[6] The 1972 Act therefore has a constitutional character and, following the 1972 Act coming into force, the normal rule is that any domestic legislation must be consistent with the EU law; such EU law has primacy as a matter of domestic law; and legislation inconsistent with the EU law is ineffective. However, legislation which alters the 'domestic constitutional status of EU institutions or of EU Law' is not constrained by the need to be consistent with the EU law. This is because of the principle of parliamentary sovereignty, which is fundamental to the UK's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that is a matter for Parliament.[7]

The government's argument was that s 2(1) of the 1972 Act is ambulatory in that the wording that EU law rights, remedies and so on 'from time to time provided for by or under the treaties' were 'to be given effect or used in the United Kingdom' accommodated the possibility of Ministers withdrawing from the treaties without parliamentary authority.[8] However, the majority considered there was a vital difference between changes in domestic law resulting from variations in the content of EU law and changes in domestic law resulting from withdrawal by the UK from the EU.[9] The latter involves unilateral action by the relevant constitutional bodies, which effects a fundamental change in the constitutional arrangements of the UK.[10] The majority concluded that they could not accept a major change to UK constitutional arrangements can be achieved by Ministers alone and it must be effected by parliamentary legislation.[11]

The dissenting view

The leading judgment for the three dissentients was given by Lord Reed. He said that there is no legal requirement for the Crown to seek parliamentary authorisation for the exercise of the power except to the extent that Parliament has so provided by statute. Since there is no statute which requires the decision under Article 50(1) enabling withdrawal to be taken by Parliament, it follows that the decision can lawfully be taken by the Crown in the exercise of

5 Ibid [63].
6 Ibid [65].
7 Ibid [67].
8 Ibid [75].
9 Ibid [78].
10 Ibid.
11 Ibid [82].

the prerogative. There is therefore no legal requirement for an Act of Parliament to authorise the giving of notification of withdrawal under Article 50(2).[12]

He accepted the importance in constitutional law of the principle of parliamentary supremacy over domestic law, but that principle did not require that Parliament pass an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU laws in domestic laws under the 1972 Act is inherently conditional on the application of the EU treaties to the UK and therefore the UK's membership of the EU. The 1972 Act imposed no requirement and manifested no intention in respect of the UK's membership of the EU. It did not therefore affect the Crown's exercise of prerogative powers in respect of UK membership. The effect of the EU law in the UK is entirely dependent on the 1972 Act.[13]

Referring to the words 'from time to time' appearing in s 2(1), he said that the rights, powers, liabilities, obligations and restrictions arising under the EU treaties and the remedies and procedures provided for under those treaties alter from time to time. This demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament. As to the majority of the Court drawing a distinction described as 'a vital difference' between changes in domestic law resulting from variations in the content of EU law and changes resulting from withdrawal by the UK from the EU, there is no basis in the language of the 1972 Act for drawing any such distinction.[14]

The differences between the majority and minority views turned largely upon differing statutory constructions of the relevant legislation. However, there was general consensus about the nature and history of prerogative powers which the judgment discussed.

The history of the royal prerogative

Unlike Australia, the UK constitution is unwritten and has been described as 'the most flexible polity in existence'.[15]

Originally sovereignty was concentrated in the Crown, which largely exercised all the powers of the State, but prerogative powers were progressively reduced as parliamentary democracy and the rule of law developed. By the end of the 20th century the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the State: the legislature (the two Houses of Parliament), the executive (Ministers and the government more generally) and the judiciary (the judges). Statutes such as the *Bill of Rights 1689* and the *Act of Settlements 1701* in England and Wales, and the *Claim of Right Act 1689* in Scotland and various Acts of Union in 1706 and 1707, formally recognised the independence of the judiciary, whose role is to uphold and further the rule of law.[16]

12 Ibid [161].
13 Ibid [177].
14 Ibid [186]–[187].
15 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) p 87.
16 [2017] UKSC 5 [41]–[42].

Sir Edward Coke CJ said that:

> The King by his proclamation or in other ways cannot change any part of the Common Law, or Statute Law, or the customs of the realm.[17]

It had become established by the *Bill of Rights 1689* that the pretended power of suspending or dispensing with laws by the monarch was illegal.[18] The Crown's administrative powers are now exercised by the executive, being the Ministers, who are answerable to the UK Parliament. However, the exercise of those powers must be compatible with legislation or the common law. The King in Council and any branch of the executive cannot prescribe or alter the law to be administered by courts of law and to do so is 'out of harmony with the principles of our constitution'.[19] It is true that Ministers can make laws by issuing regulations, known as secondary or delegated legislation, but they can only do so if authorised by statute.

The scope of prerogative powers

Today, the royal prerogative encompasses a residue of powers which remain vested in the Crown, exercisable by Ministers, provided that the exercise is consistent with parliamentary legislation. It is 'only available for a case not covered by statute'. Professor Wade described it as:

> The residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot effect the rights of subjects) and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.[20]

Since the 17th century, the prerogative has not empowered the Crown to change English common or statute law. A prerogative power, however well established, may be curtailed or abrogated by statute. There are important areas of governmental activities even today essential to the effect of operation of the State that are not covered by statute such as the conduct of diplomacy in war, and these are viewed as best reserved to Ministers.[21]

Although prerogative powers cannot change the domestic law, they may have domestic legal consequences. First, where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others, the Crown has a prerogative power to decide on the terms of service of its servants and it is inherent in that power that the Crown can alter those terms so as to remove rights, albeit such a power is susceptible to judicial review. The Crown also has a prerogative power to destroy property in wartime in the interest of national defence, although at common law compensation is payable. The exercise of such powers may affect individual rights, but it does not change the law because the law has always authorised the exercise of that power.[22]

17 *The Case of Proclamations* (1610) 12 Co Rep 74.
18 [2017] UKSC 5 [44].
19 As per Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77 [90].
20 Professor H W R Wade, *Administrative Law* (1st ed, 1961) p 13; [2017] UKSC 5 [47].
21 [2017] UKSC 5 [48]–[50].
22 Ibid [52].

The constitutional principles: accountability to Parliament for prerogative exercise

The most significant area is the conduct of foreign affairs, but as Lord Oliver said in *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry*:

> As a matter of the *Constitutional* Law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[23]

Since treaty making is outside the purview of the courts because it is made in the conduct of foreign affairs, which is the prerogative of the Crown, this may be regarded as a necessary corollary of parliamentary sovereignty because:

> If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, Parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.[24]

A further constitutional principle was pointed to by Lord Carnwath, who also dissented with Lord Reed. He did not see the choice as simply one between parliamentary sovereignty, exercised through legislation, and the untrammelled exercise of the prerogative by the executive. No less fundamental to the constitution is the principle of parliamentary accountability. The executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary parliamentary procedures. Subject to specific statutory restrictions, they were matters for Parliament alone. The court may not inquire into the methods by which Parliament exercises control over the executive or their adequacy.[25]

Lord Justice Sedley: an ethical preference

In commenting upon the Brexit judges' respective positions, Sir Stephen Sedley, a retired Lord Justice of Appeal, preferred the view of the majority on broad historical grounds notwithstanding what he regarded as the 'astute reasoning' of the dissenting Lord Reed. Sedley LJ said that, for over 400 years, British monarchs and their ministers have contested the claims of Parliament to have the last word on matters of state. Judges have arbitrated between them, laying down as part of the common law what ministers can lawfully do in the exercise of the royal prerogative, such as declaring war, making peace, signing treaties, granting honours, governing colonies, and what requires the authority of either the common law or Parliament. In 1685, James II had packed a 12 jury court, which supported him in declaring in exercise of prerogative powers that he could dispense with the Test Acts which barred Catholics and dissenters from public office. He was later forced to abdicate and, in 1688, Parliament reconstituted itself and passed the *Bill of Rights 1689*, which is still the foundational statute of the British State.

23 [1990] 2 AC 418, 500.
24 Professor C McLachlan, *Foreign Relations Law* (2014) para 5.20; [2017] UKSC 5 [57].
25 [2017] UKSC 5 [249].

That Bill provided in its second article that ‘the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late, is illegal’.

Sir Stephen Sedley considered that all this boiled down to a simple proposition: to use the royal treaty-making prerogative to stultify primary domestic legislation is to do exactly what the Bill of Rights forbids — to dispense with laws by regal authority. He saw the critical reasoning to be that of the majority when they said that there was a fundamental difference in withdrawal under Article 50 from abrogation of particular rights, duties or rules derived from EU law. It amounted to a significant constitutional change. The introduction of EU law was brought into existence by Parliament through primary legislation and so, too, withdrawal under Article 50 should be done through legislation, for it was a constitutional alteration of arrangements.[26]

The sequel to the first Brexit decision and the withdrawal agreement

Parliament responded to the first decision by passing the *European Union (Notification of Withdrawal) Act 2017* authorising the Prime Minister to give notice of withdrawal from the EU. Parliament then proceeded with some of the legislative steps needed to prepare the UK law for leaving the EU. The *European Union (Withdrawal) Act 2018* defined the ‘exit day’, but this allowed for an extension by statutory instrument if needed. It repealed the *European Communities Act 1972*, which had provided for entry into the EU (at that time the EEC). Crucially, s 13 of the 2018 Act required parliamentary approval of any withdrawal agreement reached by the government. The machinery for leaving the EU in Article 50 of the *Treaty on European Union* requires that the EU must negotiate and conclude an agreement with the Member State ‘setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. The European Union Treaty will cease to apply to that State when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council unanimously agrees to extend that period.

A withdrawal agreement with the EU by the Ministers was concluded on 25 November 2018, but this agreement was rejected by the House of Commons three times.

Following the voting down of the withdrawal agreement there was a change of Prime Minister, with Mr Boris Johnson being chosen by the Conservative Party. He had been the leading light contending that Britain should leave the EU. He contended that the European Council of the European Union would only agree to changes in the withdrawal agreement if they thought that there is a genuine risk that the UK would leave without any such agreement. However, a majority of the House of Commons would not support withdrawal from the EU without an agreement, so the *European Union (Withdrawal) Act 2019* was passed, requiring the Prime Minister to seek an extension of three months from the EU if no withdrawal agreement had been approved by Parliament.

26 Stephen Sedley, ‘Short Cuts’, *London Review of Books*, Vol 39, No 5, 2 March 2017, pp 26–7.

The proroguing of Parliament

On 28 August 2019, members of the Privy Council attended a meeting of the Council held by the Queen at Balmoral Castle and an order in council was made that Parliament be prorogued on a day no later than Monday, 14 September 2019, until 14 October 2019, when Parliament would reconvene for the Queen's speech, which was to set out the government's legislative program. In approving the prorogation, Her Majesty was acting on advice of the Prime Minister, who saw no merit in extending the deliberations of a Parliament now largely hostile to the UK leaving the EU without a withdrawal agreement to their liking and in which some members were now calling for a second referendum to review the 2016 result.

As it happened, the Prime Minister and his Ministers did get a modified withdrawal agreement with the EU, but the government no longer commanded enough parliamentary support to get it approved. Accordingly, in an endeavour to secure an outright majority to pass his modified withdrawal agreement, the Prime Minister called an election for 12 December 2019, the result of which enabled his conservative government to leave the EU on 31 January 2020 with the modified withdrawal agreement. The framework for the future relationship with the EU is intended by the UK Government to be finalised within the next year.

The second Brexit case[27]

As soon as the prorogation was announced, Mrs Gina Miller, who mounted the first Brexit challenge, launched proceedings in the High Court in England and Wales seeking a declaration that the Prime Minister's advice to Her Majesty to prorogue was unlawful. Those proceedings were heard by a divisional court comprising the Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division, and these judges dismissed the claim on the ground that the issue was not justiciable. Similar proceedings were mounted in the Scottish Court of Sessions, where initially the government succeeded but the Inner House, on appeal, held that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying parliamentary scrutiny of the executive and that the advice and the prorogation which followed it were unlawful and thus null and of no effect. There was then an appeal of both decisions to the Supreme Court, which again sat all 11 members.

The principles in question

The Supreme Court said, firstly, that the power to order prorogation of Parliament is a prerogative power, being a power recognised by the common law and exercised by the sovereign in person acting on advice in accordance with modern constitutional practice.[28] Secondly, whilst the Court cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it.[29] For this they gave the example of the *Case of Proclamations*[30] that an attempt to alter the law of the land by the use of the

27 *R (On the Application of Miller) v The Prime Minister & Others* [2019] UKSC 41.
28 Ibid [30].
29 Ibid [31].
30 (1611) 12 Co Rep 74.

Crown's prerogative was unlawful, the Court there holding that 'the king hath no prerogative, but that which the law of the land allows him', indicating that the limits of prerogative powers were set by law and were determined by the courts. Another example was *Entick v Carrington*,[31] where the Court found that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.[32]

Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. This is so because the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Further, a court has a duty to give effect to the law irrespective of the Minister's political accountability to Parliament. Ministerial responsibility is no substitute for judicial review.[33] Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers by ensuring the prorogation power is not used unlawfully. Indeed, the court will be giving effect to the separation of powers by ensuring the prorogation power is not used unlawfully.[34]

Whether these issues are justiciable

The Court saw the first issue as whether a prerogative power exists and its extent. Secondly, if it is accepted that a prerogative power existed and it has been exercised within its limits, the question then was whether a purported exercise of power was challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In *Council of Civil Service Unions v Minister for the Civil Service*[35] the dissolution of Parliament was seen by Lord Roskill as one of a number of powers whose exercise was non-justiciable. It was important to appreciate that this argument advanced by the government that prorogation is analogous to dissolution, and is therefore an excluded category, only arises if the issue in the proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits rather than as one concerning the lawful limits of the power and whether they have been exceeded. No question of justiciability can arise in relation to whether the law recognises the existence of a prerogative power or in relation to its legal limits. These are by definition questions of law for the courts.[36]

Deciding the limits of prerogative power

Whilst it is relatively straightforward to determine the limits of a statutory power, determining the limits of a prerogative power which is not constituted in any document is less straightforward. Nevertheless, every prerogative power has its limits and it is the function of the court to determine when necessary where they lie. The common law recognises prerogative power and that power has to be compatible with common law principle which may illuminate where its boundaries lie.[37]

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31 (1765) 19 State Trials 1029.
32 [2019] UKSC 41 [32].
33 Ibid [32].
34 Ibid [34].
35 [1985] AC 374; Lord Roskill mentioned at 418.
36 [2019] UKSC 41 [36].
37 Ibid [38].

Constitutional principles may be developed by the common law — for example, that justice must be administered in public; and the principle of the separation of powers between the executive, Parliament and the courts. The principle may extend to the application of governmental powers, including prerogative powers. For example, the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation.[38]

Sovereignty of Parliament is a foundational principle

The Court said that the sovereignty of Parliament would be undermined as the foundational principle of the constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority. That would be the position if there was no legal limit on the power to prorogue Parliament.[39] The longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government.[40] A prerogative power is therefore limited by statute and the common law and will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as the legislature and as the body responsible for the supervision of the executive.[41]

The Prime Minister's explanation for prorogation

The government argued that there were no circumstances whatsoever in which the Court could review a decision to prorogue Parliament.[42] However, it is a concomitant of parliamentary sovereignty that the length of prorogation is not unlimited.[43] The question then is whether the Prime Minister's explanation for advising the Parliament should be prorogued was a reasonable justification. It was recognised that the courts can rule on the extent of prerogative powers and the Court is not concerned with the mode of exercise of the prerogative powers within its lawful limits. But the advice given by Boris Johnson to the Queen to prorogue Parliament for five out of the possible eight weeks was to frustrate or prevent the constitutional role of Parliament in holding the government to account.

The government argued that to declare the prorogation null and of no effect is contrary to Article 9 of the *Bill of Rights 1689*, which states that 'the freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. It is a principal role of the courts to interpret Acts of Parliament.

In *R v Chytor*[44] a prosecution of several members of Parliament for allegedly making false expenses claims was resisted on the ground that these claims were 'proceedings in Parliament' which ought not to be 'impeached or questioned' in any court. It was held unanimously by nine justices that MPs' expenses were not 'proceedings in Parliament'. The case established that it is for the court and not for Parliament to determine the scope of

38 Ibid [40].
39 Ibid [42].
40 Ibid [48].
41 Ibid [50].
42 Ibid [43].
43 Ibid [44].
44 (2010) UKSC 52.

parliamentary privilege, whether under Article 9 of the Bill of Rights or matters within the exclusive cognisance of Parliament. The principle in Article 9 is directed to freedom of speech and debate. The prorogation itself takes place in the presence of members of both houses, but it cannot be sensibly described as a 'proceeding in Parliament'. It is not a decision of either house; rather, it is something which is imposed upon members of Parliament from outside.[45] The Court is therefore not precluded by Article 9 or by any wider parliamentary privilege from considering the validity of the prorogation itself.

The Prime Minister did not submit any evidence to the Court about what passed between him and the Queen when advising her to prorogue. However, the Court had three documents leading up to the advice, one of which contained the Prime Minister's handwritten comments on a memorandum which said 'the whole September session is a rigmarole introduced [redacted] to show the public that MPs were earning their crust, so I don't see anything especially shocking about this prorogation'.[46] The words redacted above were 'by girly swot Cameron'[47] — a reference to the former Prime Minister David Cameron, who had been at Eton College with Johnson.

The minutes of a Cabinet meeting held by conference call on 27 August, after the advice had been given, asserted that prorogation had not been driven by Brexit considerations. It had been portrayed as a means to prevent MPs from intervening to prevent the UK's departure from the EU due on 31 October 2019, but that was not so. A Queen's speech was to be delivered on 14 October and the Prime Minister sent a letter to MPs setting out 'an ambitious and domestic legislative agenda for the renewal of our country after Brexit'.[48]

The legal test of unlawfulness

However, the longer Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government.[49] The relevant limit in this case upon the power to prorogue can be expressed thus: the decision to prorogue Parliament will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[50]

This was not a normal prorogation in the run-up to a Queen's speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and the exit date from the EU, set for 31 October 2019.[51] Sometimes this interruption may not matter, but where a fundamental change was due to take place in the UK constitution on 31 October 2019 it was important.[52]

45 [2019] UKSC 41 [68].
46 Ibid [18].
47 Stephen Sedley, 'In Court', *London Review of Books*, Vol 49, No 19, 10 October 2019, p 16.
48 [2019] UKSC 41 [21].
49 Ibid [48].
50 Ibid [50].
51 Ibid [56].
52 Ibid [57].

There was no reason given for closing down Parliament for five weeks on the pretext that this time was needed for preparation of the Queen's speech setting out the government's program. The unchallenged evidence of Sir John Major, a former Prime Minister, that four to six days is sufficient for that purpose was accepted.[53] It was impossible to conclude that there was any reason to advise a prorogation of five weeks.[54]

It was found, therefore, that the advice was unlawful because it was outside the powers of the Prime Minister to give it and therefore it was null and of no effect.

The political consequences

The two decisions of the Supreme Court have had political consequences well beyond the arcane points of constitutional law which the Court decided. Had the dissenting view of the three judges succeeded in the first Brexit case, Theresa May's government would have been able to implement the withdrawal agreement with the EU without recourse to Parliament for approval of that agreement and the UK would have left the EU before that time.

It is because, in the years following the ousting of the Stuarts, the Crown ceased to govern through the Ministers and Ministers began to govern through the Crown that an issue like the prorogation crisis addressed in the second Brexit case has been able to arise.[55]

The *Bill of Rights 1689* created today's constitutional monarchy, leaving in existence a range of prerogative powers which have been significantly reduced in their scope by the recent decisions. The first Brexit case affirmed the established proposition that prerogative powers do not allow for extending or altering laws which confer rights upon individuals where those are enjoyed under domestic law. Although the executive may make treaties under international law in exercise of the prerogative, those powers have no effect upon the domestic law unless Parliament legislates to adopt the treaty terms as part of the domestic law.

The dissenting view saw the withdrawal of EU membership under Article 50 of the *Treaty of Lisbon* as the exercise of a prerogative power by Ministers. It took the literal view that the *European Communities Act 1972*, taking the UK into the EU, was simply a conduit for rights and obligations derived from a treaty, which was an exercise of the royal prerogative, and therefore could be abrogated like any other treaty terms by Ministers. There was no legal requirement that an Act of Parliament authorise the granting of notification of withdrawal under Article 50.

Conversely, the majority view in the first Brexit case was that parliamentary sovereignty, allied to the fact that this was a substantial alteration in constitutional arrangements, meant that legislative approval for withdrawal was required. Emboldened by the majority decision, Parliament introduced s 13 of the *European Union (Withdrawal) Act 2019*, requiring parliamentary approval of any withdrawal agreement reached by the government. After the withdrawal agreement reached by Theresa May with the EU had been voted down three times, Parliament legislated to require the Prime Minister to seek an extension of time from

53 Ibid [59].
54 Ibid [61].
55 Sedley, above n 47.

the EU since no withdrawal agreement had been approved by Parliament. Boris Johnson's subsequent obtaining of a modified withdrawal agreement with EU then met the difficulty that he could not command enough parliamentary support to get the withdrawal agreement passed, so an election was needed to secure a majority for passage of the modified agreement.

The two Brexit cases reaffirmed that Ministers may only govern as long as they have the confidence of Parliament; that Ministers have an accountability to Parliament for their conduct of both foreign and domestic policy; that an executive becomes rudderless where it does not have parliamentary support to pass legislation; and that the courts may hold an executive government to account for an unlawful exercise of its prerogative powers.

The excluded prerogative powers

It must be now doubted whether even the limited prerogative powers set out by Professor Wade and cited in the first Brexit case or those described by Lord Roskill in the *Council of Civil Service Union* case alluded to in the second Brexit case are non-justiciable. Lord Roskill saw the prerogative powers free from challenge as the making of treaties; the defence of the realm; the prerogative of mercy; the grant of honours; the appointment of ministers; and the dissolution of government.[56]

The separation of powers

The prerogative powers excluded from challenge have been diminished, the sovereignty of Parliament reaffirmed and the judicial role both to patrol the boundaries of political lawfulness and to scrutinise by judicial review political actions enlarged. The second Brexit case recognised that constitutional principles may be developed by the common law and that this would include recognising the separation of powers between executive, Parliament and the courts.

Are these modern developments?

In his BBC Reith Lectures Lord Sumption, who formed one of the majority in the first Brexit case but had retired before the second case, said relations between government and the citizen are governed by 'an elaborate system of administrative law largely developed by Judges since the 1960s'. Sir Stephen Sedley saw this comment as a 'historical solecism', for he said there is little in the principles in modern public law (a term he preferred to that of administrative law) which was not already there by the 19th century, but what has changed is that the polity to which these principles applied as judicial review can now reach acts done under the royal prerogative, not only when it departs from what is lawful but also to review some of the excluded prerogative categories referred to earlier by Lord Roskill.[57]

56 1985 AC 374, 418 (Lord Roskill).
57 *R (on the application of Privacy International (Appellant) v Investigatory Powers Tribunal and Others (Respondents)* [2019] UKSC 22.

Political or legal constitution?

Sir Stephen Sedley drew attention to Lord Sumption's view, expressed in the BBC Reith Lectures, that the UK constitution is 'essentially a political and not a legal constitution'.[58] This was consistent with Lord Sumption's view that the judiciary does no more than patrol the boundaries of political legality whereas two party politics should make for moderation, toleration and compromise.

It is shown by recent events in Parliament, where the members could not agree upon a course for withdrawal from the EU, and recent decisions of the Supreme Court that this 'idealised dualism'[59] of law and politics has now fallen apart.

The UK constitution and ouster clauses

Another Supreme Court decision in 2019 illustrates the increased reliance which the courts place upon the principle of legality to ensure that Parliament does not preclude the higher courts from determining what is the law. In *R (on the application of Privacy International) (Appellant) versus the Investigatory Powers Tribunal and others (Respondents)*[60] Lord Carnworth, speaking for the majority, said an ouster clause which sought to oust the supervising role of the higher courts to correct errors of law by tribunals would conflict with the rule of law. He saw this principle as fundamental to the constitution as that of parliamentary sovereignty. His Lordship held that, consistent with the rule of law, binding effect cannot be given to a clause which purports to exclude the jurisdiction of the higher court to review a decision of an inferior court or tribunal whether it be for excess or abuse of jurisdiction or the error of law.[61]

Constitutional contrast with Australia

In arriving at this result his Lordship acknowledged that in Australia the High Court in *Kirk v Industrial Court of NSW*[62] had already arrived at a similar result by use of a 'broadened concept of jurisdiction'. That case also determined that state legislators could not legislate to exclude review for jurisdictional error. Legislation to oust jurisdiction of the higher courts in Australia arose most visibly under the *Migration Act 1968* (Cth), where a 'privative clause' in legislation purporting to oust jurisdiction to review tribunal decisions was struck down on the basis of jurisdictional error.[63] Unlike the UK, the High Court has thus far preserved the difficult distinction between jurisdictional and non-jurisdictional error. This is deemed necessary because the majority in the High Court and Privy Council in the *Boilermakers case*[64] decided that the exercise of judicial power did not permit interference with executive decision-making unless there had been jurisdictional error or the legislation itself permitted some form of merits review. It remains to be seen what effect the recent public law developments in the two Brexit

58 Stephen Sedley, 'A Boundary Where There Is None', *London Review of Books*, Vol 41, No 17, 12 September 2019.
59 Ibid.
60 [2019] UKSC 22.
61 Ibid [144].
62 2010 HCA 1.
63 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) HCA 2; 211 CLR 476.
64 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

cases, together with the anticipated uncoupling of the UK from European jurisprudence, will have on constitutional developments in the Australian High Court.

Current mechanisms for the registration of lobbyists

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The title of this article indicates that it is about the registration of lobbyists. But taking my cue from the theme of the conference, concerned as it is with transparency and accountability, I intend to go a lot further. There are a number of resources that provide the details of the current mechanisms for the registration of lobbyists in Australia — among them the Commonwealth Parliamentary Library's 2014 research publication on lobbying.[1] I do not intend to do other than summarise the main features of the systems for regulating lobbyists that have been adopted in Australia at the Commonwealth level and to detail some of the ways in which different states have developed and adapted them. I propose to devote most of the article to an examination of the supposed purpose of these regimes and whether it is sufficient, particularly in the light of international experience. In doing so I will also refer to 'Operation Eclipse' — an examination currently being undertaken by the New South Wales Independent Commission Against Corruption (ICAC) of how the New South Wales Government regulates lobbying, access and influence.

The Commonwealth lobbying scheme

The mainspring of the Commonwealth scheme (and the other state schemes) is the *Lobbying Code of Conduct* (the Code). It provides definitions, establishes a register of lobbyists and sets out the rules governing contact between lobbyists and government representatives. The Code 'is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty'.[2]

The lobbyists with which the Code is concerned are those people, companies or organisations that conduct 'lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client'.[3] This is a very narrow definition, designed to include relatively few of the people who actually lobby government ministers, their staff and senior public servants. Among those the definition says are *not* lobbyists that will be regulated under the scheme are:

1. non-profit organisations 'constituted to represent the interests of their members';[4]

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1 Deidre McKeown, 'Who Pays the Piper? Rules for Lobbying Governments in Australia, Canada, UK and USA' (Research Paper Series, Parliamentary Library, Parliament of Australia, 2014).

2 Australian Government, *Lobbying Code of Conduct*, 1.4.

3 Ibid 3.15.

4 Ibid 3.5.2.

2. people, companies or organisations and their employees 'lobbying on their own behalf rather than for a client'; and[5]

3. professionals such as doctors, lawyers or accountants or other service providers who make 'occasional' representations to government in a way that is 'incidental' to the provision of their professional or other services.[6]

I will discuss later the consequences and effect on the regulation of lobbyists that flow from these three exclusions.

Those lobbyists who are covered by the definitions are required to register various details about the business, its employees and the clients for which it lobbies. The register is a public document. There is little else about lobbying that is publicly available, other than what can be gleaned from freedom of information searches.

The lobbying scheme is not statutory — it depends for its effectiveness on the Code forbidding government representatives from allowing themselves to be lobbied by a lobbyist (as defined above) who is not on the Register of Lobbyists; and on the willingness of lobbyists to comply with its demands. Being registered facilitates acquiring the necessary pass to enter and roam through Parliament House. 'Government representative' is defined to mean ministers and parliamentary secretaries and their staff, agency heads, public servants, contractors and consultants and members of the Australian Defence Force.[7]

The Code bans former ministers and parliamentary secretaries from engaging in lobbying relating to any matter that they had official dealings with in their last 18 months in office, for a period of 18 months after they cease to hold office. Similar bans apply to former ministerial staff, senior Defence staff and senior public servants, though the relevant period is 12 months rather than 18.

A person who has been sentenced to a term of imprisonment of 30 months or more, or convicted of a dishonesty offence in the previous 10 years, cannot be registered as a lobbyist; neither can members of political party executives. Breaches of the Code are punishable only (for lobbyists) by removal from the Register of Lobbyists. The Secretary has power to remove a lobbyist from the register at the direction of the relevant minister.

Policy responsibility for the Code and Register of Lobbyists was transferred from the Department of the Prime Minister and Cabinet to the Attorney-General's Department in late 2018. The day-to-day operation of the register was moved on 10 May 2019, when the Secretary of the Attorney-General's Department became responsible for the administration of the Code and register.

In this article I will not examine the Foreign Influence Transparency Scheme that came into effect last year and, similarly, falls within the responsibility of the Attorney-General's Department. This also deals with lobbying as defined in the Code together with lobbying

5 Ibid 3.5.6.
6 Ibid 3.5.6.
7 Ibid 3.3.

on a much broader scale (such as general political lobbying for the purpose of political or governmental influence and communications activities for the purpose of political or government influence) on behalf of foreign principals. Some lobbyists will be caught up in both schemes.

The states

The basic structure adopted by the Commonwealth to register and regulate lobbyists — a code, a requirement for third-party lobbyists to register, and restrictions on lobbying access to government officials to registered lobbyists — forms the basis of the regulation of lobbyists in the states. Former ministers and senior public servants are prevented from lobbying for various periods. But there are some important differences between the Commonwealth and some of the states, and among the states, that should be noted.

Three states — New South Wales, Queensland and Western Australia — began with administrative schemes like that of the Commonwealth but later gave them statutory force.[8] The New South Wales legislation has a penal provision concerning the cooling-off period that former ministers and parliamentary secretaries must observe. The Western Australian legislation imposes a financial penalty for breaches of the registration requirements. The same three states, plus Victoria, ban lobbyists from obtaining what are described as 'success fees'.

All the states except New South Wales are concerned only with third-party lobbyists, although in Western Australia the definition includes such lobbying when done gratuitously. In Victoria there is a special provision to cover lobbying by Government Affairs Directors (GAD) who lobby (an extended definition applies) in a paid capacity for an organisation or business or professional or trade organisation. Elsewhere, those who lobby for such organisations are not covered by the respective codes. But the definition of a GAD is very restricted and applies only to a person who has previously held a position as a senior staff member of a Commonwealth or a state minister or a parliamentary secretary.

The position is different in New South Wales, where the legislation and the code apply to almost all lobbyists, though only third-party lobbyists (with exceptions for those in the some of the professions) are required to register. A contravention of the code can lead to a lobbyist being placed on the Lobbyists Watch List, which may require special procedures to apply when lobbying takes place.

In Queensland, the legislation covers the lobbying of local government as well as the state government. Queensland's Lobbyists Code of Conduct requires lobbyists to report monthly (on a publicly accessible online register) their contacts with ministers and government officials, together with some details of the lobbying. Ministerial diaries are published monthly. New South Wales has a requirement for ministers to publish their diaries online quarterly.

8 New South Wales: *Lobbying of Government Officials Act 2011* as amended by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014*. Queensland: *Integrity Act 2009*. Western Australia: *Integrity (Lobbyists) Act 2016*.

The administration of the lobbyist schemes has been given to a variety of bodies. In New South Wales it is the Electoral Commissioner, in Victoria the Public Sector Standards Commissioner, in Queensland the Integrity Commissioner and in Western Australia the Public Sector Commissioner, while in South Australia and Tasmania it is the Department of Premier and Cabinet.

Why regulate lobbyists?

The preamble to the Commonwealth Code says:

> 1. Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials.
>
> 2. Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government and, in doing so, improve outcomes for the individual and the community as a whole.
>
> 3. In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.
>
> 4. The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. Lobbyists and Government representatives are expected to comply with the requirements of the Lobbying Code of Conduct in accordance with their spirit, intention and purpose.[9]

The notion of 'legitimacy' is taken up in most of the state codes as well. For example, the Queensland Lobbyists Code of Conduct includes the following rewording of the second and third items in the Commonwealth Code:

> Professional lobbyists are a legitimate part of, and make a legitimate contribution to, the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to the government, and so improve outcomes for the individual and the community as a whole.
>
> The public has a clear expectation that lobbying activities will be carried out ethically and transparently, and that government representatives who are approached by lobbyists are able to establish whose interests the lobbyists represent so that informed judgments can be made about the outcome they are seeking to achieve.[10]

Item 2 in the Commonwealth Code and its Queensland equivalent seems designed to reassure lobbyists (and the world at large) that, even though they are being regulated, the government acknowledges that they make a positive contribution to the democratic way of life. However, the following paragraph in each preamble then provides a 'nevertheless' justification for imposing some restrictions on how the lobbyists are allowed to operate.

Much that should be relevant to the regulatory exercise is missing from these preambles, and I will return to that later. For the moment, however, I want to concentrate on just who is

9 Australian Government, *Lobbying Code of Conduct*, Preamble.
10 Queensland Government, *Lobbyists Code of Conduct*, Preamble.

being regulated in the codes. The lobbyists with whom they are concerned are those that are strictly defined in the codes or the Act — third-party professional lobbyists.[11] By limiting their focus in this way, these preambles concern themselves with just a small part of the effect of lobbying on the democratic process. At one point the codes refer to lobbyists they are regulating. They then generalise about the beneficial impact of all lobbying, including lobbying that is not regulated. It is simply not correct to say that *all* lobbying of government is legitimate and/or that lobbying by people and organisations that are *not* third-party professional lobbyists 'improve outcomes for the individual and the community as a whole'. Because lobbying by those who are not third-party professional lobbyists is not regulated in any way, the public is not and cannot be assured 'that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve'.[12]

It can be argued — and I return to this later — that governments, federal and state, of both major political parties have chosen to regulate those lobbyists who have the least influence over government policies, actions and administration. The most powerful lobbyists have deliberately been left untouched by regulation — a demonstration perhaps of the strength of their influence over government decision-making. However, the argument that *all* lobbying needs to be regulated is put powerfully in the Commonwealth preamble quoted above: 'Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials … The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty'. But the Code fails to deliver on its promise by being so narrowly focused as to cover only third-party lobbyists.

Who is missing?

Before referring to the categories of lobbyists excluded from scrutiny by the limited and very narrow definitions in the codes, I should note that at least some of those intended to be covered by the scheme have found ways of avoiding its reach. The Queensland Integrity Commissioner reported in his 2016–17 annual report that a slowdown in registration of lobbyists in that state appeared to have been the result of a change in the business model of many lobbyists, who were now offering their services as 'consultants' and providing little actual lobbying contact.[13]

The more important of those lobbyists who are excluded from the Commonwealth regulatory system are covered by the exemptions listed in the definition of lobbyists. These are:

1. non-profit organisations 'constituted to represent the interests of their members';[14]

11 Except, as noted earlier, in New South Wales.
12 Australian Government, *Lobbying Code of Conduct*, 1.3.
13 Queensland Integrity Commissioner, *Annual Report 2016–17*, p 11.
14 Australian Government, *Lobbying Code of Conduct*, 3.5.2.

2. people, companies or organisations and their employees 'lobbying on their own behalf rather than for a client'; and[15]

3. professionals such as doctors, lawyers or accountants or other service providers who make 'occasional' representations to government in a way that is 'incidental' to the provision of their professional or other services.

Non-profit organisations

The non-profit organisations 'constituted to represent the interests of their members' include such bodies as the:

- Property Council of Australia;
- Minerals Council of Australia;
- Business Council of Australia;
- Australian Medical Association;
- Medicines Australia;
- Pharmacy Guild of Australia;
- Australian Petroleum Production and Exploration Association;
- Australian Bankers Association;
- Financial Planners Association;
- Association of Superannuation Funds of Australia;
- Australian Institute of Company Directors;
- Australian Council of Trade Unions (ACTU); and
- organisations representing some religions.

These and other peak organisations make frequent representations to government.[16] Often, the government takes the initiative in consulting them to get their views because it considers them to be 'stakeholders'. In its last annual report, the Property Council of Australia said it spent more than $8 million on 'advocacy'.[17] The Minerals Council of Australia regards itself as a lobbyist and declares that it 'voluntarily adheres' to the Code ('where applicable').[18]

Lobbying can be extremely effective. John Menadue, who was Secretary of the Department of the Prime Minister and Cabinet in 1975–76 and of three other departments between 1980 and 1986, has written about the 'scourge of lobbyists' and provided 'three recent instances of how they have corrupted open and good government':

15 Ibid, 3.5.6.
16 For an extensive review, see Michael West, 'Corporate Lobbying a Billion Dollar Business', michaelwest.com.au, 6 November 2017.
17 Property Council of Australia, *Annual Financial Report*, 30 June 2018, p 14.
18 Minerals Council of Australia, *Code of Conduct: Working with Governments*.

- The Pharmaceutical Benefits Advisory Committee recommended that, for 143 of the most commonly prescribed medicines, doctors could double the drugs dispensed from a single prescription. This would have saved costs for both the taxpayer and the patient. After lobbying by the Australian Pharmacy Guild (APG), the Minister for Health, Greg Hunt, ran for cover. We now also know that the APG makes donations to One Nation in expectation of support in the Parliament.
- The National Health and Medical Research Council recommended that a range of 'alternative' clinical services no longer receive government subsidies through private health insurance. As a result, some subsidies were withdrawn. So the industry lobby group, Complementary Medicines Australia, went to work on Minister Hunt and he ordered that a review be made of the withdrawal of the subsidies.
- The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne Royal Commission) recommended that trailing commissions by mortgage brokers be banned from 2020. The government accepted the recommendation. So 16 000 well-organised and influential mortgage brokers went to work and Treasurer Frydenberg changed his mind. There was no sign that borrowers or the public were consulted in any way. The lobbyists won again.[19]

People and organisations lobbying on their own behalf

Menadue's last example, of the campaign against trailing commissions, illustrates this type of lobbying. According to a report published in the *Australian Financial Review*, the campaign was led by Mark Bouris, a friend of the Prime Minister, who personally lobbied both the Prime Minister and the Treasurer and also their departments. He was actively assisted by hundreds of mortgage brokers lobbying their own MPs.[20]

Most of the lobbying that falls under this heading, however, is for the benefit of single individuals or companies, or small groups. Those with access to ministers, their staff or officials (access is a separate issue, discussed below) are able to press particular concerns about government policies that affect them — beneficially or detrimentally. This is usually done in private. The public is normally not aware of the contacts being made or their subject matter and has no opportunity to voice an opinion about whatever is being proposed.

Many large corporations and firms employ in-house lobbyists. While these people may be employed part-time or even full-time to lobby governments, they are not covered by Australia's lobbying regulations.

Professionals such as doctors, lawyers and accountants

This type includes architects, engineers and town planners in relation to local government. These professions are exempt because the lobbying they may do is characterised as incidental to the provision of their professional services. Applying this definition, it is nevertheless true that many of these professionals should register as lobbyists but do not.

19 John Menadue, 'The Scourge of Lobbyists is Part of Our Political Malaise. An Update', *Pearls and Irritations*, 29 April 2019.
20 John Kehoe, 'How Mortgage Brokers Won', *Australian Financial Review*, 14 March 2019, p 6.

Some of the larger accountancy and legal firms include non-accountants and non-lawyers (and sometimes ex-politicians) among their number who are involved in 'government relations'. The larger firms win contracts to provide various services to government that fall outside their 'professional' fields. This often occurs because of the way the Public Service has been denuded. Some of these professional groups hold boardroom lunches attended by selected clients and to which politicians and senior public servants are invited. But the discussions that take place are unlikely to be restricted to specific legal or accountancy issues.

In the local government area, which is covered by the Queensland legislation, town planners, architects and engineers spend a great deal of time trying to persuade council officers and/or councillors that particular planned developments, or buildings, fall within planning schemes or that those schemes should be amended to permit particular developments. But these professional people understandably resist putting their names down as lobbyists — a black mark, it would seem.

A better approach

The three exemptions I have referred to above mean that perhaps five out of every six people involved in lobbying in Australia are not required to register as lobbyists. This is an estimate I made almost a decade ago, based on a comparison with the Canadian (national) system of regulating lobbying.[21] The Canadian approach is not to specify the groups that should be registered and indicate exemptions but, rather, to require everyone who spends 20 per cent or more of their time actually lobbying to register.

The definition of 'lobbyist' in Canada's national system is as follows:

> [A 'Lobbyist' includes a person] any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of:
>
> (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons;
>
> (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
>
> (iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
>
> (iv) the development or amendment of any policy or program of the Government of Canada; or
>
> (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada …[22]

21 For example, in evidence I gave to the Senate Finance and Public Administration References Committee inquiry into the operation of the Lobbying Code of Conduct and the Register of Lobbyists, 21 February 2012, p 19 of the Committee's report.
22 *Lobbying Act* 1985 (Canada) (RSC, 1985, c 44 (4th Supp)) s 7(1).

The Canadian *Lobbying Act* 1985 identifies three types of lobbyists:

Consultant Lobbyist

- A person who is hired to communicate on behalf of a client. This individual may be a professional lobbyist but could also be any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.

In-House Lobbyist (Corporations)

- A person who works for compensation in an entity that operates for profit.

In-House Lobbyist (Organizations)

- A person who works for compensation in a non-profit entity.[23]

In Australian terms, a 'consultant lobbyist' is what I have referred to in this article as a third-party (professional) lobbyist; an 'in-house lobbyist (corporations)' is a lobbyist falling within the second category of exemption that I have referred to — people, companies or organisations lobbying on their own behalf; an 'in-house lobbyist (organizations)' is a lobbyist within the first of those categories, involved with a non-profit organisation representing the interests of their members. (In Canada, this includes professional organisations, trade unions, religious groups and charitable organisations). Australia's third exemption — lawyers, accountants and other professionals — would fall within the 'in-house lobbyist (corporations)' category. Canada requires registration when a person, or group of people, is involved in lobbying as defined above for 20 per cent of the time of one person or its equivalent.

As at 1 July this year, the Canadian register had on its books 1068 consultant lobbyists (representing 3572 clients), 2080 in-house corporation lobbyists (from 412 firms) and 2963 in-house organisation lobbyists (from 581 organisations).[24] The ratio of lobbyists who would be required to register under the Australian schemes to those lobbyists who would not but are required to do so in Canada remains about the same as when I first measured it — one to five.

The revolving door

The Australian codes acknowledge in their rules one of the public criticisms made about lobbying — namely, that some politicians and senior public servants move seamlessly into lobbying shortly after they cease to hold office. To quote one such complaint:

> The ministerial code ostensibly prohibits ministers from joining the industries they were responsible for in their portfolio for 18 months. Yet when Ian Macfarlane retired from [the Commonwealth] Parliament to head the Queensland Resources Council, having been industry and science minister just before retirement, and formerly the resources minister, the Prime Minister's office found there was no conflict.
>
> This is the stuff of farce. Macfarlane clearly breached the wording and spirit of the code, but its application is subject to wholly partisan arbitration. There is also an enforceability issue here: the ministerial and lobbying codes contain no details on the punishment for breaches.

23 *Lobbying Act* 1985 (Canada); Office of the Commissioner of Lobbying of Canada <lobbycanada.gc.ca>.
24 Ibid, 'Active Lobbyists and Registrations by Type'.

> As a result, while a lobbyist may be deregistered, there are few theoretical consequences for a former minister. In practice, the proliferation of revolving doors suggest there are no consequences at all.[25]

Three issues are mentioned here: the revolving door, the regulator and enforcement. Once again I will draw on Canada's answers to these problems.

As mentioned above, the Australian codes set times ranging from 12 to 18 months as quarantine periods between when a minister or senior public servant leaves their position and when they may take up a position to lobby their former government. The adequacy of these provisions may be judged by comparing them with Canada, where there is a five-year ban on public office holders taking on such positions.

The responsibility for overseeing the regulatory system in Australia varies between regular public service departments (the Commonwealth) and (existing) independent authorities (as in New South Wales and Queensland) that have another primary function.

In few jurisdictions is any penalty other than removal from the lobbyists registry available. Canada has opted for a stand-alone statutory body (the Commissioner of Lobbying) that has a full range of investigative powers. Penalties of up to $50 000 and six months imprisonment can apply to breaches of reporting requirements.

The need for regulation

The NSW ICAC is currently conducting its second inquiry into lobbying in a decade. The first — Investigation into Corruption Risks Involved in Lobbying — reported in November 2010. It made 17 recommendations, but only five were adequately implemented by the state government. In its report ICAC said:

> The Commission found that lobbying attracts widespread community perceptions of corruption and involves a number of corruption risks …
>
> A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust. Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved, and, in the absence of any overriding public interest against disclosure, to know what occurred during the Lobbying Activity.
>
> The primary aim of any lobbying regulatory system must be to improve transparency and address other corruption risks in a manner that is practical and not unnecessarily onerous, and one that does not unduly interfere with legitimate access to government decision-makers.[26]

And it referred to the principles underlying its recommendations:

> Any regulatory system for lobbying should address the relevant corruption risks. To do so it must be based on the principles of transparency and accountability. These are the broad principles the Commission applied in reviewing the current lobbying regulatory system in NSW, and in determining what changes to recommend in order to address relevant corruption risks and the community's adverse perceptions of lobbying.[27]

25 George Rennie, 'Australia's Lobbying Laws are Inadequate, But Other Countries are Getting It Right', *The Conversation*, 21 June 2017.
26 ICAC, *Investigation into Corruption Risks Involved in Lobbying: ICAC Report*, November 2010, p 7.
27 Ibid, p 16.

I note in passing that, while the primary focus of ICAC is on investigating and preventing corruption, it is also required by its Act to promote the integrity and good repute of public administration and it has to have regard to the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.[28] That is, when making recommendations, it is not concerned only with corrupt conduct. One of its aims is good government. As part of its current inquiry, ICAC has included a discussion paper by two academics,[29] to which I will refer later.

The 2010 ICAC report also referenced (favourably) a study by the Organisation for Economic Cooperation and Development (OECD), of which Australia is a member, that resulted in the OECD's development of the *Principles for Transparency in Lobbying*.[30] The principles are divided into three sections:

1. Building an effective and fair framework for openness and access;
2. Enhancing transparency; and
3. Mechanisms for effective implementation, compliance and review.[31]

These are the OECD principles most relevant to this discussion:

> 1. *Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.*
>
> Public officials should preserve the benefits of the free flow of information and facilitate public engagement. Gaining balanced perspectives on issues leads to informed policy debate and formulation of effective policies. Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests. To foster citizens' trust in public decision making, public officials should promote fair and equitable representation of business and societal interests.
>
> 4. *Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.*
>
> Definitions of 'lobbying' and 'lobbyist' should be robust, comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes. In defining the scope of lobbying activities, it is necessary to balance the diversity of lobbying entities, their capacities and resources, with the measures to enhance transparency. Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.
>
> Definitions should also clearly specify the type of communications with public officials that are not considered 'lobbying' under the rules and guidelines. These include, for example, communication that is

28 *Independent Commission Against Corruption Act 1988* (NSW) ss 12, 13.

29 Dr Yee-Fui Ng and Professor Joo-Cheong Tham, 'Enhancing the Democratic Role of Direct Lobbying in New South Wales', NSW ICAC, Sydney, April 2019.

30 OECD, *Principles for Transparency and Integrity in Lobbying*, 2013, <https://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm>.

31 Ibid.

already on public record — such as formal presentations to legislative committees, public hearings and established consultation mechanisms.

5. *Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.*

   Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.

   Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity's participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

7. *Countries should foster a culture of integrity in public organisations and decision-making by providing clear rules and guidelines of conduct for public officials.*

   Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest. Decision-makers should set an example by their personal conduct in their relationship with lobbyists.

   Countries should consider establishing restrictions for public officials leaving office in the following situations: to prevent conflict of interest when seeking a new position, to inhibit the misuse of 'confidential information', and to avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.[32]

The current ICAC discussion paper says the New South Wales legislative and regulatory framework does not fully accord with the 10 principles.[33] The same may be said of all the Australian codes. They clearly need to be strengthened to begin approaching, let alone meet, these criteria.

Funding

In point 5 above there is a passing mention of 'funding'. This is an area that does not appear to have been addressed in the Australian lobbying codes, despite its obvious importance. This is where actual or potential corruption, or the perception that corruption could arise,

32 Ibid.
33 ICAC, *The Regulation of Lobbying, Access and Influence in NSW*, ICAC, Sydney, 2019, p 6.

should enter the discussion. ICAC refers to it in its two investigations of lobbying and raises several questions about funding in its latest discussion paper.[34] It is also mentioned in the discussion paper appended to the 2019 ICAC paper on lobbying (referred to above), where the authors point out that:

> The risks of corruption and misconduct are heightened when the financial interests of government officials (and those closely related to them) are implicated in the process of lobbying — these situations throw up the prospect of improper gain that defines corrupt conduct. They include situations when lobbyists or their clients make political contributions to the elected official or his or her party. These contributions do not necessarily need to be made proximate to a particular decision. Systemic practices of contributions can give rise to a form of corruption which the High Court has described as 'clientelism'. As the High Court puts it, clientelism 'arises from an office holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'. The regular contributions made to the major political parties by organisations that also lobby government are of particular concern here.
>
> Another situation implicating financial interests of government officials that risk undermining the integrity of direct lobbying results when parliamentarians are engaged in secondary employment (employment in addition to their parliamentary duties) involving lobbying. A further situation occurs when government officials have a reasonable prospect of being employed by lobbyists and/or their clients after leaving government (post-separation employment). As NSW ICAC has observed, '(t)wo corruption risks arise from former public officials becoming lobbyists: relationships they developed with other public officials may be used to gain an improper or corrupt advantage; and confidential information, to which they had access while public officials, may also be used to gain such an advantage'. These risks are particularly significant given the high proportion of lobbyists who are former government officials.
>
> These circumstances, where financial interests of government officials are implicated, may lead to bias, or at least an apprehension of bias, where decision-makers with a financial interest to them (or their party) may be seen to be more favourably predisposed to make decisions to benefit those lobbying.[35]

The High Court case to which the authors refer is *McCloy v New South Wales*[36] (*McCloy*). This concerned New South Wales legislation that banned developers from making electoral donations in that state. In upholding the ban, the majority justices (French CJ and Kiefel, Bell and Keane JJ), in their joint judgment, relied in part on the fact that since 1990 ICAC had made eight adverse reports concerning land development applications and quoted Commissioner Roden QC: 'A lot of money can depend on the success or failure of a lobbyist's representations to Government.'[37] That statement could be applied to lobbyists in other fields.

To date, however, the only limits that have been placed on lobbyists, in just a few jurisdictions, concern success fees. But there are risks that should be addressed concerning political donations and other gifts, whether by lobbyists or their clients. Public disclosure of the donations, often many months after the lobbying occurs, is insufficient. As the majority said in *McCloy*:

34 Ibid, pp 10–11.
35 Yee-Fui Ng and Joo-Cheong Tham, above n 29, pp 8–9 (footnotes omitted).
36 (2015) 257 CLR 178.
37 Ibid [51].

> Whilst provisions requiring disclosure of donations are no doubt important, they could not be said to be as effective as capping donations in achieving the anti-corruption purpose of the [New South Wales law].[38]

A related matter, discussed by Gageler J in *McCloy*, concerns the payment of money for access, where the only object is to gain access to a minister so that a presentation can be put to him or her. However, given that Australian governments raise money by selling, at fundraising dinners, such access to the most senior ministers and even the Prime Minister (as does the opposition, by selling access to members of the shadow cabinet and the Leader of the Opposition), it is difficult to imagine that this corruption risk will be addressed by any Australian government in the near future.

Nevertheless, the fact is that any donor of a significant sum to a major political party is a potential lobbyist on their own or someone else's behalf. But few, if any, will appear on any lobbyist register. This is an important and significant inadequacy of the present system.

Transparency

The Commonwealth Code says, 'there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve'. But, by 'transparently', the Commonwealth means only what is said in the second half of the sentence — that government representatives should know on whose behalf the lobbyist is operating.[39] This may be compared with these words from the preamble to the Canadian Lobbying Act: 'it is desirable that public office holders *and the public* be able to know who is engaged in lobbying activities'.[40]

The OECD principle states:

> 5. *Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.*
>
> Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny …
>
> … core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process.[41]

38 Ibid [61].
39 This was the government's response to a recommendation in a minority report of a Senate committee in 2008 'that coverage of the Code be expanded to embrace unions, industry associations and other businesses conducting their own lobbying activities'. It said in part, 'The purpose of the Register of Lobbyists is to allow Ministers and officials to establish whose interests a lobbyist represents when they seek to influence Government officials': government response to the Senate Standing Committee of Finance and Public Administration report, *Knock, Knock … Who's there? The Lobbying Code of Conduct*, January 2009, p 4.
40 Emphasis added.
41 OECD, above n 30.

Transparency demands no less. As ICAC says, ‘A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust’.[42] But nothing approaching this standard is provided in Australia.

Worse still, the systems nationally and in the states deliberately avoid regulating most of the lobbying that takes place — lobbying that is undoubtedly undertaken in order to influence government decision-making:

> The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.[43]

The problem in Australia is that, while the various codes correctly identify a public trust issue associated with lobbying that needs to be addressed, the codes seek to regulate only a limited number of lobbyists. For the codes’ objective to be achieved, it is essential that the behavior that is monitored and opened to public scrutiny is lobbying generally. As in Canada, the regulatory regime should cover all *lobbying*, not merely some small group of narrowly defined *lobbyists*. And, to be effective, it must be based in legislation that is enforceable (with penal provisions) by a body independent of government that has broad investigative powers.

42 ICAC, above n 26, p 7.
43 Australia, *Lobbying Code of Conduct*, Preamble.

Advice on the *Water Act 2007* (Cth): lessons from the South Australian Royal Commission

Justice David Mossop*

I hope to take you on a journey of discovery. It is essentially a journey which follows my own mental processes in working out what to make of the report of the South Australian Murray-Darling Basin Royal Commission. For some of you who paid particular attention to the issues covered by the report, this may well be old news and for that I apologise. I hope that there are some of you who, like me, did not follow in great detail the controversies surrounding the development of the Murray-Darling Basin Plan, for whom it will be an adventure.

Like any discussion of law or public policy these days, I have to start with a reference to Donald Trump. You will recall that, following the non-release of the Mueller report and the release of what has now been found to be the thoroughly misleading William Barr summary of the Mueller report, Donald Trump promoted the exclamation ‘No Collusion, No Obstruction’. That has been a remarkably effective political slogan with his well and truly rusted-on supporters.

Having mentioned Donald Trump, it is also necessary to mention an equally great public figure: the Wizard of Oz. You will recall, of course, that Dorothy’s journey to see the ‘wonderful Wizard of Oz’ ends when the Wizard is revealed to be a small middle-aged man hiding behind a curtain. That is in one sense a disappointment but also a revelation.

I will return to both Donald and the Wizard later in my remarks and establish their relevance to the present topic.

You may recall that, before the world entered the parallel universe of the current United States presidency, legal scholars were able to have concerned discussions about the rule of law in the context of the reaction of the United States government to the attacks in 2001 and what has been described as the ‘war on terror’ which followed. The role of lawyers in facilitating the excesses of executive conduct under the Bush presidency has been well documented.

In his book *Bad Advice: Bush’s Lawyers in the War on Terror*, Harold Bruff, a professor at the University of Colorado, has analysed the advice given to George W Bush in this period.[1] In the first part of the book Bruff articulates the general principles that should apply to lawyers advising the president. In the second half of the book he examines the legal advice given on particular issues that confronted President Bush during the course of his presidency. These included:

a. electronic surveillance by the National Security Agency without warrants;

b. indefinite detention of enemy combatants;

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1 H Bruff, *Bad Advice: Bush’s Lawyers in the War on Terror* (University Press of Kansas, 2009).

c. attempts to avoid the strictures of the Geneva conventions;

d. the use of military commission rather than federal courts or courts martial to try persons accused of terrorism;

e. the use of ‘enhanced interrogation techniques’ (torture) to prevent terrorist attacks; and

f. the relationship between legal advice that pushed the envelope and the abuses that occurred at Abu Ghraib prison.

No doubt you will recall that these issues were significant ones during the course of the Bush presidency and significant for the assessment of the merit of his presidency in retrospect.

Bruff’s criticism was that in each case the legal advice was developed in secret by a small group of lawyers who had elite credentials but lacked experience of the world and the law. They did not consult others to make up for their lack of experience. When lawyers outside the small group sought to provide input or comment, the inside lawyers ignored it or treated it as of little value. The opinions that were drafted adopted an extreme view of executive power without recognising or giving due regard to the arguments to the contrary. The lawyers failed to give proper careful consideration to the possible consequences of the advice.

Among the cast of characters was John Yoo, who was a lawyer at the Office of Legal Counsel (OLC) between 2001 and 2003. It was during that period that the major legal initiatives in the war on terrorism had been taken.[2] Yoo was significant in the drafting of a number of the OLC opinions. It gives you some indication of his possible approach to executive power that he was former law clerk for Justice Clarence Thomas. He is described by Bruff as a person with ‘a very high level of confidence in the views he might reach’[3] with a theory of executive power which ‘differs, at times sharply, from the conventional academic wisdom’ and with a tendency to ‘oversimplify or distort positions with which he disagrees’.[4]

The opinions which came out of the OLC during this period were music to the ears of the vice president and those in the executive branch who had political goals dependent upon adoption of a very broad understanding of executive power.

‘The system’ ultimately reined in those opinions, some of them being formally abandoned by the new leadership of the OLC. The subject matter of others was eventually subject to rulings by federal courts.

What is significant about the opinions is that they illustrate the influence of legal opinions or advice in the period prior to the formal means of accountability catching up with them. Such opinions shape and provide a veneer of legitimacy to executive action at the critical time. They guide action in real time rather than reviewing it in retrospect. Their influence is very significant because, with an executive government rhetorically committed to the rule of

2 Ibid 122.
3 Ibid 106.
4 Ibid.

law, executive action is unlikely to occur if it is identified at the time as likely to go beyond available legal authority. On the other hand, legal advice that conduct is lawful or an opinion that it is lawful will provide sufficient political cover for the executive to proceed in the manner consistent with its political goals. It allows the executive to maintain its rhetorical commitment to the rule of law while allowing it to operate at the margins of or beyond legal authority.

Bruff recognises that 'legal advisers can confer legitimacy on political actions. For the advice to have legitimating effect, however, it needs to be provided from a stance of professional detachment, not sycophancy'.[5] He emphasises the significance of the professional responsibility of lawyers advising the presidency. He identifies that, after the John Yoo period, in 2006 a number of former officers within the OLC formulated and published a number of principles to guide lawyers in that office. Among those principles were the following:

> (a) When providing legal advice to guide contemplated executive action the OLC should provide an honest appraisal of the applicable law even if it will constrain the executive's pursuit of desired policies. The advocacy model of lawyers-crafting plausible legal arguments to support the client's desired action inadequately promotes the president's constitutional obligation to ensure that the legality of executive action.
>
> (b) Advice should disclose and candidly and fairly address the full range of legal sources and substantial arguments on all sides of the question.
>
> (c) The advice should counsel compliance with the law and the insufficiency of the advocacy model applied with special force where advice (or conduct based upon it) was unlikely to be reviewed by the courts.
>
> (d) The responsibility extended to facilitating executive action. Therefore, where possible the advice should recommend lawful alternatives to legally impermissible executive branch proposals.

Having read Bruff's book, I was very interested to hear of the strong criticism made by the South Australian Royal Commission of what was described as either an advice or an opinion from the Australian Government Solicitor (AGS). For convenience, and not necessarily accurately, I will refer to it as the 2010 Advice. Although, in political terms, it was an issue of ancient history, I was prompted by the report of the Royal Commission to ask: Was this criticism justified? Why was this advice the subject of such open and public scrutiny? Were there lessons, akin to those provided in Harold Bruff's book, that could be learned from the criticism of the advice?

My researches have indicated, unfortunately, that the lessons to be learned are mainly about politics and less about law. Nevertheless, I do have some suggestions that may be of utility, particularly in cases where legal advice is obtained with the intention of releasing it publicly.

The Royal Commission

In January 2018, the South Australian government established a Royal Commission to examine a number of matters relating to the terms of and compliance with the Basin Plan prepared under the *Water Act 2007* (Cth) and whether it was likely to achieve the objects and purposes of the Act.[6] It was established in response to a 2017 ABC *Four Corners*

5 Ibid 14.

6 South Australia, Murray-Darling Basin Royal Commission, *Murray-Darling Basin Royal Commission Report* (2018) 5–7.

investigation which uncovered that irrigators (notably in the report, New South Wales cotton farmers) were taking billions of litres of water which had been earmarked for the environment.[7] A subsequent report found that there was a lack of transparency surrounding water management and poor levels of enforcement of the plan generally in New South Wales and Queensland.[8]

The Royal Commissioner was Bret Walker SC. He reported on 29 January 2019. The report makes for gloomy reading. The Commissioner recorded his 'deep pessimism whether the objects and purposes of the Act and Plan will be realized. There are many ways in which a study of the grand national endeavour in question leaves a decidedly sour taste'.[9]

One of the central issues, if not the central issue, in contention relating to the management of the Basin is the amount of water taken out of the system for consumptive purposes. In the *Water Act 2007* this is determined by the setting in the Basin Plan of long-term average sustainable diversion limits, which must in turn reflect an 'environmentally sustainable level of take' (ESLT). That is a defined term.[10] It is the level of water that can be taken from a water resource which, if exceeded, would compromise:

(a) key environment assets of the water resource; or

(b) key ecosystem functions of the water resource; or

(c) the productive base of the water resource; or

(d) key environmental outcomes for the water resource.

Prominent in the Royal Commission's report is the conclusion that:

> The [sustainable diversion limit], as set in 2012, did not reflect an [ESLT] and was thereby unlawful. The passage of time has not cured that illegality, nor has any adjustment or process that has occurred in the interim. Chapter 7 demonstrates that what was unlawful then remains unlawful now.
>
> Statutory authorities, such as the MDBA [Murray-Darling Basin Authority], charged with legislative functions and a huge expenditure of public money, should not disregard the law. The MDBA's expression of confidence to this commission that the 2012 Basin Plan is consistent with the Water Act and that they 'consider it more useful to focus on the implementation of the current arrangements' is over-confident, and undesirably complacent.'[11]

A significant part of the report is devoted to an analysis of the Water Act. It includes an analysis of the 2010 Advice, saying:

> The [2010 Advice] contains a number of dubious propositions about the meaning and effect of particular provisions in the Water Act and relevant international conventions, and an unlikely and incorrect conclusion about the role of economic and social considerations in determining the [ESLT].

7 Australian Broadcasting Corporation, 'Pumped', *Four Corners*, 24 July 2017 (Linton Besser).
8 Murray-Darling Basin Authority, 'Basin Plan Evaluation 2017' (MDBA Publication No 52/17, 2017.)
9 Murray-Darling Basin Royal Commission, above n 6, 11.
10 *Water Act 2007* (Cth) s 4.
11 Murray-Darling Basin Royal Commission, above n 6, 225.

Not surprisingly, the Commissioner explains the basis for that opinion in some detail in his report, documenting a paragraph-by-paragraph criticism of the content of the 2010 Advice.

Context for the 2010 Advice

The 2010 Advice was prepared at a time of heated debate and concerted political manoeuvring in relation to the preparation of the Basin Plan under the Water Act and the proper determination of the basis for the ESLT — the amount of water that could be extracted from the river system for consumptive use. Public discussion of the issue took place by reference to the extent to which existing consumptive use would need to be reduced. In 2010 the Murray-Darling Basin Authority (MDBA) suggested a reduction in consumptive use of between 3000 and 4000 GL.[12] The proposal was met by an adverse reaction in areas that would be affected by a reduction in the amount of water available for consumptive uses. As a result of a substantial change in government position in 2010, in relation to which the 2010 Advice played a part, an ESLT was set requiring only a reduction of 2750 GL in consumptive uses.[13]

The 2010 Advice comprises a document dated 25 October 2010. It is entitled 'The Role of Social and Economic Factors in the Basin Plan'. It was produced in a political context in which, because of the protests occurring about the proposed Basin Plan, the Minister felt obliged to respond to in a politically decisive way.

When requesting legal advice from AGS, the Minister made it clear that he intended to release that advice publicly.[14] He made it clear that, whatever the advice said, he would table it the same day that it was received. This was in fact done.

The 2010 Advice was controversial in that, as deployed by the Minister, it was used to legitimise a change in approach to the preparation of the Basin Plan that would permit a greater quantity of water than had previously been proposed to be extracted from the Murray–Darling Basin system.

The Minister's statement

Having received the 2010 Advice, on 25 October 2010 at 3.20 pm, the Minister made a statement to Parliament. He referred to the MDBA having delivered its guides to the draft plan 18 days previously. He recorded that, following the release of the plan, 'there has been a wave of strong reactions across the country'.[15] He said that if the political consensus which emerged following the Water Act was allowed to collapse then there was the possibility that the final Basin Plan would be disallowed. Relevant to the 2010 Advice he then said:

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12 Ibid 170; see also Murray-Darling Basin Authority, 'Guide to the Proposed Basin Plan: Volume 2 — Technical Background' (MDBA Publication No 61/10, 2010) (RCE 2) 36.

13 Murray-Darling Basin Royal Commission, above n 6, 187.

14 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *A Balancing Act: Provisions of the Water Act 2007* (2011) 68.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 October 2010, 1305 (Tony Burke, Minister for Sustainability, Environment, Water, Population and Communities).

> Part of the problem in maintaining consensus on these issues has been uncertainty in the community and around the parliament about whether the Water Act does in fact demand the plan adopt a triple bottom line approach of taking into account environmental, social and economic impacts of reform. The MDBA has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and environmental factors. For this reason I sought legal advice from the Australian Government Solicitor to determine whether the interpretations referred to publicly by the MDBA matched the requirements of the Act. I also stated here in the House that following receipt of the advice I would make it public. This morning I received the advice. It was made available to the opposition, Greens and Independents earlier today and I now table the advice. Broadly, the advice outlines that the Water Act:
>
> - gives effect to relevant international agreements,
> - provides for the establishment of environmentally sustainable limits on the quantities of water that may be taken from basin water resources,
> - provides for the use of the basin water resources in a way that optimises economic, social and environmental outcomes,
> - improves water security for all uses, and
> - subject to the environmentally sustainable limits, maximises the net economic returns to the Australian community.
>
> Much has been made of the international agreements which underpinned the Water Act and it has been suggested that these agreements prevent socioeconomic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.
>
> The Act specifically states that in giving effect to those agreements, the plan should promote the use and management of the basin water resources in a way that optimises economic, social and environmental outcomes. It is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account. I do not offer the advice as a criticism of the MDBA. What is important now is how the MDBA now responds to this legal advice.[16]

Indicating the difficulties created by the change of position, following the ministerial release of the 2010 Advice the Chairman of the MDBA stated that the MDBA would 'clarify with the AGS any divergence between that advice in the position previously advised'.[17] The Chairman subsequently resigned and a former Labor minister from New South Wales was appointed to that position. The Chief Executive also subsequently resigned for 'personal reasons'.[18]

The Senate report

In February 2011, the Senate referred the provisions of the Water Act to the Senate Legal and Constitutional Affairs References Committee for an inquiry and report. The committee reported in June 2011. The majority report was by coalition members. A minority report was written by the Labor Party members. A separate dissenting report was made by Senator Hanson-Young and some additional comments were provided by Senator Xenophon.

The committee recommended the release of legal advice provided by AGS to the MDBA in the period following the Minister's statement to the Parliament. It recommended the

16 Ibid.
17 Senate Legal and Constitutional Affairs References Committee, above n 14, 29; see also Murray-Darling Basin Authority, 'MDBA Welcomes Minister's Statement' (Media Release, 26 October 2010).
18 Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 30.

appointment of an independent panel of legal experts to review the advice on the Water Act and subsequent amendment of the Water Act in light of that advice. It recommended strengthening the constitutional validity of the Act. The report outlines, in typical Senate committee fashion, the various contentions put to it in the submissions. In particular, it provides extracts of the opinions about the proper interpretation of the Act provided in the various submissions.[19] In a manner which is notable in hindsight, the dissenting report of the Labor members refers to the 2010 Advice as 'Summary Advice' or 'summary legal advice'.[20]

A misconception and some speculation

Quite clearly the 2010 Advice played a prominent role in the government's pivot. It was not all of the advice given by AGS. The Commonwealth made a conscious decision to not release any other advice by AGS before or after the 2010 Advice.

The first challenge was to get a copy of the advice. It had been made public and although not readily available it was found on the Parliament House website.[21] That the document was that which had been tabled in Parliament was subsequently confirmed by the Parliamentary Records Office. The fact that the 2010 Advice was not readily publicly available has a significant consequence that public understanding of its content and significance is defined by the other documents and reports which make reference to it rather than by the terms of the document itself.

Having obtained a copy of the advice I discovered, to my dismay, that the two authors of the advice were people I know and whose reputations were impeccable and expertise undoubted. They were certainly not outliers such as John Yoo. That only stimulated me further to work out what was going on.

The other thing that was immediately apparent, and inconsistent with how the 2010 Advice had been described in the Senate report and the Royal Commission report, was that the advice was not in a form in which any legal advice or legal opinion would usually be provided. While it did include the authors' names at the end of it, and the AGS logo was prominent on the first page, it was not addressed to anyone, did not identify any particular question upon which advice or opinion was sought and was more in the form of a discussion paper that might have been produced by the legal policy section of a government department.

That impression was only reinforced by the structure and content of the document. I must say that, consistently with the policy paper nature of the document, its structure does not involve any clear line of reasoning. It makes reference to the general framework provided by the objects, purposes and specific requirements of the Water Act. It refers to the way in which the Act implements international agreements and how that includes some references to economic matters. It contends for the proposition that neither the *Convention on Biological Diversity* nor the *Ramsar Convention on Wetlands of International Importance* requires economic and social considerations to be ignored. (I note that this is a rather carefully crafted

19 See in particular ibid 41.
20 Ibid 69.
21 'The Role of Social and Economic Factors in the Basin Plan' (AGS, 25 October 2010) <http://www.aph.gov.au/DocumentStore.ashx?id=dd6cb9d1-a591-48de-97aa-ec31cf91e259>.

negative proposition.) Of critical importance to the political controversy that was raging, it says something about the setting of sustainable diversion limits. On that point it contains four paragraphs. It specifically makes reference to the thorniest issue of how the ESLT is determined. It makes reference to some of the statutory provisions relevant to determining whether environmental assets are ‘key’ for the purposes of the definition of ESLT. It must be pointed out that this is only one aspect of the relevant definition. Nevertheless, having set out some of the general provisions that might influence how those are determined, the 2010 Advice continues:

> However, the MDBA and the Minister are also required to give effect to the other objects, where possible, within the specific requirements of the Water Act, and where relevant to the provision at hand. Another object relevant to determining which environmental assets are key is the object of optimising economic, social and environmental outcomes while giving effect to the relevant international agreements (s 3(c)). While the specific obligations such as those under s 21 still apply, this objective affects the scope of what the MDBA and the Minister could identify as key environmental assets. For example, the MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects.’[22]

It is only this last paragraph and, most significantly, the last nine words which contain any opinion of substance as to the operation of the Act. That is a conclusion which is the subject of significant criticism in Chapter 3 of the Royal Commission’s report.

Consistent with its nature as a legal policy paper, there is no explanation of the reasons for this conclusion having regard to the text and structure of the legislation and no consideration of any contrary arguments. For a document which has generated so much controversy, the most surprising feature of the 2010 Advice is its lack of content. Notwithstanding what the Minister said in Parliament, so far as the document itself is concerned, there was very little in the 2010 Advice for the MDBA to respond to.

It is at this point, in the absence of further explanation, I must speculate. There are several possible reasons why the document was prepared in the form that it is. It may be that the lawyers were, in fact, never asked to prepare advice or an opinion at all and were only asked to prepare a paper outlining all the ways in which social and economic factors might be taken into account. Another one is that the lawyers involved, either because of the nature of the request or because they were told that it would be made public, prepared the document in a manner that made it clear that this was not advice or an opinion in any ordinary sense. While without proper evidence about the reasons for its form it is only possible to speculate, the form of the document is likely to be of significance. It is a significance which, because of the manner in which the document was publicly marketed by the Minister, has not been recognised or emphasised. However, when recognised, the form of the document gives considerably more scope to defend criticism of what was said, or not said, in the document.

Now is the point to return to the Wizard of Oz. Like Dorothy in the Wizard of Oz, who pulls back the curtain and finds a little man rather than the Wizard of Oz, I have found that what has been referred to elsewhere in a manner which would indicate it is a significant piece of legal work looks and feels much more like a legal policy paper with little substantive content. It contains one paragraph of substantive content and very little reasoning. Like Dorothy, I

22 Ibid 9–10.

arrived at a destination somewhat different from the one that I had expected when I set out on my journey. Having set out to discover something as significant as John Yoo's 'torture memorandum',[23] I have found instead the legal equivalent of a middle-aged man hiding behind the curtain.

What are the lessons that can be learned?

Nevertheless, there are lessons that can be learned. The lessons that can be learned are in some ways similar to and in some ways different from those identified by Harold Bruff. In the present case, the issue is how publicly disclosed legal advice gets used as a political tool to assist in performing a political manoeuvre in circumstances where there was at least a rhetorical commitment to the rule of law. It is the immediate public disclosure and use of the advice which distinguishes the circumstances from those under President Bush.

I suggest the following lessons which relate to both the circumstances of the 2010 Advice and more generally in circumstances where lawyers asked to provide advice that is to be publicly released.

Treat requests for public opinions with care

It is not possible to say to a lawyer, 'Do not let the client release your advice or opinion publicly'. Obviously, the clients can do with your advice whatever they want. However, proceed cautiously when the client discloses in advance an intention to release your advice or opinion to the public. Remember that, in the circumstances, the client is trading on your reputation, not their reputation. The client is using your reputation to bolster their agenda. That is particularly obvious in the case of the 2010 Advice, which, notwithstanding that it was not advice in any ordinary sense, prominently displayed the AGS logo and identified its very credible authors. Unless you take particular care, there is a risk that your reputation will suffer as a result of the public release and political use of your advice or opinion. Associated with this is the fact that it is the client who will determine how your advice or opinion will be deployed and how it will be described. In the present case, the 2010 Advice was used to justify a political pivot away from what the Royal Commission found to be the correct interpretation of the Act. Yet the 2010 Advice really had very little to say about that issue. But that is how it was used. Notwithstanding its content, it became emblematic of a much-criticised approach to the operation of the Act.

That brings us back, as I promised, to President Trump's 'No Collusion, No Obstruction' slogan. The use of that slogan was a very effective political technique for the purposes of his supporters but bore little real relationship to the contents of the Mueller report. It illustrates the potential for there to be a difference between the content of a document and the political use of the document. Unless care is taken with documents containing complex legal concepts, political messaging can readily trump reality. That is a risk which manifested itself in the present case.

23 Bruff, above n 1, 239–47.

The potential risks of the public release of an advice or opinion can be reduced. My suggestions may well be matters of good practice in any event, but they are worth emphasising in the context of advices or opinions that are at risk of being publicly released.

Identify your instructions

First, the risks for the lawyer will be reduced if the lawyer specifically identifies instructions given by the client. This has the effect of defining and confining the scope of the task assigned to the lawyer. It provides a benchmark against which the lawyer's advice can be judged. It is notable that the 2010 Advice contained no such statement. It did not identify that it was advice. It did not identify that it had been requested by anybody for any particular purpose. It did not identify the question that it was answering. If it was to be treated simply as a legal discussion paper it did not, other than by its heading, identify its scope or why it was prepared. These features meant that there was a much greater degree of flexibility at a political level to define its character. It meant that the reputation of the authors and their organisation was more at risk from the political characterisation given to and use of the document that they prepared.

Steel man, not straw

Secondly, if preparing an advice or an opinion that is to be released to the public, make sure that the arguments to the contrary of the conclusion ultimately reached are articulated in their best form and explicitly addressed. In other words, do not ignore contrary arguments or set up a straw man. Identify the best arguments contrary to the conclusion ultimately reached — a steel man — and grapple with that. By fully addressing opposing arguments, a lawyer will increase the intellectual credibility of the advice or opinion and this will tend to mitigate the damage that may be caused by the political use of it.

Recognise uncertainty

Thirdly, addressing the opposing arguments will often mean that there is uncertainty as to the legal position. Usually in hard cases there are good arguments on both sides. Those should be recognised and the extent of uncertainty identified. That would be the norm for legal advice that is not to be publicly released, but it should also be no different if the advice is to be publicly released. The client will hate this.

Final points

I have two final points, both of which are general ones. They are points which are likely to be well known to those who routinely advise governments.

First, in cases where the advice will be to the executive government, particular care needs to be taken in relation to advice where the consequent executive action is unlikely to be readily reviewed. That is a situation which did not apply to the 2010 Advice, as it was a matter of public knowledge and discussion and there were parties readily able to challenge the government's course of conduct. The fact that there have not been such challenges is a comment on the remarkably benign state of litigation in Australia when compared, for example, to the United States. My point is that the burden of responsibility upon a lawyer advising the executive

government is all the greater when the lawyer knows that the circumstances are such that the executive action is unlikely to be able to be readily challenged in court. Lawyers advising the executive government have, in this regard, a greater burden than trial judges, who are able to make decisions in the knowledge that if they get it wrong then things can be fixed by the Court of Appeal. Much of the advice on the interpretation of statutes in a government context is, in a practical sense, never likely to be the subject of curial review. That is a fact which increases the burden of professional responsibility upon government lawyers.

Secondly, the experience in the United States demonstrates the importance and value of institutional continuity in government legal advice. Mr Yoo was only at the OLC for three years, but it is clear that the institutional constraints upon aberrant advice were insufficient. Institutional continuity and the professional culture of government solicitors is one of the important factors in constraining the political arms of government that, when under pressure, may have only a rhetorical commitment to the rule of law.

The '*Blue Sky* effect': a repatriation of judicial review grounds or a search for flexibility?

Simon Young*

At the heart of the High Court's 1998 decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[1] (*Blue Sky*), concerning a trans-Tasman stoush over Australian broadcasting standards, is a strong emphasis on specific legislative intention and context. The Court was focused there on the consequences of specific procedural failure. Yet it might be argued that this decision effectively 'picked a winner' (or at least placed a hefty bet) in the lingering contests over the true source and shape of administrative legality, and hence firmly set in motion a conceptual shift away from external, pre-mixed standards in the ongoing refinement of various judicial review principles. At the very least it can be acknowledged that *Blue Sky* exerted a strong 'centripetal force' in Australian administrative law — drawing it inwards towards statutory specifics and statutory intention.[2]

In this article I plan to engage in what might rightly be called 'top-down' reasoning — a term used by some fine international and Australian jurists[3] — in order to re-examine the '*Blue Sky* effect': its permeation through Australian administrative law, its continuing significance and its place in the broader dynamics of Australian public law. 'Top-down' thinking comes with some risk, as would be noted by that statistician who drowned in a lake with an average depth of two feet. However, it is hard for long-term academics to avoid the temptation, given our long attention to quite focused fields of study and the fact that we have the luxury of being annoyingly impractical. Moreover, my top-down thinking has been prompted by what would appear to be some top-down thinking from the top in the recent Australian jurisprudence.

Ultimately, I would like to redirect the wandering but tenacious debate between the 'statutor-ist' and 'common law-ist' views of judicial review. This debate manifested itself most prominently in historical arguments between 'ultra vires theorists' (focused on statutory boundaries) and 'common law theorists' (focused on deeper conceptual legal roots),[4] and (of course) in the formative Australian debate between Justices Mason and Brennan in the 1980s.[5] As will be seen, the latter, at least, would seem to have been settled as a theoretically unproductive draw. Yet the underlying patterns in the Australian legal development have a very real and ongoing practical significance. To jump forward in the analysis, does a Federal Court judge today still reach for the pre-mixed categories of jurisdictional error enshrined in *Craig v South Australia*[6] or to the more internal, statutory-intention focused formulation of the

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1 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

2 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 169.

3 See eg Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 303 (and the earlier commentators cited there).

4 See further Alan Robertson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 40; D Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39.

5 See particularly *Kioa v West* (1985) 159 CLR 550 (discussed below).

6 (1995) 184 CLR 163.

concept? Does the state Supreme Court judge still reach for *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[7] (*Wednesbury*) to explain and apply the standard of 'unreasonableness' or does that standard now come from specific statutory context? Is there still anything resembling a single standard of bias or bad faith or fraud? It appears that there has been an incremental 'repatriation' of judicial review grounds — so carefully settled in by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) framework — such that any remaining freestanding administrative law standards are perhaps now to be carefully calibrated to specific statutory context.

It is certainly not proposed here that we return to the old debates between the 'statutor-ists' and the 'common law-ists'. In my view that would in fact distract us from a proper analysis of the important practical evolutions noted above and of other more complex practical dilemmas in modern Australian judicial review. The common law-ists have had visible defeats, and the statutory-ists must perhaps concede that their theory is unsettled by the fact that there have been many drivers for the courts' excavation of statutory intentions and, indeed, conspicuous diversions from that course. I believe the old debate is best left as a dignified draw. My contention is that it is more productive to recognise these 'repatriations' and the closer statutory focus (more generally) as part of a bigger dynamic — namely, a two-part search for flexibility in judicial review principles in response to broad changes in regulatory context, legislative drafting, public expectations and litigation strategy. This search for flexibility certainly builds agility, but it is also somewhat confounding at times — and would appear to come at a cost.

The '*Blue Sky* effect'

In *Blue Sky*,[8] the High Court formally rejected the old (sometimes pre-emptive) labelling of procedural failures as 'mandatory' or 'directory'. According to McHugh, Gummow, Kirby and Hayne JJ, the old classifications had drawn attention away from the real task of determining whether an act done in breach of a relevant legislative provision was valid:

> [The] classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning.[9]

The Court declared that 'a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.[10] The legislative purpose in this regard was to be broadly ascertained by reference to factors such as statutory language, subject matter and the consequences of invalidity.[11]

This decision was thematically important in the evolution of Australian administrative law. The Court's strong focus on the notion of 'essential preconditions' helped to shape the gradually emerging touchstone for jurisdictional error and, indeed, this approach to identifying procedural preconditions shadowed the courts' simultaneous tussles with the

7 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
8 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
9 Ibid 390.
10 Ibid.
11 Ibid 389 (McHugh, Gummow, Kirby and Hayne JJ).

identification of 'jurisdictional facts'.[12] More broadly, as alluded to above, *Blue Sky* provided momentum and prominence to a strengthening explicit focus on parliamentary intention in the Australian principles and reflected a broader commitment to clear away older generic ideas and standards considered to be somewhat redundant. This trend can be readily (but awkwardly) traced through the recent history of 'jurisdictional error', and its early footprint is, of course, conspicuous in formative natural justice cases. Yet close examination reveals the broader reach of this '*Blue Sky* effect' across a range of judicial review principles. There is evidence of an ongoing repatriation of the outlying judicial review grounds — in a sense returning the remaining freestanding standards of administrative legality to the corral of grounds that have always been calibrated to statutory context. The most prominent example is the ground of 'unreasonableness'; however, similar thinking can be found in the context of 'bias', 'bad faith' and 'fraud'. And this lens allows us to spot some earlier examples of actual or attempted repatriation in the context of the principles relating to delegation and behest.

Jurisdictional error

The *Blue Sky* attention to the gravity of specific procedural errors, and consequent distinction between unlawfulness and invalidity, saw that case having a natural and important influence on the principles of jurisdictional error — which, of course, rests on a similarly poised assessment of the seriousness of error (more generally).[13] Unsurprisingly, the emerging focus on legislative intent — and, indeed, some lingering tension with older methodologies — is clearly on display in the recent history of 'jurisdictional error'.

Plaintiff S157/2002 v Commonwealth[14] (*Plaintiff S157*) ushered in the modern thinking on the nature and function of jurisdictional error in Australia. Most clearly for present purposes, the High Court re-examined the old 'pre-mixed' formula in *The King v Hickman; Ex parte Fox and Clinton*[15] (*Hickman*) for the handling of privative clauses and determined (or perhaps reaffirmed) that *Hickman* was essentially nothing more than an aid to construction; a tool that might assist the court in reconciling provisions which both define powers and seemingly then free them from restriction.[16] The constitutional backdrop was significant in the *Plaintiff S157* reasoning, but at a more basic level so, too, was the concern to dismantle external standards that might distract from an examination of specific statutory intent.

Beyond this relegation of *Hickman*, the reasoning of the judges in *Plaintiff S157* reflected some clear convergence of the search for 'essential' limitations in the specific statute and the notion of jurisdictional error.[17] Yet it was at this point incomplete given the lingering presence of external tools for the identification of jurisdictional error; namely, the pre-mixed formulas

12 See eg *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
13 See generally in this regard *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.
14 (2003) 211 CLR 476.
15 (1945) 70 CLR 598.
16 (2003) 211 CLR 476, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
17 See ibid 504–7 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); cf the implications of Gleeson CJ's comments at 486, 489–90, 493. See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

from *Craig v South Australia*[18] (*Craig*) and presumptions from other precedents about the status of certain types of error. The joint majority in *Plaintiff S157*, having pressed the idea of a 'reconciliation' of provisions to determine whether some failure constitutes a jurisdictional error (thus outside the privative clause's protection), ultimately quickly classified a breach of natural justice as such an error simply based on earlier precedent.[19] Chief Justice Gleeson proceeded further on the path — apparently resisting presumptions and remaining focused on an internal assessment as he emphasised that the status of a natural justice breach depended on a construction of the statute as a whole (albeit that here it did prove to be a breach of an indispensable condition).[20] The Court in the critical state sequel to *Plaintiff S157* — namely, *Kirk v Industrial Relations Commission (NSW)*[21] — also appeared perhaps to waver between the internal (statute-specific) and external (pre-mixed) conceptualisations of jurisdictional error. The joint majority emphasised that there was no 'bright line test' and that the *Craig* formulas were not a rigid taxonomy but only examples, yet it ultimately did identify jurisdictional errors in the facts of the case with close reference to *Craig* categories.[22]

In recent decisions the 'internal' approach (based on the notion of essential 'preconditions' and 'conditions' under the particular statute) has gained some ascendancy, notably in the decision of *Hossain v Minister for Immigration and Border Protection*.[23] Another variant of the maturing 'statutory intention' focus, in the broader context of privative clauses, is the prominent recent confirmation in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[24] that permissible ouster (for example, of certioriari for 'error of law on the face of the record') need not be by way of an express privative clause but can be drawn from the Act as a whole (text, context and purpose).[25]

Unreasonableness

Perhaps the most prominent of the 'repatriations' of Australian principle explored in this article (albeit not very prominent) is found in the context of 'unreasonableness'. The 2013 decision of *Minister for Immigration and Citizenship v Li*[26] (*Li*) concerned a refusal by the Migration Review Tribunal (MRT) to exercise its power to adjourn review proceedings[27] pending a second skills assessment of the visa applicant by the relevant assessing authority (which was itself delayed by internal review). A straight natural justice challenge was difficult in this context owing to the presence of an 'exhaustive statement' provision as regards the relevant procedural obligations.[28] Some carefully argued attempts to evade this problem were raised (relying on the wording of aspirational provisions often found in tribunal statutes), but Hayne, Kiefel and Bell JJ ultimately focused on the ground of unreasonableness (which they

18 (1995) 184 CLR 163.
19 (2003) 211 CLR 476, 506–8, cf 496.
20 Ibid 490–1, 494.
21 (2010) 239 CLR 531.
22 Ibid 573–5 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
23 (2018) 359 ALR 1, esp [23]–[24] (Kiefel CJ; Gageler and Keane JJ).
24 (2018) 351 ALR 225.
25 Ibid [34] and the analysis following.
26 (2013) 249 CLR 332.
27 *Migration Act 1958* (Cth) s 363(1)(b).
28 Ibid s 357A. Note, however, the approach of French CJ at [18]ff, relying on and perhaps extending the reasoning in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

considered was not displaced by the statutory terms).[29] Importantly, close analysis reveals that their Honours seemed eager to keep this ground of review close to statutory context.[30] Most directly, their Honours stated at one point that '[the] legal standard of reasonableness must be the standard indicated by the true construction of the statute'.[31] They emphasised the formulation of the ground from *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* ('no sensible authority acting with due appreciation of its responsibilities' would have so decided the matter),[32] which arguably itself contains some cross-reference to statutory context. And the focus on statutory context inevitably led Hayne, Kiefel and Bell JJ to the traditional criticism that the *Wednesbury* formulation (a decision must be so unreasonable that no reasonable person could have made it) was perhaps guilty of some 'circularity and vagueness'.[33] Their Honours emphasised that unreasonableness might be inferred from the facts and the matters falling for consideration in the exercise of a particular power: inferred where the decision viewed in that context 'lacks an evident and intelligible justification'.[34]

The idea that the actual standard of 'unreasonableness' to be applied is calibrated to statutory context[35] is potentially a significant advance on the more obvious (and more conventional) point that the assessment of 'reasonableness' will take account of statutory context. Conceivably this was prompted in part by this use of the ground in a space generally occupied by natural justice — a ground very much calibrated to statutory context. Or perhaps this additional call to statute was a natural extension of a growing (on trend[36]) emphasis on the idea that 'the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'.[37] But is this extension necessary? It appears possible that the presumed limitation intended by the legislature might simply be the standard established (albeit somewhat opaquely) by the established 'unreasonableness' cases.

The recent decision of *Minister for Immigration and Border Protection v SZVFW* [38] concerned a *Li*-style challenge to the Refugee Review Tribunal's lack of action to facilitate the appearance of the protection visa applicant. The High Court, albeit focused particularly on the nature of the appellate court's role in such a case, rejected the unreasonableness

29 (2013) 249 CLR 332 [70], [86]; cf [14] (French CJ); [92], [94]ff, [99] (Gageler J) (note that his Honour considered the express exclusion of natural justice gave 'added significance' to the implied requirement for reasonableness — which he appeared to consider might itself provide a measure of natural justice).

30 Cf [14], [23], [28]ff (French CJ); [88], [90], [92], [98], [124] (Gageler J) (noting that the statutory context included the general aspirational provisions often used in the tribunal context).

31 (2013) 249 CLR 332 [67]. Cf [92] (Gageler J) (possible variation of the 'default' position).

32 [1977] AC 1014, 1064.

33 (2013) 249 CLR 332 [68].

34 Ibid [76].

35 For a detailed analysis, see Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 117.

36 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 [28]–[29] and the discussion above of reasoning in the 'unreasonableness' cases; cf earlier discussion (and cases referred to) in Stephen Gageler QC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287; Gageler, above n 3, 307.

37 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [63] (Hayne, Kiefel and Bell JJ) (citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36). See also [28]ff (French CJ); [88]ff (Gageler J) (and the other authorities cited by their Honours).

38 (2018) 357 ALR 408.

challenge.[39] While the difficulty of precise definition of this ground was noted at various points, the broadly facilitative and inferential 'lack of evident or intelligible justification' formulation was emphasised again,[40] as was the traditional stringency of the test.[41] More relevantly for present purposes, the 'presumed legislative intention' approach to the ground continued to grow in prominence.[42] The relevance of statutory context to the assessment was certainly noted at various points;[43] however, clear confirmation of the variable standard idea raised in *Li* was more elusive. Justice Gageler's approach appeared to rest (again) on a 'default' standard that might be varied by the specific statute.[44] Justices Gordon and Nettle ultimately appeared to offer a middle position: '[the] standard of reasonableness is derived from the applicable statute but also from the general law'.[45] Justice Edelman appeared to settle on the proposition that the 'content' of the reasonableness test is 'assessed in light of the terms, scope, purpose, and object of the statute'.[46] Their Honours' ensuing analysis — and, indeed, the analysis in the short succeeding decision of *TTY167 v Republic of Nauru*[47] — reveals that there might be a fine line between context-driven assessment and a context-driven standard. However, as discussed below, there is an important point here, and an underlying pattern, that is central to the ongoing predictability and normative influence[48] of administrative law in Australia.

Bias, bad faith and fraud

Some ostensibly freestanding standards of administrative legality have long resided at the sharper end of decision-making error. Yet in recent years there are signs that these might similarly be drawn into the 'repatriation' of grounds process. In the context of bias, it is, of course, well known that a 'spectrum' of standards approach has been keenly deployed to accommodate the great range of decision-making contexts in which bias challenges might arise.[49] This approach appears to have crystallised in the context of ministerial actions in the migration context in the late 1990s / early 2000s — where close attention was paid to the nature of the decision-making process and the identity of the decision-maker.[50] This thinking

39 Ibid [14] (Kiefel CJ); [70]–[71] (Gageler J); [123] (Gordon and Nettle JJ); [140]–[141] (Edelman J).
40 Ibid [10] (Kiefel CJ); [82] (Nettle and Gordon JJ).
41 Ibid [11]–[13] (Kiefel CJ); [51]–[52] (Gageler J); cf [97] (Nettle and Gordon JJ).
42 Ibid [4] (Kiefel CJ); [51]–[53] (Gageler J); [80], [89] (Gordon and Nettle JJ); [131], [134] (Edelman J).
43 Ibid eg [52], [59] (Gageler J); [79], [90]ff (Gordon and Nettle JJ); [131]ff (Edelman J).
44 Ibid [53]; cf much earlier comments in Gageler QC, above n 36, 287.
45 Ibid [88]. Cf [133]ff (Edelman J).
46 Ibid [135] (referring to *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 (Allsop CJ).
47 (2018) 362 ALR 246 (Gageler, Nettle and Edelman JJ). Note particularly the comment at [29]: 'It was not in dispute that the standard of legal unreasonableness imposed as a condition of exercise of the power in the Refugees Convention Act is a demanding standard, *particularly in light of* the concerns of informality and the need for efficiency that that underlie Tribunal hearings and the wide latitude that the Tribunal has in making a decision under s 41(1) to decide the matter in an applicant's absence. Nevertheless, there are six reasons, in combination, why the circumstances of this case were so exceptional that the decision of the Tribunal to proceed … was legally unreasonable.' (Emphasis added and references omitted.)
48 See broadly Bateman and McDonald, above n 2, 155.
49 For a broader discussion, see Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* 928.
50 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 [78], [102] (Gleeson CJ and Gummow J). See also, in a different ministerial context, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 [50] (Gaudron, Gummow and Hayne JJ).

was also quickly applied to tribunal members[51] and has since been applied in various other contexts.[52] The High Court broadly reaffirmed this sensitivity to different decision-making context in the 2015 decision of *Isbester v Knox City Council*.[53] Beyond this, there have been hints of a more granular examination of statutory context in the formulation of bias standards. In the context of a 2012 Federal Court examination of decision-makers' use of 'cut and pasted' reasons (or 'templates') in multiple matters, and the implications as regards both the fair hearing rule and the bias rule, it was noted in passing that a bias challenge might be difficult to make out in this context, as the court weighs contextual factors such as decision-making volume and repetition, the nature of the claims and decisions in question, the *kind and degree of neutrality required*, and the precise nature of the similarity between successive decisions.[54]

In the context of 'bad faith' an example of such calibration might be found in the reasoning in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[55] which concerned a challenge to a decision of a construction adjudicator. There was support here for a context and statute-specific approach to the meanings of notions of 'good faith' and 'bad faith'. In the leading judgment of White JA, her Honour ultimately preferred to look to what the particular Act required of the decision-maker rather than 'elusive synonyms', and here it was noted particularly that in the relevant context 'rapid' decision-making was necessary.[56]

In the context of 'fraud', a telling comment is found in the important 2007 decision in *SZFDE v Minister for Immigration and Citizenship*:

> the present appeal should be resolved after close attention to the nature, scope and purpose of the particular system of review by the Tribunal which the Act establishes and the place in that system of registered migration agents. Any application of a principle that 'fraud unravels everything', requires consideration first of that which is to be 'unravelled', and second of *what amounts to 'fraud' in the particular context*. It then is necessary to identify the available curial remedy to effect the 'unravelling'. [57]

Delegation and behest

For completeness, the analysis pursued above might be applied, retrospectively, to some interesting past agitation and evolution in the law relating to delegation and the ground frequently referred to as 'behest'. In the former context we might note the gradual erosion of the old *Carltona* principle, allowing lower governmental officials to act as the 'alter ego' of senior ones, which has recently been described as being of 'uncertain' scope and status in

51 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 esp 138 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *AZAEY v Minister for Immigration and Border Protection* (2015) 238 FCR 341 (North, Besanko and Flick JJ).
52 See eg *Watson v SA* (2010) 278 ALR 168 (Doyle CJ, Anderson J agreeing); *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 (particularly Basten JA); *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* (2010) 174 LGERA 67 (particularly Tobias JA); *Duncan v IPP* (2013) 304 ALR 359 (Bathurst CJ, Barrett and Ward JJA agreeing).
53 (2015) 255 CLR 135, esp [22]ff (Kiefel, Bell, Keane and Nettle JJ).
54 *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223, [43]ff.
55 [2012] 1 Qd R 525.
56 Esp [96].
57 (2007) 232 CLR 189 [29] (emphasis added).

Australia.[58] The critical point appears to be that, although courts continue to acknowledge that the scale of administrative decision-making often requires a flexible approach to the rule against delegation,[59] in the contemporary context of more detailed statutory prescription of administrative decision-making structures and roles, the *Carltona* principle in its raw form is of less relevance, and it has become more important closely to examine the scheme and the nature and purpose of any decision-making responsibility conferred on the senior public official.[60] Indeed, the careful inquiry might be directed to which *components* of a function can be handled below.[61] And it appears that in some cases, perhaps where the 'necessity' is less compelling, the courts might look for evidence of a clear authorisation — suggesting some return in these cases to a more traditional search for an implied power to delegate and evidence of its exercise.[62]

In the classic Australian case on 'behest', *Bread Manufacturers of NSW v Evans*[63] (which concerned a challenge to orders made by the New South Wales Prices Commission), Mason and Wilson JJ in their judgment indicated that the extent to which higher views can be taken into account and acted upon will depend on circumstances such as the particular function and character of the decision-maker, the intent of the legislation as to the relationships involved, and the nature of the views expressed.[64] These comments by Mason and Wilson JJ, alluding in part to the possibility of a distinctly variable scale of required independence, appear not to have been closely explored in later decisions on this ground — but they are potentially significant in the context of this exploration in this article. On the facts, Mason and Wilson JJ felt that the Commission could not be expected to operate in a vacuum and was therefore free to take advice from others, including the Minister (in light of the ministerial veto power).[65] They went on to conclude that there was no evidence here that any member of the Commission had forsaken their independence.[66]

Even this brief and esoteric survey of examples reveals that there is a pattern in the recent evolution of Australian administrative law and that it is continuing to influence the trajectory of our incremental doctrinal development. Taking this to its logical end, there is a theoretical possibility that our traditional grounds of judicial review will, over time, be dissolved in principles of statutory interpretation.[67] Yet before we launch into critique, re-enter the theorising of past debates or even innocently ask 'how far should this go', it is important that we look closely at this pattern in broader perspective — to ensure that we are seeing the whole of the picture. Do the examples selected above truly reflect a consistent pattern of thinking? Does it have a coherent rationale? It is argued here that in fact this pattern of statutory focus and repatriation of grounds is better viewed as part of a larger

58 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 88 NSWLR 125 [11] (Basten JA).
59 See eg *New South Wales Land and Housing Corporation v Navazi* [2013] NSWCA 431.
60 See eg *Koowarta v Queensland* [2014] FCA 627, [201]ff; *Salia Properties Pty Ltd v Commissioner of Highways* [2012] SASCFC 33; cf *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCA 377 [11].
61 See eg *De Angelis v Pepping* [2015] NSWCA 236 [132]ff.
62 See eg ibid [121]ff.
63 (1981) 180 CLR 404.
64 Ibid 429–30.
65 Ibid 428ff.
66 Ibid 439ff.
67 See Gageler, above n 3, 312.

phenomenon — a natural but conceptually fraught search for flexibility in judicial review principle in response to broadening and diversifying regulatory context, evolving legislative drafting, and maturing public expectations and litigation strategy.

Departures from the 'statutory intention' focus

A broader analysis reveals, first, that there have been significant pauses, diversions and even retreats in the repatriation of principles sampled above. In many instances, these saw the courts reaching again for deeper external standards or touchstones in the application of judicial review doctrines. In broad terms, the refurbished but slightly opaque ideas behind the 'principle of legality' — a presumption against legislative interference with fundamental rights and freedoms[68] — allows the court to view legislation through a tinted protective lens[69] that can be difficult for drafters to dislodge.[70] The entwined histories of jurisdictional error and privative clause construction (some of which was recounted above) also illustrate the ongoing influence of external measures in judicial review principles. Whilst *Hickman* may have been firmly returned to the broader toolbox of constructional aids, the influence of the pre-mixed *Craig* classifications of jurisdictional error clearly lingers in contemporary reasoning.[71]

More specifically, in the context of the very principles that gave rise to *Blue Sky*, a recent case also illustrates the ongoing role of external measures in otherwise quite exacting statutory interpretation exercises. In *Forrest & Forrest Pty Ltd v Wilson*,[72] the High Court considered the consequence of non-compliance with Western Australian legislation requiring mining lease applications to be accompanied by certain operations statements and mineralisation reports.[73] The joint majority examined the statutory scheme and carefully considered but distinguished *Blue Sky* in holding that the procedural requirements were 'essential preliminaries' to the grant of leases and that the breaches were effectively invalidating.[74] Notably for present purposes, there was a very conspicuous draw on a 'line of authority' establishing that, where a statutory regime confers power to grant exclusive rights to exploit resources, it will be understood (subject to contrary provision) as 'mandating compliance with the requirements of the regime'.[75] The importance of this to the majority's conclusions was clear from the reasoning: 'Finally, and importantly, *Blue Sky* was not concerned with a statutory regime for the making of grants to exploit the resources of a State.'[76]

68 *AL-Kateb v Godwin* (2004) 219 CLR 562 [18]–[19] (Gleeson CJ).
69 See eg *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 [25]ff (French CJ); *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [31], [54] (French CJ, Hayne, Kiefel and Nettle JJ).
70 See eg operation of correlative principles in the natural justice context: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204; and most recently *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599.
71 See particularly *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; and recently (eg) *Hossain v MIBP* (2018) 359 ALR 1 (Edelman J); *MIBP v SZMTA* (2019) 363 ALR 599 (Nettle and Gordon JJ).
72 [2017] HCA 30.
73 *Mining Act 1978* (WA) s 74.
74 [2017] HCA 30 [63] (Kiefel CJ; Bell, Gageler and Keane JJ).
75 Ibid [64]ff.
76 Ibid [63].

The history of natural justice (or 'procedural fairness') is also instructive in this regard. Building on what has been said already, the context-sensitive 'spectrum' approach to bias standards appears to be now sharing ground (at least) with a newer methodology of 'speciation' — with some apparent variation in applicable standards depending on the precise nature of the bias alleged.[77] Obviously, this speciation of bias is somewhat removed from excavations of statutory intention. More directly, much of the steam that has driven the contemporary statute versus common law debates in recent times was, of course, generated by Brennan J's denial (most conspicuously in *Kioa v West*[78] (*Kioa*)) of the existence of a 'free-standing common law right' to natural justice and emphasis upon the centrality of the statutory construction process.[79] While his Honour was broadly concerned in this era to re-mark the boundary between questions of 'legality' and 'merits',[80] his particular target in *Kioa* was the notion of 'legitimate expectations' — which he regarded as being of 'uncertain connotation' and potentially misleading, particularly as regards the initial question of whether natural justice applied. He felt that this question demanded a 'universal answer' for any given statutory power.[81] As noted earlier, the debate over the source of natural justice obligations (later restated as a question of whether the rules of natural justice derive from the common law or are implied in statute by or with reference to the common law)[82] ultimately stalled amidst doubts as to its significance.[83] The notion of 'legitimate expectations', through Brennan J's lens, might now be understood as a failed (lengthy) experiment with external circumstantial considerations in the application of judicial review doctrine.[84] The final demise of this notion is likely to place more pressure upon statutory interpretation exercises — for example, in sorting through licensing/approval type scenarios (where the concept of legitimate expectations had a prominent role). Yet ironically, as will be seen, in a sense external circumstantial considerations do appear to have gained a firm foothold in the natural justice principles via the notion of 'practical injustice' — which reaches into the question of whether in a practical sense a person lost an opportunity to make some material submission.[85]

77 See further discussion of (eg) the ostensibly special position of 'prejudgment' and 'incompatibility' bias: Young, above n 49.

78 (1985) 159 CLR 550.

79 Ibid 609 (although his Honour did acknowledge the relevance of the 'background of common law notions of justice and fairness').

80 As to his Honour's comments in neighbouring cases, see the analysis in Bateman and McDonald, above n 2, 153.

81 (1985) 159 CLR 550, 611–12, 616ff.

82 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 [11]–[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

83 See particularly *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 [74]; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31 [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 [75], [77], [81], [82]; and recently *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 [83] (Nettle and Gordon JJ).

84 Its demise can be traced through *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204; *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40.

85 See eg *CSR v Eddy* [2008] NSWCA 83 [40]–[41] (Basten JA, Hodgson and McColl JJA agreeing).

A search for flexibility?

Another difficulty in embracing the 'statutory intention' explanation of Australia's administrative law evolution is the fact that it is difficult to identify a coherent rationale for such an approach. Certainly at key moments this conspicuous and exacting attention to statutory intentions has lent some democratic legitimacy and/or constitutional propriety to difficult decisions reached by the court.[86] Yet close analysis suggests that in most instances the strong focus on statutory intention was a somewhat pragmatic response to varied and difficult modern challenges: to avoid the unpalatable consequences of wholly invalidating existing broad-reaching regulatory frameworks;[87] resurrect some semblance of fairness in the face of an ouster of natural justice;[88] accommodate vastly differing decision-making contexts and responsibilities;[89] and accommodate the complexity of contemporary decision-making hierarchies.[90] In all cases then the careful statutory focus might be viewed as a search for greater flexibility in judicial review principles, to accommodate the significant evolutions in governmental and regulatory context. The democratic legitimacy and constitutional propriety advertised by the strong deference to large-L (legislative) law was certainly a bonus, particularly given that in some of these cases the courts appeared to be excavating deeper statutory intentions to tunnel around specific statutory obstacles. The statutory focus has certainly contributed agility to judicial review — perhaps more than might have seemed possible. *Blue Sky* itself illustrated that an examination of statutory intention might extend to a consideration of the consequences of invalidation for a breach. Similarly, some of the significant diversions and retreats from the statutory intention focus (discussed above) also reflect a search for a new flexibility.

Perhaps then we have tended to miscategorise that true nature of the legal evolution in play. The 'statutory intention' theory might seem to tell only part of the story — and imperfectly. To reconceptualise the challenge as a modern search for flexibility in middle-aged common law doctrine might help us to better understand the trajectory, contribute more in our discussions to the daily efforts of the courts in meeting these big challenges, and more readily spot the attendant risks. I believe the search for flexibility has come in two parts. In the first place, the courts have instinctively and deftly sought a closer connection to governmental and regulatory context — to better respond to a broadening and diversification in legislative subject matter and purpose, and in regulatory style and detail. Much of the contextual change is reflected in the relevant legislation and can be accessed through a closer and more holistic focus on legislative terms and intention. The question we are left with in this context is: does this necessitate a repatriation of all of the remaining freestanding grounds? The second part of the search for flexibility (and perhaps reflexivity) is best understood, I think, as the courts seeking a closer connection to the consequences of administrative error or misdirection — to better respond to more complex administrative decision-making contexts and more sophisticated public expectations and evolving litigation volumes and strategies. This second search takes the courts somewhat beyond statutory terms and is in many respects more challenging.

86 See particularly (eg) *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. And see more generally the valuable discussion in Bateman and McDonald, above n 2.

87 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

88 *Minister for Immigration and Citizenship* (2013) 249 CLR 332.

89 See the cases discussed above on bias, 'bad faith' and 'fraud'.

90 See cases discussed above on delegation and 'behest'.

Second-stage flexibility, as I term it here, is a topic for a succeeding study. However, relevantly for present purposes, some of the diversions and retreats from the statutory intention focus (noted above) might properly be regarded as components of this second-stage evolution of principle. This type of flexibility — calibration to consequence — has long had an inchoate presence in various corners of our judicial review doctrines. It was present in the reference to 'materiality' in the template for the relevancy/irrelevancy grounds of review laid out in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[91] (*Peko Wallsend*). In the natural justice context it had some influence in the wandering operations of the now discarded notion of 'legitimate expectations', and more clearly in the 'adverse, credible, relevant and significant' trigger for an obligation to disclose material under fair hearing rules,[92] which more recently appears to be evolving into a (possibly more subjective) requirement that the information in question be 'information that the repository of power … might take into account as a reason for coming to a conclusion adverse to the person'.[93] Of course, calibration to the consequences of the breach is also central to the natural justice notion of procedural 'practical injustice' (or 'actual unfairness') that emerged from the decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[94] (*Lam*) and to the older principle in *Stead v State Government Insurance Commission*[95] (*Stead*), focusing on the possibility of a different substantive outcome but for the natural justice error. Conventionally, the *Lam* and *Stead* notions have been kept relatively separate in their operation;[96] however, very recently there has been some possible merger of the two ideas.[97]

Very interestingly for present purposes, the calibration to consequence also found its way into the application of *Blue Sky* principles. In *Attorney General of New South Wales v World Best Holdings Ltd*[98] Spigelman CJ identified a possible ambiguity in the reasoning of *Blue Sky* — as to whether it is necessary to look for a legislative intention that 'any' act done in contravention of the relevant procedure should be invalid or, more specifically, an intention that 'an' act done in contravention should be invalid. In his view the latter approach would generally be applicable in the sense that the court must generally examine what the legislature intended in respect of the particular breach under consideration.[99] This approach appeared to surface in the High Court in the brief 2009 decision of *Minister for Immigration and Citizenship v SZIZO*.[100] There the High Court overturned the Full Federal Court's conclusion[101] that a misdirected notice of hearing was invalidating despite the attendance in

91 (1986) 162 CLR 24.
92 See particularly *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 [14]ff (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
93 *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 [83]. See also *BRF038 v The Republic of Nauru* [2017 HCA 44 [58].
94 (2003) 214 CLR 1.
95 *Stead v State Government Insurance Commission* (1986) 161 CLR 141; see also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609.
96 See eg the cautions of Basten JA in *CSR v Eddy* [2008] NSWCA 83 [40]–[41] (Hodgson and McColl JJA agreeing).
97 *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 [3], [38].
98 (2005) 63 NSWLR 557.
99 Ibid 580; cf *Applicant NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214.
100 [2009] HCA 37.
101 *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122; cf *Le v Minister for Immigration and Citizenship* [2007] FCAFC 20.

any event of the relevant party — emphasising that it was necessary in the case before it to look at the extent and consequences of the particular failure (measured here against basic nature justice standards).[102]

Obviously, there is some correlation here with the notion of procedural 'practical injustice' (or 'actual unfairness') in the natural justice context. More importantly, however, the natural association of the *Blue Sky* principles and the principles relating to 'jurisdictional error'[103] perhaps made it somewhat inevitable that this new attention to (specific) consequences in the former context would lead to further refinements in the latter. Indeed, this likelihood was nudged along, and possible terminology provided, in the 2015 High Court decision of *Wei v Minister for Immigration and Border Protection*[104] (*Wei*). At several points in their judgment Gageler and Keane JJ indicated, although it was not significant in this case, that the search was for a 'material' breach of the imperative requirement identified.[105]

Ultimately, in the 2018 decision of *Hossain v Minister for Immigration and Border Protection*,[106] Kiefel CJ and Gageler and Keane JJ emphasised that, in addition to the search for preconditions and conditions, it was necessary to discern the 'extent' of non-compliance necessary (that is, whether a particular failure was of a magnitude) to take the decision outside of jurisdiction.[107] Interestingly, as per the specific breach extension of the *Blue Sky* principles, this calibration to consequence was itself categorised as an exercise in statutory construction.[108] Their Honours proceeded to state (referring to the *Stead* natural justice cases, the *Peko Wallsend* formulation for relevancy/irrelevancy and comments in *Wei*) that a statute is ordinarily to be interpreted as incorporating a threshold of 'materiality' before denying legal force and effect to a decision made in breach of a condition — which 'ordinarily' would not be met if compliance could have made 'no difference to the decision in the circumstances in which it was made'.[109] Justice Nettle and Edelman J, in separate judgments, were at pains to emphasise that there were exceptions to any requirement that an error must be material in this sense before being classified as a 'jurisdictional error'.[110]

A majority of the High Court (Bell, Gageler and Keane JJ) confirmed this consequence-sensitive approach to jurisdictional error in *Minister for Immigration and Border Protection v SZMTA*[111] (*SZMTA*). The conceptual difficulties attending this second-stage search for flexibility — namely, the attempt to calibrate principles to specific consequence — was evidenced by the strong dissent on the key issues by Nettle and Gordon JJ in *SZMTA*. They considered that the deployment of a 'materiality' inquiry (as part of the identification of jurisdictional error as opposed to the residual remedial discretion) entailed departure from the statutory construction exercise and would lead to uncertainty — as well as involving an inappropriate reversal of the onus in the proceedings.[112] The critical questions we are

102 At [35]ff.
103 See eg *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.
104 [2015] HCA 51.
105 Ibid [28], [32], [33].
106 (2018) 359 ALR 1. See also *Shrestha v MIBP* (2018) 359 ALR 22.
107 (2018) 359 ALR 1 [27].
108 See also [66]–[67] (Edelman J).
109 (2018) 359 ALR 1 [29]–[30]. Cf [72] (Edelman J).
110 Ibid [40] and [72] respectively.
111 (2019) 363 ALR 599.
112 Ibid [88]–[93].

perhaps left with, as regards this stage 2 flexibility, are at what stage has the court descended too far into the substantial reasoning (and hence the task) of the decision-maker below and/or at what point has the objective preventative procedural protection of administrative law standards drifted too far into subjective, situation-specific speculation.

Conclusion: the implications of flexibility

There would seem to be some obvious practical costs attending the evolutions examined in this article. Most simply stated, there is a growing variability in our standards of administrative legality. It is difficult to avoid the reality that with each 'repatriation' or calibration to specific statutory context — or, indeed, with each deferral to the consequences of breach — there is some incremental loss of consistency, predictability and normative influence in Australian administrative law — which perhaps runs counter to some of the basic precepts of the modern iteration of the 'rule of law'.[113] And this in turn has implications for the 'appearance' (and hence perceptions) of administrative law. As a long-term teacher in the field, I am tempted to apply a litmus test of 'teachability' as I consider the implications of these evolutions. Practitioners might apply their test of 'advisability' as they consider these developments in the context of their clients' affairs. And public officials might be asking themselves about the accessibility of these principles in the context of their own, often broad and under-resourced, responsibilities.[114] I suspect we might all anticipate some difficulty engaging with the increasingly complex interpretive and predictive inquiries attending this field of law.

There are further reasonably apparent difficulties with the evolutions we are witnessing. Obviously, a determined calibration to statutory context carries some devaluation and disassembly of the common law of public law in Australia and, given the sophistication of existing judicial review principles, there is some artificiality[115] in attempting to attribute their complex nuances to statutory design or presumed statutory acknowledgment. Even if we embrace the latter theoretical compromise — that is, the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power[116] — this would seem to stultify somewhat the capacity of administrative law principles to continue to adapt and improve. Is the legislature presumed to have anticipated (at the time of drafting) necessary refinement in or clarification of the 'common law principles'? Another very obvious difficulty with this statutory intention focus is that in the context of *non-statutory* powers this is at best conspicuously unhelpful and at worst quite corrosive.

As regards the calibration to consequences of breach, the potential in such a context for judicial overstep (and, indeed, some drift into the merits of the decision under review) has already for some time been the subject of discussion by academics and cautionary comments by senior judges. Courts have been regularly invited retrospectively to ponder procedural hypotheticals (since *Lam*) and the probabilities of different factual findings or outcomes (under the guise of the *Stead*). In the context of the new 'materiality' principles attending jurisdictional error, the High Court recently noted and resisted (in *Nobarani v Moriconte*[117])

113 Bateman and McDonald, above n 2, 176–9.
114 On the position of public officials, see Bateman and McDonald, above n 2, 178–9.
115 Cf Gageler, above n 3, 312.
116 See recently (eg) *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 [28]–[29].
117 (2018) 359 ALR 31 [48].

a request to conduct a broad hypothetical revisiting of the original decision. Very recently in *SZMTA*[118] the majority also noted but worked around the risks, while Nettle and Gordon JJ (in dissent on the critical issues) posed the hazard of a drift into 'merits' as one of their key objections to the superimposition of a requirement of 'materiality'.[119]

However, there are also some highly complex structural issues in play. It is important to note that the first-stage reach for flexibility (through statutory calibration) was driven particularly by jurisdictional error and the *Blue Sky* principles — in both cases in the context of a consideration of the practical implications of identified error. There was also a significant contribution from natural justice, of course, in the form of some important theoretical debate (in *Kioa*) and an enormous caseload entailing the application of principles that had long been closely calibrated to statute. The influence of the evolution of jurisdictional error, on the approach taken to the more specific grounds, is not just a matter of raw force. There is also a conceptual pull involved. In the first place, as jurisdictional error (in its classification of the gravity of error) has become more firmly and cleanly attached to internal statutory terms and intentions, it might seem to become more difficult to sustain freestanding anterior standards of error in the individual grounds. Can an error identified and articulated by reference to external standards be accommodated by what is becoming a purely internally driven assessment of whether that error is 'jurisdictional'? This might require a further draw on presumptions of legislative acknowledgment of common law standards. Moreover, it must be remembered that 'jurisdictional error' now has a constitutionally privileged place (at both federal and state level), and the new reality is that some repatriation of old freestanding grounds, and their integration with the internally focused jurisdictional error principles, is perhaps the best way to preserve the underlying standards involved in the face of more legally intrusive legislative direction. The battle for freestanding common law principles might be lost in order to win a war over the underlying standards of administrative legality.[120] This, of course, underscores a key premise of my article — namely, that the evolution underway is perhaps more a matter of pragmatism than principle.

It is also interesting to note that the second-stage reach for flexibility (through attention to consequence) has been driven largely by natural justice. The cross-influence in this instance (that is, the spread of various iterations of the idea of 'materiality') *is*, I would suggest, largely a matter of raw force. The natural justice caseload has been extraordinary — and it was somewhat inevitable that transferable principles would be identified and, indeed, transferred.

My sense is that many might applaud the relative clarity of a final complete shift to the internal 'essential preconditions' approach to identifying jurisdictional error but that many might yet be uncomfortable with the broader 'repatriation' of grounds that is possibly taking place. Jurisdictional error is concerned ultimately with the seriousness and *practical implications* of identified error, which might seem to be a quintessentially legal question that the courts might very appropriately answer in a flexible and even somewhat conclusory manner. Yet the sacrifice of the normative influence and predictability of the many separate grounds of review, including where they flag error for the subsequent reflexive application of a jurisdictional error assessment, would seem to be a different matter. It would seem to be important that

118 (2019) 363 ALR 599 [48]–[49].
119 Ibid [95].
120 See Bateman and McDonald, above n 2, 178–9.

we at least seek to maintain the ‘default’ standards reflected in the traditional grounds. And, as to the very latest developments, the foray into ‘materiality’ will no doubt quickly re-enliven debates about the risks of overzealous application of the ‘practical injustice’ notion and the *Stead* principle and, indeed, the risk of blurring the two together.

A negotiation concluded? The normative structure of error of law review of fact-finding

Emily Hammond*

This article makes a narrow descriptive claim with a view to offering wider observations on the normative structure of the current Australian law of judicial review. In *Haritos v Federal Commissioner of Taxation*[1] (*Haritos*), a unanimous five-member bench of the Federal Court of Australia radically reworked a limit on the concept of *error of law* in fact-finding maintained by members of the High Court of Australia in *Minister for Immigration and Citizenship v SZMDS*[2] (*SZMDS*). My aim in making this claim is not to criticise the result. Quite the contrary: by showing the nature and significance of the *Haritos* departure from *SZMDS*, I hope to show that it is a welcome articulation of the ground of error of law in fact-finding. The Federal Court's intervention is welcome because it rejects the need, asserted in *SZMDS*, to maintain a distinction between findings required by legislation and other material findings. On the *Haritos* approach, review for error of law promotes *generally applicable* norms for fact-finding in administration of public powers. In particular, such norms as apply to findings required by statute can also apply to findings that are material to discretionary decisions. Thus, the *Haritos* approach promotes a culture of justification for the exercise of unstructured discretionary public powers affecting individuals that is absent in the method for supervising fact-finding presented in *SZMDS*.

The conflicting approaches to error of law in fact-finding in *SZMDS* and *Haritos* may be seen, I suggest, as products of two contrasting intellectual approaches to the normative structure of judicial review. Writing in 2017, Bateman and McDonald described two intellectual approaches to the legal norms for administrative action — a 'grounds approach' and a 'statutory approach':

> One expresses the legal norms of administrative law as a set of rules and principles described as 'grounds of review' which exist ex ante a statute conferring power on an administrator. The other expresses these norms as the product of a parliamentary intention arrived at through a process of statutory interpretation undertaken ex post the enactment of a statute conferring administrative power.[3]

As Bateman and McDonald emphasised, the difference between these two intellectual approaches to review cannot be reduced to a disagreement about the juristic basis for the

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1 [2015] FCAFC 92; (2015) 233 FCR 315.

2 [2010] HCA 16; (2010) 240 CLR 611, endorsing a ground for review for constructive lack of jurisdiction articulated in earlier cases: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 (*Eshetu*), [127]–[145]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165 (*S20/2002*), [34]–[37] (McHugh and Gummow JJ); *Minister for Immigration and Multicultural Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992, [38] (Gummow and Hayne JJ).

3 W Bateman and L McDonald 'The Normative Structure of Australian Administrative Law' (2017) 45 FLR 153, 155.

legal norms of administrative law.[4] Differences in the 'formal grammar of the law' and the 'basic structure of its justification'[5] correspond with differences in the law's normative impact:

> Although the statutory approach may be thought to bring gains in terms of the legitimacy of judicial review, it jettisons the normative functions of predictability, applicability and universality which are more meaningfully associated with the grounds approach.[6]

This is the specific insight from Bateman and McDonald's analysis that I adopt for this article. A grounds-based approach favours the articulation of *generally applicable* norms for the exercise of statutory powers. On a grounds-based approach, norms apply to *material* steps in the exercise of a power — that is, steps on which the exercise of the power in fact turn, even if not specifically required by statute. The statutory approach, in contrast, implies norms from legislatively set conditions for the exercise of a power. On the statutory approach, the particulars of the statutory power determine whether norms are engaged. When it comes to review of fact-finding for error of law, the grounds-based approach is likely to produce norms that attach to *any* material findings, irrespective of whether the findings are specifically required by statute. This can include findings that become a basis for an exercise of discretionary power by way of a decision-maker's policy. A statutory approach in contrast supports the application of rationality norms to findings specifically required by the enabling statute.

My contention is that reading the shift in approach to the error of law ground from *SZMDS* to *Haritos* in these terms elevates the significance of the conflicting views of error of law in fact-finding between the two cases. It prompts us to think about this as an episode in an ongoing negotiation over the normative structure of legality of fact-finding and the capacity for the error of law ground to promote legal rationality requirements for the implementation of policies adopted for the exercise of unstructured discretionary powers.

Conflicting views of error of law in fact-finding

In this section, I demonstrate the conflicting approaches to *error of law* in fact-finding with reference to the two cases.[7] I show that the Federal Court deployed, for fact-finding generally, a rationality criterion that the High Court had endorsed for one kind of finding only. This was contrary to the instructions of the Court in *SZMDS* that the criterion did *not* apply in review of 'intra mural' facts[8] for error of law.

My focus here is on review for 'error of law' in contrast to 'jurisdictional error'. These two categories of error offer distinct touchstones for supervisory jurisdiction and remedies against administrative action. Jurisdictional errors are those material errors that invalidate a decision — that is, result in a decision 'lacking characteristics necessary for it to be given

4 Ibid 157–8.
5 Ibid 154.
6 Ibid 155.
7 Compare M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) 209.
8 The term 'intra mural' is used by Gummow ACJ and Kiefel J in *SZMDS* [2010] HCA 16 [38] apparently with reference to findings made within jurisdiction, including as the basis for an exercise of discretionary power.

force and effect by the statute pursuant to which the decision-maker purported to make it'.[9] 'Error of law', in contrast, extends to material errors, constituted by breach of applicable legal requirements, whether they invalidate the decision or not.[10] 'Jurisdictional error' sets the ambit for certain supervisory jurisdictions, including those that are constitutionally entrenched,[11] and therefore understandably draws focus in scholarship on Australian judicial review. Yet review for 'error of law' is widely available in review on the common law remedial model,[12] under the *Administrative Decisions (Judicial Review) Act 1974* (Cth) and state equivalents,[13] and in appeals on questions of law.[14] The scope of the concept of 'error of law' is therefore a matter of significant practical interest.

SZMDS and the statutory approach to error of law in fact-finding

SZMDS, a much-discussed decision of the High Court of Australia, endorsed a bespoke rationality criterion for factual findings that are required by statute as a precondition to power.[15] Following *SZMDS* it is orthodox to say that *if* a statute requires an administrator to form a state of mind as to particular facts as a precondition to power *then* serious irrationality in the administrator's fact-finding will invalidate a purported exercise of the power — that is, there is a constructive lack of statutory authority if a state of mind regarding facts identified in the statute, required as a precondition to power, is 'irrational, illogical and not based on findings or inferences of fact supported on logical grounds'.[16]

9 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [24] (Kiefel CJ, Gageler and Keane JJ).

10 That is, Australian law maintains a distinction between jurisdictional and non-jurisdictional error of law — see analysis and case for the distinction in L Crawford and J Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 PLR 18.

11 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

12 Including on an application for certiorari for error of law on the face of the record or for an injunction or declaration — see critical appraisal in Crawford and Boughey, above n 10.

13 Including the *Administrative Decisions (Judicial Review) Act 1976* (Cth) s 5(1)(f).

14 For example, the *Administrative Appeals Tribunal Act 1974* (Cth) s 43.

15 These kinds of findings are a special type of jurisdictional fact — the 'fact' that is the precondition or criterion enlivening the power is not the state of affairs specified in the statute but the decision-maker's state of mind regarding that state of affairs. There are fundamentally different review methodologies for the two types of jurisdictional fact. Finding an elegant and uncontroversial form of words to make this 'awkward' distinction is difficult. Some contrasting adjectives (objective/subjective; narrow/broad) have been suggested, while others use the phrase 'state of mind jurisdictional fact' (or similar) to distinguish these from 'true' or 'traditional' jurisdictional facts: see P Cane, L McDonald and K Rundle, *Principles of Administrative Law* (Oxford, 3rd ed, 2018), 182–90 [4.4.2.1]; Aronson, Groves and Weeks, above n 7, 246–7 [4.490]; J Hutton, 'Satisfaction as a Jurisdictional Fact — A Consideration of the Implications of SZMDS' in N Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 50.

16 [2010] HCA 16; (2010) 240 CLR 611, 625 [40] (Gummow ACJ and Kiefel J dissenting). This formulation makes clear that the rationality criterion applies to the anterior findings on which the ultimate conclusion is based — see further Gummow ACJ and Kiefel J's application of the criterion to two matters that the RRT had fixed on as inconsistent with a fear of persecution on the ground of sexuality (626–628 [43]–[53]), which their Honours described as 'critical findings'. Justices Crennan and Bell held that 'illogicality or irrationality may constitute a basis for judicial review in the context of jurisdictional fact-finding' (648 [132]) but did not specifically endorse the formulation that expressly extends the rationality criterion to anterior findings. Their Honours emphasise that this rationality criterion applies only 'at the point of satisfaction (for the purposes of s 65 of the Act)' (643 [119]). Their Honours did, however, evaluate the 'rationality' of the two critical findings (648–50 [132]–[136]). SZMDS has been viewed as authority that the rationality criterion extends to those anterior findings that are critical to a finding of jurisdictional fact: see, for example, *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [91] (Beazley P; Bathurst CJ agreeing).

Discussion of *SZMDS* has focused, quite naturally on two big ticket items:

1. the content of the *SZMDS* test for serious irrationality;[17] and
2. whether serious irrationality in non-jurisdictional fact-finding can give rise to *jurisdictional error*.[18]

In this article, however, I emphasise that all four members of the Court who addressed the status of the rationality criterion warned that it should *not* be adopted as a criterion for detecting *error of law* in fact-finding. (The other member of the Court, Heydon J, specifically refrained from making any statement on the availability of the criterion as a ground for review.) The judgments are worth examining closely.

Acting Chief Justice Gummow and Justice Kiefel

The intention to corral the *SZMDS* criterion, and ensure it is not used in review for error of law, is clearly stated in the joint reasons of the dissenting judges, Gummow ACJ and Kiefel J. Their Honours explained that the rationality requirement applies to findings of jurisdictional fact only[19] and does not extend to 'alleged deficiencies in what might be called "intra mural" fact-finding by the decision maker in the course of exercising jurisdiction to make a decision'.[20] They point out that, so confined, adopting the criterion does not amount to endorsing English authorities which have extended a rationality criterion to all material facts.[21] Further:

> Confusion of thought, with apprehension of intrusive interference with administrative decisions by judicial review will be avoided if the distinction between jurisdictional fact and other facts then taken into account in discretionary decision making is kept in view.[22]

It is indisputable that Gummow ACJ and Kiefel J sought to prevent the rationality criterion being used in review of discretionary powers for *jurisdictional error*.[23] It is clear, however, that their Honours' comments drove further, to review for error of law.[24] It seems that in their discussion of the availability of review for serious irrationality, their Honours' overriding concern was to show that the rationality criterion neither threatens the merits/legality distinction as it operates in review for error of law nor disturbs the orthodox scope of review for error of law in fact-finding as a very confined site of supervisory jurisdiction.[25] Their Honours stressed that, because irrationality in fact-finding generally does not constitute an error of law, application of the criterion in the context of jurisdictional fact-finding can be reconciled with key influential judicial statements on the scope of *legality* — Mason

17 See, for example, M Smith, '"According to law, and not humour": Illogicality and Administrative Decision-making after SZMDS' (2011) 19 AJAL 33; Hutton, above n 15, 50, 61–5; T Baw, 'Illogicality, Irrationality and Unreasonableness in Judicial Review' in Williams (ed), above n 15, 66, 68–72.
18 See, for example, M Allars, 'Distinction between Jurisdictional and Non-Jurisdictional Errors' in D Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015), 74, 92–6.
19 [2010] HCA 16 [42].
20 Ibid [38].
21 Ibid [26].
22 Ibid [39].
23 That is, the serious irrationality ground for review is distinct from the *Wednesbury* ground for review of discretionary decisions. Contrast *SZMDS* [2010] HCA 16 [128]–[129] (Crennan and Bell JJ).
24 See also Aronson, Groves and Weeks, above n 7.
25 [2010] HCA 16 [5]–[6].

CJ's influential articulation of the scope of error of law in fact-finding in *Australian Broadcasting Tribunal v Bond*[26] and Brennan J's observations on the merits/legality divide in *Attorney-General (NSW) v Quin.*[27] One aspect of the reconciliation is, of course, that the standard of judicial scrutiny for rationality must be calibrated to avoid review on the factual merits.[28] This is well established. However, Gummow ACJ and Kiefel J's reasons also make a distinct, and more controversial, point — that restricting the incidence of the rationality requirement to jurisdictional fact-finding reconciles its use with the legality/merits divide.

This emphasis on the restricted incidence of the rationality requirement, as a means of reconciling its use with the legality/merits divide, is evident in their Honours' observations on English public law. They approve, from the Australian side, the divergence in Australian and English public law after the House of Lords extended rationality review from findings of jurisdictional fact to findings taken into account in discretionary decision-making.[29] Their discussion highlights that Australian courts continue to reconcile the standards applied to findings of jurisdictional fact and the legality/merits divide *without* seeking to characterise the standards as generally applicable legal norms for fact-finding. They state that, in contrast with English public law today, Australian law supports the traditional understanding that a jurisdictional fact itself is 'the appropriate marker for enforcement of legality'.[30]

Justices Crennan and Bell

The joint reasons of Crennan and Bell JJ in *SZMDS* address review for *jurisdictional error*. However, Crennan and Bell JJ do state that error of law is *not* a precondition to jurisdictional error and refer with approval to judicial discussion of this point by Gummow and McHugh JJ in the earlier case, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[31] (*Applicant S20/2002*). The joint reasons in the earlier case clearly articulate the importance of keeping 'serious irrationality' separate from error of law. The logic establishing this position can be explained as follows.

In *Applicant S20/2002*, the respondent Minister had argued that a lack of reason or logic involved in a finding of fact cannot give rise to jurisdictional error because it does not constitute an error of law and the presence of an error of law is essential for a finding of jurisdictional error.[32] Their Honours' response to this submission conceded that the lack of reason or logic referred to in the test of jurisdictional error does not constitute an error of law.

26 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355–7; [2010] HCA 16; (2010) 240 CLR 611, 624 [38].
27 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6; [2010] HCA 16; (2010) 240 CLR 611, 619 [18]–[19].
28 Compare the often-cited observation that 'irrational' may be merely an emphatic way of expressing disagreement with a finding — *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611, 626 [40] (Gleeson CJ and McHugh J).
29 [2010] HCA 16 [31], referring to *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511, 514, 519–20, where Wilcox J emphasised that the novelty of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, as understood by Australian lawmakers at the time, was that it extended a recognised ground for review of jurisdictional fact to review of any facts taken into account in an exercise of discretionary power.
30 [2010] HCA 16; (2010) 240 CLR 611, 619 [18].
31 Ibid 643–4 [119].
32 The Minister's submission is recorded in these terms in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30 [53].

However, their Honours rejected the Minister's premise that the presence of an error of law is essential for a finding of jurisdictional error:

> The introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported ...[33]

Justices Gummow and McHugh went on to elaborate further reasons for rejecting the Minister's submission that the presence of an error of law is essential for a finding of jurisdictional error by observing that the concept of 'error of law' plays a role in appeals and legislatively created systems of review 'constructed with a scope which spans more than jurisdictional error'.[34] This observation (elaborated over six paragraphs) has been read as pointing to the need for a stricter standard for rationality review in review for jurisdictional error than may be permitted in review for error of law.[35] (This reading appears to follow the logic that jurisdictional error is a more serious form of error than error of law — perhaps because it invalidates a decision or because the courts' authority to provide a remedy for error of law is not constitutionally entrenched). However, read in context, it seems that Gummow and McHugh JJ were making a different point — that the wider scope of review for error of law — meaning the range of non-jurisdictional fact-finding it touches — necessitates that it imposes narrow minimal constraints on fact-finding. The traditional view (that want of logic in fact-finding does not constitute error of law) is warranted because review for error of law potentially touches on all material fact-finding: the concept of error of law in fact-finding is constrained because error of law is used as the touchstone for appeals and statutory systems that have the widest possible scope for consideration of factual error.[36]

In summary, the High Court authorities establishing the serious irrationality criterion for review of findings of fact had consistently and expressly maintained that the criterion was *not* to be used in review for error of law, precisely, it seems, because error of law extends to all material findings of fact. While attention has tended to focus on the circumstances in which serious irrationality gives rise to *jurisdictional error*, this seems to me only part of the picture. All members of the Court who have endorsed the serious irrationality criterion have emphasised that serious irrationality in 'intra mural' fact-finding is *not* an error of law.

Haritos applies SZMDS serious irrationality as a criterion for error of law

Haritos appears, on the face of it, to flatly contradict the High Court's careful demarcation between serious irrationality and error of law in *SZMDS*. As is well known, *Haritos* established that so-called 'mixed questions of fact and law', including questions about the legality of fact-finding, can ground an appeal from the Administrative Appeals Tribunal to the Federal

33 Ibid [54].
34 Ibid [57].
35 See, for example, K Stern and M Sherman, 'The Boundaries Between Fact and Law in Administrative Review' in Williams (ed), above n 15, 172, 174 — that is, 'scope' is read as the intensity of the standard applied in review. I suggest it may instead be read to mean the *incidence* of the standard — that is, the breadth of fact-finding that engages the standard.
36 *S20/2002* [2003] HCA 30 [60].

Court[37] — that is, legally erroneous fact-finding gives rise to a 'question of law' that engages the statutory appeal avenue 'on a question of law'.[38] That ruling, supported by extensive reasoning, led to the Federal Court addressing the questions of law raised by the taxpayer's allegations of legal error in material findings made by the Tribunal. Here, the Federal Court treated *SZMDS* irrationality as an error of law in fact-finding — that is, having resolved that 'question of law' extends to an allegation of an error of law in fact-finding, the Federal Court went on to hold that the application of the *SZMDS* criterion to a material finding by the Administrative Appeals Tribunal (AAT) presented a question of law.[39]

The question of law answered in the taxpayer's favour in *Haritos* was whether an AAT decision on taxpayers' objection to an income tax assessment involved findings of fact that were erroneous in law. The relevant statutory provision requires the taxpayer to establish that the assessment 'is excessive or otherwise incorrect and what the assessment should have been'.[40] The *Haritos* taxpayers argued that the Australian Taxation Office's assessment of their personal income from their commercial cleaning business had incorrectly included payments from the business that were in fact payments to subcontractors. The taxpayers gave testimony and provided business records, but also called witnesses who provided evidence of industry benchmarks for subcontractor payments, to corroborate the taxpayers' evidence. The finding that the Federal Court held to be legally erroneous was a finding made by the Tribunal as reason to reject the evidence of three witnesses. The Tribunal rejected the testimony of the witnesses on the basis that it was based on assertions by the taxpayers, not verifiable independent knowledge of industry practice. This was incorrect. The Federal Court held that the Tribunal's rejection of the testimony as corroborative because of an asserted source in the taxpayers' evidence that does not exist 'is irrational or illogical in the sense referred to in *SZMDS*'.[41]

The Federal Court expressly assimilated the *SZMDS* criterion with 'error of law' and applied it to the specific finding made by the Tribunal about the nature of the corroborative evidence:

> The approach by the Tribunal involved an error of law. The error was ... the drawing of a conclusion about the nature or character of [the corroborative] evidence that was irrational, illogical and not based on findings or inferences supported by logical grounds.[42]

37 [2015] FCAFC 92 [110]–[202]. The Court's discussion ranges over the full gamut of 'mixed questions', including whether fact-finding is legally erroneous, and other 'mixed questions', such as the meaning of statutory words that carry their 'ordinary' meaning; whether facts fully found are capable of falling within or without the description used in a statute; and whether an exercise of discretionary power involves an error of statutory interpretation. Leave to appeal to the High Court on the scope of 'question of law' in s 44 was refused on the grounds that there were no prospects of success: *Commissioner of Taxation of the Commonwealth of Australia v Haritos* [2015] HCATrans 337. D Kerr, 'What is a question of law following *Haritos v Federal Commissioner of Taxation?*' [2016] FedJSchol 18, n 9, notes that the ruling has been considered authoritative for similarly worded statutory appeals from tribunals to state courts.

38 [2015] FCAFC 92 [192], [197].

39 That is, *after* the lengthy survey of the case law ([110]–[202]), culminating in the conclusions on the scope of 'question of law' ([192]–[202]), the FCAFC turns to the questions of law raised by the Tribunal's treatment of the taxpayer's evidence ([209]–[227]).

40 *Taxation Administration Act 1953* (Cth) s 14ZZK(b)(i); see *Haritos* [2015] FCAFC 92 [5].

41 [2015] FCAFC 92 [217].

42 Ibid [217].

Further, the Federal Court explained that this error of law — the Tribunal's conclusion about the nature of the corroborative evidence — provides a basis for relief in an appeal because it is *material* to the decision made by the Tribunal.[43] This was not a case where an impugned finding (here the conclusion about the character of the evidence) is an ultimate finding identified in a statute, such that the error might be analysed as an erroneous application of law to facts.[44] Nor was this reasoned as a case of the Tribunal misconstruing an applicable legal rule of evidence or proof in drawing its conclusion about the nature of the evidence.[45] The only legal principle the Federal Court invoked in relation to the Tribunal's treatment of the evidence was the *SZMDS* rationality principle.

Taken at face value, the Federal Court's recognition of *SZMDS* irrationality as error of law is a significant departure from the position articulated in High Court decisions endorsing the *SZMDS* criterion, without any express acknowledgment or articulation by the Federal Court to that effect. The Federal Court appears to have reasoned that, if it can be a jurisdictional error to make a jurisdictional finding which is 'irrational or illogical' in the *SZMDS* sense, it must therefore be an error of law to make a material finding which is 'irrational or illogical' in the *SZMDS* sense:

> It may be an error of law to make a decision which is irrational, illogical and not based upon findings or inferences of fact supported by logical grounds ... In this case we are not concerned with whether the lack of reason or logic relates to a matter going to jurisdiction so as to amount to jurisdictional error.[46]

As discussed further below, the idea that jurisdictional error is an error of law of a particular kind (for example, an error of law in relation to a jurisdictional task) has an attractive simplicity. However, to think this way about irrationality in fact-finding flies in the face of the High Court's careful demarcation between the *SZMDS* rationality criterion and error of law. To bring the *SZMDS* rationality criterion over from jurisdictional error to legal error presupposes that legal error is implicit in every jurisdictional error. Yet that is indistinguishable from the Minister's submission on the relationship between legal error and jurisdictional error that was specifically rejected by Gummow and McHugh JJ in *Applicant S20/2002* in terms restated by four members of the High Court in *SZMDS*.

Before closing this account of *Haritos*, I should address the possibility that the application of 'serious irrationality' in *Haritos* can be squared with *SZMDS* on the basis that the Tribunal's decision was a state of mind jurisdictional fact. Certainly, *SZMDS* does not preclude recognition that serious irrationality *constituting jurisdictional error* is an error of law.[47] However, I do not think it is compelling to square *Haritos* and *SZMDS* this way. One difficulty is that the relevant statutory provision, in form at least, does not appear to establish a state

43 Ibid [213].

44 That is, it exceeds the 'either way margin' permitted for a decision applying the law correctly stated to the facts fully found, noting that the cases conflict as to the coverage and extent of the margin (or margins) as discussed in M Aronson, 'Unreasonableness and Error of Law' (2001) 26 UNSWLJ 315, 323–8; Aronson, Groves and Weeks, above n 7, 220–2 [4.8].

45 The FCAFC in *Haritos* gave separate consideration to a distinct submission that the Tribunal misconstrued the statutory the burden of proof, doing so 'on the assumption that we are wrong in holding that the Tribunal's decision in relation to subcontractor expense was irrational and illogical': [2015] FCAFC 92 [229].

46 Ibid [212].

47 Compare ibid [202]. See also *State Super SAS Trustee Corporation v Cornes* [2013] NSWCA 257, [12] (Basten JA) and other authorities cited by Aronson, Groves and Weeks, above n 7, 216.

of mind jurisdictional fact.[48] More fundamentally, it is impossible to ignore the Federal Court's specific statement that it was not necessary, in an appeal on a question of law, that the erroneous finding be a finding of jurisdictional fact.[49] There is no indication in *Haritos* that the Federal Court considered that serious irrationality is an error of law *only* when it is involved in a finding of jurisdictional fact, and every indication the other way. The Federal Court applied the criterion to a conclusion about the nature of corroborative evidence, making no attempt to finesse this as an application of the criterion to a finding of 'jurisdictional fact'.

Conflicting approaches to error of law in fact-finding — significance and implications

In this section, I turn to consider the wider implications of the *Haritos* divergence from *SZMDS*. I begin by acknowledging that it is unclear whether 'serious irrationality' marks a significant change in the content of 'error of law' in fact-finding. Yet, even acknowledging this to be the case, I suggest we can see the *Haritos* departure from *SZMDS* as a significant moment in an ongoing negotiation over the normative structure of legality norms for fact-finding.

Difficult to point to a definitive shift in content of error of law in fact-finding

It would, I accept, be difficult to show that *Haritos* marks a fundamental change in the content of 'error of law'. Indeed, an argument might be made that *Haritos* involves a conventional application of the longstanding orthodox concept of legal error in primary fact-finding — that is, making a finding (or drawing an inference) for which there is no probative material (or facts capable of supporting the inference) properly before the decision-maker.[50] This is persuasive given the Federal Court's description of the Tribunal's error as reaching a conclusion about the source of the testimony that 'was equivalent to finding a fact with no evidence … or to drawing a conclusion that it was reasonably open to make a finding, when it was not so open'.[51] In its review of the authorities, the Federal Court describes legal errors in fact-finding in terms that track the orthodox 'no evidence' ground.[52]

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48 The *Taxation Administration Act 1953* (Cth), s 14ZZK(b)(i), required the taxpayers to prove that the assessment was 'excessive or otherwise incorrect' and 'what the assessment should have been'. The Tribunal's task was therefore to decide whether the taxpayers had met this statutory burden of proof. The absence of the form of a 'subjective jurisdictional fact' may not be insurmountable. The distinction between a statutory requirement to make a finding as a *precondition to power* on the one hand and as *the basis for the exercise of a power* on the other has been criticised: see, for example, *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242, [24] (Basten JA). Extension of the 'jurisdictional fact' analysis to a factual state of affairs specified in legislation as the basis for an exercise of power would draw support from *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 [59] (French CJ).

49 [2015] FCAFC 92 [212].

50 Here treating 'no evidence' and 'not reasonably open' as two aspects of one overarching requirement that findings and inferences have a foundation in probative material: see, for example, *Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd* [2007] NSWCA 158, [33] (Basten JA); *Republic of Turkey v Mackie* [2019] FSC 103, [22] (Bell J).

51 [2015] FCAFC 92; (2015) 233 FCR 315, 388 [217].

52 For example, in listing examples of questions of law that may be raised by a Tribunal determination of fact, the only qualitative rationality norm for fact-finding is 'whether there is evidence to support a finding of fact': ibid [182].

The question that this throws up is whether there is any difference between the *SZMDS* 'serious irrationality' criterion and the age-old test for legal error in fact-finding.[53] On the one hand, a 'no change' thesis is difficult to square with the fact that members of the High Court took care to quarantine the rationality requirement for findings of jurisdictional fact from the concept of *error of law* (as discussed above). As discussed above, that was a carefully maintained distinction, articulated to meet concerns that the *SZMDS* rationality test amounts to merits review and with the stated intention to ensure that the *SZMDS* test would not apply to findings taken into account in discretionary decision-making. The care taken by members of the High Court to quarantine the rationality test from error of law is hard to understand if it was *simply* the orthodox, long-established requirement that there be some probative material for material findings.

There are other indications that the criterion of serious irrationality goes beyond the traditional review to correct findings made in the absence of *any* probative material.[54] The impression that 'serious irrationality' and 'no evidence' are one and the same might be said to draw support from the joint reasons of Crennan and Bell JJ in *SZMDS*. Specifically, Crennan and Bell JJ adhered to an *objective* rationality test, which asks whether a finding could be made by a rational or logical decision-maker on the material before the decision-maker (eschewing a *subjective* rationality test, which asks whether the reasons given by the decision-maker are rational and logical).[55] In this respect, their Honours' reasons are consistent with the *objective* presentation of the traditional test for error of law in fact-finding.[56] Yet, even acknowledging this continuity, it would seem that an objective rationality test poses a more flexible and holistic criterion for review of a finding than the traditional 'no evidence' test for error of law. The inquiry is not simply whether there is *some* probative material for the finding. Justices Crennan and Bell explain that the criterion extends to whether a reasonable person could make the finding on 'the material before the decision-maker', or 'the evidence as a whole'.[57] Even allowing that this poses an *objective* test, it would seem to operate in a more flexible and holistic way than the traditional no evidence ground applied to primary fact-finding. The difference between the *SZMDS* criterion and the traditional no evidence ground for error of law is inchoate, but it appears undeniable that it coincides with some adjustments in supervisory practice. It may perhaps be that *SZMDS* criterion extends rationality norms traditionally confined to ultimate findings to anterior findings.[58] This might be said to permit

53 That is, making a finding that lacks any foundation in the probative material properly before the decision-maker: see the influential discussion in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356–7 (Mason CJ).

54 Compare Stern and Sherman, above n 35, 172, esp 177–8. The possible differences between the 'serious illogicality' ground and traditional legal errors in fact-finding are discussed further in, for example, Smith, above n 17, 51; Hutton, above n 15, 50, 61–5; Baw, above n 17, 66, 68–72.

55 The distinction between a subjective and objective rationality requirement for fact-finding is made by G Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 MULR 543, 561–8; and taken up in comment on *SZMDS* in, for example, Smith, above n 17, 50, and Hutton, above n 15, 61–5.

56 See the detailed treatment in Smith, above n 17, 50; Hutton, above n 15.

57 [2010] HCA 16 [135].

58 See, for example, *Health Care Complaints Commission v Sultan* [2018] NSWCA 303, [86] (Beazley P; Simpson AJA agreeing), citing *Wesiak v D & R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 [73] (McDougall J; Beazley P and Simpson JA agreeing). The examples of 'serious irrationality' given by Crennan and Bell JJ in *SZMDS* [2010] HCA 16 [135] would appear to track various formulations of legal error in *ultimate* findings and/or application of law to fact, including *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126, 138 (Jordan CJ); *Hope v Bathurst City Council* (1980) 144 CLR 1, 8–9 (Mason CJ); *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156 (Glass JA).

a slightly more overtly qualitative judgment on the rationality of anterior findings, including whether the probative material for those findings is so scant or trivial it cannot rationally support the finding.[59]

On the other hand, there is some judicial support for the view that the *SZMDS* criterion was simply a new label for the 'no evidence' ground. In a case decided shortly after *SZMDS*, Basten JA found it 'convenient to assume' that the traditional requirement for *probative* material for a finding or inference explains the *SZMDS* requirement that findings or inferences be 'supported by logical grounds':

> Implicit in the statement that there is no evidence to 'support' a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of 'relevance', on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding' …[60]

Basten JA subsequently confirmed his view that a 'lack of logic' in fact-finding amounts to making a finding for which there is no evidence and for this reason is not confined to jurisdictional facts.[61] There is support for this view in other state authorities.[62] Yet High Court decisions concerning error of law in fact-finding decided after *SZMDS* have tended to articulate the error of law in traditional terms.[63] In one instance, the High Court held that a finding of fact was irrational, but the case was argued without any reference to *SZMDS* and decided on the basis that the irrationality evidenced a wrong understanding of the applicable statutory criteria.[64] All of this is to say that it remains uncertain whether, or how, 'serious irrationality' changes the scope of error of law in fact-finding.

Emerging focus on quality of reasons for discretionary decisions

No matter where the content of 'error of law' ultimately lands, there is, I suggest, one clear point of difference between *Haritos* and *SZMDS* — that is, the approach taken by the Federal Court in *Haritos* fundamentally rejects the idea (evident in *SZMDS*) that there is a need for supervisory practice to draw a distinction between findings required by statute and other material findings, including those taken into account in discretionary decisions.

59 Compare *SZLGP v MIC* [2008] FCA 1198, [22] (Gordon J).

60 *Amaba Pty Ltd v Booth* [2010] NSWCA 344 [21]–[26].

61 *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [204]–[205], [235]–[236] (Basten JA; Bathurst CJ agreeing).

62 Basten JA's articulation of 'supported by logical grounds' is adopted and applied in *Ballina Shire Council v Knapp* [2019] NSWCA 146, [38] (Payne JA; Basten and Macfarlan JJA agreeing).

63 That is, as making a finding for which there is no probative material or drawing an inference that is 'not open'; or acting on a wrong understanding of applicable statutory criteria or legal rules of evidence. See, for example, *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, [2010] HCA 32; *Osland v Secretary, Department of Justice* (2010) 241 CLR 320. In *Republic of Nauru v WET040 [No 2]* [2018] HCA 60, the High Court (Gageler, Nettle and Edelman JJ) allowed an appeal from a Supreme Court of Nauru judgment that Tribunal implausibility findings were speculative or mere conjecture, holding that basic inconsistencies in the material before the Tribunal afforded a rational basis for the Tribunal's implausibility finding.

64 *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26, discussed in J Forsaith, 'Illogicality By Any Other Name: The High Court's Decision in FTZK and How to Use It' (2016) 86 *AIAL Forum* 61.

Taking a broader view of supervisory practice in the Federal Court, that Court's divergence from a strict statutory approach to supervision of fact-finding is stark. So, for example, in review of state of mind jurisdictional facts for jurisdictional error in the period between *SZMDS* and *Haritos*, Federal Court authorities had settled on a flexible and functional approach that did not limit review to findings required by statute, whether that be the ultimate finding identified in statute or integers of that ultimate finding.[65] In this context, the Court had said that to focus exclusively on integers of the statutory criteria would be wrong because it would 'put out of account the actual course of decision-making by the Tribunal'.[66]

Similarly, the Federal Court has adopted a flexible and functional approach to review of fact-finding in the context of discretionary powers following the High Court's restatement of the reasonableness requirement for discretionary decisions in *Minister for Immigration and Citizenship v Li*[67] (*Li*). *Li* raises many significant questions that have been discussed extensively in scholarly comment and judgments. For present purposes, I note that certain comments made in the joint reasons of Hayne, Kiefel and Bell JJ in *Li* have been read as endorsing a *subjective* reasonableness requirement for discretionary decisions,[68] which is to say a requirement that a discretionary decision-maker have reasonable reasons for their decision.[69] Notably, three of the five members of the *Haritos* Federal Court had provided joint reasons in an earlier case, stating that the 'intelligible justification' for an exercise of discretionary power must lie within the reasons given by the decision-maker.[70] As later Federal Court authorities make clear, there is no distinction drawn in this regard between matters of *permitted* and *mandatory* relevance.[71]

The Federal Court in *Haritos* did not specifically address the significance of *Li* to the concept of 'error of law'.[72] Nonetheless, it is evident that *Li* has led the Federal Court to adopt a more explicit focus in judicial review on the quality of the reasons for discretionary decisions. We might infer that this change in focus in reasonableness review fundamentally changes the context in which the Federal Court would view the *SZMDS* prescription for a 'two-track'

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65 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, [98] (Robertson J); approved *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR431, 451 [70]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 [47]–[54]. This expansive approach is discussed by Aronson, Groves and Weeks, above n 7, 271–4.

66 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 [98].

67 [2013] HCA 18; (2013) 249 CLR 332.

68 See for example J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Williams (ed), above n 15, 35, 44.

69 *Li* [2013] HCA 18 [72] fixes the ground on whether *the decision-maker has been unreasonable* and states that such a conclusion can be drawn if the decision-maker has 'committed a particular error in reasoning' or 'reasoned illogically or irrationally'. The two distinct ways unreasonableness may be framed are discussed, for example, in L McDonald, 'Rethinking Unreasonableness Review' (2014) 25 PLR 117, 120.

70 See, for example, *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 [47] (Allsop CJ; Robertson and Mortimer JJ).

71 See, for example, *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81; [2017] FCAFC 200, 94–5 [30], [55]–[57] (Charlesworth J; Flick and Perry JJ agreeing), applying the dictum from *Singh* to support holding a discretionary decision unreasonable because 'illogicality or unreasonableness in the legal sense' affected an evaluation in fact made as the permitted (not mandated) basis for a discretionary decision. There is continuing disagreement as to whether the reasonableness requirement draws down to *material* or *critical* reasons.

72 The Federal Court found it unnecessary to consider whether the Tribunal's finding in relation to the subcontractor expenses was 'so unreasonable that no reasonable decision-maker could have made it': [2015] FCAFC 92 [228].

approach to legality of fact-finding. The case for making a distinction between findings required by statute and other material findings has been significantly weakened, given the direction for reasonableness review of discretionary decisions indicated by *Li*.

Ongoing negotiation over the normative structure of error of law in fact-finding?

I have argued that *Haritos* marks a stark shift in approach to 'error of law' in fact-finding from the case of *SZMDS* and that this aligns with a greater focus in supervisory practice, following *Li*, on the quality of the reasons for discretionary decisions. What might we make of this?

First, the contrast between the two cases reminds us that a grounds-based approach is better placed to promote a culture of justification in the exercise of unstructured statutory powers, including, relevantly, in relation to fact-finding. *SZMDS* illustrates that it is a statutory approach to legality that drives a distinction between findings required by statute and findings adopted, under non-enacted policy, as the basis for the exercise of discretionary powers. Judicial supervision of the latter tends to be discouraged on the statutory approach. Rationality is required when administrators make findings required by *statute* but not when they make findings as a matter of *policy*. In contrast, a grounds-based approach to legality recognises that norms attach to findings that are material to the exercise of a public power affecting an individual. The norms apply to findings material to an exercise of public power precisely because the public power is exercised on the basis of the finding.[73]

As mentioned above, the *Haritos* departure from the *SZMDS* approach to error of law in fact-finding may draw support from shifts in thinking about the concept of 'legal reasonableness' as an implied condition on the exercise of discretionary statutory powers in and following *Li*. *Li* indicated that the implied reasonableness requirement includes a rationality requirement and illustrated that, while this requirement attaches to the exercise of statutory power, it also 'draws down' to material steps in the decision-making process. It is possible that this will, in time, prompt articulation of a rationality requirement for material findings of fact as an aspect of the legal requirement of reasonableness. If the reasonableness requirement is developed in this way, it would certainly confirm and support the extension of the concept of error of law in *Haritos*.

Second, if the *Haritos* approach to the concept of error of law in fact-finding is confirmed by the High Court, it might be said that this demonstrates the resilience of a grounds-based approach to judicial review for error of law. It should be noted that the longstanding, orthodox ground of review for 'error of law' in fact-finding enforces a *general norm* for defensible fact-finding, identified by courts *ex ante* a statute. *Haritos* reasserts this conventional aspect of the error of law ground for review of fact-finding.

Third, this in turn raises the possibility that we may be moving towards a point where the two contrasting intellectual approaches to judicial review might co-exist through a demarcation.

73 Compare Federal Court authorities holding that the 'intelligible justification' for a discretionary decision must be found in the reasons in fact given for the decision: above n 71.

While the statutory approach may prevail in the identification of *jurisdictional error*,[74] the grounds-based approach will remain influential in review for *error of law*.[75] The relationship between error of law and jurisdictional error can be simplified as *Haritos* implies — a 'jurisdictional error' may be viewed as a material legal error occurring in the performance of a jurisdictional task.[76] Even if the constitutional context requires a statutory approach to identifying jurisdictional error, this need not preclude a grounds-based approach to review for error of law. As such, despite the ascendancy of the statutory approach to review for jurisdictional error, the benefits of a grounds-based approach[77] — predictability, applicability, universality — can be preserved within the administrative law system through its continuing influence on *error of law*.

This way of thinking about the relationship between jurisdictional error and error of law — jurisdictional error as a material legal error affecting a jurisdictional task — draws support from judicial statements in *Craig v South Australia*.[78] It offers an attractive way of articulating that judicial review for jurisdictional error and error of law are both concerned with *legality*.[79] Moreover, retaining the grounds-based approach to error of law ties our understanding of legality to the nature of the norms enforced in judicial review. This in turn gives us a functional and substantive way to understand supervisory jurisdiction as an exercise of judicial power. The power exercised by the reviewing court is properly characterised as judicial by reference to the norms being enforced. In the case of judicial supervision of the rationality of fact-finding, for example, we see that this is an exercise of judicial power because the rationality norm is a justiciable legal norm applied to a finding that is material to an exercise of public power that engages the courts' supervisory jurisdiction. Contrast the formalism inherent in the idea that a rationality norm is legal when it is applied to a finding required by statute as a precondition to power but not otherwise.

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74 Compare Bateman and McDonald, above n 3; Crawford and Boughey, above n 10. Note, there would seem to be differences of approach on the detailed application of this — for example, as to whether legal errors in findings that are *critical* to the decision reached but *not required* by statute give rise to jurisdictional error. See, for example, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 [98].

75 Contrast Bateman and McDonald's observation, with reference to the ascendancy of the statutory approach to giving content to the category of jurisdictional error, that '[o]nce legislative purpose and jurisdictional error were grafted, there remained less meaningful work left to be done by the grounds of review in identifying and applying the legal norms of administrative law': above n 3, 170. This conclusion may be based in part on Bateman and McDonald's argument, at 168–71, that *Blue Sky* marked an elision of tests for legality and validity, such that *Blue Sky* thinking has a centripetal force on *legality* (as well as *validity*).

76 The concept of a 'jurisdictional task' appears to be connected to the contextual understanding of jurisdictional error. Cases suggest it may include deliberative tasks such as making findings that are preconditions to power; considering matters that have mandatory relevance under the statute; and, in cases where a duty of procedural fairness is implied, considering submissions of substance which, if accepted, would be capable of affecting the outcome of the case.

77 See Bateman and McDonald, above n 3.

78 *Craig v South Australia* (1995) 184 CLR 163, 179. See also *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [61] (Edelman J; Nettle J agreeing). This does not appear to be inconsistent with other recent judicial explanations of the concept of 'jurisdictional error', albeit that they emphasise that jurisdictional error arises from failure to comply with 'statutory preconditions or conditions': see, for example, *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 [23]–[24] (Kiefel CJ; Gageler and Keane JJ).

79 Compare *Osland v Secretary, Department of Justice* (2010) 241 CLR 320, 351 [71] (French CJ; Gummow and Bell JJ), citing *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne and Callinan JJ).

Fourth, it may be that the High Court will in due course look more closely at the shift in the concept of 'error of law' between *Haritos* and *SZMDS* and in doing so revisit the justification for confining rationality review to findings required by statute. There are unresolved questions about the relationship between unreasonableness and irrationality in the findings of fact on which an exercise of discretion is based. There are still incentives for governments to propose unstructured administrative discretions as a means to restrict the scope of review.[80] We may yet see judicial attention return to the question whether Ch III jurisprudence favours the *SZMDS* two-track approach to legality — one for findings that are required by statute as preconditions to power and one for other material findings.[81]

Conclusion

Haritos marks a significant shift in judicial thinking about the concept of error of law in fact-finding. I have suggested the case may be read as reasserting a grounds-based approach to review for error of law, after a period in which an alternative statutory approach appeared to be ascendant in the thinking of the High Court. That is, *Haritos* is a welcome turn against the view adhered to in SZMDS — that there are different standards for legality in material fact-finding, depending on whether the fact-finding is specifically required by statute or not. On this reading of *Haritos*, it represents an important readjustment of supervisory practice, as it ensures that review for error of law is able to give effect to generally applicable norms for rational fact-finding in support of administrative powers, including discretions.

80 Compare J Gleeson, 'Taking Stock After *Li*: A Comment on Professor Gummow's Essay' in Mortimer (ed), above n 18, 33, 34.

81 That is, closer attention may articulate an aspect of Ch III jurisprudence that would explain the statutory approach; contrast deployment of the *Constitution* as 'more a rhetorical trump-card than a source of reasoned justification': Bateman and McDonald, above n 3, 167.

Snell: controlling the process of the Administrative Appeals Tribunal

David W Marks QC*

At the hearing in *Commonwealth v Snell*[1] (*Snell*), it was not in issue that issue estoppel does not apply in the Administrative Appeals Tribunal (AAT). Nevertheless, the Full Federal Court explains why issue estoppel could not apply in the AAT. It is strictly obiter dicta but puts down any doubt on that point.[2]

At first instance, the AAT had acted by analogy with issue estoppel, to prevent what it characterised as relitigation of an issue, in exercise of powers to make directions under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), s 33.

Of greater interest are the implications for litigants and the AAT in the future management of one of the AAT's busy jurisdictions — workplace injury and disease. The Full Court is careful to say that its treatment of the AAT's powers to manage and direct matters are restricted to the context of the injury compensation legislation on the Comcare model.[3] Nevertheless, the decision raises important issues more generally.

The effect of the Full Court's decision is that the AAT could not simply put to one side the Commonwealth's defence of a further claim. The context was a previous consent order concerning the link between skin disorder and work, which had been made against the Commonwealth. There are few cases in which the AAT has restricted the ability to review, under the principle in *Re Matusko and Australian Postal Corporation*[4] (*Matusko*), which have gone against the Commonwealth. Inevitably it is usually a claimant who is dissatisfied with a previous determination and attempts to relitigate.

The implications of *Snell* in the workplace injury and disease jurisdiction now must be thought through. The dynamics between claimant and the compensation authority have been clarified, in one sense, but it will take time and experience for the long-run implications to be confirmed. More broadly, we are enjoined to be careful, in seeking directions from the AAT, that the directions sought are consistent with the statutory scheme of the referring legislation as well as with the power to make directions under the AAT Act. Finally, this is an important case concerning the notion of the AAT standing in the shoes of the reviewed decision-maker.

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The author thanks his junior, Mr Travis O'Brien, of Inns of Court, Brisbane, for his comments upon an earlier draft. Any remaining errors are the author's own.

1 (2019) 370 ALR 1; 164 ALD 422; [2019] FCAFC 57.

2 Ibid [51]–[52].

3 Ibid [55].

4 (1995) 21 AAR 9; [1995] AATA 14.

Chronology

To understand *Snell* properly, the chronology helps. Here I draw heavily on the Commonwealth's document filed with the Full Court (but, for privacy, reducing the specificity of some dates where it does not matter).

Date	Event
1930s	Mr Snell's birth year
1950s–1990s	Works as seafarer; exposed to sun.
2000s–2010s	Solar-related medical conditions; medical procedures including malignant melanoma removals.
2011	Claim for 'solar-induced skin disease' — compensation for permanent impairment.
2 April 2013	AAT decision awarding permanent impairment compensation for solar-induced skin disease.
22 January 2017	Claim for permanent impairment compensation for solar-induced skin disease.
2 March 2017	Determination refusing liability.
22 May 2017	Reviewable decision affirming determination.
24 May 2017	Application to AAT to review the reviewable decision.
31 July 2017 – 15 August 2017	AAT hearing.
2 May 2018	AAT decision, *Snell and Commonwealth of Australia (Compensation)* [2018] AATA 1107 (Senior Member Tavoularis).
5 November 2018	Full Federal Court hearing of s 44 appeal (direct to a Full Court).
11 April 2019	Decision: [2019] FCAFC 57.
17 June 2019	Costs decision: [2019] FCAFC 97.

The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act) and the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) have, historically, great similarities. Each involves two tiers of internal decision-making before a matter comes to the AAT. Thus, before the most recent litigation, Mr Snell sought the required internal review of the determination refusing liability dated 2 March 2017. That led to the 'reviewable decision', affirming, on 22 May 2017. At that point, his right to seek review by the AAT was engaged.

Relevance of a prior decision of a tribunal

Decisions here

There needs to be a connection between work and the injury or disease. This is where the prior consent decision of the AAT on 2 April 2013 was said to be crucial. As Senior Member Tavoularis said in *Snell v Commonwealth*:

> In order for the Applicant to succeed in the present case, the Tribunal must be reasonably satisfied that the Applicant's employment contributed in a material degree to the contraction of his metastatic malignant melanoma [in terms of the Seafarers Act s 3] … [The] Applicant has already had some success before the Tribunal in asserting that a solar-caused skin condition of his was contributed to in a material degree by his employment. Now, he asserts that his success in the 2013 decision prevents or ought to prevent the Tribunal from considering whether his metastatic malignant melanoma was contributed to in a material degree by his employment.[5]

The Senior Member described this prior success before the Tribunal:

> [The] Applicant has previously — and successfully — claimed compensation from … a company of which the parties agree the present Respondent is a legal successor, before the Tribunal. In that case, a consent decision was reached, whereby the then-respondent accepted liability for the Applicant's 'solar induced skin disease' under the [Seafarers] Act.[6]

Before Senior Member Tavoularis, Mr Snell contended that the consent decision of 2013 prevented or ought to prevent the Tribunal from considering the contribution of employment to the present condition the subject of the further application for compensation. The mechanism was referred to by the shorthand of 'issue estoppel', but what was put in substance was that the AAT should rely on the authority of two earlier cases as justifying 'a close analogue of issue estoppel'.[7]

Guba

The argument that the AAT might act by way of analogy with the doctrine of issue estoppel was given considerable life by the decision of the High Court of Australia on an appeal from the Supreme Court of the Territory of Papua and New Guinea — *Administration of Territory of Papua and New Guinea v Guba*[8] (*Guba*). As we shall see, this was cause of action estoppel, but the language used is persuasive. The facts of that case began with an 1886 purchase on behalf of the Crown of land at Port Moresby from local inhabitants. An order in council in 1901 also bore upon the issue. Questions remained. Historically, the next step was that in 1954 the Administrator summoned a Land Board to decide competing claims about various parcels of land that overlapped the land under consideration in *Guba*.

Justice Gibbs' reasons for judgment on estoppel were not obiter dicta. His Honour said that the references in the authorities to the phrase 'judicial tribunal', in the context of estoppel by *res judicata*, requires more than 'a mere administrative decision'. His Honour said, however,

5 [2018] AATA 1107; 74 AAR 526 [8].
6 Ibid [2].
7 Ibid [9].
8 (1973) 130 CLR 353.

that the application of such an estoppel was not determined 'by inquiring to what extent the tribunal exercises judicial functions, or whether its status is judicial or administrative'.[9] Justice Gibbs went on to say:

> The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not a called court, and its jurisdiction is derived from statute or from the submission of parties, and it only has temporary authority to decide a matter ad hoc …[10]

Justice Menzies[11] and Stephen J[12] agreed with Gibbs J. Chief Justice Barwick, with whom McTiernan J agreed,[13] approached the issue differently. It was strictly unnecessary for the Chief Justice to decide the issue of estoppel. Nevertheless, his Honour said:

> I am unable to perceive what relevance questions of judicial power in the constitutional sense have in this connexion. What is central to the Board's power is the power to decide. It may well be that in a system where a separation of powers existed that function could be classed as an exercise of judicial power. But it is quite immaterial in the present connexion to consider such a question or decided cases which deal with it. In my opinion, the purpose of appointing a Board … was clearly to resolve a dispute and lay to rest the question of ownership of land …[14]

The Chief Justice went on to say[15] that the decision of the Board was 'a final decision'; that it bound the then claimant, his privies and the part of the clan which he represented; and that it bound the Land Titles Commission. His Honour said:

> I suppose there could not be a better justification for resort to the principle of estoppel than the present case. The Land Board had witnesses of whose evidence the Land Titles Commissioner did not have the benefit. We are told that every encouragement was given to the [other parties interested] … and, indeed, to the Papuans generally to tell all they knew or thought they knew about the title to the ownership of the lands about which the Board was enquiring. No appeal was brought from the Land Board's decision but now, 12 years later, it is sought to agitate the same question again and with lesser information than was available to the Land Board.[16]

Mr Snell relied on *Guba* in the Full Court. The Full Court pointed out that the High Court of Australia was dealing with cause of action estoppel, not issue estoppel.[17] The High Court was also dealing with a tribunal which was not subject to 'the unique dictates of federal judicial and administrative power'.[18] (It is notable that *Guba* has a clearer reception in New Zealand, which has no written constitution.[19]) The Full Court considered that, in the light of the different context and the alternative viewpoints that had been expressed, including in the High Court of Australia, a less rigid approach to questions of relitigation should be adopted

9 Ibid 453.
10 Ibid 453.
11 Ibid 405.
12 Ibid 460.
13 Ibid 404.
14 Ibid 402–3.
15 Ibid 403–4.
16 Ibid.
17 As to the distinction, see Wilken and Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed, OUP, Oxford, 2012) [14.09]. See also *Shiels v Blakeley* [1986] 2 NZLR 262, 266 (CA).
18 (2019) 370 ALR 1 [50].
19 *P v Iyengar* [2012] NZAR 829; [2012] NZHC 2168 [16] (Kós J), applying *Shiels v Blakeley* [1986] 2 NZLR 262, 266 (CA).

by the AAT. The policy of avoidance of relitigation could be achieved by such an approach. Indeed, the Full Court cited *Matusko* in that context.

This is not a rejection of *Guba* but, rather, an indication that much the same result can be achieved, and perhaps more appropriately given the statutory and institutional context, by a modified *Matusko* approach.

Matusko

The two cases relied on by Mr Snell in the AAT were *Matusko*[20] and Senior Member Tavoularis' decision of *Moore and Military Rehabilitation and Compensation Commission*.[21] However, there is a larger body of case law about this topic, referenced in *Matusko*. *Matusko* is the product of a line of earlier decisions in the Tribunal dating back to *Re Quinn and Australian Postal Corporation*[22] (*Quinn (1992)*).

Quinn (1992)

Before the Full Court, Mr Snell relied on the joint judgment in *Quinn (1992)* of President O'Connor J and Member Barbour:

> The Tribunal does not need to decide in this case whether as a matter of law the doctrine of estoppel applies to administrative decisions. The Tribunal's process is administrative and in understanding the task of review is obliged to consider the administrative consequences and fairness of the investigation it makes in reaching the correct and preferable decision. The policy basis upon which the doctrine of estoppel rests, that is, 'it is for the common good that there should be an end to litigation' and 'no one should be harassed twice for the same cause', are relevant to administrative law. The Tribunal should be guided by the principles of 'equity, good conscience and the substantial merits of the case, without regard to technicalities' … The reexamination of the extent of the original injury nearly eight years ago would defy these principles.
>
> …
>
> The Tribunal considers that there are strong reasons, both in case law and expressed in public policy, to limit the relitigation or continual review of substantively similar matters. To this end, the Tribunal believes it more appropriate that, pursuant to its powers under s 33, it determine when parties tender evidence to it whether such evidence shall be admitted.[23]

Ms Quinn was injured at work in 1984. In previous proceedings, she had, historically, been held entitled to compensation based on total incapacity for a 14-month period. But in 1991 the Australian Postal Corporation determined that liability to pay compensation had ceased.

Quinn (1992) is a decision on an application for directions about the conduct of the oral hearing in the matter. The directions sought by Ms Quinn were intended to prevent the employer departing from a decision of the Tribunal in 1988. The directions were intended to focus the factual inquiry on any change in circumstances after the 1988 Tribunal decision. The directions sought by Ms Quinn were not made in the reported case (which was a pretrial directions matter). Nevertheless, and as shown above, the majority of the Tribunal gave an

20 (1995) 21 AAR 9; [1995] AATA 14.
21 (2017) 72 AAR 71; [2017] AATA 532.
22 (1992) 15 AAR 519; [1992] AATA 668.
23 Ibid 525–6.

indication of what should happen should a party tender evidence at the later oral hearing, tending to the relitigation of the 1988 decision. Hence, in *Snell v Commonwealth*, the AAT stated as its guiding principle that, if the issues now are the same as before, the 'issues should generally not be relitigated', unless there be reason to allow it.[24]

For completeness, in *Quinn (1992)* Member Katz went down a different path, holding that issue estoppel applied in the AAT. Member Katz would have made the directions sought. Given the weight of authority against that by 2018, Mr Snell did not promote that dissent in the Full Court.

Matusko

Matusko provides a thorough treatment of the development of case law which purported to show that a variant of issue estoppel, which might be called '*Matusko* estoppel', can be applied as a matter of discretion by the Tribunal. This was said to be because the Tribunal should not allow re-litigation of issues already decided. It was said in summary that the Tribunal should use its flexible procedures to allow further consideration of issues where there is a reason to do so — for instance:

a. where there is a different decision;

b. where there is a clear legislative intent;

c. where the reconsideration decision is final;

d. where there has been a change in circumstances or fresh evidence; and

e. where justice to the parties requires a departure from the general rule.[25]

Mr Matusko unsuccessfully sought review in the Tribunal of a refusal of a claim for compensation for incapacity, in 1991. The claimed incapacity related to chest pain and a stroke in November 1987, which he said were related to an anxiety state caused by stress at work. Then, in 1992, he made a further claim for a stress condition, but in respect of the period after November 1987. On Mr Matusko's review in the Tribunal of a negative reviewable decision by the employer, the employer sought an order (at the commencement of the hearing) dismissing the matter under the AAT Act, s 42B, based on an allegation that the application was frivolous or vexatious. But the employer also relied on *Quinn (1992)*, which is the point of greater interest here. Senior Member Dwyer and Members McLean and Shanahan found:

> From the authorities cited we conclude:
>
> (a) No formal issue estoppel arises from the Tribunal's findings …
>
> (b) The Tribunal should not *generally* allow relitigation of issues already decided,
>
> (c) But the Tribunal should use its flexible procedures to allow further consideration of issues where there

24 *Snell v Commonwealth* [2018] AATA 1107 [15].
25 See (1995) 21 AAR 9 [24]–[33], principally at [33].

is reason to do so, … [where there is a different decision; where there is a clear legislative intent; where the reconsideration decision is final; where there has been a change in circumstances or fresh evidence; and where justice to the parties requires a departure from the general rule] ...

(d) The Tribunal should usually consider the evidence proposed to be called and make appropriate directions as to its admissibility during the hearing, as suggested in re Quinn, rather than in a directions hearing prior to the substantive hearing.[26]

Mr Snell adopted that before the AAT. While found to be in error by the Full Court, that illustrates why Mr Snell was ultimately granted a certificate under the *Federal Proceedings (Costs) Act 1981*. The Full Court said there:

> The reasons of the Court reflect an important debate that was had about how the Administrative Appeals Tribunal should approach its task. That is a matter of significant public importance. The position taken by the respondent, was, in the Court's view, incorrect; but it had some support from existing authorities, as the reasons reveal. The respondent's position taken in the litigation was reasonable.[27]

For all that, it is important to understand where the Tribunal was found to have gone wrong in *Snell*, so that proper procedures are followed in future.

Scheme of legislation

The legislative scheme involves elements as outlined by the Full Court:[28]

a. the liability of an employer to pay compensation to a person, in an amount determined under the Act;[29]

b. the right of the employee who suffers injury resulting in any of death, incapacity for work, or impairment, to payment of compensation;[30]

c. the specific right to compensation for permanent impairment, which was relevant here;[31]

d. in particular, a requirement to assess whether an impairment was permanent and a requirement to assess the degree of permanent impairment as a percentage;[32]

e. the obligation of an employer to make an interim determination of the degree of permanent impairment and payment in the interim, awaiting final determination[33] (I leave to one side nuances of degree of impairment and of non-economic loss);

26 See ibid [33].
27 *Commonwealth v Snell (No 2)* [2019] FCAFC 97 [5].
28 (2019) 370 ALR 1 [24]ff.
29 *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 24.
30 Ibid s 26.
31 Ibid s 39.
32 Ibid s 39(2), (5) and (6).
33 Ibid s 40.

f. a claim must be made.[34] There is provision for investigation, and a time limit for determination. This leads toward a 'determination' under one of the respective provisions;

g. the employer must reconsider a determination, on application, or *may do so* on own initiative.[35] A decision made under s 78 of the Seafarers Act is a 'reviewable decision'; and

h. an employee may apply to the AAT for review of such a 'reviewable decision'.[36]

Having pointed to the statutory scheme, and to the fact that the compensation legislation 'does not operate in a once-and-for-all manner in relation to the employee's entitlement to compensation', the Full Court said:

> [33] … it is contemplated that a final assessment of an employee's level of impairment arising from an injury may well be subsequently reviewed where the impairment increases with the consequence that a further entitlement to compensation will arise. Necessarily that requires the decision-maker to be satisfied that the subsequently increased degree of impairment was the consequence of the compensable injury.
>
> [34] The flexible nature of the compensatory scheme in cognate legislation, being the *Safety, Rehabilitation and Compensation Act 1988* (Cth) …, was identified by the Full Court in *Telstra Corporation Ltd v Hannaford* …[37]

This is a critical passage from *Telstra Corporation Ltd v Hannaford*[38] (*Hannaford*). Justice Conti (Heerey and Dowsett JJ agreeing) speaks of the corresponding statutory scheme of the SRC Act:

> The statutory scheme allows for progressive and evolving decisionmaking giving effect to the provisions of ongoing review of relief or entitlements in the nature of course of workers compensation, being review which allows for adjustment or change in the light of events and circumstances which may subsequently happen. The statutory scheme hence reflects a flexible scope for adjustment by way of decisions in the nature of awards to be made subsequently to the determination of … liability, whether that determination be made in isolation, or in the context of decisionmaking concerning consequential relief that may be required in the light of evolving circumstances. It is therefore a scheme which allows progressively for ongoing relief, and is thus not comparable of course with the process of curial resolution of the traditional common law entitlement of an injured employees for damages as a result of the negligent conduct of an employer.[39]

The last sentence bears emphasis.

This statutory form of relief for injured workers differs from the common law of torts. This difference is critical to the Full Court's decision in *Snell*.

34 Ibid s 63.
35 Ibid s 78.
36 Ibid s 88(1).
37 (2019) 370 ALR 1 [33], [34].
38 (2006) 151 FCR 253.
39 Ibid [57].

Statutory powers of the AAT

The AAT in *Snell* set about to apply the principles identified in *Matusko*, in purported exercise of the AAT's powers in s 33 of the AAT Act. That section begins with the broad statement that, in a proceeding before the AAT, 'the procedure of the Tribunal is, subject to this Act and the regulations *and to any other enactment*, within the discretion of the Tribunal' (emphasis added). That is critical. But let us also remind ourselves of other principles in AAT Act s 33:

a. Proceedings are to be conducted 'with as little formality and technicality, and with as much expedition', as the AAT Act and other relevant enactments permit and as a proper consideration of the matters before the AAT permit.

b. The AAT is not bound by the rules of evidence.

c. The person who made the decision is to assist the AAT. So is a party to a proceeding and that party's representatives.

There is then provision about holding directions hearings.

Section 33(2A) of the AAT Act gives a non-exhaustive list of the kinds of directions that might be given. There is nothing in that list explicitly enabling the AAT to give a direction effectively preventing re-litigation of a matter determined adversely to a party who now seeks to re-litigate. By the same token, there is no explicit exclusion. As will emerge, the AAT must nevertheless act within power in making a direction.

The AAT does have power to deal with proceedings which are frivolous or vexatious, under s 42B of the AAT Act. The kinds of proceedings which can be dismissed under that power are described exhaustively as frivolous, vexatious, misconceived, lacking in substance, having no reasonable prospect of success, or otherwise an abuse of the process of the Tribunal. Section 42B of the AAT Act does not, however, deal with a situation where the *respondent* to an application seeks, by the conduct of its defence, to do any such thing. As the respondent will usually be the government or a government agency, it should be expected that there is little call for a power, such as one to strike out a defence. Nevertheless, it is a potential gap in the AAT's armoury.

As we will see, it matters little in the present context, since the AAT stands in the shoes of the person who made the 'reviewable decision'. That person is part of a decision-making process described by Conti J in *Hannaford*, above. Thus, it seems that some degree of relitigation, albeit on emerging evidence, is part of the process contemplated by the compensation legislation, read with the directions power in s 33 of the AAT Act. The principal point that can be made about s 33(1) of the AAT Act is that it does require that any direction be consistent with other relevant legislation.

I now turn to the key submissions and how they were answered.

Key submissions of the parties and result

The Commonwealth's principal ground of appeal in *Snell* was that the AAT incorrectly approached the review on the basis that there was a general rule which prevented a party relitigating a matter determined by an earlier decision. The Commonwealth went further and characterised the earlier decision as having been made in respect of a different matter, being a different injury.

At the forefront of the submission was *Hannaford* but, in particular, a passage from the judgment of Heerey J.[40] There his Honour said it was within the AAT's jurisdiction to make a finding as to whether or not a particular condition was a compensable injury *at the time of the hearing*. The primary decision-maker could reconsider its own earlier determinations. Thus, the AAT could reconsider earlier findings of fact.

The respondent contended that *Hannaford* did not prevent the AAT giving effect to a variant of issue estoppel, shorthanded as '*Matusko* estoppel'. The respondent identified the issues that the AAT should consider under *Matusko* and identified how the AAT had dealt with those issues. The respondent framed the decision of the AAT, to prevent relitigation of the connection between the work and the medical condition, as simply being a matter of procedure, where the appellant had to show error of the kind in *House v King*.[41]

The Full Court decided that:

a. Issue estoppel as such does not apply in the AAT.

b. The AAT erred in this case because it refused to consider the merits of a prior determination, despite the compensation legislation expressly empowering the primary decision maker to reconsider prior decisions.[42]

c. The AAT, on Mr Snell's 2017 hearing, 'again stood in the stead of the Commonwealth as decision-maker and exercised all the powers which the Commonwealth was entitled to exercise in relation to Mr Snell's application for compensation'. Thus, the AAT had power to 'reconsider any prior decision'. And it was thus obliged 'to assess whether he had sustained a relevant injury'.[43]

d. Because the AAT had the power to reconsider earlier decisions of the primary decision-maker, it also had power to reconsider its own earlier decisions.[44]

This last is the nub of the decision. It does raise a question about the wider consequences of identifying the AAT with the primary decision-maker, dealt with below. Some immediate implications can be addressed.

40 Ibid [9].
41 (1936) 55 CLR 499.
42 (2019) 370 ALR 1 [55].
43 Ibid [56].
44 Ibid [59].

Issue estoppel in AAT

It is probably enough for those working in the AAT simply to note the conclusion that issue estoppel is inapplicable to the AAT. In Queensland, the Queensland Civil and Administrative Tribunal (QCAT) has also determined (on the ground that it is not bound by the rules of evidence) that issue estoppel does not arise there.[45] The issue had to be considered, as QCAT is constituted as a 'court of record'.[46] Considering *Snell*, that reasoning now appears incomplete.[47]

For those wishing to delve a little deeper, the following points are made by the Full Court:

a. The Full Court looked at the nature of the AAT, under its constituent Act. Its power is derivative upon the power of the reviewed decision-makers. Its decision is deemed for all purposes to be that of the original decision-maker. And its procedures are informal, without demanding obedience to the rules of evidence.

b. Thus, it has been said in *Minister for Immigration and Ethnic Affairs v Daniele*[48] that issue estoppel has no place in proceedings in the AAT. Historically, issue estoppel was generally seen as a rule of evidence, but the rules of evidence are expressly excluded by the AAT Act.

c. To the extent that issue estoppel is regarded now as a rule of law, it was nevertheless relevant that, at the time the AAT Act was enacted, the doctrine was understood to be a rule of evidence.[49]

d. Perhaps more fundamentally, issue estoppel must emerge from a judicial decision which is final. The AAT is not a court.[50]

e. The AAT sits within the context of a constitutional division between federal judicial and administrative powers. That is also relevant.[51]

So where does this leave the AAT when faced with a plain attempt to relitigate?

Preventing re-litigation

Compensation context — SRC Act and Seafarers Act

It is now a delicate thing for the AAT to handle attempted relitigation of a matter it has previously determined. An applicant may still face an application under s 42B of the AAT Act, but even then it would be a delicate thing to say that an applicant is (for example) abusing

45 *Coral Homes (Qld) Pty Ltd v Queensland Building Services Authority* [2012] QCATA 241 [103].
46 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.
47 (2019) 370 ALR 1 [45].
48 (1981) 61 FLR 354, 359.
49 (2019) 370 ALR 1 [45].
50 Ibid [46]–[48].
51 Ibid [50]–[51].

the AAT's process by requiring reconsideration of a previous determination. A respondent cannot face effective strike-out of its defence under s 42B.

The Full Court recognises the value of preventing relitigation, but what must be done is to 'prefer a less rigid approach' to the doctrine of issue estoppel. The Full Court mentions *Matusko* but says 'the principles to be applied may be further refined'.[52] Thus, the Full Court says in *Snell* that, if no new evidence has been advanced, which relevantly undermines or alters the effect of the earlier decision, 'it is most likely that, if the application for review is not disposed of in a summary manner, the earlier decision will have significant if not overwhelming weight'.[53]

It appears that the AAT's error in *Snell v Commonwealth* was that the AAT began with a disposition against relitigation, whereas the compensation legislation was more flexible and involved a continuous decision-making process.[54]

As mentioned, s 42B of the AAT Act does not apply to a respondent's case. Critically, the Full Court considered that an employer is unlikely inappropriately to rely on power in the compensation legislation to reconsider matters settled by the AAT 'without justification'. The Full Court said that that would 'inevitably lead to further proceedings', restoration of the original decision, and liability on the employer for costs.[55] However, in the case of a dissatisfied employee who 'simply makes repetitious claims based on substantially the same facts', the Full Court highlighted s 42B of the AAT Act, saying that such proceedings 'may be easily seen as frivolous, vexatious, misconceived or lacking in substance'. The one note of caution is that s 42B requires that the proceeding be 'of such a nature that the issues raised should not be accorded a proper hearing'.[56]

Attempts to relitigate outside compensation context

The *Matusko* principle had been applied beyond the context of the SRC Act and the Seafarers Act. The Full Court makes plain that *Snell* does not venture into what might be a more usual statutory context:

> It ought also be stressed that the consequences of the admixture of the provisions of the AAT Act and of any other legislation which does not afford the decision-maker the power of reconsideration are not dealt with in these reasons.[57]

The Full Court reinforces that (unless there is the statutory ability to reexercise a power to determine a matter), 'once a power is exercised to determine the rights of a subject, the exercise is final and conclusive'. Indeed, once the power has been exercised, the person on whom the power is conferred is *functus officio*.[58] This is what made the compensation legislation a distinct category. Indeed, s 78 of the Seafarers Act permitted own motion reconsideration, as does the equivalent provision in the SRC Act.

52 Ibid [50].
53 Ibid [76].
54 Ibid [77].
55 Ibid [79].
56 Ibid [78].
57 Ibid [55].
58 Ibid [71].

In *Re Benjamin and Federal Commissioner of Taxation*[59] (*Benjamin*), Forgie DP conducted a comprehensive consideration of the *Matusko* principle. Mr Benjamin was dissatisfied with objection decisions involving his income tax. He failed to apply within time for review of the objection decisions. His application for an extension of time was opposed. The AAT refused an extension of time. The reported decision, however, is a further application for extension of time, relying on a new basis for delay. Mr Benjamin now articulated his basis for delay as health problems, both his own and his family's. However, Mr Benjamin produced no medical evidence to support those submissions. There was evidence indicating that he had been active in business, which tended to contradict the new basis. Deputy President Forgie determined that s 42B of the AAT Act could not apply to an application for extension of time.[60] More importantly, the AAT was concerned that it may be *functus officio* and thus unable to hear the further application for an extension of time.

In retrospect, Forgie DP's analysis of the cases following *Quinn (1992)* and *Matusko* foreshadows disposition of *Snell*.[61] Deputy President Forgie's first and important step is to consider 'whether the Tribunal has jurisdiction in relation to the particular type of decision of which review is sought', and then:

> If it has jurisdiction in relation to that particular type of decision, the next question — and it usually does not arise — is whether the Tribunal has previously exercised its jurisdiction in relation to that particular decision of which review is sought. That requires consideration again of the relevant statutory framework, of the particular decision that has been made and whether the Tribunal has previously exercised jurisdiction in relation to that particular decision as opposed to a decision to similar effect.[62]

As Forgie DP had previously said in *Re Rana and Military Rehabilitation and Compensation Commission*:

> The duty that is imposed upon the Tribunal must be to review the particular decision of which review is sought and in relation to which the Tribunal is given jurisdiction. Once it has done so in accordance with its statutory authority and power, it seems to me that the Tribunal has done all that it can lawfully do. It is *functus officio*.[63]

Nevertheless, Forgie DP, in *Benjamin*, went on to consider the ability to limit the scope of the review, as foreshadowed by *Matusko*. She made the following points:[64]

a. The jurisdiction to consider an application for review 'does not necessarily mean that [the AAT] must review the decision that is the subject of the application or that it need consider every aspect of that decision'. However, this statement seems to be linked with a reference to s 42B, as well as the idea of limiting the scope for review 'in some circumstances'.

b. The AAT may 'in appropriate circumstances, conclude that a previous decision should be applied again as the correct and preferable decision when it is sought to

59 [2017] AATA 39; 71 AAR 226.
60 Ibid [51].
61 Ibid [52]ff.
62 Ibid [65].
63 [2008] AATA 558; 48 AAR 385; 104 ALD 595 [99].
64 [2017] AATA 39; 71 AAR 226 [66]ff.

revisit the earlier decision at some later time'. Deputy President Forgie is quoting from *Morales v Minister for Immigration and Multicultural Affairs*.[65]

c. Deputy President Forgie also points to s 25(4A) of the AAT Act, which provides that the AAT 'may determine the scope of the review of the decision by limiting the questions of fact, the evidence and the issues that it considers'.[66] This was a power not relied on by the Tribunal in *Snell v Commonwealth*.

d. Deputy President Forgie proceeded to determine the application for extension of time in *Benjamin* informed by those principles and by reference to s 2A of the AAT Act, which sets out the objectives of the AAT.[67]

Some of Forgie DP's analysis may still require consideration, as she was referred to decisions under the compensation legislation, as well as other decisions. Nevertheless, it does seem, with respect, that Forgie DP has injected a note of realism into consideration of the issue of application of the *Matusko* principle outside the context of compensation legislation of the kind considered in *Snell*. In short, it will often be a completely different decision which is now under review. For example, it has been held that, even in income tax, and where the decision is made by the court, there is no issue estoppel as between the subject and the Crown as between different years of income.[68]

Standing in another decision-maker's shoes

A critical aspect of the reasoning in *Snell* is that the AAT stood in the shoes of the person who made the reviewable decision. Of course, that does not mean that the AAT could do all of the things that the other person could do (under other powers). Thus, the AAT does not itself raise a new assessment of income tax, when it is considering the Commissioner of Taxation's objection decision. Rather, it is the objection (and relevant powers in that regard) which are relevant. In *Frugtniet v Australian Securities and Investments Commission* the majority frame the point this way:

> The AAT exercises the same powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision. A consideration which the primary decisionmaker must take into account in the exercise of a statutory power to make the decision under review must be taken into account by the AAT. Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.[69]

That passage will bear study, alongside the Full Court's decision in *Snell*.

65 (1998) 82 FCR 374, 387–8 (FC).
66 (2017) 71 AAR 226; [2017] AATA 39 [68].
67 Ibid [69].
68 *Commissioner of Taxation v Phillips* (1917) 17 SR (NSW) 641 (FC).
69 (2019) 93 ALJR 629; 367 ALR 695; [2019] HCA 16 [51].

Whether new dynamic in compensation litigation

The Full Court in *Snell* says:

> Nor is it likely that an employer will inappropriately rely on s 78(1) to reconsider matters settled by the Tribunal without justification.[70]

In light of *Snell*, the AAT might be wary in its approach to controlling employers' presentation of evidence and submissions, even if there is a risk of overstepping. The dynamic has always been that the employer is moneyed, whereas the employee is an injured or sick person, often reliant on 'no win, no fee' legal assistance. Thus, it is to be hoped that an employee whose condition worsens and who could make a new application seeking greater benefit will not be unreasonably deterred from doing so by the prospect of the employer reducing or terminating benefit. Were there to be an adverse determination, the employee would then face the prospect of the internal and external review processes and playing for everything all over again. These are all matters that can only be determined in the light of experience.

70 (2019) 370 ALR 1 [79].

Disability and the health requirement for migrants to Australia: exercising the power of discrimination?

Kostya Kuzmin*

Australia, like many other western countries, sets the health standard for non-citizen applicants for most visa subclasses, both temporary and permanent. This is done by imposing Public Interest Criteria (PICs) 4005 and 4007 in the *Migration Regulations 1994* (Cth), which are also known as the 'health criteria'. If a health criterion is imposed on a visa, it is mandatory for the applicant to undertake a health assessment. By assigning the case to a Medical Officer of the Commonwealth (MOC) for assessment, the Department of Home Affairs can ensure that the applicant for a visa:

> (a) is free from tuberculosis; and
>
> (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
>
> (c) is free from a disease or condition in relation to which:
>
> (i) a person who has it would be likely to:
>
> (A) require health care or community services; or
>
> (B) meet the medical criteria for the provision of a community service;
>
> …
>
> (ii) the provision of the health care or community services would be likely to:
>
> (A) result in a significant cost to the Australian community in the areas of health care and community services; or
>
> (B) prejudice the access of an Australian citizen or permanent resident to health care or community services;
>
> regardless of whether the health care or community services will actually be used in connection with the applicant.[1]

PIC 4005 therefore aims to protect the Australian community from the spread of tuberculosis and other dangerous types of diseases that may be a threat to Australian citizens and non-citizens and may impose a burden on the Australian healthcare and community service system by either being too costly to an Australian taxpayer or creating queues for certain types of treatment and delays in the provision of health care or community services. Among such services, according to departmental policy, are organ transplants (including bone marrow transplants) and dialysis.[2] The current provisions do not consider whether the intending migrant will actually use these healthcare and support services. Applicants who fail the health test do not satisfy PIC 4005 and thus have their visas refused.

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1 *Migration Regulations 1994* (Cth) sch 4 cl 4005.
2 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Prejudice to Access', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019.

The department's policy previously stated that the applicant's potential healthcare costs should not exceed the threshold of A$40 000.[3] These costs were calculated either for the duration of a visa period or for the lifetime if the health condition was a permanent one and it was possible to predict the way it could possibly develop.[4] This meant that, if the person was likely to require treatment of more than A$40 000 over the rest of their life, they would not meet the health requirement, regardless of whether they would access the Australian community healthcare system or not. A 'health waver' is available for some types of visas. This is prescribed by another public interest criterion — PIC 4007. Under this PIC:

> (2) The Minister may waive the requirements of paragraph (1)(c) if:
>
> (a) the applicant satisfies all other criteria for the grant of the visa applied for; and
>
> (b) the Minister is satisfied that the granting of the visa would be unlikely to result in:
>
> (i) undue cost to the Australian community; or
>
> (ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.[5]

The word 'significant' in PIC 4005 is substituted for the word 'undue' in PIC 4007. This enables the decision-maker to make a decision that the health requirement is satisfied with a waiver. Unlike the word 'significant', which can be determined by a specific figure — in Australia, this is done by departmental policy — the word 'undue' offers greater flexibility to the decision-maker and is less unfavorable to the applicant. *Collins Online English Dictionary* defines 'undue' as 'greater or more extreme than one thinks is reasonable or appropriate'.[6] The waiver can apply to protection visas or to a limited number of temporary and permanent visa applications.

If the department decides to exercise a waiver, this will imply that the 'significant cost threshold' will not apply to the applicant and, depending on a particular case, applicants with potentially costlier health conditions will be granted visas. In deciding whether to exercise the waiver, and whether the possible healthcare and community service costs are beyond 'reason' or 'appropriateness', the department would have regard to the individual circumstances of the applicant (or their sponsor, if applicable): their ties to Australia, connections with their home country, various compelling and compassionate circumstances, the amount of income they earn (only applicable if they or their sponsor are already in Australia) to cover the potential healthcare costs, and whether they have skills that are in demand in Australia.[7]

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3 'Significant Costs', ibid, 1 October 2019.

4 Ibid.

5 'Assessing PIC 4007 Waivers for Non-Humanitarian Visas', ibid.

6 'Undue', *Collins Online English Dictionary* (Collins, 2000) <https://www.collinsdictionary.com/dictionary/english/undue>.

7 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Prejudice to Access', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019; 'Assessing PIC 4007 waivers for non-humanitarian visas'.

No difference between a disability and a disease?

The definition of a disability is provided in the *Disability Discrimination Act 1992* (Cth):

> *'disability'*, in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
>
> (b) total or partial loss of a part of the body; or
>
> (c) the presence in the body of organisms causing disease or illness; or
>
> (d) the presence in the body of organisms capable of causing disease or illness; or
>
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
>
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
>
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
>
> (h) presently exists; or
>
> (i) previously existed but no longer exists; or
>
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
>
> (k) is imputed to a person.
>
> To avoid doubt, a *disability* that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.[8]

Some parts of the definition use the words 'illness' or 'disease' or state that the presence in the body of some organisms that cause a disease or an illness is a disability. This definition, in the author's opinion, is out of date and does not reflect the modern understanding of disability. The *Disability Inclusion Act 2014* (NSW) gives a more modern and inclusive definition that does not 'label' people with a disability as ill, correctly focusing on the concept of impairment instead:

> Disability in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person's full and effective participation in the community on an equal basis with others.[9]

The definition emphasises that it is only because of the 'clash' between the impairment and the barriers which exist in our natural and built environment that people may not be able fully and actively to participate in the life of the community. Unlike those who are ill, they may not need treatment, but governments certainly need to take measures to adapt the environment around these individuals in a way which would enable people with disabilities fully to realise

8 *Disability Discrimination Act 1992* (Cth) s 4 ('disability').
9 *Disability Inclusion Act 2014* (NSW) s 7 ('disability').

their potential. In its definition of a 'person in a target group', the *Disability Inclusion Act 2014* also contributes to the development of non-discriminatory disability practices:

> [A 'person in a target group'] is a person who has a disability, whether or not of a chronic episodic nature, that:
>
> (a) is attributable to an intellectual, cognitive, neurological, psychiatric, sensory or physical impairment, or a combination of any of those impairments, and
>
> (b) is permanent or likely to be permanent, and
>
> (c) results in a significant reduction in the person's functional capacity in one or more areas of major life activity, including, for example, communication, social interaction, learning, mobility, decision-making, self-care and self-management, and
>
> (d) results in the need for support, whether or not of an ongoing nature.[10]

The focus of the definition is again on the word 'impairment', which is permanent, and not on words such as 'disease' or 'illness'. The definition is also important because, in the author's opinion, by identifying the areas of life in which the person's functional capacity is affected, it actually incudes the areas where a special approach, equipment or facilities may be needed so that the government can adapt these environments to the needs of a person with an impairment or provide individual support. All of these may potentially affect the government immigration policy and calculations of 'significant cost' in the policy of the Department of Home Affairs, even though the department would certainly not be guided by a New South Wales statute.

The *Disability Discrimination Act 1992* (Cth) provides a definition of the term 'discrimination' which applies to people with disabilities. It is also stated that such discrimination can be direct or indirect:

> **5 Direct disability discrimination**
>
> (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
>
> (2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
>
> (3) For the purposes of this section, circumstances are not *materially different* because of the fact that, because of the disability, the aggrieved person requires adjustments.

10 Ibid ('person in the target group').

6 Indirect disability discrimination

(1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

(c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

(2) For the purposes of this Act, a person (the *discriminator*) also *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.[11]

On the one hand, it can be assumed that discrimination on the basis of disability is a direct form of discrimination since the Department of Home Affairs, as 'the discriminator', treats the aggrieved person — an applicant with a disability — less favourably only on the basis of their disability. On the other hand, it may be argued that this discrimination has at least some features of indirect discrimination given that the discriminator, through the Migration Regulations, requires the aggrieved individual to comply with a requirement, specifically the one relating to health. Because of their disability, the individual is not able to comply with the requirement, which disadvantages them severely.

The similarity between direct and indirect discrimination is in their reference to the concept of 'reasonable adjustments'. In the case of direct discrimination, the discriminator does not make, or propose to make, reasonable adjustments, and the failure to do so results in a discriminative treatment of the disabled individual. In the case of indirect discrimination, the aggrieved person would be able to comply with the requirement if reasonable adjustments were made by the discriminator, but the discriminator does not do so or proposes not to do so. This has a disadvantaging effect on the person with the impairment. In other words, an inclusive environment is to be created. Certain measures to improve the inclusion of people with disabilities are part of plans of some states and territories in Australia:

11 *Disability Discrimination Act 1992* (Cth) ss 5–6.

12 Requirement for disability inclusion action plans

(1) Each public authority must, from the day prescribed by the regulations, have a plan (a *disability inclusion action plan*) setting out the measures it intends to put in place (in connection with the exercise of its functions) so that people with disability can access general supports and services available in the community, and can participate fully in the community.

(2) In preparing its disability inclusion action plan, a public authority:

(a) must consult with people with disability and have regard to any guidelines issued under section 9, and

(b) may consult with individuals or other entities the authority considers appropriate, including the Disability Council.

(3) A disability inclusion action plan must:

(a) specify how the public authority proposes to have regard to the disability principles in its dealings with matters relating to people with disability, and

(b) include strategies to support people with disability, including, for example, strategies about the following:

(i) providing access to buildings, events and facilities,

(ii) providing access to information,

(iii) accommodating the specific needs of people with disability,

(iv) supporting employment of people with disability,

(v) encouraging and creating opportunities for people with disability to access the full range of services and activities available in the community, and

(c) include details of the authority's consultation about the plan with people with disability, and

(d) explain how the plan supports the goals of the State Disability Inclusion Plan, and

(e) include any other matters prescribed by the regulations.[12]

In the author's opinion, adjustments have to be made by the discriminator where it is physically possible to do so, and Australia has to do this as part of its national and international obligations not to discriminate against people with disabilities. These adjustments would be changes or adaptations to the natural and built environment, providing disabled people with better access to all kinds of public places. There would thus be no need to include so much individual support in the health assessment of a person with 'mild' and even 'moderate' disabilities.

The terms 'mild' and 'moderate' in reference to disabilities are used by the Department of Home Affairs in its booklet *Notes for Guidance for Disability Services*.[13] The booklet is used by case officers to calculate the financial implications of disabilities and consider 'prejudice to access' to services to which people with impairments need to have access. If adjustments

12 *Disability Inclusion Act 2014* (NSW) s 12.
13 Department of Immigration and Border Protection, *Notes for Guidance for Disability Services* (November 2017).

are made, some disabilities will become ‘cheaper’, as less government support will be necessary. Lower health costs will possibly help more people to comply with the health requirement.

It is obvious that governments are obliged to make such adjustments in any case because, if they are not made, people who are socially salient will be prevented from exercising their right to take part in a wide range of public and private spheres of interaction — for example, receiving public benefits and social services, making career and educational choices, embarking on employment opportunities, and choosing accommodation and housing.[14] It is the duty of the government to make sure that the built environment is inclusive of people with disabilities. Jonathan Wolff calls these policies ‘status enhancement’ for people with disabilities, implying that ‘changes to social, material and cultural structure are made in order to modify the structural mediating factors between impairment and adverse consequences’:[15]

> An individual’s status is improved in the sense that external barriers to achievement are removed and so the person will have a wider range of opportunities … For disabled people, and especially those with mobility problems, status enhancement is also likely to take a material and cultural form. Physical access to places can be improved, technology can be adapted to meet the needs of a wider range of people, and employers, shop-keepers and other citizens can come to treat disabled people in the same way as they treat others. To the degree it is successful, status enhancement ‘cancels out’ impairment, turning disability into ‘difference’. It is important to note that, typically, status enhancement is a collective, rather than individualized, approach, in that it can improve the opportunities of many people without acting directly on any of them.[16]

For example, under current departmental policy a prospective migrant with decreased mobility would require a high level of individual support and would be several times over the ‘significant cost threshold’. They would also feel miserable because they have to comply with the ‘health requirement’ and are being treated differently from everyone else. In the current situation, the Australian Government ‘highlights’ their impairment instead of treating them seamlessly. Instead of enhancing their status, departmental policy puts them into an even more vulnerable position, amplifying the lack of mobility that makes them different from other individuals. If the infrastructure had been planned better for the people who can propel themselves in a wheelchair and more had been done to make workplaces accessible, potentially the costs would have been lower.

Similarly, for a blind person, all visual information should have been provided in sound or the Braille code so that the blind can have the same experience as the people who can see. For a deaf person, sign language should be taught to and used by operators and staff of all public and entertainment venues, and not only community service venues which assist people with that type of impairment. In other words, it is the duty of the Australian Government to design an inclusive world, because this has to be done anyway in order to improve the wellbeing and exercise of freedom of its own citizens who live with impairments. If the environment were made inclusive, the costs incurred by accepting migrants with disabilities would be lower. This view is also advanced by Douglas Mackay — an American scientist and researcher on international immigration. He gives similar advice to Canadian

14 Douglas MacKay, ‘Immigrant Selection, Health Requirements, and Disability Discrimination’ (2018) 14(1) *Journal of Ethics and Social Philosophy* 66.

15 Jonathan Wolff, ‘Disability, Status Enhancement, Personal Enhancement and Resource Allocation’ (2009) 25 *Economics and Philosophy* 51.

16 Ibid.

lawmakers (currently, Canadian immigration legislation uses the term ‘excessive demand’, the definition of which also includes the ‘cost’ element, as opposed to the terms ‘significant cost’ and ‘undue’ cost, which are used in Australian migration law):

> [T]here may be cases in which the admission of a prospective immigrant with a disability is likely to lead to and ‘excessive demand’ on Canada’s health and social services only because Canada has not fulfilled its duty to ensure that people are not disadvantaged because of morally arbitrary features. For example, … a deaf prospective immigrant would satisfy the definition of ‘excessive demand’, but that full compliance with its duty of inclusion would require Canada to structure its social world in a way that is fully inclusive of people whose hearing is limited or absent, eg, by requiring all citizens to learn sign language. In this case, admission of a deaf prospective immigrant would only be likely to result in an ‘excessive demand’ on Canada’s health and social service programs — ie, require certain forms of assistance, — because Canada has not complied with its duty of inclusion. If Canada had done so, the prospective immigrant in question — as with deaf Canadians — would not require any form of assistance to live and work. [17]

The author shares Mackay’s opinion. If any government that accepts foreign migrants took all the measures to create an inclusive environment for its own citizens with impairments as well as for prospective migrants, this would make a substantial contribution to non-discriminatory practices. This is exactly what people with disabilities expect from decision-makers: an egalitarian manner of assessment. To do this, the impediments that prevent disabled people from being able to look after themselves, subsist and be productive should be removed. Furthermore, where necessary, proper infrastructure should be created:

> Canada would have available a nondiscriminatory means of preventing the admission of such immigrants from resulting in an ‘excessive demand’ on its health and social service programs — namely, designing its social world in an inclusive way, and this redesign would not require the imposition of an undue burden on Canada since Canada would have a duty of justice to carry it out anyway.[18]

Similarly, should all the conditions to deliver an inclusive world be created fully by the Australian Government for the benefit of both its citizens and new arrivals with disabilities, which would inevitably decrease the amount of the ‘cost threshold’ and enable some people to meet the health requirement then, in the author’s opinion, Australia would be thought to have fulfilled its non-discrimination obligations.

However, this does not mean that intending migrants should put the health and life of Australian citizens and existing permanent and temporary residents at risk. The country might then find itself in a situation where the interests of an Australian citizen might be in conflict with the interests of the non-citizen visa applicant. This mostly concerns those with disabilities who might require organ transplantation in the near future and where a donor might be sought. Whether it is a ‘prejudice to access’ for PIC 4005 or ‘undue prejudice to access’ for PIC 4007, a certain amount of discrimination against a disabled overseas person may seem lawful and morally right. If this category of individuals is not discriminated against then an Australian citizen or permanent resident would be discriminated against unjustly, and protecting one’s population, including their life and health, is one of the major roles of any government, including the Australian Government.

17 MacKay, above n 14, 67.
18 Ibid.

Therefore, the norms that prevent visas from being granted to non-citizen applicants who may impose excessive pressure on medical and community services, the supply of which cannot possibly be increased quickly by better management of hospitals and the healthcare system, should remain in place. The same should apply in the case of organ transplants where organs are in short supply if the increase of such supply is unrealistic in the short term and could potentially lead to a choice between the life and health of an Australian citizen or resident and that of a foreign resident. This view is shared by a number of scientists, including MacKay, who suggests that the government should apply the same approach in Canadian circumstances:

> One might argue that this is the wrong way to compare the purposes of Canada on the one hand and prospective immigrants on the other. Instead, one might suggest, one might simply compare the interests of Canadian residents that would be promoted … with the interests of prospective immigrants that would be set back by this policy. To take a simplistic example, suppose that a prospective immigrant with end-stage renal disease wishes to be admitted to Canada because she is unlikely to secure a life-saving kidney transplant in her country of residence, and her chances are much better as a resident of Canada. Suppose that, given the limited supply of kidneys for transplantation in Canada, admitting this prospective immigrant will mean that a citizen of Canada with end-stage renal disease will be unable to secure a life-saving kidney.[19]

MacKay believes that, although in such a case the interests of the prospective migrant and the interests of the citizen may seem to be the same, priority should be given to the citizen's needs, and failure to do so is unjust. Excluding and discriminating against a non-citizen can be the only justifiable policy because it would serve the morally right purpose of safeguarding the country's own citizens:

> Canada has a right and duty of justice to fulfill its morally important purposes, whereas the prospective immigrants in question have no right or claim of justice to secure admission in Canada. When Canada admits the prospective immigrant with end-stage renal disease, knowing the consequences for its own citizens of doing so, all else being equal, it fails to realize a morally important purpose that it has a right and duty of justice to realize: promoting the health of its citizens. By not admitting the prospective immigrant in question, by contrast, Canada violates no right nor fails to fulfill some claim of justice. An injustice occurs when Canada fails to promote its citizens' health but not when it excludes a prospective immigrant who has no claim to residency.[20]

If we look at the definition of 'discrimination on the basis of disability' suggested by the United Nations *Convention on the Rights of Persons with Disabilities* in the light of MacKay's thoughts, it may seem that no discrimination takes place when the migrant is not accepted because of their disability, as they have 'no claim to residency' and accepting them is at the discretion of the Australian Government:

> 'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.[21]

19 Ibid 70.
20 Ibid 71.
21 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008), Article 2 ('discrimination on the basis of disability').

The Convention affirms that people with disabilities should be able to enjoy the same human rights as all other people. One of those basic rights is the freedom of movement, asserted by Article 13 of the *Universal Declaration of Human Rights*:

> **Article 13.**
>
> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
> (2) Everyone has the right to leave any country, including his own, and to return to his country.[22]

From the Article's wording it is obvious that individuals, including individuals with a disability, can exercise their right to free movement within the border of their own state. This does not imply that they will be able to move freely internationally. They have the right to leave their country of residence; however, this does not mean that any other country, including Australia, is under a legal obligation to accept them and grant them a visa. It should first exercise the duty of taking care of its own citizens, whose state of health may be equal to that of the state of health of the non-citizen. At the same time, Australia's international obligations require that disabled individuals have equal treatment and equal benefit of the law:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
>
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.[23]

Currently, intending migrants with a disability cannot receive an equal benefit of the law because the Migration Regulations prescribe discriminative criteria against them. For example, a mechanical engineer with no impairment who would meet the health requirement would benefit from the law and be able to have their visa granted, while a mechanical engineer in a wheelchair would not be able to do so, although they are completely equal in satisfying all other criteria: age, a profession that is in the skilled occupation list, a skill assessment from a relevant skilled assessment authority, language proficiency, and character and other criteria. Furthermore, even if the disability was that of the child of the main applicant — that is, both the applicant and their spouse have no disability and there is no doubt about them contributing to Australia equally to all other migrants — the whole family unit would still fail to meet the health requirement because of the Australian 'one fails, all fail rule'.

The Australian Migration Regulations and the policy of the Department of Home Affairs seem to be even more punishing to people with disabilities in the light of Article 18 of the *Convention on the Rights of Persons with Disabilities* and *Optional Protocol*:

22 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Article 13.
23 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008), Article 5.

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

   a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

   b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

   c) Are free to leave any country, including their own;

   d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.[24]

The *Convention on the Rights of Persons with Disabilities* uses the term 'liberty of movement' instead of the term 'freedom of movement', which is used in the *Universal Declaration of Human Rights*, and, while the Declaration implies movement within the borders of the disabled people's own country, the Convention grants them the right to be an applicant in immigration proceedings to a foreign country and not to be discriminated against in such proceedings on the basis of their disability. Australia certainly acts as a discriminator in this case.

Discrimination against migrants with disabilities who have to undertake a health examination in order to satisfy the health requirement largely resides in the fact that neither the statutory provisions nor the departmental policy differentiate between people with diseases and people with disabilities, although these two groups of individuals are completely different. Treating a disability as a disease is, in the author's opinion, very much a relic of the past.

Disability is a type of impairment that may affect one or several bodily functions, yet in many cases it will still allow the individual to live a long and productive life and contribute to the society without putting excessive pressure on the community and health service system. Under current policy, a person who is deaf may be refused a visa, but it is doubtful whether a person with such a disability would incur significant treatment costs and could be considered under the same provisions as would a person with HIV or an end-stage hepatitis B.

The department in its policy uses two different terms that apply to health issues — namely, 'health condition' and 'disease', in this way implying that disability is a type of health condition and not a disease. However, the rules for calculating the 'significant cost' are, in fact, the same for both categories. The fact that decision-makers identify people with disabilities to be a burden to the Australian health system shows that decision-makers are not expected to treat these two classes of persons differently when they exercise their powers.

24 Ibid, Article 18.

MacKay, however, believes that there is a strong overlap between ‘socially costly’ health conditions and disabilities. At the same time, he does not deny that prospective immigrants are often discriminated against only because of their disability and suggests that the ‘discrimination in question is a form of direct, or intentional discrimination’.[25] However, contrary to this argument on the interconnection of disease and disability, Australian lawmakers saw the need to recognise the difference between these two, thus making a first step towards putting an end to the discriminative treatment of individuals with disabilities, by making a recommendation as part of the Joint Standing Committee on Migration report *Enabling Australia: Inquiring into the Migration Treatment of Disability*:

> The Committee recommends that the Australian Government amend Schedule 4 of the Migration regulations 1994 (in particular Public Interest Criteria 4005, 4006A and 4007) so that the assessment of diseases and medical conditions are addressed separately from the assessment from the assessment of conditions as part of a disability.[26]

In more than nine years since the report was tabled, this and many other recommendations in it have not become part of Australian official migration policy, let alone part of the statutory framework. In the author’s opinion, it is necessary to review the findings of the report, since they offer a range of ways to rethink the health assessment process and ‘significant cost’ calculation and mitigate the discriminative effect it has had on disabled immigrants for many years now.

The intent of Australia to discriminate against people with disabilities can be right in a very limited number of cases. It may be morally right and justified if it concerns the Australian ‘prejudice to access policy’, which is the equivalent to Canadian ‘mortality and morbidity’ concepts. Although they are phrased differently, these concepts describe the same issue — the issue which arises when the demand for a particular healthcare service, operation, treatment or organ transplant significantly exceeds its supply. This seems to be a viable argument in favour of the exclusive and discriminatory practices that both countries have in the treatment of visa applicants with disabilities.

However, it should be acknowledged that ‘prejudice to access’ is the only argument that can justify the discrimination against disabled people by the provisions of migration legislation. Increasing the ‘cost threshold’, including by making the environment more inclusive of people with different types of impairments, differentiating between a disability and a disease and assessing the potential contribution that the disabled migrant and members of their family unit could make to Australia are vital steps towards enhancing the treatment of foreign migrants and eradicating discrimination.

A humiliating experience

The cases of people with disabilities who are quite independent and can support themselves without being a burden to the system, yet are refused visas and even deported, are not rare and give rise to sympathy all over Australia. Applicants whose visas are refused while they are in Australia resort to the Administrative Appeals Tribunal to challenge decisions of the

25 MacKay, above n 14, 50.

26 Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiring into the Migration Treatment of Disability* (2010) 58.

Department of Home Affairs.[27] In practice, however, such appeals are unsuccessful because, with the current health regulations in place, there is almost no chance for a positive appeal outcome if the person does not satisfy the health requirement prescribed by PIC 4005.

There is a glimmer of hope for those who expect a health waiver to be exercised under PIC 4007. The departmental officer might have failed to consider all compassionate and compelling factors, as well as the income and savings of the applicant or their sponsor to mitigate the potential 'significant costs' to the Australian healthcare system. This, on balance, might result in a favorable decision. However, other applicants, after the decision of the Department of Home Affairs is affirmed, have to resort to asking the Minister to make a more favorable decision under the Act.[28] Some of them admit that having to ask the Minister to act personally and grant them or their dependents a visa, attracting media attention to their case, is an emotionally draining and humiliating process.[29] For the applicants who were refused a visa while overseas and do not meet the health requirement, there are no appeal options at all.[30]

Blake and Lindauer have argued that it is necessary for a state to treat prospective immigrants in the same way as it would treat its own citizens. They believe that, by discriminating against prospective immigrants, governments do not wrong prospective immigrants, but they do wrong citizens who belong to the same socially salient group as prospective immigrants in question.[31] It may thus be argued that the way Australia treats applicants with disabilities can be an indication of a similar attitude to its own people who were born with or have acquired an impairment.

Recent minor changes introduced by the department 'silently'

It was unexpected and positive news when the Department of Home Affairs increased the 'significant cost' threshold from A$40 000 to A$49 000 per applicant for the new migration year which commenced on 1 July 2019. As strange as it may seem, most applicants found out about this change from media reports and not from departmental announcements.[32] This, however, cannot be deemed a giant leap forward in treating people with disabilities fairly.

First, an increase in the threshold was recommended in the 2010 report by the Joint Standing Committee on Migration. At the time the report was published, the threshold stood at a mere A$21 000:

27 *Migration Act 1958* (Cth) ss 347–350.

28 Ibid s 351.

29 Damian McIver, 'Two-Year-Old Boy Faces "Painful and Premature Death" as Deportation Looms', *ABC News* (online), 21 April 2019 <https://www.abc.net.au/news/2019-04-21/family-from-maldives-fight-sons-deportation-disabilty/11019598>.

30 *Migration Act 1958* (Cth) s 347(2).

31 Michael Blake, 'Discretionary Immigration' (2002) 30(2) *Philosophical Topics* 251; Matthew Lindauer, 'Immigration Policy and Identification Across Borders' (2017) 12(3), *Journal of Ethics and Social Philosophy* 280, quoted in MacKay, above n 14, 54.

32 Maani Truu, 'Exclusive: Government Quietly Relaxes Controversial Visa Policy Affecting People with Disabilities', *SBS News* (online), 5 August 2019 <https://www.sbs.com.au/news/exclusive-government-quietly-relaxes-controversial-visa-policy-affecting-people-with-disabilities>.

> The Committee recommends that the Australian Government raise the 'significant cost threshold' … to a more appropriate level. The Committee also recommends that the Department of Immigration and Citizenship quickly complete the review of the 'significant cost threshold'.[33]

Secondly, most people with the disabilities will still be over the threshold with their deemed healthcare costs and thus will be refused visas if their treatment and support costs are calculated in the way they are. Given the cost of medical and community support services in Australia, an increase in the figure of a mere A$9000 would not significantly increase the rate of visa grants to disabled individuals.

However, another change is far more significant. Previously, if the condition an individual had was a permanent and predictable one (and most if not all disabilities fell within the scope of such description), the health and support costs were calculated over the period of the expected lifetime of the person. An assessment was made of how long the person would live to make sure they did not exceed the given limit before the end of their life. Under the amended policy, the maximum period over which the costs will be calculated is 10 years.[34] This is an important step which is long overdue. Canada, for instance, has had this norm in its statutory regulations for many years.[35]

Canadian research and experience

In a 2018 article, Douglas MacKay comprehensively and meticulously looked at the legal, philosophical and societal aspects of discrimination of immigrants on the ground of disability and the extent to which such discrimination can be justified.[36] He also suggested legislative change and proposed an alternative wording for the Canadian *Immigration and Refugee Protection Act* 2002.

However, the statutory provisions for calculating the 'excessive demand' as well as the threshold itself were reviewed by the Canadian government before MacKay's article was published and it is not yet known whether other statutory changes, including the ones suggested by MacKay, will follow. It is certain, though, that even the current wording of the Canadian statutes that regulate the health requirements for migrants are less discriminative than the relevant Australian statutory provisions and departmental policy. Sections 38(1) and 38(2) of the Canadian *Immigration and Refugee Protection Act* provide:

> **Health grounds**
>
> 38(1)A foreign national is inadmissible on health grounds if their health condition
>
> (a) is likely to be a danger to public health;
>
> (b) is likely to be a danger to public safety; or
>
> (c) might reasonably be expected to cause excessive demand on health or social services.

33 Joint Standing Committee on Migration, above n 26, 58.
34 Department of Immigration, Citizenship and Multicultural Affairs, Australian Government, 'The Health Requirement, Significant Costs', *Procedures Advice Manual (PAM3)*, Sch 4, 1 October 2019.
35 *Immigration and Refugee Protection Regulations*, SOR/2002-227, reg 1 ('excessive demand').
36 MacKay, above n 14.

Exception

(2) Paragraph (1)(c) does not apply in the case of a foreign national who

(a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;

(b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;

(c) is a protected person; or

(d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).[37]

The provisions regarding public health and safety are very similar to the relevant Australian provisions of the *Migration Regulations 1994* (Cth). The only difference is that Australia puts additional weight on making sure that the applicant is free from tuberculosis before their visa application is approved. However, the wording of s 38(1)(c) of the Canadian Act is critically different from the relevant provisions of the *Migration Act 1958* (Cth).

The words ‘might reasonably be expected’ express the same modality as the Australian ‘would be likely to’. However, the focus of the Canadian legislation is on a *reasonable* expectation, which certainly requires greater justification on the part of the decision-maker than the Australian mere likelihood. The Canadian concept of ‘excessive demand’ is an equivalent of the Australian concept of ‘significant cost’. It is obvious that these have a different meaning.

‘Excessive demand’ means *too much, more than the system can actually bear* or *more than it is reasonable or possible to fund*, even if the state budget on health care is managed and planned in the best possible way. ‘Excessive demand’ inevitably exceeds reasonable expectations in a way that becomes a burden to other taxpayers in the community, not only in terms of cost but also in terms of access to the services. The Australian ‘significant cost’, however, seems to view the cost as an independent figure, without connection to the capacity of the system or the actual ability of the state to fund such healthcare spending to support the health and wellbeing of the intending migrant.

It is easy to change the ‘significant cost’ in policy. Basically, any cost can become significant in the policy of the decision-maker, whether it is A$1000 or A$10 000. It is the amount that the decision-maker considers to be significant; it is not the demand that puts pressure on the system and compromises the system’s capacity to fulfil its obligations to existing users — Australian citizens and non-citizen permanent visa holders. The Canadian *Immigration and Refugee Protection Regulations* provide the following definition for the term ‘excessive demand’:

excessive demand means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive

37 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 38 (1), (2).

years immediately following the most recent medical examination required under paragraph 16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents. (*fardeau excessif*).[38]

The demand and cost of both health services and social services are taken into account and the amount is specified in a very straightforward way — the maximum limit is the total cost of average Canadian per capita health and social services over a period of five or no more than 10 years. The longer period will apply if the health condition or disability is likely to entail further provision of services over the five-year period. Interestingly, the Canadian legislation uses the Australian term 'significant costs', although in plural, to define the demand for services that is likely to persist and extend beyond the five-year period immediately after the medical examination, although it is not used to define the period of five consecutive years.

On the contrary, the Australian 'significant cost' threshold is defined by the departmental policy and not the statutory provisions. It is therefore legislatively not connected with any objective indicators like the Canadian 'per capita health and social services cost' and so acts 'on its own', without being a reflection of whether the cost would be too great to enable the Australian health and community services system to take on an intending migrant, including a migrant with a disability. Also, the Department of Home Affairs has no obligation to review the amount unless they consider it necessary.

The Canadian *Immigration and Refugee Protection Regulations* also provide a definition for 'health services' and 'social services':

health services means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care. (*services de santé*)

social services means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

(a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and

(b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies. (*services sociaux*).[39]

Australia, on the other hand, uses the terms 'health care' and 'community services'. 'Health care' is not defined in the regulations, but, presumably, it has the same meaning as the Canadian 'health services'. 'Community services', according to the *Migration Regulations 1994* (Cth), 'includes the provision of an Australian social security benefit, allowance or pension'. This means that an individual with a disability has an entitlement to receive money to live on because their ability to work might be affected by their state of health.

38 *Immigration and Refugee Protection Regulations*, SOR/2002–227, reg 1 ('excessive demand').
39 Ibid ('health services', 'social services').

It seems that the definition of Canadian 'social services' is much broader because, in addition to financial support (whether direct or indirect) from governments and government-funded agencies, it also involves being looked after at one's home or a residence, using individual support services, enjoying social interaction and being able to study based on one's particular needs, including those that have arisen because of the person's specific type of disability.

There may be an impression that the Canadian term 'social services' discriminates more against individuals with disabilities than the Australian term 'community services' because it encompasses all the residential, educational and social services they might take advantage of and thus might impose an 'excessive demand' on the system. However, this is not the case for two reasons. First, although it is not included in the definition provided in the Migration Regulations*,* community services in Australia actually include the same services that are included in the Canadian social services. Secondly, the definition of 'excessive demand' in the Canadian *Immigration and Refugee Protection Regulations* explicitly states that the 'cost threshold' is a figure obtained by multiplying Canadian health and social services per capita by five or, if the condition is likely to remain (which is the case with most types of disabilities), by multiplying Canadian health and social services per capita by 10. It is therefore obvious that disabled people are more likely not to be above the 'cost threshold' and meet the health requirement in Canada than they are in Australia:

> The new cost threshold is equal to 3 times the Canadian average for health and social services. For 2018, the value is $99,060 over 5 years (or $19,812 per year). The department will update the cost threshold every year.[40]

The cost for 10 years would be double the amount, making the figure almost CAD$200 000 and making it possible for a lot of migrants with disabilities to become admissible. This is in contrast to the revised Australian threshold of A$49 000. The Canadian statutory provisions on the health requirement reflect the changes made in 2018 and, in the opinion of the Hon Ahmed Hussen, the former Canadian Minister of Immigration, Refugees and Citizenship, are a critical step towards greater inclusion of people with disabilities.[41] The Hon Kirsty Duncan, the former Canadian Minister of Science and Minister of Sport and Persons with Disabilities, has stated she believes that the changes are long overdue and she expects they will enable more families to come to Canada.[42]

Importantly, unlike in Australia, where the department may change the cost threshold when and if they deem necessary to do so, the cost threshold in Canada is part of the concept of 'excessive demand', which is defined by a statute, relying on the 'per capita' health expenditure. Immigration, Refugees and Citizenship Canada therefore needs only to rely on the figure reported annually by the Canadian Institute for Health Information and to comply with the statutory definition.

40 Immigration, Refugees and Citizenship Canada, 'Excessive Demand: Calculation of the Threshold, 2018' (Minister of Immigration, Refugees and Citizenship, 2018).
41 Immigration, Refugees and Citizenship Canada, 'Government of Canada Brings Medical Inadmissibility Policy in Line with Inclusivity for Persons with Disabilities' (Media Release, 16 April 2018) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2018/04/government-of-canada-brings-medical-inadmissibility-policyin-line-with-inclusivity-for-persons-with-disabilities.html>.
42 Ibid.

Having the cost threshold embedded in the statutory framework is much less discriminative and more unbiased than the system currently in place in Australia — that is, where the ‘significant cost’ is defined by the departmental policy and the department can keep to the old views on disability and inclusion. In the light of high costs of Australian health care, a change from A$40 000 to A$49 000 in the ‘cost threshold’ is a formality and does not principally change the approach to migrating individuals and their family members who have impairments.

Homeward bound: social security and homelessness

In 2019 the Australian Capital Territory (ACT) chapter of the Australian Institute of Administrative Law (the Institute) awarded an administrative law project grant of $5,000 to ACT community legal centre Canberra Community Law (CCL) to undertake research on social security and homelessness in the ACT.

This research culminated in the report *Homeward Bound: Social Security and Homelessness*, which was a collaboration between the National Social Security Rights Network (NSSRN) and CCL to examine the impacts of social security and public housing systems and their intersection with homelessness.

The report makes recommendations for how the social security and public housing systems could be improved to reduce or prevent homelessness. The report's findings rely on data collected by CCL which demonstrate the impact of social security and public housing on residents in the ACT. These findings have broader application to other Australian jurisdictions, particularly given that social security is a responsibility of the Commonwealth Government.

Social security recipients experience the highest rates of poverty in Australia, with over half of Newstart Allowance recipients living below the poverty line and most priced out of the private rental market. For many social security recipients, public housing is the only viable housing option for them. However, this research found that high demand and long waiting lists leave many people with nowhere to turn.

The client experiences examined in this research included people sleeping rough, people unable to pay their rent and people sleeping on couches, in their cars and in the living rooms of friends and family. Clients frequently sought assistance from CCL after relationship breakdowns, family tensions or overcrowding, which made their informal living arrangements untenable. Those in private rental accommodation said they faced eviction but had not yet been allocated a public housing property. Even people in public housing were extremely vulnerable to any changes in their personal circumstances, including unexpectedly high bills or other expenses, or costs associated with repairs or damage, as their Centrelink payments left no room for emergency expenditure.

This research report was funded by the Institute; however, the views expressed were those of CCL and NSSRN and were not necessarily those of the Institute.

The full report can be read at <http://www.nssrn.org.au/wp/wp-content/uploads/2019/12/19756-CCL-Homeward-Bound-Social-Security-and-Homelessness-low-res.pdf>.