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Overview of the 100th issue

Robin Creyke

The Australian Institute of Administrative Law (AIAL) is celebrating this hundredth issue of its journal, *AIAL Forum*, with a specially commissioned set of articles by eminent public lawyers, many of whom have or had a formative connection with the Institute. The National Committee of the Institute expresses its sincere thanks to them for their willing participation.

The broad guideline for the authors was to consider current issues and future directions in administrative law. All have complied admirably. Their canvass covers that multiplicity of principles, remedies, and institutions which characterise the discipline.

There was one exception to the prospective theme — a history of the journal — undertaken by Robert Orr QC. His account, following extensive research and interviews with key figures in the AIAL's development, metamorphosed into a history of the AIAL. It will remain the definitive account of the evolution of the Institute and of its flagship journal.

A collection of this nature is an incentive to reflect on fundamentals, as evidenced in several of the articles. Bluemmel's, for instance, reminds us that the widespread use of social media, and the community's tolerance of COVID-19-induced interference by government with individual freedoms, if unchecked by administrative law accountability measures such as privacy laws, pose a threat to Australian democracy.

An inherent characteristic of administrative law is that it has dual constituencies: government; and the people. They are best served when the law achieves a balance between meeting governments' objectives and protection of individual rights. This fundamental aspect of the discipline is illustrated by the article by Justice Basten. Basten takes as his starting point the thesis by Bateman and McDonald[1] that justification for judicial review now turns on principles of statutory interpretation rather than grounds of review. While acknowledging that there are strong doctrinal grounds for this development, Basten has also discerned a weakness in the approach. Rules of statutory interpretation are focused on protection of individual rights and interests and too heavy a reliance on these principles gives insufficient emphasis to distributive justice. His assessment calls for a rebalancing of these competing foundational values.

Identification of fundamental principles also features in Justice Pritchard's article. She accepted the challenge for tribunals to identify their foundational philosophy with a valuable statement of that philosophy as it relates to amalgamated tribunals, now present in all the states and territories except Tasmania.[2] The value of that statement of principle is illustrated by her statistical analysis of the workload of those tribunals. That analysis graphically illustrates that these tribunals have departed significantly from the Commonwealth merit review tribunal model. Amalgamated state and territory tribunals are predominantly civil and protective management, not administrative review, bodies, since their administrative law

1 W Bateman and L McDonald 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153.

2 Tasmania has announced that its legislation for TasCAT will be introduced in 2020.

caseload comprise less than 5 per cent of their output. These figures call for a substantial realignment of administrative justice as it applies to amalgamated tribunals and will increasingly impact on their operation and future development.

Statistical information also features in the article by Groves, in his case as it has emerged in cases of apprehended bias. Use of statistics exemplifies the current emphasis on evidence-based decision-making if standards of proof are to be met. Whether courts are willing to accept this form of evidence in bias cases is illustrated by Groves's article. The case law relied on in the article, admittedly a limited selection, suggests some judicial reluctance to accept statistical evidence as indicators of judicial predisposition. That is not to suggest a similar reluctance in other circumstances but may highlight a need for more selective use of statistics and support from other forms of evidence in similar cases rather than relying solely on raw figures.

What the future holds for administrative law inevitably touches on the impact of machine learning, algorithms, and e-communications. The impact of these forms of technology is examined in the articles by McCabe and Pritchard. They detail the administrative law advantages and disadvantages of increased use of automated assistance in tribunal decision-making and the practical impact of their embrace of online interactions, including for mediated and hearing processes. As some of these changes are likely to continue indefinitely, they herald a significant alteration to the processes of administrative review.

A prominent theme of the articles is the need for better identification of principles of good administration and their improved alignment with administrative law. As the Administrative Review Council pointed out over a decade ago, '[i]n view of the high standards expected of public officers, mere compliance with the law alone is insufficient'.[3] This recognition of the high standards of behaviour expected of public officers extends to their organisations.

The organisational focus is apparent in the article by McMillan. He has thrown light on a hitherto little considered area of public administration — the need for increased attention to the allocation of names, powers, functions and jurisdiction of the oversight accountability bodies. This is not simply a call for enhanced organisational tidiness. It also affects the remuneration of their officers and their ability to interact with each other. The article suggests government legislation and practices need better to identify criteria for categorisation of classes of the existing oversight bodies and those created in the future.

Principled guidance is also the underlying emphasis in the Lim, Ng and Weeks article. Their article highlights disparities in the discretionary compensation schemes when individuals have suffered loss due to administrative action not otherwise amenable to administrative law redress. The article, like that of McMillan, indicates the need for discernment of criteria for eligibility for such schemes. Acknowledgment that these schemes are discretionary does not obviate that need. Fairness so demands. Fairness also demands enhanced transparency about such schemes. The paucity of information about the outcomes reached under the various schemes is illustrated by the limited information available in the few Commonwealth

3 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (rev ed, August 2000) 6.

agencies which publish statistics. Their discretionary nature does not prevent the need for information about whether they are operating effectively.

The need for improved analysis of key areas of public administration is another prevalent theme. Hitherto under-explored areas considered in the articles include the tension between private law contract and public law principles evident in government contracting. Seddon has examined the need for better synthesis of public and private law in this area. His article illustrates, as he says, 'the difficulties encountered when the oil of public is mixed with the water of private'. He recommends that administrative lawyers look 'broadly at the various issues' and understand 'that the public–private tension must be recognised, … considered and weighted' if ascendancy to one at the expense of the other is to avoid controversy.

One important justification for the call for identification of criteria reflecting the dual interests operating in public law is that it provides the measure against which to assess, inform and shape laws and rules for the guidance of public law officials and of institutions. The focus on principles of good administration also reflects a focus on this deficiency.

The mothballing of the Administrative Review Council in 2015 may have indicated a view in some quarters that Australian administrative law had reached a plateau posing fewer challenges than those tackled in its evolutionary phase. The articles in this collection give the lie to that perception. They have thrown light on key elements of the discipline requiring novel solutions and renewed focus in the face of current and emerging issues. Their insights have served their community well and chart some of the issues which will be explored in the next one hundred editions of *AIAL Forum*.

A short history of the Australian Institute of Administrative Law

*Robert Orr**

We all love administrative law,
Mandamus, Kioa and more,
It's a little abstruse,
And it's not of much use,
But the AIAL we adore.[1]

I heard one hundred drummers whose hands were a-blazin'.[2]

This is the 100th edition of the *AIAL Forum*, in which most of the articles consider current key issues in administrative law. But this also seems an appropriate moment to look backward and reflect on the history of the Australian Institute of Administrative Law (AIAL or Institute), including the *AIAL Forum*, and its role in Australian public law and administration.

In this article I first consider the origins of the AIAL. Secondly, I summarise its key activities — in particular, the *AIAL Forum* and national administrative law conferences. Thirdly, I note some significant issues which the activities of the Institute have considered. An appendix at the end of the article sets out some basic information about its office holders and activities. In writing this article I have looked at the historical records of the AIAL, although, given the nature of the organisation as one principally run by volunteers, these records are limited in some respects. Further, because many important memories are fading, I have interviewed a number of prominent figures — some of these interviews are available as podcasts on the AIAL website — and also obtained information from a range of people.[3] The choice of key events and issues referred to in this article reflects these interviews and in part my own views. I certainly do not purport to speak for the Institute, its many past and current office holders and its very many past and present members. However, I do seek to acknowledge the work of those office holders and of the many others who have supported the undertakings of the AIAL — in particular, by speaking on, writing about and discussing Australian administrative law.

* Robert Orr QC is a special counsel at AGS; a part-time senior member and acting presidential member at the ACT Civil and Administrative Tribunal; and a former President of AIAL.

1 An entry in the limerick competition held at the AIAL national administrative law conference in Canberra in 2011. Unfortunately, the name of the author has been misplaced. See the President's report 2011. References to reports and minutes of meetings in this article are to AIAL reports and AIAL meetings.

2 Bob Dylan, 'A hard rain's a' gonna fall', *The Freewheelin' Bob Dylan* (1963).

3 The podcasts with Robin Creyke and John McMillan are on the AIAL website, <http://www.aial.org.au/>, under 'News'. The written interviews were with Stephen Argument, Dennis Pearce and Peter Sutherland. These people have also generously read and provided comments on the article. I have also obtained information from officers of state chapters — namely, Rebecca Heath of Western Australia; Jeffrey Barnes and Emma Turner of Victoria; Shirley Fisher, Dami Sheldon and Richard Dennis of South Australia; and Andrew Chalk and Justice Rachel Pepper of New South Wales. Research assistance in relation to the citation of AIAL publications in cases was provided by Birgit Hofer. The appendix is incomplete, and some references and dates are educated guesses: if anyone can provide further information, I will put a more developed version of the article on the AIAL website. Any errors are mine, and I would be very grateful if readers could tell me about them.

Origins

Somewhat inauspiciously, the AIAL began on 1 April 1989 at the Hyatt Hotel, Canberra, after an ACT Law Society seminar. There had been a recent major conference on administrative law at the Australian National University (ANU),[4] and at the ACT Law Society seminar a question was raised as to what might be done to give the so-called 'new administrative law'[5] some form of broad-based, non-partisan, institutional support. Derek Emerson-Elliott,[6] a Canberra barrister, articulated what he described as 'the obvious answer', and John Griffiths, then Director at the Administrative Review Council (ARC) and now a Federal Court judge, and Robert Todd,[7] one of the first members of the Administrative Appeals Tribunal (AAT), buttonholed him after the event and suggested he might 'put some effort where his mouth was'.[8]

Derek wrote that little effort was in fact needed. By 3 May 1989 there was a respectable meeting of those interested in the creation of the Institute, which included four past, present or acting Commonwealth Ombudsmen, three professors, two members of the AAT, the presidents of both the Australian Law Reform Commission (ALRC) and ARC, 'plus a plethora of experts, activists and archivists — and perhaps the odd healthy anarchist'. Robert Todd chaired the meeting and it was agreed that the organisation should not be a lobbying group, should not be confined to lawyers and should not be just a Canberra group. A working party was established, chaired by Robert Todd, which met four times. Geoff Kolts QC, former First Parliamentary Counsel, Office of Parliamentary Counsel (OPC) and Ombudsman, drafted the Rules. At a meeting on 5 July 1989, at which there were apparently a range of amendments moved from the floor, the Institute was voted into existence in the ARC Conference Room, Canberra.[9] It was formally incorporated in the ACT on 23 March 1990.[10] The first President was Geoff Kolts, after Professor Jack Richardson, former Ombudsman, apparently withdrew his nomination to avoid an election, although Geoff resigned early and Jack Richardson took over. Jack was then appointed as Samoan Ombudsman, and Professor Dennis Pearce[11] was elected president at the first annual general meeting on 26 September 1990 at the

4 AIAL Podcast No 2: Interview with Professor John McMillan; *Administrative Law: Retrospect and Prospect* (1989) 66 *Canberra Bulletin of Public Administration* 29.

5 See generally ARC, *Report of the Commonwealth Administrative Review Committee* (Kerr Review) (Parliamentary Paper No 144, 1971), which led to the *Administrative Appeals Tribunal Act 1975* (Cth), *Ombudsman Act 1976* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Freedom of Information Act 1982* (Cth) and *Privacy Act 1988* (Cth) and their state and territory equivalents.

6 Derek Emerson-Elliot had been Aide-de-Camp to the Governor-General Lord Casey and has had a range of roles as a lawyer in Canberra, including at the University of Canberra. He has recently written two novels: *In the Mouth of the Tiger* with Lynette Silver (2014), based on the life of his father; and *The Immortality Project* with M Elizabeth Fini (2020).

7 Robert Todd was a barrister in Melbourne before he was appointed as a full-time senior member and then Deputy President of the AAT. He was also president of the ACT Administrative Appeals Tribunal and the Legal Aid Commission (ACT). He was a president and life member of AIAL. See Allan N Hall, 'Vale Robert Todd', (2020) 98 *AIAL Forum* 9; and Fiona Todd, 'Robert Todd' (2020) 67 *Victorian Bar News* 80–81.

8 Derek Emerson-Elliott, 'Our Beginning: An Historical Footnote' (1989) 1 *AIAL Newsletter* 2–3.

9 Ibid; AIAL Podcast No 1: Interview with Professor Robin Creyke.

10 Minutes of the national executive committee meeting on 27 September 1989; Australian Institute of Administrative Law Incorporated certificate of incorporation.

11 Dennis Pearce was Professor of Law at ANU and Commonwealth Ombudsman from 1987 to 1991. He was and remains a prolific author — see especially *Administrative Appeals Tribunal* (4th ed, 2015) and *Statutory Interpretation in Australia* (9th ed, 2019) and earlier editions. He was a President of AIAL and is a life member.

Hyatt Hotel in Canberra. The meeting included an address by Justice Deidre O'Connor, President of the AAT, and was followed by a dinner. The first secretary was Derek Emerson-Elliot and the first treasurer Dr Gary Rumble of Blake Dawson Waldron, formerly of the Attorney-General's Department.[12]

Broadly, the Institute had the purpose of promoting knowledge of and interest in administrative law. Its structure involved an executive — essentially, a national executive committee constituted to manage and control its affairs, elected at an annual general meeting. This national executive committee has comprised generally Canberra residents, reflecting the genesis of the AIAL, and it generally meets monthly. An amendment made to the Rules at the 1990 annual general meeting provided for state and territory chapters.[13] This federal-like structure predictably has been the subject of much debate and some tension over the years, especially as the state chapters were established and membership from those chapters grew and their activities developed. This came to a head in 1994 and led to a major amendment of the Rules at the annual general meeting on 20 September 1994 to provide for a national council which consists of the officers of the national executive committee and two representatives of each chapter. The national council's functions include making recommendations to the annual general meeting as to fees, how those fees should be remitted to the chapters, generally how funds should be used, and future directions for the organisation. The council must meet once a year and has usually met twice — once in person at the national administrative law conference and at another time by phone.[14]

The first public meeting of the AIAL was held in Canberra on 30 August 1989. At that meeting, Jeffrey Lubbers, Director of the Administrative Conference of the United States of America, a body similar to the ARC, spoke on the framework of the American system of administrative law, with particular emphasis on the function and status of administrative law judges.[15] It was not long before the first edition of the *AIAL Newsletter* was published in late 1989.

But it was said — in particular, by Robert Todd — that financially the Institute started off on 'spindly legs'. Stephen Argument[16] has noted that when he took over as secretary there was about $300 in the bank — he had to think twice about buying a roll of stamps to do a mail-out to members, and he had to affix the stamps himself. This poor financial position came to a head when John Nethercote, secretary of the ACT division of the Royal Australian Institute of Public Administration Australia (RAIPA, and then IPAA) suggested a conference run by the two organisations. But the RAIPA took the view that AIAL could only share in the profits of the conference if it put up the same money to support the event as RAIPA — namely, $5,000. AIAL did not have this money, but Dennis Pearce successfully approached Phillips Fox for

12 Minutes of the annual general meeting on 26 September Ibid.
13 Ibid.
14 Minutes of the annual general meeting on 20 September 1994; interview with Stephen Argument; Australian Institute of Administrative Law Incorporated Rules.
15 'United States Administrative Law' (1989) 1 *AIAL Newsletter* 4–6.
16 Stephen Argument worked as a research officer for the Senate Standing Committee on Constitutional and Legal Affairs and later other Commonwealth and ACT parliamentary committees, including as Secretary of the Senate Standing Committee for the Scrutiny of Bills, and government agencies. He is the author, with Dennis Pearce, of *Delegated Legislation in Australia* (5th ed, 2017) and earlier editions, and has been a prolific writer for AIAL (see below). He was secretary of AIAL from 1991 to 2010 and is a life member.

a loan.[17] The conference was held on 29–30 April 1991 at the Lakeside Hotel in Canberra. It was so successful that AIAL was able to pay back the loan and have a healthy bank balance. As Stephen Argument stated, the AIAL never looked back.[18]

Institute chapters were established in New South Wales and Queensland in 1991 and then South Australia, Victoria and Western Australia in 1992. A chapter in Tasmania was later established in 1996, and one in the Northern Territory in 1999,[19] although these are currently dormant. Membership rose fairly quickly to about 450[20] and then 570.[21]

These early developments illustrate some themes which have continued throughout the story of the AIAL. First, its principal aim was to be a forum for discussion of administrative law issues and not a lobby group for particular positions on these issues. Of course, discussion of administrative law issues has generally assumed the continued existence of a rigorous, principled and fair administrative law regime, and at least implicitly the Institute has stood for that continued existence. Geoff Kolts wrote at an early stage that the Institute was important because the federal institutions had been the subject of ill-informed criticism and a more insidious attack by being starved of adequate resources to carry out their statutory functions.[22] There has been some tension in the organisation about how much to support the elements of the new administrative law, such as the ARC.[23] Secondly, while law has been its focus, other perspectives were welcomed and discussed. Administrative decisions impact on every aspect of Australian life; those who make such decisions and those who are affected by such decisions are generally not lawyers; factors other than the law, such as policy, politics, and values, are very relevant to such decisions. In acknowledgement of this a range of voices beyond those of lawyers have been heard in Institute activities. Thirdly, while the Institute was based in Canberra, state and territory chapters have had a vital role in its activities. The Institute has developed as a national community of people interested in administrative law and undertaking a wide range of activities across Australia.[24] Fourthly, the AIAL emerged at a particular time, driven by a generation born during and after the Second World War, often called 'baby boomers', and reflecting the legal and cultural concerns of this generation.[25] One of the challenges for the AIAL has been and will continue to be how to engage and address the concerns of following generations.

17 Minutes of national executive committee meeting on 7 February 1991; interview with Dennis Pearce; interview with Stephen Argument.

18 Dennis Pearce, 'Overview of the Forum' in Stephen Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (AIAL, 1996); interview with Stephen Argument; interview with Dennis Pearce; minutes of the national executive committee meeting on 6 June 1991.

19 Minutes of the national executive committee meetings on 7 February 1991 (NSW); 11 March 1991 (Qld); 3 February 1992 (SA, Vic and WA); 9 April 1996 (Tas); and 4 August 1999 (NT).

20 Letter from Dennis Pearce to Commonwealth Attorney-General, 18 August 1992.

21 President's report 1993.

22 'From the President' (1989) 1 *AIAL Newsletter* 2.

23 Interview with Stephen Argument.

24 AIAL Podcast No 1: Interview with Professor Robin Creyke.

25 Robert French, 'Administrative Justice — Words in Search of Meaning' (Opening Address, AIAL National Conference, 22 July 2010) especially the opening paragraph; n 2 above.

Activities

AIAL Forum

The predecessor to the *AIAL Forum* was the *AIAL Newsletter*, the first edition of which was published in late 1989. It was edited by Allan Anforth, then a solicitor with the Welfare Rights & Legal Centre in Canberra and now a barrister based in Canberra and senior member of ACT Civil and Administrative Tribunal (ACAT). The layout was by Melissa Freeman. The first issue contained a summary of the first AIAL seminar by Jeffrey Lubbers, as well as an article by Robert Todd entitled 'On Being Reasonably Judicial' and one by Geoff Kolts, 'When Should Rules be Made in Primary, Rather Than Subordinate, Legislation'. There was an editorial advisory committee made up of Robert Todd, John McMillan[26] and Gary Rumble.[27] There were 16 editions of the *AIAL Newsletter* published from late 1989 to December 1993.

The first edition of the *AIAL Forum* was published in June 1994, edited by Michael Sassella.[28] It contained reprints of 22 articles that originally appeared in the *AIAL Newsletter*. The second edition comprised 46 pages and set the format which has generally been followed since then. It included articles by Commonwealth Ombudsman Philippa Smith, Commonwealth Sex Discrimination Commissioner Sue Walpole, Chairman of the Australian Securities Commission Alan Cameron, and President of the ARC Dr Susan Kenny, later a Federal Court judge, as well as an article on public participation in rule making by Kim Rubenstein and one on public tenders by Nicholas Seddon, both later professors at ANU.

From 1994 until about 2006 the editor was generally a senior member of the Institute and its national executive committee, principally Michael Sassella; Kathryn Cole of the Parliamentary Library, OPC and Australian Government Solicitor (AGS); Hilary Manson of AGS; Dennis Pearce; Dr Max Spry, a barrister in Canberra and later Brisbane; and Robin Creyke.[29] In about 1998 an editorial board was established to assist with this process. The board comprised one representative from each of the state chapters plus two nominated by the national executive committee.[30] It included Michael Barker QC, chair of the Western Australian chapter and later Justice of the Federal Court; Justice Margaret Beazley, chair of the New South Wales chapter for many years and later President of the NSW Court of Appeal and now Governor of New South Wales; Geoff Airo-Farulla of the Commonwealth and Queensland Ombudsman's office, now of the Queensland Building and Construction Commission and long-term chair of the Queensland chapter; and Eugene Biganovski, South Australian Ombudsman for many years and chair of the South Australian chapter.

26 John McMillan was Professor of Law at ANU, Commonwealth Ombudsman, Australian Information Commissioner and Privacy Commissioner and NSW Ombudsman and is the author of many publications, including for AIAL (see below) and *Control of Government Action* (5th ed, 2018) with Robin Creyke, Matthew Groves and Mark Smyth and earlier editions. John has been President of AIAL and is a life member.

27 Minutes of national executive committee meeting on 29 August 1989.

28 Michael Sassella was a senior lawyer at the Department of Social Security, other departments and the National Disability Insurance Agency; a senior member of the AAT; and long-term member of AIAL. He is now a volunteer lawyer at Legal Aid ACT.

29 Robin Creyke was Professor of Law at ANU, a senior member of the AAT and ACAT, and integrity adviser to the Australian Taxation Office. She is the author of many publications, including for AIAL and *Control of Government Action* (5th ed, 2018) with John McMillan, Matthew Groves and Mark Smyth, and earlier editions. Robin was a President of AIAL and is the current chair of the editorial board of *AIAL Forum*.

30 Minutes of national council meeting on 18 November 1998.

In 2007, Alice Mantel, a lawyer and writer,[31] took over the role of sole editor. She was succeeded by professional editors Elizabeth Drynan in 2009 and then Kirsten McNeill of Apricot Zebra, the current editor, in 2016. In about 2011 the role of the editorial board was reviewed. It became a smaller group, chaired by John Carroll of Clayton Utz and then Robin Creyke, and was made up mainly of members of the national executive committee.

There have been some changes in content since 1994. A Recent Developments section, written by Ron Fraser of the Commonwealth Attorney-General's Department, commenced in 2002 and ran until 2005. Peter Prince of the Commonwealth Department of Health and Aging then took this up and authored the section between 2006 and 2007. He was followed by Alice Mantel from 2007 to 2009 and, most recently, Katherine Cook from 2012 to date. From 1991 proceedings of the national conferences were published separately and then on compact discs. But more recently many of the papers given at the national conferences have been published in *AIAL Forum*. Similarly, the early national lectures were separately published, but since 2011 these have been published in *AIAL Forum*.

Robin Creyke, who has been an editor and is now chair of the editorial committee, has said:

> From its inception the Forum was never intended to be a predominately scholarly journal … It was designed to be practical in focus dealing with day-to-day issues of practising public lawyers. … I believe it's the journal's strength. Although the journal does offer refereeing for academics … people who do not have academic backgrounds but do have an important point to make about an aspect of administrative law can have their views published in *AIAL Forum*.[32]

From 1989 to date there have been about 722 articles published in the *AIAL Newsletter* (78) and the *AIAL Forum* (644). In this discussion it is necessary to put this within the full output of AIAL and add to it the papers given at the national conferences — about 750. Some of those were published in separate AIAL publications (in particular, those from 1992 to 2004), some were in *AIAL Forum* or elsewhere and some were not published. Similarly, there were many AIAL local seminars, probably by my rough calculation over 900. Again, some of those were published in *AIAL Forum* or elsewhere and some were not published. This discussion focuses on *AIAL Forum* and *AIAL Newsletter* but also has regard to these other activities.

The *AIAL Newsletter* and *AIAL Forum* have generally been recognised as having had a substantial impact on administrative law in Australia. John McMillan has noted that, in his experience, it is his articles in *AIAL Forum*, rather than elsewhere, which are most read, referred to and discussed[33] — an observation backed up by the healthy copyright payments the Institute receives. Although assessing the impact of *AIAL Newsletter* and *AIAL Forum* more precisely is difficult, I note the following factors, greatly assisted by the excellent subject and author indices which have been maintained for *AIAL Forum*,[34] currently by Peter Sutherland.

31 Alice has recently written *Everywoman's Guide to Retirement* (2019).

32 AIAL Podcast No 1: Interview with Professor Robin Creyke. Robin wrote an introduction to the 50th edition of *AIAL Forum* entitled 'Golden Jubilee of AIAL Forum' — see (2006) 50 *AIAL Forum* 1.

33 AIAL Podcast No 2: Interview with Professor John McMillan.

34 These are on the AIAL website at <http://www.aial.org.au/resources/archives>.

First, there has been an enormous range of authors and speakers. This has included Australia's leading lawyers. Chief Justice Sir Anthony Mason and Chief Justice Robert French of the High Court of Australia have written articles for *AIAL Forum* as well as speaking at conferences and delivering national lectures. Chief Justice Gerard Brennan gave the opening address at the conference in 1998 on the AAT[35] and Justice Gummow gave the national lecture in 2012 at the national conference in Adelaide.[36] Of the current High Court members, Justice Stephen Gageler has written for *AIAL Forum*[37] and spoken at a number of conferences, and Justice Keane gave the national lecture in 2011.[38] The former Chief Justice of New Zealand Dame Sian Elias gave the national lecture in 2013.[39] Very many Federal Court and Supreme Court justices have also been prominent in writing and speaking for AIAL.

Public law academics have been major contributors to *AIAL Forum*. Robin Creyke and John McMillan have done so extensively, as noted above and below. Professor Mark Aronson of the University of NSW (UNSW)[40] has written for *AIAL Forum* on nullity[41] and spoken at national conferences. Justice Michael Kirby and Professor Michael Taggart wrote an article celebrating the career of Mark Aronson in the 50th edition of *AIAL Forum* in 2006. Professor Matthew Groves of Monash University and now Deakin University has written a number of articles, spoken often at conferences and seminars, and wrote an obituary for Professor Enid Campbell in *AIAL Forum*.[42] Associate Professor Greg Weeks of ANU has an article in this issue of *AIAL Forum* and is currently a member of the national executive committee. Professor Dennis Pearce has also been a major figure in the Institute and written extensively for it. Professor Margaret Allars (and now also of the New South Wales bar); Professor Mary Crock from the University of Sydney; Professor Susan Kneebone from Monash and now Melbourne University; Associate Professor Jeffrey Barnes from La Trobe University and long-time secretary of the Victorian chapter; Associate Professor Chris Finn of University of Adelaide; and Professor Bill Lane of the Queensland University of Technology have been active writers, presenters and supporters of the AIAL.

From the executive, Commonwealth, state and territory Attorneys-General and other ministers have written for *AIAL Forum* and spoken often at AIAL functions, as have leading members of the Commonwealth public service, including Mike Codd as Secretary of the Department of Prime Minister and Cabinet; Pat Brazil, Henry Burmester QC and Rob Cornall from the Commonwealth Attorney-General's Department; Chris Conybeare as Secretary of the Department of Immigration; Peter Shergold as Public Service Commissioner; Denis Richardson as head of the Australian Security Intelligence Organisation (ASIO); Gary Banks, chair of the Productivity Commission; and Mike D'Ascenzo, Commissioner of Taxation. Many state and territory public servants have also written and spoken. Of course, many executive government reviewers have contributed significantly — almost every President

35 John McMillan (ed), *The AAT — Twenty Years forward* (AIAL, 1998) 4.
36 (2012) 70 *AIAL Forum* 19.
37 (1999) 22 *AIAL Forum* 37.
38 (2012) 68 *AIAL Forum* 1.
39 (2013) 74 *AIAL Forum* 11.
40 See in particular Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2016) and earlier editions.
41 (2004) 40 *AIAL Forum* 19.
42 (2010) 63 *AIAL Forum* 1.

of the AAT and every Commonwealth Ombudsman has written or spoken for AIAL, as have many equivalent state and territory officers.

In addition, a range of other perspectives have been provided — for example, Sandra Koller from the Welfare Rights Centre, Sydney, on what consumers can expect from administrative justice;[43] Andrea Durbach, from the Public Interest Advocacy Centre (PIAC), on public litigation;[44] Kathleen McEvoy on public housing decisions;[45] Katie Miller, from Victoria Legal Aid, on robodebt communities;[46] and Peter Sutherland, from the Legal Aid Clinic in the ACT, on social security overpayments.[47] As Peter Sutherland has noted, the emergence of legal aid and community legal centres has been absolutely essential to administrative justice in Australia.[48] But, as even this brief overview shows, there have not been as many contributions from these more diverse and broader perspectives — in particular, from beyond governments, courts and tribunals, private lawyers and academia — as was perhaps anticipated when AIAL was founded or as seems appropriate now. That is an issue I return to at the end of this article.

There have been some very prolific contributors to the *AIAL Newsletter* and *AIAL Forum*. I have left out of these calculations Recent Developments articles and notes about AIAL activities. People who have written four to eight articles include Zac Chami of Clayton Utz, Sydney; Professor Nick Seddon of ANU and now Ashurst; Dr David Solomon, journalist and then Queensland Integrity Commissioner; Dr Max Spry; Dr Alan Freckleton QC, barrister in Melbourne and member of many tribunals; Sir Anthony Mason; Professor Matthew Groves; Justice John Basten of the Supreme Court of New South Wales and currently chair of the New South Wales chapter; Bronwyn McNaughton, who worked for parliamentary committees, ministers and later the Commonwealth Superannuation Corporation; and Denis O'Brien of Minter Ellison and later the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT). Even more prolific writers, at nine or more articles, are Professor Robin Creyke; Chris Wheeler; the Deputy NSW Ombudsman; Mick Batskos of FOI Solutions, Melbourne; Professor Dennis Pearce; Robert Lindsay, a barrister in Perth; and Professor John McMillan. But the most prolific has been Stephen Argument, who has written six articles for the *AIAL Newsletter* and 14 for *AIAL Forum*, including his popular quartet 'Legislative Instruments Bill — RIP?', 'The Legislative Instruments Bill — Lazarus with a Triple By-pass', 'The Legislative Instruments Bill Still Lives!' and, finally, 'The Legislative Instruments Act 2004 — Is It the Cherry on the Top of the Legislative Scrutiny Cake?'.[49] Stephen has also written numerous reports on AIAL activities and key people for *AIAL Forum.*

AIAL articles and other publications are regularly cited in Australian courts and tribunals. A review of those most cited by the High Court, Federal Court, state Supreme Courts and major

43 Robin Creyke and John McMillan, *Administrative Justice: The Core and the Fringe* (AIAL, 2000) 150.
44 (1998) 17 AIAL Forum 31.
45 'Building Secure Communities: Delivering Administrative Justice in Public Housing' (2011) 65 *AIAL Forum* 1; see also, with Chris Finn, (2010) 62 AIAL Forum 30.
46 'Connecting the Dots: A Case Study of Robodebt Communities' (2017) 89 *AIAL Forum* 50.
47 'Social Security Overpayments and Debt Recovery: Key Developments' (2017) 89 *AIAL Forum* 69.
48 Interview with Peter Sutherland.
49 (1998) 17 *AIAL Forum* 37; (2003) 39 *AIAL Forum* 44; (2004); 40 *AIAL Forum* 17; (2006) 48 *AIAL Forum* 35; with a recent sequel at (2019) 95 *AIAL Forum* 37.

tribunals includes, unsurprisingly, Sir Anthony Mason's lectures,[50] the national lecture by Justice Keane,[51] Robin Creyke on judicial review[52] and John McMillan on merits review.[53] But there are important articles on more neglected areas which are also cited multiple times. An early article by Mick Batskos, 'Natural Justice and the Constitution of Tribunal Membership',[54] is one example. An article by Professor Jim Davis, 'Misfeasance in Public Office, Exemplary Damages and Vicarious Liability', is a second;[55] Professor Roger Douglas's article 'Collateral Attacks on Administrative Decisions: Anomalous But Efficient' is a third;[56] and the article by Graeme Hill, a Melbourne barrister, 'Applying Project Blue Sky',[57] is another. Duncan Kerr's talk given at a New South Wales seminar in 2013, 'Keeping the AAT from Becoming a Court', is also referred to several times. Two articles on revisiting decisions are also quite popular: 'Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions' by Professor Margaret Allars[58] and 'Don't Think Twice? Can Administrative Decision Makers Change Their Mind?' by Robyn Briese and me.[59] I thought these last two articles might also be in the running for the catchiest title, but there is some competition from 'Review of Collegiate Decisions: Judicial Protection for "Pissants"', by Vincenzo Salvatore Papro, an AIAL essay competition entrant;[60] 'The Prerogative: Boris and the "Girly Swot"' by Robert Lindsay;[61] and 'ADJR at 40: In its Prime or a Disappointment to its Parents?' by Greg Weeks.[62]

AIAL national administrative law conferences

The second major activity of the Institute has been the annual national administrative law conference. For a long time these were called national administrative law forums, but more recently they have been called conferences so they will not be confused with the journal (and I use this latter term). The first national conference was held on Monday 29 and Tuesday 30 April 1991 at the Lakeside Hotel in Canberra. It was entitled *Fair & Open Decision Making*. As noted, it was conducted jointly with the ACT Division of RAIPA. The keynote address was given by the Commonwealth Attorney-General, the Hon Michael Duffy MP, and this was followed by a wide range of plenary sessions and one group of concurrent talks on what would become familiar titles and themes, including 'Administrative Law — The State of Play', 'The Cost of it All', 'Can Review Bodies Lead to Better Decision-Making?', 'Freedom of Information' and, of course, the eternal 'Future Directions'. The after-dinner entertainment was a debate on the proposition 'There Has Been Too Much Law and Not Enough Justice'. Jack Waterford, Deputy Editor of *The Canberra Times* and Clare Petre of the Redfern Legal Centre were for the proposition; and Justice Brian Beaumont of the Federal Court of

50 (2001) 31 *AIAL Forum* 45.
51 (2012) 68 *AIAL Forum* 1.
52 (2003) 37 *AIAL Forum* 42.
53 McMillan (ed), above n 35, 32.
54 (1998) 16 *AIAL Forum* 22.
55 (2010) 64 *AIAL Forum* 59.
56 (2006) 51 *AIAL Forum* 71.
57 (2015) 80 *AIAL Forum* 54.
58 (2001) 30 *AIAL Forum* 1.
59 (2002) 35 *AIAL Forum* 11.
60 (2005) 47 *AIAL Forum* 65, quoting the former Mayor of Sydney Frank Sartor.
61 (2020) 98 *AIAL Forum* 13.
62 (2018) 92 *AIAL Forum* 103.

Australia and Robert Todd from the AAT were against.[63] Jack Waterford turned his speech into a column in *The Canberra Times* with the ominous title 'Lawyerisation and Costs, Signs of a System's Illness'.[64] There were a number of other reports in *The Canberra Times* of particular presentations, including those by Peter Sutherland, then of the ACT Welfare and Legal Rights Centre;[65] Chris Conybeare, Secretary of the Department of Immigration, Local Government and Ethnic Affairs, who was challenged in relation to his comment that changes to migration regulations were simply 'continuing fine-tuning';[66] Ann Forward, Director of the Merit Protection and Review Agency, who argued against new Commonwealth whistleblowing legislation; and Professor Paul Finn of ANU, who maintained that Commonwealth legislation on whistleblowers was in compelling need of reform.[67] The papers from these proceedings were edited by John McMillan, H McKenna and John Nethercote and published in (1991) 66 *Canberra Bulletin of Public Administration*.

This conference format has continued since then and has involved a mix of plenary and concurrent sessions dealing with a wide range of topics by a wide range of speakers. The conferences have circulated around Australia. Every second year they have been in Canberra, but they have also been held in Brisbane (1994, 2016), Surfers Paradise (2006), Sydney (1996, 2010, 2018), Melbourne (1998, 2008), Adelaide (2000, 2012), Fremantle (2002) and Perth (2014), and Hobart (2004). AIAL also co-sponsored a conference on *The AAT — Twenty Years Forward* in 1996 at the ANU in Canberra. There is a list of the national conferences in the appendix at the end of this article.

John McMillan has stated that a striking feature of AIAL national conferences has been that they have brought together a broad audience of people from academia, government, community legal practice, tribunals, the judiciary and other professions to consider administrative law issues and developments. He thought that they were unique in that respect and noted that visiting academics have been struck that Australia has this organisation that brings all elements of the community together, with their diverse perspectives. He also thought that the publications which emerged from the conferences were read and referenced by this broader audience.[68] Stephen Argument has noted that part of the success of the conferences was a result of listening to what ordinary members of the AIAL wanted, which involved trying to keep the more academic themes in check or at least balanced with more practical presentations. Another key to success, he thought, was a focus on making the conferences enjoyable, at least in part — for example, by activities such as the administrative law trivia quiz, discussed below, but also by providing opportunities for catching up with other people involved in administrative law.[69] I also note the obvious and important educative role of the conferences and the other AIAL activities. In my view, they have been very influential, particularly in helping public sector officers and lawyers to reflect on their roles and do their work better; and helping those outside government to understand how government works as well as how its decisions can be tested and challenged.

63 AIAL, *Fair & Open Decision Making*, National Administrative Law Conference, Programme, 1991.
64 *The Canberra Times*, 5 May 1991, 8.
65 *The Canberra Times*, 1 May 1991.
66 *The Canberra Times*, 30 April 1991.
67 *The Canberra Times*, 3 May 1991, 4.
68 AIAL Podcast No 2: Interview with Professor John McMillan.
69 Interview with Stephen Argument.

There have been a range of activities at the conferences other than discussion of administrative law. This has included debates, after-dinner speeches, music (including by the Shiny Bum Singers and Shortis and Simpson, who performed some songs from their musical on the *Constitution*) and limerick competitions.[70] But a favourite has been the administrative law trivia quiz during the conference dinner. Many of the questions in the quiz took a not very flattering approach to some of the colourful identities involved in administrative law. I think it best to leave those behind. Another group of questions involved providing photos and asking: 'lawyer or serial killer?'. Stephen Argument reports that photos of Gary Rumble and Rick Snell were quickly dispatched by many into the latter category. Another common theme was noting the excursions into high, and even occasionally popular, culture in decisions.[71] Unsurprisingly, many contests were very hard fought. I thought we could reminisce with a few characteristic questions:

1. Prior to entering federal Parliament, Paul Keating managed a rock band. What was its name: (a) The Scumbags; (b) Paul Revered and the Raiders; (c) The Ramrods; or (d) The Silver Bodgies?

2. In the 2003 quiz, it was noted that there was a fast-developing trend among judges to invoke images of Kafka to describe administrative decision-making. With 17 references in the past five years, most could be attributed to one High Court judge, one Federal Court judge and one Victorian Supreme Court judge. Can you name them?

3. In 2005, we fondly waved goodbye to Senate power, and the quiz reflected on the Senate's sterling performance in delaying passage of the Legislative Instruments Bill: (a) in what year was it first introduced; (b) how many times was it introduced/reintroduced before finally being passed; and (c) in what year was it passed?

4. Julian Assange was born in which town in which Australian state or territory? Where did he live from 2012 to 2019? Where does he live now?

5. Who wrote an article entitled 'Dolores Umbridge and the Concept of Policy as Legal Magic'?

6. *Isbester v Knox City Council* [2015] HCA 20 concerned the procedural fairness rights of a dog owner. What was the name of the dog: (a) Fido; (b) Kev; (c) Izzy; (d) Pluto; or (e) Max?

The answers are at the end of this article.

National lectures

The AIAL national lectures began as a series by Sir Anthony Mason, former Chief Justice of the High Court and an original member of AIAL, in Perth, Canberra and Sydney in 2001.[72] The first lecture was on the foundations and the limitations of judicial review, the second

70 See above, n 1.

71 See, for example, *Commissioner of Police v Tanos* [1958] HCA 6; 98 CLR 383, 395–6; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53; 216 ALR 631 [1], [28]; *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 [453].

72 (2001) 31 *AIAL Forum* 1.

was on the scope of judicial review and the third compared Australian administrative law with overseas models. These have been described as a 'tour de force' and 'extraordinary, scholarly publications'.[73] The second national lecture series was given in Sydney, Adelaide and Brisbane in 2004 by Chief Justice James Spigelman of the Supreme Court of New South Wales, who focused on the integrity branch of government.[74] The third national lecture series was given in 2006 by Walter Sofronoff QC, Solicitor-General for Queensland, in Brisbane on constitutional writs; Michael Sexton SC, Solicitor-General for New South Wales, on investigative bodies; and former Solicitor-General for New South Wales Justice Keith Mason on judicial review at the state level, both in Sydney, and David Bennett QC, Solicitor-General of Australia, in Melbourne on natural justice.[75] Since then the national lectures have been given at the national conference. Speakers have included Dame Sian Elias, then Chief Justice of New Zealand (Canberra, 2013);[76] Peter Hanks QC (Canberra, 2017);[77] and Justice Margaret Beazley, President of the NSW Court of Appeal (Sydney, 2018).[78] Details of all the lectures are set out in the appendix.

Local seminars

In addition to national events, the national executive and the chapters have organised a wide range of local seminars. It is difficult to assess just how many AIAL seminars there have been, but I estimate over 900. The first seminars run by the chapters are set out in the appendix. A few snapshots indicate the number and range of activities:

- In 1996–1997 there were 32 seminars across Australia: six in Perth, six in Melbourne, three in Tasmania, two in Adelaide, 10 in Sydney and five in Canberra.[79]
- In 2006 there were 45 seminars across Australia: nine in Canberra, six in Sydney, five in Adelaide, two in Darwin, three in Brisbane, seven in Adelaide, one in Tasmania, seven in Melbourne and five in Perth.[80]
- In 2019 there were 14 seminars: five in Adelaide,[81] three in Sydney,[82] three in Canberra[83] and three in Perth.[84]

73 AIAL Podcast No 1: Interview with Professor Robin Creyke; AIAL Podcast No 2: Interview with Professor John McMillan.
74 Dennis Pearce (ed), *AIAL National Lecture Series on Administrative Law No 2* (AIAL, 2004).
75 Alice Mantel (ed), *AIAL 3rd National Lecture Series* (AIAL, 2006).
76 (2013) 74 *AIAL Forum* 1.
77 (2017) 89 *AIAL Forum* 1.
78 (2018) 93 *AIAL Forum* 1.
79 President's report 1997.
80 President's report 2006.
81 Including by the South Australian Guardian for Children and Young People Penny Wright, finding facts on merits review by the President of the South Australian Civil and Administrative Tribunal Justice Judy Hughes, parliamentary privilege, and state tribunal design and federal jurisdiction after *Burns v Corbett* [2018] HCA 15; 265 CLR 304. Also see (2019) 95 *AIAL Forum* 10.
82 Including on robodebt and automated administrative decisions; and the use and abuse of soft law in environmental decision-making.
83 Including on 'Tweet speech' by Prue Bindon, an ACT barrister; and the Michael Will address at the annual general meeting by Michael Manthorpe, the Commonwealth Ombudsman.
84 Including by Justice Debbie Mortimer of the Federal Court on preparing judicial review cases; and by the Western Australian Commissioner for Children and Young People, Colin Pettit. See generally the President's report 2019.

Some of these seminars involved a range of speakers and resulted in publication, often in the AIAL Newsletter and AIAL Forum. These seminars are very much the engine room of the Institute and demonstrate the benefits of a federal structure, with state chapters often having good access to state officials who can talk on local initiatives and developments.

The COVID-19 pandemic is currently a major hurdle to running seminars and conferences. The 2020 national conference in Melbourne has been postponed till 2021. But a number of webinars have been run, some organised from Brisbane by David Marks QC, a Brisbane barrister, on current administrative law issues.[85] Others have been organised from Canberra — one on recent administrative law cases[86] and another on review of national security decisions[87] — by Jaala Hinchcliffe, the Commonwealth Integrity Commissioner. These webinars have been facilitated and supported by the Institute's secretariat, led by Sue Hart. They have proved very successful and reached a large national audience. There have also been two podcasts prepared in this period and put on the website, involving interviews with Robin Creyke and John McMillan. Webinars, podcasts and other uses of social media are likely to be important Institute activities into the future.

Website

In 1998 the Institute established an internet presence. Much of the early work was done by Sue Tongue of the ALRC and Immigration Review Tribunal and then president of AIAL; and Elizabeth Goodbody, then treasurer. Demonstrating one of the benefits of a federal structure, the Tasmanian chapter was in fact the first to establish a home page.[88] The national webpage was maintained by Michael Sassella as 'webmaster',[89] then upgraded and maintained by Sarah Todd of the Therapeutic Goods Administration and Peter Sutherland. A new site was created in about 2017 under the direction of Cain Sibley of Clayton Utz, Mandy Lister of the Department of Social Services, Peter Sutherland and me. The new site contains information about AIAL activities, issues of *AIAL Forum* and some national conference publications, and further materials will be added. It also contains links to a range of online sites relevant to administrative law.

Essay prize

The first national essay competition was held in 1996, organised principally by Dennis Pearce.[90] The winner was Daniel Stewart for an essay entitled 'Taking the Breaks Off: Applying Procedural Fairness to Administrative Investigations'.[91] Since then the national prize has been awarded every second year and is generally presented at the national conference dinner. In 2019 the prize, principally organised by Margaret Tregurtha, Deputy Director of IP

85 On *Commonwealth v Snell*, at which David Marks QC and Travis O'Brien, barrister, spoke (see [2019] FCAFC 57; 370 ALR 1, and see (2020) 98 *AIAL Forum* 85), the administrative continuum with Matthew Paterson of Minter Ellison, and unreasonableness with Amelia Wheatley QC and Ben McGlade, barrister.

86 With Professor Peta Spender of ANU on bias, Geoffrey McCarthy of ACAT on merits review, Alice Kingsland of AGS on the relevance of climate change to development approvals, and Cain Sibley of Clayton Utz on materiality in judicial review.

87 By Jake Blight, Deputy Inspector-General of Intelligence Services

88 Minutes of the meeting of the national council on 12 August 1997.

89 Minutes of the meeting of the national council on 18 November 1998.

90 (1996) 10 *AIAL Forum* 40.

91 (1997) 13 *AIAL Forum* 1.

Australia, was awarded to David Patrick Hertzberg for his topical article entitled 'The Three Forms of Executive Power and the Consequences for Administrative Law Review'.[92] Prize winners, and sometimes other commended entrants in the competition, have been published in *AIAL Forum*. The South Australian chapter has for many years provided administrative law prizes to final year students at the three major South Australian universities. The Victorian chapter has also awarded prizes to law students.

Grants

The AIAL has from time to time funded, by grants, research on issues in administrative law and education materials. The New South Wales chapter jointly funded a publication entitled *Discrimination Toolkit: Your Guide to Making a Discrimination Complaint*, which was launched in March 2007 by Justice Elizabeth Evatt. Justice Evatt described the book as assisting complainants who were representing themselves, including whether they should begin in state or federal jurisdiction.[93] The New South Wales chapter also supported the Toongabbie Legal Centre's production of a resource in relation to the imposition of fines.[94] In 2019 the national executive funded some research and a report by Canberra Community Law and the National Social Security Rights Network entitled *Homeward Bound: Social Security and Homelessness*, which is based on the ACT experience but which in due course may be expanded into a national project.[95]

Administration

The Institute has relied principally on its office holders to organise and undertake its activities. The principal officers are set out in the appendix. As outlined in this article, many experts in administrative law have given generously of their time in writing and presenting papers for the AIAL.

In its first few years the Institute's membership rose to well over 400, then to well over 500, and in the 2000s to over 600. In recent years it has returned to a membership of over 400. It received some grants from the Commonwealth Attorney-General's Department in the early years, but since then it has relied on membership fees. The general individual membership fee has risen from $30 to $110. This has been supplemented by surpluses from successful national conferences and copyright payments, some of which have been quite significant. The Institute has generally not accepted sponsorship, although it regularly holds events with other bodies, and is assisted by provision of meeting rooms, hospitality and prizes by other organisations.

The Institute has had significant support from a contracted secretariat. From 1993 to 2010 this was provided by the secretariat of the ACT division of RAIPA, then IPAA. Two people from this team need especially to be mentioned. One is Jenny Kelly, who was described as a pillar of the AIAL secretariat, organising every conference till 2009, including the 1987 conference at the ANU, and demonstrating professionalism and great organisational skills

92 (2019) 96 *AIAL Forum* 23.
93 (2007) 53 *AIAL Forum* 6; President's report 2007.
94 President's report 2009.
95 (2020) 98 *AIAL Forum* 118.

even when things went wrong.[96] Another is Kathy Malcolm, who died in 2005 while still working at the secretariat. Stephen Argument wrote that Kathy was the human friendly face of the Institute, always understanding of the follies and sometimes unreasonable demands of AIAL officers, who she forgave because, as she noted, 'they're only bloody lawyers, what can we expect'.[97] Commerce Management Services, led by Sue Hart, took over from 1 December 2010 and have provided very supportive secretariat services since then.

Issues

Judicial review

One of the principal reasons for the establishment of the AIAL was the recognition that administrative law in Australia had become much more than judicial review. But there can be no denying the continued relevance of judicial review as a significant area of administrative law.

AIAL Forum, national conferences, national lectures and seminars have traced the developments brought about by leading judicial review cases since 1989. In terms of articles on specific cases in *AIAL Forum,* the decision in *Minister of State for Immigration and Ethnic Affairs v Teoh*[98] seems to lead the field with five articles,[99] which is appropriate since it raised such fundamental issues about the relationship between international law and domestic decision-making.

There has also been significant discussion of earlier cases. At the 2010 national conference at the University of Sydney there was a fascinating session entitled 'Jason's Legacy — Impact of Immigration on Administrative Law' in relation the decision in *Kioa v West*,[100] led by Professor Mary Crock. At this session Reverend Jason Kioa himself, then Moderator of the Uniting Church in Australia, spoke of his experience, as did Justice Ron Merkel, who had been his counsel; Michael Clothier, his solicitor; and Andrew Metcalfe, Secretary of the Department of Immigration and Citizenship. This provided quite a moving account of the impact of the decision on an individual litigant and also on the broader development of the law of judicial review in Australia.

Another highlight was the somewhat controversial article entitled '*Federal Court v Minister for Immigration*'[101] by John McMillan, published in 1999, which argued that there had been judicial overreach in relation to Federal Court migration decisions which was inimical to administrative law generally. Others disagreed, including Robert Beech-Jones, now Justice of the Supreme Court of New South Wales, in his discussion of the role of courts at the national conference in Canberra in 2007.[102] It is clear that the area of migration has given

96 Stephen Argument, 'Farewell to Jenny Kelly (AIAL Secretariat)' (2009) 61 *AIAL Forum 3*.
97 Stephen Argument, 'Obituary Kathleen Anne Malcolm' (2005) 61 *AIAL Forum* 67.
98 [1995] HCA 20; 183 CLR 273.
99 Henry Burmester QC, Chief General Counsel at AGS, (1995) 5 *AIAL Forum* 6, and revisited at (2004) 40 *AIAL Forum* 33; Leslie Katz, Justice of the Federal Court, at (1998) *16 AIAL Forum* 1; John McMillan at (1995) 5 *AIAL Forum* 10; and Neil Williams, a Sydney barrister, at (1995) 5 AIAL Forum 1.
100 [1985] HCA 81; 159 CLR 550.
101 (1999) 22 *AIAL Forum* 1.
102 (2007) 57 *AIAL Forum* 70.

rise to intense legal, policy and political debate in Australia, which is reflected in the activities of AIAL. More generally, the focus by the High Court on the general concept of jurisdictional error and the sidelining, to some extent, of the *Administrative Decisions (Judicial Review) Act 1977* and state and territory counterparts, with their specified grounds of review, has also been a subject of ongoing debate.

Merits review

But one of the major focuses of AIAL has been to recognise that administrative law is now much more than judicial review — that, in reality, judicial review is just one limited aspect of our modern system and that merits review in particular has grown considerably in importance. In a talk given at the national conference in Perth in 2014 and subsequently published in *AIAL Forum*, Justice Janine Pritchard of the Supreme Court of Western Australia spoke on 'The Rise and Rise of Merits Review: Implications for Judicial Review and for Administrative Law'.[103] She argued that merits review is now far more significant than judicial review and discussed the range of possible reasons for this.

The nature and form of merits review has also been much considered. Michael Sassella, in a provocative talk at the 1997 national conference, raised a number of important issues — in particular, the failure, in his view, of the AAT to have proper regard to government policy and the tendency for it to be too wedded to court-like architecture.[104] As John McMillan has noted, it is often these more controversial interventions which are most discussed and remain most memorable.[105]

Of course, merits review has not been static over this period. One major development has been the amalgamation of many tribunals into what are now called 'super' tribunals. An early step in this direction was the Commonwealth proposal for a new Administrative Review Tribunal (ART) in 2000. AIAL organised a one-day seminar held in conjunction with the Senate Legal and Constitutional Affairs Legislation Committee at Parliament House in Canberra on 25 October 2000 to discuss that proposal. The Attorney-General, the Hon Daryl Williams MP, and Sandra Power from the Attorney-General's Department outlined the initiative. It was discussed by a wide range of participants, including representatives of every major political party; Justice Deidre O'Connor, President of the AAT; Kathryn Cronin, Deputy President of the ALRC; Sandra Koller from the NSW Welfare Rights Centre; and a number of academics.[106] Robin Creyke has noted that she believes the seminar was a major factor in the government's decision not to proceed with the ART. Later in 2015 an amalgamation at the Commonwealth level took place, but to a significant extent that had regard to many of the criticisms of the ART discussed at the AIAL seminar.[107]

Other oversight bodies

In addition to courts and tribunals, there is now a wide range of other bodies which review executive government action. John McMillan has stated that he was particularly delighted

103 (2015) 79 *AIAL Forum* 14.
104 'Commentary' in John McMillan (ed), *Administrative Law under the Coalition Government* (AIAL, 1997) 65.
105 AIAL Podcast No 2: Interview with Professor John McMillan.
106 These are published in (2000) 27 *AIAL Forum* 1.
107 AIAL Podcast No 1: Interview with Professor Robin Creyke.

that the AIAL provided a strong forum for the work of Ombudsmen in Australia. He also noted the growing importance of independent and external complaint handling more generally and that a commitment to good complaint handling now runs through almost all organisations, public and private.[108]

The Institute has played a significant role in bringing to light the operation of the modern range of oversight bodies. Influentially, in the second national lecture series Chief Justice Spigelman of the Supreme Court of New South Wales focused his three talks on the concept of the integrity branch of government. Professor Mark Aronson from the University of New South Wales, Chief Justice John Doyle from South Australia and Chief Justice Paul de Jersey from Queensland were commentators in relation to these lectures. As Chief Justice Spigelman argued, 'the primary basis for the recognition of an integrity branch … is the fundamental necessity to ensure that corruption, in a broad sense of that term, is eliminated from government … the idea has implications for our understanding of constitutional and legal issues of broader significance'.[109]

The 2012 national conference in Adelaide had as its theme *Integrity in Administrative Decision Making*. One plenary session, with Justice Chris Kourakis of the Supreme Court of South Australia, Professor Geoff Lindell from the University of Adelaide and Stephen Gageler, then Solicitor-General of Australia, looked at integrity of institutions under state constitutional law. However, in the national lecture at that conference, Justice Gummow stated that he saw little utility and some occasion for confusion with the concept of the integrity branch.[110] The discussion continues.

Review of the executive by Parliament itself has been thought by some to be of declining significance, but, as Sarah Moulds pointed out in a recent article entitled 'Committees of Influence: The Impact of Parliamentary Committees on Law Making and Rights Protection', parliamentary committees have the potential to enhance rights compliance and the overall quality of law making.[111] The media is also a traditional review body, and commentators who are or have been journalists, at least at some time, have spoken and written for AIAL — for example, Jack Waterford, Michael McKinnon, John Hilvert[112] and Dr David Solomon.

There are, of course, a range of views about the rigour of the review mechanisms. Those outside government sometimes argue for greater review and more mechanisms. Those inside sometimes note the burden of these mechanisms. This emphasis on review mechanisms should not distract from the key role of primary decisions, many of which are not in practice subject to any review. Justice French has written, after outlining the range of review mechanisms, that:

> There would be few officials today in any field of public administration who, when they reflect on these various mechanisms, would not feel the world was perched on their shoulder as they formulated their decisions. This perception may induce a level of anxiety, although my own impression is that the more

108 AIAL Podcast No 2: Interview with Professor John McMillan.
109 Pearce (ed), above n 74, 2.
110 (2012) 70 *AIAL Forum* 19.
111 (2019) 97 *AIAL Forum* 11.
112 'A Working Journalist's Perspective on Security' (2016) 83 *AIAL Forum* 18.

experienced officials have become enured to these levels of scrutiny as part of their normal working environment.[113]

Administrative justice

Despite the strong focus on the practice of administrative law in the AIAL, there are often considerations of its fundamental underpinnings. The concept of administrative justice has been much discussed. This raises issues as to what are the core values and outcomes of the administrative law system. A national conference in Canberra in 1999 had a wide range of speakers on this subject.[114] The conference in Sydney in 2010 returned to this theme. A particularly important contribution was by Justice Marcia Neave of the Supreme Court of Victoria, who gave a paper at the 1999 conference entitled 'In the Eye of the Beholder: Measuring Administrative Justice', which concluded that attempts to measure administrative justice should involve an ongoing dialogue between those involved in the system, politicians, administrators, tribunals, lawyers and members of the public.[115]

Information and information technology

The role of freedom of information and privacy legislation has been a regular theme in articles, conferences and seminars. A further issue which has emerged throughout the life of AIAL is the role of information technology in government decision-making. At the 1998 conference on the AAT, Peter Sutherland and Peter Johnson from Softlaw Corporation spoke on 'The Impact of Technology on Decision-making and Administrative Review'.[116] A range of others have written and spoken on this subject, including Katie Miller,[117] Mick Batskos[118] and Justice Garry Downes, President of the AAT, who noted at the final, 'graveyard' session of the 2011 national conference that the use of technology as an aid to decision-making will be one of the most significant influences on government administration in the foreseeable future.[119] In the 2018 national lecture Peter Hanks QC, a leading advocate at the Victorian bar and author, spoke on 'Administrative Law and Welfare Rights: A 40-Year Story from *Green v Daniels* to "Robotdebt Recovery"'. In that lecture he looked at the history of social security law and undertook a forensic and influential analysis of the legal arrangements for Robodebt scheme.[120]

Commercial administrative law

Another key issue has been the outsourcing and privatisation of government services and decision-making. One of the main questions considered at the national conference in Sydney in 1996 was: who will bear administrative and legal responsibility for the performance of a public function where the service provider is a private entity to whom the government has

113 'Administrative Justice in Australian Administrative Law' in McMillan and Creyke (eds), above n 43, 21.
114 McMillan and Creyke (eds), ibid.
115 Ibid 124 at 137.
116 McMillan (ed), above n 35, 183.
117 'The Application of Administrative Law Principles to Technology Assisted Decision-making' (2016) 86 *AIAL Forum* 20.
118 'The Impact of Technology on Refusal Decisions about "Voluminous" FOI Requests in Australia and Other Jurisdictions' (2014) 76 *AIAL Forum* 43.
119 (2011) 67 *AIAL Forum* 35.
120 (2017) 55 *AIAL Forum* 1.

contracted the function?[121] Professor Nicholas Seddon has written and spoken regularly on this topic. In 2000 he argued that public contracts are not the same as private contracts, that public law values do not sit easily with private law values and that the extra scrutiny of public law remedies should be brought to bear on government contracting activity.[122]

Effects of administrative law on people

One concern of the AIAL has been the impacts of administrative law on those affected by it. The first standalone AIAL national conference held in 1992 was entitled *Administrative Law: Does the Public Benefit?* I have mentioned the presence of Reverend Jason Kioa at the 2010 conference in Sydney. At the 2018 conference, also in Sydney, a session on the National Disability Insurance Scheme (NDIS) sought to understand the impact of that regime on those affected by it. Speakers included James Constance from the AAT, Jackie Finlay from Legal Aid NSW, Dr Darren O'Donovan from La Trobe University, and Professor Ron McCallum. It was chaired by Lauren Buttlerly of UNSW. At the 2019 conference Dr Cathy Kezelman of the Blue Knot Foundation and Francis Sullivan of the Truth Justice and Healing Council of the Catholic Church discussed their experiences of the Royal Commission into Institutional Responses to Child Sexual Abuse. At the 2016 conference in Brisbane, in a fascinating paper, Professor Matthew Groves talked on 'What is the Purpose of Fairness' and noted interesting social research on the impact of fair procedures on acceptance of the outcome and regard for the review process and the law more generally by those affected.[123]

The silences of administrative law

I think it is also important to reflect briefly on the issues which the Institute has not focused on and has perhaps neglected, recognising that this involves a personal perspective. Australia is a diverse society, but at times I think AIAL struggles to reflect that diversity. Zadie Smith has written that the 'only thing I ever learned about slavery during my British education was that "we" ended it'.[124] Public law often takes a similar approach, focusing on important developments, such as the new administrative law regime, rather than the effect of past regimes, and even present regimes, on those subject to them. AIAL has had a number of speakers who have talked about constitutional recognition of Australia's Indigenous peoples — for example, Ben Wyatt, Treasurer of WA;[125] Professor Megan Davis of UNSW; and Professor Asmi Wood of ANU — but there has been little consideration of the effect of the administrative state on the lives of Indigenous people. We have made efforts to demonstrate in our activities the diversity of those involved in administrative law but have said little about the effect of this system on women and minority groups such as LGBTI people. Also, while from the beginning AIAL has looked to overseas experiences, these have mainly been in the United States, Canada, United Kingdom and New Zealand. Those experiences are interesting but similar to our own; perhaps we should also look to the experiences in Asia and the Pacific as well.[126]

121 Margaret Beazley, 'Introduction' in Linda Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (AIAL, 1997) xi.
122 (2000) 26 *AIAL Forum* 67.
123 'The Unfolding Purpose of Fairness' (2017) *Federal Law Review* 653, 675–9.
124 'What Do We Want History to Do?' *New York Review of Books*, 27 February 2020, 10.
125 (2017) 89 *AIAL Forum* 102.
126 See Mitsuaki Usui, 'Administrative Justice in Japan' (2014) 77 *AIAL Forum* 33.

The future of administrative law

But it is the strength of the AIAL that anyone prepared to talk or write, or organise for someone to do so, on these issues has a community in which discussion can take place. This article has highlighted other issues which will clearly need to be the subject of future consideration, such as the role and form of judicial review and merits review and the effect of automated decision-making. I also note that this edition of *AIAL Forum* is published in the midst of a terrible pandemic, which has followed a season of terrible bushfires.[127] These raise issues as to how governments should prepare for, respond to, operate in and reflect on such events, and what place administrative law has in this. No doubt there are and will be many other issues for further discussion. In my view, AIAL clearly has a very important ongoing role in bringing together a wide range of people, many of whom are seen as combatants in other more adversarial contexts, and providing a forum for sometimes provocative, sometimes esoteric, sometimes difficult, but always relevant and respectful discussion of Australia's administrative law regime and the important issues it faces.

APPENDIX

National presidents

Geoffrey Kolts QC (OPC, former Ombudsman) (1989–1990); Professor Jack Richardson (ANU, former Ombudsman) (1990); Professor Dennis Pearce (ANU, Ombudsman) (1990–1992); Robert Todd (AAT) (1992–1994); Dr Gary Rumble (Blake Dawson Waldron) (1994–1996); Denis O'Brien (Minter Ellison) (1996–1998); Sue Tongue (ALRC, Immigration Review Tribunal) (1998–2000); Professor John McMillan (ANU) (2000–2002); Bert Mowbray (AGS, AAT) (2002–2004); Professor Robin Creyke (ANU) (2004–2006); Michael Will (DLA Phillips Fox) (2006–2008); Alan Bradbury (Minter Ellison) (2008–2010); Robert Orr QC (AGS) (2010–2012); Dr Jonathan Aleck (Civil Aviation Safety Authority) (2012–2014); Linda Crebbin (ACAT) (2014–2016); Cain Sibley (Clayton Utz) (2016–2018); Gary Humphries (AAT) (2018–2020).

National secretaries

Derek Emerson-Elliot (1989–1991); Stephen Argument (1991–2010); Meghann Everett (2010–2013); Amanda Lister (2013–2015); Tara McNeilly (2015–2020).

National treasurers

Dr Gary Rumble (1989–1992); Bert Mowbray (1992–1997); Dr Gary Rumble (1997–1998); Elizabeth Goodbody (1998–2000); Amanda Frost-Drury, then McIntyre (2000–2006); David Fintan (2006–2008); Peter Sutherland (2008–2020).

127 Perhaps as foreshadowed by n 2 above.

Life members

Stephen Argument

Professor John McMillan

Professor Dennis Pearce

The late Professor Geoffrey Sawer

The late Robert Todd

AIAL Newsletter / AIAL Forum

Editors of the *AIAL Newsletter*: Allan Anforth (1989); Gary Corr (1990); Geoffrey Kolts (1990); John McMillan (1991); Robert Todd (1992); Stephen Argument (1992–1993); Michael Sassella (1993).

Editors of the *AIAL Forum*: Michael Sassella (1994); Kathryn Cole (1994–1999); Hilary Manson (1996–2002); Professor Dennis Pearce (1999–2005); Dr Max Spry (2002–2005); Alice Mantel (2005–2009); Professor Robin Creyke (2005–2006); Elizabeth Drynan (2009–2016); Kirsten McNeill (2016–2020).

Editorial committee members within the period 1998 to 2011: Michael Barker QC; Justice Margaret Beazley; Eugene Biganovsky; Peter Boyce; Kathryn Cole; Dr Susan Kneebone; Professor Dennis Pearce; Dr Gary Rumble; Chris Finn; Rick Snell; Maurice Swan; Mark Robinson; Professor Bill Lane.

Editorial committee members within the period from 2011 to 2020: John Carroll (chair); Professor Robin Creyke (chair); Alison Playford; Dr Geoff Airo-Farulla; Tara McNeilly; Peter Woulfe.

Recent Developments contributors: Peter Prince (2006–2007); Alice Mantel (2007–2009); Katherine Cook (2012–2020).

New South Wales chapter

A meeting to discuss the formation of a chapter in New South Wales was held on 11 December 1990, chaired by Professor Jack Goldring, and a steering committee was appointed. The chapter was established in February 1991. At the inaugural meeting Alan Cameron, Commonwealth Ombudsman, talked on the role of the Ombudsman. Another early seminar was held on 13 June 1991 and included a paper by Keith Mason QC, Solicitor-General for New South Wales, entitled '*Attorney-General (NSW) v Quin* and the Limits on the Executive's Rights to Change its Mind', which was published in the *AIAL Newsletter*; and Denis Tracey of the ARC on 'Multiculturalism and Access to Administrative Law Review Processes'.[128]

128 (1991) 7 *AIAL Newsletter* 1; President's report 1992.

Chairs: Hugh Roberts (NSW Crown Solicitor) (1993–1994); Justice Margaret Beazley (Supreme Court of New South Wales) (1994–2018); Justice John Basten (Supreme Court of New South Wales) (2019–2020).

Secretaries: James McLachlan; Mark Robinson; Melinda Jones; Pamela Madafiglio (1994–2010); Andrew Chalk (2010–2019); Justice Rachel Pepper (2020).

Treasurers: John Fitzgerald; Dr James Renwick; Gabriel Fleming; Andrew Carter.

Victorian chapter

The Victorian chapter began with a preliminary meeting on 12 November 1991, organised by Professor Cheryl Saunders.[129] The chapter was established in February 1992 and an inaugural meeting was held on 13 May 1992, at which Professor John Evans, Osgoode Hall Law School, Toronto, Canada, spoke. Other early undertakings were a seminar on immigration decision-making with Kevin Bell, Chris Conybeare and Peter Hanks on 16 September 1992; and a significant event on 'Non-legal Members of Review Bodies; Social Welfare Jurisdictions' on 22 November 1992.[130]

Chairs: Julian Gardner (RRT) (1992–1995); Stephen Newman (1995–1996); Mick Batskos (FOI Solutions) (1996–2000); Amanda Watt (Minter Ellison) (2000–2002); Richard Knowles (barrister) (2002–2004); Stephen Moloney (barrister) (2005–2009); Rachel Walsh (solicitor, now a barrister) (2009–2014); Emma Turner (Russell Kennedy, Lawyers) (2014–2020).

Secretaries: Mick Batskos; Ian Cunliffe; Kevin Bell; Roz Germov; Fiona McKenzie; Rea Hearn Mackinnon; Jeffrey Barnes (2008–2020).

Treasurers: Jacky Kefford; Leo Doyle; Jane Salveson (2008–2017); Gabi Crafti (2008–2009, joint); Patrick Considine (2017–2019); Maria O'Sullivan (2019–2020).

South Australian chapter

A meeting was held in Adelaide on 5 December 1991 to consider formation of a South Australian chapter. The chapter was established in February 1992 and the inaugural meeting was held on 14 April 1992.[131] The first seminar, on 'Is There Too Much Natural Justice', was given on 10 September 1992 by Professor Dennis Pearce, Justice Deidre O'Connor of the AAT and Justice Trevor Olsson of the Supreme Court of South Australia. Another early seminar on 7 April 1993 considered the Whistleblowers Protection Bill (SA).[132]

Chairs: Eugene Biganovsky (SA Ombudsman); John Harley (Pubic Advocate for South Australia) (1994–1995); Eugene Biganovsky; Chris Finn (University of Adelaide and then University of South Australia); Margaret Boylan (Centrelink); Greg Parker (Crown Solicitor and then President of South Australian Civil and Administrative Tribunal and Justice of the

129 (1991) 6 *AIAL Newsletter*, Members Notes.
130 Publication complied by Loula S Rodopoulos (AIAL, 1992); President's report 1992.
131 (1992) 9 AIAL Newsletter, Members Notes.
132 President's report 1992.

Supreme Court of South Australia); Mike Wait (Crown Solicitor and then Solicitor-General for South Australia) (2017–2020).

Secretaries: Allessandro Gardini; Dianne Gray; Kristina Miller; Margaret Boylan; Edward Ireland; Chris Finn; Richard Dennis; Shirley Fisher (2004–2014); Dami Sheldon (2014–2020).

Treasurers: K Kelly; Paul White; Richard Dennis; Dianne Gray; Greg Parker; Dale Mazzachi (2012–2020).

Queensland chapter

A seminar on 'Administrative Law in Queensland: A New Beginning' was held at the Hilton Hotel in Brisbane in May 1990, organised principally by Maurice Swan, and in response to the Fitzgerald Report. In February 1991 a meeting was held concerning the formation of a Queensland chapter, and in March 1991 the chapter was established. In July 1991 Justice Deidre O'Connor, President of the AAT, addressed a dinner meeting of the chapter and on 31 October Dean Wells, Attorney-General of Queensland, spoke on Queensland legislation on freedom of information and judicial review.[133]

Chairs: Maurice Swan (Australian Government Solicitor); Barry Cotterell (Queensland Civil and Administrative Tribunal); Dr Gary Rumble (Blake Dawson Waldron); Maurice Swan; Dr Max Spry (barrister); Dr Geoff Airo-Farulla (offices of the Commonwealth and Queensland Ombudsman) (2010–2020).

Secretaries: Michael Halliday; John Cockburn; Sandra Kerr; James Howard (2010–2020).

Treasurers: John Bickford; Martin Carey; Dan O'Gorman; Paul Kanowski; Michelle Howard (2018–2020).

Western Australian chapter

A meeting in Perth to consider the establishment of a Western Australian chapter was held on 23 January 1992. The chapter was established in February 1992 and an inaugural meeting was held on 15 April 1992.[134] Early seminars were Robert Todd's popular lecture on 'Breaker' Morant (10 March 1993) and by Justice Deidre O'Connor, President of the AAT (1 September 1993).[135]

Chairs: Dr Hannes Schoombee (Murdoch University) (1992–1993); Justice Robert Nicholson (of the Supreme Court of Western Australia and then the Federal Court of Australia) (1993–1997); Michael Barker QC (barrister, later Justice of the Supreme Court of Western Australia and then the Federal Court of Australia) (1997–2003); Graham Castledine (Castledine Gregory, Law and Mediation) (2003–2006); Richard Hooker (barrister) (2006–2016); Adam

133 President's report 1992.
134 (1992) 9 *AIAL Newsletter*, Members Notes.
135 President's report 1992; President's report 1993.

Sharpe (barrister) (2016–2019); Julian Misso (Western Australian State Solicitor's Office) (2020).

Secretaries: Ilse Petersen (1992–1995); Graham Castledine (1995–1997); Jane Burn (1997–2003); Frank van der Kooy (2003–2006); Sally Raine (2006–2009); Jean Shaw (2009–2015); Rebecca Heath (2015–2020).

Treasurers: Richard Fayle (1992–2002); T Caravella (2002–2003); John Hockley (2003–2006); Scott Moloney (2006–2008); Michael Cashman (2008–2010); Adam Sharpe (2010–2016); Julian Misso (2016–2019); Sean Mullins (2019–2020).

Tasmanian chapter

The Tasmanian chapter was established in April 1996. The inaugural meeting, at which Sir David Williams of Cambridge University spoke, took place on 22 November 1996. (He had also spoken in Sydney and Melbourne, and in Perth by videolink, for the Institute).

Chairs: Rick Snell (University of Tasmania); D Fanning.

Secretaries: Fleur Grey; John McDonald; Jackie Gaghan.

Treasurers: John McDonald; Fleur Grey; Ray Chan.

Northern Territory chapter

The Northern Territory chapter was established in August 1999. The inaugural meeting was held on 30 November 1999 in the Stranger's Bar of the Legislative Assembly. Former Justice Toohey of the High Court of Australia addressed the meeting.

Chairs: Peter Boyce (NT Ombudsman); P Shoyer.

Secretaries: Dominic Gallo; M Storey; Mark Steele; Mary Chalmers.

Treasurer: Rita Harvey.

National administrative law conferences

Fair & Open Decision Making was held on 29–30 April 1991 at the Lakeside Hotel in Canberra, jointly with the RAIPA. The publication of the proceedings was edited by John McMillan, H McKenna and John Nethercote and published in (1991) 66 *Canberra Bulletin of Public Administration* 45–174.

Administrative Law: Does the Public Benefit? was held on 27–28 April 1992 in Canberra. The publication of the proceedings was edited by John McMillan (AIAL, 1992).

Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof? was held in Canberra on 15–16 April 1993, jointly with the IPAA. The publication of the proceedings was edited by Stephen Argument (AIAL, 1994).

Administrative Law: Are the States Overtaking the Commonwealth? was held at Brisbane on 7–8 July 1994. The opening address was given by Peter Duncan, Parliamentary Secretary to the Commonwealth Attorney-General, Michael Lavarch. The publication of the proceedings was edited by Stephen Argument (AIAL, 1996).

Administrative Law and Public Administration: Form vs Substance was held in Canberra on 27–28 April 1995, jointly with the IPAA. The publication of the papers was edited by Kathryn Cole (AIAL, 1996). See also (1996) 79 *Canberra Bulletin of Public Administration* 15–172.

Administrative Law: Setting the Pace or Being Left Behind? was held in Sydney on 11–12 April 1996. The introduction was by Justice Margaret Beazley, chair of the New South Wales chapter, and the keynote address by Jeff Shaw QC, Attorney-General of New South Wales. The publication of proceedings was edited by Linda Pearson (AIAL, 1997).

AIAL also sponsored (along with the AAT and the Faculty of Law, ANU) the conference *The AAT — Twenty Years Forward* on 1–2 July 1996 in Canberra. The publication of the papers for this conference was edited by John McMillan (AIAL, 1998).

Administrative Law under the Coalition Government was held at the National Convention Centre, Canberra, on 1–2 May 1997, jointly with the IPAA. The first conference theme paper was given by the Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs. The publication of proceedings was edited by John McMillan (AIAL, 1997). See also (1997) 87 *Canberra Bulletin of Public Administration* 30–134.

Administrative Law and the Rule of Law: Still Part of the Same Package? was held at the Hilton on the Park in Melbourne on 18–19 June 1998. The opening address was given by Justice Susan Kenny. The publication of the proceedings was edited by Susan Kneebone from Monash University (AIAL, 1999).

Administrative Justice: The Core and the Fringe was held at the National Convention Centre in Canberra on 29–30 April 1999. The opening address was given by Justice Robert French. The publication of the proceedings was edited by Robin Creyke and John McMillan (AIAL, 2000).

Sunrise or Sunset?: Administrative Law in the New Millennium was held at the Stanford Plaza in Adelaide on 15–16 June 2000. The opening address was given by Justice Keith Mason, President of the NSW Court of Appeal. The proceedings of the conference were edited by Chris Finn (AIAL, 2000).

Administrative Law — The Essentials was held in Canberra on 5–6 July 2001. The opening address was by Dr Peter Patmore, Attorney-General of Tasmania. The publication of the proceedings was edited by Robin Creyke and John McMillan (AIAL, 2002).

Appraising the Performance of Regulatory Agencies was held in Fremantle on 3–4 July 2002. The opening address was given by Jim McGinty, Attorney-General of Western Australia, and the closing remarks were by Justice Robert Nicholson of the Federal Court, a former chair of the Western Australian chapter. The proceedings were edited by Justice Michael Barker, who was Chair of the Western Australian chapter (AIAL, 2004).

Practical and Problem Areas of Administrative Law was held on 3–4 July 2003 at the National Convention Centre, Canberra. Dr Peter Shergold gave the opening address, with the first plenary session on conducting inquiries by Ian Temby QC and Wayne Martin QC.

Shaping Administrative Law for the Next Generation was held on 1–2 July 2004 at the Wrest Point Hotel in Hobart, Tasmania. The opening address was by the Attorney-General of Tasmania, Judy Jackson.

Administrative Law Horizons was held in Canberra on 30 June to 1 July 2005. The opening address was by the Attorney-General of Australia, the Hon Philip Ruddock MP.

Administrative Law: Protection of Individual and Community Interests was held at Surfers Paradise on 22–23 June 2006. It was co-hosted by the Northern Territory chapter and the Queensland chapter of AIAL.

The Impact of Administrative Law was held on 14–15 June 2007 at the Australian Institute of Sport, Canberra. The keynote address was by the Attorney-General of Australia, who acknowledged the Institute's 'continued contribution to the development of an area of law so important to maintaining and improving Australia's democracy'.[136]

Practising Administrative Law was held at the Sofitel Hotel in Melbourne on 7–8 August 2008. The Attorney-General of Victoria, the Hon Rob Hulls, opened the conference. The President of the Victorian Court of Appeal, Justice Chris Maxwell, presented the first plenary session and the Attorney-General of Australia, the Hon Robert McClelland MP, gave the keynote address.[137]

Administrative Law Reform was held on 6–7 August 2009 at the Hotel Realm in Canberra. The opening address on reform of the *Freedom of Information Act 1982* was delivered by the Hon Joe Ludwig MP, Commonwealth Special Minister for State.[138]

Delivering Administrative Justice was held at the University of Sydney on 22–23 July 2010. The opening address was given by Chief Justice Robert French, High Court of Australia. The dinner speaker was Sir Anthony Mason.[139]

Democracy, Participation and Administrative Law was held at the Hotel Realm, Canberra, on 21–22 July 2011. The opening address was by Justice Debbie Mortimer of the Federal Court of Australia. The national lecture was given by Chief Justice Patrick Keane, Federal Court of Australia.

Integrity in Administrative Decision Making was held at the National Wine Centre, Adelaide, on 19–20 July 2012. The opening address was by John Rau, Attorney-General of South Australia. The national lecture was by Justice William Gummow of the High Court of Australia.

136 President's report 2007.
137 (2008) 59 *AIAL Forum* 1.
138 (2009) 61 *AIAL Forum* 1.
139 (2010) 64 *AIAL Forum* 1.

Administrative Law in an Interconnected World was held at the Hotel Realm, Canberra, on 18–19 July 2013.The first plenary session was given by Professor Lorne Sossin, Osgoode Hall Law School, Toronto, Canada. The national lecture was delivered by Dame Sian Elias, Chief Justice of New Zealand.

Innovations in Administrative Law and Decision-making was held at the University of Western Australia, Perth, on 24–25 July 2014. The opening address was by Dr Tim Soutphommasane, Commonwealth Race Discrimination Commissioner, and the national lecture was delivered by Chief Justice Wayne Martin of the Supreme Court of Western Australia.

Administrative Law — Challenges of a New Age: Balancing Fairness with Efficiency and National Security was held at the QT Hotel, Canberra, on 23–24 July 2015. The national lecture was given by Chief Justice Robert French, High Court of Australia.

Administrative Law — Making a Difference: Improving Public Administration and Providing Administrative Justice was held at the Brisbane Showgrounds on 21–22 July 2016. The national lecture was given by Chief Justice Catherine Holmes, Supreme Court of Queensland.

Ripples of Affection — Administrative Law and Communities: Meeting Community Expectations — Ensuring Engagement and Participation — Achieving Just and Correct Outcomes was held at the Hotel Realm, Canberra, on 20–21 July 2017. The keynote address was by Justice John Griffiths of the Federal Court of Australia. The national lecture was given by Peter Hanks QC of the Victorian bar.

Administrative Law in the 21st Century and Beyond was held at the University of New South Wales, Sydney, on 27–28 September 2018. The keynote address was by the Hon Mark Speakman, Attorney-General of New South Wales. The national lecture was given by Justice Margaret Beazley, President of the NSW Court of Appeal.

People, Parliament and the Public Interest was held at the Hotel Realm, Canberra, on 18–19 July 2019. The national lecture was given by Justice David Thomas, President of the AAT.

National lectures

Sir Anthony Mason, former Chief Justice of the High Court of Australia, 'The Foundations and the Limitations of Judicial Review', 'The Scope of Judicial Review' and 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (Perth, Canberra, Sydney, 2001).[140]

Chief Justice James Spigelman, NSW Supreme Court, 'The Integrity Branch of Government', with Professor Mark Aronson as commentator; 'Jurisdiction and Integrity', with Chief Justice John Doyle, SA Supreme Court as commentator; and 'Integrity and Privative Clauses', with Chief Justice Paul de Jersey, Queensland Supreme Court as commentator (Sydney, Adelaide, Brisbane, 2004).[141]

140 *AIAL National Lecture Series on Administrative Law* (2001) 31 *AIAL Forum* 1.
141 Pearce (ed), above n 74.

Walter Sofronoff QC, Solicitor-General for Queensland, 'Constitutional Writs' (Brisbane, 2006), Michael Sexton SC, Solicitor-General for New South Wales, 'The NSW Landscape: Investigative Bodies Examined' (Sydney, 2006), David Bennett QC, Solicitor-General of Australia, 'Is Natural Justice Becoming More Rigid than Traditional Justice?' (Melbourne, 2006), Justice Keith Mason, President, NSW Court of Appeal, 'The NSW Landscape: Judicial Review at State Level' (Sydney, 2006).[142]

Chief Justice Patrick Keane, Federal Court of Australia, 'Democracy, Participation and Administrative Law' (Canberra, 2011).[143]

Justice William Gummow, High Court of Australia, 'The 2012 National Lecture on Administrative Law: A Fourth Branch of Government?' (Adelaide, 2012).[144]

Dame Sian Elias, Chief Justice of New Zealand (Canberra, 2013).[145]

Chief Justice Wayne Martin, Supreme Court of Western Australia (Perth, 2014).[146]

Chief Justice Robert French, High Court of Australia, 'Statutory Interpretation and Rationality in Administrative Law' (Canberra, 2015).[147]

Chief Justice Catherine Holmes, Supreme Court of Queensland, 'Not Making a Difference: Queensland's Extension of Statutory Review' (Brisbane, 2016).[148]

Peter Hanks QC, Victorian bar, 'Administrative Law and Welfare Rights: A 40-Year Story from *Green v Daniels* to "Robotdebt Recovery"' (Canberra, 2017).[149]

Justice Margaret Beazley, President, NSW Court of Appeal, 'Administrative Law and Statutory Interpretation: Room for the Rule of Law?' (Sydney, 2018).[150]

Justice David Thomas, President, AAT, 'Contemporary Challenges in Merits Review: The AAT in a Changing Australia' (Canberra, 2019).[151]

Answers to trivia questions: 1. (c) The Ramrods; 2. Justice Michael Kirby, Justice Ron Merkel and Justice Philip Cummins; 3. (a) 1994 (b) four times — 1994, 1996, 1998 and 2003; (c) 2003; 4. (a) Townsville, Queensland; (b) The Ecuadorian Embassy, London (c) HM Prison Belmarsh, London; 5. Chief Justice Robert French (2008) 82 ALJ 322; 6. (c) Izzy.

142 Mantel (ed), above n 75.
143 (2012) 68 *AIAL Forum* 1.
144 (2012) 68 *AIAL Forum* 19.
145 (2013) 74 *AIAL Forum* 1.
146 (2014) 78 *AIAL Forum* 1.
147 (2015) 82 *AIAL Forum* 1.
148 (2016) 85 *AIAL Forum* 1.
149 (2017) 89 *AIAL Forum* 1.
150 (2018) 93 *AIAL Forum* 1.
151 (2019) 96 *AIAL Forum* 1.

The foundations of judicial review: the value of values

*Justice John Basten**

A bit like using Twitter, choosing the title of an article requires condensing a possibly complex communication into a few words. The result will probably be inaccurate and may be positively misleading. Both are true in this case; it is necessary, therefore, to start by explaining the issues I propose to address.[1]

Identifying the issues

Writing in 1998, shortly after the first issue of *AIAL Forum* was published, Professor Paul Craig lamented the extent to which administrative lawyers writing about judicial review focused on the legitimacy of the jurisdiction rather than the normative content of its principles.[2] The riposte from Mark Elliott was that the two elements could not be separated, the content of the grounds being a function of its constitutional foundation.[3]

The constitutional debates which have taken place in the UK may be viewed with a degree of detachment by Australian public lawyers. Where legislative power is vested in different parliaments, it falls to the superior courts to determine disputes as to the constitutional validity of legislation. Declaring an executive act invalid was (and is) far less of an apparent affront to parliamentary sovereignty.

Interestingly, while Craig would no doubt approve the 'unashamedly doctrinal' vision of the leading Australian text on judicial review of administrative decision-making,[4] Elliott's approach, developed in a country with no written constitution and no strong attraction to the separation of powers, is also well established in Australian jurisprudence. In 2017 Will Bateman and Leighton McDonald charted what they described as 'a profound reorientation' of the normative structure of Australian administrative law in the last 40 years.[5] That shift was identified as proceeding from principles of judicial review based on grounds of review (a 'grounds approach') to one based on principles of statutory interpretation (a 'statutory approach'). They stated that 'a shift in the formal grammar of the law of judicial review has resulted in a shift in the basic structure of its justification'.[6] They saw the statutory approach as having been developed in answer to challenges to the 'democratic legitimacy of judicial review of administrative action' by invoking a doctrine of legislative intent which avoids

* Justice Basten is a justice of the Court of Appeal, Supreme Court of New South Wales. The author is most grateful to Rian Terrell for assistance in the preparation of this article.

1 There are many who have written insightfully in this area, including S Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303; M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law' (2005) 12 *Australian Journal of Administrative Law* 79; M Groves, 'Administrative Justice in Australian Administrative Law' (2011) 66 AIAL Forum 18.

2 P Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63, 86–87.

3 M Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) 18.

4 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 1; by contrast, R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action: Text, Cases & Commentary* (LexisNexis, 5th ed, 2019) has a far broader scope; p xvii.

5 W Bateman and L McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153.

6 Ibid 154.

confrontation with the principle of parliamentary sovereignty. While accepting that such an approach will tend to defuse criticism of the courts as 'counter-majoritarian', they argued that it did little to support, and may have undermined, the broader claim for legitimacy of judicial review as a mechanism to render accountable modern administrative government, which now operates through extensive delegation of rule-making and the grant of discretionary powers.[7] The justification for the latter claim was that a focus on grounds for challenging the validity of administrative decisions creates a correlative procedural code which can be applied by administrative decision-makers. It was argued that principles of statutory interpretation provide no such practical guidance.[8]

There are several elements underlying the analysis by Bateman and McDonald which should be noted. First, if it were true that the adoption of an approach based on statutory interpretation is motivated by a perceived need to legitimise the court's role in undertaking judicial review, that might be a matter for concern. It would at least invite the question whether the approach was mere window-dressing or a veneer designed to deflect criticism of judicial over-reach in interfering with the exercise of executive power.

Those critical of reliance on judicially discovered implied legislative intentions to limit the scope of statutory powers conferred in unqualified terms have treated such reliance as a 'fig leaf'. Sir John Laws, writing in 1966 about developments in judicial review, stated:

> They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of the Parliament, save as a fig leaf to cover their true origins. We do not need the fig leaf anymore.[9]

Professor Paul Craig, a strong supporter of transparency and a critic of the English 'ultra vires' doctrine, has referred to 'the impenetrable formalism of legislative intent'.[10]

Secondly, as will be explained below, the dichotomy between a 'grounds approach' and a 'statutory approach' may be too rigid to recognise the interplay between the two and, indeed, the explanatory power of each. It will be suggested that greater understanding may be obtained by identifying the common elements of each, which then allows for a search for values and standards which underlie each approach. This kind of analysis has been undertaken with respect to constitutional principles[11] but less rigorously with respect to judicial review.

Thirdly, there are risks in focusing too precisely on judicial review of administrative action. When exercising jurisdiction under a statute, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), which confers jurisdiction with respect to 'a decision of administrative character', it is, of course, necessary to focus upon the scope of the jurisdiction. It does not extend to conduct of a legislative or judicial character.

7 Ibid 173–4.
8 Ibid 178–9.
9 J Laws, 'Law and Democracy' [1995] *Public Law* 72, 79.
10 P Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63, 76; cf C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 50 *Cambridge Law Journal* 122.
11 See, eg, R Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018); L Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

Nevertheless, it may be important to bear in mind that courts also determine the validity of delegated legislation and the constitutional validity of statutes. Further, the supervisory jurisdiction of superior courts extends to review of judicial decision-making by inferior courts; so much was expressly recognised in *Craig v South Australia*[12] (*Craig*). Except for dicta, *Craig* is therefore not a case about administrative law; rather, it is concerned with the exercise of the supervisory jurisdiction in relation to the District Court of South Australia. Nevertheless, it is common to see the catchwords for such judgments including references to 'administrative law'.

There is no doubt that the High Court has engaged in the normative restructuring described by Bateman and McDonald. However, the High Court has suggested that any differences in approach are of historical interest only; differences have been resolved. To the extent that is so, it is necessary to ask whether anything has been lost in the switch of focus from grounds of review to principles of statutory interpretation. The suggestion made in this article is that each approach, and any approach which involves an amalgam of the two, will provide limited guidance as to the scope and proper function of judicial review, unless it is soundly based on a transparent recognition of the values and standards underpinning judicial review.

On any view, the statutory approach is more than a fig leaf justifying the exercise of judicial review powers. It imposes a framework for application by judges required to determine judicial review applications. The change in emphasis shifts the search for a principled justification from general law statements as to available grounds of review to general law principles of statutory construction. The normative structure of judicial review must depend upon the identification and application of public law values and standards in relation to particular areas of decision-making.

Stage I: from forms of relief to grounds[13]

Provision for judicial review based on specified grounds may have reached its apogee in the ADJR Act. However, there have in effect been three, rather than two, conceptually distinct mechanisms for explaining the scope of judicial review. Section 75 of the *Constitution* confers original jurisdiction on the High Court by reference to the subject matter of the legal dispute ('matter'), the parties involved (such as a state or an officer of the Commonwealth), the place of residence of the parties, or the form of relief. Section 75(v) defines jurisdiction by reference to relief: namely, writs of mandamus and prohibition; and injunctive relief against an officer of the Commonwealth.[14] Although the writ of certiorari is not mentioned, it is presumed to be available in its form as a quashing order (rather than merely the procedural calling up of the file from an inferior tribunal) in aid of an order in the nature of mandamus, requiring the decision-maker to determine the matter according to law. Section 75(v) did not identify the grounds upon which such relief might be sought: those grounds therefore depended on the general law, subject to the operation of the *Constitution* itself. As Lisa Burton Crawford has written: [15]

12 (1995) 184 CLR 163, 176–7; [1995] HCA 58.

13 See generally, S Gageler, 'Administrative Law Judicial Remedies' in M Groves and HP Lee (eds), *Australian Administrative Law* (Camb UP, 2007) Ch 23.

14 See L Burton Crawford, 'Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the Australian Constitution' (2014) 42 *Federal Law Review* 253, 259.

15 Ibid 277.

> the framers regarded the remedies as legal terms of art, which could be picked up and incorporated into the *Constitution* with relative ease. They expressed a somewhat naïve belief that these common law concepts were relatively certain and static, and included them in the trust that they would not give the High Court a jurisdiction which was greatly different from or broader than the courts of the UK or Australian colonies. This will be relevant to determining whether s 75(v) implicitly entrenches the common law grounds on which those remedies were known to lie at the time the *Constitution* was drafted — and thus the 'full scope of the entrenched minimum provision of judicial review'.[16]

In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[17] Deane and Gaudron JJ held that the effect of s 75(iii) and (v) is to ensure 'that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority'. This passage was relied upon by Gaudron and Gummow JJ in in *Re Refugee Review Tribunal*; *Ex parte Aala*[18] (*Aala*) to conclude that the actual circumstances in which relief could be granted were not limited to those which may have been available in England from the Court of Kings Bench. In determining whether relief was available under Ch III for a failure to accord procedural fairness, Gaudron and Gummow JJ noted that in 1900 the law was in a state of development but nevertheless concluded:

> The doctrinal basis for the constitutional writs provided for in s 75(v) should be seen as accommodating that subsequent development when it is consistent with the text and structure of the *Constitution* as a whole.[19]

Self-evidently, relief was to be available with respect to the exercise of statutory powers which did not exist in 1900 and was to be available in relation to the invalid or unlawful use of such powers.

As Emeritus Professor Mark Aronson has noted,[20] a similar question arises as to the scope of the supervisory jurisdiction of state supreme courts in 1900 and the relevance of subsequent developments in determining the scope of their essential characteristics protected as part of an integrated judicial hierarchy, pursuant to s 73 of the *Constitution*. However, the statement in *Aala* that the basis upon which the writs were available was in a state of development in 1900 demonstrates that there was a stage — indeed, before the term 'judicial review' had been formulated — when there was no coherent conception of the available grounds.

The grounds-based approach was therefore a second stage. Importantly, the ADJR Act removed procedural obstacles to the effectiveness of the writs and made provision for decision-makers to provide reasons for decisions as well as formulating relevant grounds. The grounds were not a code: s 5(1)(j) covered any decision 'otherwise contrary to law'; s 5(2) further particularised improper exercises of power, ending with 'any other exercise of a power in a way that constitutes abuse of the power': s 5(2)(j). Nevertheless, s 5 provided a checklist of grounds which in practice left little need to look elsewhere in order to formulate a claim for judicial review.

16 W Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463.
17 (1995) 183 CLR 168, 204–5; [1995] HCA 23.
18 (2000) 204 CLR 82; [2000] HCA 57 [20], [22].
19 Ibid [34].
20 M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 182.

Rather, the weakness of the drafting lay in seeking to be comprehensive — it did not identify grounds in discrete and independent terms, with the result that there was a high degree of overlap. Furthermore, it did not address the problem of a privative provision purporting to limit or exclude judicial review. The problems with s 5 became manifest when the Parliament removed a large area of its operation — migration decisions — and enacted a more constrained list of grounds in s 476 of the *Migration Act 1958* (Cth). Further, s 476 invited an approach which focused on statutory interpretation by identifying an error of law as 'an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision': s 476(1)(e).

The conventional language used in s 476 reflected what had been described in *Craig*[21] as 'jurisdictional error' under the general law. As the High Court noted in *Minister for Immigration and Multicultural Affairs v Yusuf*[22] (*Yusef*):

> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. … [I]f an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.[23]

A similar point was made in *Yusuf* by Gaudron J, in language reflecting that adopted in her joint judgment with Gummow J in *Aala*:

> The statement that errors involving the wrong denial of jurisdiction or the placing of limits on a tribunal's powers or functions are not reviewable under s 476(1) of the Act requires qualification. That is because notions that have been developed in relation to the grant of mandamus and prohibition, whether by way of prerogative relief or pursuant to s 75(v) of the *Constitution*, do not have precise equivalents in the scheme established by Pt 8 of the Act or, indeed, in other statutory schemes providing for judicial review of administrative decisions.[24]

Stage II: from grounds to statutory interpretation

A porous field of operation

As Bateman and McDonald explained, it is possible to describe the current focus on statutory interpretation as involving a paradigm shift in defining the principles of judicial review. However, the picture will remain incomplete unless judicial review is seen as part of a broader field of legal control of government action. As Professor Cheryl Saunders has noted, 'the boundaries between public and private law in common law systems have always been and remain porous'.[25] Much of what is currently described as 'administrative law' deals with the manner in which the government provides benefits (health and welfare), approves entry to the country (immigration) and confers licences (through a plethora of regulatory schemes,

21 (1995) 184 CLR 163, 179.
22 (2001) 206 CLR 323; [2001] HCA 30.
23 Ibid [82] (McHugh, Gummow and Hayne JJ).
24 Ibid.
25 See C Saunders, 'Common Law Public Law: Some Comparative Reflections' in J Bell, M Elliott, J Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 355.

including controls over land use). Yet some of the most intrusive interactions lie elsewhere, including police powers and taxation.

Taxation has been described as the 'compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered'.[26] Further, as explained by Kitto J in *Giris Pty Ltd v Federal Commissioner of Taxation*:

> There is no need to cite authority for the general proposition that the operation of a law with respect to taxation may validly be made to depend upon the formation of an administrative opinion or satisfaction upon a question, eg, as to the existence of a fact or circumstance, or as to the quality (eg, the reasonableness) of a person's conduct, or even as to the likelihood of a consequence of the operation of the law in an individual case, as in s 265 where the question is whether the exaction of an amount of tax will entail hardship.[27]

Yet in this area administrative law texts tend to focus upon two cases. The earlier, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[28] (*Richard Walter*), was decided almost exactly three years before *Project Blue Sky Inc v Australian Broadcasting Authority*[29] (*Project Blue Sky*). The relevance of *Richard Walter* for administrative lawyers was to be found in the pithy treatment of a privative clause by Brennan J:

> The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded.[30]

Justice Brennan's description of a privative clause as expanding the authority of the decision-maker was sought to be relied upon by the Commonwealth in *Plaintiff S157/2002 v The Commonwealth*[31] (*Plaintiff S157*) but was not adopted by the Court in the context of the complex provisions of the Migration Act and Regulation.

Richard Walter also considered the operation of the principle in *The King v Hickman; Ex parte Fox and Clinton*[32] (*Hickman*), Dawson J stating in emphatic terms:

> In [*Hickman*] a formula was devised to reconcile the prima facie inconsistency between a statutory provision which limits the powers of a decision-maker and another provision — a privative clause — which contemplates that any decision will operate free from any restriction. …
>
> However, I am unable to discover in the present case anything which would warrant the application of the *Hickman* formula, either directly or by way of analogy. The requirements of the Act which govern the making of an assessment do not produce any inconsistency with the provision that a notice of assessment constitutes conclusive evidence in recovery proceedings. That is because s 175 provides that the validity of any assessment shall not be affected by reason of the fact that any of the provisions of the Act have not been complied with. The effect of s 175 is that the requirements of the Act relating to the making of an assessment are directory only and, whilst imposing obligations upon the Commissioner, their non-observance has no consequences for the validity of the assessment.[33]

26 *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, 270 (Latham CJ); [1938] HCA 38; but cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, 467; [1988] HCA 61.
27 (1969) 119 CLR 365, 379; [1969] HCA 5.
28 (1995) 183 CLR 168; [1995] HCA 23.
29 (1998) 194 CLR 355; [1998] HCA 28.
30 (1995) 183 CLR 168, 194; [1995] HCA 23.
31 (2003) 211 CLR 476; [2003] HCA 2.
32 *The King v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53.
33 *Richard Walter* (1995) 183 CLR 168, 222–3.

Although abandoning the conclusory language of directory or mandatory provisions, the last step in the reasoning was consistent with the approach later adopted in *Project Blue Sky*, a case in which argument was heard one month following Dawson J's retirement.

The second case to which reference is frequently made is *Commissioner of Taxation v Futuris Corporation Ltd*[34] (*Futuris*). *Futuris* was also concerned with the operation of s 175 of the *Income Tax Assessment Act 1936* (Cth), which provided that '[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. Applying the language of *Project Blue Sky*, the majority asked 'whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with provisions of the Act renders the assessment invalid; in determining that question of legislative purpose regard must be had to the language of the relevant provisions and the scope and purpose of the statute'.[35] It was common ground that s 175 did not apply to the exercise of a power for ulterior or improper purposes. The Court held that there had been no deliberate failure to administer the law according to its terms. It was not necessary, therefore, to determine the effect of s 177(1) of the Act, which provided that '[t]he production of a notice of assessment … shall be conclusive evidence of the due making of the assessment and, except in proceedings … on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct'. In the final paragraphs of the joint judgment in *Futuris*, it was noted that 'not only is [s 177(1)] not a privative clause, but there is not the conflict or inconsistency between s 177(1), s 175 and the requirements of the Act governing assessment which calls for the reconciliation of the nature identified in *Plaintiff S157/2002 v The Commonwealth*'.[36] The description of the relationship identified by Dawson J in the passage set out above from *Richard Walter* was adopted.[37] Finally the joint reasons stated:

> Various views were expressed in *Richard Walter* respecting the construction of and relationship between ss 175 and 177(1). Reference was made to the then accepted distinction between mandatory and directory provisions, and to what seems to have been some doctrinal status then afforded to *Hickman*. As to the first matter, *Project Blue Sky* has changed the landscape and as to the second, *Plaintiff S157/2002* has placed 'the *Hickman* principle' in perspective. Hence this appeal should be decided by the path taken in these reasons and not by any course assumed to be mandated by what was said in any one or more of the several sets of reasons in *Richard Walter*.[38]

With respect to privative clauses, the conventional approach in the High Court from 1945 (*Hickman*) until 2003 (*Plaintiff S157*) was to treat the reconciliation of a privative provision with what otherwise appeared to be mandatory obligations, as a question of statutory construction. *Plaintiff S157* did not depart from that approach. Accordingly, the importance of statutory interpretation in determining the scope and operation of general law judicial review is longstanding.

Specifically in relation to taxation cases, the absence of discussion of taxation law in administrative law texts is in part a function of the highly specialised nature of the jurisdiction. However, there have been developments in the area of scholarly commentary in an

34 (2008) 237 CLR 146; [2008] HCA 32.
35 Ibid [23] (Gummow, Hayne, Heydon and Crennan JJ).
36 *Futuris* (2008) 237 CLR 146; [2008] HCA 32.
37 Ibid [67].
38 Ibid [70].

administrative law context, including papers by Geoffrey Kennett and David Thomas,[39] and by Mark Aronson.[40]

Secondly, there is the area of police powers. This label has a broad and variable coverage. Some areas are recognised as falling within the subject of administrative law; some are addressed within a confined scope because they arise in the context of collateral challenges to the validity of action[41] or are addressed, like some taxation cases, as illustrative of broader principles. The area potentially covers the issue of telephone interception warrants, search warrants, arrests, decisions to charge with an offence, the conduct of investigations by crime commissions and other bodies, and decisions to freeze or confiscate proceeds of crime. One aspect of the porous quality of the public law / private law distinction is that the lawfulness of an arrest will usually be considered in an action for damages for unlawful imprisonment. Challenges to the validity of warrants may be found in interlocutory proceedings in criminal cases seeking the exclusion of evidence obtained as the result of a search. Broadly speaking, administrative law covers claims for invalidity but not for damages.[42] However, the inclusion of government liability in damages in the sixth edition of Aronson, Groves and Weeks involves a recognition that there is some artificiality in this distinction.[43]

The point for present purposes is that, although determined against a general law contextual background, a case concerning the validity of an arrest will be decided by principles of statutory construction, not by reference to grounds of judicial review — a recent example is *State of New South Wales v Robinson*.[44] The same may be found with respect to challenges to the authority of an officer of a crime commission to conduct a compulsory examination of a person charged with an indictable offence, as illustrated by *X7 v Australian Crime Commission.*[45]

Once these broader aspects of the relationship between government and citizen are taken into account, reliance on principles of statutory construction in cases of judicial review may appear more conventional than novel.

The rise of statutory interpretation

In 1985 in *Kioa v West*[46] (*Kioa*), dealing with the basis upon which a decision might be reviewed for breach of procedural fairness, Mason CJ described the principle as a 'fundamental rule of the common law doctrine of natural justice'. Justice Brennan identified the basis as an implied legislative intention that 'observance of the principles of natural justice is a condition of the valid exercise of the power'.[47] In *Attorney General (NSW) v Quin*[48] (*Quin*) some five years later, Brennan J stated that 'the modern development and expansion of the law of

39 G Kennett and D Thomas, 'Constitutional and Administrative Law Aspects of Tax' in N Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) Ch 12.
40 M Aronson, 'Retreating to the History of Judicial Review?' (2019) 47 *Federal Law Review* 179, 192.
41 See, for example, Aronson, Groves and Weeks, above n 4, 751–7.
42 Ibid [1.150].
43 For an early discussion, see P Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489.
44 [2019] HCA 46; 94 ALJR 10.
45 (2013) 248 CLR 92; [2013] HCA 29.
46 (1985) 159 CLR 550; [1985] HCA 81.
47 Ibid 609.
48 (1990) 170 CLR 1; [1990] HCA 21.

judicial review of administrative action has been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[49] However, as Stephen Gageler noted in 2000, what appeared to be 'diametrically opposed' approaches dissipated on closer examination. So much was apparent from the fact that Mason CJ conceded the power of the Parliament to manifest in clear terms a contrary statutory intention, and from the absence of any suggestion in the reasoning of Brennan J that 'the principles of natural justice' were themselves found in the text of the statute. Rather, Brennan J's reasoning postulated an independent and antecedent source; it was observance of the principles which the legislature implicitly accepted.

The principle of statutory interpretation must itself have been sourced in general law principles, without which the act of the court in supplying the omission of the legislature[50] would be an exercise of judicial power unfettered by established principle — something which would have been anathema to Brennan J's legal philosophy. Chief Justice Mason's concession that the Parliament could indicate a contrary intention (denying or limiting the requirements of procedural fairness) itself appeared to envisage an affirmative contrary implication, absent a clear statement of such an intention. This invocation of the clear statement principle echoed the language of O'Connor J in *Potter v Minahan*.[51]

The coexistence of the two approaches was upheld in 2012 in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[52] dealing with a non-compellable, non-delegable personal discretion vested in the Minister to grant protection visas to persons whose applications had already been refused. The Court unanimously held that the exercise of the power did not attract an obligation to accord procedural fairness. The joint reasons of Gummow, Hayne, Crennan and Bell JJ explained the approach taken to such a question in the following terms:

> The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the *Constitution*. … It is in this sense that one may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.[53]

However, although principles of statutory interpretation are part of public law, they are not focused on judicial review. Whether their application necessarily produces the same results as would the application of grounds of review deserves attention: there are reasons to suppose that results may differ.

49 Ibid 36.
50 (1985) 159 CLR 550, 609 (Brennan J).
51 (1908) 7 CLR 277; [1908] HCA 63.
52 2012) 246 CLR 636; [2012] HCA 31.
53 Ibid [97].

Stage III: Refining statutory interpretation — articulating values

Characterising limits on executive powers

The apparent differences in approach over time have been resolved by an appreciation that both descriptions invoke an external source to make good the 'omission of the legislature'. It is not simply a matter of construing the words of the statute in a legal vacuum; nor is it right to disregard the statutory language. It is, however, not the same exercise as reading the statute against the background of the settled law in order to determine its substantive effect. Rather, the implied limits on powers derive from the values, or standards, which are found within our legal and political systems of government, including constitutional principles governing the institutional structure of the government.[54]

The exercise may be characterised as an application of principles of statutory interpretation, but that label reveals little as to the source or justification of the applicable principles. Further, there is no fixed set of applicable principles or a hierarchical rule determining paramountcy in the case of conflict.

Limits on powers come in different forms — some are procedural, governing the manner of exercise of a power; others are substantive, governing the circumstances of their exercise. Because the latter are less obvious, a few examples may assist in making the distinction.

Powers are usually expressed in discretionary or mandatory terms: 'If x, the commissioner may issue a notice'; or 'If y, the commissioner shall issue a notice'. Interpretation statutes have long recognised and sought to regularise this dichotomy: 'may' confers a discretionary power; 'shall' or 'must' imposes an obligation. Yet this is not a rigid rule, although certainty of operation might be enhanced if it were. As was held in *Julius v Bishop of Oxford*,[55] 'may' will sometimes confer a power coupled with a duty to exercise it whenever its conditions of engagement are satisfied. However, recognising this possibility raises the further question of when a discretion is limited in this way. One such circumstance is said to be where a judicial power is conferred. Thus a judge who finds a breach of contract causing loss to an innocent party cannot decline to assess the loss and order payment of damages; as expressed from the point of view of the litigants, a breach of duty engages a right to relief. On the other hand, there is no doubt that many judicial powers to grant relief are truly discretionary; and many executive powers, such as determining tax liability or social security entitlement, are not. In some circumstances the use of 'may' reflects the fact that the condition of engagement involves an evaluative judgment in circumstances where elements of the condition overlap with factors affecting the grant of relief.[56]

Although the point cannot be developed here, the concept of a 'power coupled with a duty' does not necessarily give rise to a binary choice; some discretions are so heavily constrained as to generally involve a duty to act, whereas others are somewhat lower on the scale of

54 Rather more diffusely described in R French, 'Administrative Law in Australia: Themes and Values' in Groves and Lee, above n 13, Ch 2.

55 (1880) 5 AC 214.

56 An example is provided by the testator's family maintenance (or family provision) jurisdiction: see *Singer v Berghouse* (1994) 181 CLR 201, 210–11 (Mason CJ; Deane and McHugh JJ); 219–20 (Toohey J); [1994] HCA 40.

obligation. It can also readily be seen that there will be no bright line between characterising one situation as involving a duty to act or not act in particular circumstances, and another as a duty to take particular steps in identifying the existence of such circumstances.

There is a further complication. A countervailing principle in relation to the exercise of judicial functions is that powers conferred on superior courts should not be read down by imposing implied limitations.[57] Yet, on one view, that is precisely what is done when a discretion is read down as an obligation to grant relief.

These cases deal with the nature of a power: the more common cases are procedural and address the manner of its exercise. Of these, the most obvious and common example is the obligation to accord a person procedural fairness before exercising a power adversely to his or her interests. It was this obligation which led to the statement of principles addressed in *Kioa*.[58] Accepting that such an obligation derives from principles established under the general law, it is reasonable to inquire as to where precisely these principles are found and whether they are of general application. If one considers the history of the criminal law and the longstanding incompetence of the accused person to give evidence in his or her own defence when facing an adverse consequence as serious as life imprisonment or death, it may be doubted whether the modern concept of procedural fairness is longstanding or of general application.

To continue the structural analysis, somewhere between substantive and procedural limitations are fetters on the proper outcome. It is doubtful whether any executive power is entirely free from legal constraints.[59] For example, most powers have a readily discernible purpose; their exercise for an extraneous purpose will be invalid.

Further, powers are to be exercised 'reasonably'; that is, their outcome must fall within a range identified by reference to the circumstances of the individual case. If the potential outcomes are truly a binary choice, the analysis may involve something close to the exercise of a power coupled with a duty to act. However, where the outcome may fall along a spectrum, there must be a reasonable relationship between the chosen outcome and the circumstances engaging the power.

Public law values and statutory interpretation

There is a rich history of judicial dicta and academic writing on the topic of public law values. On the basis that values underpin legal principles, the assumption is that it is the principles rather than the underpinning values which are to be applied by a court determining a judicial review application. In 1991 Sir Gerard Brennan, delivering a lecture in honour of Sir Richard Blackburn, stated:

57 *Owners of Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404, 420–1; [1994] HCA 54.

58 *Kioa* (1985) 159 CLR 550; [1985] HCA 81.

59 Cf *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; [2015] HCA 50 [39], referring to a criterion 'that is so open-textured that it may be doubted whether a challenge to its correctness is viable'.

> In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and helped to mould the meaning of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws to ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential.[60]

Such statements tend to focus on broad rule-of-law values. Similar views have been expressed by TRS Allan,[61] Peter Cane[62] and Paul Craig.[63] Interestingly, given the modern trend to demand written reasons in support of administrative decision-making, 'transparency' was not one of the values listed by Sir Gerard Brennan in 1991.

Addressing the grounds identified in the ADJR Act, Aronson wrote in 2005:

> ADJR's eighteen grounds say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations. Nor does ADJR mention the Thatcher era's over-arching goals of efficiency, effectiveness and economy … ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.[64]

This casts the net more broadly but is focused on judicial review. Clearly the categories will overlap; many may be subsumed within principles of good administration. There is an assumption in some writing that such principles provide a standard against which judicial review is to be judged. At least when considering the power of an administrative agency to review its own decisions, the High Court has expressly referred to the standard of good administration;[65] however, while identifying this as a value or standard, there are also statements in the High Court that it should not be treated as a legal principle of direct application.[66]

There is, of course, nothing remarkable in judges speaking of values and standards. Referring to the equitable concept of 'conscience', the High Court has noted that it is 'a juridical and not a personal conscience',[67] noting that '[t]he conscience spoken of here is a construct of values and standards against which the conduct of "suitors" … is to be judged'. The present purpose is not to pursue a discussion of the nature of values and standards applicable to

60 G Brennan, 'Courts, Democracy and the Law; (1991) 65 *Australian Law Journal* 32, 40.
61 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001) 2.
62 P Cane, 'Theory and Values in Public Law' in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays for Carol Harlow* (OUP, 2003) 3, 14; cf M Loughlin, 'Theory and Values in Public Law: An Interpretation' [2005] *Public Law* 48.
63 P Craig, 'Theory and Values in Public Law: A Response' in Craig and Rawlings, ibid, 23–4.
64 Aronson, above n 1, 79.
65 *Quin* (1990) 170 CLR 1, 20–1 (Mason CJ), 56 (Dawson J); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 [8] (Gleeson CJ), [122]–[123] (Kirby J)
66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 [32] (Gleeson CJ).
67 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 [15], citing JN Pomeroy and SW Symons, *Treatise on Equity Jurisprudence* (Bancroft-Whitney and Lawyers Cooperative, 5th ed, 1941) Vol 1, 74.

administrative law[68] but, rather, to note the effect of a change in focus from general law values encapsulated in specific grounds of review (which are values underpinning administrative law) to a focus on statutory interpretation. The change in focus will result in a change in underlying values. Principles of statutory interpretation, such as the 'principle of legality', better known as the clear statement principle, rest on assumptions as to how the legislature operates, or should operate in a liberal democracy. In applying such principles, the courts are conscious of the boundary between the legislative and judicial functions. They will be less concerned with the limits of executive functions, which are presumed to be determined by a correct reading of the statute. This shift in focus builds on the existing limits of judicial understanding of, and interest in, the way the bureaucracy operates.

The value-based reasoning underlying principles of interpretation is that famously expressed in Maxwell, *On the Interpretation of Statutes*,[69] quoted by O'Connor J in *Potter v Minahan:*

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.[70]

The application of this principle, now a normative proposition rather than one based on probabilities as to behaviour,[71] of which there are many examples in recent High Court decisions, requires the identification of relevant 'rights' and of what constitutes 'the general system of law'. This is no straightforward task: the latest edition of Pearce, *Statutory Interpretation in Australia*,[72] contains, in Ch 5, headed 'Legal assumptions: principle of legality', a table at paragraph 5.60. The table lists more than 60 'Principles, rights and privileges' which have been held to engage the clear statement principle for their abrogation.

The focus and purpose of the clear statement principle was explained by Gleeson CJ (albeit in dissent) in *Al-Kateb v Godwin*[73] (*Al-Kateb*) in the following terms:

> Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[74]

Al-Kateb was directed to the possible indeterminate detention of a non-citizen pending removal from Australia. The case was not concerned with administrative decision-making, because the statute (the Migration Act) dictated, as a matter of obligation, how the unlawful citizen was to be held, pending removal from the country. The case was not one of judicial review, but the significance of the statement by the Chief Justice is that it locates the

68 See generally P Daly, 'Administrative Law: A Values-based Approach' in Bell et al, above n 25, Ch 3.
69 PB Maxwell, *On the Interpretation of Statutes* (Sweet and Maxwell, 4th ed, 1905) 121; the language being taken from *United States v Fisher* 6 US (2 Cranch) 358, 390 (Marshall CJ) (1805).
70 (1908] 7 CLR 277, 304; [1908] HCA 63.
71 B Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.
72 DC Pearce, *Statutory Interpretation in Australia* (Lexis Nexus Butterworths, 9th ed, 2019).
73 (2004) 219 CLR 562; [2004] HCA 37.
74 Ibid [19].

justification for the principle in the relationship between the legislature and the judicial arm of government.

A similar approach underlies an understanding of the limits of the principle, identified by Gageler and Keane JJ in *Lee v New South Wales Crime Commission*:

> The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[75]

The application of this principle, widespread as it may be, must be understood as a qualification of the strong text-based approach demanded by the High Court in other contexts.[76] Its effect is to impose constraints on administrative action which might otherwise be thought to interfere with rights and freedoms found within the general system of law. As explained in revealing terms by Brennan J, the purpose is to 'supply the omission of the legislature'. It is not compatible with the underlying justification of an approach based solely on statutory interpretation — namely, to root the function of judicial review in the firm soil of parliamentary sovereignty.

The cases reading down the operation of privative clauses seek to protect access to the courts as an essential element of the 'rule of law' — a phrase used to encompass a set of public law values. Like *Al-Kateb*, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[77] (*Probuild*) was not concerned with an administrative decision but dealt with the availability of review for error of law on the face of the record. Legislation governing building and construction work[78] provided for progress payments to contractors. Disputes as to entitlement were determined by an adjudicator. The question in *Probuild* was whether the statute, which contained no express privative clause, was intended to allow the adjudicator to operate free of review for non-jurisdictional error of law. The Court held unanimously that it did. The majority[79] identified the need for a clear expression of intention 'to alter the settled and familiar role of the superior courts'.[80] They adopted the explanation of Brennan J in *Quin* that 'the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise'.[81] Construing the legislative scheme, the joint reasons concluded that the jurisdiction to review determinations of the adjudicator for non-jurisdictional error of law was ousted.[82]

Justice Gageler took a different approach, not dependent upon the statutory enactment of the supervisory jurisdiction or the interaction of two statutory schemes:

75 (2013) 251 CLR 196; [2013] HCA 39, [313].
76 S Gardiner, 'What Probuild Says about Statutory Interpretation' (2018) 25 *Australian Journal of Administrative Law* 234, 241–3.
77 (2018) 264 CLR 1; [2018] HCA 4.
78 *Building and Construction Industry Security of Payment Act 1999* (NSW).
79 Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.
80 *Probuild* (2018) 264 CLR 1; [2018] HCA 4 [34].
81 Ibid [33], quoting *Quin* (1990) 170 CLR 1, 36.
82 Ibid [35].

> The scope and incidents of that historical, inherited, supervisory jurisdiction were defined by the common law. The statutory perpetuation of that former jurisdiction does not alter its common law character.[83]

He further noted that the jurisdiction yields to legislation which, according to common law principles of interpretation, manifests an intention 'that a decision or category of decisions is not to be quashed or otherwise reviewed'.[84] His point of departure from the joint reasons lay in his approach to the principles of statutory construction. Those principles, he reasoned, 'are no longer adequately captured in the all-encompassing aphorism that "recourse to the courts is not to be taken away except by clear words" or in some variation of that aphorism'.[85]

There is a presumption, identified in *Craig*, that power conferred on a non-judicial body does not authorise decisions on a mistaken view of the law. Justice Gageler saw any additional presumption as to the availability of the supervisory jurisdiction to correct errors of law as essentially duplicative: accordingly, once satisfied that the statutory scheme did not require the adjudicator to form a correct view as to legal issues, there was no purpose in considering any additional presumption, which 'would at best be supererogation and at worst be conducive of incoherence'.[86]

Justice Edelman accepted that, if 'the traditional, narrow approach to construction of legislation that purports to exclude review for non-jurisdictional errors of law' were adopted, the legislation would fail that test.[87] He did not apply that test, however, in its full force, primarily because the adjudicator did not produce a final determination of legal rights of the parties.[88] His conclusion was expressed in the following terms:

> The Security of Payment Act did not authorise adjudicators to take unlawful steps by making errors of law. What it did do, by implication based upon a background legislative assumption, was to immunise from judicial review any non-jurisdictional error of law on the face of the record. The conclusion that judicial review of a non-jurisdictional error of law could be excluded merely by a background implication despite the narrow approach to construction is unusual. The reason for the unusual result is that the narrow approach applies only weakly to the construction of the provisions excluding judicial review of non-jurisdictional errors of law on the face of the record. The rationale for the narrow approach to construction is protective of the reason for judicial review, namely access to the courts to correct legal errors relating to a person's rights. Where, as here, that access is generally preserved without much practical effect on rights then the rationale is not sufficiently engaged to overcome the inference that arises from ordinary principles of construction.[89]

Probuild was not a case about grounds of review; rather, it was a case about the scope of the supervisory jurisdiction. All three judgments treated it as involving a question of statutory construction. The legal effect of the adjudicator's decision was to require a progress payment to be made, without usurping the judicial power to resolve disputes as to the legal entitlement to the payment. The legal effect was thus temporary rather than final. Its practical effect was to shift the risk of insolvency pending the judicial determination of any legal disputes.

83 Ibid [56].
84 Ibid [57].
85 Ibid [59], the quotation being from *Hockey v Yelland* (1984) 157 CLR 124, 130; [1984] HCA 72.
86 Ibid 78].
87 Ibid [100].
88 Ibid [102].
89 Ibid [108].

The result was consistent with the conventional view that the supervisory jurisdiction is ultimately protective of legal rights and only engages with steps taken on the way to a final determination of legal rights for limited purposes.

To the extent that principles of legality, fairness and reasonableness are embedded in public law values, they are protective of individual rights and freedoms. What find no reflection in such principles, as presently articulated, are the institutional values associated with good administration. Protection of individual rights may impose significant costs on administration which should be weighed against the benefits to be obtained for the public good. The focus of the court in a case of judicial review is squarely on the situation of the individual complainant; the focus of the author of the impugned decision is likely to have been far broader (seeking to achieve consistency and rationality over hundreds of cases) and far narrower (disregarding the case law through which complex principles of judicial review have been fine-honed). An unusual case, in which principles of good administration were determinative, was *Plaintiff M64/2015 v Minister for Immigration and Border Protection*.[90] As noted by French CJ, Bell, Keane and Gordon JJ:

> Policy guidelines … promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in 'high volume decision-making' …[91]

Justice Gageler observed:

> Where, as here, the statutory question is whether the decision-maker should be persuaded that there are compelling reasons for giving special consideration to granting one of a finite number of permanent visas to a particular applicant, the correct or preferable decision in the individual case cannot be divorced from the correct or preferable decision across the range of cases in which an exercise of that decision-making power can be expected to be sought. Blinkered and individualised decision-making would be a recipe for maladministration.[92]

The demand for clear and cogent reasons as a condition of valid decision-making may also be seen as promoting transparency and guarding against arbitrariness. However, if the demands are too great, the results may be counter-productive.[93] While it is not clear that a grounds-based approach to judicial review has in the past provided an adequate vehicle for this balancing exercise, there is reason to doubt that an unqualified focus on statutory interpretation will improve the situation.

Further, as observed by Edelman J in *Minister for Immigration and Border Protection v SZVFW*:

> Speaking in the context of the adjudication of questions of construction of legislation, Aronson, Groves and Weeks observe that '[o]ne of the assumptions underlying Marshall CJ's judgment in *Marbury v Madison* remains to this day, namely, that to every question of law, there can be only one right answer'. On judicial review of, or appeal from, a decision concerning the construction of legislation, a contract, a will, or a trust, no latitude is given to a primary decision-maker even where the primary decision was one about which

90 (2015) 258 CLR 173; [2015] HCA 50.
91 Ibid [54].
92 Ibid [69].
93 J Mashaw, 'Public Reason and Administrative Legitimacy' in Bell et al, above n 25, 17; Aronson, Groves and Weeks, above n 4, 626–7.

> opinions might reasonably differ. 'As to construction, there is always one and only one true meaning to be given to fully expressed words.' [94]

In *Hossain v Minister for Immigration and Border Protection*,[95] referring to an essay by Alan Robertson,[96] Kiefel CJ, Keane and Gageler JJ demonstrated sensitivity to the need for a nuanced approach to the construction of statutes conferring executive powers, stating:

> The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecison-making is a function of the real world'.[97]

The second half of this passage will require an application of general principles of statutory interpretation with due regard to the nature of the particular power and, one hopes, to relevant public law values. It is an exercise entailing a degree of sophistication, not merely the articulation of a principle at a high level of generality, followed by a search for a contrary indication.

Conclusions

The focus on statutory interpretation when identifying the boundaries of judicial review may well have exacerbated a concern long held by John McMillan that judges are insufficiently attuned to the institutional framework within which administration occurs. Principles of statutory interpretation are, relevantly, protective of individual rights and freedoms and of the judicial system. They are not focused on institutional facets of good administration. Bateman and McDonald saw the focus on statutory interpretation as coming 'at the cost of limiting the predictability, applicability and generality of the legal norms of administrative law and, thereby, a diminution of the capacity of the legal norms of Australian administrative law to contribute to the legitimation of bureaucratic power in an administrative state'.

I would put it slightly differently: statutory interpretation depends to a large degree on general law principles. However, they are not principles which necessarily reflect the values and standards associated with good administration. A focus on individual rights and freedoms is a necessary element in imposing accountability on the executive arm of government. That is a proper function of the courts. However, it must be balanced by an understanding that, to paraphrase Brennan J, achieving a just result in a particular case may be a collateral or subsidiary benefit of the broader function of maintaining the regularity of administrative practice. Yet the collateral benefit is the motivation for the claimant, who is primarily

94 (2018) 264 CLR 541; [2018] HCA 30 [127].
95 (2018) 264 CLR 123; [2018] HCA 34.
96 A Robertson, 'Is Judicial Review Qualitative?' in Bell et al, above n 25, at 243.
97 (2018) 264 CLR 123; [2018] HCA 34.

concerned with the final outcome.[98] Ultimately, it is necessary to articulate the grounds on which judicial review is available by reference to a set of values and standards which promote good administration of the laws by the executive in the public interest. Hopefully these issues will be teased out in the next 100 issues of *AIAL Forum*.

98 Which is often beneficial: the administrative decision is reversed on reconsideration — see R Creyke and J McMillan, 'The Operation of Judicial Review in Australia' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge UP, 2004) Ch 6.

Privacy, participation and purpose: how information rights are essential to a society worth living in

*Sven Bluemmel**

At the time the first *AIAL Forum* was published in 1994, Australia's first privacy legislation was five and a half years old. Our first Freedom of Information Act was just about to enter its teenage years, even though it had first been proposed to Parliament some 20 years earlier. Other relevant developments were similarly finding their feet. These included data analytics and artificial intelligence,[1] even though the latter had been conceived much earlier.

While social media as we know it today was still three years away, with the social network service Six Degrees not launching until 1997, mobile phones had been introduced to Australia some seven years earlier. And the very first smart phone, IBM's Simon Personal Communicator, went on sale in the United States in August 1994, just three months after the first issue of this journal. The first iPhone was still 13 years away.

All of these developments have had an important impact on how we communicate and socialise. They have changed how we inform, develop, shape and communicate opinions. Their effect on how we learn, interact, collaborate, unify and divide has been substantial. The impact on our society has been profound.

The purpose of this article is to outline how information laws have developed in Australia, to identify areas in need of further development and to make the case that information rights are essential to a successful democracy that respects human rights.

Information laws

This article will primarily consider privacy laws and freedom of information (FOI) laws as they apply to government, the public sector and to the delivery of public services. I will refer to these collectively as 'information laws'.

There are, of course, other mechanisms that deal with government accountability. These include parliamentary mechanisms as well as legislation establishing oversight bodies such as Ombudsmen, auditors-general and integrity and anti-corruption commissions. Records management and archival legislation also plays a crucial role in ensuring records are made and kept, which allows those other mechanisms to be effective. However, a consideration of these other mechanisms is outside the scope of this article.

It is tempting to see information rights as one of those first-world luxuries to which we can only aspire because, for most of us, our basic survival needs of food, shelter and the like are met. And this is true. However, a similar argument applies to many rights that we hold dear as being hallmarks of a free and fair modern society — for example, rights to freedom

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1 For an investigation of the concept of Artificial Intelligence, its applications and potential regulatory approaches, see C Bertram, A Givson and A Nugent (eds), *Closer to the Machine — Technical, Social, and Legal Aspects of AI* (Office of the Victorian Information Commissioner, 2019) <https://ovic.vic.gov.au/closer-to-the-machine-ai-publication/>.

of expression and religion, the right to a fair trial, equality before the law and protection from torture or inhuman treatment.

I will look first at privacy laws. Article 12 of the *Universal Declaration of Human Rights* states, 'No one shall be subjected to arbitrary interference with [their] privacy, family, home or correspondence, nor to attacks upon their honour and reputation'. The United Nations General Assembly proclaimed the Universal Declaration in 1948 as a common standard of achievement for all peoples and all nations.

In some Australian states and territories, some information rights are similarly enshrined in human rights legislation. For example, the Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the right to privacy as well as the right to take part in public life. Exercising the latter surely requires understanding of, and therefore access to, information about government.

In 1994, only the Commonwealth had passed information privacy legislation, in the form of the *Privacy Act 1988*. With the exception of Western Australia and South Australia, all Australian jurisdictions now have information privacy laws.[2] Some also have laws that specifically govern the handling of health information.[3] All of these laws require the regulated entities to comply with a number of privacy principles when handling personal information and all can trace their origins to the Organisation for Economic Co-operation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* introduced in 1980 and updated in 2013..

The OECD guidelines, and thus Australian privacy laws, are based on three pillars: the collection limitation, the purpose specification and the use limitation.

In brief, the collection limitation requires that collection of personal information be limited to only what is necessary; personal information should only be collected by lawful and fair means; and, where appropriate, it should be collected with the knowledge and/or consent of the individual. The purpose specification provides that the purpose of collecting personal information should be specified to the individual at the time of collection. Finally, the use limitation provides that personal information should only be used or disclosed for the purpose only for which it was collected, unless there is consent or legal authority to do otherwise.

The underlying goal of these intertwined principles is to minimise the amount of information any one organisation holds about an individual and to ensure that the way the information is handled is consistent with the expectations of that individual. As I will discuss later, the adequacy of these principles is being tested by technology, particularly by analytics and artificial intelligence.

Turning now to the second category, all Australian jurisdictions have laws that give individuals a legislated right to access government information, subject to certain limitations

2 *Privacy Act 1988* (Cth); *Privacy and Personal Information Protection Act 1998* (NSW)*; Information Privacy Act 2009* (Qld); *Personal Information Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic); *Information Privacy Act 2014* (ACT); *Information Act 2002* (NT).

3 *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic); *Health Records (Privacy and Access) Act 1997* (ACT).

and exceptions. These are variously known as FOI laws,[4] right to information laws[5] or public access laws.[6] For the purposes of this article, I will refer to them generically as FOI laws.

FOI laws are often considered to be primarily tools of government accountability and transparency. While they certainly perform those functions, there is another reason why they are so important to an effective liberal democracy. Access to information allows citizens to participate meaningfully in the processes of government.

The first Australian state with FOI legislation was Victoria, which passed the *Freedom of Information Act 1982* (Vic) in the same year as its Commonwealth counterpart. By 1994, every Australian jurisdiction other than the Northern Territory had similar legislation. By 2003, national coverage was complete.

The relationship between government and citizens

This article primarily analyses the role of information laws that apply to government or to government service delivery, rather than laws that govern the private sector generally. To do this, it is appropriate to look at some aspects of the relationship between government and citizens.

Government has powers that are not generally available to non-government bodies. It is a fundamental aspect of modern democratic societies that we are prepared to give up some of our freedoms for a form of common benefit. Government has the power to regulate conduct. It makes and enforces laws, raises revenue through non-voluntary mechanisms and can even jail people where the law requires it to do so. While some companies are arguably more powerful than some governments when measured by financial or even social influence, they still rely on the existence and enforcement of rules by government in order to operate.

It has become fashionable for governments to refer to their citizens in various contexts as 'customers'. As I have written in this journal previously, this trend should be resisted.[7] A true customer has the freedom to choose a service or product from a competitive marketplace. A person interacting with government generally does not. This monopoly position of the state is counterbalanced by the state's behaviour being subject to limitations and scrutiny which do not apply to the private sector — for example, obligations of transparency under FOI laws and particular requirements to protect privacy and other human rights.

The relationship between citizens and their government is put under particular strain during times of crisis. This year has, of course, seen the world grapple with the COVID-19 pandemic. Much will be written about the factors that contributed to the success and failure of governments' responses to this crisis. One theory that emerged early in the pandemic was that societies ruled by authoritarian governments would be better placed to respond to the

4 *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 2016* (ACT); *Freedom of Information Act 2002* (NT).

5 *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas).

6 *Government Information (Public Access) Act 2009* (NSW).

7 S Bluemmel, 'Corporatisation and Electronic Records: On a Collision Course with Administrative Justice?' (2011) 66 *AIAL Forum* 33.

situation than liberal democracies.[8] And one can indeed point to individual cases to support this argument.[9] However, one can also point to examples of liberal democracies whose responses have so far been very effective.[10] Similarly, one can point to authoritarian regimes that have so far fared very poorly.[11]

While a robust analysis of the effectiveness of crisis response in various systems of government is beyond the scope of this article, there is one factor that is highly relevant to the role of information laws. That factor is trust. Successful implementation of the measures that are known to be effective in slowing the spread of COVID-19 requires substantial behavioural change by the population. This comes at considerable financial and social cost to individuals. In the absence of the kind of unchecked state power that exists in some undemocratic societies, the extent to which citizens are willing to engage in the behavioural change that their governments say is necessary will depend, to a significant extent, on citizens' trust in those responses and the governments and institutions behind them. A critical factor necessary in liberal democracies to maintain governments' social licence to impose restrictions on freedom of movement and economic trade during the pandemic has been, in part, the provision of timely information and data to inform citizens.

In the context of information laws, there are two key elements to establishing the necessary trust. First, governments must commit to the responsible and proportionate use of citizens' personal information. Second, governments must be honest and open with citizens about governments' efforts. Both of these elements must be subject to effective and independent oversight. It is here that privacy and freedom of information play a crucial role.

The role of privacy

Privacy is generally considered an essential human right. In several jurisdictions around the world, including in two Australian states and one territory, it is enshrined in human rights legislation.[12] The right to privacy enables individuals freely to develop their personality and identity. It is crucial in developing an ability to participate in political, economic, social and cultural life. It is an enabling right that is important for the realisation of other human rights, such as the right to freedom of expression. Can we truly develop our best sense of self unless we are, in some dimension, left alone to do so? Would important social movements such as universal suffrage or civil rights have succeeded if all their adherents had felt under constant surveillance? Will future generations of young adults find their protest songs if all of the music to which they are exposed is curated for them by algorithms?

Many current privacy laws, including all broad information privacy legislation in Australia, are centred on the concept of personal information. The laws then prescribe how such

8 See, for example, Ilan Alon, Matthew Farrell, Shaomin Li, 'Regime Type and COVID-19 Response' (2020) 9(3) *FIIB Business Review* 152–60 <https://journals.sagepub.com/doi/10.1177/2319714520928884>.

9 Ibid.

10 Carl Benedikt Frey, Chinchih Chen and Giorgio Presidente, 'Democracy, Culture, and Contagion: Political Regimes and Countries' Responsiveness to Covid-19' (2020) 18 *COVID Economics* 222–38 <https://cepr.org/sites/default/files/news/CovidEconomics18.pdf#Paper8>.

11 Ibid.

12 *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004 (*ACT).

information may be collected, used and disclosed. This is usually formulated in a number of privacy principles with which organisations must comply. These laws are far better than nothing, but two fundamental limitations are becoming apparent.

The first limitation is that the laws only apply to the collection, use and disclosure of *personal information*. Developments such as artificial intelligence, data analytics and the sheer volume of information being collected and inferred mean that my privacy can be infringed very effectively (potentially destructively) by an organisation that does not even know my name. My newsfeed can feed me stories that cater to my hopes, dreams, biases and hatreds, based on information collected and inferred from many sources. If designed cleverly, it may be able to do so without ever using information that would render me personally identifiable. It can then effectively use or sell these insights to businesses, political parties and others. Again, if done cleverly, it does not need to use my name or other personally identifiable information about me to do so. Instead, it just needs to convince the buyer that it can give reliable access to a cohort of users that are particularly receptive to a particular approach. This can be because that cohort is particularly vulnerable; particularly open to political persuasion; predisposed to believing conspiracy theories; or susceptible to racism, misogyny, or fear or outrage.

This leads to the second limitation. Current privacy laws are conceptually transactional in nature and consent features strongly. Practices are permitted where an individual consents. This treats privacy as a private good and theoretically allows each of us to make our own decisions about what is best. The inherent appeal of this approach to our sense of freedom and agency is obvious.

There are, however, limitations to conceiving privacy as a tradeable consumer good, the price of which is determined by the market. Thinking of privacy as something that can be owned also implies that it can be sold.

Following the Facebook / Cambridge Analytica scandal,[13] more people at least claim to value their privacy. In this climate, privacy becomes an asset to companies — a selling point. The market value of privacy increases, and more companies turn their attention to how they can protect privacy to gain and retain customers. However, letting the market decide the value of our privacy is a very risky move. It also raises the existence of the 'privacy paradox' — where people often say they care about privacy but do not end up putting this into action. One of the challenges of privacy is that it usually appeals to people's future selves, but it is often our current selves who urgently require the new app or service and who end up clicking 'I agree' because there is no other meaningful choice, given what feels most urgent at that moment.

Instead of thinking of privacy as a private good, I argue that we should think of it as a public good. The privacy choices we make as individuals result in collective harm or benefit. If enough of us are careless with our privacy choices, micro-targeting in election campaigns becomes worthwhile. The societal harms from this are substantial. Political discourse becomes more polarised and there is less pressure on political parties to be logically or

13 Julia Carrie Wong, 'The Cambridge Analytica Scandal Changed the World — But it Didn't Change Facebook', *The Guardian* (18 March 2019) <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook>.

philosophically consistent or coherent. We all suffer when some of us make poor privacy choices, just as we all suffer when some of us choose to pollute the water supply or when some of us choose to ignore evidence-based infection prevention measures. Personal choice is a good starting point, but it has its limitations.

Data insights and joined-up services

The use of information, including information about individuals, can, of course, have tremendous benefit. A particular area of opportunity that has become much more relevant in recent times is that of data analytics.

CSIRO's data sciences arm Data61 describes data analytics as being about seeing patterns, adding insight and understanding the world in new ways. In other words, analytics transforms raw data into new insights and knowledge. This can be used to develop better policy, improve the planning of infrastructure and help to deliver joined-up services. Effective responses to the current pandemic rely heavily on data and analytics. Even the use of genomic sequencing of the SARS-CoV-2 virus helps to analyse the spread of the virus and to contain outbreaks.[14]

Effective analytics does not have to come at the expense of effective privacy protections. Victoria provides an example of an approach that achieves valuable data insights while protecting privacy. Under the *Victorian Data Sharing Act 2017* (Vic), data may be shared for the purposes of informing policy-making, service planning and design. The Act establishes a Chief Data Officer to coordinate these efforts. Data sharing under the Act is subject to clear safeguards, including the de-identification of data and oversight by the Health Complaints Commissioner and by my office.

Other specific legislation deals with information sharing in particular contexts in Victoria, including for the prevention of family violence,[15] the promotion of the wellbeing and safety of children[16] and for quality and safety purposes in the health context.[17] The *Service Victoria Act 2018* (Vic) provides for safeguards and oversight in relation to the use of personal information in the context of joined-up service delivery.

The above examples show that data insights and joined-up service delivery need not come at the expense of privacy, provided privacy issues are considered early and meaningfully in the design of any initiatives.

While privacy will not usually stand in the way of a well-considered and well-designed initiative to share or analyse data for legitimate public purposes, recent history has demonstrated one significant limitation on how data analytics can be safely performed.

14 In this context it is important to note that the genome being sequenced is that of the virus, not the carrier.
15 *Family Violence Protection (Information Sharing and Risk Management) Regulations 2018* made under the *Family Violence Protection Act 2008* (Vic).
16 *Child Wellbeing and Safety (Information Sharing) Regulations 2018* made under the *Child Wellbeing and Safety Act 2005* (Vic).
17 Part 6B of the *Health Services Act 1988* (Vic).

Until several years ago, it was reasonable to hope that it would be possible to de-identify a complex longitudinal dataset about individuals in such a way that the de-identified dataset could be widely published without breaching anybody's privacy, while still remaining useful for analysis and insight. This now looks less likely. Complex, longitudinal unit-level data about people's behaviours is almost certainly re-identifiable, given sufficient context. This was highlighted by two instances where two such de-identified datasets were found to be re-identifiable. One instance dealt with the release of Australian medical billing records in 2016;[18] the other with the release of public transport usage data in Victoria in 2018.[19]

Both cases demonstrate that complex, longitudinal unit-level datasets, which are, of course, the most useful for generating meaningful insights, may not ever be capable of being reliably de-identified. This does not mean that they cannot be used for analysis. It does, however, mean that relying solely on de-identification is dangerous and unlikely to protect privacy. Instead of releasing such dataset broadly, agencies will need to facilitate the analysis in controlled environments. As noted above, the model under the *Victorian Data Sharing Act 2017* provides one mechanism for doing so while enduring appropriate oversight and control.

Participation and accountability

Citizens in a representative democracy should rightly expect government to be something they can participate in, not something they have done to them. Having access to information is as crucial to citizens' ability to participate meaningfully in society as other important rights, such as the right to freedom of expression or the right to vote.

Freedom of information legislation recognises that government does not exist for its own benefit but only to serve and govern for the public good. It is also a tool for accountability and for minimising, or at least exposing, corruption and misconduct. All of these are important factors in the level of citizens' trust in their government and public institutions.

To be fully effective as a tool for public participation in government, FOI laws must allow for citizens to get access to information easily and quickly. Agency FOI decision-makers must similarly administer the legislation in this spirit.

Some Australian jurisdictions have reformed their FOI legislation to place a greater emphasis on proactive and informal release of information. These include Queensland and New South Wales. In jurisdictions such as Victoria, the legislative focus has remained on providing access to documents following receipt of an FOI request. However, there is nothing preventing agencies from providing access to information outside of a formal request, either proactively or informally in response to a general request. Further, legally binding professional standards issued under the legislation in 2019 require agencies to consider whether a document in their possession can properly be provided to an applicant outside the Act.

18 V Teague, C Culnane and B Rubinstein, 'The Simple Process of Re-Identifying Patients in Public Health Records' *Pursuit* (online, 18 December 2017) <https://pursuit.unimelb.edu.au/articles/the-simple-process-of-re-identifying-patients-in-public-health-records>.

19 Office of the Victorian Information Commissioner, *Disclosure of Myki Travel Information* (OVIC, 2019) <https://ovic.vic.gov.au/wp-content/uploads/2019/08/Report-of-investigation_disclosure-of-myki-travel-information.pdf>.

A 2019 Monash University pilot study commissioned by the Office of the Victorian Information Commissioner surveyed six Victorian agencies subject to the *Freedom of Information Act 1982* (Cth) and found proactive release of information by public sector agencies is important, but it needs to be better supported.[20] Pleasingly, that report also found that the vast majority of the FOI practitioners that participated in the study are sincere, passionate and committed to a well-functioning access to information regime in the state.

Looking at FOI through the lens of public participation in government can have a profound impact on how individual access decisions are reached. A common scenario is where a person requests access to documents that inform a decision on a potential infrastructure project. The argument that disclosure of such a document is against the public interest because deliberations are currently at a sensitive pre-decision stage becomes much weaker when one thinks that meaningful public participation in government is an intended outcome of the legislation. Instead, the fact that deliberations are currently at a sensitive pre-decision stage becomes an argument in favour of disclosure.

There is another quite different area where laws intended to achieve transparency and accountability are being challenged. This is in the area of automated decision-making involving some form of artificial intelligence or machine learning. As these tools become more sophisticated, it becomes more difficult (or even impossible) to explain how a particular decision was reached in a particular instance. As current FOI laws create a legally enforceable right to access documents, they are unlikely to be fully effective in allowing a person to obtain a meaningful insight into how automated decisions have been arrived at. This is further complicated by the fact that private sector developers understandably guard their intellectual property jealously and are unlikely to allow public sector organisations access to algorithms and source code in a way that would allow those organisations to give any meaningful explanation of outcomes to citizens.

When ministers and agencies deal with formal and informal applications for government information, their approach, attitude and decisions will either enhance public trust in government or undermine it. This does not necessarily mean that they must always give full access. FOI legislation quite rightly contains exemptions from disclosure. These exemptions reflect Parliament's view that, in some cases, the public interest will not be in favour of disclosure. However, it is important that ministers and agencies approach their decisions with a view to giving effect to Parliament's intention and dealing with applicants fairly, promptly and respectfully. As I have argued above, doing so will earn trust, and trust is an important aspect in a well-functioning democracy.

What should the future hold?

I hope that the discussion above demonstrates that information laws are coming under intense scrutiny in light of rapid technological and societal developments. The way we develop, grow, learn, interact, argue and participate is changing faster than it has ever changed before.

20 Monash University, *The Culture of Administering Access to Government Information and Freedom of Information in Victoria: Pilot Study May–August 2019* (OVIC, 2019) <https://ovic.vic.gov.au/wp-content/uploads/2019/09/Monash-report-FOI-and-Information-Access-Culture-in-Victoria-pilot-study-2019.pdf>.

Some of our information laws and their associated enforcement mechanisms are coping with the changes, but there are areas of increasing strain.

My hope is that we have a meaningful and broad discussion about the kind of society we wish to live in and want to bequeath to future generations. From this, we will be able to identify the information laws that need to be in place to support that vision. Such a discussion should engage with the following questions:

- Are the definitions and key concepts in our information laws still fit for purpose?
- Should privacy laws be limited to regulating the handling of personal information or should they be broader? As discussed above, developments in technology and big data allow a person's privacy to be substantially infringed by an organisation that does not even know that person's identity.
- Is it feasible for privacy laws to continue to be limited to a conception of privacy as a private, transactional issue? Can we as a society agree that there are certain behaviours and practices that we consider to be such unacceptable infringements of our collective privacy and social fabric that they should be prohibited outright?
- Should access to information laws require more proactive and informal release of information? How do we ensure 'transparency by design' in government policy and decision-making processes?
- How do we regulate automated decision-making that affects the rights and responsibilities of individuals?
- Many information rights rely on some concept of what is and is not in the public interest. The interpretations of this can vary considerably, as noted above in the example of whether disclosure of documents relating to a particular infrastructure project is or is not in the public interest. Is it feasible to develop a common legislated approach to how this is interpreted?

Much work and thought is already being devoted to answering these questions. The ramifications are broad, and all parts of society must have the opportunity to be part of the conversation.

A final thought

I hope that I have made a persuasive case that information rights matter a great deal. They matter not just to the concept of accountability and the prevention of wrongdoing but also to whether we truly live in a free and participatory society where each of us can develop to our best potential.

Like all rights, information rights are not absolute. They coexist with other rights and sometimes that coexistence leads to tensions that need to be addressed. They also exist in the context of rapid technological and social developments, some of which can strengthen our society and some of which can weaken it. But ultimately we need to choose which kind of society we want to live in.

Coming back to the title of this article, are information rights essential to a society worth living in? It depends on whether we want to be able to develop fully as individuals. It depends on whether we want to enjoy personal freedoms. It depends on whether we want to participate in our democracy. And it depends on whether we want those who wield executive power to be accountable to us, the people. If the answer to any of those questions is yes then information rights are indeed essential to a society worth living in.

Bias by the numbers

*Matthew Groves**

The hearing and bias rules are the twin pillars of natural justice. Each fosters fairness in a different but complementary manner. The hearing rule dictates the array of requirements available to ensure a fair procedure during the hearing or consideration of an issue. The bias rule requires a level of impartiality to ensure that the fair procedure of the hearing rule is administered by a fair decision-maker. Each rule depends heavily on context.[1] Whether a hearing has been fair will depend on all of its wider circumstances.[2] The same is true of bias.[3] A further contextual element in the bias rule is that the level of impartiality required of an official will reflect the character of that particular decision-maker.[4] Elected officials, for example, are given a level of latitude by reason of the particular functions that politicians are required to discharge.[5] The contextual nature of the rules means that rigid principles have not found favour in the laws governing fairness and bias.[6] It also surely helps to explain why legislative attempts to codify the procedural requirements of migration tribunals have proved so difficult.

This article examines a different attempt at rigidity — the use of statistics to demonstrate bias. Several years ago, the Full Federal Court rejected an attempt to found a claim of apprehended bias against a lower court judge on a statistical analysis of the judge's rulings.[7] The Full Court rejected the simple proposition at the heart of the claim, namely that the numbers spoke for themselves. Despite that firm ruling, a version of that same argument was recently resurrected before the Full Federal Court.[8] If the Full Court was surprised, it should not have been. Claims based on statistical evidence are inevitable in the information age. Law students now count laptops and smartphones among their vital organs. Practitioners spend huge amounts of time sorting through electronic documents in due diligence or discovery processes. Courts have also embraced the information age. They accept the need to communicate their processes and, to the extent possible within rule of

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1 As Lord Steyn once famously explained, 'In law context is everything': *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548. This comment remains widely repeated. See, for example, *Rush v Nationwide News Pty Ltd [No 7]* [2019] FCA 496 [480] (Wigney J).

2 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

3 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20] (Kiefel, Bell, Keane and Nettle JJ).

4 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 460 [70] (McHugh J), 480 [134] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 150 [64] (Kirby J); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 545 [122] (Kirby J); *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [23] (Kiefel, Bell, Keane and Nettle JJ).

5 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 [50] (Gaudron, Gummow and Hayne JJ), *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 [13] (Spigelman CJ).

6 Beatson LJ has explained that the twin difficulties are the need to avoid both the 'procedural straightjacket' of overly prescriptive principles and overarching ones that are stated at 'a level of generality which is not of use as a practical tool to decision-making': *R (L) v West London Mental Health NHS Trust* [2014] 1 WLR 3103 [72].

7 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30.

8 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

law constraints, their decisions. Virtually all court judgments are available online, so they can be collated, compared and measured.[9] It is almost inevitable that scholars and lawyers might seek to identify patterns and draw inferences from them. This article considers the extent to which the courts can continue to resist that trend in the area of bias. It argues that sometimes numbers do speak for themselves and that also sometimes courts seem hard of hearing.[10]

Reflection on the law of bias is especially timely because the federal Attorney-General has recently provided a reference on this issue to the Australian Law Reform Commission.[11] That reference requires the Commission to consider whether the existing law governing bias is 'appropriate and sufficient to maintain public confidence in the administration of justice'; whether the law provides 'enough clarity' to decision-makers, the legal profession and the community; and whether the existing mechanisms to raise and decide claims of bias are 'sufficient and appropriate'.[12]

Apprehended versus actual bias

Bias can take many forms but the purposes of administrative law, the hallmark of bias is insufficient impartiality. The notion of insufficient impartiality reflects an acceptance that no decision-maker is a blank canvas. Judges, tribunal members and administrative officials are a product of their own personal history. They inevitably carry life experience, predispositions and other personal qualities that influence their attitudes, conduct and the decisions they make. The bias rule does not require decision-makers be devoid of those qualities.[13] In fact, many argue that the experience and predispositions that can lead decision-makers to hold preconceptions and opinions which could affect their impartiality, especially if that requirement was applied strictly, are also the very qualities that make people suitable for judicial and other such positions.[14] On this view, experience can inform and assist decision-making, rather than obscure or impede it. These general principles are a key reason why the bias rule requires sufficient rather than absolute impartiality.

The vast majority of bias claims are ones of apprehended rather than actual bias. The distinction is important in principle and for practical reasons. A claim of actual bias is more

9 The same is true for statutes. See, for example, Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48 *Federal Law Review* 159.

10 This phrase is taken from the Hon Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96.

11 The reference was issued on 11 September 2020. The Commission is required to present its final report by 30 September 2021. These are and other aspects of the reference are reproduced by the Australian Law Reform Commission at <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/>.

12 Australian Law Reform Commission, 'Review of Judicial Impartiality Terms of Reference' (online) <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/>. The quoted words are taken directly from the Attorney-General's terms of reference.

13 In *R v S (RD)* [1997] 3 SCR 484, 504, L'Heureux-Dubé and McLachlin JJ cited with approval the Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) 12, which stated that 'there is no human being who is not the product of every social experience, every process of education, and every human contact'. This means a decision-maker must have an open mind, rather than an empty one: Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 645.

14 Matthew Groves, 'Experience, Empathy and the Rule Against Bias in Criminal Trials' (2012) 36 *Criminal Law Journal* 84, 100.

serious but harder to prove given that it carries a heavy onus of proof.[15] It is more serious because it effectively requires a court to find a decision-maker has a closed mind and is not capable of persuasion.[16] A finding to that effect has been described as a 'grave' one for a court to make.[17] This seriousness means that courts require actual bias to be 'clearly proved' or 'firmly established'.[18] In practice, proof of actual bias is hard to obtain because the claim depends on the state of mind of the relevant judge or decision-maker.[19] In the case of judges, this is the one person who cannot be questioned on the issue of bias.[20]

The less demanding standard of apprehended bias is a subjective one that depends on whether a fair-minded and informed observer might believe that a decision-maker might not approach his or her function with sufficient impartiality. The use of an informed and fair-minded observer is regularly criticised for providing a flimsy veil for judicial views,[21] but it is intended to introduce a level of objectivity that reflects the connection of the bias rule to the wider public.[22] A key rationale for the bias rule is the importance of public confidence in the courts and the wider legal system.[23] The public will have greater confidence in, and be more accepting of, decisions if they are made by impartial officials.

The informed and fair-minded observer provides a device by which judges can gauge, as much as is realistically possible, questions of bias from a distance rather than subjective

15 *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 [97] (McColl JA, Giles and Tobias JJA agreeing). See also *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 123, where Wilcox J held that claims of actual bias required cogent evidence.

16 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 532 [72], Gleeson CJ and Gummow J described actual bias as requiring proof that a decision-maker is 'so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented'.

17 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 127, 133 (Burchett J).

18 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531 [69] (Gleeson CJ and Gummow J), 546 [127] (Kirby J).

19 *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427, 437–8 [33] (Gummow A-CJ; Hayne, Crennan and Bell JJ).

20 Judges cannot be questioned during the course of a bias claim: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 472 [3]; *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1039 [39] (Lord Mance); *Makucha v Sydney Water Corporation* [2011] NSWCA 234 [9] (Basten JA). See also Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd ed, 2017) 3.5(e), explaining that it is 'not appropriate for a judge to be questioned by parties or their advisers'.

21 See, for example, Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68 *Cambridge Law Journal* 388; Matthew Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188. See also Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 377, who describe the informed observer as a judicial 'puppet' that is 'unlikely to inspire public confidence'.

22 The informed observer was adopted as a device by which to assess claims of apprehended bias in *Webb v R* (1994) 181 CLR 44. Chief Justice Mason and Deane J reasoned that public confidence in the judicial system, which is a core rationale of the bias rule, was 'more likely' to be fostered by a test 'that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question': 51. The House of Lords used similar reasoning when it later also adopted the use of the fair-minded observer and a standard of 'real possibility' to determine claims of apprehended bias in *Porter v Magill* [2005] 2 AC 357.

23 *Webb v The Queen* (1994) 181 CLR 41, 68 (Deane J); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107 [186] (Gageler J); *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [55] (Nettle and Gordon JJ).

judicial impression.[24] The observer also provides a convenient means for courts to avoid the direct adverse findings required for actual bias. A finding of an apprehension of bias relieves both the decision-maker and relevant judge from that personal dimension because it only requires the judge to conclude that an observer might find the decision-maker to be insufficiently impartial. This finding is not what the relevant judge believes about the relevant decision-maker, only what an abstract observer might conclude. This face-saving artifice also encourages those claiming bias to frame their claims as ones of apprehended bias. 'A party would be foolish', Kirby J explained, to 'needlessly assume a heavier obligation when proof of bias from the perceptions of the reasonable observer would suffice to obtain relief'.[25] Justice Callinan opined that the easier evidentiary standard of apprehended bias might conceal the uncomfortable truth that some such claims 'may be no more than a polite fiction for no doubt unintended, unconscious and ultimately unprovable, but nonetheless actual bias'.[26] Some academics have argued for the end of such niceties. Professor Goudkamp, for example, suggested that courts should discard these diplomatic fictions and be prepared to make the more honest finding of actual bias in such cases,[27] but that appeal to doctrinal integrity has not been accepted by the courts.

Establishing an apprehension of bias

The prevailing test for apprehended bias is the two-step process adopted in *Ebner v Official Trustee*[28] (*Ebner*). That case saw the High Court reject the longstanding principle of automatic disqualification for pecuniary interest, which treated cases in which a decision-maker held some sort of financial interest in a decision as a separate category of presumptive bias. *Ebner* abolished that discrete category, holding that all claims of apprehended bias should be determined by a uniform two-step approach. The Court explained that two-step process as follows:

24 Chief Justice French acknowledged the limits of the observer in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 307 [48] when he stated the concept was useful because it 'reminds' judges 'to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers'.

25 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 541 [111]. See also *SZUEP v Minister for Immigration and Border Protection* [2017] FCAFC 94 [10], where Perram, Robertson and Wigney JJ stated 'it is difficult to see why a claim of actual bias is necessary or appropriate in circumstances where the legislation does not exclude a ground of reasonable apprehension of bias'.

26 *Johnson v Johnson* (2000) 201 CLR 488, 517 [79].

27 James Goudkamp, 'Facing up to Actual Bias' (2008) 27 *Civil Justice Quarterly* 32. Goudkamp's suggestion is arguably counterintuitive to British law, where automatic disqualification for pecuniary and other direct interests still prevails after *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119. Automatic disqualification is based upon the presumption that some interests must necessarily disqualify a decision-maker. As long as British courts embrace the arguably fictitious nature of automatic disqualification, it seems unlikely they would favour uncomfortable realism by more readily accepting claims of actual bias.

28 (2000) 205 CLR 337.

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[29]

According to this test, the nature or source of an interest alone cannot create an apprehension of bias. Explanation is required of how the interest identified might have the effect suggested. In one sense, this approach simply confirmed the rejection of automatic disqualification because it made clear that no interest, financial or otherwise, would create a 'conclusive inference' of bias.[30] The demise of automatic disqualification has arguably diverted attention from its mirror image — those cases where courts refuse to accept an apprehension of bias may arise, or at least be held by non-judicial observers such as the fair-minded and informed observer. This rarely noticed aspect of the bias rule means that, while Australian courts have firmly rejected the notion that some issues necessarily lead to bias, they also accept that many issues do not usually create an apprehension of bias.

Before those issues are examined, we must consider some of the subtle difficulties in the supposedly demanding test to establish an apprehension bias. The courts issue regular reminders of the serious nature of a finding of apprehended bias, variously describing such claims as serious and ones which will not be upheld lightly.[31] That apparent strictness does not sit easily with the content of *Ebner's* test, which is one of possibility rather than probability.[32] The precise nature of that lesser standard is muddied by *Ebner's* use of 'two mights', which require that the informed observer *might* accept that a decision-maker *might* not be suitably impartial. That double-barrelled use of possibilities has been accepted as setting a 'low threshold'.[33] Just how low is unclear. The Victorian Court of Appeal noted a related difficulty when it explained that *Ebner's* use of two mights meant that:

> the observer may simultaneously consider there is a real possibility that the judge is impartial, and a real possibility that the judge is not impartial. Wherever there is a real possibility that the judge might not bring an impartial mind, the judge should not hear the case.[34]

This approach is a precautionary one because it anticipates recusal or disqualification even when the observer might think the decision-maker will be sufficiently impartial.[35] That caution, at least in the cases about judicial bias, is explicable by the unique nature and constitutional

29 Ibid 345 [8] (Gleeson CJ; McHugh, Gummow and Hayne JJ), 396 [182] (Callinan J agreeing on this point). Gageler J has identified a third step in *Ebner's* test, which may arise from a statement that follows the passage just quoted. The majority noted that, when the explanation was provided in accordance with its second step, 'only then can the reasonableness of the asserted apprehension of bias be assessed': 345 [8]. Gageler J has suggested that this requires the further step of 'consideration of the reasonableness of the apprehension of' the departure of impartiality as asserted by the party claiming bias: *Isbester v Knox City Council* (2015) 255 CLR 135, 155–6 [59]. This third step of *Ebner's* test has not yet gained acceptance within the High Court.

30 The quoted words are the description employed by McHugh J in *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 459 [69].

31 *R v Luskink; Ex parte Shaw* (1980) 32 ALR 47, 50 (Gibbs CJ).

32 The question is clearly 'one of possibility (real and not remote), not probability': *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [7] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing).

33 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 (Spigelman CJ).

34 *Melbourne City Investments Pty Ltd v UGL Ltd* [2017] VSCA 127 [67] (Warren CJ; Tate and Whelan JJA).

35 This is consistent with the suggestion that recusal is the 'prudent step' in a case of 'real doubt', as an appellate court might easily take a different view: *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [20] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing).

importance of judicial power.[36] The real possibility that an exercise of judicial power *might* be perceived as insufficiently impartial, even if it also *might not* be, is enough to warrant recusal. At this point, a new dichotomy arises. Courts often adopt a cautionary and rigorous approach to standards in the bias test, yet in many cases involving judicial and legal norms they remain strangely unwilling to accept that the informed observer will accept conduct and norms as easily as judges and lawyers do. This judicial tendency to overload the observer with knowledge of legal traditions and behavioural norms presents other difficulties. The greater the level of knowledge attributed to the observer, the closer the decision becomes one of what the observer might *actually* think of the facts at hand, rather than what might be apprehended at a more general level.[37] When the observer is overloaded with knowledge and acceptance of the habits and norms of the legal system, it inevitably strips away any real role for the observer. The dilemma is the one faced by Goldilocks — not too much or too little, to reach that obviously vague point of 'just right'.

Some issues are not, however, even placed in the hands of the fair-minded and informed observer. The English Court of Appeal long ago issued a dogmatic list of qualities that could not support an apprehension of bias, with the implication that these were so clear that courts should not allow the observer to consider them.[38] The Court of Appeal held that bias could almost 'never' arise simply by reason of a judge's gender, age, religion, race, class, wealth or sexual preference.[39] The Court provided a further catalogue of factors it thought would 'hardly ever' support a claim of bias, including membership of a professional, sporting or charitable association; extrajudicial writings; the judge's political, social and educational background; any connections arising from the judge's former bar chambers; and any possible Masonic associations.[40] The final list issued by the Court of Appeal, which it held would ordinarily support a bias claim, included family connections, personal friendships and dislikes, and close professional relationships.[41] Fairly similar lists have been suggested in Australia.[42] Of course, exceptions can always occur. Academic and other extrajudicial writings can create

36 The possibility that individual cases in which a court or judge lacked sufficient independence or impartiality could affect perceptions of the judicial system as a whole was accepted in *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [7] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

37 Kirby J has suggested that 'for a court simply to impute all that was eventually known to the court to an imaginary person ... would only be to hold up a mirror to itself': *Johnson v Johnson* (2000) 201 CLR 488, 506. The greater the level of knowledge attributed, the clearer the reflection.

38 The adjective 'dogmatic' was taken from Michael Taggart, 'Administrative Law' [2003] *New Zealand Law Review* 99, 101.

39 *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480. Justice Kiefel, as her Honour then was, in *Bird v Volker* [1994] FCA 132 similarly held that the observer would think that a judge's gender or membership of a religious group 'would ever enter into the decision making process' of judges. That statement would surely not apply when a judge identified so strongly with such qualities, or those within *Locabail's* 'never' list, as to create a perception that this might affect impartiality.

40 Ibid 480. The inclusion of Masonic association in the Court of Appeal's list is explicable by longstanding public controversy in the UK about the supposed dominance of senior ranks of the police and other agencies by Freemasons. Possible membership of a Masonic lodge was rejected as a basis to claim apprehended bias in *Makucha v Sydney Water Corporation* [2011] NSWCA 234. (Masons have dominated the senior ranks of the Australian judiciary, to the satisfaction of all.)

41 *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480.

42 *Rouvinetis v Knoll* [2013] NSWCA 24 [24] (Basten JA, Barrett and Ward JJA agreeing). See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 3.3.4.

an apprehension of bias if a judge has expressed those views in sufficiently rigid terms and they intersect with an issue or party that is relevant to a case before the judge.[43]

The demarcation of various interests and associations that ordinarily will, or may hardly ever, support an apprehension of bias can be partly understood as ground rules for both judges and lawyers. Listing issues that will hardly ever support an apprehension of bias serves to limit hopeless claims from lawyers. Similarly, the list of those issues that will normally support an apprehension serves to remind judges and other decision-makers of those instances that would invite an almost inevitable bias claim were they to preside. While such categories may be sensible, they also constitute a fairly lengthy list of situations in which things are thought so obvious that the opinion of the fair-minded and informed observer should not be called upon. Another category arises from the role of precedent within the common law method, which provides an important element of the backdrop of the bias rule. There are some things that judges (and, by necessary implication, tribunal members as well as other decision-makers influenced by precedent) do that could theoretically be regarded as prejudgment, but adherence to precedent has long been quarantined from use in claims of apprehended bias. Hayne J explained:

> The principles about apprehension of bias must be understood in the context of a judicial system founded in precedent and directed to establishing, and maintaining, consistency of judicial decision so that like cases are treated alike and principles of law are applied uniformly. The bare fact that a judicial officer has earlier expressed an opinion on questions of law will therefore seldom, if ever, warrant a conclusion of appearance of bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case. Fidelity to precedent and consistency may make it very likely that the same opinion about a question of law will be expressed in both cases. But that stops short of saying that the judicial officer will not listen to and properly consider arguments against the earlier holding.[44]

Precedent is not the only aspect of our legal system known to the informed observer. That person will 'of course consider all of the facts' within their 'proper context',[45] which approach means the observer will find it 'necessary to consider … the legal, statutory and factual context in which the decision is made'.[46] The statutory context will include the 'key elements' of a relevant statute, though not its finely grained detail.[47] This can include general knowledge about how barristers work, including some of their more esoteric commercial habits such as accepting general or special retainers,[48] and that as part of taking instructions they can

43 This principle applies to extrajudicial statements in general: Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40 *Monash University Law Review* 115.

44 *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302 [12]. This is not the case if the judge has made earlier findings about a party, witness or disputed issue in terms sufficiently strong or adverse as to raise an apprehension that the judge might not approach that same party, witness or issue with sufficient impartiality in a later case. Such a finding created an apprehension of bias in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

45 *Meerabux v Attorney-General of Belize* [2005] 2 AC 513, 528. This context includes the 'overall social, political or geographical context' of a decision: *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [3] (Lord Hope).

46 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20] (Kiefel, Bell, Keane and Nettle JJ).

47 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [59] (Nettle and Gordon JJ).

48 A finding made by the majority of the Court of Appeal in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 379–81.

often make strong statements without any attachment to arguments they press.[49] The observer also knows that judges are typically former barristers but accepts that the contacts in chambers are essentially left in the past upon judicial appointment.[50] The observer would also realise that claims of judicial bias involve a 'professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'.[51] This faith in the judiciary is not undying. The House of Lords, for example, accepted that the judicial oath would be relevant to the observer but was not a panacea against bias claims.[52] Such expressions of doubt are rare. Judges mostly affirm their unique professional experience in making and considering arguments in a detached manner, which starts at the bar, then continues and strengthens on the bench.[53] It follows that judges who affirm their professional disposition of impartiality do so with decades of personal experience. This perspective may explain why judges can easily accept their professional disposition to impartiality. It is does not explain why the informed and fair-minded observer is thought to accept the assessment judges make of their own experience without serious question.

At this point, it is useful to note that the judges have readily accepted that the informed observer retains a healthy level of scepticism about other professions. In a case that considered whether police officers could serve on a jury with sufficiently impartiality, when the trial would hear and depend greatly on the acceptance or rejection of evidence from other police officers, Lord Bingham conceded the possibility that police officers would, as jurors, like 'most adult human beings, as a result of their background, education and experience, harbour certain prejudices of which they may be conscious or unconscious'.[54] His Lordship thought that danger was acute for police officers in jury service because of their 'strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition'.[55] The inability of other professions to cast aside their shared experience, bonds of loyalty

49 See, for example, *Setka v Gregor* [2011] FCAFC 64 [13], where Tracey J rejected a bias claim based on his earlier strong cross-examination of a party when he was counsel assisting a royal commission.

50 *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 [24]–[28] (Campbell JA). The Queensland Court of Appeal took a more nuanced view when it suggested that longstanding links made at the bar were diminished rather than extinguished upon judicial appointment: *Markan v Bar Association of Queensland* [2014] 2 Qd R 273, 276 (Muir JA, McMurdo P and Mullins J agreeing).

51 *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (approving remarks of McHugh JA in *Vakauta v Kelly* (1988) 13 NSWLR 502, 527). Justice McHugh presided in the hearing of the NSW Court of Appeal in *Vakauta* and had been appointed to the High Court when an appeal of that decision was heard by the High Court. His Honour did not, of course, preside in the High Court hearing.

52 *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [23] (Lord Walker). Lord Mance accepted that the oath of office held great personal force for judges but concluded it was ultimately 'more a symbol than of itself a guarantee of the impartiality' that was ultimately only 'one factor' considered by the observer: [57]. In *Gaudie v Local Court (NSW)* (2013) 235 A Crim R 98 [86] the judicial oath was described as 'not an answer to a claim of apprehended bias … it is a matter which the bystander may take into account'.

53 I put aside the related but important issue of judicial temperament. This concept is often mentioned as a key element for judicial office but it remains quite ill-defined. See, for example, Terry Maroney, '(What We Talk About When We Talk About) Judicial Temperament' (2020) 61 *Boston College Law Review* 2085. For present purposes, the difficult questions about judicial temperament are when and how it arises.

54 *R v Abdroikov* [2007] 1 WLR 2679 [23]. See also *R v Gough* [1993] AC 646, 659, where Lord Goff accepted that 'even though a person may in good faith believe that he is acting impartially, his mind may unconsciously be affected by bias'. This passage was approved by the Western Australian Court of Appeal in *I v Western Australia* (2006) 165 A Crim R 420 [15] (Steytler P; Roberts-Smith and McLure JJA).

55 *R v Abdroikov* [2007] 1 WLR 2679 [24].

and common professional values, stands in stark contrast to what is thought possible and reasonable for judges.

The observer also knows a fair amount of detail about the conduct of cases in general, including an often surprising amount about the case at hand. Justice Callinan suggested it is 'axiomatic that the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer. But the fictional observer should not be taken to be completely unaware of the way in which cases are prepared and tried'.[56] The observer will understand the differences between modes of hearing that allow non-judicial decision-makers to adopt more novel techniques, such as tribunal members taking a very active approach if the body is more inquisitorial in character,[57] coroners taking a very inquisitorial approach at the early stage of a hearing,[58] or anti-corruption commissioners taking novel procedural steps as part of their novel jurisdiction.[59] The observer will also know and understand the lapses and other foibles that can occur during hearings. Judges can sometimes be exasperated or overly blunt, especially in lengthy or difficult hearings,[60] or express tentative views during a hearing to which they are not committed,[61] without creating an apprehension of bias. Such latitude on the part of the observer recognises the possible 'wear and tear' that can occur during hearings. Pragmatic accommodations of this nature are quite understandable because they reinforce the reasonable nature of the observer's judgment, but they also invite a difficult question. If understandable judicial expressions of humanity occur during the bustle of a hearing, why not elsewhere? Surely it is possible that judges might sometimes be less than perfect in wider issues, such as their singular professional skill for impartiality. Judges may not think so, but it is surely possible that the informed observer might.

That possibility seems natural in light of the careful thought processes the observer is accepted to adopt. In *Johnson v Johnson*[62] Kirby J thought that the observer is a 'reasonable

56 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 635 [177].

57 See, for example, *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 [30]–[31], where Gleeson CJ, Gaudron and Gummow JJ accepted a migration tribunal member could adopt a style that could 'more readily' create an apprehension in a court. The problem in that case was that the member went too far and became overbearing. See also *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 [3], where Allsop CJ said robust questioning in such cases may not only be allowed but also may be called for, to ensure that key issues are drawn to the clear attention of the parties.

58 *R v Doogan; Ex parte Lucas-Smith* (2005) 158 ACTR 1, 13–4, where it was held the observer would be unsurprised by a coroner's decision to take a view of an area without the parties, as part of preparation for a hearing.

59 See *Duncan v Ipp* (2013) 304 ALR 359 [152]–[156], where Bathurst CJ (Barrett and Ward JJA agreeing) accepted that a commissioner of the New South Wales Independent Commission Against Corruption might sometimes correspond with public officials, without notice to the parties, as part of an inquiry.

60 See, for example, *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 636 [180], where Callinan J thought many exasperated statements of the trial judge were 'unfortunately so' but fell short of creating an apprehension of bias. See also Johnson v Johnson (2000) 201 CLR 488, 508–9 [53] (Kirby J).

61 *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ; Gaudron, McHugh, Gummow and Hayne JJ); *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 610 [112] (Kirby and Crennan JJ). There can be great difficulty in distinguishing those cases where a decision-maker has expressed tentative views to a party in order to highlight important issues for further consideration, as opposed to tentative expressions that appear fixed and thus capable of supporting an apprehension of bias: *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 [27] (Flick J).

62 (2000) 201 CLR 488.

member of the public' who is 'neither complacent nor unduly sensitive or suspicious'.[63] The observer will also consider things before making a reasoned rather than snap judgment.[64] In theory, the observer will decide what issues are relevant and how they will be weighed,[65] although in practice these are matters that are carefully controlled by judges. Justice Kirby summarised the observer's key qualities and thought processes as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[66]

Such a reasonable person exercising such reasonable judgment is clearly an ideal rather than an ordinary or typical person.[67] The observer's collected virtues make that person 'so unlike the average member of the public'[68] and someone with qualities 'many of us might struggle to attain'.[69] In my view, the observer does not represent judicial conceptions of a normal or reasonable person, but instead the kind of person who judges feel is suitable to make key decisions about the bias rule. This creature of virtuous reason is clearly one we would like, as Kirby J suggests, to make decisions which are important to the parties and the community. The difficulty with such reasoning is that it fails to acknowledge the importance of such decisions to judges and the wider legal system. When the observer accepts institutional legal practices, as well as the apparently singular ability of judges to remain impartial, that person is affirming legal traditions, judicial habits and the judges' own perceptions of their abilities. All this is done by the courts in the name of a fictional observer, whose judgment helps to uphold public confidence in judges and our legal system. This is a circular and self-serving form of quality control that would make even our politicians blush. The next section briefly outlines some of the reasons why that should not continue or should at least be reconsidered.

Judges as real people — not better, not worse and certainly not different

The distinction between actual and apprehended bias explained earlier in this article drew attention to the relative nature of impartiality, which has arisen from widespread acceptance that judges, like all other people, are the product of the sum of their life experience. While there is continuing debate about when and why judges may draw openly from their personal

63 Ibid 508. This conception of the observer has been endorsed many times by the House of Lords and Privy Council: *Lawal v Northern Spirit* [2004] 1 All ER 187 [14]; *R v Abdroikov* [2007] 1 WLR 2697 [15]; *Lesage v The Mauritius Commercial Bank Ltd (Mauritius)* [2012] UKPC 41 [48]; *Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago (Trinidad and Tobago)* [2018] UKPC 23 [35].

64 *Johnson v Johnson* (2000) 201 CLR 488, 494 (Gleeson CJ; Gaudron, McHugh, Gummow and Hayne JJ).

65 *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 All ER 731 [17] (Lord Hope).

66 (2000) 201 CLR 488, 508.

67 *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd* (1986) 6 NSWLR 272, 275.

68 Philip Havers and Alisdair Henderson, 'Recent Developments (and Problems) in the Law on Bias' [2011] *Judicial Review* 80, 82.

69 *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [1] (Lord Hope).

life experience to decide cases,[70] this movement towards greater realism in the art of judging has led to constructive discussion in judicial writing about the extent to which judges should acknowledge and seek to counteract their own prejudices.[71] Such self-reflection may seem admirable, but its full consequences remain largely unexplored by judges. Those wider consequences include the large and still growing body of behavioural psychological research which suggests that judges are no better able to identify and control their own predispositions, prejudices and other cognitive limitations.

Keith Mason, then President of the New South Wales Court of Appeal, drew attention to this possibility in his illuminating discussion of unconscious judicial prejudice. While much of that analysis was about what Mason termed 'attitudinal prejudices', which are the possible predispositions and prejudices that judges and anyone else can hold without being consciously aware that they do so, he also accepted the relevance of the 'cognitive revolution'.[72] Research into cognition and related issues is challenging to the bias rule because it questions what one study described as 'declaratory impartiality'.[73] These are the principles and assumptions adopted by judges essentially to conclude that they are more able to decide issues objectively or that their training and experience can inure them from the weaknesses that scientific research has shown apply to all people.[74] A small selection of relevant issues can be outlined briefly for present purposes.

A significant body of American research has confirmed that judges are normal in the sense of being no different from other people in their susceptibility to cognitive biases and the difficulties this can cause to thinking and decision-making. One landmark study of American judges concluded that the 'cardinal premise' of judicial impartiality 'that judges are impartial because they can choose to be so — is wrong.'[75] That study concluded that judges have the 'same cognitive realities of human thought that sustain and plague all of us', with the exception that they appear to struggle more than many others to recognise this.[76] Several empirical studies involving American judges established that judicial reactions on issues

70 This is sometimes described as 'contextual judging', which arose from the approach used by L'Heureux-Dube and McLachlin JJ in *R v RDS* [1997] 3 SCR 484, 495–7. Their Honours accepted that judges could draw upon personal life experience, if relevant and not based on inappropriate stereotypes, to help decide the issues before them. This approach was described as a 'contextual judicial method' in Richard Devlin, 'We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialised Perspective' (1995) 18 *Dalhousie Law Journal* 408, 413.

71 See, for example, David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?" (2000) 19 *Australia Bar Review* 212; Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676; Raymond Finkelstein, 'Decision Making in a Vacuum?' (2003) 29 *Monash University Law Review* 11.

72 Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 684.

73 Gary Edmond and Kirsty A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82 *Modern Law Review* 633, 663.

74 Mason provides an unwitting example of this in his article when declaring that 'the jury is still out' in this and other areas of psychology: Mason, above n 71, 684. In fact, the jury returned its verdict long ago. There is no scientific doubt that judges are subject to the vast majority of attitudes, psychological weaknesses and blind spots that affect all others. The unsettled issue is why many judges continue to think otherwise. The challenge for such a study is to capture sufficient wild judges for study.

75 Anna Spain Bradley, 'The Disruptive Neuroscience of Judicial Choice' (2018) 9 *UC Irvine Law Review* 1, 6.

76 Ibid 7. That author has applied similar reasoning to decisions by those holding high executive office: 'Cognitive Competence in Executive-Branch Decision Making' (2017) 49 *Connecticut Law Review* 713.

relevant to the legal process, such as emotional responses to witnesses,[77] or subconscious racial prejudice,[78] are not greatly different from those of the general population. These individual studies are consistent with an enormous wider body of research in cognitive and behavioural psychology which has established that the belief that judges hold in their own abilities to identify and manage their own preconceptions and biases is unfounded.[79]

Another of the many behavioural psychology theories relevant to the bias rule is 'anchoring', which in very simple terms refers to the collective gravitational weight that information obtained later in a process can gain when connected to an initial assumption. Things that follow are 'anchored' to what precedes them. The stronger the reliance on an initial assumption, the heavier the anchor.[80] Those anchoring studies involving judges have found they are not immune from its subtle effects.[81] Anchoring has a strong connection to heuristics. These are the mental shortcuts, akin to the use of 'shortcuts' in thinking, which enable people to make good decisions quickly.[82] People typically invoke anchoring under the guise of experience or the adoption of well-settled propositions, ones so well settled that they do not required fundamental review and can thus be adopted quickly so that other more important and difficult issues can be decided. After considering some of the leading research on this issue, Gageler J made a remarkable admission about his 'former practice', explaining:

> I equated my subjective confidence in my ability to arrive at a correct decision with the objective probability of me arriving at a correct answer. Almost certainly, I over-estimated my own ability.[83]

The admission of Gageler J is a rare one among judicial officers, who generally do not reflect on their own processes so openly. If judges considered their own heuristics, they might consider the possibility of anchoring and their own vulnerability to such phenomena. This could in turn lead judges to consider the possibility that many decisions attributed to the informed observer are in fact based on judicial anchoring. Judges make crucial assumptions about their own impartiality, their ability to step aside from personal prejudices and so on, which are then attributed to the informed observer. If the observer began with some basic scepticism about the abilities and habits of judges, even a small amount, the bias rule would

77 Andrew Wistrich, Jeffrey Rachlinski and Chris Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 *Texas Law Review* 855. This study arose from research involving 1,800 judges.

78 Andrew Wistrich, Sheri Lynn Johnson, Jeffrey Rachlinski and Chris Guthrie, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195. This study also found that judges can largely overcome this issue if sufficiently informed and motivated, though it also found that overconfidence and time constraints can make the task difficult.

79 The wider literature is usefully analysed in Jeffrey Rachlinski and Andrew Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 *Annual Review of Law and Social Science* 203; Andrew Wistrich and Jeffrey Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do about It' in Sarah Redfield (ed), *What Judges Can Do about Implicit Bias* (American Bar Association, 2017).

80 The pioneering study was conducted by Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1131.

81 See, for example, Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32 *Personality and Social Psychology Bulletin* 188.

82 Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Strauss and Giroux, 2011). That author won a Nobel Prize for his work in behavioural psychology, notably anchoring.

83 Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 199.

not be cast adrift. But it could enable the informed observer to reach a view in difficult cases that judges would struggle to accept. The next section considers two such instances.

ALA15 and *CMU16*

ALA15 v Minister for Immigration and Border Protection[84] (*ALA15*) was an appeal against the refusal of a primary judge to disqualify himself on the ground of apprehended bias. The bias claim was based on the judge's history of decisions in migration cases, particularly claims for protection visas. Statistical material was provided to the Full Federal Court, drawing on the first six months of the judge's appointment to the Federal Court of Australia. During that time, the judge decided 286 cases and 254 of these were migration claims. All of the migration cases were delivered ex tempore — all 254.[85] The judge found in favour of the applicant in only two cases. In each of those cases, the Minister had conceded that a jurisdictional error had occurred.[86] The combined effect of those statistics meant that the judge decided 100 per cent of migration cases ex tempore, decided only 0.79 per cent of all claims in favour of applicants and did not decide a single contested claim in favour of an applicant. Statistics drawn from the annual reports of migration tribunals revealed that, around this time, 10.8 per cent of decisions by the Migration Review Tribunal and 12.2 per cent of decisions of the Refugee Review Tribunal were set aside by the Federal Circuit. This stood in striking contrast to the 0.79 per cent rate of the judge complained about.[87]

The primary judge rejected the claim of apprehended bias as 'not relevant' to establishing an apprehension of bias,[88] holding that:

> the use of such statistical evidence is not evidence of conduct in respect of which the fair-mind[ed] observer might believe that the Court might not bring a fair, impartial and independent mind to the determination of the matter on its own merits.[89]

That decision contained no substantive analysis of the laws governing bias, or the novel nature of this claim, and was, perhaps unsurprisingly, delivered ex tempore.[90]

The Full Federal Court gave greater consideration to questions of principle when finding there was no apprehension of bias against the trial judge, providing five reasons why an apprehension of bias was not established, although its reasoning on each point was rather sparse. The first reason was raw statistics would 'normally … need to be accompanied by a relevant analysis of the individual' decisions, so that the 'statistics were placed in a proper context'.[91] The Full Court noted that detailed analysis could reveal that many or even all of the decisions were rightly decided, but it added the quite remarkable comment that:

84 [2016] FCAFC 30.
85 In almost two-thirds (64.96 per cent) of the judge's cases, he delivered the ex tempore reasons at the first scheduled hearing date: ibid 11(f).
86 The two cases were *ABT15 v Minister for Immigration and Border Protection* [2015] FCCA 1051; and *Kautoga v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 1679.
87 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [11(h)].
88 *ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047 [10].
89 Ibid [11].
90 A related decision rejecting the applicant's request for an extension of time was also delivered ex tempore: *ALA15 v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 2048.
91 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [38].

> even if some or all of the judgment were wrongly decided, that may be the consequence of human frailty on the part of the judge and not prejudgment, a consideration which a fair-minded observer would take into account.[92]

The Full Court also held that attempts to compare the relevant judge with others on the same court 'does not generally indicate prejudgment'.[93] Support for this finding was drawn from *Minister for Immigration and Multicultural Affairs v Jia Legeng*[94] (*Jia*), where Gleeson CJ and Gummow J reasoned that the mere fact it was easier to persuade one judge than another did not suggest either was biased.[95] The third reason of the Full Court was the more technical one that comparison of the judge's decision-making was drawn from annual reports of migration tribunals in the years immediately before the judge's appointment. The Full Court did not mention the point that annual reports for later years, which would have covered the times when the relevant judge had been presiding, were not available. The fourth reason of the Full Court relied upon *Vietnam Veterans' Association of Australia* (*NSW Branch Inc*) *v Gallagher*[96] (*Vietnam Veterans*), where Heerey J held that statistical evidence about a tribunal member who decided veterans' pension cases could not reveal an apprehension of bias because:

> All such evidence could show is that, because a decision-maker has decided a particular kind of case in a particular way in the past, he or she is likely to decide a case of the same nature in the same way in the future. Even if that be accepted as a conclusion of fact, it does not make out a case of apparent bias. The law is not so ignorant or disdainful or human nature as to assume that judges or quasi-judicial decision-makers are automatons.[97]

Justice Heerey drew attention the listing practices of the tribunal, which randomly assigned cases to members. He added:

> it is no use tendering statistical evidence, or any other evidence, to show merely that a judge is likely, from what could be colloquially called a track record, to decide a case in a particular way. To permit that to be done would be effectively allowing a party to shop for the judge of his or her choice and would, apart from anything else, raise endless disputes with opposing parties contending for judges more suited to their own interests.[98]

The Full Court acknowledged that the statistics in *Vietnam Veterans* revealed a much lower level of supposed partiality but concluded that the case remained relevant for its rejection of statistical evidence for a lack of explanatory analysis.[99] But the Full Court took an important further step that Heerey J did not, declaring that 'raw statistics are generally likely to be irrelevant to the knowledge and information which is imputed to the hypothetical observer'.[100] This bold statement was neither supported by clear authority nor accompanied by any explanation. The Full Court's reliance on *Vietnam Veterans* meant it did not consider questions that were not before Heerey J, such as whether statistics might be viewed differently if they were larger in number and much more one-sided in what they appeared to

92 Ibid [38].
93 Ibid [38].
94 (2001) 205 CLR 507
95 Ibid 532 [72].
96 (1994) 52 FCR 34.
97 Ibid 41.
98 Ibid 42.
99 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [44].
100 Ibid [43].

suggest. The even more difficult question that the Full Court did not confront was the effect of possibly changing public attitudes. Since the more than two decades after the decision of Heerey J, is it likely that the informed observer would continue quickly to reject statistical material about judges and other officials?

The final reason of the Full Court for finding that no apprehension of bias arose was that the statistics ended on the date that a differently constituted Full Court delivered one of many decisions that overturned the lower court judge in unusually blunt terms.[101] The twin assumptions in this finding of the Full Court were that the judge's conduct before he was overturned in rather frank terms could not be compared to his conduct afterwards and also that the informed observer would accept such a distinction. Neither assumption was explained by the Full Court in any real detail. If both assumptions had been considered, the question that might have arisen would have been an especially difficult one for the Full Court. Would the informed observer accept that earlier findings marked the turning they were thought to be in *ALA15*? The Full Court appeared to have thought that its earlier decisions had some sort of corrective or educative effect on the trial judge. Whether the informed observer would think that is another matter.

The subsequent case of *CMU16 v Minister for Immigration (No 2)*[102] (*CMU16*) was another appeal from the same lower court judge. It was also a migration case in which the judge ruled against the applicant, although that decision was not delivered ex tempore. The applicant raised several grounds of appeal, including both actual and apprehended bias, as well as other grounds not presently relevant, such as jurisdictional error and inadequate reasons. The Full Federal Court, composed differently from the one that determined *ALA15*, rejected all grounds of appeal.[103] This article will consider only the claims of bias, which were based upon different material from that offered in *ALA15*. That material comprised extracts from three unrelated migration cases in which the appellant's counsel represented a migration claimant before the lower court judge — reasons said to be from the first 10 migration cases decided by the judge in September 2017 and a further 10 decisions of the Full Federal Court which were 'said to be critical of the primary judge'. The Full Court noted that a further eight of its decisions were also referred to.[104] Various common themes were highlighted in each of the 10 cases from the trial judge and those of the Full Federal Court. Those claimed aspects of the trial judge's decisions included his dismissal of cases without adequate reasons and his failure properly to consider evidence or accord procedural fairness to appellants. The Full Federal Court decisions were also said to confirm such errors by the judge.[105] The respondent Minister objected to the introduction of such evidence, mainly on the ground of relevance. The Full Court gave several reasons why the material was not admissible and also appeared to suggest more generally that such a claim was hopeless.

The first reason the material was rejected arose from the various exclusionary provisions in the *Evidence Act 1995* (Cth). The Full Court focused on the tendency rule, which provides that evidence about the 'character, reputation or conduct of a person, or a tendency' the person

101 The relevant cases were *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301; and *SZWBH v Minister for Immigration and Border Protection* (2015) 229 FCR 317.
102 *CMU16 v Minister for Immigration (No 2)* [2017] FCCA 1948.
103 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.
104 Ibid [13].
105 Ibid [14]–[17].

had, or has, to act in a particular way or to hold a particular state of mind is inadmissible unless the court thinks the evidence has significant probative value.[106] The same essential requirements attend to the coincidence rule, which enables the introduction of evidence to dispel claims that a person's states of mind over different events were not coincidental.[107] The Full Court referred to an earlier decision of a differently constituted Full Federal Court, which rejected not dissimilar evidence about the same judge. In *CDD15*, that earlier decision held that tendency evidence was irrelevant to a claim of apprehended bias because:

> In the context of such a test, the concept of tendency makes no sense. The ostensible bias issue does not relate to an inquiry into whether a judicial officer has a tendency to behave in any particular way. Rather, it is concerned with whether the way in which the judicial officer has behaved might generate a particular apprehension. The Appellant's invocation of s97 in relation to the ostensible bias case is, therefore, misconceived. That does not mean that the evidence of the other cases is necessarily irrelevant; rather, it just means that it is not relevant on a tendency basis. For that reason, we would not receive this additional evidence under s 97 in relation to the ostensible bias case in respect of which, as tendency evidence, it has no probative value.[108]

The Court in *CDD15* then added:

> Different considerations apply in respect of the actual bias case. Here the tendency argument would be that the other two cases are evidence that his Honour had a tendency to decide cases adversely to refugee applicants regardless of their merits. However, for largely the same reason as that just given, it is not possible to gauge the correctness of that proposition without knowing a lot more about the cases and, in particular, about their merits. For that reason, we would not accept that the proposed evidence has significant probative value for the purposes of s97(1)(b) of the Evidence Act (Cth) and would not receive it as tendency evidence in relation to a case of actual bias. We would be prepared to accept, as a matter of theory, that the evidence could bear upon a case of actual bias in a way which did not involve the use of tendency reasoning. Again, however, we do not see that this could occur without, as we have already noted, some consideration of the underlying merits of the two cases.[109]

The Full Court found in *CMU16* that this reasoning was correct, should be followed and provided a strong basis to reject the claims of actual and apprehended bias before it. The value of such material to claims of actual bias was dismissed in quick terms by the Full Court, holding that the 'ultimate fact in issue' in claims of actual bias was the judge's actual state of mind, rather than his character, reputation, conduct or tendency. Thus, the material did not fall within the exceptions to tendency evidence[110] and was based on a small number of cases that were too selective and lacking in detail to provide any useful or relevant guidance to the Court.

The Full Court also found the material proffered for the claim of actual bias to be inadmissible and unhelpful for largely similar reasons. The Court commented on what it described as the 'impossible task' the appellant had set himself. That critical description was based

106 This greatly simplifies the content of s 97 of the *Evidence Act 199*5 (Cth) but it captures all details relevant for the present discussion.

107 This explanation of s 98 of the *Evidence Act 1995* (Cth) is provided with the same caveat made in the previous note.

108 *CDD15 v Minister for Immigration and Border Protection* (2017) 250 FCR 587, 599 [75] (Perram, Robertson and Wigney JJ).

109 Ibid 599–600 [77].

110 Section 94(3) of the *Evidence Act 1995* (Cth) provides that Pt 3.6 (on tendency and coincidence) does not apply to evidence about a person's character, reputation or conduct if those things are a fact in issue.

partly on the highly selective nature of the cases chosen and the absence of any real detail about them, but the Full Court suggested that no amount of detail would be sufficient. This could only occur through a full review of the earlier cases, without which an appellate court 'could not possibly satisfy itself that such evidence was relevant or had significant probative value'.[111] The Court continued:

> In order to overcome the problem of selectivity, the appellate court would have to be willing to conduct *de facto* appeals within an appeal involving potentially all cases in which the primary judge has decided a migration application in order to decide if the evidence does have relevance or significant probative value. That is to say, the appellate court would have to decide for itself the merits of every such case before it could possibly conclude that the evidence met the tests of relevance or significant probative value. Moreover, the appellate court would have to be willing to do so without hearing from any of the parties to those cases, which would be a fraught exercise in any event. This is not the function of the appellate court, which has to determine the instant appeal, not hypothetical appeals.[112]

At other points in its decision, the Full Court acknowledged the possibility left open in *ALA15* — namely, that statistical data with sufficient explanatory information could provide the basis for a claim of apprehended bias[113] — but the passage just quoted appears to close that door very firmly. In my view, this aspect of *CMU16* is misconceived for several reasons. One is the quite mistaken reference to the need for an appellate court to 'satisfy itself' that statistics about, or an appraisal of, earlier cases need to satisfy a court. A claim of apprehended bias requires the informed observer to form a view about how a judge *might* behave, not what *would* convince a court.[114] Another is the very invocation of the tendency rule. If this is thought relevant to claims of apprehended bias, it must surely apply in a general manner to issues such as the value of the judicial oath, the high standards of judges and barristers. The selective invocation of the tendency rule may exclude evidence of some judicial tendencies, but it invites questions about others.

Are things as clear as the Full Court believes?

On one reading, the decisions in *ALA15* and *CMU16* are unremarkable examples of the common law method. Each considered whether well-settled principles of apprehended bias were satisfied by fairly novel statistical claims. Each answered that question in the negative. Perhaps the most curious silence in the decisions of the Full Federal Court was the absence of any mention of the publicity surrounding the Federal Circuit Court judge who was the subject of both decisions. That judge has been the subject of many media reports which make strongly unfavourable comment about the judge's decisions. The judge is regularly referred to as 'controversial'.[115] The gravity of errors that the Full Federal Court found to have been established in various cases decided by that judge has also been the subject

111 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 [42].
112 Ibid [43].
113 Ibid.
114 References in the quoted passage about the 'fraught' nature of the inquiry the Full Court thought would be needed can perhaps be best described as a modern, imperfectly polished, version of the floodgates argument.
115 See, for example, Helen Davidson, 'Asylum Case Rejected by Controversial Judge Sandy Street Will Be Reheard', *Guardian Australia*, 22 August 2019 <https://www.theguardian.com/law/2019/aug/22/asylum-case-rejected-by-controversial-judge-sandy-street-will-be-reheard>.

of repeated, very unflattering, media commentary.[116] The reasoning in *CMU16* suggests that such material would be rejected as irrelevant and inadmissible for technical reasons associated with evidence legislation. Such reasoning would be much more convincing if judges applied the same technical dogma to the many norms and habits of the judiciary and legal profession that are well accepted by the informed observer. Put another way, hurdles drawn from evidence legislation seem to be placed before applicants seeking to articulate claims about possible judicial errors, but the many virtues of the bench and bar never seem to face such obstacles.

The rejection of statistical material in *ALA15* invites questions on other grounds. On the one hand, the Full Court in *ALA15* found the statistical evidence presented was lacking because comparisons with other judges were not legally relevant, and figures drawn from annual reports were not a 'valid control measure' because they did not align with the appointment times of the relevant judge. This suggests that a level of rigour is required in any statistics presented to a court. On the other hand, the Full Court made the extraordinary assumption, without reference to any legal or other authority, that the informed observer would take into account the possibility that a judge might decide well over a hundred cases in a particular jurisdiction wrongly but that this could be explicable by reason of 'human frailty'. This reasoning evidences many things, intellectual and evidential rigour not among them. One flaw in this aspect of *ALA15* is the obvious failure of the Full Court to distinguish between what a judge might apprehend and what members of the public might. Another is the distorted reference to human frailty. That concept was mentioned in *Ebner*, when the High Court accepted that the bias rule 'admits the possibility of human frailty. Its application is as diverse as human frailty'.[117] That reference was as much about judicial as human frailty[118] and clearly intended to indicate that the test for apprehended bias can and should err on the side of caution (in favour of recusal) because it is often difficult openly to discuss predilections, unconscious preferences and how outsiders might perceive conduct.[119] The Full Court entirely distorted that notion by its acceptance that the observer would somehow accept, as a consequence of human frailty, the possibility that a judge might decide countless cases wrongly. An observer said to be fair-minded would almost certainly reject such reasoning. The observer might instead ask why such obviously subjective judicial opinions were sought to be justified as reasoning that others might think plausible.

Concluding observations

One consequence of the uncertain standard of *Ebner's* test for apprehended bias, noted earlier this article, is the possibility that the fair-minded and informed observer could conclude

116 See, for example, Nicola Berkovic, 'Court in Controversy', *Weekend Australian*, 6 March 2018, 11; Nicola Berkovic, 'Judge Has 47 Rulings Reversed in 3 Years', *Weekend Australian*, 6 March 2018, 7; Nicola Berkovic, 'Judge Mentored after Rulings Rejected', *The Australian*, 3 September 2019, 7; Hagar Cohen, 'Almost 99 Percent of Protection Visa Review Applications Fail when Heard by Controversial Judge New Figures Reveal', *ABC News*, 6 September 2019 <https://www.abc.net.au/news/2019-09-06/almost-99-per-cent-fail-when-heard-by-judge/11457114>. Those articles are just a selection of the media commentary on the relevant judge.

117 (2000) 205 CLR 337, 345 [8] (Gleeson CJ; McHugh, Gummow and Hayne JJ), 396 [182] (Callinan J agreeing on this point).

118 The frailty mentioned in Ebner was equated with human nature by Heydon, Kiefel and Bell JJ in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 331 [139].

119 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [132]–[133] (Edelman J).

that a decision-maker might accept that an official was not sufficiently impartial, while also accepting that the official might not be.[120] The same may be true for the criticisms made of the Full Federal Court decisions of *ALA15* and *CMU16* in this article. Perhaps both of those Full Court decisions are correct, but so also are the criticisms I have made of them. That possibility alone should provide pause for thought. The possible value of statistics is one reason for pause. The assertion of the Full Federal Court in *ALA15*, that statistics do not speak for themselves and instead require detailed explanation, is entirely plausible. But sometimes there may be another reason statistics do not speak. It is because they shout — loudly enough for it to be possible that an informed observer *might* consider that those figures necessarily say something. Sometimes statistics are so extreme, so one-sided, that their sheer weight alone *might* say something even in the absence of a detailed analysis of the cases that comprise the statistical set. The difficult question that follows is whether courts can even conceive of that possibility, let alone hear it.

Judicial cautions about the limits of the informed observer are regularly made, including the need to ensure that courts do not ascribe that fictional construct with 'a knowledge of the law and the judicial process which ordinary experience suggests is not the case'.[121] Despite those cautions, the courts regularly imbue the observer with surprising knowledge and acceptance of judicial practices. This judicial practice reveals a circularity in the supposed connection of the bias rule to public confidence in the legal system. We are told that, if the observer is satisfied of the impartiality of judges and other officials, he or she is more likely to accept the integrity of the wider legal system. At the same time, however, the observer is often attributed with specialist knowledge, and genial acceptance, of the processes and norms of that very system. This is anchoring of the most obvious kind. The uneven nature of the observer's quest for explanation is also curious. The Full Federal Court would have us believe the observer can only draw conclusions about statistics when accompanied by very detailed analysis. But the same observer has no such curiosity about legal processes and norms. These and other such contradictory assumptions made by the Full Federal Court should be questioned.

120 A paradox noted in *Melbourne City Investments Pty Ltd v UGL Ltd* [2017] VSCA 128 (at n 34 above).
121 *Webb v The Queen* (1994) 181 CLR 41, 52 (Mason CJ and McHugh J).

Government schemes for extrajudicial compensation: an assessment

*Sarah Lim, Nathalie Ng and Greg Weeks**

Providing redress where loss has been suffered is not the sole preserve of the judiciary. At least in part, this is because loss can be suffered by individuals in the absence of legal liability. While this is not the exclusive province of public entities, it is more commonly the case that 'moral liability' justifying the payment of compensation is borne by public entities.[1] For one thing, public entities generally have a much greater capacity to cause individuals — even relatively sophisticated or commercially adept parties[2] — to act in a way that they otherwise might not. Government and other public figures come cloaked in authority,[3] with the consequence that people are more likely to comply with requests or instructions. Such compliance will frequently not create a legal obligation if the individual suffers loss. Compensation schemes are premised on the belief that the action might nonetheless create *moral* obligations and that these can be a sufficient basis for compensation to issue.

This article considers the provision of compensation outside the legal system, usually paid on the basis of 'moral liability' rather than a claim founded in law. There are a number of different schemes in place which may achieve this end, across every Australian jurisdiction and they are both statutory and executive. Our consideration of those schemes forms part of the article, the rest being given over to the assessment of whether and to what extent they are successful in what they set out to do. Our conclusion on this point may be summarised by saying that extrajudicial compensation has become an essential part of seeing that justice is done in public law matters, particularly those which do not disclose a strong legal basis but in which a party has undoubtedly suffered loss as a result of a public entity's acts or decisions.

A brief history of discretionary compensation

Extrajudicial compensation schemes have a long history. Carol Harlow noted that, while law reform in England had once been directed against examples of Crown immunity which were seen 'as an affront to the rule of law', the focus of reform shifted after the passage of the *Crown Proceedings Act 1947* (UK) to the need better to compensate citizens who had suffered loss due to government action.[4] Awards of ex gratia compensation were often made

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1 It is generally understood that government is obliged to adhere to a higher moral standard than that applicable to private entities: see eg N Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) 15.

2 See eg the claimants in *R (Davies) v The Commissioners for Her Majesty's Revenue and Customs* [2011] 1 WLR 2625, who had taken advice in forming their view of a government publication, only to have the Supreme Court find against that view.

3 See the example of the police officer in G Weeks and L Pearson, 'Planning and Soft Law' (2018) 24 *Australian Journal of Administrative Law* 252, 253.

4 C Harlow, 'Rationalising Administrative Compensation' [2010] *Public Law* 321, 321.

before 1947 but were made by the Crown in its then customary role of ruthless litigant.[5] It followed that:

> [Such compensation at that time] was in principle an evil. It vested in officials an important discretionary power which allowed them to shelter their misdeeds behind the convenient screen of a secret settlement process. Perhaps it was assumed that, the [Crown's legal] immunity once ended [by the Crown Proceedings Act], ex gratia payments would dwindle into insignificance.[6]

They did not; instead, payments of compensation came to be used for a different purpose.[7]

The notion of making ex gratia payments for a purpose akin to paying 'hush money' is somewhat discordant to the modern ear, especially given that such payments respond to the existence of a moral obligation on the part of government where no legal liability to the applicant exists, either actually or potentially. We think it logical that Harlow considered the secrecy of compensation payments to be an 'evil' rather than the fact of those payments[8] and that view fits with the modern, moral motivation for making an ex gratia payment. The capacity of government to respond to moral triggers in providing compensation in the absence of a legal right is perhaps the most significant development in this area since the period described by Harlow.

Part of the utility and — we would argue — necessity of the state having the capacity to make ex gratia payments can be observed in two connected principles.

The first is that the Crown is held accountable in common law systems, such as those in England and Australia, primarily as a matter of judicial review, which is to say by the issue of writs and associated orders.[9] However, in the UK:

> the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England … either the Crown's servants are personally liable or there is no redress.[10]

This was the very point behind passing the English *Crown Proceedings Act 1947*. The suite of Australian statutes which had removed the protected position of the Crown in the colonies from 1853 and at Commonwealth level from just after Federation[11] did not work in the same

5 One 'whose legal advisers stood upon unmeritorious, technical defences and used the Crown's legal immunity to drive hard bargains': C Harlow, *Compensation and Government Torts* (Sweet and Maxwell, 1982) 117; cf *Legal Services Directions 2017* (Cth); J Boughey, E Rock and G Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) Ch 17.

6 Harlow, above n 5, 117.

7 G Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 256.

8 To regard the operation of a compensation system or other government scheme as an 'evil' seems more likely than to regard the system or scheme as good or evil of *itself*. We leave the latter considerations to those more theologically inclined.

9 At Commonwealth level, this occurs because the jurisdiction to grant two writs (mandamus and prohibition) and injunctive relief are embedded in s 75(v) of the *Constitution* and certiorari can issue as an ancillary remedy to the constitutional writs. State supreme courts also have a constitutionally protected capacity to issue the remedies that were within their jurisdiction at federation: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

10 *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997 [20] (Sedley LJ).

11 These generally sought to equate the position of the state 'as nearly as possible' with the other party to litigation: eg *Judiciary Act 1903* (Cth) s 64. See M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [19.70].

way as the subsequent English Act.[12] Rather, it made the Crown vicariously liable for the tortious acts of its servants.[13]

The second is that damages — or any monetary payment generally — is not a remedy recognised by courts exercising judicial review.[14] Lord Scott noted that '[t]here is no general right to recover damages for loss caused by *ultra vires* acts of public authorities. Some recognised tort claim is necessary', but has not so far been forthcoming.[15] The availability of non-judicial compensation payments has been a practical cure for the absence of a legally enforceable remedy. The enforced non-judicial nature of compensation payments in Australia[16] is, as we will discuss, an important aspect of their application. It is fair to say that even in the UK, where there has in modern times been a generally progressive approach to law reform, reform proposals in this area have been met with caution. More frankly, the Law Commission's proposed reforms in this area were rebuffed with indelicate vehemence and speed.[17] We would be surprised to see extensive reform of compensation payments in the short term.

Ex gratia compensation is a superior remedy to a judicially ordered damages payment, if only because it is more readily available since damages payments are tied to a private law cause of action. It is also better than receiving no compensation at all (and there is a real possibility that many claimants would otherwise receive exactly that) but its utility does not mean that it is an ideal system or that it should not be exposed to criticism. This point was made by Winter, writing in the context of 'relationships between the law and Australia's Indigenous communities':[18]

12 Weeks, above n 7, 184–5.

13 Sedley LJ pointed out that it was only 'with the enactment of the *Human Rights Act 1998* (UK) that the Crown, in the form of a "public authority", has acquired a primary liability for violating certain rights': *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997 [20]. See Aronson, Groves and Weeks, above n 11, [19.60].

14 See E Rock and G Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* 1159. An attempt to divide monetary awards on a 'public' and 'private' law basis is inaccurate due to the existence of a single 'public' tort — misfeasance in public office — in respect of which damages lie. See eg *Brett Cattle Company Pty Ltd v Minister for Agriculture* (No 2) [2020] FCA 916; M Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1.

15 His Lordship continued, however, that merely to 'have sustained loss as a consequence of the administrative action in question' was insufficient to establish liability: *Somerville v Scottish Ministers* [2007] 1 WLR 2734, 2761 [77]. In the context of considering a claim for damages arising under statute, his Lordship considered that this 'chapter of public law still [remains] … largely unwritten', thereby perhaps expressing hope that that situation will change. We harbour doubts that any change will come swiftly.

16 In the UK, non-statutory compensation schemes have been reviewable since *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] QB 864, in which Diplock LJ reasoned (at 888) that the decision of the Compensation Board to authorise a compensation payment was legally significant because it constituted the difference between a payment to an applicant being lawful or unlawful (approved by the High Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 162). Some, but not all, Australian compensation schemes are statutory.

17 See Law Commission, UK, *Administrative Redress: Public Bodies and the Citizen* (Law Commission, 2010) [1.3]. While the Law Commission's response was restrained, others were not: see *Mohammed v Home Office* [2011] 1 WLR 2862, 2870 [22] (Sedley LJ); Editorial, 'Damages for Maladministration: The Law Commission Debacle' (2012) 17 *Judicial Review 211*.

18 S Winter, 'Australia's Ex Gratia Redress' (2009) 13 *Australian Indigenous Law Review* 49, 49.

> Corrective justice recognises remedial rights to full compensation. Ex gratia redress is a denial of liability associated with what may be less than full compensation. Since the relevant cost savings for claimants do not derive from the ex gratia nature of the redress programs, the ex gratia denial of right may constitute part of the States' resistance to paying full compensation. In support of this possibility, ex gratia redress offers both decreased payouts and the prospect of making the associated costs more predictable.[19]

As numerous members of the High Court noted in *Love v Commonwealth of Australia*,[20] the relationship between Australia's First Nations people and Australia as a polity more generally is complex. Furthermore, the wrongs that they have suffered are not always compensable by money, despite that fact that monetary compensation is the guiding light of the common law's private law compensatory doctrines.[21] Money only approximates placing a claimant in the position they would rather occupy — it cannot alter history.[22] Winter's point is good in as much as it expresses dissatisfaction with a remedial approach that admits nothing, fails to embrace corrective justice principles and yet still tends to drive down the value of any payment made.[23] Whether an ex gratia payment is better than nothing might, on this view, depend on the claimant's perspective.

One important point is that the perspective of a potential recipient of ex gratia compensation as to the preferable amount of such a payment is irrelevant. Payments are made on the basis that the public entity in question owes a moral obligation to a would-be claimant which it proposes to meet by the payment of monetary compensation, but the determination of the sum of compensation is determined by the public entity alone, although the claimant will often make a submission as to the amount the person thinks suitable. Such submissions might be presented more persuasively, for example, if they were made on the claimant's behalf by the Ombudsman,[24] but they do not bind the public entity as to the amount of the compensation it offers.[25]

The link between maladministration and discretionary schemes

Maladministration has sometimes been defined in statute as poor governance and mismanagement resulting in an 'irregular or unauthorised use of public money, [the] substantial mismanagement of public resources, or … the substantial mismanagement in

19 Ibid 53.

20 (2020) 94 ALJR 198.

21 Money is the tool by which courts approximate the loss suffered by the plaintiff to the extent that such a calculation is possible: see *Robinson v Harman* (1848) 1 Exch 850, 855 (contractual damages); *Todorovic v Waller* (1981) 150 CLR 402, 412 and 463 (tortious damages).

22 Sometimes, damages are no more than a 'consolation' to the successful claimant: H Luntz, 'The Purposes of Damages in Tort Law' in PD Finn (ed), *Essays on Torts* (Law Book Co, 1989) 243, 248. In England, compensation is calculated on the same basis as that used to calculate damages payable in tort, that is by placing complainants 'in the position they would have occupied if they had been correctly advised at the outset': see the citations in Weeks, above n 7, 256 (n 34).

23 A tendency noted elsewhere: see Weeks, ibid 258.

24 See Weeks, ibid 252–3. Courts might occasionally make similar recommendations to the same effect where they find that the claimant might have a 'moral' case but lacks legal grounds for a compensation claim: see *Croker v Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 1136 [11] (Rares J). Furthermore, it is 'not uncommon' for the AAT to perform this role: Boughey, Rock and Weeks, above n 5, 308–9.

25 J Davidson and S Stoddart, 'Judicial Review of Discretionary Payments' (2017) 24 *Australian Journal of Administrative Law* 74.

or in relation to, the performance of official functions'.[26] In practice, it constitutes actions of a public authority which are unlawful, unreasonable, unfair, improperly discriminatory, taken for an improper purpose or otherwise wrong.[27] Maladministration can also describe circumstances where, although the relevant administrative conduct is flawed, it is not necessarily illegal or corrupt. Maladministration covers such cases because it is primarily a concept that goes to justice rather than law.[28] There is a linguistic distinction between 'malfeasance'[29] and 'misfeasance',[30] terms which have more precise meanings in tort. Justice Gummow saw the distinction as one of intention, specifying that the misfeasance tort of 'concerns conscious maladministration rather than careless administration'.[31]

The question of how maladministration which causes harm should be addressed and resolved has long been debated. Ombudsmen offer a range of practical remedies at one end of the spectrum; at the other, judicial review is highly impractical.[32] While monetary compensation has been suggested as a solution,[33] courts remain unable to award monetary relief in public law matters.[34]

In the absence of a framework to compensate an individual for harm suffered due to an administrative action, non-judicial mechanisms which operate independently of public law wrongs play a prominent role. Where the Commonwealth has no legal liability but bears a moral obligation, two Commonwealth discretionary compensation schemes exist to compensate persons for losses suffered: first, the non-statutory Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme),[35] which is administered by the Commonwealth Department of Finance; and, secondly, discretionary financial assistance pursuant to ss 63 (waiver of debt or modification of payment terms), 64 (set-off of debts owed to or by the government) and 65 (act of grace payments) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act).[36]

26 *Independent Commissioner Against Corruption Act 2012* (SA) s 5(4).
27 *Public Interest Disclosure Act 2010* (Qld) Sch 4.
28 G Weeks, 'Maladministration: The Particular Jurisdiction of the Ombudsman' in M Groves and A Stuhmcke (eds), *Ombudsmen in the Modern State* (Hart Publishing, forthcoming). See n 36 below.
29 See eg *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 238 [49] per French CJ, citing FAR Bennion, *Bennion on Statutory Interpretation* (LexisNexis Butterworths, 5th ed, 2008) 82. His Honour was making a similar point about the negligent exercise of a statutory authority.
30 See eg *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732.
31 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376 [124] (reference omitted).
32 See Boughey, Rock and Weeks, above n 5, 16–17.
33 M Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 8 *Judicial Review* 104.
34 Rock and Weeks, above n 14, 1159. There is a relatively minor exception to this rule where a public entity is unjustly enriched as the result of an ultra vires demand for payment: ibid 505–13.
35 The CDDA Scheme was originally established by the Commonwealth Department of Finance Estimates Memorandum vol 1995/4 (1995) and was subject to further revised iterations in Finance Circulars in 2001, 2006, 2009 and 2014 prior to its current version: Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment Caused by Defective Administration* (Australian Government, 2019) <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>.
36 See Commonwealth Department of Finance, *Resource Management Guide No 401: Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013* (Australian Government, 2018) <https://www.finance.gov.au/publications/resource-management-guides-rmgs/requests-discretionary-financial-assistance-under-public-governance-performance-accountability-act-2013-rmg-401>.

Outside of these Commonwealth mechanisms, other specific discretionary compensation schemes have been established as a response to wrongs perpetrated by government. For example, the Salvation Army National Redress Scheme[37] is a private scheme created at the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse to enable persons who have experienced institutional child sexual abuse to seek redress. Similarly, following a review by the Victorian Equal Opportunity and Human Rights Commission, the Victoria Police Restorative Engagement and Redress Scheme[38] was developed for police personnel who had suffered from workplace sex discrimination and sexual harassment. Currently, at the behest of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, a Compensation Scheme of Last Resort[39] is in the process of being established to enable consumers who are so entitled to receive compensation, even though the licensed financial adviser who is liable to them has become insolvent or is otherwise unable to pay the necessary compensation.

The role of the Ombudsman

Judicial remedies are often — erroneously — considered the gold standard in obtaining justice. The reasons this contention can be challenged have been rehearsed elsewhere and often, but it is sufficient to note here that tribunals annually resolve many more matters than courts; bodies like ombudsmen resolve many more matters still. For good reason, these bodies have been described as 'the engine room of administrative law'.[40]

Ombudsmen should not be seen to operate wholly within an adversarial system but derive their success from effectively and judiciously exercising their *influence*, as opposed to wielding *power*. The belief that Ombudsmen are 'toothless tigers'[41] misunderstands this reality and ignores the fact that Ombudsmen have evolved specifically to address maladministration — a task for which they are perfectly adapted[42] Where maladministration is found, the Ombudsman can exert influence on the decision-maker by making recommendations for a remedy or other improvement, notwithstanding that the Ombudsman does not wield determinative power. The office has an aptitude for settling issues which extend beyond mere illegality to allegations of injustice more broadly that courts and tribunals lack, which explains why the judiciary is not generally apt to be involved in the matters those offices handle.

It is the central task of Ombudsmen to address maladministration, which denotes conduct capable of causing injustice and which could also be systemic in the sense that, if left unremedied, it might foreseeably continue to affect other parties. Allegations

37 See The Salvation Army, 'The National Redress Scheme' (online) <https://www.salvationarmy.org.au/about-us/governance-policy/the-national-redress-scheme/>.

38 See Victorian Government, 'Restorative Engagement and Redress Scheme' (online) <https://www.vic.gov.au/redress-police-employees>.

39 See The Treasury, 'Compensation Scheme of Last Resort' (online, 7 February 2020) <https://treasury.gov.au/consultation/c2019-43848>.

40 G Weeks, 'Attacks on Integrity Offices: A Separation of Powers Riddle' in G Weeks and M Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25, 29.

41 Cf R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 5th ed, 2019) 244.

42 Weeks, above n 28.

of maladministration might indicate poor governance or corruption and yet disclose no 'wrongdoing' of the sort remediable in judicial proceedings. Maladministration is often a matter of degree[43] and the capacity to determine its seriousness cannot be determined in advance.[44] While it can, of course, occur on a large scale, maladministration is often mundane (in the sense that it is everyday, dull or routine) and might be caused by inattention as easily as malice.[45] This does not necessarily affect either the quantum of loss maladministration might impose on the unlucky individual who is on its receiving end or the need for it to be addressed.

Courts are suited to some tasks more than others. For example, various aspects of criminal procedure, such as cross-examination of witnesses, have been considered in the past to illustrate that courts have an institutional advantage in establishing criminal guilt. Other tasks are ill-suited to the judiciary due to the way that judicial decision-making is structured.[46] We submit that judicial proceedings are not the right mechanism for dealing with maladministration. They are relentlessly process driven in both their grounds of review and their remedies. A party affected by the maladministration of a public body must usually establish the presence of a jurisdictional error[47] to obtain writs which will either strike down an ultra vires decision and/or require an intra vires decision to be made in its place. Even if injunctive or declaratory relief is sought, the applicant must establish that they have been affected by an error of law, whether or not jurisdictional in nature. As we have stated above, maladministration can occur without the presence of a legal error and might cause no lesser loss or injury to the affected party for that. Lateness, misapplication of guidelines, poor communication with internal or external parties and deficiencies in staff training are but a few examples[48] of possible causes of injustice to those who deal with government or public bodies more generally. None is likely alone to amount to an error of law, but each is an example of how a public body might fall short of delivering 'good administration' to a greater or lesser extent. We think it likely that much maladministration is of this 'mundane' type rather than malicious in nature, but, given that proving malice where required in legal proceedings is far from easy, it suffices to say that maladministration is never addressed satisfactorily in judicial review proceedings.

It was commented nearly 50 years ago that the Ombudsman is 'perhaps the most striking feature in the search for more effective remedies for maladministration'.[49] It remains true

43 Similar observations have long been made about jurisdictional error, including Jordan CJ's observation that there are 'mistakes and mistakes': *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420.

44 See the analogous statement of Mason P in *Holt v Cox* (1997) 23 ACSR 590, 597.

45 The term 'mundane maladministration' was coined by Harlow and Rawlings to describe 'widespread delays, poor communication and inaccurate information to clients, badly trained staff, and failures of communication with other agencies': C Harlow and R Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 78.

46 Polycentric decision-making, for example, is not best achieved by a system in which two parties must bring a dispute before a court: see eg LL Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; E Campbell and M Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia: Essays in Honour of Enid Campbell* (Federation Press, 2005) 213.

47 Usually on the basis of a procedural failure, such as a failure to offer procedural fairness, and rarely on the basis that the relevant decision or act was unreasonable to the necessary degree.

48 See Harlow and Rawlings, above n 45, 78.

49 KC Wheare, *Maladministration and its Remedies* (Stevens and Sons, 1973) 141.

that, while the involvement of the Ombudsman is not required to obtain compensation for maladministration, it places a claimant in a position of greater advantage if their application is supported by that office. As we will see, the publications which outline the availability of compensation are not published with potential claimants as their audience;[50] the Ombudsman is invaluable to most successful claimants as an experienced and knowledgeable guide.

Commonwealth schemes

There is a variety of subject specific schemes for compensation in Australia, in addition to which the Commonwealth and other Australian jurisdictions have compensation schemes which address maladministration generally. The difference between these schemes is that some aim to compensate individuals for losses specific to them and others recognise that a large number of people might have been affected by a single policy, entity (whether public or private) or policy.[51]

Compensation schemes addressing specific subjects

A number of schemes exist which do not focus on the effect of maladministration on an individual but address circumstances where a particular class of persons has experienced loss arising from a common cause. There are too many such schemes for us to consider them all, but we will point out three of the most significant.

A number of schemes exist to compensate Indigenous claimants for loss suffered by them collectively.[52] Perhaps the most noteworthy of these are the programs which aim to compensate members of the Stolen Generations of Indigenous children removed from their families by the state. Not every jurisdiction has such a scheme, which is perhaps the first issue to observe. Of those that do:

- Tasmania has a statutory scheme funded to a total of $5 million, of which no claimant was eligible to receive more than $5,000;[53]
- South Australia has a non-statutory Stolen Generations Reparations Scheme,[54] which was funded to $11 million, divided between ex gratia payments of up to $50,000 for individual claimants and community-wide reparations to a total of $5 million; and

50 Boughey, Rock and Weeks, above n 5, 298.

51 One type of scheme, developed over a century ago, stands apart from the others. Every jurisdiction in Australia has a statutory scheme for compensating victims of crime: *Victims' Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime (Financial Assistance) Act 2016* (ACT); *Victims of Crime Assistance Act 2006* (NT). These recognise that people who have suffered loss as the result of a criminal act are not compensated for that loss as a direct result of the process by which the state tries the perpetrator of the crime. They have a greater basis in policy than schemes aimed at correcting the effects of maladministration, which cannot usually be predicted to the same extent.

52 See Boughey, Rock and Weeks, above n 5, 324–5.

53 *Stolen Generations of Aboriginal Children Act 2006* (Tas) ss 10 and 11(1)(a) and (2).

54 Government of South Australia, 'Stolen Generations Reparations Scheme' (online) <https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme>.

- New South Wales created a non-statutory scheme[55] which pays ex gratia compensation of $75,000 to eligible claimants for five years ending 30 June 2022. Payments of up to $7,000 payable under the Funeral Assistance Fund are capped at $7,000.

Each of these schemes defines with some precision who is to be considered a member of the 'Stolen Generations', has limits on funding and the amount each claimant may receive and, in the case of New South Wales, also allows claims only within a specific window. These limitations are perhaps understandable as matters of public policy, but one notes that they are not imposed in this fashion on claimants under, for example, the CDDA Scheme. This might indicate a difference in policy between the schemes, illustrated by the possibility that compensation is available to Stolen Generations survivors virtually as of right, thereby justifying tighter limitations on the time within which it can be claimed.

The Commonwealth government's long-running Royal Commission into Institutional Responses to Child Sexual Abuse heard from an enormous number of witnesses about sexual abuse committed by those working in a wide range of institutions. The Royal Commissioners made an interim recommendation that there be a $4 billion national redress scheme to compensate survivors of this abuse.[56] The statutory National Redress Scheme,[57] which commenced on 1 July 2018 and will run for 10 years, has an accountability function over the institutions responsible for the abuse suffered.[58] In this regard it differs from other schemes which compensate individuals for maladministration.

A third scheme was also the product of a Royal Commission. The Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended the creation of an industry-funded Compensation Scheme of Last Resort (CSLR) to cover future unpaid compensation in parts of the financial services sector where there is evidence of a significant problem of compensation not being paid.[59] There is some precedent for such

55 New South Wales Government Department of Aboriginal Affairs, 'Stolen Generations Reparations Scheme and Funeral Assistance Fund' (online) <https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme>. This scheme was created in response to a parliamentary report: Legislative Council of NSW General Purpose Standing Committee, *Reparations for the Stolen Generations in New South Wales: Unfinished Business* (Report 34, June 2016).

56 Four states had in fact instituted schemes for compensating survivors of sexual abuse, but the other four state and territory jurisdictions had not. One of the issues that was always going to affect a Commonwealth-led compensation scheme was the extent to which some states had already led the way on this issue and funded the necessary compensation. See Boughey, Rock and Weeks, above n 5, 323–4.

57 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth). There are also several items of delegated legislation: *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (Cth); *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018* (Cth); National *Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018* (Cth); *National Redress Scheme for Institutional Child Sexual Abuse Declaration 2018* (Cth). The government publishes a guide to assist claimants to use the scheme: Australian Government, *National Redress Guide* (online, 1 July 2019) <https://guides.dss.gov.au/national-redress-guide>.

58 National Redress Scheme, 'About the National Redress Scheme' (online) <https://www.nationalredress.gov.au/about/about-scheme>.

59 Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Final Report (Australian Government, 2019) recommendation 7.1. It adopted the details set out in the Review of the Financial System External Dispute Resolution and Complaints Framework, *Supplementary Final Report* (Australian Government, 2017) (Ramsay Review).

a scheme: in the UK, the Financial Services Compensation Scheme (FSCS) is a statutory[60] compensation scheme of last resort for customers of financial services firms. This scheme is not about accountability in the same sense as the National Redress Scheme, nor is it truly about maladministration in the sense that the CDDA Scheme is. Rather, it operates as a safety net in the event that loss is suffered[61] consequent on a 'financial advice failure' from a provider as defined by statute.

Maladministration schemes

CDDA Scheme

The CDDA Scheme is a discretionary mechanism designed to compensate a party which has suffered detriment as a result of a non-corporate Commonwealth entity's defective administration. It may be engaged only when there is no legal requirement to make a payment.[62] Applications are decided by individual portfolio ministers or an authorised official in a portfolio entity pursuant to the executive powers under ss 61 and 64 of the *Constitution*.[63] The constitutional validity of the CDDA Scheme was opened to doubt by the result of *Williams v Commonwealth*[64] (*Williams No 2*), in which the High Court struck down the government's attempt to give statutory authority to its capacity to spend money on placing chaplains in public schools. The government was responding to the High Court invalidating that scheme in *Williams v Commonwealth*[65] (*Williams No 1*), but its subsequent attempt to protect the chaplaincy scheme through legislation[66] encompassed many schemes, including the CDDA Scheme, which were not subject to the decision in *Williams No 2*, because the Court had granted standing only to challenge the chaplaincy scheme. Their constitutional validity was nonetheless subject to doubt.

However, we doubt that the constitutional validity of the CDDA Scheme will ever be challenged and, if it were, that such a challenge would succeed. First, it is unlikely that a purported challenger would have standing, since they would need to have received a payment for that to be the case (thereby reducing the motivation to challenge the validity of its grant).[67] Secondly, and connected to our first point, it is highly unlikely that there will ever be litigation which seeks to establish that the CDDA Scheme is constitutionally invalid.[68] It will in that sense be like the proverbial tree falling in the forest — if nobody challenges it, in what practical sense is it really unconstitutional? Thirdly, we agree that the better view in any case is that payments under the CDDA Scheme would be constitutionally valid, falling within

60 It is established under the *Financial Services and Markets Act 2000* (UK) and simultaneously independent from and accountable to UK regulators: see Ramsay Review, ibid, Appendix 1.

61 And remains unpaid notwithstanding a decision from the Australian Financial Complaints Authority, a court or a tribunal and 'after reasonable steps, as defined by a CSLR' have been taken: Ramsay Review, ibid 4.

62 Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment caused by Defective Administration* (Australian Government, 2017), <https://www.finance.gov.au/sites/default/files/rmg-409-scheme-for-cdda.pdf>, hereafter 'CDDA Scheme Guide'.

63 Ibid [6] and [7].

64 *Williams v The Commonwealth* (2014) 252 CLR 416 *(Williams No 2)*.

65 *Williams v The Commonwealth* (2012) 248 CLR 156 (*Williams No 1*).

66 Through the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

67 Weeks, above n 7, 263.

68 See Boughey, Rock and Weeks, above n 5, 293–4.

s 61 and therefore s 51(xxxix) of the *Constitution*, and so 'within the incidental power of the departments or agencies to which they relate'.[69]

Notably, the CDDA Scheme provides, presumably for accountability purposes, that a decision-maker (other than the portfolio minister) is an agent and not a delegate of the minister.[70] The decision-maker must determine each case on its own merits and in accordance with procedural fairness.[71] Under the CDDA Scheme, a claimant must first identify the defective administration that has occurred. 'Defective administration' can refer to a decision vitiated by the element of unreasonableness in the exercise of an administrative power. This might be the unreasonable failure to give proper advice that is within the official's power and knowledge, or, the giving of advice that is incorrect or ambiguous.[72] It could also include delay by an agency, a failure to follow proper procedures, or IT systems issues and errors.[73] The CDDA Scheme Guide clarifies that an unreasonable failure is one where actions of the public officer are considered to be contrary to the standards of diligence one could expect from a reasonable officer with the same power and access to resources and in the same circumstances.[74] In certain cases, the collective impact of numerous individual administrative omissions or errors may constitute defective administration, even though each individual instance may not be regarded as unreasonable.[75]

If defective administration has occurred, the decision-maker must consider whether it has directly resulted in the detriment suffered.[76] If not, no compensation is payable. An offer of compensation must be fair and reasonable, having regard to the claimant's actions and specific set of circumstances,[77] with the overarching goal of restoring the claimant to the position they would have been in had defective administration not occurred.[78] The CDDA Scheme sets no financial limit on the amount of compensation payable.[79] It must, however, function as the remedial option of last resort, where there is no reasonable possibility of legal liability to the Commonwealth and a claimant has already exhausted all other avenues under existing Commonwealth legislation or schemes.[80] The CDDA Scheme Guide suggests that,

69 M Aronson, M Groves and G Weeks, above n 11, [6.640].
70 Commonwealth Department of Finance, above n 62, [9].
71 Ibid [39]–[41].
72 Ibid [17]. Providing incorrect or misleading information might be tortious: *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225. In that event, a claimant would be expected to pursue his or her legal options rather than seeking a CDDA payment.
73 R Cornall AO, *An Independent Review into the Compensation for Detriment Caused by Defective Administration Scheme in relation to the Australian Taxation Office and Small Business* (Australian Government, June 2019), 33.
74 Commonwealth Department of Finance, above n 62, [46]. The circularity of this definition is typical of attempts to define unreasonableness in administrative law: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
75 Commonwealth Department of Finance, above n 62, [47].
76 Detriment refers to the claimant's quantifiable financial loss, including opportunity costs, as well as any non-financial losses. As with claims for damages in contract or tort, a claimant is required to take reasonable steps to mitigate their loss: ibid [54]–[55].
77 Rather than what might regarded as normative: ibid [76].
78 Ibid [69]–[70].
79 Ibid [68].
80 Including the *Public Governance, Performance and Accountability Act 2013* (Cth): ibid [19], [23]. See Boughey, Rock and Weeks, above n 5, 295.

where concurrent applications are made under the CDDA Scheme and another scheme, it is for the entity to determine the most appropriate mechanism to address the claim.[81]

It is commendable that the CDDA Scheme Guide provides a clear framework for compensation which avoids mirroring the complexity of litigation. CDDA Scheme claims (usually accompanied by recommendations from the Ombudsman) have been helpful in alerting agencies to potential problem areas and opportunities for improvement.[82] However, concerns have previously been raised that the implementation of the CDDA Scheme is hindered by agencies through: unhelpful legalism; a compensation minimisation approach; unsupportive conduct; delay in deciding claims; and poorly reasoned decisions.[83]

As far back as 1999, the Ombudsman noted:

> the compensation mechanisms … can be interpreted broadly enough to enable agencies to pay compensation in all cases where they believe it is warranted, or narrowly enough to exclude any request, depending on the agency's approach to compensation generally or in individual cases.
>
> … [W]e believe agencies could provide compensation more often than they do, by adopting a more flexible, customer focused approach based on a broad interpretation of the powers available to them and by reference to standards they set themselves, for example, in their service charters.[84]

Those concerns continue to be relevant today. The public interest is arguably not served, due to a lack of visibility and transparency, where claimants must adhere to confidentiality requirements and waive their right to take legal action. Ultimately, the CDDA Scheme is limited by virtue of being treated as a de facto fault-based scheme, with the burden of demonstrating defective conduct and consequential detriment borne by the party least able to do so. Further, decisions under the CDDA Scheme are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, meaning that there are limited opportunities to seek to hold decision-makers accountable.[85]

Schemes under the PGPA Act

The PGPA Act is administered by the Finance Minister and provides for the provision of three distinct modes of discretionary financial assistance: waiver of debt or modification of payment terms;[86] set-off of debts owed to or by the government;[87] and act of grace payments.[88] Like the CDDA Scheme, these mechanisms are discretionary[89] and function as the remedial option of last resort.[90] That is to say the schemes are permissive; they enable,

81 Commonwealth Department of Finance, above n 62, [21]–[22].
82 Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration* (Report No 11, 2009).
83 J McMillan, 'Future Directions 2009 — The Ombudsman' (2010) 63 *AIAL Forum* 13.
84 Commonwealth Ombudsman, '*To Compensate or Not to Compensate?' Report under s 35A of the Ombudsman Act 1976* (1999).
85 Commonwealth Department of Finance, above n 62, [93].
86 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63
87 Ibid s 64.
88 Ibid s 65.
89 Commonwealth Department of Finance, above n 36, [1].
90 Ibid [3], [28].

but do not oblige, decision-makers to approve a request made under the PGPA Act.[91] Each request to the Finance Minister for discretionary financial assistance is considered on its individual merits, is decided at the discretion of the decision-maker and, once decided, does not establish a precedent for other requests.[92]

Section 63 of the PGPA Act enables the Finance Minister to authorise, on behalf of the Commonwealth, the waiver of an amount owing to the Commonwealth or the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth.[93] The authorisation of a waiver by the Minister may be made either unconditionally or on the condition that the person agrees to pay an amount to the Commonwealth in specified circumstances.[94] The discretion conferred by s 63, although broad,[95] is 'not free of constraint'.[96] It is limited, to a certain degree, by the considerations provided in the Discretionary Payment Schemes Guide, including the circumstances in which a debt is unlikely to be waived.[97] These include:

- debts that have been established by a judicial decision of a court, which are separate from the decisions of the executive arm of the Australian Government;
- debts owed to the Commonwealth that will be paid on to third parties;
- debts that have arisen through deliberate fraudulent or other illegal actions;
- requests submitted by companies on the grounds of financial hardship; and
- where an amount owing to the Commonwealth is not certain or ascertainable.[98]

Exercise of the discretionary powers to waive or modify a debt owed to the Commonwealth is also subject to a requirement[99] that an accountable authority of a non-corporate Commonwealth entity must pursue recovery of each debt for which the accountable authority is responsible.[100] There may be some reluctance to waive a debt using powers under the PGPA Act, since doing so extinguishes the debt owed to the Commonwealth for all time and the matter cannot be reconsidered if the claimant's financial situation improves in the future.[101]

91 Ibid [8], [33]. See *Pearce v Minister for Finance* [2020] FCCA 1291.
92 Commonwealth Department of Finance, above n 36, [1]. This is comparable to the way in which tribunal decisions are made, although it has long been suspected that demands for consistent and predictable decision-making lead tribunals to impose to 'an informal de facto system of precedent': JA Farmer, *Tribunals and Government* (London, Weidenfeld and Nicolson, 1974) 174.
93 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(1). The Minister must consider the circumstances in which the debt arose and any adverse consequences which the claimant alleges will arise from enforcement of the repayment obligation: *Stirling v Minister for Finance* [2017] FCA 874 [46].
94 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(3).
95 See generally *'CF' and Department of Finance* [2014] AICmr 73 [21].
96 *Stirling v Minister for Finance* [2017] FCA 874 [45].
97 Commonwealth Department of Finance, above n 62, [36]. See generally *Stirling v Minister for Finance* [2017] FCA 874 [45].
98 Commonwealth Department of Finance, above n 36, [36].
99 *Public Governance, Performance and Accountability Act 2013* (Cth) s 63(2).
100 *Public Governance, Performance and Accountability Rule 2014* (Cth) r 11.
101 Boughey, Rock and Weeks, above n 5, 306.

Greater flexibility is offered under s 64 of the PGPA Act, which gives the Finance Minister the discretion to set off part or all of an amount owed to the Commonwealth by a person against an amount owed to that person by the Commonwealth.[102] This discretion is subject to any requirements in the Public Governance, Performance and Accountability Rules and the necessity that any payment owed by the Commonwealth be neither rendered inalienable by a law of the Commonwealth nor unable to be assigned.[103]

Section 65 of the PGPA Act gives the Finance Minister or their delegate power to authorise in writing one or more payments to a person if the Minister or delegate 'considers it appropriate to do so in special circumstances'.[104] While neither of the key terms in this provision — 'special circumstances' and 'appropriate' — is defined in the PGPA Act,[105] the Discretionary Payment Schemes Guide provides a number of examples of special circumstances sufficient to justify an act of grace payment, including:

- an act of a non-corporate Commonwealth Entity has caused an unintended or inequitable result to the individual seeking payment;
- Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the claimant's circumstances, and those circumstances were:
    - specific to the claimant;
    - outside the parameters of events for which the claimant was responsible or had the capacity adequately to control; or
    - consistent with what could be considered to be the broad intention of the relevant legislation; and
- the matter is not covered by legislation or specific legislation or policy, but the Commonwealth intends to introduce such legislation or policy, and it is desirable in a particular case to apply the benefits of the relevant policy retrospectively.[106]

In addition, the Discretionary Schemes Payment Guide describes the circumstances in which act of grace payments will generally not be approved. These include circumstances where:

- the proposed payments would have the effect of supplementing capped payments set by other specific legislation, in circumstances where that legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances;[107]

102 *Public Governance, Performance and Accountability Act 2013* (Cth) s 64(1).
103 Ibid ss 64(1A)–(2).
104 Ibid s 65(1).
105 But see *Toomer v Slipper* [2001] FCA 981 [22]–[32]; *Dennis v Minister for Finance* [2017] FCCA 45.
106 Commonwealth Department of Finance, above n 62, [10].
107 Ibid [12].

- the proposed payments would have the effect of establishing a payment scheme to apply to a group of individuals, without considering the merits of their requests on an individual basis;[108] and
- where the claimant's sole assertion is that it is unfair that they have been historically ineligible to receive a benefit for which a person in similar circumstances would not be eligible, or where the claimant was historically eligible for a payment but is now ineligible due to a change in the criteria.[109]

The Discretionary Payment Schemes Guide also specifies that act of grace payments will not, as a matter of practice, be made:

- when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or non-corporate Commonwealth entity of the Commonwealth and the matter is not related to the impact of Commonwealth legislation;
- in respect of a matter that relates solely to the involvement of corporate Commonwealth entities which have a separate legal identity to the Commonwealth;
- to compensate a person or body for a debt owed to the Commonwealth; or
- to compensate a person for a loss arising from a judicial decision not involving the executive arm of government.[110]

The reasoning behind these points is that act of grace payments must be made from money appropriated by the Parliament.[111]

It is almost impossible to anticipate the situations in which such payments will be warranted. In consequence, the discretion vested in the Minister to grant or refuse to grant relief under s 65 is 'obviously broad'.[112] Further, as there are no criteria prescribed by statute in relation to the assessment of a claim for an act of grace payment, the matters to be taken into account and the weight to be given to the evidence as to those matters are generally for the decision-maker to determine.[113]

If a claimant is dissatisfied with the decision, they may lodge a complaint with the Commonwealth Ombudsman, seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* or (if relevant new information or a serious factual error is identified) request a reconsideration of the decision.[114] Applicants inevitably face difficulties in seeking judicial review over decisions made under the PGPA Act. For example, the court cannot consider the circumstances which might have led to a benefit being denied where they are relevant only to the merits of the applicant's case. The narrowness of judicial review's application can lead to imperfect results. Justice Heffernan indicated in *Pearce*

108 Ibid.
109 Ibid [14].
110 Ibid [13].
111 Ibid [13]; *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1), note 2.
112 *Dennis v Minister for Finance* [2017] FCCA 45 [41].
113 *Collins v Department of Finance and Deregulation (No 3)* [2012] FMCA 860 [125].
114 Discretionary Payment Schemes Guide, above n 62, [15].

v Minister for Finance (*Pearce*) that judicial review will often be the wrong tool for the job of achieving fairness:

> The applicant has a deeply heartfelt grievance at the chain of circumstances that resulted in her not having received [a parental leave payment] after the birth of her first child. It is most unfortunate that she did not. Given the fact that the [payment] was readily available to parents all over the country in a similar position to the applicant and her husband, and given the vast amounts of money presumably expended by the Commonwealth under the scheme to benefit parents, her dissatisfaction is understandable. *That is not the test on judicial review* and it does not, given the unfettered discretion to approve act of grace payments, mean that the Delegate exercised her power improperly, made an error of law or made a decision that was otherwise contrary to law.[115]

While we take issue with the words 'unfettered discretion', a notion unknown to Australian law,[116] his Honour's point is understandable: the discretion granted to the Minister's delegate under s 65(1) of the PGPA Act is so broad that it is in most circumstances extremely difficult to find a ground of judicial review that will be breached.[117] Appeals to considerations of policy and fairness are doomed to fail. This fact does not make those arguments bad, but it may indicate that they are being made in the wrong forum.

Equivalent state and territory schemes

Australian jurisdictions have taken their own steps to establish discretionary compensation schemes providing redress for maladministration:[118]

- In New South Wales, ministers are empowered by soft law instruments to make ex gratia[119] and act of grace payments,[120] the former being non-statutory and non-delegable and the latter statutory and delegable. Ex gratia payments may not be made in respect of matters remediable through legal proceedings.
- In Queensland, legislative provisions with a similar effect to the waiver and act of grace sections in the PGPA Act allow a government entity's accountable officer[121] to 'write off losses' and 'authorise special payments' from departmental accounts.[122] The definition of special payments includes 'ex gratia expenditure and other expenditure that is not

115 *Pearce v Minister for Finance* [2020] FCCA 1291 [40] (emphasis added).
116 It has been suggested that 'the very thought of it will induce a rash in a traditional administrative lawyer': Aronson, Groves and Weeks, above n 11, 116.
117 But see M Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in J Boughey and LB Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 129.
118 Greater detail on state and territory schemes can be found in Boughey, Rock and Weeks, above n 5, 313–21.
119 New South Wales Treasury, *Treasury Circular TC11-02: Ex Gratia Payments* (2011) <https://www.treasury.nsw.gov.au/sites/default/files/pdf/TC11-02_Ex_Gratia_Payments.pdf>. This document was reviewed in 2019.
120 New South Wales Treasury, *Treasury Circular TC19-10: Statutory Act of Grace Payments* (2019) <https://www.treasury.nsw.gov.au/sites/default/files/2019-12/TC19-10%20%20Statutory%20Acts%20of%20Grace%20Treasury%20Circular%202019.pdf>.
121 *Financial Accountability Act 2009* (Qld) s 65. A department's accountable officer is defined in *Public Service Act 2008* (Qld) s 14 and *Financial Accountability Act 2009* (Qld) s 65(2).
122 *Financial Accountability Act 2009* (Qld) s 72(1)(a) and (b).

under a contract'.[123] The discretion to make a 'special payment' can be exercised only 'with the approval of the Governor in Council'.[124]

- South Australia's Treasurer has powers under the *Public Finance & Audit Act 1987* (SA) s 41 to issue instructions about financial matters and has done so with relation both to ex gratia payments[125] and debt waivers.[126] The latter is a more detailed document, because it interacts with legislation to a greater degree than the program for ex gratia payments. Payments require ministerial authorisation, regardless of their amount, although payments over $10,000 must be approved by the Treasurer.[127] The instructions on waiver that public authorities must ensure that they 'aim to recover all amounts owing to the authority' as debts.[128] Such debts as are written off or waived must be recorded along with considerations such as the reason for not pursuing the debt in full and what recovery action was undertaken.[129]

- Although there are subject-specific examples of each discretion, Tasmania has no general statutory provisions for making ex gratia payments or waiving debts, the closest being ss 13 and 14 of the *Financial Management and Audit Act 1990* (Tas).[130]

- Victoria's policy on the disclosure of ex gratia expenses by public bodies[131] is broadly drafted to include expenses in the nature of compensation for damages, personal injury or injustice; write-offs and waivers of debts; and voluntary payments.[132] It supposes that the government has the legislative power to make such payments.[133]

- Western Australia's capacity to make payments appears to be broader than the equivalent power at Commonwealth level.[134] There have been indications from government that such payments are made under prerogative powers and are not intended to be wholly compensatory. Nonetheless, s 80(1) of the *Financial Management Act 2006* (WA) allows for the Treasurer to authorise payments in special

123 *Financial Accountability Act 2009* (Qld) sch 3. However, the statute is short on detail about the function of such payments and how they are to be made.

124 *Financial Accountability Act 2009* (Qld) s 72(2). See the equivalent Commonwealth provision: *Public Governance, Performance and Accountability Act 2013* (Cth) s 65(1).

125 Department of Treasury and Finance, South Australia, *Treasurer's Instruction 14: Ex Gratia Payments* (2015) <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0020/232094/TI-14-Ex-gratia-payments.pdf>.

126 Department of Treasury and Finance, South Australia, *Treasurer's Instruction 5: Debt Recovery and Write Offs* (2015) <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0018/36306/TI-05-Debt-Recovery-and-Write-Offs-Jan-2015.pdf>.

127 Department of Treasury and Finance, South Australia, above n 125, [14.4].

128 Department of Treasury and Finance, South Australia, above n 126, [5.7].

129 Ibid [5.25].

130 These sections allow the Treasurer to authorise expenditure from the Consolidated Fund and the Special Deposits and Trust Fund in accordance with an Appropriation Act.

131 Victorian Government, FRD 11A: Disclosure of Ex Gratia Expenses (2013) <http://www.dtf.vic.gov.au/Publications/Government-Financial-Management-publications/Financial-Reporting-Policy/Financial-reporting-directions-and-guidance>. Public bodies are defined in s 3 of the *Financial Management Act 1994* (Vic).

132 Ibid [6.6].

133 For writing off a debt, *Financial Management Act 1994* (Vic) s 55. Other Victorian legislation supports making ex gratia payments for a variety of specific reasons, although these payments do not seem to be the ones anticipated by the general terms of the disclosure policy.

134 Including that it has made at least one payment in relation to a matter in which the claimant retained legal rights: see Boughey, Rock and Weeks, above n 5, 317–18.

circumstances.[135] The legislation's strict approach to the matter of ex gratia payments is somewhat at odds with the state's history of approving payments: applications for ex gratia and act of grace payments are assessed by the State Solicitor; and payments may be recovered as a debt due to the state in a court of competent jurisdiction in the event of breach of any condition subject to which they were made.[136]

- The ACT has a legislative basis for making act of grace payments and waiving debts.[137] The Treasurer may, as in other jurisdictions, make an act of grace payment if it is 'appropriate to do so because of special circumstances' and the payment 'would not otherwise be authorised by law or required to meet a legal liability'.[138] The Territory's waiver powers also fall to the Treasurer and must be exercised in writing.[139]

- The Northern Territory has statutory grants of power to make ex gratia payments and waive or write off debts. The authority to make ex gratia payments comes with the standard features: the Treasurer may authorise a payment if satisfied that it is proper to do so by reason of special circumstances.[140] The Treasurer also has the discretion[141] to write off losses of money or property and to waive an amount owed or the recovery of property.

None of these approaches is identical to any other but they are all sufficiently similar to allow us to conclude that there is a broad national approach to the provision of compensation in the absence of legal rights.

Judicial review challenges

As we have noted, a claimant who is disappointed by the decision with regard to their application for a compensation payment may approach the Ombudsman,[142] having first sought internal review from the department or agency responsible for the decision. The Ombudsman's support for a claimant's case is not a certainty.[143] The judicial review options are more constrained. For example, only decisions made under the PGPA Act can be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which is limited to reviewing statutory instruments.[144] A challenge to a decision

135 The authority to approve a payment under this section is limited by the regulations to claims below $250,000: *Financial Management Regulations 2007* (WA) r 8. Claims for amounts in excess of that sum must be approved by the Governor: *Financial Management Act 2006* (WA) s 80(2).

136 *Financial Management Act 2006* (WA) s 80(3).

137 Respectively, the *Financial Management Act 1996* (ACT) ss 130 and 131.

138 Ibid s 130(1).

139 Ibid s 131(1).

140 The special circumstances must have arisen in the course of the business of the government of the Territory and there must be money lawfully available to make the payment: *Financial Management A*ct (NT) s 37(1) and (2).

141 Under the *Financial Management Act* (NT) s 35.

142 For CDDA claims: Commonwealth Department of Finance, *Resource Management Guide No 409: Scheme for Compensation for Detriment caused by Defective Administration* (2019), [4]; and see [28], [91]–[92]; for act of grace payments: Commonwealth Department of Finance, above n 36, [15]; and requests for waiver of debt, ibid [37].

143 See *LRKR and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 750 [9].

144 There have been few cases in which the courts have been asked to review the decisions of the Minister of Finance in respect of the act of grace payments.

about a claim under the CDDA Scheme would probably be made under s 39B(1) of the *Judiciary Act 1903* (Cth).[145] In either event, these decisions are discretionary and the potential remedies are no more than procedural. An applicant for judicial review would in practice face a difficult task in convincing the court that the challenged decision was not only less than preferable but affected by either an error of law or a jurisdictional error.[146]

The success of discretionary compensation schemes

While there is evidence showing that the amounts paid out under compensation schemes by certain Commonwealth agencies (for example, the Department of Defence and the Australian Taxation Office) have generally trended upwards over the past five to 10 years, there are insufficient data to support a conclusion that discretionary compensation schemes have been an absolute success. There are certain facts we do not know. For example, in 2015, the Department of Human Services declined to provide key statistics of its administration of the CDDA Scheme over a 10-year period.[147]

On the data available, it is arguable that the numbers of approved claims, versus the number of claims received and the amounts paid, are for relatively small amounts when considered against the volume of business conducted by the various government agencies. For example, in 2018, the Department of Health paid the relatively small sum of $1,000 in act of grace payments.[148] An example of an agency which generally receives a large bulk of the CDDA Scheme claims is Services Australia through its Centrelink, Medicare and Child Support programs.[149] In 2018–19, Services Australia received 1,414 compensation claims and approved 417 customer compensation claims under the CDDA Scheme, which represented 34 per cent of all claims determined under the CDDA Scheme.[150] The data in the tables at the end of this article highlight some key statistics which are publicly available.

Compensation schemes have been viewed as a mechanism which promotes settlement of a dispute without the need for civil litigation, although the approval of a claim for compensation is not necessarily a settlement of a legal dispute.[151] The government agency responsible for approving a compensation payment often wields greater bargaining power than if it were not fearful of litigation. However, claimants may lack the financial capacity to pursue civil litigation against a government agency, even if they had legal grounds to do so (which the CDDA Scheme requires that they must not). As a result, while the amount of financial compensation under compensation schemes is generally less that could be achieved in

145 Commonwealth Department of Finance, above n 62, [93].
146 See Boughey, Rock and Weeks, above n 5, 308–9.
147 Relying on a practical refusal reason under the *Freedom of Information Act 1982* (Cth): *Bradley Bartlett and Department of Human Services* [2015] AICmr 8 [7]–[8].
148 Australian Government Department of Health, *Annual report 2018–19*, 206.
149 Cornall, above n 73, 31.
150 Services Australia, *Annual report 2018–19*, 305.
151 *Cf Badraie v Commonwealth of Australia* (2005) 195 FLR 119; and see G Weeks, above n 7, 258–9.

litigation, the two methods of obtaining redress should be understood as operating parallel to each other without ever actually touching.[152]

The CDDA Scheme has been reviewed on several occasions: by the Ombudsman's office in 1999, the Australian National Audit Office in 2003–04, the Department of Finance in 2004–05, and again by the Commonwealth Ombudsman in 2009.[153] However, with a sole exception,[154] it has not been reviewed for some time and a comprehensive review is arguably overdue.

Legal standing of compensation schemes

The constitutionality of statutory compensation schemes turns on whether there is Commonwealth legislation that authorises the making of compensation payments and whether such payments are supported by a constitutional head of power.[155] The analysis of the High Court in *Williams No 2* was limited to a single scheme for Commonwealth expenditure, which was held to be invalid. The fact that that case did not address the Commonwealth's legislative approach[156] to ensure the validity of other additional schemes left the validity of discretionary schemes in general open to doubt. *Williams No 2* did, however, provide some guidance regarding the validity of the other schemes by saying that the legislation 'should be read as providing power to the Commonwealth to make, vary or administer arrangements or grants *only where it is within the power of the Parliament to authorise* the making, variation or administration of those arrangements or grants'.[157]

Even if discretionary compensation schemes were found to be invalid, it is arguable that the government could have some capacity to make ex gratia payments,[158] through non-statutory mechanisms for compensation and remedies. In *R v Criminal Injuries Compensation Board, Ex parte Lain*, which established that a compensation payment mechanism 'makes lawful a payment to an applicant which would otherwise be unlawful',[159] the Board offered a victim of crime an ex gratia payment, on condition that the applicant did not have a right to sue for

152 We note two related issues. First, evidence requirements may differ between compensation schemes and general litigation. The assessment of a compensation claim lacks the rigour of an open fact-finding process inherent in litigation. Further, successful claimants are often subject to comprehensive non-disclosure and release deeds which shield government agencies from public accountability. Secondly, the availability of compensation under the CDDA Scheme is often subject to the existence of any statutory provisions protecting the Commonwealth (and its officers) from civil liability, and query whether executive schemes such as the CDDA Scheme are effective in counterbalancing the operative breadth of such provisions: see eg *Biosecurity Act 2015* (Cth) s 644.

153 Commonwealth Ombudsman, above n 82.

154 The independent review of the ATO and Small Business: Cornall, above n 73.

155 *Williams No 1* (2012) 248 CLR 156.

156 Financial Framework Legislation Amendment Bill (No 3) 2012 (Cth), which amended s 32B of the *Financial Management and Accountability Act 1997* (Cth). The provisions now appear in the *Financial Framework (Supplementary Powers) Act 1997* (Cth).

157 *Williams (No 2)* (2014) 252 CLR 416, 457. As outlined above, the constitutional validity of discretionary schemes is unlikely to be challenged and those schemes will probably remain legal de facto.

158 Weeks, above n 7, 264.

159 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] QB 864, 888.

that sum.[160] It was held that the Board's exercise of prerogative power was not absolutely immune from judicial review.[161]

The Commonwealth Ombudsman concluded in 2009 that 'the survival of the CDDA Scheme probably depends upon it remaining an administrative scheme under which decisions are not routinely subject to court or tribunal review'.[162] However, discretionary compensation schemes involve rule-based decision-making which is amenable to judicial review[163] and may warrant judicial supervision. Nonetheless, judicial supervision of decisions whether or not to make discretionary compensation payments have been undertaken by Australian courts with notable reserve.

Given that the CDDA Scheme, PGPA Act schemes and other ex gratia payment mechanisms are all wholly discretionary, a disappointed claimant has limited review options. The CDDA Scheme specifically is revocable at will, creates neither legal rights nor obligations,[164] and has a history of being treated as soft law. These gaps show that, in the absence of a legislative program, compensation payments are not made on a stable and reliable basis of rights — something that claimants do not always expect, even when they have access to such schemes.

In contrast, the Defence Abuse Reparation Scheme[165] (DARS) provides a mechanism by which a reparation payment may be made by the Department of Defence to persons who may have suffered abuse while employed in Defence. Notably, the reparation payments under DARS are deemed not to be compensation payments but an acknowledgment by the Australian Government, Department of Defence and Australian Defence Force that abuse is wrong and the mismanagement by Defence is unacceptable.[166] The payment does not constitute an admission of liability by the Commonwealth and there is no requirement to meet a legal burden of proof.[167] The legal rights of the recipient are not affected,[168] including their right to access other entitlements.

What scope for improvement?

We consider that there is substantial scope for improvement to the way compensation is provided through statutory and executive schemes. These improvements broadly fall into the categories of better information provision and better record-keeping. As we have noted,

160 This precedent has survived the decline of the 'Ram doctrine', which previously held in England that the state had the power to spend money in whatever manner it deemed fit and that ministers could exercise residual power outside of statute or prerogative: Boughey, Rock and Weeks, above n 5, 291. Australia's constitutional arrangements meant the 'Ram doctrine' was never relevant here.

161 This was met with the High Court's qualified approval in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

162 Commonwealth Ombudsman, above n 82, [2.54].

163 Administrative Review Council, *Federal Judicial Review in Australia* (2012) [2.40].

164 *Smith v Oakenfull* (2004) 134 FCR 413, 418.

165 Australian Government, *Defence Abuse Reparation Scheme Guidelines* (2017) (DARS). This scheme is administered by the Defence Abuse Response Taskforce established by the Australian Government in November 2012.

166 Ibid [1.5.2].

167 Ibid [1.6.1].

168 Ibid [1.6.2].

claimants (successful or otherwise) have limited options to challenge decisions made under compensation schemes. While this is so for several reasons, several should be addressed.

First, the amount of information available to the public about compensation schemes can vary wildly. As such, individuals who might fit within a compensation scheme may find it more difficult to obtain, or to challenge a decision about why it has been denied, when they have access only to incomplete information about how and why the relevant decision was made. Secondly, as agencies are generally responsible for their own formal internal review mechanisms,[169] there is considerable scope for agencies' fact-finding processes to be somewhat opaque and even for agencies to refuse to reconsider a claimant's case,[170] subject to the requirements of procedural fairness. Finally, the capacity for courts to review compensation decisions is narrow. This is, of course, a feature of judicial review generally,[171] but there is a distinction to be drawn between judicial review of a decision which has been exposed to rigorous merits review, such as in tribunal proceedings, and one which has faced only the variable rigour of internal review. This fact increases the importance of making initial decisions about compensation properly.

It is over a decade since the Commonwealth Ombudsman reported on the effectiveness of Australian discretionary compensation schemes and made recommendations for their improvement in *Putting Things Right: Compensating for Defective Administration.*[172] The report identified that:

> It is important that members of the public are aware of their options and the remedies available to them when they believe they have been adversely affected by government administrative action.[173]

The Ombudsman correctly pointed out that this is so because both the efficiency and quality of agency decision-making 'will be improved if agencies assist claimants by explaining the process that will be followed, the factors that will be considered, and the information required to decide a claim'.[174] As a corollary to the obvious disadvantage to claimants, the failure to publish sufficient information about a discretionary compensation scheme may result in disadvantage to the agency, since 'if a person is not made aware of unpublished material that affects them, the agency cannot apply that material in a way that prejudices the person'.[175]

As stated above, the comprehensiveness and accuracy of information provided about compensation schemes varies greatly between agencies. We consider that, as recommended in *Putting Things Right*, there should be greater consistency and completeness in the information that is provided to claimants by agencies. To that end, we endorse the Ombudsman's recommendation of a comprehensive claim form with supporting instructions (designed to elicit relevant information and minimise the submission of irrelevant information or claims), subject only to minimal and necessary amendment by each agency.

169 Cf the few examples where internal review mechanisms are stipulated by legislation: eg *Freedom of Information Act 1982* (Cth) Pt VI.
170 See eg *Smith v Oakenfull* [2004] FCA 4.
171 The classic statement of the limitations facing courts was made by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6
172 Commonwealth Ombudsman, above n 82.
173 Ibid [2.5]–[2.6].
174 Ibid [2.7].
175 Ibid [2.6]. See also *Freedom of Information Act 1982* (Cth) s 10.

The inadequacy of current data collection processes is another area of potential improvement. There are two main reasons why it is important to collect and (where appropriate) publish data on compensation schemes: to maintain the accountability and transparency of government agencies; and to facilitate the review of decisions to grant (or refuse to grant) a request for compensation by an internal reviewer or by an external body such as the Ombudsman.

The paramountcy of accountability and transparency in the administration of discretionary compensation schemes was considered by the UK Law Commission in its 2010 report *Administrative Redress: Public Bodies and the Citizen*. The Law Commission identified that:

> Clear and open governance is the cornerstone of any democratic system. This includes the requirement that the way in which public money is spent should be outlined openly and clearly.[176]

This recognised the importance of data collection in the interests of accounting to Parliament for the way its resources are distributed and being transparent to citizens,[177] and recommended that (subject to the completion of a pilot study) HM Treasury — the relevant government body — ensure the costs of compensation to central government bodies were regularly collated and published. In making its recommendation, the Law Commission noted that compensation data was 'already being generated'[178] and that collecting and reporting on this data would allow government and other public bodies to improve service delivery and act in the most economically efficient manner.[179] Relevantly, the availability of this data would allow for an assessment of repeat payments 'where changes to behaviour do not occur and instead a practice develops of paying compensation rather than changing service delivery'[180] and would show where timely changes to service delivery would have been the better practice in purely economic terms.[181] As we have noted,[182] the opposition to the Law Commission's project was both strong and unprecedented,[183] with the result that the Law Commission thereafter restricted its work to an analysis of Ombudsmen[184] rather than saying anything further about state liability.

We consider that similar issues arise in the Australian context. Although some statutory data collection and publication requirements exist, they are minimal and the amount of data that is collected and published in practice varies greatly from agency to agency. Where that data has been collected, it can be difficult to access by interested members of the public.[185] As such, it is not always possible to identify the deficiencies in, or to suggest improvements to, a particular agency's data collection practices and thereby hold that agency to account. This obviously limits the ability of agencies to improve service delivery and act economically efficiently by reducing any recurring errors. In addition, as the Ombudsman has pointed

176 Law Commission, *Administrative Redress: Public Bodies and the Citizen* (2010) [4.80].
177 Ibid [4.62].
178 Ibid [4.77]
179 Ibid [4.64], [4.67].
180 Ibid [4.68]
181 That is not to say that the Law Commission's recommendations were accepted by Parliament: Justin Leslie, 'A Response to the Law Commission "Debacle"' (2013) 18(1) *Judicial Review* 42, 42.
182 See n 17 above.
183 Law Commission, above n 176, [1.3].
184 See Law Commission, *Public Services Ombudsmen* (2011).
185 See eg *Bradley Bartlett and Department of Human Services* [2015] AICmr 8; *'LW' and Department of Human Services* [2017] AICmr 65.

out, poor record-keeping has an impact on agency decision-making and can easily lead to unjust outcomes:

> If recordkeeping is poor, it is not clear how a decision was reached. This makes reviews of the decisions more difficult, whether internally or by an external body such as the Ombudsman. Poor recordkeeping also makes it difficult for an agency to assess the consistency of decision-making on similar cases.[186]

By way of example, a member of the Administrative Appeals Tribunal considered the difficulty of reviewing a decision made under the CDDA Scheme by the Department of Families, Housing, Community Services and Indigenous Affairs, in which:

> The documents … that are before me contain errors and omissions [and] it is not clear whether Mr and Mrs Hall were provided with procedural fairness in the CDDA decision-making process. It appears that Mr Hall provided information to the CDDA decision maker by telephone on 8 November 2010, but it is not clear on the present evidence whether he and Mrs Hall were sufficiently informed about the issues and the decision-making process in advance, or whether they were given an adequate opportunity to present their case … I also note that the text of the CDDA decision does not reveal whether Mr Hall was invited to put additional evidence or to test evidence that was before the decision-maker.[187]

Noting that its review jurisdiction did not extend to the Department's decision to refuse to make a payment under the CDDA Scheme, the member nonetheless observed that 'circumstances such as those arising in this case highlight the desirability of providing a mechanism for redress within the legislative framework, with attendant rights of review *to enable relevant information to be obtained and evidence to be thoroughly tested'.*[188]

Despite the suggestion that decisions made under discretionary compensation schemes should be reviewable by an external body such as a court or tribunal,[189] for the reasons we have stated above, we do not consider it appropriate for courts or tribunals to take on a greater role in reviewing decisions to grant (or refuse to grant) compensation under an executive scheme. We recognise that discretionary compensation schemes, on the whole, are systems which function on goodwill and that there are some persuasive arguments in favour of greater supervision.[190] Nonetheless, as stated above, we consider it is more appropriate that government bodies improve their own decision-making processes (by way of greater information provision and information gathering). Further, the Ombudsman is highly effective, and its recommendations are more often than not adopted by agencies,[191] and there are fragmentation/resource management issues that arise with the addition of another statutory review body.

186 Commonwealth Ombudsman, *Executive Schemes* (2009) [2.29].
187 *Hall and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 111 [15]–[16].
188 Ibid [17] (emphasis added).
189 See eg *Hall and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 111.
190 See eg ibid [14]–[17].
191 This is a fact that has been observed over many years: see now Commonwealth Ombudsman, *Annual Report 2018–19* (2019) 30–2. It is not a universal principle: see eg J Boughey, 'Administrative Law's Impact on the Bureaucracy' in Weeks and Groves (eds), above n 40, 93.

Conclusions

Discretionary compensation undoubtedly occupies an important place in administrative law, as it draws on analogous principles to recognise where loss has been suffered as a result of maladministration; address elements of accountability, moral obligations and natural justice; and then award some monetary remedy. Theoretically, effective compensation achieves a win–win outcome for a private person and a public body by eliminating the need to establish liability and allowing parties to bypass the courts.

However, we consider the Australian approach to be underdeveloped. While the existing Commonwealth schemes have been in place for a number of years, they are arguably stagnant due to lack of comprehensive review and reform, and tend towards a low profile, excessive legalism, compensation minimisation, and limitation on judicial review. There is more flexibility in schemes that do not deal specifically with maladministration, but we consider that these 'safety nets' could be made more robust. There is evidence that recommendations of the Ombudsman can be very influential and the Ombudsman is uniquely suited[192] to address maladministration. Expanding the involvement of the Ombudsman could prove effective for claimants, but, even so, there is still substantial room for development and improvement.

192 Weeks, above n 28.

Table 1: Year-on-year snapshot of Australian Taxation Office total CDDA Scheme payments

	2013–14	2014–15	2014–16	2014–17	2014–18	2014–19
Number of claims received	216	192	160	190	171	182
Number of claims finalised	219	201	160	192	166	167
Number of approved claims	79	77	59	96*	76	79
Total amount paid	$841,754	$738,402	$317,502	$801,305	$409,035	$2,271,135
Average payment	$10,655	$9,590	$3,414	$8,435	$7,575	7,496
Median payment	$300	$484	$424	$500	$495	193

* Including additional payments made as a result of a streamline claim process.

Table 2: Year-on-year snapshot of Department of Defence total CDDA Scheme payments

2012	2013	2014	2015	2016	2017	2018	2019
$464,000	$296,000	$745,000	$762,000	$1,623,000	$2,623,000	$5,289,000	$1,118,000

Table 3: Summary of compensation statistics of various agencies, 2018–19

	Act of grace payments	CDDA Scheme payments
Australian Taxation Office	$613,000 on act of grace payments in 2019.	$745,000
Department of Defence	$1,235,000 on act of grace payments in 2018. $253,000 on act of grace payments in 2019.	$5,289,000 on CDDA Scheme payments in 2018. $1,118,000 on CDDA Scheme payments in 2019.
Department of Education	$5,249,000 on act of grace payments in 2018. $5,054,000 on act of grace payments in 2019.	N/A
Department of Finance	$2,747,000 on act of grace payments in 2018–19.	N/A
Department of Foreign Affairs and Trade		19 claims made under the CDDA Scheme with respect to Department of Foreign Affairs and Trade activities in 2018–19.
Department of Health	$1,000 on act of grace payments in 2018.	N/A
Department of Home Affairs	$452,000 on act of grace payments in 2018. $44,000 on act of grace payments in 2019.	N/A
Services Australia	N/A	417 compensation claims approved under the CDDA Scheme, of a total 1,414 compensation claims received in 2018–19.

Automated decision-making in (good) government

*Bernard McCabe**

The Snowy Mountains Hydro-electric Authority introduced government to the potential of computing in 1960. 'Snocom', the authority's first computer, was built with the assistance of academics from the University of Sydney. It was used to perform the complex mathematical calculations required in the design and engineering of the Snowy scheme.[1]

Snocom was a transistor-based computer — one of the first of its kind in the world. Its magnetic drum memory held up to 2,048 words. It had the equivalent of 8 kilobytes of RAM.[2] It was essentially a bulky calculator. Yet it represented an important scientific advance. The Authority's computers (starting with Snocom) helped it construct the enormously complex scheme on time and, famously, under budget.

Modern computers are vastly more powerful than Snocom, and they are ubiquitous. Their capacity is turbocharged by networking, the internet and the cloud. Smart devices with user-friendly applications are a feature of daily life. Governments have taken to the new technology more slowly than some businesses, but computers and computerised processes have had profound effects on public administration. Public servants now use computerised information systems every day in their work.

The evolution of information technology and, more recently, the advent of artificial intelligence systems that 'learn' and adapt holds out the possibility of faster, cheaper, quicker and more accessible public services. That is promising, but administrative lawyers are yet to resolve all the potential obstacles to making these new decision-making processes accountable through Australia's system of administrative law.

Administrative lawyers have their work cut out, but the challenge goes further than merely ensuring accountability. The ultimate objective must be to promote good government. Policy-makers need to understand how automated processes can be accommodated within a framework of values concerning public administration. The task is not simply legal or technical. It requires a broader perspective on the way government is supposed to work, and — to some extent — what government is intended to do. That is an ambitious task. This article offers a modest contribution to the debate.

The article begins with a discussion of the concept of good government. The report of the Administrative Review Council (the ARC) titled *Automated Assistance in Administrative*

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1 G Philipson, 'The 1950s and 60s Were Busy Times for Building Home-grown Computers' (online, 13 February 2017) <https://ia.acs.org.au/article/2017/acs-heritage-project--chapter-9.html>. During the 1950s, before Snocom was developed, the Authority had used more primitive devices, including the SILLIAC system, that were developed by the University of Sydney and the forerunner of the CSIRO.

2 T Wright, '40 Years Later, the Snowy Mountains Scheme is Back in Vogue', *Sydney Morning Herald* (online, 16 March 2017) <https://www.smh.com.au/politics/federal/40-years-later-the-snowy-mountains-scheme-is-back-in-vogue-20170316-guzjis.html>. For the purposes of comparison, the Samsung Galaxy S20 mobile phone has up to 512GB of memory and 12GB of RAM.

Decision Making is an important reference point.[3] The report was published in 2004 — several lifetimes ago in cyber terms. Yet the insights in the report remain fresh because they are grounded on a clear conception of good government. The report identified five values as crucial elements of all good decision-making processes. The report also proposed a series of principles that should inform the design and implementation of automated processes. The principles were derived from the values.

I use the five values (and the related principles) identified by the ARC as a framework for discussing and evaluating a number of specific decision-making processes. In doing so, I consider some of the implications of automation — and where it can go wrong. The article concludes with a modest call to reinforce the central role of the Administrative Appeals Tribunal (AAT) in promoting good government in the Commonwealth's use of automated decision-making processes.

Good government

Section 51 of the *Constitution* provides that the Parliament has 'the power to make laws for the peace, order, and good government of the Commonwealth' with respect to a number of identified subjects. As a matter of constitutional law, the reference to 'peace, order, and good government' is not intended to create a limitation on the Parliament's legislative powers. There is no suggestion a court can evaluate a particular law to determine whether the law *actually* promotes the public interest according to some objective standard.[4] And yet the expression reflects an aspiration for government that embodies concepts of sound public administration.

The Australian conception of good government has been driven by forces particular to this country. Human rights legislation has shaped the jurisprudence in relation to the role of government in many other modern western democracies. Australia does not have entrenched human rights legislation. Of course, Australian courts and the Parliament have not been blind to developments overseas. The Commonwealth is a signatory to a range of treaties that impose human rights obligations. But our courts and the Parliament do not have the lodestar of a bill of rights to guide the development of rules regulating public administration. They have had to make their own way in developing a system of administrative law (including administrative law doctrines) that ensures sound public administration.[5]

At the same time, the Australian constitutional settlement has required lawmakers to think more deeply about alternatives to judicial review in circumstances where a strict separation of powers provides for a more constrained role for the courts. That reflection prompted a burst of reform in administrative law in the 1970s and 1980s that commenced with the establishment of the Kerr committee[6] and included the establishment of the Ombudsman,

3 Administrative Review Council, *Automated Assistance in Administrative Decision Making* (Report No 46, 2004).

4 *Union Steamship Company of Australia Pty Ltd v King* [1988] HCA 55 [16] (Mason CJ; Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

5 See eg Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43 *University of New South Wales Law Journal* 1, 2.

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

the AAT, the ARC and the Federal Court, and the passage of the *Administrative Decisions (Judicial Review) Act 1978* (Cth) (ADJR Act) and the *Freedom of Information Act 1982* (Cth). These innovations created rights (such as the right in the ADJR Act to be provided with reasons for a decision) that were not generally recognised in the common law. They also created new rights of review with more flexible and accessible remedies.

The AAT was arguably the most striking of these innovations. The AAT was conceived as a general merits review tribunal that would permit a more wide-ranging review of government decision-making. While the courts were generally confined to addressing the lawfulness of government action given the separation of powers in the *Constitution*, the AAT was intended to reconsider the merits of individual reviewable decisions.

From the outset, the AAT was conceived as a mechanism for achieving administrative justice for individuals. But it also has a larger, systemic role. As Sir Gerard Brennan explained, the AAT was established on a judicial model so that it would have the capacity to generate clear, well-reasoned and objective decisions that established norms. Those norms could then be applied to decision-makers in the agency concerned, and elsewhere in the bureaucracy.[7] In that sense, the AAT serves the cause of good government by promoting good decision-making across government. It does that by modelling good decision-making behaviour in the individual reviewable decisions that come before it.[8]

The AAT explicitly embraced its mission as a tool of good government from the time of its earliest decisions. In *Drake and Minister for Immigration and Ethnic Affairs (No 2)*,[9] for example, Brennan J wrote perceptively about the proper place of policy in administrative decision-making. The President articulated a vision of orderly, objective and well-informed decision-making that was carefully attentive to the rights of individuals and conscious of the need for consistency and economy in a modern bureaucracy.

While the AAT was arguably the most interesting of the reforms enacted during the period, the role of the ARC was also important. The ARC served as a repository of expertise about good government and sound public administration. Its statutory remit envisaged it monitoring and reporting on government decision-makers and making recommendations for improvement.

This brings me to the ARC's 2004 report on automated assistance in decision-making processes. In the covering letter to the Attorney-General which accompanied the report, the President of the ARC referred to the 'potential for cost savings, efficiencies and greater accuracy in decision-making' that suggested automated computer systems that assisted administrators 'will become increasingly important tools of government'.[10]

7 Sir Gerard Brennan, 'The AAT — Twenty Years Forward' (Speech, Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996). See also G Brennan, 'The Future of Public Law — The Australian Administrative Appeals Tribunal' (1979) 4 *Otago Law Review 286.*

8 See eg *RBPK and Innovation And Science Australia* [2018] AATA 404 [11] (Thomas J; DP McCabe); see also B McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-making' (2016) *AIAL Forum* 40, 45–6.

9 [1979] AATA 179.

10 The letter addressed to the Attorney-General which accompanied the report is dated 12 November 2004.

The report began with a discussion of the crucial elements of the administrative law system. The ARC identified five values that should be observed in the design and operation of all administrative decision-making processes. They are:

- lawfulness;
- fairness;
- rationality;
- openness or transparency; and
- efficiency.[11]

Those values were themselves informed by concepts of administrative justice which include the 'four basic requirements for just decision-making in a society governed by the rule of law' identified by French J (as he then was) in 2001. These requirements were lawfulness, fairness, rationality and intelligibility.[12] His Honour said those values were evident in the various grounds of judicial review.

Justice French argued the requirements of lawfulness and fairness were covered by the 'error of law' and 'procedural fairness' grounds of review. The requirement of rationality was addressed by the obligation to take account of relevant considerations and ignore irrelevant considerations. The requirement of intelligibility was addressed in the requirement (arising under the ADJR Act, at least) that the decision-maker give proper reasons for the decision.[13]

The values identified by the ARC overlapped with those derived from the values evident in the decisions of the courts as they conducted judicial review. The two sets of values are not exactly the same. The view from the bench is different from the perspective of the ARC given the constitutional constraints on the courts. Justice French recognised as much. He pointed out other values or factors might make an important contribution in securing the larger objective of administrative justice. He noted that education of administrators on the precepts of administrative justice was crucial[14] — although one might interpolate that sound public administration is more likely if administrators have been provided with *all* the training and education (along with the resources) they need to do their jobs. His Honour also referred to the importance of internal and external review mechanisms and the role of parliamentary scrutiny and the media.[15] He also acknowledged the pressures facing a modern bureaucracy which deals with an enormous workload. With 'the practical realities of administrative decision-making' in mind, his Honour acknowledged the importance of attributes like accessibility, affordability and timeliness when evaluating the success of a system of administrative justice.[16]

11 Administrative Review Council, above n 3, 3.
12 RS French, 'Judicial Review Rights' (2001) 28 *AIAL Forum* 28, 30.
13 Ibid 33.
14 Ibid 35.
15 Ibid.
16 Ibid 34.

The ARC's perspective is necessarily wider than that. It is not simply concerned to promote administrative justice, although justice is of central importance. The ARC is concerned with good government and sound public administration. The five values it identified in the report embody a rich trove of thought on the subject that is applicable to all decision-making processes, not just those that are wholly or partly automated.

Corralling the technology to focus the debate

We will return to the values proposed by the ARC below. But first we must engage with some of the details of the ARC's report — in particular, the way in which the report approached the technological and conceptual issues involved in automated decision-making processes. That is important because the ARC report developed a series of principles that were to be used to guide the development and implementation of automated processes. The design of those principles was inevitably informed by the state of technology (and what was foreseeable) at the time.

The ARC distinguished between information technology systems that *support* decision-makers as they make decisions (including data storage and file management systems; word processing technology; calculators; and what are now known as smart forms and intelligent systems that included prompts to ask questions, seek information or apply rules) and 'expert systems'. The report explained an expert system is a computer that is programmed using a set of rules which enables it to mimic (or establish a proxy for) the thought processes of human experts as it processes data.[17] A *legal* expert system was one that performed the role of a lawyer or other person with specific legal expertise.[18]

Most legal expert systems in contemplation at the time of the report were rule-based systems that assisted human decision-makers. They were programmed to follow an orderly process that reflected the legislative requirements. The expert system typically operated by proposing standard questions designed to elicit relevant information. The system might also include prompts on interpretation or policy issues to assist the decision-maker. The machine might also include links to explanatory material or suggest standard wording.

The report anticipated the power of modern apps and smart forms used in web portals. It pointed out expert systems in use at the time might increasingly work online. Importantly, the report also assumed some of these systems might draw conclusions without the intervention of a human decision-maker.[19]

The report acknowledged the potential for the development of expert systems which learned from data. Those systems isolate, assimilate and apply rules inferred from data points. This kind of expert system was not necessarily programmed with all the legislative rules: the systems were able to observe or infer the existence of the rules from the data, and learn from that experience. The ARC questioned whether these systems would be as useful as rule-based systems, and it doubted whether a 'neural network' or other form of artificial

17 Administrative Review Council, above n 3, 5.
18 Ibid.
19 Ibid 6.

intelligence could ever satisfy the requirement that decision-makers provide intelligible reasons for their decisions. But those systems might still support human decision-makers.[20]

The ARC correctly anticipated developments in artificial intelligence and machine-based learning that have revolutionised commerce. Modern tech firms like Google, Amazon and Facebook use sophisticated algorithms and large datasets in search of patterns that might reveal useful information about trends and consumer preferences. They use that data to target advertising and other services. Pizza delivery chains are able to predict deliveries (and accurately devise staffing rosters in local stores) weeks into the future by analysing data from past sales that is cross-referenced with data about television programming, sporting events and other variables that might not be taken into account by human observers.[21] In medicine, computerised processes play an increasingly important role in diagnosis. The technology is also useful in research: by quickly and rigorously sorting data, a computer can identify hitherto unseen connections between events or phenomena, predict events that were once thought to be random, or posit the existence of things that are yet to be discovered.

Those developments have had their analogue in the public sector. The Australian Taxation Office (ATO) is able to operate a vast self-assessment system which is kept in check by the ever-present threat of audit. The decision to audit is informed by sophisticated taxpayer profiles developed from vast amounts of data about the way taxpayers conduct their affairs. Services Australia, the entity that operates Centrelink, uses data analysis and data-matching processes to reduce the incidence of fraud and rorting. Data supplied to Centrelink can be verified against information supplied to other agencies. In each case, the computerised support system can prompt decisions (to commence an audit and potentially issue an amended assessment in tax matters, or to prompt a review and potentially raise a debt in social security matters) as well as provide information used in the decision-making process itself.

The distinction the ARC made between support and expert systems is becoming harder to maintain in the face of these technological developments. The evolution of ever more powerful computers and new ways to collect, store, process, analyse and share data has given administrators access to valuable tools. When combined with computerised techniques like decision trees that include prompts, templates and information from knowledge banks, 'support' systems are playing a larger, more direct role in many decision-making processes. That balance between automated processes and the humans that administer them might shift further as the humans are de-skilled. The ARC was aware of this risk: Principle 16 provided that officers using expert systems should continue to receive training so they could understand the relevant legislation and explain outcomes.[22] But it is unclear whether that is occurring. With machines undertaking more administrative work, the humans who administer the system are likely to become less engaged in the specifics of the decision-making process. They may be rendered incapable of explaining (let alone

20 Ibid 9.

21 J Davidson, 'AI Tells Domino's When You Will Want a Pizza with Uncanny Accuracy', *Australian Financial Review* (online, 31 August 2020) <http://www.afr.com/technology/ai-tells-domino-s-when-you-will-want-a-pizza-with-uncanny-accuracy-20200826-p55pl5?btis>.

22 Administrative Review Council, above n 3, 40–2.

second-guessing) the outcomes of the automated process as they become dependent, even if they retain the formal ability to override the process.[23]

The ARC's report must be read with all those caveats about technological developments in mind. Given all the change that has come to pass, it is likely to be more useful to focus on the values identified by the ARC. But the principles are still valuable. The principles were set out at the front of the report in a section titled 'Best practice principles for automated assistance in administrative decision-making'. I will refer to particular principles below as I discuss each of the five values and their application to particular decision-making processes.

Lawfulness

The use of an automated process in decision-making must be lawful. Where the automated process in question is clearly a support system that does not go to the heart of the decision-making, that is unlikely to be an issue — although the decision-maker must still ensure the system (such as it is) meets privacy and confidentiality rules.[24] More complicated issues arise where the automated process plays a more direct role in the decision so that the line becomes blurred between support system and decision-maker — or where the system itself becomes the de facto or de jure decision-maker.

Lawfulness might be an issue in two ways. The first relates to the conceptual question of whether it is legally possible for a computer to make a decision — and, if so, which ones? The second arises in relation to the operation of particular decision-making processes. Does the particular process apply the correct legal rules and do its job in a way that meets the standards imposed under administrative law?

Lawfulness in conception

To what extent can a computerised decision-making process be authorised formally to make a decision? As Perry J pointed out in one of a series of useful articles and addresses on this general topic:

> It cannot be assumed that a statutory authority vested in a senior public servant which extends by implication to a properly authorised officer, will also extend to an automated system; nor that authority to delegate to a human decision-maker will permit 'delegation' to an automated system. Authority to use such systems should be transparent and express.[25]

The ARC report in 2004 doubted whether it would be legally valid to delegate the formal decision-making power to a computer system. It pointed out both the ADJR Act and the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) assumed the decision-maker in

23 Ibid. Principle 17 dealt with the desirability of having officers available to step in if the automated process fails. While some organisations almost certainly retain that capacity, there is good reason for doubt whether the principle is universally observed in circumstances where automated decision-making processes have achieved such a level of penetration in many organisations.

24 Ibid 28, 30. Principle 8 provides: 'The people responsible for constructing an expert system must ensure that it is compatible with their agency's privacy obligations.'

25 M Perry, 'iDecide: Administrative Decision-making in the Digital World' (2017) 91 *Australian Law Journal* 29, 31.

each case was a person.[26] (In footnote 56, the report noted ss 5 and 6 of the ADJR Act and s 25 of the AAT Act 'make reference to "his or her" when discussing the person exercising the decision-making power', which was taken to indicate an expectation that the decision-maker would be human. The report also noted the relevant provisions of the *Acts Interpretation Act 1901* (Cth) referred to the power to delegate to a person holding, occupying or performing the duties of an office or position — the suggestion being that the person in question was a natural person.)

Section 6A of the *Social Security (Administration) Act 1999* (Cth) is an example of an authorising provision that deals with problem by using the device of a deeming provision. That device — at least notionally — leaves a natural person at the heart of the decision-making process. The section provides:

> **Secretary may arrange for use of computer programs to make decisions**
>
> (1) The Secretary may arrange for the use, under the Secretary's control, of computer programs for any purposes for which the Secretary may make decisions under the social security law.
>
> (2) A decision made by the operation of a computer program under an arrangement made under sub-section (1) *is taken to be a decision made by the Secretary.* [Emphasis added.]

Provisions like this one are becoming more common, but they still raise questions. Perry J pointed out in her extrajudicial writing:

> Nonetheless such deeming provisions require acceptance of highly artificial constructs of decision-making processes. More sophisticated approaches may need to be developed as these issues come to be litigated in the courts and these provisions fall to be considered.[27]

Taking up this theme, Bateman and others have referred to a decision-making paradigm that contemplates the exercise of *human* judgment. Bateman, quoting Professor Lon Fuller, points to 'human cognition' as a key element in any system of administrative justice precisely because it 'stopped law from producing gross injustice by the ridged [sic] application of unyielding logical stipulates'.[28] To put the argument differently, a decision made by a human (assuming, of course, the human is not a psychopath) is more likely to take proper account of the human consequences of that decision, even if subliminally. At any rate, Bateman and others argue the administrative law paradigm is constructed on the assumption a natural person will *at some point* take responsibility for the decision that has been made and be held accountable through the usual administrative law remedies.[29]

Bateman acknowledges it is possible to treat inanimate objects (or things that have no physical existence at all, like a modern company) as legal actors with capacity. Those legal entities can incur obligations and be held responsible for their own actions or for actions taken in their names. In those circumstances, Bateman concedes there is nothing to prevent the Parliament from conferring legal personality on an algorithmic system. But he goes on to argue:

26 Administrative Review Council, above n 3, 19.
27 Perry, above n 25, 31.
28 W Bateman, 'Algorithmic Decision-making and Legality: Public Law Dimensions' (2020) 94 *Australian Law Journal* 520, 530.
29 Ibid.

> Orthodox principles of public law would, by default, limit attempts to sever the exercise of statutory powers from an immediate exercise of *human* judgment.[30]

Bateman relies on the High Court's decision in *Graham v Minister for Immigration and Border Protection*[31] (*Graham*) in this connection. In *Graham*, the majority (Kiefel CJ and Bell, Gageler, Keane, Nettle and Gordon JJ) observed:

> all power of government is limited by law. Within the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies.[32]

Those remedies — the prerogative writs — are referred to in s 75(v) of the *Constitution*. That subsection of the *Constitution* refers to the original jurisdiction of the High Court in relation to writs 'sought against *an officer* of the Commonwealth' (emphasis added). The remedies are well adapted to enforcing the administrative law obligations of *individual* decision-makers. It is less clear how well the remedies are adapted to dealing with a computer program that does not (a) engage in an identifiable conventional reasoning process; or (b) provide intelligible reasons for its decision which explain what the automated decision-maker regarded as relevant and determinative. There must also be *some* doubt over whether deeming that decision to be the decision of a natural person — such as the Secretary or other designated officer — addresses the challenge when the deemed decision-maker has not *in fact* turned his or her mind to the question at hand.

Questions over the efficacy of non-human decision-making have increased after the decision of the Full Federal Court in *Pintarich v Deputy Commissioner of Taxation*[33] (*Pintarich*). In *Pintarich*, a taxpayer had negotiated with an authorised officer of the ATO over a tax debt that included primary tax liability and an amount in respect of the general interest charge (GIC) which continued to accrue while the taxpayer's debt remained unpaid. In the course of negotiations, the officer agreed to accept a lump sum from the taxpayer in settlement of the debt. It was apparent the taxpayer understood the deal to include GIC, whereas the officer's notes from the meeting confirmed the question of GIC had not been resolved. The officer intended that GIC would be considered separately. The officer repaired to his office after the negotiations and entered the settlement information into the relevant system, which prepared a form letter recording the terms of the deal. The letter dated 8 December 2014 included the following sentence:

> This payout figure is inclusive of an estimated general interest charge (GIC) amount calculated to 30 January.

The officer did not realise the sentence was included in the letter. It was in the template on the computerised system. The trial judge found (and the Full Court accepted) the officer had not reached a view about remission of the GIC when the letter was despatched.

30 Ibid 529–30 (emphasis added).
31 (2017) 263 CLR 1.
32 Ibid [39].
33 (2018) 262 FCR 41.

The taxpayer paid the lump sum amount in response to the letter. His bank loaned him money to make the payment on the strength of assurances the moneys would be used in full and final settlement of the tax debt. The taxpayer was understandably surprised when he subsequently learned the Deputy Commissioner did not accept the settlement included GIC. The Deputy Commissioner argued the letter containing that suggestion was issued in error. Mr Pintarich continued to negotiate about remission of the GIC under protest. In a letter dated 13 May 2016, the Deputy Commissioner purported to make a decision allowing a partial remission of the GIC. That decision was less favourable to the taxpayer than the deal he thought he had struck. Mr Pintarich sought judicial review of the remittal decision. He argued the Deputy Commissioner's decision of 13 May 2016 was ultra vires because the discretion had already been exercised on 8 December 2014.

The case was not, strictly speaking, concerned with a decision made by (or with the assistance of) a computer. The purported decision of 8 December 2014 was the product of a clerical error that resulted in a letter which did not accurately describe the terms of the settlement that had been reached following the negotiations between the taxpayer and the authorised officer, who was a natural person. A computerised system was certainly used by the decision-maker to document and communicate the decision, but there was no suggestion that any part of the decision-making process itself was delegated to, or undertaken by, an expert system. The issue before the Court was whether the *authorised officer* had made a decision on 8 December 2014 to exercise the discretion in s 8AAG of the *Taxation Administration Act 1953* (Cth) to remit the GIC.

In making its decision, the majority relied on the reasoning of Finn J in *Semunigus v Minister for Immigration and Multicultural Affairs*[34] (*Semunigus*). In that case, a member of the Refugee Review Tribunal had prepared written reasons for a decision. The member provided those reasons with the decision to registry staff for publication to the applicant. After the registry staff received the decision from the member but before it was published, the applicant lodged additional submissions with the Tribunal. The decision as written was subsequently published without reference to the new submissions. A question arose as to whether the Tribunal was already *functus officio* when it received the submissions (and therefore relieved from any obligation to take them into account). Finn J explained:

> *For present purposes* I am prepared to hold that the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion — as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final.[35]

The majority in *Pintarich* accepted that the statement of Finn J 'capture[d] the elements that are generally involved in the making of a decision'.[36] The majority also noted the trial judge's uncontested finding of fact that the authorised officer had not turned his mind to the question at issue under s 8AAG or reached a conclusion. In those circumstances, the majority concluded, the decision-making process in relation to the remittal of GIC had not been completed on 8 December 2014 notwithstanding the representations contained

34 [1999] FCA 422.
35 Ibid [19] (emphasis added).
36 (2018) 262 FCR 41 [143].

in the letter of the same date because there had been no mental engagement with the statutory question.[37]

The references to mental engagement by the decision-maker in the decision-making process have fed into the debate over automated decision-making. The potential significance of *Pintarich* in this regard was apparent in the reasoning of Kerr J in dissent. Justice Kerr, a former president of the AAT, warned against adopting too narrow a view of what constitutes a decision. His Honour explained:

> while I agree that Finn J's statement still represents what is usually involved in a (valid) decision, I would respectfully observe that that may be rapidly becoming an artefact of the past.
>
> The hitherto expectation that a 'decision' will usually involve human mental processes of reaching a conclusion prior to an outcome being expressed by an overt act is being challenged by automated 'intelligent' decision making systems that rely on algorithms to process applications and make decisions.
>
> What was once inconceivable, that a complex decision might be made without any requirement of human mental processes is, for better or worse, rapidly becoming unexceptional. Automated systems are already routinely relied upon by a number of Australian government departments for bulk decision-making. Only on administrative (internal or external) and judicial review are humans involved.[38]

In the course of his reasons, his Honour referred to the decision of the Western Australian Court of Appeal in *Polo Enterprises Pty Ltd v Shire of Broome*[39] (*Polo*). In that case, Martin CJ (with whom Newnes and Murphy JJA agreed) discussed the decision in *Semunigus* and pointed out the issue in *Polo* was different to a question over whether a decision-maker was *functus officio*. That difference was significant in the circumstances. Martin CJ observed:

> it would not be appropriate to construe the passage [ie the passage in the judgment of Finn J in *Semunigus* containing the statement of what was generally required for a valid decision] as asserting that in every case and in every context there cannot be a 'decision' unless there has been a process of mental engagement by the decision-maker.[40]

The majority in *Pintarich* also referred to the reasoning in *Polo* which suggested the statement about decision-making in *Semunigus* should not be applied reflexively — as well they might, given the statement of Finn J opened with the qualifier 'For present purposes'. Justices Moshinsky and Derington noted:

> We have treated the statement of Finn J [in *Semunigus*] as a general statement of what is involved in the making of a decision, and we accept that it may not be applicable in relation to all issues.[41]

That qualification suggests the reasoning in *Pintarich* must be read carefully. The decision under review in that case involved the exercise of a discretion. Statutory provisions presumably invest a decision-maker with a genuine discretion in circumstances where it is too hard to anticipate and devise a rule that is capable of precise and consistent application. The discretion is available to provide a measure of flexibility to avoid arbitrary outcomes in particular cases. The Parliament (and ultimately the community) entrusts the final outcome

37 Ibid [153].
38 Ibid [45]–[47].
39 [2015] WASCA 201.
40 Ibid [78].
41 (2018) 262 FCR 41 [148].

of the process to the decision-maker's good judgment. Judgment is a concept ordinarily associated with individuals, not machines — even intelligent ones. It is easy to see why mental engagement might be regarded as an essential feature of most genuinely discretionary decisions. But not all administrative decisions involve the exercise of discretion, and not all decisions involving the exercise of discretion require fine judgment. Some discretionary provisions have such tightly drawn criteria that they do not involve the exercise of genuine judgment. The reasoning in *Pintarich* and *Semunigus* may be distinguishable in those cases.

The distinction between discretionary and non-discretionary decisions was anticipated by the ARC in its report in 2004. The report pointed out decision-makers must exercise discretionary powers personally and may not be fettered in doing so.[42] The ARC's report made clear that some decisions were best left to humans — most obviously those decisions which involved the exercise of a genuine discretion. To that end, Principle 1 in the ARC's 2004 report stated:

> Expert systems that make a decision — as opposed to helping a decision-maker make a decision — would generally be suitable only for decisions involving non-discretionary elements.[43]

Principle 2 was even more explicit. It provided, 'Expert systems should not automate the exercise of discretion'.[44] Principles 3 and 4 went on to explain how expert systems might be used to *assist* the (human) decision-maker to make discretionary decisions but emphasised the discretion must not be fettered or directed in such a way that it was rendered nugatory.

Where does that leave us? At the level of theory, there may yet be questions over the lawfulness of automated decision-making, but those questions are more likely to arise in relation to discretionary decision-making. For the rest, we should not lose sight of the reality of decision-making. Administrative decisions which involve the exercise of statutory powers ultimately require the decision-maker to answer a question derived from a statute. That question may be hard to divine, but it will often be straightforward: if X (and assuming X is not in doubt), then Y. That style of decision-making is well suited to automated processes. In many such processes, there is unlikely to be any doubt about the reasons why a decision was made. There will be no difficulty in obtaining redress under established rules if an error does occur. Given that reality, it would be a pity to deprive the community of the benefits of automated decision-making in simple, high-volume decision-making. In these straightforward cases, accuracy, speed and efficiency count for a great deal.

There may yet be a technical fix to residual concerns over the conceptual and paradigmatic challenges posed by automated decision-making. Those engaged in a field of research and study known as 'ethical information technology' aim to adapt automated decision-making processes so they can be made accountable according to established administrative law principles. The ethical IT movement aims to address the so-called 'Black Box' problem

42 Administrative Review Council, above n 3, 12, 15–16.
43 Ibid viii.
44 Ibid.

in which the automated decision-making process is opaque and poorly understood.[45] Proponents of ethical IT call for automated decision-making processes to be programmed with the ability to provide an intelligible statement of reasons for the decisions they make in their own right, or on behalf of a deemed decision-maker.[46] Such a statement of reasons would be capable of identifying the relevant facts and considerations that were taken into account. That facility would make correcting errors easier — at least as easy as it would be in the case of a human decision-maker. With human decision-makers, it might be hard to tell if the statement of reasons accurately reflects the reasoning of the individual. (Computers are not disingenuous, after all.) These developments would also assist more complex decision-making processes gradually to conform to the administrative law values discussed in the ARC's report.

The caution evident in the ARC's report in relation to discretionary decision-making was prescient. Difficult questions remain over the extent to which it is possible (or even desirable) to automate any decision-making process involving the exercise of discretion. Other, more routine decision-making processes may present fewer legal issues — and to the extent they do raise questions, those questions may yet be amenable to technological fixes that bring them into conformity with the law.

Lawfulness in operation

It is incumbent on any decision-maker to get the law right and to apply it in accordance with established principles of administrative law. That is easier said than done.

Almost every administrative decision involves the decision-maker in answering a question derived from a rule set out in a statute. The trick lies in the precise formulation of the question in a given case. Every judge and tribunal member will be (sometimes painfully) aware that the hardest part of a case may lie in formulating the question correctly. Once the question is accurately formulated, the answer is often obvious. But the quintessentially *intellectual* process involved in framing the question is much harder than it might appear to outsiders or to software programmers and coders — or to some of the managers in the upper reaches of the bureaucracy who commission automated systems. Those managers do not necessarily have hands-on experience of the complexity of a particular decision-making process or the real-life circumstances that may be encountered.

Even in those cases where the correct formulation of the question is obvious or settled, it may be fiendishly difficult accurately to translate the rule into programming language that is capable of predictable application in all circumstances. Human decision-makers, for all their faults, can reason from a rule to deal with new, unusual or nuanced circumstances. (The common law has successfully operated on that model for 1,000 years.) Rule-based automated processes may end up being confined to the most routine decisions because

45 See, for example, M Kearns and A Roth, 'Ethical Algorithm Design Should Guide Technology Regulation', Brookings Institution (online, 13 January 2020) <https://www.brookings.edu/research/ethical-algorithm-design-should-guide-technology-regulation/;>; see also Information Commissioner's Office, UK, and The Alan Turing Institute, *Explaining Decisions Made with AI* (online, 20 May 2020) <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/explaining-decisions-made-with-ai/>.

46 See, for example, Yee-Fui Ng et al, above n 5, 14.

rule-based systems are, by their nature, good at making binary choices between clearly recognised data points.

The likelihood of legal error increases exponentially when the decision-making process involves more steps, or more complicated enquiries. The potential for error — and the cost and inconvenience that results — has been amply demonstrated by the Robodebt initiative.

The Online Compliance Initiative, or 'Robodebt', was an initiative of the Department of Human Services. Robodebt was launched in 2016. It was intended to identify instances where individual recipients of Centrelink benefits were overpaid because they failed accurately to declare their income. In the past, officers of the department responded to tip-offs and computer-generated profiles by undertaking a comparison with employer-reported data held by the ATO. The process was slow and resource-intensive, and the department suspected a good deal of overpayments were not detected. Robodebt was intended to automate the data-matching *and* decision-making processes. The computer took over the task of comparing data provided to the department with the employer-generated data held by the ATO. Where anomalies were detected, the system was programmed to generate a letter asking the individual to update the information they provided to Centrelink. The computer then automatically adjusted the payments which the individual received in response to the data. Where necessary, the system also generated a letter informing the individual that a debt had been raised, which led, in the ordinary course, to recovery processes. The system was an immediate success in that it identified many individuals who had received overpayments — certainly many more individuals than would be identified using the processes in place before Robodebt was launched.

The legal authority for the decision-making process was found in s 6A of the *Social Security Act 1991* (Cth). That section deemed the decisions to raise debts to be decisions of the Secretary. That authorisation suggested compliance with Principle 5 in the ARC report, which provided:

> The use of an expert system to make a decision — as opposed to helping a decision-maker to make a decision — should be legislatively sanctioned to ensure that it is compatible with the legal principles of authorised decision-making. [47]

Yet the lawfulness of the scheme remained an issue. A report from the Ombudsman confirmed there were problems with the design and implementation of the scheme.[48] One of the central difficulties arose out of the design of the algorithm, the set of instructions that drove the program's data-matching process. It used the yearly income figures from the ATO and divided them into equal fortnightly instalments for the purposes of calculating and comparing the individual's income for welfare purposes. But that assumption does not hold

47 Administrative Review Council, above n 3, viii.

48 Acting Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report No 02/2017, April 2017) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

good for casual workers whose income fluctuated over the year but who were required to report fortnightly.[49]

At least in that respect, the computer got the law wrong and asked the wrong question. The process fell short of Principles 7 and 10 in the ARC report. Principle 7 provided:

> The construction of an expert system must comply with the administrative law standards if decisions made in accordance with the rule base are to be lawful.
>
> Decisions made by or with the assistance of expert systems must comply with administrative law standards in order to be legally valid.[50]

Principle 10 provided:

> Expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.[51]

The Robodebt initiative was shut down earlier this year. The government has reportedly agreed to refund $721 million collected from around 370,000 Centrelink customers.[52] This costly exercise serves as a reminder of the importance of ensuring that, at a minimum, automated decision-making processes are lawful in operation.

Fairness

All decision-making processes should be fair. Fairness in this context has two components. The process must be procedurally fair to the subject; and it should (at least up to a point) be substantively fair.

There were a number of problems with the operation of the Robodebt project that raised procedural fairness issues. The Ombudsman pointed to problems with the way in which information was collected from individuals. There was a high error rate in the data being supplied because individuals may have been unclear on what was required.[53] The agency failed to comply with Principle 21 in the ARC report, which provided:

> Agencies should take steps to ensure that the data collected and used by expert systems for administrative decision making remain accurate and complete.[54]

Those issues with the data were compounded when the decision-making process acted on the wrong information. The Ombudsman pointed out the burden of proof may have shifted unfairly onto individuals once they were identified for administrative action as part

49 For a useful discussion of the Robodebt program, see D Hogan-Doran, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-making' (2017) 13 *The Judicial Review* 345, 358ff.
50 Administrative Review Council, above n 3, viii.
51 Ibid ix.
52 J Hayne and M Doran, 'Government to Pay Back $721 Million as it Scraps Robodebt for Centrelink Welfare Recipients', *ABC Online*, 29 May 2020 <https://www.abc.net.au/news/2020-05-29/federal-government-refund-robodebt-scheme-repay-debts/12299410>.
53 Acting Commonwealth Ombudsman, above n 48, 23.
54 Administrative Review Council, above n 3, x.

of the program.[55] Many vulnerable individuals were forced to undertake time-consuming and stressful appeal processes to correct the problem. Worryingly, a large number of disempowered individuals may have just given up and accepted the computer's erroneous decision.

There is another dimension to the requirement of fairness that has, to some extent, been overlooked in the furore over Robodebt. While the Robodebt project had an unacceptably high rate of error, the process did identify a large number of individuals who received overpayments as a consequence of under-reporting their income. They enjoyed the benefit of moneys they were not entitled to receive. Many of these individuals might have escaped notice had the agency persisted with its resource-intensive and time-consuming manual comparison and decision-making processes. Those processes were plainly inefficient. In the absence of Robodebt, at least some recipients of benefits would have continued to receive moneys to which they were not entitled. That is not fair to those who accurately account for their income. It may be that a properly designed automated data-matching and decision-making process would reduce overpayments and fraud by enabling the agency to undertake compliance investigations more thoroughly, more quickly and more often.

The decision-making process involved in Robodebt did not meet standards of fairness, but it must be acknowledged there are concerns over the fairness of the slow and inevitably arbitrary process it was intended to replace. There is no reason in principle why data-matching processes should not be extensively automated — and, to a significant extent, they are. Where the data-matching process identifies a problem, there may be a role for an automated process in calling the beneficiary to account. But the process must be properly designed with the law *and* fairness concerns in mind.

Rationality

A good decision-maker takes into account relevant and probative evidence and ignores irrelevant considerations in the course of reaching a reasoned and logical decision about how the law should be applied in a particular case. The requirement of rationality also contemplates striving for the holy grail of administrative decision-making: objectivity.

On the face of it, automated decision-making processes should excel when measured against this value. A rule-based expert system should be a model of rationality *assuming it is programmed correctly*. It should also be completely objective in the sense that it will not be swayed by human bias or emotion.

The practical reality is more complicated. We have already observed in the Robodebt case what can go wrong when the program is incorrectly programmed. The decisions made in that case were not, strictly speaking, irrational: there is no doubt the automated process was rigorously logical, as it applied the (perhaps misstated) rules to the (misunderstood) data it was instructed to interrogate. Yet that is unlikely to be comforting to the individual on the wrong end of the decision. The fact the wrong rules were rigorously applied to the wrong data lends the whole process a Kafka-esque quality.

55 Ibid 23.

If Robodebt involved unintended consequences, a case involving the *Business Names Registration Act 2011* (Cth) (Registration Act) can help illuminate the problems with intended and rational consequences that nonetheless bemuse or irritate the public. The Registration Act says individuals must register the business name they intend to use in carrying on a business. The Registration Act establishes the modern incarnation of a registration process that was formerly carried out manually by clerks in the office of the Registrar of Business Names or equivalent in each state and territory.

The computerised decision-making process that replaced the clerks of old is authorised under s 66 of the Registration Act. That section uses essentially the same language as that employed in s 6A of the *Social Security (Administration) Act 1999* (Cth) referred to earlier. In other words, the statute deems the determination reached by the automated decision-making process to be that of the regulator, the Australian Securities and Investments Commission (ASIC).

The registration process starts when an application is lodged using the appropriate 'smart' form on a website. The applicant must provide an Australian Business Number and answer a number of questions. The applicant must also enter the precise name it wishes to register. Section 24 of the Registration Act says ASIC must register the business name if the name is available and the other requirements are satisfied.

It follows that the question of whether a business name should be registered is essentially binary in nature. The name is either available to the applicant or it is not. There is no discretion involved in the decision. The decision-making process does not *appear* to require the decision-maker to evaluate or weigh complex facts or arguments.

A string of cases considered by the AAT suggest the decision in question is more complicated than it first appears. The problem arises because the register must be precise in its recording of existing business names to facilitate the computerised decision-making process. What of the situation where a business name is similar to — but not precisely the same as — an existing name? That is a challenge contemplated by the statute. Section 16 of the Registration Act sets out the objects of the legislation, and s 16(3) specifically refers to the purpose of 'avoid[ing] confusion by ensuring that business names that are identical or nearly identical are not registered'. That was the problem in *Smith and Australian Securities and Investments Commission and Amee Donohoe trading as Central Coast Surf Academy*[56] (*Smith*). The proprietor of the existing business name 'Central Coast Surf School' was upset at a likely rival's attempt to register the name 'Central Coast Surf Academy'. The owner of the existing name objected to the application on the basis that 'Central Coast Surf Academy' was identical, or nearly identical, to the existing name.

It is easy to see why the owner of the existing name protested. There are many cases where businesses have been found to have engaged in misleading or deceptive conduct after using business names that are similar to a commercial rival or which might suggest an association that did not exist. The applicant in *Smith* argued it was common sense that the name 'Central Coast Surf *Academy*' should not be available for registration under s 25.

56 [2014] AATA 192 [1] (SM McCabe).

The words 'identical' and 'nearly identical' were defined in a ministerial determination. Section 6 of the *Business Names Registration (Availability of Names) Determination 2012* (the Determination) explained:

> When comparing a business name with another name (other than a company name) to determine whether the names are identical or nearly identical, a word or expression in an item in Schedule 1 is to be taken to be the same as each other word or expression in the item.

ASIC insisted — and the AAT ultimately accepted — that the particular words in Schedule 1 were a precise and exhaustive list of what might be regarded as identical or nearly identical. The names and words on the list were not examples from which the decision-maker could extrapolate or analogise. As I explained in my reasons:

> It seems one of the motivations for constructing the law in this way is to make it easier to automate the process of applying for a business name. Computers do not do well with examples: while they work more quickly (and presumably more cheaply) than the registry clerks of fond memory, they do not yet have the capacity to analogise from a list of examples. They prefer clear instructions capable of certain application. Computers don't 'do' nuance, and they are not open to persuasion.[57]

The list of names contained in the schedule was, at least at the time, a forest of single instances. There was a list of names that might be used by dance instructors which were taken to be identical or nearly identical to each other, including 'academy of dance, dance academy, dance centre, dance studio, school of dance'. But the list in the schedule did not refer to an equivalent form of words when used by surfing instructors. In those circumstances, the expressions 'Central Coast Surf *School*' and 'Central Coast Surf *Academy*' were not identical or nearly identical to each other.

I acknowledged in my reasons in *Smith* that the decision-making process operated exactly as the legislation intended.[58] Yet, while the outcome was correct and rational in the sense it proceeded from fact to rule to conclusion in a straightforward way, the applicant's experience of the process was hardly preferable if one is concerned about good government or public confidence in the rationality and wisdom of administrative decision-making.

Having said that, the decision in *Smith* may also be the exception that proves a rule. The case was decided during the relatively early stages of the system's operation. The minister subsequently issued the *Business Names Registration (Availability of Names) Determination 2015*, which says names including the words 'institute, academy, school, college' should be treated as nearly identical if the only relevant difference between the names is one of those words. The schedule includes many other examples of common substitutes that are not linked to specific occupations. The outcome in *Smith* would likely be different under those revised rules. It follows the shortcomings of the automated decision-making process in that case were easily fixed.

I mentioned previously that automated decision-making processes should be more objective than decisions made manually. Objectivity should be less of an issue where the rule being applied is clearly drawn and the facts are easily ascertained. But the decision in *Smith*

57 Ibid [14].
58 Ibid [13].

demonstrates how objectivity (or at least the perception of objectivity) might be undermined in surprising ways. In *Smith*, ASIC pointed out that surf instructors or other businesses could lobby the minister (as dance instructors may have done) to have variations of their business names included on the list in the schedule. The need to do so evaporated once the Determination was changed in 2015, but the potential for special pleading is a worry.

The risk of bias, inconsistency and arbitrariness — the antithesis of rationality — is greater where the decision-making process in question requires the decision-maker to evaluate more complex facts or form a state of mind. A good example of such a process can be found in the provisions of the *Social Security Act 1991* (Cth) which require the decision-maker to identify whether an individual is a 'member of a couple'. Members of a couple may be paid social security benefits at a lower rate than individuals who do not meet the criteria set out in s 4(3) of the Act. The legislation assumes members of a couple require less generous assistance than single persons because couples have the opportunity to pool their resources. The policy objective which underlies the provision is clear and laudable. Social security benefits should be targeted and tailored to some extent according to need. That tailoring comes at a cost. To target and tailor, more information is required, and — particularly given the subtlety and variety of human relationships — more complex and nuanced distinctions may be necessary.

The legislation adopts a fudge in its definition of the enormously fluid concept of 'a couple'. Rather than attempting an exhaustive definition,[59] s 4(3) says a decision-maker must have regard to all the circumstances of a relationship between two people to determine whether they are members of a couple. In making that assessment, the test requires the decision-maker to consider a number of indicia which are thought to be characteristic of these relationships.

The definition, such as it is, demands an assessment that is as complex as it is subtle. That is probably inevitable given the richness and diversity of human relationships, but that truism does rather point to the practical difficulty of delivering on the policy objectives of the legislation. Any casual reader of decisions in the AAT on the topic will see that reasonable people may disagree on whether a particular relationship satisfies the definition. There is a real risk of subjectivity, bias and idiosyncrasy in decision-making if this sort of assessment is undertaken manually. But how would a rule-based automated decision-making process apply the criteria systematically without creating the risk of arbitrariness given the very subjectivity of some of the observations required?

The decision required in the 'member of a couple' case is not discretionary, but it does require a careful evaluation of facts before reaching a binary conclusion that is freighted with meaning and values. A rule-based automated decision is not likely to be especially useful in that endeavour beyond helping a decision-maker to assemble appropriate data and generating prompts to ask questions and provide commentary.

59 One is reminded of the words of Potter Stewart J in *Jacobeliss v Ohio* 378 US 184 (1964) in the United States Supreme Court. In that case, his Honour declined to exhaustively define the word 'obscenity' but pointed out: 'I know it when I see it': 197.

Might a more advanced system powered by artificial intelligence offer a solution to these more complex cases? The ARC was sceptical of systems that derived the rules from observed data, but the principal objection appeared to lie in technical concerns about how the decision-making process would be held accountable. I shall discuss that issue below, but for now I want to focus on the possibility of more objective decision-making on the basis of vast datasets using systems that can learn and adapt by observation. If the automated process was provided with enough information about couples, might it more reliably identify couples when they apply for benefits?

It turns out systems like this may yet incorporate biases inherent in the data, even if they are not themselves prone to bias. The data may be subject to distortions that are difficult to detect and correct. For example, same-sex couples were not regarded as being in marriage-like relationships under the social security legislation until 2009. It follows there is less historical data about relationships of this kind. Even now, there is likely to be under-reporting of these relationships in some sections of the community. Some couples are reluctant to identify themselves as such. They may not even think of themselves in those terms. The consequences for the integrity of the data are unclear. That inevitably calls into question the reliability of decision-making based on that data.

It is entirely possible that automated processes might assist decision-makers to identify and analyse data more conveniently and objectively. To the extent those processes do so, they promote rationality by ensuring relevant information is taken is brought into consideration. But it is important to test the assumption that more information is inevitably better in decision-making. The quality of the data and the integrity of the datasets should never be taken as a given.

Openness or transparency

A decision-making process is effectively unaccountable if the decision-maker's reasoning is not apparent. Individual decision-makers can generate reasons which explain their reasoning, although there is always the danger of artifice or misstatement. The problem is more complicated in some automated decision-making processes.

In straightforward binary decisions like registering a business name, the reasoning process is rarely in doubt. The computer is programmed to apply a rule — in that case, the rule laid down in the Determination. If the computer rejects the application to register a particular name, the reasons for that decision should be perfectly clear. More complicated issues arise where the decision is made by a human with substantial input from a support system which the human does not understand. That may occur, for example, where an agency calculates the quantum of a debt using an obscure method that is not understood by the decision-maker responsible for making the decision to recover or waive the debt. Any statement of reasons provided by the human decision-maker in those circumstances will be incomplete.

Even more difficult issues arise in relation a computerised decision-making process involving the application of artificial intelligence. As the ARC report pointed out, the outcome of such a process is dictated by the computer's application of a rule derived by data. But the operation

of the algorithm may not lend itself to an intelligible explanation because it does not engage in a recognisable reasoning process. The challenge is made more difficult by the fact the algorithm might be regarded as valuable intellectual property by the software developers. The developers may insist on the algorithm being kept confidential.

I have already mentioned that the so-called 'Black Box' problem might be addressed through 'ethical IT' initiatives. This field of research is developing innovations like software that creates virtual windows into the automated decision-making process. The software enables the computer to provide an explanation for what it did at each important point in the decision-making process. Further thought will need to be given to whether software developers should be able to restrict access to their algorithms and other key features of their products. It may be costly to require governments to rely on open-source software or pay for one-off products so they can be exposed to scrutiny.

Efficiency

Manual decision-making processes can be costly. They can be slow and prone to error. The processes can also be expensive for users who must line up in queues and wait for outcomes. Automated processes can often be accessed remotely, and at any time of the day or night. Some of the processes can provide immediate responses. Other processes that can quickly analyse vast datasets offer the promise of better targeted, more responsive and better informed decision-making. Data-matching programs can reduce fraud and waste.

The automated business name registration process established under the Registration Act was undoubtedly more efficient than the manual processes it replaced. With commerce occurring on a national scale, the old state-based systems were no longer viable. A central register was required 'to remove the inconvenience caused by the registration of business names under the law of more than one jurisdiction within Australia'.[60] Registry clerks were no longer required under the new arrangements, which presumably led to budgetary savings. Applicants might also have benefited from using a process that was quick and simple to use. Yet an applicant that is concerned about a business name being nearly identical may have less protection than the process involving the business name clerks. In the past, an applicant could negotiate with a business clerk over a particular name if there were concerns it might be similar. While that rough-and-ready process was hardly foolproof, it did offer some protection for the intellectual property in a business name. That meant there was less need for small businesses to resort to more expensive legal processes like trademarks or claims for misleading or deceptive conduct.

Efficiency appears to be a given in circumstances where armies of public servants are relieved of the obligation to make manual decisions. But the efficiency gains might not be as great as they first appear. As an agency's potential to process information increases, there may be a temptation to ask for ever *more* information — on the assumption that more and better data produces more accurate decisions. As the power of the system increases, the ambitions of those who use the data can be expected to grow. The net effect is that individuals are required to provide ever more data — and surrender ever more of their

60 *Business Names Registration Act 2011* (Cth) s 16(1)(b).

privacy. While that might not be costly from the viewpoint of the decision-maker, the costs to the citizen and the community might be high.

It follows that increased capability might not yield the net efficiency gains that are promised. Budgetary savings might be dissipated by mission creep within the agency as it moves to exploit the increased capability — which potentially increases the regulatory burden on members of the community.

Claims that particular decision-making processes promote efficiency must be scrutinised carefully. The efficiencies may be achieved by simply shifting costs. The efficiencies may also be illusory. Some automated processes are expensive boondoggles that deliver none of the promised gains. There is also a real danger that agencies expend large amounts on poorly designed automated processes without making proper allowance for the costs in the event of failure. Those costs might be visited on vulnerable members of the community, as in the Robodebt case, where individuals were left to face stressful and time-consuming review processes. More research is required into the direct and indirect costs to the individual of using these systems and accessing review processes when they fail.

A way ahead?

It is important to understand how decisions made using automated processes differ from manual decision-making — but it is also important to see the ways in which they are the same. The values the ARC identified in its 2004 report should inform every decision-making process. It is therefore important to reflect on how decision-making processes that are wholly or partly automated might be accommodated by existing administrative law mechanisms of accountability and review.

The ARC referred to the importance of ensuring that automated decision-making processes conform to the precepts of administrative law. The report pointed out decisions should, at a minimum, be reviewable against the grounds identified in s 5 of the ADJR Act. But it also referred to the potential for merits review of administrative decisions made by expert systems.[61]

The decision-making processes in each agency tends to be carried on separately. Most agencies use computer systems that have been adapted to meet the needs of that organisation. Computers in some agencies are able to interact with computerised systems in other agencies subject to certain protocols, including privacy rules. The interaction between the systems operated by the Department of Human Services and the ATO is a good example of this process. While there are some common standards (especially technical standards) that apply across the government, the decision-making processes are typically shaped by the enactment which authorises them.

Given that diversity, the AAT plays an important unifying role in Australian public administration. The AAT reviews decisions made under more than 450 enactments. In each of those cases, the AAT forms part of the ‘continuum of administrative decision-making’ carried on by the executive government through the agency in question.

61 Administrative Review Council, above n 3, 23–7.

From its central vantage point, the AAT exerts a moderating influence on each decision-maker. That independent moderating influence is likely to be particularly important where the decision-making process within the agency is wholly or partly automated. The AAT can provide the all-important human control that provides direction and correction for machine learning processes. It can also provide a repository of decision-making expertise as an antidote to the de-skilling that may occur in some agencies as automated decision-making processes become more common.

To play its role effectively, the AAT will need to continue conducting its own decision-making processes manually. The ARC anticipated as much in its report. Principle 23 provided:

> External reviews of administrative decisions should be done manually, in accordance with the procedures and practices of the particular tribunal or court conducting the review. [62]

Technology will play a part in the AAT's operations, of course. There is a role for smart forms and other online tools to assist users to access the AAT's services, and modern technology (including hearings conducted in person and online using documents in digital form, and modern case management systems) will be a feature. But the essence of the model envisaged for the AAT by Sir Gerard Brennan — of a relatively small organisation in which experienced decision-makers used court-like processes and forensic tools to conduct rigorous reviews that serve as a model — is more relevant than ever in a world of automated decision-making. As Sir Gerard realised, that model of the AAT, while relatively costly, was the key to much larger efficiency gains in decision-making processes carried on elsewhere.

While AAT review will be an important mechanism for ensuring the integrity and efficacy of many expert systems, not all automated decision-making processes are likely to benefit from merits review. Many decision-making processes — as it happens, the ones that are amongst the easiest to automate — are simple and binary in nature. The factual enquiries are straightforward, and the law is clear. In those cases, at least, there is no particular advantage to be gained from the AAT's court-like processes. Making those decisions reviewable by the AAT risks overwhelming the AAT without adding to the quality of the decisions under review. A better system of internal review reinforced by prompt judicial review is likely to be more efficient. But the AAT already plays an important role in the review of discretionary decisions and more complex binary decisions where the facts or the law are such that the AAT's more court-like processes would assist. That function will become even more significant if the decision-making process below, or part of that process, is automated.

Perfecting the AAT's role as a form of institutionalised human control of automated decision-making processes requires a good deal of coordination between administrative lawyers and the individual agencies as they develop the systems in question. The AAT will need to learn more about how the decision-making process works in each case. The AAT will also be concerned to know how its decisions are dealt with once they are made. How will those decisions be taken into account by the original decision-maker in future cases? In the case of expert systems which learn from data, how precisely will AAT decisions be incorporated into the data or used to modify the algorithm which drives the process? Further thought is required on how the AAT can better play its role in the continuum of administrative

62 Ibid xi.

decision-making. Recognising the centrality of that role is a good start. That may yet require a change in culture from those agencies that regard AAT review as an annoyance or an optional extra.

Conclusion

'Good government' is not an empty slogan. The reality and perception of good government is a key to civic order and prosperity. Automated decision-making processes have a role to play in enhancing good government, but they need to be watched carefully to ensure they are wrought for the public good. The stakes are high: every serious misadventure in the implementation of automated decision-making processes will diminish the credit society extends to government.

The integrity oversight network: titles, links and gaps

John McMillan[*]

The public law landscape is dotted with a large number of oversight agencies. They share a common purpose — to ensure that other bodies (usually those with a service delivery function) discharge their functions lawfully and fairly.

The oversight agencies are recognisable by their titles, though diversity abounds. Some are called 'Ombudsman', others 'commissioner', as well as 'inspector-general', 'inspector', 'monitor' and even 'complaints authority'.

Why do they have different titles? Does anything substantive turn on the use of a particular title? Does the title point to a unique or special character of the oversight agency that may influence both how it goes about its work and what the public expects of it? Should the use of titles be more systematic and better understood?

One answer to all those questions is that it is notoriously difficult — perhaps futile — to control the use of language, even in legislation. Language usage and fads are driven by many factors. Writers and speakers commonly insist on the freedom to choose their own words, or, in the oft-noted quip of Humpty Dumpty to Alice, to 'use a word [to] mean just what I choose it to mean'. Governments equally use legislative language to suit a political objective, as illustrated by evocative statutory titles that include such words as 'new', 'fair', 'strengthening' and 'my'.

There has, nevertheless, been some attempt in other areas of government to control how entities and units are described and grouped. Doing so can maintain a degree of consistency and structure in the framework of government.

Leading (Commonwealth) examples are the *Acts Interpretation Act 1901* (Cth) and the *Public Service Act 1999* (Cth). The Acts Interpretation Act supports consistency in statutory referencing by defining how terms such as 'magistrate', 'chair', 'minister', 'department' and 'officer' are to be ordinarily understood.[1] The Public Service Act creates structure by defining the term 'agency' to mean either a 'department', an 'Executive Agency' or a 'Statutory Agency'.[2] The head of a department is a 'secretary', and generic principles are set out on the responsibilities of the Head of an Executive Agency and the procedure for appointing and removing the Head.[3]

A related trend in government has been to lay down a coherent governance structure that applies across the board. Two leading (Commonwealth) examples are the *Public Governance*, *Performance and Accountability Act 2013*, which lays down general rules for the governance and accountability of corporate and non-corporate Commonwealth entities;

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1 *Acts Interpretation Act 1901* (Cth) ss 16C, 18B, 19, 19A, 21.

2 *Public Service Act 1999* (Cth) s 7.

3 Ibid s 67.

and the *Regulatory Powers (Standard Provisions) Act 2014*, which lays down a framework to encourage consistency and predictability in regulatory activity.

Two themes are addressed in this article. The first (and major theme) is whether there is or should be consistency in the titles given to oversight bodies. Interestingly, the lack of consistency is why we group these bodies by using other ill-defined descriptions such as 'oversight body', 'complaints agency' and 'watchdog'.

The second theme is the need to review and update how the diverse range of oversight bodies and mechanisms are interlinked. As the oversight system has grown sporadically, gaps and tension points have emerged as to how the various oversight bodies relate to each other and discharge their functions.

Ombudsman

A short history of the title

It is a familiar story that the institution of Ombudsman traces back to Sweden in 1809 and the establishment of the Justitie-ombudsman — 'representative of the people'. That initiative was followed in a couple of Scandinavian countries in the 1900s, New Zealand in 1962 and the Australian states and the Commonwealth in the 1970s. Two states (Western Australia and Queensland) initially opted for the tile 'Parliamentary Commissioner for Administrative Investigations', but all Australian jurisdictions now use the Ombudsman title.

As the importance of complaint handling spread, and the difference between government and private sector service delivery diminished, the Ombudsman model proliferated. An early example was the Telecommunications Industry Ombudsman, established in 1993 to build on the role the Commonwealth Ombudsman had formerly discharged when a government entity, Telecom Australia, delivered domestic telecommunications services. In like fashion, Ombudsman offices were established in relation to energy, water and transport, covering both public and private sector delivery of those services.

Ombudsman offices were also being established at the same time to receive complaints about services provided only by the private sector — such as the Australian Banking Industry Ombudsman, established in 1990. The rationale was that the community's interest in questioning whether key services were being delivered fairly and responsibly did not turn on whether the service delivery body was a government agency or a public corporation.

Two other developments contributed to the proliferation of Ombudsman offices. One was the emphasis that Ombudsmen had themselves given to the need for effective internal complaint handling to complement the Ombudsman's external complaint role. Many large bodies responded by establishing an 'internal Ombudsman office' — particularly local government, universities and finance and insurance companies.

The other development was that government itself applied the Ombudsman title to new bodies that did not fit the traditional mould and would likely have been described differently in earlier times. An early example was the creation in 2007 of the Workplace Ombudsman (now the Fair Work Ombudsman), which was adapted from the existing Office of Workplace Services.

Later examples of specialist Ombudsman offices established within the Commonwealth Government framework were the Private Health Insurance Ombudsman (now merged with the Commonwealth Ombudsman), the Aircraft Noise Ombudsman and the Australian Small Business and Family Enterprise Ombudsman.

A recent counter-trend is to rebadge an Ombudsman office with a new title. An example is the Australian Financial Complaints Authority (AFCA), established in 2018 as the latest chapter in the merger and extension of former Ombudsman bodies that oversighted banking, financial services and insurance. A direct link with that history has been maintained in naming the head of AFCA the Chief Ombudsman, who is supported by 26 senior officers who are each called an Ombudsman.

A similar proposal floated in a government consultation paper in 2018 but not ultimately adopted was to replace the Telecommunications Industry Ombudsman with a new External Dispute Resolution body.[4]

Concerns raised about use of the Ombudsman title

The use and proliferation of the Ombudsman title has stirred some controversy.

One arena in which this has played out is in the International Ombudsman Institute (IOI). The IOI was founded in 1978 and has a membership of 205 Ombudsman offices from more than 100 countries. Though the structure and jurisdiction of those offices is diverse, the IOI took a stance from the outset that membership was open only to offices that were independent of government, established by legislation and had a jurisdiction focused on public sector maladministration.

This restriction closed the IOI door on industry Ombudsman offices. The IOI later broadened its membership base, but retained a distinction between voting members who meet the traditional criteria, and other members who support IOI principles.

The IOI restriction that initially excluded industry Ombudsman membership caused acrimony and led to the formation of alternative Ombudsman associations. One example is the International Ombudsman Association, formed in the United States in 2005, that styles itself as a 'professional association committed to supporting organisational ombuds'.[5]

Another example was the Australian New Zealand Ombudsman Association (ANZOA), formed in 2010 and which — despite its inclusive name — initially confined its membership to industry Ombudsmen. ANZOA has since become one of many national and regional Ombudsman associations to sign a memorandum of understanding with the IOI to cooperate in promoting Ombudsman objectives. Interestingly, too, ANZOA has been the lead body

4 Consumer Safeguards Review, *Report to the Minister for Communication and the Arts, Part A: Complaints handling and consumer redress* (September 2018).

5 Ombudsman Association, 'About the International Ombudsman Association (IOA)' (online) <www.ombudsmanassociation.org>.

in Australia in campaigning to ensure proper use of the term 'Ombudsman' (as explained below).

Another arena in which concern about proper use of the Ombudsman title has played out has been in legislation. The South Australian *Ombudsman Act 1972* (SA), s 32, provides that a public sector agency 'must not use the word "Ombudsman" in describing a process or procedure by which the agency investigates and resolves complaints against the agency'. In effect, the Act preserves the principle that (at least in the public sector) an Ombudsman is an external and independent agency and not an internal grievance resolution procedure.

New Zealand went a step further in 1991, amending the *Ombudsman Act 1975* (NZ), s 28A, to prohibit use of the name generally without the written consent of the Chief Ombudsman. Consent was given twice — to the Banking Ombudsman Scheme in 1992 and the Insurance and Financial Ombudsman Scheme in 1995. In 2015 consent was refused to another industry-based financial complaints scheme. It successfully challenged the refusal decision in the New Zealand Court of Appeal, which ruled that the policy applied by the Ombudsman unduly restricted the discretion to grant approval.[6]

The Court's decision was effectively overturned by a subsequent amendment to the Ombudsman Act in 2020 that tightened the ground for approval to use the name. The discretion to grant approval no longer rests with the Chief Ombudsman but with the Minister for Justice, who can only grant approval to a public sector agency. The earlier two approvals to the banking and insurance Ombudsman schemes were preserved.

A third arena in which the concern has played out has been in Australian public policy debate. Two access to justice inquiries — by the Access to Justice Advisory Committee in 1994[7] and the Productivity Commission in 2014[8] — cautioned that the valuable association of the Ombudsman title with accessible, independent, impartial review would lose that credibility if associated with bodies that did not meet those standards.

Ombudsman offices have also taken up the case from time to time. The Commonwealth Ombudsman and the Banking Ombudsman published a draft code in 1994 setting out minimum essential criteria to be named an Ombudsman.[9] Individual offices have also raised concerns with government from time to time — but not always successfully, as illustrated by the use of the term by local councils and in the establishment of bodies such as the Workplace Ombudsman.

A related development has been the adoption by the Commonwealth in 1997 of benchmarks to be applied in accrediting industry customer dispute resolution schemes — accessibility, independence, fairness, accountability, efficiency and effectiveness.[10] They are similar to the principles that are emphasised in defining Ombudsman essentials. The benchmarks

6 *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27.
7 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) 315.
8 Productivity Commission, *Access to Justice Arrangements* (Report No 72, 2014) Vol 1, 329.
9 The draft code was published in (1994) 39/40 *Admin Review* 60–1.
10 Australian Government Minister for Customs and Consumer Affairs, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (1997). These were reissued in 2015 by the Minister for Small Business.

have been picked up in legislation that requires licensed commercial entities to belong to an approved dispute resolution scheme.[11]

Using the Ombudsman title

That short history prompts several questions. Is it important to have an agreed understanding of what the term 'Ombudsman' means? Can a meaningful definition be reached? Can use of the term be regulated according to an authoritative definition?

One view is that the time for assigning any special meaning to the term 'Ombudsman' has passed. The institution eludes classification, as evidenced by the plethora of different Ombudsman offices and an equally diverse range of independent complaint and investigation arrangements. Picking up that theme, one writer has referred to 'the sprawling Ombudsman family' and 'rambling Ombudsman structures'.[12] Another writer observes that 'the dominant narrative of worldwide ombud-development is one of largely unimpeded expansion, diversification and successful adaptation'.[13]

A cynical critique is that 'brand recognition may be more important for those who work within the system … than for users … "Ombudsman" holds no magic meaning for those who need to hold state bodies and companies to account'.[14]

The opposing view is that the importance of the term 'Ombudsman' is demonstrated quite simply by the frequent attempts to use it. Why else would government rebrand an existing function as an Ombudsman office? Why else would a local council, university or corporation choose to apply the Ombudsman title to an internal office, when established alternatives are readily at hand? In a couple of years this author counted over 30 proposals in the media to create a specialised Ombudsman office, ranging over activities such as sports, gambling, franchising, the arts, auctions, funerals and drinking.[15]

As ANZOA explained in launching a campaign in 2010 to halt misuse of the term 'Ombudsman', increased adoption of the title has sprung from public respect for the independence, integrity and impartiality of Ombudsman offices.[16] While the adoption of the Ombudsman brand is an encouraging recognition of the importance attached to effective complaint handling and oversight, the trend poses a risk of tarnishing the stature of the Ombudsman role by inappropriate and unreliable use.

ANZOA's key concern was that a body should not be described as an Ombudsman office if it is not independent and impartial in a comprehensive way: the office must have a firm

11 Eg *Telecommunication (Consumer Protection and Service Standards) Act 1999* (Cth) s 128(10); *Corporations Act 2001* (Cth) ss 1050–1051A.

12 C Harlow, 'Ombudsmen: "Hunting Lions" or "Swatting Flies"' in M Hertogh and R Kirkham (eds), *Research Handbook on The Ombudsman* (Edward Elgar, 2018) Ch 5, 73.

13 N O'Brien, 'Ombudsmen and Public Authorities: A Modest Proposal' in Hertogh and Kirkham, ibid, Ch 3, 36.

14 V Bondy and M Doyle, 'What's In a Name? A Discussion Paper on Ombud Terminology' in Hertogh and Kirkham, ibid, Ch 26, 503.

15 J McMillan, 'What's In a Name? Use of the Term "Ombudsman"' (presentation, 2008), available on the Commonwealth Ombudsman website.

16 Australian New Zealand Ombudsman Association, 'Peak Body Seeks a Halt to Misuse of the Term Ombudsman' (media release, 18 May 2020).

statutory or other legal foundation, be independent of the organisations being investigated, and be headed by an Ombudsman who is appointed for a fixed term, is not subject to direction, has a threshold power to rule on whether complaints are within jurisdiction, and has an independent right to publish findings.

A related concern has to do with function. While Ombudsmen now discharge many roles, the core role is the investigation of complaints that can be made directly to the office by members of the public. In ANZOA's view it was inappropriate to use the title to describe an office that primarily has regulatory, disciplinary or prosecutorial functions.

Drawing from those concerns, ANZOA developed a statement of 'Essential Criteria for Describing a Body as an Ombudsman'. There are six criteria: independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

The ANZOA statement largely accords with the description of the Ombudsman role by others. Descriptions vary nevertheless, as illustrated in the following contrasting definitions by the Productivity Commission (a narrower definition) and the IOI (a broader definition):

> Ombudsman are impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systemic cases based on those complaints.[17]
>
> The role of Ombudsman institutions is to protect the people against the violation of rights, abuse of powers, unfair decisions and maladministration. They play an increasingly important role in improving public administration while making the government's actions more open and its administration more accountable to the public.[18]

Concluding observation

A lesson to be drawn from this analysis is — not surprisingly — that it is remarkably difficult to control how language is used and how it evolves and adapts to social trends. An analogous example is the now familiar institution described as the 'NRL Judiciary'.

The difficulty of controlling usage is all the harder in the Australian federal system, where each jurisdiction has control of its own terminology. And the jurisdiction with probably the loosest practice in using the Ombudsman title is the Commonwealth.

ANZOA's work in defining the term has nevertheless been valuable and possibly influential. It is a clear statement that captures essential Ombudsman features while also accepting that individual offices are structured and function differently. ANZOA applies the criteria in deciding whether to admit Ombudsmen to ANZOA membership.

Two features of the ANZOA definition that are particularly important — and that provide guidance for future usage — are that an Ombudsman's central role must be the investigation of complaints that are received from the public through an accessible procedure, and the office must be established in a way that safeguards its independence and impartiality.

17 Productivity Commission, above n 9, 312.
18 International Ombudsman Institute, 'About the IOI' (online) <www.theioi.org/the-i-o-i>.

Inspector-General

Another office with some traction in Australia is that of inspector-general. There is scant information on the public record to explain why this title was chosen for individual offices, and the explanation may largely be pragmatic. There is a stronger institutional foundation for the office in the United States, and it may be that this has been influential in Australia although not expressly mentioned when individual offices have been established.

The office of inspector-general in Australia

Inspectors-general in Australia tend to fall into three groups. The first group is that of executive agency head. There may be only one member of this group — the Inspector-General of Bankruptcy, who is the Chief Executive of the Australian Financial Security Authority that administers Australian bankruptcy and personal property security legislation.[19] The Inspector-General's role dates back to the first Commonwealth bankruptcy law enacted in 1924.[20]

A second group comprises statutory officers who are appointed (often in recent times) to discharge a specialist monitoring and oversight role in an area that can be controversial for government and where it welcomes independent assurance that the law is being administered correctly. Three Commonwealth examples are the Inspector-General of Biosecurity, which was given a statutory basis in 2015;[21] the Inspector-General of Live Animal Exports, established in 2019;[22] and the Inspector-General of Murray-Darling Basin Water Resources, established in 2019 and soon to be given a statutory basis in the *Water Act 2007* (Cth). Two comparable state example are the Queensland and Victorian Inspectors-General of Emergency Management, established respectively in 2013 and 2014.[23]

A third inspector-general group is statutory office holders that have a public law complaint-handling and investigation function, focused on a particular agency or group of agencies. The decision to confer an inspector-general title on each office was no doubt driven in part by a desire to distinguish them from the Commonwealth Ombudsman, who had similar or concurrent jurisdiction to the new inspector-general office:

- The Inspector-General of Intelligence and Security (IGIS) was established in 1987[24] to examine whether the six intelligence agencies (including the Australian Security Intelligence Organisation) are acting legally, with propriety and consistently with human rights principles. IGIS oversight can be triggered by a complaint, a ministerial referral or an own-motion investigation or compliance auditing review. The IGIS was established on the recommendation of the (second) Royal Commission on Australia's Security Intelligence Agencies in 1984. The Commissioner, Justice Hope, explained briefly that the administrative law review framework did not apply to the intelligence

19 *Bankruptcy Act 1966* (Cth) s 11.
20 *Bankruptcy Act 1924* (Cth) s 11. See Wenn and Lowe, 'History of Bankruptcy Administration in the 20th Century' (2001) 11(1) *New Directions in Bankruptcy* 10.
21 *Biosecurity Act 2015* (Cth) Ch 10, Pt 6.
22 *Inspector-General of Live Animal Exports Act 2019* (Cth).
23 *Disaster Management Act 2003* (Qld) Pt 1A; *Emergency Management Act 2013* (Vic) Pt 7.
24 *Inspector-General of Intelligence and Security Act 1986* (Cth).

agencies and that a new office with a different title would be preferable, commenting only: 'I believe the title "Inspector-General" is more descriptive of the intended role of the office and is less likely to connote executive responsibilities than the title "Security Commissioner"'.[25]

- The Inspector-General of Taxation (IGT) was established in 2003,[26] initially with a limited function of investigating systemic problems in taxation administration, and from 2015 with an additional function of handling complaints from the public. Both functions were formerly discharged by the Commonwealth Ombudsman, under the title Taxation Ombudsman, before those functions were relocated to the IGT.[27] The IGT commenced using the additional title of Taxation Ombudsman after 2015.

- The Inspector-General of the Australian Defence (IGADF) was initially established on an executive basis within the Department of Defence, and then as a statutory office in 2005.[28] The office oversights the operation of the Australian Defence Force military justice system, through complaints, own-motion inquiries and ministerial referrals. The Commonwealth Ombudsman has always had the concurrent title and functions of Defence Force Ombudsman. There are differences in the IGADF and Ombudsman roles, but some overlap.

As that summary indicates, the role of inspector-general in Australia is adaptable to prevailing policy choices within government. There has not been any move to spell out a definition or philosophy of the institutional role of an inspector-general as there has been for the office of Ombudsman.[29]

There are possibly three themes that can nevertheless be drawn from Australian developments. The first is that statutory independence from government is seen to be an important feature of an inspector-general, even though some offices were initially established by executive action. A statutory foundation is also essential for some of the powers that can be exercised by inspectors-general, such as coercive information-gathering powers.

Secondly, the offices have a jurisdiction that is limited to a particular aspect of government activity — such as taxation, intelligence or emergency management. These have generally been described as areas in which an external oversight body should have special insight or experience (though that claim could as easily be made about most areas of government activity).

Thirdly, government has been sparing in establishing offices of inspector-general. It is more common, by contrast, to see proposals for a new commissioner or Ombudsman function. This is probably a reflection of the apparent attitude in government that an office of inspector-general is a special role to be created only when there is a strong policy justification for doing so.

25 Royal Commission on Australia's Security Intelligence Agencies, *Report on the Australian Security Intelligence Organisation* (Australian Government, 1984) para 16.85.
26 *Inspector-General of Taxation Act 2003* (Cth).
27 *Ombudsman Act 1976* (Cth) s 4(3).
28 *Defence Act 1903* (Cth) Pt VIIIB.
29 *Ombudsman Act 1976* (Cth) ss 19B–19D.

The office of inspector general in the United States

The office of inspector general (IG) is a well-established feature of the federal administration in the United States.[30] In 2019 there were 74 statutory IGs established within departments and major agencies such as the Federal Trade Commission, US Postal Service, Central Intelligence Agency and the Library of Congress. The statutory foundation for most IGs (65) is the *Inspector General Act of 1978* (IG Act), while another nine were established by separate statutes. The largest IG office in the Department of Health and Human Services has 1,600 staff.

The role of the IG within each agency is to prevent and detect waste, fraud, abuse and mismanagement; and to promote program economy and efficiency. The IG does this through conducting audits, investigations, inspections and evaluations. The IG has broad access to agency records and the power to subpoena records and take evidence under oath. The larger offices include criminal investigators who have powers of arrest and search and seizure and are armed. The IG can receive anonymous complaints from agency employees, who are protected against retaliation.

Though located within an agency, the IG is regarded as an independent office. Most are appointed by the President of the United States (and the IG Act requires this be done on grounds of merit and not political affiliation); an IG can be removed only on stated grounds that must be reported to the Congress; there is a reporting power to the agency head and the Congress; they are subject only to 'general supervision' within the agency and not to direction; the IG appoints its own staff and legal counsel; and there are protections for budgetary independence. An added safeguard is that the IG Act establishes a Council of the Inspectors General on Integrity and Efficiency.

The independence of IGs has not been free of controversy. In a two-month period in 2020 President Trump removed five IGs appointed to the US intelligence community and the Departments of State, Defense, Transportation and Health and Human Services.[31]

Other titles

A few other titles that are commonly used in government are applied to officers who have a public law oversight and scrutiny role.[32] It is usual that the office holder has an identifiable public role, has specific functions and inquiry powers, is appointed for a fixed term, and has independence from government control or direction.

30 Two helpful papers relied on for this analysis were: Congressional Research Service, 'Statutory Inspectors General in the Federal Government: A Primer' (R45450, 3 January 2019); and Council of the Inspectors General on Integrity and Efficiency, 'The Inspectors General' (14 July 2014).

31 Wikipedia, '2020 Dismissal of Inspectors General' (Wikimedia Foundation, 3 September 2020) <https://en.wikipedia.org/wiki/2020_dismissal_of_inspectors_general>.

32 Another category of office is those with an advocacy function for disadvantaged or vulnerable groups — for example, the Victorian Office of the Public Advocate and the NSW Office of the Advocate for Children and Young People. These offices do not usually have a complaint-handling or investigation function.

Commissioner

The term 'commissioner' has a broad meaning. It commonly describes a person appointed to a statutory position to head a government agency, be a member of a commission or be responsible for a particular government activity, program or inquiry. Other usage is common, including in compound titles such as high commissioner, trade commissioner, royal commissioner, police commissioner, fire commissioner, electoral commissioner, chief commissioner and district commissioner.

A large number of Australian commissioners are appointed to regulatory roles to safeguard and promote interests and values as diverse as commercial integrity, consumer protection, fair trading, building safety, industrial harmony, workplace safety, small business, health advancement, public sector standards, law reform, legal services, liquor licensing, environmental sustainability, public housing availability, equal opportunity, Aboriginal engagement, mental health, victims' rights, youth safety and e-safety.

The 'commissioner' title is also commonly used for offices that have a public law complaint-handling, investigation, merit determination or standard-setting role. One commissioner group is those administering information laws — the information commissioners, privacy commissioners and, in the Commonwealth (though currently unfilled), the freedom of information commissioner.[33] Another commissioner group consists of those responsible for human rights protection, where again there are several human rights commissioners and specialist anti-discrimination and equal opportunity commissioners.[34] A third group consists of the commissioners responsible for the related areas of health and community services, disability services and aged care.[35] Among the most high-profile commissioners are those responsible for the prevention and investigation of public sector corruption and misconduct.[36]

Each commission is unique, although a prevailing theme is that the adoption of a commissioner model enables the office holder to bring a personal dimension to the role, perhaps more so than in many areas of public administration. That, in itself, contributes to the public perception that the commissioner has an independent scrutiny and integrity promotion role.

Inspector

The office of inspector is also widely used in Australia, both generally and for public law roles.

One distinguishing feature of the inspector model is that within an individual agency there may be many inspectors (or delegates), headed by a chief inspector. Some small offices may have only a single inspector.

A second feature is that the function of the inspector is usually to conduct an inspection to certify whether there is compliance with a particular law or standard. The inspection may be

33 Eg *Australian Information Commissioner Act 2010* (Cth).
34 Eg *Australian Human Rights Commission Act 1996* (Cth).
35 Eg *Health Care Complaints Act 1993* (NSW); *Disability Act 2006* (Vic); *Aged Care Quality and Safety Commission Act 2018* (Cth).
36 Eg *Crime and Corruption Act 2001* (Qld); *Law Enforcement Integrity Commissioner Act 2006* (Cth).

triggered when a person applies for a compliance certificate or licence or it may result from an own-motion (and unannounced) decision by the inspector to conduct an inspection.

Examples of inspectors that fit that model are those who examine compliance with laws relating to mines, factories, health, quarantine, education, building safety, pest control, transport security, motor vehicles, weights and measures, and lifts and scaffolding.

In the public law realm the inspector model is principally used in two areas. The first is the office of inspector of custodial/correctional/prison services.[37] This type of inspector conducts regular inspections and reviews of detention facilities, including critical incident investigations. The scope of the role has tended to expand in recent times in line with the expectation that detention facilities will comply with human rights standards as to how the facility is designed and managed and how custodial inmates are treated.

The office does not ordinarily have a separate complaint investigation role, which is more commonly discharged by the Ombudsman (which in some jurisdictions substitutes for the inspector). The inspector's office is established as an independent office with control over its own inspection program, the conduct of inspections and public reporting.

A second public law inspector role is that established in most Australian jurisdictions to oversee the operations and conduct of the anti-corruption/integrity commissions. Three examples are the Victorian Inspectorate,[38] the NSW Inspector of the Independent Commission Against Corruption[39] and the Parliamentary Inspector of the Crime Commission of Western Australia.[40] The Commonwealth and Tasmania do not have an equivalent position.

With one exception those inspectors have a narrow jurisdiction confined to oversighting only one agency — the anti-corruption/integrity commission in that jurisdiction. The exception is the Victorian Inspectorate (an office of 14 staff) that monitors most of the State integrity agencies, including the Independent Broad-based Anti-corruption Commission, Auditor-General, Ombudsman, Information Commissioner, Judicial Commission and Public Interest Monitor.

The inspector is an independent statutory office holder. In most instances the appointee is a former judge or senior counsel appointed on a part-time basis.

The common model is that the inspector can act on complaints or on an own-motion basis; investigate any aspect of the commission's operations or the conduct of its officers; conduct inquiries, inspections and audits; have full access to the commission's records; compel witnesses to give evidence; utilise covert surveillance powers; report publicly or to the Parliament; and recommend disciplinary or criminal action against a commission officer.

The commission inspectors are, in many ways, a unique office with extraordinary powers to ensure that anti-corruption and integrity commissions act with integrity and do not abuse

37 Eg *Inspector of Custodial Services Act 2012* (NSW); *Inspector of Correctional Services Act 2017* (ACT).
38 *Victorian Inspectorate Act 2011* (Vic).
39 *Independent Commissioner Against Corruption 1988* (NSW) Pt 5A.
40 *Corruption, Crime and Misconduct Act 2003* (WA) Pt 13.

the considerable powers vested in them.[41] They are an answer to the age-old riddle — *Quis custodiet Ipsos custodes* ('who will guard the guards themselves')? Generally, the inspectors have played a high-profile role from time to time, occasionally publishing reports that have been strongly critical of a commission's conduct.[42]

Public Interest Monitor

Two states — Queensland and Victoria — have established the statutory office of Public Interest Monitor.[43] The monitor — a senior legal practitioner — assesses and tests the validity of applications by law enforcement bodies for surveillance and covert search warrants.

As the title of the office suggests, the monitor's role is to ensure that the public interest is routinely considered in the warrant authorisation process in compliance with the detailed statutory criteria that must be considered in granting a warrant. The monitor's role stems from a concern that the public interest can be sidelined in an authorisation process that is routine, frequent and necessarily conducted in private. The monitor can appear at the hearing for a warrant application and examine witnesses and make submissions.

An analogous monitoring role that can be performed by a monitor or Ombudsman is to examine, after a warrant has been issued and executed, whether the conditions stated in the warrant and the legislation were observed.[44]

Another monitor position, though of a different kind, is the Commonwealth Independent National Security Legislation Monitor (NSLM).[45] The NSLM reviews (and publishes reports on) the operation, effectiveness and implications of national security and counter-terrorism laws, with a particular focus on the necessity for the laws and whether individual rights are protected. Unlike the state public interest monitors, the NSLM does not have an individual case monitoring role. (It is of passing interest too that the description 'Independent' is part of the statutory description of the office.)

Gaps in the integrity oversight network

The analysis to this point has looked at the titles and roles of Australian (particularly Commonwealth) oversight bodies. They have been created sporadically over many years, sometimes in response to a troubling incident or governmental trend. To that extent there are elements of difference in the history, setting and role of each oversight body.

41 See J Wood, 'Ensuring Integrity Agencies Have Integrity' (2007) 53 *AIAL Forum* 11.

42 Eg Office of the Inspector of the Independent Commission Against Corruption, *Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B(l)(d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act* (Special Report 20/02, December 2019).

43 *Crime and Corruption Act 2001* (Qld) Pt 5; *Public Interest Monitor Act 2011* (Vic). The role of the Monitor is examined in NSW Ombudsman, *Operation Prospect* (2016) Vol 5, Ch 19, section 19.9.3.

44 Eg the Commonwealth Ombudsman has an inspection function under the *Telecommunications (Interception and Access) Act 1979* (Cth), the *Surveillance Devices Act 2004* (Cth) and the *Fair Work (Building Industry) Act 2012* (Cth).

45 *Independent National Security Legislation Monitor Act 2010* (Cth). See J Renwick, 'Monitoring Australia's National Security and Counter-terrorism Laws in the 21st Century' (2020) 99 *AIAL Forum* 49.

There is little on the public record to explain why each body was given its particular title or whether any broader thinking was undertaken about how a new oversight body would compare with and be linked to existing bodies. Australian developments aptly illustrate the observation made by Professor Harlow about British arrangements: 'The emphasis placed on grievance-handling in contemporary public administration has left us with a wide but uncoordinated assortment of mechanisms for dispute-resolution and the reception of complaints.'[46]

To the extent that we have a theory or philosophy to explain the integrity oversight network, it tends to be focused on particular segments. A lot has been written about the character and role of the Ombudsman but partly in response to a concern that the Ombudsman title has been used indiscriminately. A lot has equally been written about the anti-corruption and the human rights bodies, but the writing commonly focuses on the subject issues those bodies deal with and how the bodies have exercised their investigation and inquiry powers.

The most ambitious work undertaken so far to map the Australian integrity framework and to identify gaps and weaknesses has been the National Integrity Systems research project, led by the Griffith University Centre for Ethics, Law, Justice and Governance and supported by Transparency International Australia and several Commonwealth and state integrity bodies, with Australian Research Council funding.[47] The project has been highly influential in fostering the notion that accountability bodies, although they have discrete functions and objectives, should also be seen as elements of a larger oversight network that aims to assist the public and to promote integrity in government.

Viewed in that light, a range of specific and practical questions arise about whether and how integrity bodies are interlinked. Some questions would require a legislative response, others a revision of operating procedures and network arrangements. Following is a sample of the issues.

Titles

Should guidance be published on the appropriate or distinguishing use of titles such as Ombudsman, inspector-general, commissioner or monitor? At present, the relevant drafting direction from the Office of Parliamentary Counsel observes only that 'Different names are appropriate for different kinds of bodies … Authority, Commission, Council, Office is appropriate for advisory bodies, bodies engaged in administrative work or policy making, and representative bodies'.[48]

46 Harlow, above n 13, 86.

47 See AJ Brown et al, *Chaos or Coherence? Strengths, Challenges and Opportunities for Australia's Integrity Systems* (Griffith University and Transparency International Australia, 2005); and AJ Brown et al, *A National Integrity Commission — Options for Australia* (options paper, 2018). See also BW Head, AJ Brown and C Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008).

48 Office of Parliamentary Counsel, 'Commonwealth Bodies' (Drafting Direction No 3.6, May 2019) para 71.

Relationship to each other

There is informal contact between individual oversight agencies, and some enter into memoranda of understanding (MOU) with each other. Should this be more structured or formalised?

The Board of the Tasmanian Integrity Commission established in 2009 initially included the heads of the other main integrity oversight bodies, but this has since been discontinued. The five main integrity agencies in Western Australia (Ombudsman, Auditor-General, Information Commissioner, Corruption and Crime Commissioner and Public Service Commissioner) have established an Integrity Coordination Group that hosts a website and activities.[49] Similar, less formal arrangements have been adopted in other jurisdictions, but activity tends to wax and wane according to the interest of the individual office holders at a particular time. Another example of a network arrangement is the New South Wales Public Interest Disclosures Act 1994, s 6A, that constitutes a Public Interest Disclosures Steering Committee that includes several other office holders, as well as some senior government officers.

Jurisdiction over each other

A related issue is to define the jurisdiction that integrity bodies have over each other. At present they are largely treated as no different to any other agency — so, for example, the Ombudsman and the Human Rights Commission can each investigate complaints against each other and also against the Information Commissioner, who can likewise handle privacy and freedom of information (FOI) matters involving the others.

Not surprisingly, an unsuccessful complainant to one oversight agency will seek to keep the matter alive by treating that agency's conduct as the basis of a fresh complaint to another oversight agency. That is unavoidable to the extent that each agency is itself subject to administrative law requirements (see below). But there is equally a risk that the original complaint issue about the conduct of a government agency will expand to include the conduct of the oversight agency — a 'dispute about a dispute'. Public interest disclosure legislation adds to the options available to a dissatisfied complainant to inflate their dispute.

Reciprocal investigations by oversight agencies is an issue they sometimes addressed in MOUs with each other. Now, with so many oversight agencies and complaint options, it may be time to grapple with the issue in a more structured and comprehensive way.

Amenability to administrative law mechanisms

Little if any attention was paid to how administrative law mechanisms would apply to each oversight agency when they were being established, or at least to the implications of applying those mechanisms in a standard way.[50] For example, the Office of the Australian Information Commissioner (OAIC) is subject to the *Freedom of Information Act 1982* (Cth), which means

49 Western Australian Government, 'Integrity Coordinating Group' (online, 30 June 2020) <www.wa.gov.au/government/document-collections/integrity-coordinating-group>.

50 Attention was, by contrast, paid to that issue in relation to the Australian National Audit Office, which is an exempt agency under the *Freedom of Information Act 1982* (Cth) Sch 2: see *Brett Goyne and Australian National Audit Office* [2014] AICmr 9.

that it receives FOI requests for documents that have been received from other agencies for the purposes of the OAIC's merit review work. Equally, an FOI applicant to the OAIC whose request has been refused can seek both internal review of that refusal by the OAIC and independent external review of that decision by the OAIC.

The application of administrative law mechanisms to oversight agencies has, by contrast, been addressed directly in state legislation. In New South Wales, for example, an application cannot be made under the *Government Information (Public Access) Act 2009* (NSW) to either the Ombudsman or the Information Commissioner for information relating to their complaint-handling, investigative and reporting functions.[51] Nor are investigative agencies required to comply with most of the Information Protection Principles in the *Privacy and Personal Information Protection Act 1998* (NSW) when discharging their complaint-handling functions or in providing information to other investigative agencies.[52]

Another controversial immunity in New South Wales (and in most other states) is that judicial review proceedings cannot be instituted against the Ombudsman without the leave of the Supreme Court on the ground of bad faith.[53] In dismissing a constitutional challenge to the validity of that limitation, the NSW Court of Appeal observed that a rationale for the limitation was that the Ombudsman's powers 'do not extend to the making of decisions affecting the rights of individuals, but rather only to the making of recommendations which, if accepted by others, may affect such rights'.[54] Similar reasoning was adopted by the Full Court of the South Australian Supreme Court in relying on a privative clause to dismiss a judicial review challenge to an Ombudsman investigation.[55]

Relationship to the Parliament

The relationship between oversight agencies and the Parliament is an obvious issue that has not been properly grappled with, at least in the Commonwealth. This is surprising, given that the first two Ombudsmen in Australia were given the title of Parliamentary Commissioner; and the *Auditor-General Act 1997* (Cth) declares that 'The Auditor-General is an independent officer of the Parliament'.[56] The same status is given to the Ombudsman in the ACT, Queensland and Victoria.[57]

There are differing views on whether anything practical turns on the adoption of that course and whether it is desirable that all integrity agencies should have the status of officers of

51 *Government Information (Public Access) Act 2009* (NSW) Sch 2, Pt 2.
52 *Privacy and Personal Information Protection Act 1998* (NSW) s 24.
53 *Ombudsman Act 1974* (NSW) s 35A.
54 *Kaldas v Barbour* [2017] NSWCA 275 [156] (Bathurst CJ).
55 *King v Ombudsman* [2020] SASCFC 90.
56 *Auditor-General Act 1997* (Cth) s 8(1); subs 8(2) provides that 'no implied functions, powers, rights, immunities or obligations' arise from this status.
57 *Ombudsman Act 1989* (ACT) s 4A; *Ombudsman Act 2001* (Qld) s 11(2); *Constitution Act 1975* (Vic) s 94E(1).

the Parliament.[58] An alternative approach is to emphasise the relationship among oversight agencies as part of a national integrity system, or even as a 'fourth branch of government'.[59]

Whichever approach is taken, an important issue is whether oversight agencies should, individually or as a group, report to a special committee of the Parliament. The committee can, at the least, ensure that separate consideration is given to the annual reports of the agencies and to any proposed legislative changes that might affect them. A committee can also be given a consultative (or even veto) role in relation to the appointment of an office holder.

Three examples of special committee arrangements are the Joint Committee of Public Accounts and Audit, to which the Commonwealth Auditor-General reports;[60] the Joint Committee on the Australian Commission for Law Enforcement Integrity; and, in New South Wales, the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.

Accessibility to the public

The threshold issue in access to justice is whether a person with a grievance knows where to go and can get there easily. A person may need to select not only from among a range of external oversight agencies but also between those agencies and internal review mechanisms. This raises several questions, including the adequacy of the guidance available to the public, the existence of effective consultation and transfer mechanisms among agencies, and whether impediments to agency cooperation are imposed by privacy laws or secrecy provisions.

The *Ombudsman Act 1976* (Cth) illustrates how these issues have generally been addressed in a piecemeal fashion. If the Ombudsman forms the view that a person should first have taken their complaint to the agency concerned, the Ombudsman can decline to investigate the complaint but has no general transfer power.[61] Specific transfer powers have been added from time to time as the complaint system has evolved — for example, to facilitate the transfer of complaints to an industry ombudsman, the Integrity Commissioner, Information Commissioner, the Inspector-General of Taxation or Small Business Ombudsman.[62]

Privacy impediments to effective investigation were similarly developed in a catch-up manner. The Ombudsman Act was amended in 2005 to override Privacy Act impediments to providing information to the Ombudsman after there was growing agency reluctance to provide 'the whole file'.[63] By contrast, there is a better framework in the New South Wales

58 Eg see D Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (CIPL, 1998); P Wilkins, 'Watchdogs as Satellites of Parliament' (2015) 74 *Australian Journal of Public Administration* 8–27.

59 See R Creyke, M Groves, J McMillan and M Smyth, *Control of Government Action* (Lexis Nexis, 5th ed, 2019) paras 1.4.5–10.

60 *Public Accounts and Audit Committee Act 1951* (Cth); see J McMillan and I Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review* 42.

61 *Ombudsman Act 1976* (Cth) s 6.

62 Ibid ss 6(10), 6(13), 6B, 6C, 6D, 6E, 20ZQ.

63 Ibid s 7A(1D).

privacy statute, which provides an exception to the Information Privacy Principles for the disclosure of information between agencies in the course of complaint handling by an investigative agency, or to refer an inquiry from one public sector agency to another.[64]

Secrecy provisions in the statutes establishing oversight agencies can impede information exchange between oversight agencies. This is a regular topic for internal legal advice within oversight agencies and slows down investigations. The Australian Law Reform Commission (ALRC) drew attention in its report in 2009 to the inconsistent and antiquated range of secrecy provisions in Commonwealth legislation. Among the Commission's recommendations were that the general and specific secrecy offences recommended in the report should include an exception for disclosure in the course of a Commonwealth officer's functions or duties.[65] The report also recommended an enhanced role for the OAIC in reviewing information-handling and disclosure practices in Australian government.

A related issue is whether in an age of regular online communication between agencies, oversight agencies should have online access to agency databases for the purposes of investigation. The customary procedure of a summons or formal request to an agency to provide hardcopy documents reflects the design of a former age. It is not uncommon that police oversight agencies have online access to the police complaints database and there is a case for adopting that practice more widely.

Another pertinent issue in a digital age is whether there should be an integrated framework of complaint mechanisms and guidance, in line with the 'one stop shop / no wrong door' philosophy. New South Wales again leads the way following the joint development of a Complaint Handling Improvement Program by the NSW Ombudsman, Customer Service Commissioner and Department of Finance, Services and Innovation. One element of the program is a web-based portal, Feedback Assist, that is featured on the home page of all agencies so that customer complaints, suggestions or feedback can be lodged at numerous points and be redirected if necessary to the appropriate agency. The system is backed up by Six Commitments to Effective Complaint Handling that are subscribed to by all agencies and are monitored by the Ombudsman.

Inquiry powers

A missing element in the integrity oversight framework is an Inquiries Act that would enable government to establish ad hoc, independent inquiries. The inquiry options open to the Commonwealth government at the moment are to establish a royal commission, establish an executive inquiry that lacks the powers, protections and immunities that are thought to be essential for controversial or sensitive inquiries, or rely upon a statutory oversight agency to commence an own-motion investigation into a matter that falls within its jurisdiction.

64 *Privacy and Personal Information Protection Act 1998* (NSW) ss 24, 27A.

65 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, 2009), recommendations 7.1, 10.2.

The ALRC recommended in 2009 that the *Royal Commissions Act 1902* (Cth) be renamed the Inquiries Act and incorporate two types of inquiries — royal commissions and official inquiries.[66]

Updating the integrity oversight network

The variable and unexplained use of titles for integrity oversight bodies points to the need for a general review and updating of how those bodies link together as a vital element of the government accountability framework.

That has occurred in other areas of government, as noted at the beginning of this article. The *Public Service Act 1999* (Cth) is one example. Another is the *Public Governance, Performance and Accountability Act 2013* (Cth), which itself replaced two earlier laws designed to introduce coherence and consistency in the structure of government — the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth). Those reforms were accompanied by major governance reviews, such as the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig review, 2003).

The Australian tribunal system also underwent a complete rethink and restructure with the creation of general-jurisdiction administrative appeals tribunals. The establishment of each tribunal followed an inquiry highlighting that the proliferation of individual tribunals had led to anomalies, gaps and inconsistencies in their jurisdiction, powers and procedure.

There is no obvious pathway for a general review of the range of issues raised in this article regarding oversight agencies. The most suitable body to undertake such a review would be the Administrative Review Council (ARC) — although it is a familiar lament that, while it still formally exists,[67] it has been inactive since 2012. Another option is always the ALRC, which has already addressed a few of the issues noted in this article and has undertaken past review work that has led to significant restructure of some administrative law elements. An example is the joint ALRC/ARC report on open government in 1995 that was picked up in reforms implemented in 2010.[68] It is possible too there will be a fresh focus on updating the integrity oversight framework after the Australian Government publishes proposed legislation for a Commonwealth Integrity Commission.[69]

While a comprehensive review is not presently on the horizon, the importance of a review should not be overlooked.

66 Australian Law Reform Commission, *Making Inquiries* (Report No 111, 2009).
67 *Administrative Appeals Tribunal Act 1975* (Cth) Pt V.
68 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* (ALRC Report No 77 / ARC Report No 40, 1995); see *Australian Information Commissioner Act 2010* (Cth) and *Freedom of Information (Reform) Act 2010*.
69 Attorney-General's Department, *A Commonwealth Integrity Commission — proposed reforms* (consultation paper, 2018).

Australian civil and administrative tribunals: challenges and opportunities

*Janine Pritchard**

For over two decades, Australia has witnessed a steady but inexorable trend towards the amalgamation of a multitude of smaller tribunals into larger 'super tribunals'. Such 'super tribunals' can now be seen at the Commonwealth level (in the Australian Administrative Tribunal (AAT)); in each of the states except Tasmania[1] (the Victorian Civil and Administrative Tribunal (VCAT), the Western Australian State Administrative Tribunal (SAT), the Queensland Civil and Administrative Tribunal (QCAT), the New South Wales Civil and Administrative Tribunal (NCAT), and the South Australian Civil and Administrative Tribunal (SACAT)); and in the territories (the Australian Capital Territory Civil and Administrative Tribunal (ACAT) and the Northern Territory Civil and Administrative Tribunal (NTCAT)). Outside the federal sphere, this trend has seen the amalgamation of tribunals with a diverse range of functions: merits review, guardianship and mental health, vocational and occupational regulation, and the resolution of *inter partes* civil disputes.

The emergence of these civil and administrative tribunals (CATs) at the state and territory level has given rise to questions, challenges and opportunities. CATs can no longer be viewed as existing on the periphery of Australia's justice system. They are 'considered significant elements of the adjudicative architecture, are accorded equivalent status to the courts, and are now often included in the "basket of funds" governments allocate for adjudication'.[2] CATs provide an alternative avenue to the courts for the delivery of civil and administrative justice. Yet the conferral of jurisdiction on them largely appears to have occurred on an ad hoc basis. And despite having their origins in merits review, the raison d'être for these CATs now extends far beyond that role.

It is an opportune time to reflect on our understanding of the role of CATs in the justice system, and to consider how CATs might better deliver justice in the future. In this article, I consider three areas of the emerging challenges and opportunities for CATs in Australia:

i. Purpose and philosophy;

ii. Composition and culture;

iii. Use of technology.

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1 A TasCAT is to be introduced in 2020. A 2015 Tasmanian report recommended the amalgamation of a number of tribunals into a single tribunal: Tasmanian Department of Justice, *A Single Tribunal for Tasmania* (Discussion Paper, September 2015), ch 6.

2 Robin Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26 *Australian Journal of Administrative Law* 206, 228.

Purpose and philosophy

In a paper published earlier this year,[3] Emeritus Professor Creyke reported on her findings from a significant piece of primary research: a survey she administered to the AAT, VCAT, NCAT, QCAT, SAT, SACAT, ACAT and NTCAT (Creyke survey). Responses to the Creyke survey identified a number of advantages of amalgamation. These included greater public knowledge of tribunals as avenues for dispute resolution; heightened government awareness of tribunals and a greater status for tribunals in the adjudicative structure; an increased ability to handle disputes over a diversity of matters; more experts to deal with a variety of matters; a higher calibre of members; an enhanced ability to meet digital challenges; cross-pollination of ideas; increased administrative efficiencies and improved consistency and quality of decision-making; enhanced scope for adopting best practices and use of alternative dispute resolution (ADR) and facilitative dispute resolution (FDR); and opportunities for developing best practice in delivering administrative justice to the public.[4] On the other hand, a number of disadvantages of amalgamation were also identified. These included inadequate resourcing, especially in the event of increases in jurisdiction which are not properly funded; physical difficulties in accessing one central location (especially in the central business districts of capital cities); the loss of speciality tribunal members; and procedural differences mandated by legislation.[5]

One issue tackled by each of the CATs has been the development of cohesive procedures and culture across their disparate areas of jurisdiction. The inquisitorial role undertaken by a CAT in considering an application for guardianship and administration orders is vastly different from its adjudication of the *inter partes* adversarial contest involved in a vocational regulatory matter, or in an application to resolve a dispute over allegedly defective building works, or in an application by a party for the review of a decision made by a government decision-maker. Finding common ground among such different areas of jurisdiction has not been free of difficulty. Pearson described this challenge as:

> [T]he need to ensure that at the same time as preserving necessarily different processes for different types of matters, what emerges is more than simply a collection of effectively distinct components sharing central leadership and governance.[6]

Developing a cohesive approach to the various aspects of a CAT's jurisdiction starts with identifying the central purpose, or raison d'être, of CATs within Australia's justice system. As Professor Creyke has put it, 'it is time for tribunals "to carve out a philosophy of their own existence"'.[7] That statement presupposes that CATs in this country share a common philosophical foundation. In my view, there is sufficient similarity in their history, in the time

3 Ibid.
4 Ibid 228.
5 Ibid 229–30.
6 Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Daniel Stewart and Anthony Connolly (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (The Federation Press, 2015) 196.
7 Robin Creyke, 'Tribunals — "Carving out the philosophy of their existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 30, citing John McMillan, 'Merit Review and the AAT: A Concept Develops' in J McMillan (ed), *The AAT — Twenty Years Forward* (Australian Institute of Administrative Law, 1998) 33.

frame in which the CATs were established, and in the areas of jurisdiction conferred on the CATs, to support that conclusion.

Why is it necessary to identify an underlying philosophy for the existence of CATs (philosophical foundation)? Identifying their philosophical foundation provides a touchstone to guide decisions about every aspect of a CAT's operation. It may also provide a basis for governments and stakeholders to assess whether further amalgamation of tribunals should be undertaken, especially in those areas where, to date, it has been resisted, such as in relation to industrial commissions, or workers' compensation commissions, and to identify whether additional civil jurisdiction should be conferred on CATs.

The question, then, is how to identify the philosophical foundation of the CATs. Each of them is a creature of statute — of their constituting Acts and their enabling Acts. The existence of each CAT is the product of a policy decision by the executive government, which was implemented in legislation. The jurisdiction they have is the product of dozens, if not hundreds, of such policy decisions and legislative actions over many years. If a philosophical foundation for CATs is to be discerned, the starting point must be to ascertain why governments pursued the amalgamation of disparate tribunals, to identify the themes which emerge from the stated objects of the amalgamated tribunals, and to identify common areas of jurisdiction now exercised by CATs following these amalgamations.

History of amalgamation

The genesis for the concept of amalgamating tribunals in Australia lies in the *Report of the Administrative Review Committee* (Kerr Report) almost 50 years ago. The Administrative Review Committee (Committee) favoured the adoption of a general policy of providing for a review of administrative decisions, which should be undertaken by one tribunal, rather than by a multitude of specialist tribunals as had previously been the case.[8] While the Committee did not recommend abandoning the conferral of merits review jurisdiction on specialist tribunals, it nevertheless proposed that merits review jurisdiction be conferred on an administrative review tribunal whenever a general merits review was thought to be suitable.[9] The Committee also suggested that consideration be given to whether the jurisdiction of existing adjudicative review tribunals should be transferred to the proposed Administrative Review Tribunal.[10] That approach set a new direction for administrative tribunals in Australia, which has had profound and far-reaching effects.

In discussing the jurisdiction of tribunals, the Committee referred only to tribunals with jurisdiction to review the merits of decisions made by government decision-makers. No doubt that reflected the fact that it was not then common for jurisdictions to determine *inter partes* disputes to be conferred on tribunals. That began to change by the early 1970s, with the creation of small claims tribunals.[11]

8 Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, August 1971) (Kerr Report) [279]–[280].
9 Ibid [292].
10 Ibid [311].
11 See, for example, *Small Claims Tribunals Act 1973* (Vic) and *Small Claims Tribunals Act 1974* (WA).

The amalgamation of civil tribunals with administrative review tribunals was first pursued in Victoria. A 1996 discussion paper which examined whether the jurisdiction of civil tribunals should be transferred to the Victorian Administrative Appeals Tribunal (Discussion Paper) noted that 'Victorian tribunals have been established as specialist bodies to deal with a variety of issues as particular needs have arisen. Compared to the courts, they are intended to be informal speedy and inexpensive'.[12] The Discussion Paper identified the issues determined by tribunals in Victoria at that time as falling into two broad categories: administrative disputes (that is, merits review) and *inter partes* disputes, such as those determined by the Small Claims Tribunal, the Residential Tenancies Tribunal, the Domestic Buildings Tribunal, the Credit Tribunal and the Anti-Discrimination Tribunal.[13]

The Discussion Paper noted that 'there are no formal criteria by which to assess the appropriateness of conferring a particular type of jurisdiction on a tribunal. In reviewing whether a particular jurisdiction should be conferred on a tribunal, it should not be assumed automatically that the courts have a first call on all adjudicative or merits review functions. Rather, in each case a number of factors should be considered in order to achieve a consistent and rational allocation of jurisdiction between courts and tribunals'.[14] Those factors were:[15]

- The extent of the jurisdiction in monetary terms: cases of modest value were thought more appropriate for tribunals because in those cases where 'larger interests are at stake, the inevitable substantive and procedural compromises involved in an *inter partes* tribunal as compared to a court are more difficult to justify';[16]
- Volume of cases: high-volume jurisdictions were thought to indicate the need for a tribunal to achieve the expeditious disposition of those cases;
- Need for informality: in some jurisdictions informality was not only considered desirable to deal with cases quickly and cheaply, but was more suitable, given the nature of the jurisdiction (in the case of anti-discrimination and guardianship matters); and
- Need for specialist expertise to deal with particular classes of cases.

Consequently, two categories of matters were seen as appropriate for amalgamation: reviews of government decisions, and civil or *inter partes* disputes which involved small claims and were of a high volume and a specialised nature, in which an informal and expeditious procedure would promote cost savings without compromising the provision of justice.[17] The objectives of the amalgamation of those tribunals were seen to be the rationalisation of procedures, the simplification of litigation, and a reduction in costs, while at the same time preserving the flexibility to ensure that, in appropriate cases, members with specialist knowledge relevant to the matter could constitute the tribunal.

12 Hon Jan Wade MP, *Tribunals in the Department of Justice: A Principled Approach* (Attorney-General's Department (Vic), October 1996) 3.
13 Ibid.
14 Ibid 8.
15 Ibid 8–9.
16 Ibid 8.
17 See, for example, Justice S Morris, 'The Emergence of Administrative Tribunals in Victoria' (2004) 41 *AIAL Forum* 16, 19–20.

Professor Creyke discerned similar themes from more recent ministerial statements about the proposed amalgamation of various tribunals into the ACAT and SAT, namely:[18]

> [A] consolidated tribunal was to be more accessible, more efficient and cost-effective, should operate with fair, flexible and streamlined procedures, and produce speedier outcomes … Other objectives include that the amalgamated framework would result in more consistent, higher quality decisions, a more coherent legislative framework, provide a broader range of work and an enhanced career pathway to attract high-quality members, produce a better skilled tribunal workforce with an increased range of expertise, and lead to improved decision-making within public administration.

It is thus clear that the amalgamation of civil and administrative tribunals was primarily driven by the anticipated practical and process benefits for government and for litigants. The anticipated benefits for litigants included accessibility; fairness, flexibility and simplicity of procedures; cost-effective and speedier outcomes; and better quality decisions. The primary anticipated benefits for government lay in greater efficiency and cost-effectiveness in the CAT's operations. Only in respect of merits review did amalgamation have any explicit normative objective, namely to improve decision-making in public administration.

Objects of CAT constituting legislation

I turn, next, to consider the objects sections of the constituting legislation of the CATs, which in large part reflect these objectives.[19] By way of example, s 3 of the *Civil and Administrative Tribunal Act 2013* (NSW) sets out a variety of objects, including to enable the NCAT to make decisions as a primary decision-maker, to review decisions, to determine appeals and to exercise such other functions conferred on it, to ensure that the Tribunal is accessible and responsive to the needs of all of its users, to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality.

Similarly, the objects set out in s 3 of the *Civil and Administrative Tribunal Act 2009* (Qld) include to establish an independent tribunal to deal with the matters it is empowered to deal with under that Act or an enabling Act, to have the Tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick, and to promote the quality and consistency of Tribunal decisions.

The objects in s 8 of the *Civil and Administrative Tribunal Act 2013* (SA) are similar, and also include ensuring that applications are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes and the use of mediation and alternative dispute resolution procedures wherever appropriate.

The objectives of the SAT, as set out in s 9 of the *State Administrative Tribunal Act 2004* (WA) are to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and to make appropriate use of the knowledge and experience of Tribunal members.

18 Creyke, above n 2, 210.
19 Ibid.

The objects of set out in s 10 of the *Civil and Administrative Tribunal Act 2014* (NT) and s 6 of the *Civil and Administrative Tribunal Act 2008* (ACT) are similar, as is s 98 of the *Civil and Administrative Tribunal Act 1998* (Vic).

Although there are occasional references to improved public administration, the overriding focus of the objects sections of the constituting legislation of each of the CATs is on their processes and their approach to decision-making. The common, key themes are accessible, fair, informal, flexible, cost effective procedures, and quick outcomes.

The diverse jurisdiction conferred on CATs

Academic discussion of the significance of CATs in Australia has tended to focus largely on their role in merits review. That is no doubt because of the influence and significance of the AAT. However, that focus tends to obscure the fact that the significance of the CATs in the Australian justice system extends far beyond their role in merits review, in two respects. First, the CATs, and especially the largest CATs — VCAT, NCAT and QCAT — deal with an enormous volume of work each year. Secondly, a very significant proportion of the work done by every CAT (and in some cases, a very large majority of the work of the CAT) lies in the determination of civil disputes. It is convenient to illustrate the point by reference to the statistics from the VCAT, NCAT and QCAT.

According to VCAT's annual report for 2018–19, 85,850 cases were lodged in that year. 52,412 (or 61 per cent) of those were in the Residential Tenancies Division. A total of 15,031 cases (or 17.5 per cent of total cases) were lodged in the Civil Division (comprising building and property, civil claims and owners' corporations (strata) claims). In summary, 78.5 per cent of cases lodged in VCAT during the 2018–19 year were *inter partes* civil disputes. Of the remaining cases lodged in VCAT during that year, 14,076 cases (or 16 per cent) were in the guardianship jurisdiction. Only 3,752 cases (or 4 per cent) were lodged in the 'planning and environment' and 'review and regulation' lists of the VCAT.[20] The latter lists include applications for the review of administrative decisions made by government decision-makers, but not exclusively so. The review and regulation list, for example, also deals with disciplinary inquiries in relation to the conduct of various professionals.[21] The figures for the 2017–18 and 2016–17 financial years were broadly consistent with those for 2018–19.[22]

The picture from the NCAT is similar. According to its annual report for 2018–19, 68,388 applications were lodged in NCAT. Of those, 54,976 (80.4 per cent of total applications) fell within the Consumer and Commercial Division of the NCAT. The Consumer and Commercial Division of the NCAT deals with a range of disputes including those concerning residential tenancies, retail leases, home building, strata schemes, and consumer disputes under the *Fair Trading Act 1987* (NSW).[23] There were 11,716 (17.1 per cent) applications to NCAT in the guardianship jurisdiction. Only 777 (1.1 per cent) fell within the Administrative

20 Victorian Civil and Administrative Tribunal, *VCAT annual report 2018–2019* (Report, 2019) 9.
21 Ibid 58.
22 Ibid 9.
23 NSW Civil and Administrative Tribunal, *NCAT annual report 2018–2019* (Report, 2019) 35.

and Equal Opportunity Division.[24] Of these, only 678 applications were made in the various lists in the Administrative and Equal Opportunity Division which deal with merits review.[25] NCAT's top 10 matters by volume in descending order for 2018–19 were residential tenancy and social housing; guardianship; consumer claims; home building matters; strata and community title, retirement village and similar matters; motor vehicle disputes; other commercial matters, including retail leases; administrative reviews of government decisions; professional disciplinary matters; and anti-discrimination matters.[26] The figures for the 2017–18 financial year were broadly consistent with these.[27]

The QCAT received a total of 31,592 applications in the 2018–19 year. Of these, 17,090 applications (54 per cent) were received in the Civil Division of the QCAT. Within the Civil Division, the very large majority of applications (16,246 or 51 per cent of total applications in the QCAT) concerned minor civil disputes, 352 applications were for building disputes and 188 were for retail shop lease disputes.[28] The minor civil disputes jurisdiction covers civil disputes including residential tenancy disputes, minor debts, consumer and trader disputes, motor vehicle property damage disputes and dividing fence disputes, where the claims are for a value of less than $25,000.[29] The balance of the Civil Division encompasses disputes such as domestic building disputes (where no monetary limit applies), community living matters (community title schemes, retirement villages and manufactured home parks), retail shop lease disputes with a value of up to $750,000, and tree disputes.[30] The next most significant jurisdiction by volume was the guardianship jurisdiction, in which 12,805 applications (or 40.5 per cent of total applications) were received. Only 837 applications (2.6 per cent) fell within the workload of the Administrative and Disciplinary Division, of which 469 applications (1.5 per cent of total applications in the QCAT) were for general administrative (merits) review[31] and the balance were for occupational regulation matters.[32] The figures for the 2017–18 year were very similar.[33]

The distribution of work — as between civil disputes, guardianship applications, and merits review applications — appears to be broadly similar in the other CATs, albeit with

24 Ibid 7.

25 The lists in which merits review is undertaken are the Administrative Review List (which deals with the review of decisions made by government decision-makers in areas such as access to information, breach of privacy, reviews of decisions made by the New South Wales Trustee and Guardian), the Community Services List (which includes the review of decisions such as whether a person should be permitted to work with children) and the Revenue List (which covers the review of state government tax decisions): NSW Civil and Administrative Tribunal, above n 23, 31.

26 Ibid 5; NSW Civil and Administrative Tribunal, *NCAT annual report 2017–2018* (Report, 2018), 5.

27 Ibid 8.

28 Queensland Civil and Administrative Tribunal (QCAT), *Queensland Civil and Administrative Tribunal annual report 2018–19* (Report, 2019), 13.

29 Ibid 23.

30 Ibid 21.

31 Some merits review applications in relation to child protection matters fall within the workload of the Human Rights Stream; 413 such applications were received in the 2018–19 year. If these are combined with the general merits review applications received in the Administrative and Disciplinary Division, a total of 882 applications for merits review (2.8 per cent of total applications) were received in the QCAT in the 2018–19 year.

32 Queensland Civil and Administrative Tribunal, above n 28, 13.

33 Ibid.

some variations.[34] For example, the SAT has jurisdiction to deal with civil disputes, such as those arising under the *Strata Titles Act 1995* (WA), but does not have jurisdiction to deal with residential tenancy disputes under the *Residential Tenancies Act 1987* (WA). The SAT received 6,855 applications in the 2018–19 year. Of these, 2,321 were received in the Commercial and Civil List. The bulk of these were for commercial lease amendments, for building disputes, and for strata titles disputes and other commercial matters. The majority of applications to the SAT (3,938 applications) were received in its guardianship and administration jurisdiction. Only a very small proportion of applications overall were for merits review.

A number of insights into the reasons for the existence of the CATs can be discerned from these statistics. First, while tribunals had their origins as vehicles for merits review, it is apparent that the raison d'être of CATs can no longer be said to lie in, or primarily in, merits review, or in improving public administration through merits review. Judged by reference to the volume of applications, a large majority of the work undertaken by the CATs is concerned with the resolution of *inter partes* civil disputes. (In that sense, the jurisdiction of the CATs 'reaches into the heartland of the courts by including civil and commercial jurisdictions — and in many instances removes those jurisdictions from the spheres of the courts'.[35]) The next most significant aspect of the CATs' jurisdiction lies in their guardianship jurisdiction. The merits review jurisdiction is comparatively small by volume. While merits review remains an important part of the role of the CATs, the fact is that the CATs are now primarily concerned with the resolution of civil disputes and the determination of guardianship applications.

Secondly, it cannot be said that the philosophical foundation for CATs lies in the fact that they are not courts and do not exercise judicial power. While the CATs clearly exercise power which is not judicial power (for example, in appointing guardians[36]), their jurisdiction to determine *inter partes* civil disputes does involve the exercise of judicial power.[37] Furthermore, QCAT is a court of record,[38] and it has been held that QCAT is a 'court of a State' for the purposes of s 77(iii) of the Commonwealth *Constitution*.[39] On the other hand, those CATs which are not constituted as courts cannot be regarded as providing a complete alternative to courts for the resolution of civil disputes, because they cannot exercise jurisdiction in federal matters described in s 75 and s 76 of the Commonwealth *Constitution*.[40] Alternative arrangements need to be available to ensure that those matters can be determined by courts.[41]

Thirdly, it also cannot be said that the philosophical foundation for CATs is concerned with the resolution of minor or small claims. While much of the work of the CATs, and especially

34 ACAT: administrative review, guardianship, and civil disputes. NTCAT: civil disputes and small claims, residential tenancies, guardianship.

35 Bertus De Villiers, 'Accessibility to the Law — The Contribution of Super-Tribunals to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39(2) *University of Western Australia Law Review* 239, 245.

36 See, for example, *GS v MS* [2019] WASC 255.

37 See, for example, *Zistis v Zistis* [2018] NSWSC 722 [57]–[67] (Latham J); *Raschke v Firinauskas* [2018] SACAT 19 [90] (President Hughes); *Sharma v Carlino* (2019) 96 SR (WA) 198 [40] (Senior Member Aitken); *Shuttleworth v Pearson* [2018] WASAT 112 [38] (Senior Member Aitken).

38 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1).

39 *Owen v Menzies* [2012] QCA 170 [55] (McMurdo P).

40 *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15; *Meringnage v Interstate Enterprises Pty Ltd t/as Tecside Group and Ors* [2020] VSCA 30.

41 See, for example, Pt 3A of the *Civil and Administrative Tribunal Act 2013* (NSW).

VCAT, NCAT and QCAT, is concerned with simple civil disputes of a small value, their jurisdiction to resolve civil disputes also encompasses claims involving factual or legal complexity, and/or high value. By way of example, VCAT's 2018–19 annual report indicates that the cases it deals with in its Civil Claims List predominantly comprise disputes about the supply of goods and services under the *Australian Consumer Law and Fair Trading Act 2012* (Vic).[42] There is no limit on the amount that may be claimed in these claims. While the vast majority of these claims were for minor amounts (less than $10,000), 1,907 of these claims were for amounts exceeding $10,000 and 131 were for amounts in excess of $100,000. These consumer law disputes range from 'everyday consumer transactions' to more complex cases such as disputes concerning the sale of businesses, professional negligence claims against accountants and other service providers, contractual disputes for software development, disputes under insurance policies, and disputes between franchisors and franchisees.[43] In its Building and Property List, VCAT deals with a range of disputes including domestic building disputes, retail tenancies, commercial building works and leases, and the sale or division of co-owned land and goods. Building disputes, in particular, are becoming more complex, increasingly concerning defects in high-rise apartments and multi-unit developments.[44] Finally, while its Residential Tenancies List is 'a high-volume, efficient throughput list' which aims to resolve most matters within four weeks of the original application,[45] that list also includes a small number of 'complex high-value compensation claims between landlords and tenants'.[46]

Fourthly, there has not been a consistent approach across the CATs to the conferral of civil jurisdiction on CATs rather than courts. As noted above, the SAT does not have jurisdiction to deal with residential tenancy disputes under the *Residential Tenancies Act 1987* (WA). Those disputes are dealt with by the Magistrates Court. On the other hand, the SAT deals with disputes under the *Strata Titles Act 1995* (WA). Recent amendments to that Act resulted in the conferral on SAT of jurisdiction to deal with applications which previously fell within the jurisdiction of the District Court of Western Australia.[47] There does not appear to be any consistent rationale for why some CATs have jurisdiction over particular kinds of civil disputes and others have not been conferred with that jurisdiction.[48] Nevertheless, these recent examples serve to illustrate that CATs constitute an alternative vehicle for the adjudication of civil disputes and, in that respect, determine disputes that would otherwise require determination by courts.

The philosophical foundation for CATs in Australia

How, then, might the philosophical foundation of the CATs be encapsulated in a statement? Taking into account the matters already discussed, a starting point might be as follows:

42 Victorian Civil and Administrative Tribunal, above n 20, 43.
43 Ibid 42.
44 Ibid 40.
45 Ibid 56.
46 Ibid 56.
47 See, for example, s 31 of the *Strata Titles Amendment Act 2018* (WA) conferring jurisdiction on SAT to deal with applications to vary strata schemes on damage or destruction of the building.
48 De Villiers, above n 35, 246–7.

> CATs exist to act as independent decision-makers in any of a wide variety of roles which may be conferred on them by statute: to conduct merits reviews, to act as an original decision-maker, or in adjudicative or inquisitorial roles. The legal, or other specialist, expertise of their members, and their flexible and informal processes, enable CATs to focus on achieving a just outcome, and on making decisions of the highest quality, as efficiently, simply, speedily and cost-effectively as is possible, having regard to the circumstances of each case.

It will immediately be noticed that this statement focuses on how CATs operate, rather than what they decide. That is precisely the point. The diversity of jurisdiction which, over time, has come to be conferred on CATs means that their philosophical foundation cannot be exclusively tied to a particular jurisdictional anchor.[49]

However, to state this philosophical foundation in terms concerned, fundamentally, with process, does not preclude reference to the objectives of a CAT's jurisdiction being added to, or overlaid on, this philosophical foundation. So, for example, the philosophy underlying a CAT's merits review jurisdiction might be to promote the best principles of public administration by identifying the correct and/or preferable decision at the time of the review.[50] The philosophy underlying a CAT's small civil claims jurisdiction might be to resolve disputes using resources and time proportionate to the quantum and complexity of those disputes. In vocational regulation, the philosophy might be to promote the observance of professional standards of conduct, for the protection of the community. In guardianship and administration, a CAT's philosophy might be to adopt an inquisitorial role to ensure that those who require the protection of the legislation receive it, so far as their best interests require. Different CATs may have different views about how to encapsulate the underlying objectives of particular aspects of their jurisdiction.

Identifying the philosophical foundation for CATs permits a principled approach to decisions about the procedures adopted by a CAT in the exercise of its diverse jurisdiction, and may also inform other decisions, such as those concerning its membership and composition, or the role and emphasis on ADR or FDR across all areas of its jurisdiction, or the extent to which technology can and should be used to resolve disputes. Furthermore, keeping that philosophical foundation steadily in focus acts as a reminder that CATs exist because they are able to offer an approach to the delivery of justice which is different from the approach taken in the courts. If the manner in which CATs operate does not continue to manifest that difference, the purpose for their existence may be called into question.

Composition and culture

I have already discussed the wide range of jurisdiction conferred on CATs and the challenges experienced by CATs in seeking to develop cohesive procedures and culture. The SAT's experience suggests that a cohesive approach can be adopted across all jurisdictions (other than the guardianship and administration jurisdiction). While retaining the flexibility to tailor its procedure to the needs of an individual case, the typical approach following the filing of an application in the SAT is to hold an initial directions hearing, at which the issue for resolution

49 Cf Bernard McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40, 44.

50 *State Administrative Tribunal Act 2004* (WA) s 9; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(a); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 10(a).

will be identified and the most expeditious means to resolve it will be explored. Orders will usually be made to require a brief responsive document to be filed, and the parties will then be required to attend a mediation or compulsory conference. If the proceeding does not resolve at the mediation then a second directions hearing will be held, at which point orders will, if appropriate, be made for the filing of statements of issues, facts and contentions, or statements of agreed facts, for the filing of witness statements, and for the listing of the final hearing. In more complex matters, the process may be more protracted in that the parties may require longer to prepare documents, or may seek to adduce expert evidence. However, broadly speaking, the process remains the same.

That brings me to an additional challenge for those CATs with a large civil jurisdiction, and especially one which includes more complex or high-value cases. That challenge lies in combating the resistance of some lawyers to dealing with cases quickly, using streamlined processes. Attempts to impose short time frames at each stage of a proceeding may be met with consent orders by the parties to extend time. Statements of issues, facts and contentions, or summaries of cases, can start to look like pleadings. In such cases, it is particularly important for CATs to keep steadily in mind their philosophical foundation, and to continue to press the parties to narrow the dispute to what is really in issue, to endeavour to resolve the case by compromise through ADR or FDR and, failing that, to proceed to a hearing as quickly as possible.

A continuing question for CATs concerns the qualification of members and, in particular, whether only legally qualified members should be appointed. It cannot be disputed that in many areas of the civil and merits review jurisdiction conferred on CATs, it is essential that members have legal training and experience. That is so in high volume areas of jurisdiction, as much as it is in cases involving factual or legal complexity, or in merits review, in which statutory construction may be involved. The attraction in appointing only lawyers to tribunals lies in their potential to undertake a wide variety of work. That thinking clearly underlined the recommendation of the Callinan Review[51] that all persons appointed as members of the AAT in the future should be lawyers.[52]

CATs need legally qualified members with a range of abilities and competencies. Some will be suited to specialisation in specific areas of work, such as guardianship applications. Some will be suited to dealing extremely efficiently with large numbers of small civil disputes. Others will have interpersonal skills which will be invaluable in avenues of ADR or FDR. The recruitment of members with skills in mediation is especially important if CATs are to resolve matters efficiently, speedily and cheaply.

The philosophical foundation for CATs means that there is an important role for members who are not legally trained, but who have specialist knowledge and expertise in fields of endeavour related to the work of the CATs. In some areas of jurisdiction — such as vocational regulation — the involvement of specialist decision-makers is mandated by legislation.[53] In other areas, such as in merits review of planning decisions, or in building disputes, the

51 Hon Ian Callinan AC QC, *Review: Section 4 of the Tribunals Amalgamation Act 2015* (Cth) (Report, 2018).
52 Ibid 9 (measure 6), 125.
53 See, for example, *State Administrative Tribunal Act 2004* (WA) s 11(4); *Legal Profession Act 2008* (WA) s 437.

expertise of specialists from a relevant field is essential to the efficient conduct of a CAT's work. The assistance able to be provided by non-legally trained members is also especially valuable in the mediation of disputes involving technical or professional standards, where the presence of a specialist member can assist the parties to more quickly come to understand the potential strengths and weaknesses of their case, and that of their opponent. Finally, in other areas of a CAT's decision-making roles, the value of the different perspectives offered by members who have expertise outside the law, and who are experienced decision-makers, should not be underestimated. The opportunity for collaboration between legally trained members and members with other specialist qualifications is also an important feature of CATs which facilitates the efficient resolution of disputes. When the philosophical foundation for CATs is borne in mind, it is apparent that a CAT will be best placed to deal with the diverse jurisdiction conferred on it if it has members with a range of qualifications and expertise, who are able to deal with cases individually or collaboratively, to enable the tribunal to quickly and efficiently deal with the issues in a case.

Use of technology

I turn, finally, to consider an increasingly important issue in relation to the operations of CATs, namely the use of technology, which itself presents a number of challenges and opportunities.[54] It is fair to say that the upheaval produced by the COVID-19 pandemic over the past six months, and the enormous challenges this has posed for courts and tribunals around the country to continue to deliver justice while ordinary operations have been interrupted, has increased the speed at which the use of technology has been embraced, but has also starkly highlighted the challenges associated with its use. The following observations are based on my own reflections on the benefits and challenges associated with the use of technology, informed by SAT's recent experience.

There are two areas in which the use of technology will be essential if a CAT is to be able to operate in accordance with its philosophical foundation in the future: the use of e-lodgment and e-filing systems; and the use of telephone and videoconferencing technology (VCT) in the conduct of both mediations and hearings.

E-lodgment and e-filing systems

E-lodgment systems permit documents to be filed — that is, lodged with a CAT registry online — and to be filed in the CAT file for the proceeding in question. E-filing systems permit CATs to move to a paperless filing system, whereby all members and staff of a CAT will be able to access the digital file for a proceeding, to undertake file management tasks, and to use the digital file for hearings, as they would a paper file. E-filing systems also permit parties to proceedings to access the e-file online, subject to any rules governing that access, just as they would be able to inspect a paper file at a CAT registry.

There are obvious and very significant advantages for the efficient operations of CATs in transitioning to e-lodgment and e-filing. E-lodgment and e-filing is convenient, at least for those with the capacity and skills to access it. It is fast — documents can be lodged instantaneously. It minimises delay in litigation because CAT staff and parties to proceedings

54 Creyke, above n 2, 214, 216.

can quickly access documents on an e-file wherever they are, at will, provided they have an internet connection. An e-lodgment and e-filing system is cost-effective, once established, because paper files no longer need to be maintained and stored. If properly designed, an e-filing system can make file management and use of filed documents simpler and easier for members and staff of a CAT. And an e-filing system permits easy access to CAT files for staff members working remotely.

On the other hand, there are a number of obvious challenges for CATs in transitioning to elodgment and e-filing systems. The first is adequate resourcing. Little more needs to be said about this, save in one respect, which concerns the hidden cost of converting large numbers of legacy paper files to digital format. This is a particular issue in the guardianship and administration jurisdiction, where represented persons may be the subject of applications to a CAT, including for mandatory reviews of existing orders, over many years, and for which documents filed in earlier applications (such as medical reports which confirm that a represented person suffers from a permanent disability) may continue to be relevant many years later.

There are three additional challenges for CATs in moving to e-lodgment and e-filing systems. First, depending on the application process adopted by the CAT, e-lodgment systems for CATs may be more complex than those used for courts. By way of example, a large number of enabling Acts confer jurisdiction on the SAT. While the same style of application form is used (other than in relation to guardianship and administration applications) the SAT has a discrete form for each kind of application able to be brought under each enabling Act. While that approach has the major advantage that it identifies, from the outset, the nature and source of the jurisdiction that an applicant relies on in applying to the SAT, the consequence for the development of SAT's e-lodgment system is that the system needs to accept over 850 different documents for lodgment. Most of these are application forms. The very small remaining number of documents (about 70) comprise other documents used in SAT proceedings, such as statements of issues, facts and contentions; witness statements; witness summonses and so on.

Secondly, if SAT's experience is any guide, developers responsible for designing e lodgment and e-filing systems may not readily appreciate that CATs have different procedures which may require the development of bespoke e lodgment and e-filing systems, rather than the implementation, with minor adjustments, of e lodgment and e-filing systems used for courts. SAT's procedures in respect of guardianship and administration applications are very different from the procedures which generally apply across the balance of its operations,[55] and it has been essential in the development of its e-filing system to accommodate that difference.

Thirdly, and most significantly, while the use of e-lodgment and e-filing systems is convenient for many, for those without access to the internet, or who experience difficulty in using online technology, e-lodgment and e-filing can be an impediment to access to justice. CATs need to ensure that their processes are sufficiently flexible to permit other forms of lodgment of documents, and to provide assistance to those who require it, when lodging documents.

55 See, for example, s 112 of the *Guardianship and Administration Act 1990* (WA) for the unique confidentiality requirements and application required for guardianship and administration matters in the SAT.

The e-lodgment system being developed for the SAT guides applicants through a series of questions to identify the source of jurisdiction on which their application relies. Other assistance will continue to be available once the e-lodgment system is rolled out, especially in the form of a telephone help line, through which a SAT staff member will be able to guide a user through the online lodgment process. And for the foreseeable future, lodgment of documents by means other than via the e-lodgment system will remain possible.

Use of VCT

Maintaining CAT operations while observing the social distancing restrictions in response to COVID-19 has undoubtedly brought about a swifter embrace of VCT than would otherwise have occurred. In doing so, the challenges and benefits of the use of such technology have been brought into sharp relief.

Turning first to the challenges, I will not dwell on those that are attributable to inadequate hardware, software or bandwidth, or to a lack of hearing rooms equipped to conduct hearings using VCT, or to the steep learning curve for all involved in learning how to use VCT software in mediations and hearings. Let me instead highlight seven lessons about the difficulties in using VCT for mediations and hearings, drawn from the SAT's experience over the past six months.

First, identifying videoconferencing software which is suitable for SAT mediations and hearings has posed some challenges. Many proceedings in SAT involve multiple parties. Videoconferencing software does not necessarily, or effectively, accommodate multi-party hearings. There are often limits on the number of parties who can be seen on screen at any given time, and the greater the number of participants the more difficult it is to see them clearly. This has been a particular impediment in large mediations where eye contact and visual cues can be an important means to reach understanding and compromise. It is to be hoped that improvements to VCT software in future will result in the development of products which are more suitable to court and tribunal hearings.

Secondly, and counterintuitively, mediations and hearings conducted using VCT frequently take longer than those conducted in person, because of a loss of connection or poor-quality connections for any of the participants.

Thirdly, there are practical difficulties for all involved in a telephone or VCT hearing, over and above the use of the technology itself. Conducting proceedings in this way results in increased levels of fatigue, and requires reserves of patience, for all involved. Conducting a proceeding by telephone or VCT when an interpreter is required is especially difficult. The difficulties experienced by parties who are from culturally and linguistically diverse backgrounds, or who are elderly, or who live with disabilities, which make participating in a proceeding difficult at the best of times, may be exacerbated by not being in the same hearing room as the tribunal member or other parties. Merely using VCT software is an additional stressor for those representing themselves in a hearing.

Fourthly, the challenges posed by the use of VCT have highlighted the need for education and training of judges and members in new skills for mediations and hearings conducted in this way. Perhaps because of the additional level of informality involved in VCT proceedings,

parties often do not behave with the same respect for the tribunal, or each other, as they would in an in-person hearing and, whether consciously or not, will often talk over each other during the proceeding. Judges and members conducting VCT hearings need the skills to convey expectations of behaviour to the parties, to maintain the decorum of the proceedings, and to respond effectively to departures from appropriate behaviour. Paradoxically, this may require the use of greater formality in a VCT hearing, to assist a member to maintain control of the proceedings.[56]

Fifthly, an effective VCT hearing requires advance preparation by litigants, over and above that which would ordinarily be required for a hearing. CATs will need to provide assistance to those self-represented litigants who do not have experience in participating in a hearing conducted using VCT. In order to do so, the SAT has prepared information sheets for parties in the SAT, which provide guidance on downloading relevant software and participating in a hearing conducted using VCT.

Sixthly, cases involving factual contests which turn on documentary evidence are not ideal for VCT hearings. The logistical difficulties involved are not insurmountable, but to avoid them requires considerable pre-planning (such as in the preparation of bundles of documents filed in advance of the hearing, and provided to witnesses if necessary).

Finally, it is important for CAT judges and members to conduct telephone and VCT hearings from hearing rooms, if it is possible to do so. Conducting a hearing from a hearing room assists to convey the serious nature of the proceedings, despite the informality inherent in conducting a VCT hearing. Furthermore, it is vitally important that justice is seen to be done in CATs. That means hearings need to take place in public. While it is possible to permit interested persons to observe VCT hearings by allowing them to connect to the VCT hearing itself, that poses additional logistical challenges, and usually comes at the cost of the loss of the anonymity to which observers of any court or tribunal proceedings are entitled. Social distancing requirements aside, if a CAT member conducts a VCT hearing from a hearing room, the public has the opportunity to see the CAT undertaking that hearing.

On the other hand, the use of VCT for SAT proceedings over the past few months has highlighted a number of unexpected benefits. First, as staff and parties have become more familiar with the use of VCT, there has been a marked improvement in the effectiveness of mediations and hearings conducted in this way. The informality of SAT proceedings has no doubt contributed to that outcome, perhaps because parties and counsel are more accommodating of different procedures than they might be in a more formal courtroom environment.

Secondly, the use of VCT software for conducting mediations involving small numbers of parties has been surprisingly successful, perhaps because visual contact can be maintained by all parties, and the close-up view which is possible when fewer participants are involved lends an increased intimacy to the exchange.

Thirdly, assuming that there is a good video connection to a witness, and that the witness is correctly positioned in front of the camera, the use of VCT can permit a tribunal member

56 McCabe, above n 49, 46.

to see a witness very clearly. To the extent that demeanour can be relied upon to assess the credibility of a witness, VCT hearings may be equally as effective for that purpose as in-person hearings.

Fourthly, for those parties who are represented by legal practitioners, VCT hearings can result in reduced costs. This is especially so in relation to directions hearings where multiple matters may be listed in a single sitting for procedural directions to be made. If legal practitioners can attend using VCT, the travel time and waiting time, for which their clients would otherwise be charged, can be avoided, and the costs involved can be limited to the duration of the hearing itself.

Fifthly, the use of VCT software presents an important means of providing access to a CAT for those in regional areas. In the Creyke survey, Professor Creyke noted that Australia's size and dispersed population posed challenges for the delivery of services, including for the conduct of hearings in places outside the capital cities,[57] and that 'servicing regional areas remains a challenge for all the tribunals, ACAT excepted'.[58] Professor Creyke noted that the use of telephone and videoconferencing was one way the impact of geographical spread could be minimised, but that the use of that technology had drawbacks.[59] In a sparsely populated state like Western Australia, providing access to SAT facilities for Western Australians in the regions has always posed particular difficulties. Unlike other states with very large regional centres, SAT does not maintain registries and permanent staff outside metropolitan Perth. Furthermore, the volume of work in regional centres often does not warrant regular circuits to regional centres. The ability to conduct proceedings using VCT will increase SAT's accessibility for those in regional Western Australia. There is, of course, a balance to be struck in evaluating the suitability of a VCT hearing, as opposed to an in-person hearing, in a given case, with a view to achieving a just outcome as efficiently, simply, speedily and cost-effectively as possible. But the existence of the option to conduct VCT mediations and hearings for those in the regions has been a very significant positive development for the SAT.

SAT's experience over the past six months has left no doubt that the ability to conduct proceedings using VCT software is an important element in SAT's toolkit of flexible procedures, which will be able to be deployed in appropriate cases. Having regard to SAT's experience, there is also no doubt that VCT hearings will, if used in appropriate cases, greatly assist the CATs to achieve just outcomes quickly and effectively.

Conclusion

The future for Australian CATs is positive. While the amalgamation of diverse tribunals to form the CATs has given rise to challenges, many opportunities have also been created to better deliver justice in the various decision-making roles those CATs perform. The philosophical foundation for CATs is as decision-makers whose composition and flexible procedures enable them to reach just outcomes in a manner different from that adopted by courts. The unique composition and flexible procedures of tribunals have been well suited

57 Creyke, above n 2, 213.
58 Ibid 231.
59 Ibid 214.

to merits review in the past, but CATS have proven to be equally suited to a wide variety of decision-making roles, including the resolution of civil disputes. The philosophical foundation for the existence of CATs provides a principled point of reference for navigating the challenges of organising the work of a CAT, for developing new procedures across its jurisdiction, and for determining whether, and in what ways, the jurisdiction of a CAT should be expanded. That philosophical foundation also provides a touchstone in identifying new approaches, techniques or technology which might be adopted by CATs to deliver justice more simply, quickly and cost-effectively in the future.

Government contracts: using the right spectacles

*Nick Seddon**

Public lawyers have struggled with the public–private dichotomy for a very long time. It is the key to the judicial review gateway, whether under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or under non-statutory administrative law. When is a decision of an administrative character? When does it involve an exercise of public power? The dichotomy is essential for determining whether certain immunities operate, particularly immunity from statute. In this context, the dichotomy is central to the interpretation of legislation that purports to deal with Crown immunity. It may influence the interpretation of government contracts and legislation applying to those contracts. There are many other areas of law where the distinction is crucial.

The labels 'public' and 'private' have been criticised for being almost impossible to pin down, let alone be determinative of the outcome of a particular dispute. Some commentators have suggested abandonment of the dichotomy or, alternatively, a recognition of convergence so that public law values are applied across the board.[1] This article does not engage with that debate.

Nor does it engage with another area of current interest: the constitutional constraints on government contracting. These are sometimes quite surprising — they come out of left field — because their origins are buried in the *Constitution* and were not foreseen by the parties. Thus the Commonwealth does not have the power, executive or legislative, to make funding agreements for the provision of chaplaincy services in schools across Australia.[2] The Commonwealth cannot be taken before a state tribunal when it insists on discriminatory recruitment criteria for its contractor's employment of personnel.[3] A state cannot raise a levy payable to the state by a contractor to a Commonwealth entity carrying out construction work on land acquired by the Commonwealth for public purposes within the meaning of s 52(1) of the *Constitution*.[4] These types of cases are plainly public and do not turn on identifying that fact or weighing its significance to the dispute.

Instead, this article is confined to observations about the use of contract in what is undoubtedly the public sphere — namely, government. In this article, these observations are necessarily selective. The reason they have been selected is that, because of the many controversies generated by the use of contract by government, they show, in the author's

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1 Three examples of this theme: CD Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1982) 130 *Pennsylvania Law Review* 1441; S Thomson, 'Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Taxonomy' (2017) 41 *Melbourne University Law Review* 890; G Airo-Farulla, '"Public" and "Private" in Australian Administrative Law' (1992) 3 *Public Law Review* 186.

2 *Williams v Commonwealth* (2012) 248 CLR 156; [2012] HCA 23 (executive power); *Williams v Commonwealth (No 2)* (2014) 252 CLR 416; [2014] HCA 23 (legislative power).

3 *Meringnage v Interstate Enterprises Pty Ltd T/A Tecside Group* [2020] VSCA 30 (the continuing saga of federal jurisdiction matters only being decided by a court and not a tribunal).

4 *Construction Industry Training Board v Transfield Services (Australia) Pty Ltd* [2017] SASCFC 103 (Transfield was a contractor to Australian Rail Track Corporation, a wholly owned Commonwealth company. The Corporation was treated as an emanation of the Commonwealth).

view, the difficulties encountered when the oil of public is mixed with the water of private.[5] These difficulties can, in some instances, result in perverse or bizarre consequences. In others, the tension is resolved satisfactorily.

Contrasting values in the mix

Good government according to law involves 'openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality'.[6] Taggart's similar list included 'honesty'.[7] Contract is almost perfectly opposite in its value system, apart from honesty, which is common to both. (You cannot exempt yourself from liability for fraud.) Contract is traditionally about protecting secrecy; no duty to act fairly; participation restricted to the parties; no obligation of accountability unless specified in the contract; no duty to act consistently unless an estoppel operates; no duty to act rationally or impartially unless tempered by a good faith obligation or legislation such as discrimination legislation; and access to grievance procedures provided by the state through the courts or by private resolution such as arbitration. Hence the oil and water reference above, though it is not clear which is more suitable to which side.

Apart from these contrasting values, the institution of contract is traditionally about freedom to bargain for private gain with minimum external regulation — laissez faire. The role of the courts is to take a minimalist stance in resolving disputes. By contrast, the role of the courts in relation to government conduct is to be interventionist where needed to advance the public interest; to pronounce on such matters as lack of fairness, openness, accountability and rationality; and to hold a government party accountable for its actions.[8] The remedies are very different for wrongdoing: money (almost invariably) for breach of contract; and correction of the bad decision or conduct in the public sphere.

Public law values and principles are not all sweetness and light. Over many centuries it has been thought necessary to accord government (originally the king or the queen) a number of immunities. The most important still-current immunities are immunity from statute[9] and, in a sense, immunity from contract. The latter is embodied in the executive necessity doctrine and its closely related rule against fettering.[10] These darker sides to public law will be discussed below.

Bringing these value systems and principles together in government contracts inevitably creates tensions raising many questions. Should government commercial decisions be subject to scrutiny in the same way as are other government decisions? Should it be possible for a citizen to have access to the terms and conditions which apply to a contracted-out service provided to the citizen, particularly when it is borne in mind that public

5 As noted below, it is not clear which is which.
6 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [1.10].
7 M Taggart, 'The Province of Administrative Law Determined?' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 3.
8 T Daintith, 'Contractual Discretion and Administrative Discretion' (2005) 68 *Modern Law Review* 554, 556.
9 See N Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 6th ed, 2018) Chs 4 and 6.
10 Ibid Ch 5.

money is being spent on the service? Should administrative law apply to a decision or conduct of an outsourced service provider? Is it appropriate for a decision to award a government contract to be subject to administrative law remedies or the Ombudsman's scrutiny? Is it appropriate for public sector tender processes to be subject to a high degree of regulation as compared to private sector tender processes? Should traditional government immunity apply in connection with regulatory legislation, such as the competition and consumer legislation? Are there some inherent limits on what government can do by contract — that is, a function is so fundamentally governmental that it cannot be outsourced?

One type of contracting where tensions are most evident and troublesome is in the outsourcing of government functions to contractors — in particular, the provision of services to the public. This is a very large subject that cannot be canvassed in this article, although it is touched on. Suffice it to say here that contract is not very good at capturing the important public values that must be included in this kind of outsourcing. It is sometimes baffling why governments choose contract over traditional public service delivery for this kind of activity.[11]

Should the courts, when adjudicating on a problem arising from a 'public' contract, make adjustments or take a modified stance to accommodate the difficult mix of values and principles that do not arise in an ordinary private sector contract dispute?

The spectacles metaphor

There are certainly statements of high authority drawing attention to the proper recognition of the public in government dealings.

In *Commonwealth v John Fairfax & Sons Ltd*[12] (*John Fairfax*) Mason J employed an illuminating rhetorical device when he wrote about government secrecy and the law of confidentiality:

> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.[13]

This usage was repeated by Kirby J in *ABC v Lenah Game Meats Pty Ltd*[14] (*Lenah Game Meats*):

> Special considerations govern the provision of injunctive relief where the information in question concerns the activities of public bodies or governmental information. In such cases it is necessary for courts to wear 'different spectacles'.[15]

11 Ibid [1.12]. One example is the debacle that resulted in the contracting out of vocational training, in competition with the TAFEs.
12 (1980) 147 CLR 39; [1980] HCA 44.
13 Ibid 51 [26]. See also *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31; [1995] HCA 19 [39] (Mason CJ).
14 (2001) 208 CLR 199; [2001] HCA 63.
15 Ibid 275 [181]. Gummow and Hayne JJ also briefly referred to Mason J's 'spectacles' metaphor at 259 [137].

The 'spectacles' device was again used in *Williams v Commonwealth*[16] (*Williams*), where Gummow and Bell JJ wrote:

> The law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government. Where public moneys are involved, questions of contractual capacity are to be regarded 'through different spectacles'.[17]

What can we draw from this usage? In one sense it is almost empty of content. It cannot be elevated to a determining principle. However, in context, in each case the meaning becomes clearer. In *John Fairfax* Mason J went on to spell out a substantive principle that has been very influential — namely, a government claim to secrecy, either on the basis of public interest immunity or on the basis of confidentiality, will be scrutinised very closely. In fact, Mason J said that the onus is on the government to show that disclosure will harm the public interest. It is not sufficient that the government would prefer the relevant information to be secret. In *Lenah Game Meats* Kirby J was discussing the exercise of discretion to grant an injunction and concluded that the implied freedom of political communication determined that the injunction should not be granted. The third usage in *Williams* was not about public information but about whether it is correct to assume that the government is in the same position as an individual or corporation in its contracting activities. It was concluded that it is not: the government does not enjoy freedom of contract. Government enterprise is very different from private enterprise in many ways, not the least for the reason that it is not spending its own money.[18]

In each case, the spectacles are used to ensure that the 'public' is properly focused — that is, the complex of concerns that stem from the extra responsibilities imposed on, and expected of, government as compared with private sector entities.

Getting the focus right — the *Town Investments* case

In *Town Investments Ltd v Department of the Environment*[19] (*Town Investments*) it was necessary to interpret legislation that was aimed at curbing inflation. The case involved two leases to government, each to the 'Secretary of State for the Environment'. The legislation applied to 'business tenancies' which, in turn, required answers to the three questions: who was the tenant in each lease? Were the premises occupied by the tenant? If so, were they occupied for the purpose of a business carried on by the tenant? The Court of Appeal[20] had concluded that the tenant was the Secretary, the premises were not occupied by the tenant and the tenancy was not a business tenancy. The House of Lords reached the opposite conclusions. The importance of this case is that it illustrates the need for public spectacles. The use of these spectacles resulted in a decision that was exactly the opposite from that resulting from the use of private spectacles. The Court of Appeal (and the dissenting Lord Morris of Borth-y-Guest in the House of Lords) looked at the questions from a private law perspective. The lease provided that the Secretary was the tenant. The premises were in

16 (2012) 248 CLR 156; [2012] HCA 23.
17 Ibid 236 [151].
18 See the remarks of Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 40–2.
19 *Town Investments Ltd v Department of the Environment* [1978] AC 359.
20 *Town Investments Ltd v Department of the Environment* [1976] 1 WLR 1126.

fact occupied by public servants from other departments and certainly not by the Secretary. The purposes of public servants were not 'business'. Lord Diplock, on the other hand, saw the issues quite differently:

> My Lords, the fallacy in this argument is that it is not private law but public law that governs the relationship between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments.[21]

Taking this approach meant that the tenant was in effect the government, which was similar in many respects to a corporation. It followed that the premises were occupied by the tenant. This was for the business of government.[22]

The case illustrates the importance of not putting on private blinkers but, instead, understanding that government in its dealings is different from private enterprise and this difference can have a substantive effect.

An example of not using the spectacles: *JS McMillan Pty Ltd v Commonwealth*[23]

Mention has been made of government immunities. The focus here is on the principal legislation governing commerce in Australia — the *Competition and Consumer Act 2010* (Cth) and its accompanying Australian Consumer Law (Sch 2 of the Competition and Consumer Act). Is government in its contracting activities bound by this legislation?

This legislation does include express sections which are apparently aimed at removing Crown immunity. At all levels of government, the government is bound by the legislation in so far as it 'carries on a business'.[24]

What does 'business' mean?

This then raises the question: what does 'carries on a business' mean when considering government commercial activity? The bizarre answer to this is that case law has established that government *procurement* for government purposes does not constitute 'business'.[25] The consequence of this is that a very major area of economic activity in Australia[26] is exempt from the principal legislation governing commerce. Thus, the sections that purport to remove Crown immunity actually maintain it in a very substantial way — namely, in respect of government's principal commercial activity of procurement. The main effects of this

21 [1978] AC 359, 380.

22 The meaning of 'business' in the context of government is discussed below as it arises under the competition and consumer legislation in Australia.

23 (1997) 147 ALR 419.

24 This expression appears in s 2A (how the Commonwealth is bound), s 2B (how the states and territories are bound by Pt IV), s 2BA (how local government is bound by Pt IV) and in each state and territory Act which adopted the Australian Consumer Law.

25 The case law is discussed by Seddon, above n 9, 317–24.

26 Seddon's rough estimate is that government procurement across all governments in Australia represents approximate 6.5 per cent of GDP. See N Seddon, 'Holes in Hilmer Re-visited: Government Exemption from Australian Competition and Consumer Law' (2012) 20 *Australian Journal of Competition and Consumer Law* 239, 240. In 2017–2018 the Commonwealth alone spent $71.1 billion on procurement: <https://www.finance.gov.au/business/selling-government-procurement>.

exemption are that governments are able — are permitted — to engage in anti-competitive practices when undertaking procurement;[27] and governments can engage in misleading or deceptive conduct in their commercial dealings with impunity.[28] Suppliers to government are, of course, bound by this legislation.

How did this extraordinary state of affairs arise? It all started with s 2A of what was the *Trade Practices Act 1974* (Cth) which now appears in the Competition and Consumer Act. It provides that the Act 'binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth'. The 'carries on a business' formula was then mimicked at all levels of government.[29]

The important case that examined what these crucial words mean was *JS McMillan Pty Ltd v Commonwealth*[30] (*JS McMillan*). The case involved a Commonwealth tender for the sale of AGPS, the former publishing service of the Commonwealth. One of the bidders, McMillan, alleged that, in the conduct of the tender process, the Commonwealth had engaged in misleading conduct in breach of s 52 of the Trade Practices Act. Justice Emmett so found.

It was then necessary to consider whether the Act as a whole bound the Commonwealth. This particular activity was the one-off sale of a Commonwealth asset. It was relatively easy to conclude that this did not amount to carrying on a business and Emmett J so held. However, he conducted a wider examination of these crucial words. The words 'carries on a business' or just 'business' have been considered by the courts in a number of contexts. Justice Emmett considered private sector cases and cases involving government and the application of s 2A.[31] He expressed the opinion that the AGPS, when supplying services to Commonwealth agencies, was carrying on a business.[32] But, crucially, he stated that the purchasing agencies would not be carrying on a business when buying services for ordinary government purposes.[33] This was *obiter dicta*. Justice Emmett was of the opinion that the words 'in so far as' in s 2A signify that the Commonwealth can be carrying on a business when engaged in one activity but not so when engaged in another activity. His Honour quoted the second reading speech when s 2A was introduced:

27 As in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1; [2007] HCA 38, where the ACCC conceded that state and territory governments were not bound by Pt IV of the Trade Practices Act when conducting a tender to purchase medical supplies.

28 As in *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419, discussed below; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 [1369]–[1395] (Finn J).

29 At state level this appears in the Acts which adopt the Australian Consumer Law. See, for example, *Fair Trading Act 1987* (NSW) s 36. This section is functionally the same in all state and territory legislation that adopted the Australian Consumer Law.

30 (1997) 147 ALR 419.

31 His Honour did not consider the *Town Investments case*, where a very wide view of the meaning of 'business' in the context of government was taken.

32 This was technically incorrect because s 2C of the Act states that business does not include a transaction in which the Commonwealth is on both sides. AGPS was a unit within the Department of Administrative Services.

33 (1997) 147 ALR 419, 437.

Government commercial operations

I announced last December that the government had decided in principle that its commercial operations should be subject to the same restraints of the Trade Practices Act as apply to like operations of private enterprise. I then informed this House that the government was studying the detailed implementation of this decision. This bill gives effect to that decision in cl 4 which provides that the Act is to apply to all business undertakings of the Commonwealth Government and its authorities.[34]

Justice Emmett drew from this that the intention of Parliament was to apply the Act to the Commonwealth only when it engaged in business in a private sector sense — that is typically, entrepreneurially. This interpretation of Parliament's intention was not compelled by the words used by the Minister. It depends which spectacles one uses. Given that the new s 2A was about a rather important public law principle — government immunity from legislation and its removal — it would seem to be appropriate to use public spectacles. From this focus, 'commercial operations' in the context of government does not denote entrepreneurial activity and 'business undertaking' similarly can be interpreted as 'government business', which is principally procurement. In fact, the government rarely engages in commercial operations in a private sector sense. That is left to government business enterprises, such as electricity generators or port facilities. When applied to the executive government, s 2A has almost no work to do if the interpretation of 'business' in a private enterprise sense is adopted.[35]

This examination was *obiter dicta* because the factual inquiry concerned a one-off sale of a government asset, not the procurement activities of government. The conclusion that the sale of AGPS did not constitute carrying on a business and that, therefore, the Commonwealth was not liable for misleading conduct is unexceptionable.[36] However, the *obiter dicta* about government purchasing for ordinary government purposes not amounting to carrying on a business has much wider ramifications. It has been treated in subsequent cases as authoritative in supporting the proposition that government procurement does not amount to carrying on a business.[37]

It is submitted that the interpretation adopted by Emmett J and followed in later cases was the result of wearing the wrong spectacles. The essence of s 2A is not 'business', and certainly not business in a private sector sense, but instead removal of government immunity from legislation — very much a public law concern.

There is high authority for the proposition that the word 'business' must be interpreted according to the context in which it is used. That context, in the present instance, is removal of government immunity. The contextual nature of 'business' was acknowledged by

34 Australia, House of Representatives, *Debates*, 3 May 1977, Minister John Howard, p 1447.

35 There are a few small parts of the Commonwealth which do sell their services and thus could be said to be carrying on a business in the private sector sense. Two examples are the Defence Science and Technology Organisation and the Australian Bureau of Agricultural and Resource Economics and Sciences.

36 Justice Emmett indicated that he was not happy about the result of the litigation but pointed out that it was for the Parliament to determine the extent to which the Trade Practices Act bound the Commonwealth.

37 *Corrections Corp of Australia v Commonwealth* (2000) 104 FCR 448; *Sirway Asia Pacific Pty Ltd v Commonwealth* (2002) ATPR (Dig) 46–226; [2002] FCA 1152; GEC *Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 [1369]–[1395] (Finn J); *Knevitt v Commonwealth* [2009] NSWSC 1341. Compare *Murphy v Victoria* (2014) 45 VR 119; [2014] VSCA 238, where a more nuanced approach to the meaning of 'business' in the government context was advanced.

Emmett J.[38] The High Court in *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*,[39] in the context of 'the activities of public authorities and departments of government, which do not or may not carry on commercial undertakings for profit', observed:

> Of all words, the word 'business' is notorious for taking its colour and its content from its surroundings: see *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at pp 378–379. Its meaning depends upon its context. It is common and apt to speak of 'the business of government': see, for example, *Conway v Rimmer* (1968) AC 910 at p 952.

The chameleon metaphor (an 'etymological chameleon') was also used by Lord Diplock in *Town Investments*[40], where, as already noted, it was appropriate to treat leasing of accommodation for public servants as government business. He made the point that the word 'business' embraces 'almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or a duty which requires attention is a business'.[41] And, as noted earlier, Lord Diplock made it clear that the kind of problem of statutory interpretation facing the House had to be considered from the perspective of public law, not private law.[42] In short, when considering whether legislation binds the Crown, this is a public problem and should not be viewed through private spectacles which test the government's procurement activities against inappropriate private enterprise norms.

The great irony is that government procurement in Australia has been regarded in the cases as not private enough — it is a governmental activity — at least in respect of the application of the Competition and Consumer Act to government. This is in contrast with the general attitude, discussed briefly below, that the courts have taken to government contracting — namely, that it is 'private' and no special public rules should apply.

It is worth noting that the High Court has made it pretty clear that claims to Crown immunity will not be treated with any enthusiasm. This can be seen by what was said by Gibbs CJ in *Townsville Hospitals Board v Council of the City of Townsville*:

> All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them.[43]

This was in the context of whether a statutory corporation could claim Crown immunity. Similarly, the High Court denied Crown immunity to another statutory corporation in *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal*,[44] even though legislation stated that the body was immune.[45] In *Re Residential Tenancies Tribunal of New South*

38 (1997) 147 ALR 419, 435, citing Mason J in *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 378–9, who spoke of the words like 'business' having 'a chameleon-like hue, readily adapting themselves to their surroundings, different though they may be'.

39 (1990) 171 CLR 216, 226 (Mason CJ, Gaudron and McHugh JJ).

40 [1978] AC 359, 383.

41 Ibid, citing Lindley LJ in *Rolls v Miller* (1884) 27 Ch D 71, 88; [1881–5] All ER Rep 915, 920.

42 *Town Investments* [1978] AC 359, 380.

43 (1982) 149 CLR 282, 291.

44 (2005) 221 CLR 646; [2005] HCA 55.

45 The High Court overturned *Wynyard Investments Pty Ltd v Commissioner for Railways (New South Wales)* (1955) 93 CLR 376, a decision of 50 years' standing, on exactly the same legislation.

Wales and Henderson; *Ex parte Defence Housing Authority*[46] the High Court denied immunity to a Commonwealth statutory corporation that was held to be bound by state residential tenancies legislation. A claim to derivative immunity was denied to a supplier to government in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*.[47] A claim to immunity under s 2B of the Trade Practices Act (that is, it was argued that the body was not carrying on a business) was denied to a Northern Territory GBE in *NT Power Generation Pty Ltd v Power and Water Authority*.[48] A claim by the executive government to be immune from local legislation was denied in *Bropho v Western Australia*.[49] There is a decision that goes against this trend — *Commonwealth v Western Australia*,[50] where it was held that the Commonwealth was not bound by the *Mining Act 1978* (WA).

These cases do not directly provide a court with a basis for reading 'carries on a business' in the context of government procurement in a broad way to include purchasing by government. But they do indicate that the ancient legacy should be kept to a minimum. This can be done through the well-established precedents discussed above on the meaning of 'business' in the public sphere. A similar stance of paring back Crown immunity was taken by the Australian Law Reform Commission.[51] More recently, specific recommendations about the immunity provided by the words 'carries on a business' have been made.[52] Significantly, the Harper review recommended that the words be replaced by 'in so far as [governments] undertake activity in trade or commerce'.[53] This would substantially fix the problem.[54] This has not been implemented. It appears that governments prefer to be free to engage in anti-competitive practices and not to be bothered by the pesky prohibition of misleading conduct.

Privileging the private

The point is noted above that the non-recognition of procurement for government purposes as 'business' (it is not private enough) is in contrast with the emphasis in other cases that government contracting is 'private'. This is usually in the context of attempts to use judicial review in connection with contracting. Cases of this kind generally are concerned to prevent the intrusion of administrative law in a 'private' domain. An example is *General Newspapers Pty Ltd v Telstra Corp*,[55] where a statutory corporation (Telecom) was held to be engaging in private activity when entering into a contract, despite a specific power to contract provided

46 (1997) 190 CLR 410.
47 (2007) 232 CLR 1; [2007] HCA 38.
48 (2004) 219 CLR 90; [2004] HCA 48.
49 (1990) 171 CLR 1; [1990] HCA 24.
50 (1999) 196 CLR 392; [1999] HCA 5.
51 Australian Law Reform Commission, *The Judicial Power of the Commonwealth — A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, 2001) in which, among other things, the Commission made comprehensive recommendation about winding back Crown immunity. See also Australian Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown* (AGPS, 1992).
52 Productivity Commission, *Review of NCP Reforms* (No 33, 28 February 2005) recommendation 10.1; Senate Finance and Public Administration References Committee, *Commonwealth Procurement Procedures* (July 2014) recommendation 12.
53 Commonwealth of Australia, *Competition Policy Review Final Report* (March 2015, chair Prof Ian Harper) recommendation 24.
54 N Seddon, 'Government Exemption from Competition and Consumer Law: Has Harper Patched the Holes?' (2015) 23 *Australian Journal of Competition and Consumer Law* 181.
55 (1993) 45 FCR 164.

for in its legislation. Accordingly, when contracting, Telecom was not making a decision 'under an enactment' for the purpose of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Davies and Einfeld JJ said:

> A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract.[56]

Similarly, in the New Zealand case of *Schelde Marinebouw BV v Attorney-General and Tenix Defence Pty Ltd*[57] it was held that a government tender process governed by a pre-award contract is not amenable to administrative law challenge. The Court considered that, where a private law regime has been chosen to govern the tender process, it is inappropriate to resort to judicial review. This binary, either/or, approach is not self-evident and there are tendering decisions that show that both public and private law can be employed:[58]

> The view that contracting belongs entirely to the private sector is a regrettable, but predictable, result of a binary approach which insists on seeing power as being either public or private.[59]

The same point can be made about the meaning of 'business', discussed above. It is possible that a particular activity is both business and governmental. They are not mutually exclusive.[60]

In Australia it is firmly established that a decision made under a public contract is not amenable to judicial review.[61]

Another perspective on the private–public debate, in connection with the proper domain of administrative law, is the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd*[62] (*Neat*), where it was held by the majority that the exercise of statutory powers by AWB Ltd was not amenable to judicial review, principally because AWB was private in form (a company) and function (maximising returns) and it was said that it was not possible to impose public law obligations on AWB while at the same time accommodating pursuit of its private interests. The High Court was not prepared to follow the path of the English Court of Appeal in *R v Panel on Take-overs and Mergers, Ex parte Datafin*[63] (*Datafin*), in which a body, not created by legislation but which exercised important public powers, was amenable to judicial review.

The High Court continued its private path when examining the powers exercised by a

56 Ibid 173 (Davies and Einfeld JJ).
57 [2005] NZAR 356. This was a case involving no statutory overlay.
58 An example is *Lovegrove Turf Services Pty Ltd v Minister for Education* [2003] WASC 66 — appealed on another issue [2004] WASCA 305. See also *Willow Grange Pty Ltd v Yarra City Council* [1998] ANZ Conv R 415.
59 M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 46.
60 *Murphy v Victoria* (2014) 45 VR 119, 138; [2014] VSCA 238 [58] (Nettle AP; Santamaria and Beach JJA).
61 *Australian National University v Burns* (1982) 43 ALR 25. Followed in numerous cases and endorsed by the High Court in *Griffith University v Tang*, discussed below.
62 (2003) 216 CLR 277; [2003] HCA 35.
63 [1987] QB 815; [1987] 1 All ER 564.

publicly funded university established by legislation[64] in *Griffith University v Tang*[65] (*Griffith University*). It was held that a decision to exclude a student from PhD candidature was not a decision made 'under an enactment' for the purpose of the *Judicial Review Act 1991* (Qld). Nor was the relationship governed by contract (or at least that was assumed by all parties). So the student was in a legal vacuum.

The High Court's decisions in *Neat* and *Griffith University* were controversial, attracting a large response, mostly critical, from legal scholars.[66] The cases and the responses demonstrate that striking the right balance in the mixture of public and private law is difficult. The cases represent a marked reluctance to allow judicial review to expand its boundaries — that is, it should be confined to the narrow concept of what has traditionally be seen as public, no matter that the decision in each case had a public aspect (by history and legislation in *Neat* and by function and legislation in *Griffith University*). These decisions confirmed two private points made in earlier decisions: that a decision under a public contract (for example, termination) is not amenable to judicial review;[67] and that a statutory corporation, with a standard contract-making power conferred by legislation, is not making a decision under that legislation when it enters a contract.[68]

Despite these decisions, McHugh, Hayne and Callinan JJ in *Neat* left open the possibility that 'public law remedies may be granted against private bodies' in that the judges decided the case on the narrower ground that, in the specific circumstances of that case under the relevant legislation, no reviewable power was being exercised. The larger question was not being answered.[69] This left the way open for a lower court to show more public concern about the impact of contract as a tool of public administration. For example, in *CECA Institute Pty Ltd v Australian Council for Private Education and Training*, Kyrou J said:

> In my opinion, the *Datafin* principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the *Datafin* principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature.[70]

So far, this idea of letting public law in has not flourished in Australia. By contrast, the position in the United Kingdom is very different, albeit with some contradictions and difficulties.[71]

64 *Griffith University Act 1998* (Qld).
65 (2005) 221 CLR 99; [2005] HCA 7.
66 Seddon, above n 9, 455 n 209.
67 Confirming *Australian National University v Burns* (1982) 43 ALR 25.
68 Confirming *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164, discussed above.
69 (2003) 216 CLR 277, 297; [2003] HCA 35 [49]–[50].
70 *CECA Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552 [99] (Kyrou J).
71 E Aspey, 'The Search for the True Public Law Element: Judicial Review of Procurement Decisions' (2016) *Public Law* 35.

The private paradox: enhanced accountability

Privileging the private may have a beneficial effect. This is demonstrated in two areas: tendering and the rule against fettering.

Tendering

The development of the private law of tendering posits two contracts, one governing the tender process itself and the other the contract awarded after completion of the tender process. This has occurred in the context of government procurement.[72] There is no reason why the same analysis could not apply in the private sector, but this has not happened. It is a peculiarly 'public' phenomenon. It is justified in public terms: the integrity of a government tender process is paramount[73] — in particular, that government conducts itself according to high standards and the fact that public money is being spent and value for money is best achieved by a proper competition.

However, this development is vulnerable to a basic contract law principle: parties can always opt out. If parties wish to engage commercially, it is open to them to exclude contract. This is a rare phenomenon in the private sector, but is nevertheless a longstanding principle. The parties can expressly declare that they do not intend to create legal relations in their dealings.[74] The Commonwealth has taken advantage of this principle. After the decision in *Hughes Aircraft Systems International v Airservices Australia*[75] (*Hughes Aircraft*), the Commonwealth routinely includes a clause in the request for tender that states that the tender process is not contractual.[76]

This is unfortunate because contract is the most effective device for ensuring accountability and proper process in a tender. It is more effective than judicial review (even if it is available) because the remedies available — in particular, damages for a wronged tenderer — are more likely to concentrate the minds of public servants to conduct a process with probity and fairness.[77] This is borne out by Canadian experience, where there is a very large number of government tender challenge cases. Further, the existence of a process contract ('contract A' in Canadian terminology) is usually not excluded. In one case, an attempt was made to exclude a process contract. This was treated as a signal that judicial review should operate and that the exclusion of contract was considered to be of itself a breach of procedural fairness in public law.[78]

72 The leading Australian case is *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, where Finn J called the first contract a 'process' contract. In Canada there are hundreds of cases of this nature arising from government tender processes. See Seddon, above n 9, ch 7.

73 *Hughes Aircraft*, ibid, 28–9.

74 N Seddon and R Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th ed, 2017) 5.14.

75 (1997) 146 ALR 1.

76 State adoption of this measure has been patchy.

77 The exclusion of contract has been to some extent alleviated by the *Government Procurement (Judicial Review) Act 2018* (Cth), which provides limited redress to a tenderer if there has been a breach of the Commonwealth Procurement Rules. This legislation does not provide for full damages as contract can, nor does it provide for a contract to be set aside once awarded.

78 *Canada (Attorney General) v Rapiscan Systems Inc* [2015] FCA 96 (CanLII).

Meanwhile in Australia, at least at Commonwealth level, the salutary effect of a pre-award contract in government tenders is neutralised. It is worth noting that the two bases on which Hughes Aircraft Systems International won its case — breach of a process contract and misleading conduct — have gone. The case law on the interpretation of 'business' occurred after the *Hughes Aircraft* decision.

The rule against fettering

Perhaps the most controversial doctrine associated with government contracts is executive necessity and its related sub-rules about fettering.[79] Executive necessity in its purest form allows a government simply to break a contract without the usual consequences because it is necessary to do so for some pressing governmental reason.[80] Freedom to govern trumps freedom of contract. Perhaps more than any other issue in the public–private debate, this is quintessentially the most stark. It has been labelled 'sovereign risk' — a pejorative label. It renders void the relevant contract.

The boundaries of this principle are ill-defined and the formulation in *Rederiaktiebolaget Amphitrite v The King*[81] (*Amphitrite*) is generally regarded as stated too widely.[82] Some of the associated sub-rules are unexceptionable — for example, that government cannot contract out of legislation and cannot pledge through a contract to legislate, or not legislate, in a certain manner. Another sub-rule is that it is said that the government cannot by contract fetter a future exercise of executive power. The limits of this sub-rule are very uncertain, not least because it is usually the executive power that supports contract-making by government. Does the principle mean that, if the government makes two contracts that are in some respect inconsistent, the later contract must prevail over the earlier contract which could not fetter the exercise of executive power in the second contract? The private sector answer to this problem is that both contracts are effective and, if there is a breach of one of them, the usual contract remedies apply.

A solution to the controversies and uncertainties stemming from executive necessity was suggested by Mason J by way of *obiter dicta* in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*[83] (*Ansett*). This was that the contract under consideration is not void but it could not be enforced by coercive orders such as an injunction of specific performance but could be the subject of a damages remedy.[84] This solution preserves the underlying rationale of the fettering doctrine that government must be free to govern (and break the contract) and, at the same time, protects the contractor. It is clear that the denial of the remedies of injunction or specific performance is because of the government's imperative to be unhindered in its task of implementing its policies and programs and not for one of the

79 Seddon, above n 9, ch 5.

80 Said to originate in the controversial decision of Rowlatt J in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 and recognised in the High Court with some reservations in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 74 (Mason J); *A v Hayden* (1984) 156 CLR 532, 543; [1984] HCA 67 [8] (Gibbs CJ).

81 *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500.

82 A claim to executive necessity was given short shrift by White J in *New South Wales Rifle Association Inc v Commonwealth* (2012) 293 ALR 158; [2012] NSWSC 818.

83 (1977) 139 CLR 54.

84 Ibid 76.

reasons that guides a court's discretion under the ordinary law of contract. To this extent the rule against fettering is preserved. The unavailability of these remedies means that the contract does not fetter. Even if the contract was one in which the discretionary remedy could be made, it would not be ordered. This idea has been supported by way of *obiter dicta* in a number of later cases,[85] but in no case was there an occasion to apply it.

The Mason solution involves the donning of private spectacles to modify a public law doctrine that is generally regarded as unsatisfactory in generating sovereign risk. In *Searle v Commonwealth*[86] (*Searle*) for the first time in Australia, the Mason solution has been applied.

Mr Searle joined the Navy as a marine technician. After being signed up, he entered into a training contract under which he would undertake a course of training towards a Certificate IV in Engineering. The training contract expressly said that it was legally binding. Under it the Navy undertook to provide a training plan and the various components to achieve the certificate. The Navy failed to provide these elements of training. The Navy had decided no longer to sign up servicemen or women to training contracts of the kind entered into by Mr Searle. After leaving the Navy, Mr Searle sued for damages for breach of contract. He argued that, if he had achieved the certificate, he could have obtained a more remunerative job in civilian life than he in fact got. Other Navy personnel were similarly affected and joined a class action.

There is a special legal background to this story. Going back to medieval times, English law held that the Crown does not enter into contracts with its servants. This applies in Australia although, for the ordinary public service, it has been superseded by elaborate legislation. Not so for the military, or at least not so as to remove the basic proposition that there is no employment contract between an ADF member and the Commonwealth.[87] Such members are engaged at her Majesty's pleasure.

The Commonwealth said that the basic employment arrangement was not contract but, instead, an exercise of the Crown's prerogative (or executive) power. Even if the training contract was a separate arrangement, over and above the underlying employment arrangement, the training contract could not fetter the Navy's prerogative right to direct, control and manage Mr Searle as a military person (dubbed 'Naval Command' in the Court of Appeal). The Commonwealth could simply break the training contract with impunity. This argument succeeded before the trial judge, Fagan J.[88] The training contract could not prevent, for example, a decision to post Mr Searle to a ship or to an overseas posting, even if such a posting prevented the required training.

85 *Hughes* (1997) 146 ALR 1, 74–5 (Finn J); *L'Huillier v Victoria* [1996] 2 VR 465, 481 (Callaway JA); *Upper Hunter Timbers Pty Ltd v Forestry Commission of NSW* [2001] NSWCA 64 [58] (Giles JA); *Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council* [2014] NSWCA 429 [4]–[6] (McColl JA).

86 [2019] NSWCA 127.

87 See the then applicable provision in 2011: *Defence (Personnel) Regulations 2002* (Cth), reg 117.

88 *Searle v Commonwealth* [2018] NSWSC 1017.

On appeal, the NSW Court of Appeal took this opportunity to examine the longstanding controversy about executive necessity, described as 'exceedingly vague and far reaching',[89] 'ill-defined'[90] and dogged by uncertainty.[91] The lead judgment by Bell P was supported by short judgments from Bathurst CJ and Basten JA. It was held that the training contract did not amount to a fetter on the Commonwealth's executive (or prerogative) power of Naval Command and that the Commonwealth was in breach and liable to pay damages. Bell P, having noted that the case raised very important questions of principle,[92] undertook a thorough and learned analysis of this controversial area of contract and public law, citing 24 academic sources. His Honour summed up the tension:

> What underlies the debate and difficulties attending the Fettering Doctrine is the existence of two competing considerations: on the one hand, the importance of a Minister, government department or public authority remaining free to act in the future in the public interest and for the public benefit by reference to relevant considerations at the time a particular prerogative or executive power is to be exercised and, on the other hand, the desirability of government being able to contract and of contractual counterparties having confidence that their bargains will be honoured.[93]

In *Searle*, the contest was not between two inconsistent contracts but between a contract and the prerogative or executive power of government. Should the latter trump the former?

Absent a possible fettering argument, there was no basis for challenging the contract. The Commonwealth conceded[94] that it had the power to enter into such a contract and did not attempt to argue that it lacked that power, absent a fettering argument. The training contract was within power.[95]

At a factual level, the training contract simply did not fetter the power of Naval Command. Any resort to Naval Command that detracted from the obligations arising from the training contract did not fetter the Commonwealth in any real sense. Even the possibility of having to pay damages in accordance with the Mason solution would not amount to a practical fetter, although some commentators have canvassed the possibility that the spectre of damages would in effect amount to a fetter.[96] The Court of Appeal did not consider that this was a real possibility.[97]

Bell P, during the course of his wide-ranging examination of the academic and judicial criticisms of the fettering doctrine, was clearly motivated by the fundamental principle that contracts should be kept, not just for the sake of the contractor but also from the perspective of government, because otherwise it would not be a credible commercial player[98] — a point made by Mason J in *Ansett*,[99] among others. Bell P was also concerned to modify a doctrine

89 Citing PW Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Law Book Co, 1971) 130.
90 Citing DW Greig and JLR Davis, *The Law of Contract* (Law Book Co, 1987) 218.
91 [2019] NSWCA 127 [101]–[112] (Bell P).
92 Ibid [27].
93 Ibid [97].
94 Ibid [138].
95 Ibid [151], [156].
96 Ibid [127].
97 Ibid [130], [145].
98 Ibid [108]–[112], [116]–[118].
99 *Ansett* (1977) 139 CLR 54, 74–5.

that has brought the government into disrepute, contrary to the judicially-stated idea that government must act in accordance with the highest ethical standards.[100]

Having considered a number of possible ways suggested by commentators and academics in which the invalidating effect of the fettering doctrine could be pared back,[101] Bell P found the Mason solution to be the most satisfactory. This solution does not bring government contracts into exact alignment with private contracts because, as noted, it preserves the fettering doctrine to the extent of denying injunction or specific performance. But it does equate to the proposition that contracts provide a choice: to perform or pay damages.

The Commonwealth decided not to appeal.

Conclusion

This article has attempted to show through selected examples the difficult tensions and dilemmas stemming from the mixing of contract and government. A motif has been the necessity of looking broadly at the various issues and understanding that the public–private tension must be recognised — that is, both sides must be considered and weighed. Where the tension is a zero-sum game, the solution must in some cases give ascendancy to the public and in other cases ascendancy to the private. In some cases, the proper approach is to look from the perspective of 'both … and' rather than 'either … or'. The solution will almost inevitably be controversial.

100 [2019] NSWCA 127, [108]–[112].
101 Ibid [114].

Recent developments

Katherine Cook

New Independent National Security Legislation Monitor

Commonwealth Attorney-General Christian Porter has announced that Mr Grant Donaldson SC will be appointed Australia's acting Independent National Security Legislation Monitor (INSLM).

The INSLM independently reviews the operation, effectiveness and implications of Australia's national security and counter-terrorism laws.

The government continues to modernise and strengthen legislation to address the evolving terrorist and espionage threat at home and abroad.

'The INSLM has an important role in reviewing legislation as to whether the laws contain appropriate protections, are proportionate to terrorism or national security threats and remain necessary', the Attorney-General said.

'Mr Donaldson will be appointed for an initial period of three months while preparatory arrangements for his permanent appointment are made.'

'An eminent barrister with experience in commercial, private and criminal law, Mr Donaldson brings a wealth of legal and public policy expertise to the role.'

Mr Donaldson served as the Solicitor-General for Western Australia from 2012 to 2016, and has held senior leadership positions in the Western Australian Bar Association and the Legal Practice Board of Western Australia. A former Rhodes Scholar, Mr Donaldson is a Fellow of the Australian Academy of Law and has been a Visiting Fellow at the Law School of the University of Western Australia since 1991.

The Attorney-General congratulated Mr Donaldson on his appointment and thanked Dr James Renwick CSC SC for his valuable contribution in reviewing Australia's national security and counter-terrorism laws, over the course of his term.

<https://www.attorneygeneral.gov.au/media/media-releases/new-independent-national-security-legislation-monitor-8-july-2020>

Appointment of Deputy Commonwealth Ombudsman

The Morrison government has congratulated Penny McKay on her five-year appointment as a Deputy Commonwealth Ombudsman.

As Deputy Ombudsman, Ms McKay will assist the Commonwealth Ombudsman with strategic leadership and day-to-day management, in addition to the development of policies, systems and processes for effective and timely investigations and compliance audits.

Ms McKay is currently First Assistant Secretary of the Integrity, Security and Assurance Division at the Department of Home Affairs. Ms McKay's 23-year public service career spans state and commonwealth jurisdictions and includes senior roles with the Australian Commission for Law Enforcement Integrity, the Commonwealth Director of Public Prosecutions and the ACT Department of Justice and Community Safety.

Ms McKay commenced on 10 August 2020. She replaces Ms Jaala Hinchcliffe, who was appointed as Integrity Commissioner in February 2020.

Ms McKay's qualifications include a Bachelor of Laws and a Bachelor of Business (Management). She was admitted to practise in 1999. She has held the position of First Assistant Secretary at the Department of Home Affairs since March 2020, serving as an Assistant Secretary from 2018 to 2020.

Ms McKay has served as General Counsel for the Australian Commission for Law Enforcement Integrity (2014–2018); the Director of the Royal Commission into the Protection of and Detention of Children in the Northern Territory (secondment 2016–2017); and Principal Legal Officer, Commonwealth Director of Public Prosecutions (2008–2014).

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-deputy-commonwealth-ombudsman-24-july-2020>

New National Children's Commissioner appointed

The Morrison government is pleased to announce the appointment of Ms Anne Hollonds as the new National Children's Commissioner.

Ms Hollonds is currently the Director of the Australian Institute of Family Studies and replaces Australia's inaugural Children's Commissioner, Megan Mitchell, who served in the role for seven years.

As Children's Commissioner, Ms Hollonds will promote discussion and awareness of issues affecting children; conduct research and education programs; consult directly with children and representative organisations; and examine Commonwealth legislation, policies and programs that relate to children's human rights.

The Attorney-General, Christian Porter, said Ms Hollonds had an extensive background in the area of child and family welfare, including front-line engagement with families, children and young people as a therapist and through her roles as CEO of The Benevolent Society and Relationships Australia.

Ms Hollonds will complete her appointment as Director of the Australian Institute of Family Studies before taking up her five-year appointment on 2 November 2020.

The President of the Australian Human Rights Commission will continue to manage the responsibilities of the Children's Commissioner role until Ms Hollonds commences.

Ms Hollonds' qualifications include a Bachelor of Arts (Psychology), a Bachelor of Social Studies and a Master of Business Administration.

She has been a registered psychologist since 1992 and is a current and former member of a variety of advisory boards on child and family welfare, including the National Children's Mental Health and Wellbeing Strategy Steering Group and the National Mental Health Commission.

Ms Hollonds has served as Director of the Australian Institute of Family Studies since 2015.

Prior to this she has held senior roles with Our Watch, The Benevolent Society and Relationships Australia.

<https://www.attorneygeneral.gov.au/media/media-releases/new-national-childrens-commissioner-appointed-28-july>

Reappointment of the Registrar of the Administrative Appeals Tribunal

Ms Sian Leathem has been reappointed as the Registrar of the Administrative Appeals Tribunal (AAT) for a further two-year term to 6 April 2022.

Ms Leathem commenced as the Registrar of the AAT on 7 April 2015.

Ms Leathem has played a key role in supporting the President of the AAT, the Hon Justice David Thomas, in implementing the restructure of AAT's corporate and support services, progressing the digital strategy that includes a single case management system and completing the Registry Transformation Program. Recently, she has supported the President in ensuring the AAT has been responsive in adjusting its procedures and operations to fit the circumstances brought about by the COVID 19 pandemic.

Following her initial appointment in 2015, Ms Leathem oversaw the amalgamation of the AAT with the former Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal on 1 July 2015.

Prior to her appointment as Registrar of the AAT in 2015, Ms Leathem was the inaugural Principal Registrar of the New South Wales (NSW) Civil and Administrative Tribunal and Registrar of the NSW Workers Compensation Commission. Ms Leathem was also formerly Assistant Registrar of the AAT and has significant legal policy experience across the Commonwealth and NSW Public Service.

Ms Leathem holds a Bachelor of Arts, Master of Arts (Merit) and Bachelor of Laws (Honours) from the University of Sydney and an Executive Masters of Public Administration from the Australian and New Zealand School of Government.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointment-registrar-administrative-appeals-tribunal-26-june-2020>

Rapid detection, assessment and notification critical in data breaches

An increase in data breaches caused by ransomware attacks and impersonation is among the key findings in the latest statistics report from the Office of the Australian Information Commissioner (OAIC).

The OAIC's Notifiable Data Breaches (NDB) Report for January to June 2020 shows a slight fall in the number of eligible breaches reported (518) against the previous six-month period (532) but an increase of 16 per cent compared to the same period last year.

Australian Information Commissioner and Privacy Commissioner, Angelene Falk, said malicious or criminal attacks including cyber incidents remain the leading cause of data breaches involving personal information in Australia.

'Malicious actors and criminals are responsible for three in five data breaches notified to the OAIC over the past six months', Commissioner Falk said.

'This includes ransomware attacks, where a strain of malicious software is used to encrypt data and render it unusable or inaccessible.'

The report shows the number of data breaches caused by ransomware rose from 13 in the previous six-month period to 33 between January and June, Commissioner Falk said.

'We are now regularly seeing ransomware attacks that export or exfiltrate data from a network before encrypting the data on the target network, which is also of concern', she said.

'This trend has significant implications for how organisations respond to suspected data breaches — particularly when systems may be inaccessible due to these attacks.'

'It highlights the need for organisations to have a clear understanding of how and where personal information is stored on their network, and to consider additional measures such as network segmentation, robust access controls and encryption.'

Across the reporting period approximately 77 per cent of notifying entities were able to identify a breach within 30 days of it occurring.

However, in 47 instances the entity took between 61 and 365 days to become aware and assess that a data breach had occurred, while 14 entities took more than a year.

'Organisations must be able to detect and respond rapidly to data breaches to contain, assess and notify about the potential for serious harm', Commissioner Falk said.

'A number of notifications also fell short of the standards required, in failing to identify all the types of personal information involved and not providing advice to people affected on how to reduce their risk of harm.'

'In these cases, we required the organisation to re-issue the notification. We will continue to closely monitor compliance with assessment and notification obligations as part of our system of oversight.'

In other findings:

- The insurance industry entered the top five sectors for the first time since the report began, notifying 35 breaches.
- Health service providers continued to be the top reporting sector (115 notifications), followed by the finance and education sectors.
- The number of notifications resulting from social engineering or impersonation has increased by 47 per cent during the reporting period to 50 data breaches.
- Actions taken by a rogue employee or insider threat accounted for 25 notifications, and theft of paperwork or storage devices resulted in 24 notifications.

The number of notifications per month varied widely across the reporting period, ranging from 63 in January to 124 in May — the highest number of data breaches reported in a month since the NDB scheme began in February 2018.

While the increase coincided with widespread changes in working arrangements due to the COVID-19 outbreak, Commissioner Falk said the OAIC had not found evidence to suggest the increase in May was the result of changed business practices.

'The report shows that more human error data breaches were reported in May, accounting for 39 per cent of notifications that month, compared to an average of 34 per cent across the reporting period', she said.

'While no specific cause for this change has been identified, it reinforces the need for organisations and agencies to take reasonable steps to prevent human error breaches, including training for staff who handle personal information.'

'Organisations must also continue to assess and address any privacy impacts of changed business practices, both during their response to the COVID-19 outbreak and through the recovery.'

<https://www.oaic.gov.au/updates/news-and-media/rapid-detection-assessment-and-notification-critical-in-data-breaches/>

Information Commissioner launches investigation into the timeliness of freedom of information in Victoria

Victorian Information Commissioner, Sven Bluemmel, has commenced an investigation into the timeliness of freedom of information (FOI) in Victoria.

This own-motion investigation is the first of its kind to be undertaken under the *Freedom of Information Act 1982* (Vic) (FOI Act).

The FOI Act was enacted to promote openness, accountability and transparency in the Victorian public sector by giving the public the right to access government information. There are around 1,000 public sector organisations subject to the FOI Act, including Victorian Government departments, local councils, statutory authorities, public hospitals, universities and TAFE colleges.

Delay in providing access to information is the most common complaint made to the Office of the Victorian Information Commissioner (OVIC).

In 2018–19, 18 per cent of decisions on FOI requests were made outside the statutory timeframe. The number of delayed FOI decisions in 2019–20 is anticipated to increase due to COVID-19 and other factors.

'Providing timely access to information is more than just a compliance exercise', said Mr Bluemmel.

'Enhancing the public's right to access information helps level the playing field and redistribute the balance of power from government to the public. It equips citizens, the media, advocacy groups and others with information that allows them to scrutinise decisions and actions taken by government.'

The investigation will examine the FOI practices of selected agencies to identify causes for delay in releasing government information. OVIC is reviewing data and complaint information to determine which agencies will be subject to investigation.

The Information Commissioner invites members of the public who have experienced delays to share their experience. Submissions received may assist the Information Commissioner in identifying agencies that will be subject to investigation.

At the conclusion of the investigation, the Information Commissioner may submit a report for tabling in the Parliament, setting out any findings and recommendations to improve timeliness in FOI practices across Victoria.

The investigation report and recommendations are expected to be completed in mid-2021.

<https://ovic.vic.gov.au/mediarelease/information-commissioner-launches-investigation-into-the-timeliness-of-freedom-of-information-in-victoria/>

Western Australian Ombudsman elected president of world body — the International Ombudsman Institute

Western Australian Ombudsman, Chris Field, has been elected President of the International Ombudsman Institute (the IOI). It is the first time in the 42-year history of the IOI that an Australian has been elected President.

The IOI, established in 1978, is the global organisation for the cooperation of 205 independent Ombudsman institutions from more than 100 countries worldwide. The IOI is organised in six

regional chapters — Africa, Asia, Australasian and Pacific, Europe, the Caribbean and Latin America and North America.

His appointment also marks the first time that a President has been elected by IOI members. Historically, presidents were elected by the IOI World Board. A new voting system, applicable for the first time in the 2020 election, provided the opportunity for every IOI member globally to vote for the position of President.

Chris will commence his four-year term as President at the rescheduled 12th World Conference and General Assembly of the IOI in Dublin, Ireland.

Chris will bring significant experience to the role of President. He is currently Australia's longest serving Ombudsman and has previously served on the IOI World Board as Second Vice President between 2016 and 2020, Treasurer between 2014 and 2016 and President of the Australasian and Pacific Ombudsman Region between 2012 and 2014.

In addition to his role as Ombudsman, he concurrently holds the roles of Energy and Water Ombudsman; Chair, State Records Commission; and Chair, Accountability Agencies Collaborative Forum (a forum comprising the Ombudsman; Chief Psychiatrist; Information Commissioner; Commissioner for Equal Opportunity; Inspector of Custodial Services; Commissioner for Children and Young People; Director, Health and Disability Services Complaints Office; Director, State Records Office; Director of Equal Opportunity in Public Employment; Chief Mental Health Advocate; and the Commissioner for Victims of Crime).

He has for the last 14 years been an Adjunct Professor in the School of Law at the University of Western Australia, where he teaches the advanced administrative law unit Government Accountability — Law and Practice — a course he founded with Professor Simon Young (co-author of the university textbook Lane and Young, *Administrative Law in Australia*). Chris is also the author of a range of publications on the Ombudsman and administrative law.

Of his appointment as President, Chris said he hoped to 'continue the productivity, professionalism and collegiality that have defined the Board's work and will seek to continue the outstanding leadership provided by his close colleague, current President, Peter Tyndall, Ombudsman and Information Commissioner for Ireland'.

To do so, he will work alongside his IOI World Board colleagues, an Executive Committee of the Board comprising himself; First Vice President, Mr Viddhavat Rajatanun, Chief Ombudsman of Thailand; Second Vice President, Ms Diane Welborn, Ombudsman for Dayton and Montgomery County, Ohio; Treasurer, Ms Caroline Sokoni, Public Protector of Zambia; and Regional Presidents for Europe and the Caribbean and Latin America.

Chris will also work closely with Mr Werner Amon, Austrian Ombudsman and Secretary General of the IOI. The Austrian Government generously provides funding to the office of the Austrian Ombudsman for a staff secretariat to support the work of the IOI, led by the Secretary General, who is also one of three Austrian Ombudsmen.

His goals for his term as President are:

1. contribute leadership on behalf of the global Ombudsman community with respect to issues that nations face regarding integrity and good governance;
2. focus the work of the IOI on promoting access to justice; contributing to the rule of law; advancing human rights; protecting minorities, first peoples and the vulnerable; standing strongly with Ombudsmen under threat; and supporting developing democracies and emerging Ombudsman institutions;
3. further develop the IOI's relationship with the United Nations, including promoting the Venice Principles. The Venice Principles, adopted by the Venice Commission (the Council of Europe's Commission for Democracy through Law), represent the first independent, international set of standards for the Ombudsman institution. They are the equivalent of the United Nation's Paris Principles, which set out the standards against which national human rights institutions are judged; and
4. ensure inclusion of every IOI region and member so that all voices are fairly represented and heard.

'It is an extraordinary honour to be elected by my peers as President and also humbling to be the first Australian to hold the office of President', said Chris.

Recent decisions

Are decisions of the SA Ombudsman reviewable?

King v Ombudsman & Anor [2020] SASCFC 90 (15 September 2020) (Parker, Doyle and Tilmouth JJ)

The appellant (Mr King) sought judicial review in relation to, among other things, a completed investigation and report of the first respondent (the Ombudsman) (the 2016 Investigation).

The 2016 Investigation concerned the conduct of Mr King in his capacity as General Manager of the Anangu Pitjantjatjara Yanjunytjatjara (the APY) — an office created under the *Anangu Pitjantjatjara Yanjunytjatjara Land Rights Act 1981* (SA) (the APY Act). The APY is an agency for the purposes of the *Ombudsman Act 1972* (SA) (the Ombudsman Act). The second defendant (Mr Adamson) was the named complainant in respect of the 2016 Investigation. He is an Anangu person and member of the APY and was until April 2017 the Chairperson of the Executive Board.

In the 2016 Investigation report the Ombudsman found that Mr King had acted in a manner that was 'wrong' in failing to provide copies of the handwritten notes of certain Executive Board meetings to Mr Adamson. The Ombudsman also made a finding that Mr King failed to cooperate with the investigation in a timely manner and to provide documentation as requested of him.

Mr King sought various forms of relief, including a declaration that the Ombudsman had no jurisdiction to conduct the 2016 Investigation. Mr King contended that the Ombudsman

had no jurisdiction to investigate the complaints by reason of s 13(3)(a) of the Ombudsman Act, which proscribes any investigation of an administrative act in respect of which the complainant has a right of appeal, reference or review under an enactment.

The respondents contended, among other things, that the claim must fail because the Ombudsman's powers of investigation and report under the Ombudsman Act are not amenable to judicial review. Notably, the Ombudsman contended that in circumstances where the report, opinions and recommendations of the Ombudsman have no legal effect, they are not amenable to judicial review on the grounds relied upon by Mr King.

At first instance, the primary judge dismissed the proceedings on the grounds that none of the contended jurisdictional errors had been established. Her Honour did not consider it necessary to determine the respondents' contentions that the Ombudsman's findings were not amenable to judicial review.

Mr King then appealed to the Full Court of the South Australian Supreme Court (the Full Court).

The Full Court found that relief in the nature of *certiorari* will not ordinarily be available to quash an Ombudsman's report. The nature of the reporting power — and, in particular, the absence of any direct legal consequence flowing from its exercise — will ordinarily be fatal to the availability of that form of relief. However, it does not follow that there are no constraints upon the Ombudsman's powers to investigate and report that might warrant judicial intervention. Judicial intervention will be available in circumstances where the Ombudsman does not have jurisdiction to conduct the relevant investigation (for example, pursuant to the Court's jurisdiction under s 28 of the Ombudsman Act) or where the Ombudsman has acted in excess of his coercive powers during the conduct of the investigation. Intervention in such circumstances might result in declaratory or injunctive relief, or perhaps relief in the nature of prohibition. While it should be acknowledged that there are some provisions of the Ombudsman Act which provide a measure of reputational protection, an Ombudsman's report will often result in reputational harm to the agency and people responsible for the administrative act under investigation, and in some cases that action may well have ramifications for the employment and promotional prospects of relevant individuals.

The Full Court also found that subs 30(1) of the Ombudsman Act provides the Ombudsman (and any member of staff) with an immunity from liability. However, the Court did not agree that the carve-out from s 30(2) (that neither the Ombudsman nor any members of the Ombudsman's staff can be called to give evidence before a court in legal proceedings) provides a proper basis for divining the extent of judicial review that is available in respect of the Ombudsman's functions. The Court found there must be scope for judicial review to the extent that the Ombudsman either acts in excess of his coercive powers in the conduct of his investigations or fails to observe one of the express constraints upon his powers (such as the obligation to give an opportunity to comment upon the subject matter of a report). While s 30(2) does not contemplate the compellability of the Ombudsman as a witness in those proceedings, it does not provide a basis for concluding that the Ombudsman's reporting power was not intended to be subject to judicial review on the ground of a failure to observe an implied constraint.

Does a Defence Force magistrate have jurisdiction to hear the charge during peacetime?

Private R v Brigadier Michael Cowen & Anor [2020] HCA 31(9 September 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions (DMP) with one count of assault occasioning actual bodily harm against a woman with whom he had previously been in a relationship. The alleged offending occurred in Brisbane. The plaintiff was and is a member of the Australian Defence Force (ADF) and the complainant, at the time of the alleged assault, was also a member of the ADF. Neither was on duty or in uniform at the time of the alleged offending.

On 26 August 2019, the plaintiff appeared before a Defence Force magistrate on a charge under s 61(3) of the *Defence Force Discipline Act 1982* (Cth), which provides that a Defence member is guilty of an offence if the person engages in conduct outside the Jervis Bay Territory and that conduct would be an offence if it took place in the Jervis Bay Territory. Assault occasioning actual bodily harm is an offence under s 61(3) by reason of s 24 of the *Crimes Act 1900* (ACT).

The plaintiff objected to the Defence Force magistrate's jurisdiction to hear the charge. The Defence Force magistrate dismissed the objection on the basis that it is sufficient to confer jurisdiction on a service tribunal that the accused was a member of the armed forces when the charged offence was allegedly committed.

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking prohibition to prevent the Defence Force magistrate hearing the charge against him. The application concerned, among other things, the extent to which the defence power conferred on the Commonwealth Parliament by s 51(vi) of the *Constitution* supports the conferral of jurisdiction by the Defence Force Discipline Act upon military service tribunals to hear and determine charges relating to conduct that also constitutes an offence under ordinary criminal law and that is committed in a time of peace when civil courts are reasonably available. Section 51 of the *Constitution* relevantly provides: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.'

Before the High Court, the plaintiff contended that it is not reasonably necessary for the maintenance of military discipline to make all civil offences committed by Defence members subject to military jurisdiction in peacetime when the civil courts are available to deal with those offences. The plaintiff, urging the application of what was described as the 'service connection' test, whereby a service tribunal may exercise jurisdiction only where the circumstances of the particular case are sufficiently connected to the military service of the accused, argued that this test is not satisfied in the circumstances of the present case.

The Commonwealth contended that plaintiff's approach is ad hoc and impressionistic, and not capable of drawing a clear line between those circumstances which present a sufficient

connection to the requirements of military discipline and those which do not. It was therefore said to be unsuitable as a test to determine the existence of the jurisdiction of a service tribunal to deal with a particular case. The Commonwealth further submitted that it is central to the very existence and maintenance of the ADF as a disciplined and hierarchical force (*White v Director of Military Prosecutions* [2007] HCA 29) that its members be required to observe the standard of behaviour demanded of ordinary citizens and that those standards be enforced by service tribunals (*Re Tracey; Ex parte Ryan* [1989] HCA 12). It is self-evident that soldiers whose conduct amounts to the commission of a criminal offence manifest qualities of attitude and character that may detract from the maintenance of a disciplined and hierarchical defence force (*O'Callahan v Parker* [1969] USSC 134).

The High Court unanimously held that the Defence Force magistrate had jurisdiction to hear the charge.

A majority of the Court held that s 61(3) of the Defence Force Discipline Act, in obliging Defence members to obey the law of the land, is, in all its applications, a valid exercise of the defence power. The majority held that expressions 'service connection' and 'service status', while a convenient shorthand, distract from the question which arises in relation to the scope of s 51(vi) of the *Constitution*. The test of the validity of a law purporting to be made under s 51(vi) is whether the measure can reasonably be seen to conduce to the efficiency of the defence forces of the Commonwealth, and that will not be so where 'the connection of cause and effect between the measure and the desired efficiency [is] so remote that the one cannot reasonably be regarded as affecting the other' (*Farey v Burvett* (1916) 21 CLR 433, 441). To similar effect, in *Marcus Clark & Co Ltd v The Commonwealth*, Dixon CJ expressed the test of validity as being whether 'the measure does tend or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth' (1952) 87 CLR 177, 216). If that question is answered in the affirmative in relation to the impugned law in the present case, it is valid in all its applications, and there is no occasion to consider whether the 'service connection' test is satisfied in the circumstances of any particular case.

The Court found that the system of military justice established under s 51(vi) stands distinctly outside of Ch III of the *Constitution*. The fact that decisions of service tribunals are amenable to review under s 75(v) of the *Constitution* 'points away' from the conclusion that such tribunals exercise judicial power (*Attorney General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 579).

The Court held that, whether service tribunals exercise judicial or administrative power, the power is required to be exercised judicially — that is, in accordance with the requirements of reasonableness and procedural fairness to ensure that discipline is just. The High Court is invested with jurisdiction by s 75(v) of the *Constitution* to supervise the exercise of power by officers of the Commonwealth to ensure that their powers are exercised judicially.

Procedural fairness in the South Australian ICAC

C v The Independent Commissioner Against Corruption [2020] SASCFC 57 (26 June 2020) (Kourakis CJ; Stanley and Bleby JJ)

On 22 March 2017, the plaintiff attended the Independent Commissioner Against Corruption's (the Commissioner's) offices in response to a summons and underwent an examination. The plaintiff was legally represented and made a claim of privilege against self-incrimination with respect to the whole of his evidence. The Commissioner subsequently made a non-communication direction to the effect that any evidence given by the plaintiff that would enable him to be identified must not be communicated to any person (with certain exceptions) in the course of the examination. On 22 June 2017, the Commissioner varied that direction without reference to the plaintiff, which meant that the fact the plaintiff had given evidence was communicated to the relevant staff of the Office of the Director of Public Prosecutions (DPP). The DPP declined to lay charges against the plaintiff.

On 9 August 2018, the plaintiff was told by the Commissioner that the corruption investigation had concluded. However, on 6 November 2019, the Commissioner said that, on 6 July 2018, he had modified the assessment of the investigation so that it was assessed as a matter raising issues of serious and systemic misconduct and maladministration in public administration.

On 19 December 2019, the Commissioner further varied the non-communication direction to enable any evidence given by the plaintiff, or information that might enable him to be identified as a person who gave evidence before the Commissioner, to be communicated to certain people, including his superiors.

The plaintiff applied for judicial review of seven decisions, acts or omissions which he claimed occurred in the course of action taken, or purported to be taken by the Commissioner, under s 24 of the *Independent Commissioner Against Corruption Act 2012* (SA) (the ICAC Act). The plaintiff contended, among other things, that the defendant, in making the decisions to vary the directions, denied the plaintiff procedural fairness, which was a jurisdictional error. The plaintiff contended, by reference to accepted orthodoxy, that procedural fairness must be accorded where it is contemplated that an administrative decision will be made that in some way abrogate a person's rights and interests. In this case, the plaintiff's rights and interests related to his reputation. The plaintiff also relied on cl 3(10) of Sch 2 the ICAC Act, which requires, among other things, that the examiner give a non-disclosure direction if a failure to do so might prejudice the reputation of a person.

The plaintiff sought relief in the nature of certiorari and/or declarations as to the decisions made by the Commissioner, in addition to an injunction restraining the use of the plaintiff's evidence compulsorily obtained in the corruption investigation from being used as part of a maladministration or misconduct investigation.

The Court summarily dismissed the plaintiff's application for judicial review. The Court held that the plaintiff's application did not disclose a reasonable basis for the claim.

The Court found that, prior to making the variation of 19 December 2019, the Commissioner

did not have an obligation to accord procedural fairness to the plaintiff in respect of the putative risk to the plaintiff's reputation.

The Court found that the requirement to give procedural fairness to an examinee or any person whose reputation might be affected adversely would unreasonably encroach upon and hinder an effective and expeditious investigation. Therefore, such an obligation would be unworkable.

The Court also held that the concept of 'prejudic[ing] the ... reputation' of a person within the meaning of subcl 3(10) of Sch 2 of the ICAC Act does not extend to prejudicing the person's reputation in the eyes of those to whom disclosures are required, as a matter of law, to be made for the purposes of discharging natural justice obligations in the course of the investigation itself.

The Court further held that the limited disclosure (mainly to the plaintiff's superiors) meant that any interim damage to the plaintiff's reputation within that small circle is more likely to be capable of being remedied at the conclusion of the investigation by a finding of no maladministration or misconduct, should that be the result.