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CONTENTS

Recent developments

Anne Thomas

Appointment to the Federal Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Ms Helen Rofe QC as a judge of the Federal Court of Australia.

Ms Rofe has been appointed to the Victorian registry and will replace Justice Simon Steward following his appointment of the High Court of Australia. She will commence her appointment on 12 July 2021.

Ms Rofe graduated from the University of Melbourne with a Bachelor of Science in 1988, a Bachelor of Laws (Hons) in 1992 and a Master of Laws in 1995. Following her admission to the Supreme Court of Victoria in 1993, Ms Rofe commenced her legal career as a solicitor at Blake Sly & Weigall (now Deacons). She was called to the Bar in 2001, where she specialised in science and technology related matters. Ms Rofe is currently Junior Vice President of the Victorian Bar Council and was the President of the Intellectual Property Society of Australia and New Zealand from 2007 to 2009.

We congratulate Ms Rofe on her appointment.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-federal-court-australia-11-june-2021>

Leading a national approach to justice for victims and survivors of sexual assault, harassment and coercive control

The Attorney-General, the Hon Michaelia Cash MP, has announced a Government-led new multijurisdictional initiative aimed at ensuring victims and survivors of sexual violence and coercive control have similar protections and legal avenues throughout Australia.

The majority of criminal laws relating to sexual violence and sexual harassment are the responsibility of states and territories, which makes justice and community education challenging issues due to the variations in law from state to state. The Commonwealth is seeking, through the initiative, to address how these laws can be harmonised while working towards a consistent response to domestic, family and sexual violence across Australia. The initiative will also focus on achieving greater clarity and uniformity with respect to application of relevant offences.

‘We are working towards a better system, one which will reassure sexual assault and sexual harassment victims that the justice system will provide consistent outcomes’, the Attorney-General said.

The initiative will look at issues such as:

- sentencing
- evidence law
- coercive control
- consent
- protections for vulnerable witnesses
- minimum sentencing standards
- specialist sexual offence courts.

<https://www.attorneygeneral.gov.au/media/media-releases/leading-national-approach-justice-17-may-2021>

Appointment to the Federal Circuit Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Ms Sandra Taglieri SC and Mr Marcus Turnbull SC as judges of the Federal Circuit Court of Australia.

Ms Taglieri will commence in the Hobart registry on 18 May 2021, replacing Judge Barbara Baker. Ms Taglieri was admitted to the Supreme Court of Tasmania and the High Court in 1989, where she commenced her career as a barrister and solicitor at the firm Butler McIntyre & Butler and then from 1995 as a partner at Phillips Taglieri. In 2009, Ms Taglieri joined Derwent & Tamar Chambers and was appointed as Senior Counsel in 2018.

Mr Turnbull will commence in the Launceston registry replacing Judge Terrance McGuire following his appointment to the Family Court of Australia. Mr Turnbull was admitted to the Supreme Court of Tasmania and the High Court in 1991. Since 2000, he practised as a partner at Ogilvie Jennings and was appointed as Senior Counsel in 2020.

We take the opportunity to congratulate Ms Taglieri and Mr Turnbull on their appointments.

<https://www.attorneygeneral.gov.au/media/media-releases/appointments-federal-circuit-court-australia-13-may-2021>

Reappointments to the Administrative Appeals Tribunal

The Government has announced 13 reappointments to the Administrative Appeals Tribunal. The Tribunal is an important mechanism in ensuring the provision of independent merits review. The Government is committed to ensuring the Tribunal has the resources it needs to provide high-quality merits review with minimum delay.

The reappointments are as follows.

One part-time Deputy President:

- The Hon Dennis Cowdroy AO QC.

Seven full-time members:

- Mr Theodore Tavoularis
- Dr Louise Bygrave
- Mr Kent Chapman
- Mr Jeffrey Thomson
- Ms Justine Clarke
- Ms Jennifer Cripps Watts
- Mr Justin Meyer.

Five part-time members:

- Professor David Ben-Tovim
- Ms Angela Cranston
- Mr Michael Manetta
- Ms Jane Marquard
- Mr James Silva.

We congratulate all the appointees.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointments-administrative-appeals-tribunal-13-may-2021>

Extension for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Morrison Government has extended the final reporting date for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability to 29 September 2023.

This extension provides an additional 17 months to account for the disruption caused by COVID-19 and recognises the broad and complex issues under the Royal Commission's terms of reference.

The Minister for Families and Social Services, the Hon Anne Ruston, said '[t]his extension will enable the Government to receive and implement recommendations as expeditiously as possible. This will make meaningful change to the lives of people with disability, while also enabling the Royal Commission to fulfil its terms of reference'.

A seventh Commissioner has also been appointed to assist the Commission's workload.

<https://www.attorneygeneral.gov.au/media/media-releases/extension-royal-commission-violence-abuse-neglect-and-exploitation-people-disability-13-may-2021>

Establishment of a Royal Commission into Defence and Veteran Suicide

The Morrison Government has recommended to the Governor-General the establishment of a Royal Commission into Defence and Veteran Suicide in recognition of the need to prevent the tragic loss of any Australian Defence Force member or veteran to suicide.

Prime Minister Scott Morrison said the Royal Commission will be set up after listening to community calls for a national inquiry focusing on the systemic issues faced by Australian Defence Force members and veterans that too often result in their loss of life to suicide.

The Minister for Veterans' Affairs, the Hon Darren Chester MP, said the Royal Commission was another step in efforts to build confidence, trust and hope for current and future veterans and their families that they will be supported.

'This will provide an opportunity for us all to reset, further increase our understanding of this issue, and unite the Parliament, the ex-service community, and the families who have been affected by suicide', Minister Chester said.

The Attorney-General's Department will provide administrative support to the Royal Commission.

It is the Government's intention that the Royal Commission and the National Commissioner for Defence and Veteran Suicide Prevention operate together in a complementary way to achieve long-term change. Although the terms of reference for the Royal Commission have yet to be finalised, the Royal Commission will look at past deaths by suicide (including suspected suicides and lived experience of suicide risks) from a systemic point of view. The National Commissioner will, on the other hand, have a forward-looking role, including overseeing the implementation of the Royal Commission's recommendations. The National Commissioner for Defence and Veteran Suicide Prevention Bill currently before the Parliament will be amended to enable the Commissioner to operate in this complementary manner.

It is anticipated that three Commissioners will be required to lead the inquiry given the complex issues for consideration and the importance of ensuring members of the Australian Defence Force, veterans and their families have an opportunity to be heard. Consultation is underway to appoint these candidates.

A public consultation process on the draft terms of reference closed on 21 May 2021, with an announcement to be made once the terms of reference are finalised. The Prime Minister has also communicated with First Ministers inviting their contributions to the draft terms of reference with the view of a joint Commonwealth−State Royal Commission.

<https://www.attorneygeneral.gov.au/media/media-releases/establishment-royal-commission-defence-veteran-suicide-19-april-2021>

Appointment to the Family Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Judge Paul Anthony Howard to the Family Court of Australia from his current position as a judge of the Federal Circuit Court of Australia.

Judge Howard has been appointed to the Brisbane registry and will commence on the 6 April 2021.

Judge Howard graduated with a Bachelor of Laws from the Queensland Institute of Technology in 1986, when he was admitted as a solicitor to the Supreme Court of Queensland. Judge Howard commence his legal career in 1987 as a solicitor at Pattisson & Barry Solicitors and then at Vercorp Pty Ltd in 1988. He then practised as a barrister from 1990 to 2007 before being appointed as a judge in the Brisbane Registry of the Federal Circuit Court of Australia in 2007, where he predominately heard family law matters. In 2018, Judge Howard completed the Fulbright Scholarship as a visiting foreign judicial fellow at the Federal Judicial Centre in Washington DC.

Judge Howard has extensive experience working through complex family law trials. He has lectured extensively on his research, domestically and internationally, and has published extensively on Australia's family law system.

We congratulate Judge Howard on his appointment.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-family-court-australia-1-april-2021>

Appointment to the Federal Circuit Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Senior Registrar Colin Campbell, Ms Jennifer Howe and Mr Jonathan Davis QC as judges of the Federal Circuit Court of Australia.

Senior Registrar Campbell will commence in the Sydney Registry on 6 April 2021. He was admitted as a legal practitioner of the Supreme Court of NSW in 1986 and commenced his career as a solicitor at Vaughan Hains and Main in 1987. In 2005 he was appointed as a Registrar of the Family Court of Australia and the Federal Circuit Court of Australia and was appointed Senior Registrar in 2020.

Ms Howe will commence in the Melbourne Registry on 6 April 2021. She was admitted as a barrister and solicitor in the Supreme Court of Victoria in 2005 and commenced her career in 2005 as a solicitor at Phillips Fox (now DLA Piper). Ms Howe specialises in family law.

Mr Davis QC will commence in the Melbourne Registry on 6 April 2021. He was admitted as a barrister and solicitor in the Supreme Court of Victoria in 1991. He commenced his career as a solicitor in 1991 specialising in commercial practice.

We take the opportunity to congratulate Senior Registry Campbell, Ms Howe and Mr Davis QC on their appointments.

https://www.attorneygeneral.gov.au/media/media-releases/appointment-federal-circuit-court-australia-1-april-2021

Reappointments of Sex Discrimination Commissioner and Age Discrimination Commissioner

Ms Kate Jenkins and the Hon Dr Kay Patterson AO have been reappointed as Commissioners of the Australian Human Rights Commission.

Ms Jenkins was reappointed as the Sex Discrimination Commissioner and Dr Patterson as the Age Discrimination Commissioner. The appointments are for a further two years to enable the Commissioners to continue their important work at the Commission.

Ms Jenkins led the Commission's project on cultural reform within the Australian Defence Force and the National Inquiry into Sexual Harassment in Australian Workplaces culminating in the Respect@Work report. Ms Jenkins will continue to support the Government's implementations of the report's recommendations as Chair of the Government-established Respect@Work Council. She is also leading an independent inquiry into Commonwealth parliamentary workplaces that was announced by the Government on 5 March 2021.

Dr Patterson is currently implementing the recommendations from the Commission's *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* report and the Australian Law Reform Commission report *Elder Abuse – A National Legal Response* and the priorities outlined in the National Plan to Respond to the Abuse of Older Australians.

We congratulate Ms Jenkins and Dr Patterson on their reappointments.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointment-sex-age-discrimination-commissioners-1-april-2021>

Commonwealth Ombudsman report on the AFP's use and administration of telecommunications data powers

On 28 April 2021, the Commonwealth Ombudsman, Mr Michael Manthorpe PSM, released a report on his investigation of the Australian Federal Police's (AFP) use and administration of telecommunications data and powers.

The investigation commenced in response to a disclosure made by the AFP to the Ombudsman that it had identified compliance issues affecting ACT Policing's handling of requests for location-based services (LBS) telecommunications data, dating back to 2007.

The investigation concluded that many of the authorisations made by ACT Policing for LBS between 2015 and 2019 were not properly authorised or reported to the Ombudsman or the relevant Commonwealth Minister, which had led to a culture of non-compliance with the *Telecommunications (Interception and Access) Act 1979* such that 'LBS could have been accessed unlawfully', according to Mr Manthorpe.

'This could have a number of potential consequences, for example, the privacy of individuals may have been breached and we are unable to rule out the possibility that unauthorised LBS may have been used for prosecutorial purposes', said Mr Manthorpe.

The investigation also found that the AFP and ACT Policing had failed on a number of occasions to identify and address the issue.

'Law enforcement agencies rely on a wide range of covert and intrusive tools to do their work, but to maintain public trust these tools need to be properly deployed, in accordance with the legislation which governs their use', Mr Manthorpe said.

The report makes eight recommendations to assist the AFP in addressing these non-compliance issues and implementing processes to prevent recurrence. The AFP has accepted all eight recommendations.

The report can be found on the Commonwealth Ombudsman website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/112476/Report-into-the-AFPs-use-and-administration-of-telecommunications-data-powers.pdf>.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2021/28-april-2021-commonwealth-ombudsman-report-into-the-afps-use-and-administration-of-telecommunications-data-powers>

Consent law reform

In light of recommendations made in the New South Wales (NSW) Law Reform Commission Report 148, *Consent in Relation to Sexual Offences*, handed down in November 2020 (which can be found at <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>), the NSW Government is seeking to both strengthen and simplify sexual consent laws in an effort to protect victim−survivors and educate the community.

NSW Attorney General, Mr Mark Speakman, said, '[n]o law can ever erase the trauma of sexual assault, but we can send a message that survivors' calls for reform have been heard'.

The key law reforms include legislating that:

(a) a person does not consent to sexual activity unless they said or did something to communicate consent; and

(b) an accused person's belief in consent will not be reasonable in the circumstances unless they said or did something to ascertain consent.

'This means we have an affirmative model of consent, which will address issues that have arisen in sexual offence trials about whether an accused's belief that consent existed was actually reasonable', Mr Speakman said.

The reforms will also introduce five new jury directions available for judges to give at trial to address common misconceptions about consent.

'These directions will support complainants by ensuring their evidence will be assessed fairly and impartially, and that juries will be able to better understand the experiences of sexual assault survivors', explained Mr Speakman.

The NSW Government has also committed to fund a research project designed to improve understanding of victim experiences with the criminal justice process and a targeted education program for judges, legal practitioners and police.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/consent-law-reform>

Have your say on NSW privacy laws

On 7 May 2021, the NSW Attorney General, Mr Mark Speakman, and NSW Minister for Digital and Minister for Customer Service, Mr Victor Dominello, released for public consultation a draft of the Privacy and Personal Information Protection Amendment Bill 2021. If enacted, the scheme provided for in the Bill will make NSW the first Australian state or territory to introduce a mandatory data breach notification scheme, increasing accountability and transparency in the handling of personal information held by NSW public sector agencies.

Essentially the scheme will ensure NSW public sector agencies are required to notify the Privacy Commissioner and affected individuals when a date breach involving personal information is likely to result in serious harm.

The NSW Privacy Commissioner will play a role in the implementation and administration of the scheme.

'The NSW Government is committed to enhancing services through digital innovation, but it is vital the use of technology and data embodies the highest privacy, trust and security standards', Mr Dominello said.

'The Information and Privacy Commission NSW and agencies such as Cyber Security NSW support the introduction of mandatory reporting to clarify agency obligations and give the NSW public greater certainty about how data breaches involving personal information will be handled.'

Public submissions closed on Friday, 18 June 2021.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/have-your-say-on-nsw-privacy-laws>

Recent decisions

The effect of interpretation errors on a decision-maker's decision

DVO16 v Minister for Immigration and Border Protection; BNB1717 v Minister for Immigration and Border Protection [2021] HCA 12

DVO16 v Minister for Immigration and Border Protection; BNB1717 v Minister for Immigration and Border Protection concerned two matters involving the effect of interpretation errors on two separate visa decisions reviewed by the Immigration Assessment Authority (the Authority). The two matters were heard together before Kiefel CJ and Gageler, Gordon, Edelman and Steward JJ, both on appeal from the Federal Court of Australia. While the bench unanimously dismissed the appeals, Edelman J wrote a separate judgement. The decision was handed down on 14 April 2021.

DVO16 and BNB17 were two individuals who had applied for protection visas. DVO16 was a Shia Muslim from Khuzestan in Iran and identified as an Ahwazi Arab. DVO16's visa application was based on a fear of persecution resulting from the failure of the Iranian state to protect him from harm inflicted by another Iranian tribal group, resulting from a specific incident and from a fear of persecution resulting from the failure of the Iranian state to protect him more generally from harm inflicted by another tribal group by reason of his ethnicity as an Ahwazi Arab. BNB17 was a Hindu Tamil from Sri Lanka who based his application on a fear of persecution by reason of imputed links to the Liberation Tigers Tamil Eelam (LTTE).

Each appellant participated in a protection interview with the delegate, who later refused their respective applications for a protection visa. In each case the Minister referred the decision of the delegate to the Authority for review under Pt 7AA of the *Migration Act 1958* (Cth), the fast-track review process in relation to certain protection visa decisions. The Secretary of the Department of Immigration and Border Protection gave the respective audio copies of the protection interviews to the Authority as part of the review material. In each case, the Authority affirmed the decision of the delegate.

However, in each respective protection interview there had been interpretation errors made by the interpreters. The subsequent decisions of the Authority were made in consideration of the audio recording of the protection interviews as part of the review material which included those interpretation errors. This, the appellants submitted, gave rise to jurisdictional error in the Authority's respective decisions.

In DVO16's case, the result of the interpretation error was that the delegate, and later the Authority, misapprehended that the appellant did not understand what was meant by 'ethnicity' when in fact the appellant did not understand what was meant by 'persecution'. In BNB17's case, there were three identified interpretation errors. The first was the statement of the appellant that he feared harm from 'army, CID, police', which was translated as that he feared harm from 'other people'. The second was that the appellant's answer as to what he meant by his claim to 'have been beaten' and the substance of his response that it was 'to find out whether he was a member of LTTE or supported LTTE' had not been translated. The third error was in relation to a reference by the appellant to 'sexual assault', which had been translated as 'sexual harassment'.

Each appellant sought judicial review of the Authority's decision in the Federal Circuit Court of Australia (*DVO16 v Minister for Immigration and Border Protection* [2018] FCCA 3058*;* and *BNB17 v Minister for Immigration and Border Protection* [2019] FCCA 1314). Each appeal was dismissed. Appeals from decisions of the Federal Circuit Court were dismissed respectively in the Full Court of the Federal Court of Australia (*DVO16 v Minister for Immigration and Border Protection* (2019) 271 FCR 342) and a single Justice of the Federal Court of Australia, exercising the power of the Full Court (*BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304). In the Federal Court and before the High Court, the grounds of appeal in each case were concerned with whether the interpretation errors during the protection interviews with the delegate resulted in the decision of the Authority being affected by jurisdictional error — specifically, whether the translation errors were so significant as to require the Authority to exercise its powers under s 473DC of the Act to get new information or take any other step to cure the error such that the Authority's failure to do this means the decisions were affected by error; and, secondly, whether the interpretation errors meant that the review material provided to the Authority was incomplete such that the Authority failed to complete its statutory review task.

In other words, as summarised by the Court, in what circumstances could mistranslation result in the invalidity of an administrative decision? This, the Court determined, would turn on consideration of whether the mistranslation might result in non-compliance with a condition expressed or implied in the legislation authorising the decision-making process and the limits on the decision-making authority.

The plurality decision found that there were only two possibilities where interpretation errors could lead to an error of law by the Authority when making a decision under a Pt 7AA review process, neither of which were present in either case. The first possibility arises from the implied condition of reasonableness on the Authority's duty to regard the review material and from the Authority's powers to get new information and consider, if satisfied, that it is credible information not previously known that would have otherwise affected the Minister's decision and there are 'exceptional circumstances' to justify its consideration (see the *Migration Act 1958* (Cth) s 473DD).

The plurality noted that interpretation errors in a recording of a protection interview revealed or suggested by the review material provided by the Secretary could enliven the Authority's powers to get and consider new information. Where it fails to exercise those powers to interview the referred applicant and then to consider the referred applicant's testimony as

correctly translated, this could lead to error. However, whether the decision of the Authority is in breach of the reasonableness requirement turns on whether the decision-making course 'adopted by the Authority in the circumstances known to it was open to a reasonable member of the Authority cognisant of the statutory obligation of the Authority ordinarily to conduct its reviews without accepting or requesting new information or interviewing the referred applicant, cognisant of its powers to get new information in an interview with the referred applicant and to consider that information, and mindful of the statutory exhortation on the Authority to pursue the objective of providing a mechanism of limited review that is both "efficient" and "quick"', as required under s 473FA the Act (at [21]).

The second possibility arises through non-compliance with the duty of the Authority to 'review' the referred decision — that is, to consider the review material provided by the Secretary with the ability to request new information and consider it subject to limited circumstances. The Authority's duty in reviewing the referred decision requires an assessment of the claims raised by the applicant against the criteria for the grant of a protection visa in order to determine whether or not to be satisfied that those criteria have been met. Mistranslation has the potential to result in the Authority failing to understand and therefore consider the substance of the claim against the criteria.

The plurality found that in neither case were the interpretation errors such that they impacted the reasonableness of the Authority's ability to make a decision or that they provided a basis for a conclusion that the Authority failed to understand and therefore consider the substance of the claims made by the appellants in their respective interviews. Specifically, for BNB17, the substance of the questions that were misinterpreted was repeated several times during the course of the interview, where they were subsequently interpreted correctly, while in DVO16's case the delegate asked the appellant a number of open-ended questions which gave him plenty of opportunity to give evidence about his fear of persecution, which he failed to do. As a result, the Authority had all the relevant information in the review material for both matters, despite the interpretation errors, to make a reasonable and considered decision.

Justice Edelman likewise held that in neither case had the Authority committed an error of law. Justice Edelman identified three situations where interpretation errors could lead to a decision of the Authority being affected by jurisdictional error, with the first and third situations mirroring largely those identified by the plurality. The first is where significant interpretation errors are apparent to the Authority which, as a matter of legal reasonableness, would require the exercise of an available power by the Authority to remedy the error — such as, for example, obtaining new information under s 437DC of the Act. The second is where the mistranslation is so significant in critical respects that the Secretary is unable to perform the duty, which is a precondition for a valid review by the Authority, of giving the Authority a statement that contains reference to the evidence on which the findings of the delegate were based. The third is that the misinterpretation is so extreme that it deprives the assessment by the Authority of its character as a 'review' under s 473CC of the Act.

Justice Edelman also identified a fourth situation, which he considered not applicable under a Pt 7AA review — that is, the possibility that misinterpretation might result in a breach of the natural justice hearing rule. However, s 473DA(1), which requires the rules for the conduct of a review under Pt 7AA to be 'taken to be an exhaustive statement of the requirements of the

natural justice hearing rule', effectively means that the requirements for the rule have been excluded under a Pt 7AA review.

In both cases Edelman J found no issues regarding the reasonableness of the Authority's decision not to exercise its power under s 473DC of the Act to obtain new information in light of the interpretation errors. The imperfect translations 'did not rise to a level of significance of interpretation error' (at [73]), requiring the exercise of the Authority's powers to remedy the errors. Justice Edelman noted that the power under s 473DC is shaped by the statutory context which includes the expressed assumption that the Authority generally 'does not hold hearings' and is required to conduct its review efficiently and quickly. Moreover, the Authority's review is not 'de novo' in the traditional sense, as the Authority is provided with the delegate's decision and is required to take the delegate's reasoning into account; and, even if new information is obtained, it can only be considered in limited circumstances (s 473DD of the Act).

The second possibility of error also did not arise in these cases, as the requirement, under s 473CB of the Act, that the Secretary give the Authority the review material was in fact met. The submission made by the appellants was that s 473CB(1)(b) of the Act required the Secretary to give the Authority 'material provided by the referred applicant to the person making the decision', which included any information provided by the applicant during an interview, including oral interview remarks. This was rejected by Edelman J. He agreed with the interpretation of 'material' in this context by Anderson J in the Federal Court — that is, 'material' refers to physical or electronic documents, objects and information', such that the oral evidence provided by the applicant at the interview was not 'material' provided by the appellant to the delegate and thus was not required to be provided to the Authority by the Secretary (see *BNB17 v Minister for Immigration and Border Protection* [2020] FCA 304 [95]).

As to the third possibility of error, Edelman J held that in neither case were the translation errors of such a fundamental nature as to deprive the exercise of power by the Authority of the character of a 'review' of the decision. In both cases, the interpretation errors did not preclude the appellants from putting forward their cases and the Authority understanding the 'gist' of it.

The presence of procedural fairness where access to certain material is denied

SDCV v Director-General of Security [2021] FCAFC 51

SDCV v Director-General of Security concerned an appeal from the Administrative Appeals Tribunal (AAT) which was heard before Rares, Bromwich and Abraham JJ (*SDCV and Director-General of Security* [2019] AATA 6112). Their joint decision was handed down on 9 April 2021, dismissing the appeal. Justice Rares, while agreeing with the decision and reasoning of Bromwich and Abrahams JJ, provided separate observations on the constitutional issue.

The applicant is a citizen of Lebanon. In 2012 he was granted a Class BS Subclass 801 Partner (Residence) visa, permitting him permanent residence in Australia. Sometime after, his application for citizenship was approved. However, it subsequently came to the attention

of the Australian Security Intelligence Organisation (ASIO) that some of the applicant's relatives were connected to the Islamic State of Iraq and the Levant (ISIL). The applicant was consequently a subject of an ASIO investigation which concerned his contact with his relatives in Syria and Lebanon.

On 14 August 2018, the applicant was assessed to be 'directly or indirectly, a risk to security' as defined in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). This assessment was reflected in the Director-General of Security's certificate, which also recommended that the applicant's visa be cancelled. The certificate and the assessment comprised the adverse security assessment (ASA) decision of the Director-General of Security, made on behalf of ASIO. The Minister for Home Affairs, in light of the ASA decision, subsequently cancelled the applicant's visa on the basis that 'he reasonably suspected that the applicant did not pass the character test and was satisfied that cancellation of his visa was in the national interest'. The effect of this was that the visa cancellation could not be revoked as long as the ASA remained in place.

On 27 August 2018, the applicant sought a review of the ASA decision by the AAT under s 54 of the ASIO Act. The review was conducted in the Security Division of the AAT in accordance with ss 39A and 39B of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). The Minister signed four certificates under s 39B of the AAT Act. The certificates effectively precluded the applicant and his lawyers from access to some of the evidence and submissions before the AAT and from being present when that evidence was given and those submissions were made.

On 2 December 2019, the AAT affirmed the ASA. The AAT handed down two sets of reasons — one 'open', which was seen by the applicant and his lawyers; and one 'closed', which has not been seen by them. The applicant appealed the AAT's review of the ASA decision to the Federal Court under s 44 of the AAT Act on five questions of law. However, prior to hearing the appeal, the Court heard a constitutional challenge concerning the validity of s 46(2) of the AAT Act. The Commonwealth Attorney-General intervened and the respondent adopted the Attorney-General's submissions. Prior to hearing the substantive appeal, the Court advised that the constitutional challenge had been unsuccessful for the following reasons.

Section 46(2) of the AAT Act effectively operates to prevent the disclosure of certified matter to the applicant or his legal representatives. As there was no challenge made to the validity of the Minister's certificates under s 39B of the AAT Act in this case, the premise for the appeal was that the information to which s 46(2) applied is material that was properly certified.

The basis for the applicant's constitutional challenge was, first, that a court exercising judicial power of the Commonwealth cannot be required (or authorised) to act in a manner that is procedurally unfair, brought about in this case by s 46(2) of the AAT Act, which excluded the applicant from accessing all the evidence that was before the AAT; secondly, that s 46(2) was the cause of this procedural unfairness unless read down; and, thirdly, that s 46(2) could be read down to remain within constitutional limits. In other words, where a procedure has the capacity to result in the court making an order that finally determines a right or legally protected interest of a person, it must afford that person a fair opportunity to respond to evidence on which that order might be made, as a minimum. Essentially, if the Court views

material and considers it relevant to the matter before it then the applicant is entitled to see the material.

The plurality accepted the uncontroversial position that procedural fairness is an essential feature of a Ch III court and noted that the underlying question in this case was 'whether, taken as a whole, the Court's procedures avoid practical injustice' (at [85]). This question was considered in light of the particular legislative regime in which s 46(2) appears in the AAT Act and governs the nature of the merits review function of the AAT.

Justices Bromwich and Abraham noted that, despite the risk of exposure of sensitive material, in the AAT Act Parliament has imposed a duty on the Director-General of Security to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable, under s 39A(3) of the AAT Act. This ensures that the AAT can conduct a meaningful merits review. However, to mitigate the risks of this material being disclosed, Parliament has enacted a specific regime. Consequently, unlike ordinary Tribunal proceedings, these proceedings must be in private (s 39A(5) of the AAT Act) and the persons who can be present are specified (s 39A(6) of the AAT Act). These include the applicant and his/her representative, except where the Minister has certified that the evidence or submission to be made are of such a kind that the nature of the disclosure of the evidence or submission would be contrary to the public interest because it would prejudice the security or defence of Australia, and that evidence is being addressed (s 39A(9) of the AAT Act). The disclosure of that material can be governed by a certificate issued by the Minister under s39B of the AAT Act. Section 44 of the AAT Act provides for an appeal on a question of law arising from the merits review process. Subsequently, s 46(2) ensures that all the material before the AAT is also before the Court for the judicial review proceedings.

The plurality went on to contrast this with the situation if s 46(2) of the AAT Act was absent — that is, the material before the AAT would simply not be before the Court on appeal, as there would inevitably be a public interest immunity claim and, where those claims are successful, that material would be excluded from evidence. The only challenge would be way of judicial review of the ASA, which would occur without access to the material upon which the decision was based. Moreover, where the material relates to national security, it is reasonable to assume that any claim of public interest immunity would have significant prospects of success. Consequently, without the Court having the material as provided by s 46(2) of the AAT Act, the applicant would likely be in a worse position. The plurality found no practical injustice on the applicant having appealed by way of s 44 of the AAT Act from the decision of the AAT, such that s 46(2) was invalid.

In making its decision the plurality also heavily distinguished the authorities relied upon by the applicant to the issues in this case (see *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 78 CLR 38; HT v R (2019) 374 ALR 216; *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532*;* and *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1). Namely, there was no party in this case requiring an order of the Court that would affect or alter the rights or interests of a person on the basis of evidence which is not revealed to the applicant as a result of public interest and national security issues, finding seven reasons the arguments advanced by the applicant based on those authorities were incorrect or not applicable to the case.

Justice Rares likewise agreed with the conclusion reached by Bromwich and Abraham JJ and emphasised the fact that, absent s 46(2) of the AAT Act, all evidence and other material subject to the s 39B certificate and the closed reasons of the AAT would be (or at least highly likely to be) inadmissible into evidence because those relate to matters of state within the meaning of s 130 of the *Evidence Act 1995* (Cth) — namely, adducing such evidence would 'prejudice the security, defence or international relations of Australia', which mirrors the ground under s 39B of the AAT Act. As a result, an applicant challenging an ASA would only have the open evidence, material and open reasons available in which to argue a question of law.

Justice Rares held that s 46(2) of the AAT Act is an important provision in ensuring that evidence which would otherwise be inadmissible under s 130 of the Evidence Act, but which is likely to have been of significant weight to the Tribunal's decision and the interests of justice, can be considered by the Court as evidence as part of a review under s 44 of the AAT Act. Section 46(2) is a parliamentary modification of the common law principles of procedural fairness and open justice. Both of these are capable of adapting to preclude one party knowing or having access to crucial evidence in the case against that party provided it is necessary in the interests of justice to do so. Justice Rares emphasised the fact that 'necessity can warrant departure from the rules of procedural fairness' (at [29]), which is an objective criterion that has no element of discretionary judgement. Moreover, in this case, s 46(2) is analogous to the exceptions to the ordinary application of the principles of procedural fairness and open justice, albeit that it does not give the Court the power to control whether the procedure that it mandates should apply.

In summary, s 46(2) is a statutory mechanism that allows the Court to consider the confidential and secret material on which the Tribunal based its decision while also protecting that confidentiality and secrecy in the public interest because the grounds of the s 39B certificate reflect matters of state immunity that would otherwise make this evidence inadmissible except as provided by s 46(2) of the AAT Act.

Aside from the constitutional challenge, the applicant raised five questions of law which were considered by Bromwich and Abraham JJ in their decision. All five grounds were found to have failed.

Ground 1 raise by the applicant was that the Tribunal misconstrued and or misapplied the concept of 'directly or indirectly a risk to security' because the Tribunal did not identify some specific future overt act by the applicant. The plurality held that the capacity to be a risk did not have to be confined to what the applicant might immediately or directly cause by his own actions. It could also encompass someone who may in some way indirectly materially increase the difficulty of protecting Australia. While regard is to be had to the broad definition of 'security' under s 4 of the ASIO Act, neither the Tribunal nor the ASA is confined to only aspects of that definition.

Under grounds 2a and 4, it was submitted that the Tribunal failed to give reasons and make findings in relation to the ASA, as the open reasons provided to the applicant stated that the Tribunal was unable to form a view as to whether the ASA was justified based on the open evidence. The plurality found that there is nothing that requires the Tribunal's findings to be

recorded in open reasons and there were no issues with the Tribunal preparing two sets of reasons, one open and one closed. Additionally, the s 39B certificates did not preclude the Tribunal from 'casting a broader restrictive umbrella' over the material that could be discussed in the closed reasons. The plurality accepted the Attorney-General's submissions that there was no obligation on the Tribunal to identify in its open reasons whether or not it concluded that the ASA was justified. In light of the closed reasons, the Court found no defect in the Tribunals' conclusion — it complied with the Tribunal's requirements under s 43(2B) of the AAT Act to include in its reasons findings on material questions of fact and reference to the evidence or material on which those findings were based.

Ground 2b submitted by the applicant was that the Tribunal failed to make findings on unchallenged evidence which was the witness evidence from a Catholic priest and the applicant's wife. The error in this line of argument that was pointed out was that the applicant did not have access to all the evidence and the Minister's non-publication certificates prevented closed evidence being put to the witnesses such that the evidence was in and of itself rather limited. The fact that the Tribunal did reference the evidence in its open reasons was considered evidence that it was material the Tribunal had taken into account and had given some limited weight to. This was considered sufficient enough in the circumstances such that on the totality of the open and closed reasons the Court found no error by the Tribunal in going no further with the evidence.

The applicant's third ground was that there had been a denial of procedural fairness by the Tribunal because of a translation of an Arabic message used for the purposes of cross-examination of the applicant which may not have been accurate and which the applicant was not given access to. As with ground 5, which asserted the decision of the Tribunal was illogical or irrational, the plurality could find no basis for either ground in light of the open and closed evidence before the Tribunal and the conclusions it reached.

Validity of a ministerial determination preventing international travel

LibertyWorks Inc v Commonwealth of Australia [2021] FCAFC 90

LibertyWorks Inc v Commonwealth of Australia was a joint decision of Katzman, Wigney and Thawley JJ handed down on 1 June 2021.

On 18 March 2020 the Governor-General declared the existence of a human biosecurity emergency — the COVID-19 pandemic. In light of the declaration, on 25 March 2020 the Health Minister, under s 477 of the *Biosecurity Act 2015* (Cth), made the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination* (the Determination). The Determination, under s 5, prevents any Australian citizen, permanent resident or operator of an outgoing aircraft or vessel from leaving Australian territory unless an exemption applies to the person or is granted to the operator. An exemption can only be granted by the Australian Border Force (ABF) Commissioner or ABF employee and only in 'exceptional circumstances' where a 'compelling reason for needing to leave the Australian territory' has been demonstrated.

In October 2020, Christopher De Bruyne, an employee of LibertyWorks Inc, applied through an online portal administered by the Department of Home Affairs for an exemption under

s 7(1) of the Determination in order to travel from Sydney to London to 'assess potential conference venues' for an upcoming conference hosted by LibertyWorks. Mr De Bruyne's application was refused on the ground that Mr De Bruyne's travel was 'not exempt from the travel restrictions'. The Declaration that was in force at the time of Mr De Bruyne's application was registered on 11 September 2020 and remained in force until 17 December 2020.

By an originating application, LibertyWorks Inc challenged the validity of the Determination and sought a declaration that the Determination was 'invalid by reasons of inconsistency with, or of lacking authority in, the [Act]'. Specifically, LibertyWorks challenged the validity of the restriction on overseas travel imposed by the Determination such that the Determination was ultra vires because this restriction is a measure 'of a kind' set out in s 96 of the Act that may not be included in the Determination.

During a human biosecurity emergency, s 477 of the Act gives the Health Minister the power to determine any requirement that he or she is satisfied is necessary in order to prevent or control the entry of the listed human disease the subject of a declaration into Australia or its emergence, establishment or spread in Australia; to prevent or control the spread of the disease made to another country; or to give effect to any recommendation in relation to the disease made to the Health Minister by the World Health Organisation under Pt III of the International Health Regulations. Section 477(6) prevents the Minister from making a determination which requires an individual to be subject to a biosecurity measure of a kind set out in Subdiv B of Div 3 of Pt 3 of Ch 2. Section 96 appears in that subdivision. It provides that, for a specified period of no more than 28 days, an individual may be required by a human biosecurity control order not to leave Australian territory on an outgoing passenger aircraft or vessel. LibertyWorks submitted that, since s 5 of the Determination had the same purpose and effect as the measure permitted in s 96, the Determination was beyond the Minister's power. The Health Minister, it argued, could not subject a group of individuals by a determination to a measure of a kind which the Chief Medical Officer could only subject an individual by a biosecurity order.

The Court turned to the construction of s 477 read in light of its context consistent with the principles of statutory interpretation under *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Chapter 2 of the Act in which s 96 sits provides for the making of human biosecurity control orders on individuals. On the other hand, Ch 8, which includes s 477, is intended to be used in circumstances where there is an emergency of such a scale and significance as to require management at a national level, according to the Explanatory Memorandum to the Act and as outlined in s 473 of the Act.

Specifically, the Court found that the power under s 477 was very broad such that the Health Minister is entitled to impose any requirement he or she is 'satisfied is necessary' to prevent or control the entry of COVID-19 into Australian territory or the spread of the disease in Australia or elsewhere. This would include the ability to restrict or prevent the movement of person in or between places, including across international borders. To construe this power as anything less than that would be contrary to Parliament's intention in enacting the emergency power.

This, according to the Court, was reinforced by the simplified outline in s 473, which states that Pt 2 of Ch 8 contains *additional powers* to those available in Ch 2. Moreover, restricting the scope of a determination under s 477, as suggested by LibertyWorks, would lead to a situation where the only way to prevent or reduce the risk of contagion from Australians who travel overseas during a pandemic would be through making a human biosecurity control order on every single individual who wishes to do so and then only for more than 28 days. In addition, any officer imposing the order would be required to ensure that each individual had been informed of the order and provided an opportunity to consent to it. The affected individuals would also have a right to seek merits review of the order in the Administrative Appeals Tribunal, with potential avenues for judicial review. The time and expense of such a mechanism would far outweigh the utility of the order and have a detrimental effect on the ability of the Government to control a human biosecurity emergency.

The Court found that the mere fact that a determination made under s 477 may affect an individual does not prevent the Health Minister from making the determination and, while Art 12 of the *International Covenant on Civil and Political Rights* ratified by Australia in 1980 requires acquiescence to the right to freedom of movement, it also expressly allows for restrictions provided by law which are necessary, among other things, to protect public health.

The Court upheld the validity of the Determination and dismissed the originating application.

Proportionality in Australian public law

*Justice Peter Davis**

The title of this article is a wide one. What I have explored is the recent history of proportionality as it has found its way into constitutional and administrative law in Australia.

What is proportionality and why is it a potentially difficult subject in administrative law?

In a paper delivered by the Hon Justice Susan Kiefel in 2012 titled 'Proportionality: A Rule of Reason', her Honour described proportionality in these terms:

> One meaning of the word 'proportion' is the correct relation that one thing bears to another. When something is in proportion it may be said to have achieved a correct balance. The term is employed in many disciplines, including mathematics, musical theory and philosophy. In law, proportionality is employed as a concept and an ideal; as a test and as a conclusion. Its basis as a legal rule is reason.[1]

Various areas of the law can be identified where proportionality as a concept is obviously applied. This is because the common law has developed so that proportionality is naturally a part of the exercise of administrative or judicial power or a statute has introduced proportionality into the mix.

Sentencing is an obvious area where common law principles are applied proportionally. In *Markarian v The Queen*,[2] the High Court considered how a sentencing judge should approach the calculation of a sentence. Alternative approaches were advanced. The first was the 'two-tier approach'. That involved setting a preliminary sentence and then adding and subtracting from that starting point to reflect aggravating and mitigating factors. The second approach was the 'intuitive synthesis approach' which, in essence, obliges the sentencing judge to look at the entire case and set a sentence taking into account all the relevant circumstances.

In the course of endorsing the instinctive synthesis approach, McHugh J observed:

> The principle of proportionality is one of the fundamental principles of sentencing law. It is difficult — maybe impossible — to reconcile that principle with the two-tier approach to sentencing. *The principle of proportionality requires the judge to make a judgment concerning the relationship of the penalty to the facts.* This is a value judgment, based on experience and instinct, derived after taking into account all the facts and circumstances of the case. The existence of the proportionality principle makes one wonder whether, despite appearances, two-tier sentencers exist. At the end of the process, the subtractions from the objectively determined sentence is proportionate to the accused's offence. What happens if the judge concludes that the result is not proportionate to the offence? It would be almost a miracle if it was. If the judge tinkers with the quantum of each component in the sentence to achieve a result compatible with the concept of proportionality, the two-tier structure is meaningless, if not a charade.[3]

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* Justice Davis is a judge of the Supreme Court of Queensland and President of the Queensland Industrial Relations Commission. This is an edited version of a speech delivered at an Australian Institute of Administrative Law seminar on 8 June 2021.

1 Hon Justice Susan Kiefel AC, 'Proportionality: A Rule of Reason' (2012) 23 PLR 85.

2 (2005) 228 CLR 357.

3 Ibid (emphasis added).

Common law damages claims (although now heavily regulated by statute) naturally involve the assessment of proportionality between the extent of the injury and the level of damages awarded as compensation. There are many other examples.

A statutory example can be found in the criminal law concerning self-defence. The defence used must be proportionate to the assault being defended against. By s 271 of the *Criminal Code* the authorised force used in defence is described as that force 'as is reasonably necessary to make effectual defence against the assault'.[4]

Fitting proportionality into the construct of well-understood principles of administrative law is quite another matter. That is because of the limitations which the law has traditionally placed on the review of executive power. Basic principles underpinning the doctrine of the separation of powers dictate that the exercise of administrative power is not replaced or supplanted by the later exercise of judicial power on review. Judicial review of administrative action is, subject to statute, aimed at correction of error in the process of the exercise of administrative power, not a review of the merits of the decision, subject, of course, to *Wednesbury* unreasonableness.

That was made clear in *Attorney-General (NSW) v Quin*[5] (*Quin*), where Brennan J, as his Honour then was, observed as follows:

> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.
>
> There is one limitation, '*Wednesbury* unreasonableness' (the nomenclature comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[6] which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: *Nottinghamshire County Council v Secretary of State for the Environment*.[7] Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined.[8]

Since *Quin*, there have been significant developments in the Australian understanding of *Wednesbury* unreasonableness. That occurred in *Minister for Immigration and Citizenship v Li*[9] (*Li*), to which I shall return.

What is seen from the constitutional cases to which I will turn shortly is a resort by at least some of the judges of the High Court to a process of proportionality reasoning which

4 *Criminal Code*, s 271(1).
5 (1990) 170 CLR 1.
6 [1948] 1 KB 223.
7 [1986] AC 240, 249.
8 (1990) 170 CLR 1, 36.
9 (2013) 249 CLR 322.

has relatively modern European origins, although general concepts of proportionality, as explained by Kiefel CJ in her paper, date back to Plato and Cicero.

The European concept that has taken hold has three limbs:

1. the limitation or restrictions be adapted or suitable to the legislative purpose;

2. the statutory restrictions be reasonably necessary; and

3. the restrictions not be excessive.[10]

That approach is more adaptable as a test of validity of a statute — or, in other words, as a test to examine the exercise of legislative power and whether its limits have been exceeded — than to the exercise of executive power. However, the adoption of that sort of assessment on a review of the exercise of decision-making power would be a leap away from traditional understandings.

When considering the role of proportionality in the assessment of a judicial review of an administrative decision on the basis that it was unreasonable, Aronson, Groves and Weeks observed:

> It used to be unthinkable to maintain that administrative action could be attacked for being too heavy-handed unless, of course, it was so harsh that (in *Wednesbury's* terms) no reasonable decision-maker would agree with it.[11]

No doubt similar sentiments motivated Spiegelman CJ in *Bruce v Cole*[12] to note:

> The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than *Wednesbury* unreasonableness. This is not the occasion to take such a step in the development of administrative law, if it is to be taken at all.[13]

The *Australian Constitution* cases

The notion of proportionality as an identifiable concept arose for consideration in the High Court in *McCloy v New South Wales*[14] (*McCloy*).

McCloy concerned a constitutional challenge to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). That legislation sought to limit and regulate donations to political parties. The basis of the challenge was that the law allegedly impermissibly burdened the plaintiff's implied freedom of communications on governmental and political matters, as explained in *Lange v Australian Broadcasting Corporation*[15] (*Lange*), *Coleman v Power*[16] *and Unions New South Wales v New South Wales*[17] (*Unions NSW*).

10 Kiefel, above n 1, 88.
11 MI Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Law Book Co, Thomson Reuters, 6th edition, 2017).
12 (1998) 45 NSWLR 163.
13 Ibid [59].
14 (2015) 257 CLR 178.
15 (1997) 189 CLR 520.
16 (2004) 220 CLR 1.
17 (2013) 252 CLR 530.

All seven justices in *McCloy* held that the implied freedoms were not infringed. It was in the reasoning to that conclusion where those who joined in a joint judgement (French CJ and Kiefel, Bell and Keane JJ) differed from those who delivered separate judgements (Gageler, Nettle and Gordon JJ).

All judges confirmed that the *Lange* test, as explained in *Coleman v Power*, led to the necessity to ask three questions in order to determine the question of the constitutional validity of a law which allegedly burdened the implied constitutional freedom. Those questions were:

1. Does the law burden the freedom?

2. If so, are the purposes of the law legitimate in being compatible with the maintenance of the constitutionally prescribed system of representative government?

3. Is the law reasonably appropriate and adapted to advance that legitimate objective?

It was the third question that was held by those who participated in the joint judgement in *McCloy* to resort to proportionality reasoning. Their Honours explained question 3 as follows:

> If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?[18] This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.
>
> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test - these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *suitable* — as having a rational connection to the purpose of the provision;[19]
>
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.[20]

Importantly for present purposes, their Honours went on to say:

> As noted, the last of the three questions involves a proportionality analysis.
>
> *The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done.* Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the *Constitution* or a statute, which

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.
19 *Unions NSW v New South Wales* (2013) 252 CLR 530, 558−559 [55]−[56].
20 (2015) 257 CLR 178 [3].

> may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. *Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.*[21]

It can be seen that, while *McCloy* was a constitutional case, those participating in the joint judgement considered the proportionality principles applicable to consideration of the exercise of 'purposive powers' which included 'administrative acts'.

There is no doubt that the application of the *Lange* and *Coleman v Power* test involves consideration of proportionality in the sense of balancing the appropriateness of the law to the advancement of the legitimate objective. The issue was whether the European-based concepts, described by Gageler J in *McCloy* as 'standardised proportionality analysis', was an appropriate tool to use in the assessment of the validity of the law.

In *McCloy* Gageler J said:

> Together with a majority of the Court, I hold that none of the provisions challenged in this case imposes an impermissible burden on the implied constitutional freedom. Unlike a majority of the Court, however, I do not reach that result through the template of standardised proportionality analysis. I reach that result instead by concluding that the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object. The compelling statutory object is the object of preventing corruption and undue influence in the government of the State.
>
> To explain my analysis, it is appropriate to commence by reiterating the structural reasons identified in *Lange v Australian Broadcasting Corporation*[22] for the implication of the constitutional freedom of political communication, and by relating those structural reasons to the analytical framework established by that case for determining whether or not a law impermissibly burdens the implied constitutional freedom.[23]

The attitude of Nettle J is seen in this passage:

> For reasons which will later be explained, it should now be accepted that the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden. A law which imposes a discriminatory burden will require a strong justification. And the availability of alternative means is a relevant but not determinative consideration. For present purposes, however, it is unnecessary to delve into strict proportionality.[24]

And Gordon J said:

> Thus, when asking what is 'the extent of the burden effected by [Div 2A] on the freedom'[25] or to what extent does Div 2A affect or burden the freedom,[26] it is neither right nor relevant to ask whether the benefits which will follow from application of the impugned law are 'larger than' or 'outweigh' the diminution

21 Ibid (emphasis added).
22 (1997) 189 CLR 520.
23 (2015) 257 CLR 178 [98]−[99].
24 Ibid [222].
25 See *Dietrich v The Queen* (1992) 177 CLR 292, 319−321; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 199 [141]. See also, eg, the incremental development of the law in negligence: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481; *Hill v Van Erp* (1997) 188 CLR 159, 178−179; *Cattanach v Melchior* (2003) 215 CLR 1, 24 [39].
26 *Unions NSW* (2013) 252 CLR 530, 554 [36], 555 [40].

in political communication (a test of proportionality strictly so called and sometimes seen as part of proportionality analysis).[27]

None of Gageler J, Nettle J or Gordon J resorted to proportionality reasoning in reaching the same conclusion that was reached in the joint judgement.[28]

The third element of the *Lange* test necessarily involves a weighing of the restrictions imposed by the law sought to be impugned and the right being compromised. To that extent, the exercise naturally and necessarily involves considerations of proportionality. The difference between the three individual judgements and the joint judgement is that it is only in the latter where there was resort to what was described as 'strict proportionality' or, to use Gageler J's term, 'standardised proportionality testing' which harks back to the recognition of proportionality as an approach to reasoning. The other judges simply approached the issue at hand by applying the principles which had been settled in *Lange* and *Coleman v Power*.

The first time the High Court considered *McCloy* was in *Murphy v Electoral Commissioner*.[29] That was another constitutional case. It was argued that provisions in the *Commonwealth Electoral Act 1918* (Cth), which regulated how electoral rolls would be settled and prepared, were constitutionally invalid as being incompatible with the system of representative government prescribed by the *Constitution*. That raised issues about whether the restrictions were 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'[30]. Chief Justice French and Bell and Kiefel JJ all expressly relied on proportionality reasoning. Chief Justice French and Bell J observed:

> A structured approach to the application of the general proportionality criterion to a law said to burden the implied freedom of political communication was recently set out in the joint judgment in *McCloy*. It was invoked by the plaintiffs in support of their case. That approach, foreshadowed in the judgment of Kiefel J in *Rowe*,[31] involved an unpacking of the question whether a law found to burden the implied freedom, and to do so for a legitimate purpose, was 'reasonably appropriate and adapted to advance that legitimate object'.[32] The analysis used to answer the proportionality question was undertaken by reference to three considerations drawn from the approach of European and, in particular, German courts:[33]
>
> 1. Suitability — whether the law had a rational connection to the purpose of the provision — a criterion which reflects that adopted by Gleeson CJ in *Roach*.
>
> 2. Necessity — whether there was an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom.
>
> 3. Adequacy in its balance — whether the extent of the restriction imposed by the impugned law was outweighed by the importance of the purpose it served.
>
> The adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law. It is a mode of analysis applicable to some

27 (2015) 257 CLR 178 [338]; cf *Bedford v Canada (Attorney-General)* [2013] 3 SCR 1101, especially at 1150−1152 [120]−[123].
28 (2015) 257 CLR 178 [98] (Gageler J), [222] (Nettle J) and [338] (Gordon J).
29 (2016) 261 CLR 28.
30 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [83], cited in Murphy at [31].
31 (2010) 243 CLR 1 at 140–142 [460]–[466].
32 (2015) 257 CLR 178 at 193–195 [2].
33 (2010) 243 CLR 1 at 140 [460] per Kiefel J.

cases involving the general proportionality criterion but not necessarily all. For example, as Kiefel J observed in *Rowe*:[34]

> A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question.

In *Davis v The Commonwealth*,[35] *Nationwide News Pty Ltd v Wills*[36] and *Australian Capital Television Pty Ltd v The Commonwealth*,[37] as her Honour observed, want of proportionality was assessed by reference to a range of factors.[38]

Neither Keane J nor Nettle J resorted to the principles.[39] Justice Gageler observed:

> The problem for the plaintiffs was at the next level of the analysis. The problem was exacerbated by the plaintiffs' treatment of the question of whether there was a substantial justification for the exclusion as one which needed to be answered through the application of standardised 'proportionality testing'.[40]

He said later:

> My reservations about the appropriateness of importing such a structured and prescriptive, and ultimately open-ended, form of proportionality testing into our constitutional setting have been expressed elsewhere.[41] The plaintiffs' attempt to shoehorn their argument within it highlights the inappropriateness of attempting to apply such a form of proportionality testing here. What is at best an ill-fitted analytical tool has become the master, and has taken on a life of its own.[42]

Justice Gordon said:

> The questions in *Lange* were directed to whether a law will be invalid for infringing the implied freedom of political communication. More recently, in *McCloy v New South Wales*,[43] a majority of the Court altered the traditional formulation of that test and adopted a framework of 'structured' proportionality.
>
> Here, the plaintiffs proceeded on the basis that, because of the 'affinity' between the test outlined in *Roach* and the second question in *Lange*, the validity of the impugned provisions fell to be determined in accordance with the 'structured' proportionality approach of the joint judgment in *McCloy*. The Commonwealth, while accepting that some form of proportionality testing was appropriate, rejected the suggestion that it should take the form adopted by the joint judgment in *McCloy*. The Attorney-General for South Australia, who intervened to make submissions only on the issue of the relevant test, supported the Commonwealth's approach.
>
> The concept of proportionality is applied in a variety of areas in Australian jurisprudence.[44] It should not be assumed that, because a particular test for proportionality has been adopted in one particular constitutional context, it can be uncritically transferred into another context, constitutional or otherwise, [45]even within the same jurisdiction.

34 (2010) 243 CLR 1, 136 [445].
35 (1988) 166 CLR 79.
36 (1992) 177 CLR 1, 31.
37 (1992) 177 CLR 106.
38 (2016) 261 CLR 28 [37].
39 Ibid [31], [34], [36], [37], [38] (French CJ and Bell J); [62], [63], [64], [65] (Kiefel J).
40 Ibid [98].
41 *McCloy v New South Wales* (2015) 257 CLR 178, 235−239 [141]−[152].
42 (2016) 261 CLR 28 [101].
43 (2015) 257 CLR 178.
44 (2015) 257 CLR 178, 195 [3].
45 Ibid 215 [72]; see also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [39]; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178−179 [17]; *McCloy* (2015) 257 CLR 178, 234 [139], 288−289 [339].

> The 'structured' proportionality approach adopted by the joint judgment in *McCloy* is inappropriate in the constitutional context in this case. That can be demonstrated by considering the 'necessity' stage of the *McCloy* test.[46]

Brown v Tasmania[47] was another case concerning the alleged impermissible restriction upon the implied freedom of political expression. This case involved consideration of the provisions of the *Workplaces (Protection from Protestors) Act 2014* (Tas). Largely, that case concerned the application of the *Lange* and *Coleman v Power* principles by reference to what had been said in *McCloy*.

Of some interest to the present topic was what Gageler J observed in relation to proportionality reasoning:

> Three-staged proportionality testing was not sought to be characterised in *McCloy* as anything more than a tool of analysis,[48] not to be confused with the constitutional principle it served.[49] The plurality did not suggest that its adoption is compelled by the reasoning which supports the implication of the freedom of political communication as authoritatively expounded in *Lange*.[50] The plurality also disavowed any suggestion that 'it is the only criterion by which legislation that restricts a freedom can be tested'.[51]
>
> The point is therefore not one of reopening and overruling *McCloy*: nobody has suggested that *McCloy* was wrongly decided; *McCloy* does not elevate three-staged proportionality testing to the level of constitutional principle; and *McCloy* does not endow it with precedential status. The point is one of emphasising that the tool is, at best, a tool. For my own part, I have never considered it to be a particularly useful tool.
>
> Though it originated within a civil law tradition, three-staged testing for proportionality (*Verhältnismäigkeit*) has been found by some courts applying the methodology of the common law to be useful when undertaking constitutionally or statutorily mandated rights adjudication. The structure it imposes is not tailored to the constitutional freedom of political communication, which is not concerned with rights, and which exists solely as the result of a structural implication concerned not with attempting to improve on outcomes of the political process but with maintaining the integrity of the system which produces those outcomes. The first stage — 'suitability' (*Geeignetheit*) — can be quite perfunctory if confined to an inquiry into 'rationality'. The second — 'necessity' (*Erforderlichkeit*) — is too prescriptive, and can be quite mechanical if confined to an inquiry into 'less restrictive means'. The third stage — 'adequacy of balance' (*Zumutbarkeit*) — even if the description of it as involving a court making a 'value judgment'[52] conveys no more than that the judgment the court is required to make can turn on difficult questions of fact and degree,[53] is too open-ended, providing no guidance as to how the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged.[54]

Falzon v Minister for Immigration and Border Protection[55] concerned a different constitutional challenge. The complaint there was that, by reference to the principles of proportionality as

46 (2016) 261 CLR 28 [294]−[297].
47 (2017) 261 CLR 328.
48 (2015) 257 CLR 178 [68], [73], [77], [78]. See also at [144], quoting *Bank Mellat v HM Treasury (No 2)* [2014] AC 700; [2013] 4 All ER 495; [2013] UKSC 38 [74].
49 (2015) 257 CLR 178 [68].
50 Ibid [70]–[72].
51 Ibid [74].
52 Ibid [2], [74]–[75].
53 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270; 31 ACSR 99; [1999] HCA 27 (*Re Wakim*) [149].
54 (2017) 261 CLR 328 [158]−[160]. See F Schauer, 'Proportionality and the Question of Weight' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) pp 173, 177–178, 180.
55 (2018) 262 CLR 333.

explained in *McCloy*, a constitutionally guaranteed freedom from executive detention had arisen. That was rejected.[56]

McCloy was considered again in *Burns v Corbett*,[57] but that is not relevant to the current question.

Club v Edwards; Preston v Avery[58] was yet another case involving the implied freedom of political communication. Again, Kiefel CJ and Bell and Keane JJ considered the case by reference to proportionality testing. Justice Gageler, while agreeing with the result reached in the joint judgement, continued to express resistance to three-tiered proportionality reasoning, at least in a constitutional setting. His Honour said:

> The three stages of the *Lange−Coleman−McCloy−Brown* analysis are anchored in our constitutional structure. They are part of our constitutional doctrine. Their application is mandated by precedent. Structured proportionality has not been suggested to be more than an intellectual tool.[59]
>
> That there continue to be differences of opinion about the propriety and utility of importing the three stages of the structured proportionality analysis is hardly surprising. The Australian constitutional tradition derives from that of the common law. Lawyers brought up in the tradition of the common law are comfortable with the application of precedent. Lawyers brought up in that tradition are less than comfortable with being constrained to adopt a standardised pattern of thought and expression in determining whether a given measure in a given context can be justified as reasonable or appropriate or adapted to an end. We value predictability of outcomes more than we value adherence to analytic forms. We have learned through long and sometimes bitter experience that '[l]inguistic refinement of concept' can 'result in fineness of distinction which makes it ever more difficult to predict a course of judicial decision' whereas 'an overtly imprecise concept can yield a degree of certainty in application, provided the reasons for choice are also made as overt as we can'. [60]

Justice Nettle accepted the utility of proportionality testing with some qualifications.[61] Justice Gordon said:

> Structured proportionality testing[62] is a means of expressing a chain of reasoning undertaken to arrive at a conclusion about the validity of a provision said to be beyond power because it burdens the implied freedom of political communication. It is a means of setting out steps to a conclusion — a tool of analysis.[63] 55 It is not a constitutional doctrine[64] or a method of construing the *Constitution*. The contention that, in the Australian context, structured proportionality — even if not deployed in a rigid or sequenced way —

56 Ibid [25], [30].
57 (2018) 265 CLR 304.
58 (2019) 267 CLR 171.
59 *McCloy v New South Wales* (2015) 257 CLR 178, 213 [68]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 52 [37], 60−61 [62].
60 (2019) 267 CLR 171 [158]−[159]. See KS Jacobs, 'The Successor Books to "The Province and Function of Law" - Lawyers' Reasonings: Some Extra-judicial Reflections' (1967) 5 *Sydney Law Review* 425, 428, quoted in JS Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) p 674.
61 At [266].
62 See *McCloy* (2015) 257 CLR 178, 194−196 [2]−[4], 213−220 [69]−[92]; *Brown* (2017) 261 CLR 328, 363−364 [104], 368−370 [123]−[131].
63 *McCloy* (2015) 257 CLR 178, 213 [68], 215−216 [74]; *Brown* (2017) 261 CLR 328, 369 [125], 370 [131], 376 [158]−[159], 417 [279]−[280], 476−477 [473].
64 *McCloy* (2015) 257 CLR 178, 213 [68]; *Brown* (2017) 261 CLR 328, 476−477 [473].

> may provide a better account of judicial reasoning and thereby promote more consistency and clarity in judgment[65] is to be approached with caution.[66]

Edelman J observed:

> Clarity about, and reconciliation of, the reasoning and outcome in *Brown v Tasmania* and in the Preston appeal is furthered by the application of a three-stage structured proportionality test. Structured proportionality testing provides an analytical, staged structure by which judicial reasoning can be made transparent. The extent of its value will depend upon the content of each stage. However, despite the presence of proportionality testing in many countries, there is no fixed approach within each stage. In Australia, a restrained approach to each stage is required because the freedom of political communication is a limited implication from the *Constitution* that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the *Constitution*. The approach at each stage must also reflect the terms and structure of the *Constitution* and the operation of the system of government that it instantiates. Those terms and that structure also contain a divide between legislative power and judicial power, which, whilst not clearly delineated, is now deeply embedded.[67]

Spence v Queensland[68] concerned the validity and operation of various Commonwealth and Queensland laws where the State laws were said to be invalid pursuant to s 109 of the *Constitution*. Chief Justice Kiefel and Bell, Gageler and Keane JJ considered proportionality[69] whereas Edelman J thought it was unnecessary to reignite the debate.[70] Other constitutional cases have considered *McCloy*, but they need not be considered here.[71]

The administrative law decisions

Not since *McCloy* has there been consideration of proportionality in an administrative law setting by the High Court. The authors of the joint judgement in *McCloy* mentioned 'administrative acts' in the same breath as proportionality. Proportionality (at least as a general concept) had been raised earlier as an issue in administrative cases such as *Plaintiff S156-2013 v Minister for Immigration and Border Protection*.[72]

Li,[73] decided before *McCloy*, is a landmark decision on the application of the *Wednesbury* principle. As previously explained, from the point of view of administrative law, the impact of proportionality is likely going to be felt most when considering an allegation of an unreasonable exercise of administrative power.

65 See VC Jackson, 'Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality' (2017) 130 *Harvard Law Review* 2348, 2375.
66 (2019) 267 CLR 171 [390].
67 Ibid [208]. See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 272.
68 (2019) 367 ALR 587.
69 Ibid [63].
70 Ibid [350].
71 *Comcare v Banerji* (2019) 267 CLR 373; *Victoria International Container Terminal Ltd v Lunt* (2021) 388 ALR 376; *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1; *Gerner v Victoria* (2020) 385 ALR 394; and *Palmer v Western Australia* (2021) 388 ALR 180.
72 (2014) 254 CLR 28.
73 (2013) 249 CLR 332.

Unreasonableness as a ground for judicial review is now statutorily provided.[74] However, as explained in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*,[75] it was always a common law basis of judicial intervention.[76]

Li was an appeal arising from a decision of the Migration Review Tribunal not to grant an adjournment to enable the applicant to muster some materials. The applicant was ultimately successful in the High Court on *Wednesbury* grounds.

Chief Justice French expressed the *Wednesbury* ground in terms, at least in part, upon proportionality reasoning. His Honour said:

> The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, 'may have no particular legal consequence'.[77] As Professor Galligan wrote:[78]
>
> > The general point is that the canons of rational action constitute constraints on discretionary decisions, but they are in the nature of threshold constraints above which there remains room for official judgment and choice both as to substantive and procedural matters. In other words, within the bounds of such constraints, different modes of decision-making may be employed.
>
> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable.[79] *It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts.*[80] *Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut,*[81] *may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.* That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions.[82]

Chief Justice French's reference to a decision being 'characterised as irrational' was a reference back to Lord Greene MR's decision in *Wednesbury*[83] — namely, that the decision ought to be set aside if it is so unreasonable that no reasonable person could have arrived at it.

Decisions of the High Court up to *Li* generally show a restrictive view of what was unreasonable for the purposes of administrative review.[84]

74 In Queensland, *Judicial Review Act 1991* (Qld) ss 20(2)(e) and 23(g).
75 (2007) 233 CLR 229.
76 Ibid [80], considering *House v The King* (1936) 55 CLR 499, 505; and see *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.
77 (1999) 197 CLR 611, 626 [40].
78 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) p 140.
79 G Airo-Farulla, 'Reasonableness, Rationality and Proportionality', in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) pp 212, 214–215.
80 For an analogous application of reasonable proportionality as a criterion for the validity of delegated legislation see *Attorney-General (SA) v Adelaide Corporation* (2013) 249 CLR 1.
81 Airo-Farulla, above n 79, p 215.
82 (2013) 249 CLR 332 [30].
83 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233.
84 (2013) 249 CLR 332 [113] (Gageler J).

Of some significance in *Li* was the statement of Hayne, Kiefel and Bell JJ in a joint judgment in these terms:

> Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury*[85] has been criticised for circularity and vagueness', as have subsequent attempts to clarify it.[86] However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it — nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*,[87] before *Wednesbury* was decided. And the same principles evidently informed what was said by Dixon J about review of an administrative decision in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[88] which was decided less than two years after *Wednesbury*, at a time when it was the practice of the High Court to follow decisions of the Court of Appeal in England which appeared to have settled the law in a particular area.[89]

They also said:

> In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1). With that in mind, consideration could be given to whether the Tribunal gave excessive weight — more than was reasonably necessary — to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.[90]

What appears to be a general widening of the *Wednesbury* test has been picked up in the Federal Court and discussed in the context of *McCloy*.

Minister for Immigration and Border Protection v Stretton[91] (*Stretton*) was, as is obvious, a migration case, and the ground of review was alleged unreasonableness.

In following *Li*, Allsop CJ observed:

> The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of *power*. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over-categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by

85 [1948] 1 KB 223, 230.
86 See *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation* (1990) 96 ALR 153, 166 (Gummow J), referring to M Allars, *Introduction to Australian Administrative Law* (1990) p 187 [5.52].
87 (1936) 55 CLR 499.
88 (1949) 78 CLR 353, 360.
89 (2013) 249 CLR 332 [68]. See also *Wright v Wright* (1948) 77 CLR 191, 210; *Commissioner of Stamp Duties (NSW) v Pearse* (1953) 89 CLR 51, 63−64; [1954] AC 91, 12.
90 (2013) 249 CLR 332 [74].
91 (2016) 237 FCR 1.

> seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.[92]

After referring to various authorities, his Honour then said:

> This concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary. For instance, in argument, the submission was put that [76] of *Li* in the judgment of Hayne, Kiefel and Bell JJ contained two (different) 'tests': (1) if upon the facts the result is unreasonable or plainly unjust and (2) if the decision lacks an evident and intelligible justification. The submission reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The plurality's discussion of unreasonableness at [63]−[76] in *Li* should be read as a whole — as a discussion of the sources and lineage of the concept: [64]−[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been *described*: [68]−[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]−[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]−[76].[93]

Chief Justice Allsop has regarded Li as a fundamental step in the development of the jurisprudence of unreasonableness as a ground of review and, importantly for present purposes, regarding proportionality reasoning as appropriate and useful in the assessment.

In the same case Griffiths J also endorsed proportionality reasoning in the concept of *Wednesbury* unreasonableness. His Honour said:

> The concept of 'unreasonableness' can accommodate individual heads of judicial review, including a 'proportionality analysis by reference to the scope of the power' (at [73]). Thus, although the argument was not presented in this way in *Li* itself, the plurality stated that, if the Migration Review Tribunal gave 'excessive weight' to the question whether the visa applicant had had an opportunity to present her case, 'an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached' (at [74]). It may be interpolated at this point that, in the recent decision in *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3], French CJ, Kiefel, Bell and Keane JJ described the term 'proportionality' in Australian law as describing a class of criteria:
>
> > … to determine whether legislative or administrative acts are within the constitutional or *legislative* grant of power under which they purport to be done. (Emphasis added.)
>
> This may indicate that the concept of proportionality is an aspect of judicial review of administrative action.
>
> > By analogy with the approach in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 (House) (ie that an appellate court should not interfere with the exercise of a discretionary power by an inferior court merely because the appellate court would have taken a different course), it must be evident in a judicial review of the exercise of a statutory power by a tribunal that there has been some error in exercising the discretion (at [75]). The plurality's statement at [76] is also relevant and is set out in [18] above.[94]

92 Ibid [2].
93 Ibid [10].
94 Ibid [57].

Various Federal Court decisions since *Stretton*[95] all contain caveats against the recognition of proportionality as a separate and distinct ground upon which jurisdictional error could be found.

As can be seen from *McCloy* itself, proportionality is not an independent concept of the constitutional law. Indeed, it does not appear as an established set of principles. It exists as a tool to use in some circumstances to test the application of established constitutional principles and tests.

Proportionality does not exist as a separate ground of judicial review or as a separate ground upon which jurisdictional error might be found, if there is relevantly here a difference in those two concepts. However, just like the application of constitutional principles, proportionality seems to be gaining some foothold as a tool for use in assessing the lawfulness of administrative action.

However, no case has been decided where *Wednesbury* unreasonableness, as a ground has been substituted for a three-tier proportionality test; the type of approach that Gageler J described as 'standardised proportionality analysis'.

Unreasonableness as a ground of administrative review will no doubt continue to be considered in terms of the width of the power that has been bestowed by the statute and whether the decision under review is such that it is one beyond the power. That excess of power is identified by unreasonableness.[96]

The Federal Court cases were recently reviewed by Justice Banks-Smith in *DPB16 v Minister for Home Affairs*,[97] which was a case concerning a Sri Lankan national who unsuccessfully applied for a protection visa. One of the grounds of review was unreasonableness.

Her Honour referred to *Stretton*[98] and then observed:

> However, care must be taken in assuming that the concept of proportionality may be applied outside the recognised contexts of subordinate and delegated legislation and constitutional review, and outside the context of legal unreasonableness. In *Lobban v Minister for Justice* [2015] FCA 1361, McKerracher J said the following:
>
> > [96] While disproportionality may be a factor to take into account in considering a legal unreasonableness submission, it does not, under Australian law as it presently stands, taken in isolation, offer a stand-alone basis for concluding there has been jurisdictional error in the exercise of the decision. (Nothing said in *McCloy v New South Wales* [2015] HCA 34 (delivered since argument in this application) concerning proportionality as a tool in construing legislative power, rather than administrative action, affects the position.)

95 *Lobban v Minister for Justice* [2015] FCA 1361; *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412; and *DJS16 v Minister for Immigration and Border Protection* [2019] FCA 254, all reviewed and considered in *DBP16 v Minister for Home Affairs* [2020] FCA 781; *ANZ15 v Minister for Immigration and Border Protection* [2016] FCA 1195.

96 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123.

97 [2020] FCA 781.

98 (2016) 237 FCR 1 [91], [92].

> [97] The fourth ground is, in truth, only an element of the third ground. It would be necessary, as the Chief Justice has said in *Li* (at [30]), to conclude that the disproportionate exercise of the administrative discretion was in itself irrational or unreasonable as it exceeds, on any view, what is necessary for the purpose it serves. The Minister's decision to surrender cannot be so characterised. It is but one final step in the administrative process, which is governed by other legislative safeguards.

Those reasons were published prior to the delivery of *Stretton*, but later in *Renzullo v Assistant Minister for Immigration and Border Protection* [2016] FCA 412, McKerracher J said the following:

> [40] Mr Renzullo also relies on [*McCloy*] (at [3]) in relation to the argument that the decision was disproportionate, as a case in which the role of 'proportionality' in determining whether an administrative act is within power was recently affirmed. In my view, *McCloy* is not particularly helpful in this instance because *McCloy* did not involve the judicial review of ministerial administrative action. Rather, *McCloy* concerned the examination of State legislation in which issues of constitutionality arose.

In *AMZ15 v Minister for Immigration and Border Protection* [2016] FCA 1195 Katzmann J rejected an argument based on the primary judge's 'failure to undertake a proportionality analysis by reference to the scope of power', an argument said to be based on *Li*. The Tribunal in that case had rejected evidence on credibility grounds. Katzmann J considered there were several difficulties with the appellant's argument. For example, in contrast to *Li*, the appellant's case was not a case about the exercise of discretion. Her Honour concluded:

> [77] It will be a rare case indeed in which a disproportionate response will lead to a finding of jurisdictional error. As *Stretton* well illustrates, even where a decision under review is a discretionary one, there are real dangers in applying a proportionality analysis to an administrative decision without sliding into merits review.

Subsequent to *Stretton*, Griffiths J also commented on the need for judicial restraint in assessing proportionality as an aspect of unreasonableness: *Malek Fahd Islamic School Limited v Minister for Education and Training (No 2)* [2017] FCA 1377 at [68].

Against the backdrop of those cases and some uncertainty as to the role of proportionality in judicial review, the context in which the appellant seeks to call in aid proportionality must be recalled. This case does not concern constitutional or legislative grants of power or delegated legislation. This is not to ignore the fact that reference has been made in the authorities to proportionality in the context of judicial review and legal unreasonableness. However, that is not the context of this case. This case is about the decision-maker's credibility assessment.[99]

The latest case from the Full Federal Court which mentions proportionality in the context of *Wednesbury* unreasonableness is *Ogawa v Carter of the Department of Home Affairs (as the Second Delegate of the Finance Minister)*,[100] which was decided in February 2021. There, an administrative decision had been made under the provisions of the *Public Government*, *Performance and Accountability Act 2013* (Cth) concerning the repayment of a debt owed by Dr Ogawa to the Commonwealth. She challenged the decision and one of the grounds of challenge was *Wednesbury* unreasonableness.

In a joint judgement, Logan, Katzmann and Jackson JJ referred to various statements by Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[101] to the effect that it was generally for the decision-maker to determine what was relevant

99 [2020] FCA 781 [93]–[97].
100 [2021] FCAFC 16.
101 (1986) 162 CLR 24.

and not to the making of the decision and then turned to the question of *Wednesbury* unreasonableness. In that context, their Honours then said:

> The observations made by Mason J in *Peko-Wallsend*, at 41, to which we have just referred have never been disapproved by the High Court. His Honour elaborated in retirement on his understanding of the unreasonableness jurisdictional error ground in an article, *The Scope of Judicial Review* (2001) 31 *AIAL Forum* 21 in which he expressed the opinion that proportionality was a concept which 'should inform our understanding of *Wednesbury* unreasonableness'. The reference to '*Wednesbury*' was a reference to observations as to the content of this jurisdictional error ground made by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury* Corporation [1984] 1 KB 223 (*Wednesbury*). In *Wednesbury*, at 234, Lord Greene had allowed that an administrative decision might be set aside as unreasonable if an administrative decision-maker had 'nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it'.[102]

The court then went on to consider *Li*, with no mention of *McCloy* and no mention of strict three-tiered proportionality testing.

Statutory proportionality

I referred earlier to the fact that many statutes import general notions of proportionality. However, there seems little doubt that the *Human Rights Act 2019* has incorporated features of the three-tiered European proportionality approach.

Section 58 of the Human Rights Act makes it unlawful for a public entity to 'act or make a decision in a way that is not compatible with human rights'. Section 8 provides that, relevantly here, 'a decision is compatible with human rights if it does not limit the human right' or, critically, 'limits a human right only to the extent that it is reasonable and demonstrably justifiable in accordance with section 13'.

Section 13 provides:

> **13 Human rights may be limited**
>
> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant —
>
> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;

102 *Ogawa v Carter (Delegate of Finance Minister)* [2021] FCAFC 16 [46].

(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

(g) the balance between the matters mentioned in paragraphs (e) and (f).

Section 13(2)(a)−(g) show more than a passing resemblance to three-tiered proportionality reasoning.

In many cases, the s 13 test (or its equivalent in other states) has been described as a proportionality test. The section's resemblance to European styled proportionality reasoning was expressly recognised by Garde J sitting in the Victorian Supreme Court in *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children & Ors*[103] (*Certain Children*). That case concerned the impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) upon a decision made to establish a youth detention centre in part of an adult prison. The case is an important one concerning the Victorian human rights legislation which is in much the same terms as the later Queensland Act. When considering s 7(2) of the Victorian Charter, which is very similar to our s 13(2), his Honour observed:

> Section 7(2) provides:
>
> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
>
> The factors in s 7(2)(a) to (e) broadly correspond to the proportionality test identified in *R v Oakes*[104] by the Supreme Court of Canada.[105] In that case, the Court said:
>
> > There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[106]

103 (2016) 51 VR 453.
104 (2016) 51 VR 453 [207]−[208]; *R v Oakes* [1986] 1 SCR 103.
105 Defendants' submissions [136], citing *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 [148]; *PJB v Melbourne Health* (2011) 39 VR 373 [304]–[317].
106 *R v Oakes* [1986] 1 SCR 103 [43] (citations omitted).

R v Oakes[107] is a decision of the Supreme Court of Canada concerning the *Canadian Narcotic Control Act*. That Act contained a provision which reversed the onus of proof against a person charged with trafficking a dangerous drug once it was proved that he or she was in possession of the dangerous drug. The section read:

> If the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking.

Later it said:

> If the accused establishes that he was not in possession of the narcotic for the purpose of trafficking he shall be acquitted of the offences charged.

It also said:

> If the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking he shall be convicted of the offence as charged and sentenced accordingly.

Canada has a constitutionally enshrined Charter of Rights and Freedoms which are guaranteed 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. That gives rise to proportionality reasoning which was described in the passage considered by Garde J in *Certain Children*. Ultimately, the Supreme Court of Canada struck down the provisions.

Certain Children is an important decision for various reasons and has been considered on numerous occasions. His Honour's comments about proportionality have been adopted by the Supreme Court of the Australian Capital Territory in *Islam v Director-General, Justice and Community Safety Directorate*.[108]

Whether the words of a particular statute do or do not import notions of European-style proportionality may largely be of only academic interest, as ultimately the meaning of the provision must be determined upon application of the usual principles of construction.[109]

This was raised in a Queensland case, *State of Queensland v Deadman; Thompson v State of Queensland*.[110] There, the Court of Appeal considered provisions of the *Criminal Proceeds Confiscation Act 2002* (Qld). The Act operated so that upon conviction of an offender for certain drug offences against the *Drugs Misuse Act 1986* (Qld), the sentencing court had to issue a serious drug offence certificate which had the effect of forfeiting all of the offender's property to the Crown unless 'the court is satisfied that it is not in the public interest to issue the certificate'. The point on the appeal was as to how the public interest test was to be construed and applied. No doubt the assessment of the public interest involves at least general considerations of proportionality. However, a submission was made that proportionality reasoning could be looked at in determining the scope of the discretion or, in other words, could be used in the exercise of construing the relevant sections.

107 (1986) 1 SCR 103.
108 [2021] ACTSC 33 at [42]−[45].
109 *Moncilovic v The Queen* (2011) 245 CLR 1 [26], [34].
110 (2016) 261 A Crim R 128.

That submission was dismissed, with Philippides JA, who wrote the judgement of the court, stating:

> Proportionality is a concept used in administrative law and has relevance in determining the constitutional validity of legislative enactments. It is not of particular assistance in relation to the question of statutory interpretation to be determined in this case.[111]

The authority given by her Honour in support of that proposition was *McCloy*.

Conclusions

General notions of proportionality are well entrenched in many areas of the law, including administrative law. The last limb of the *House v The King* test introduces questions of 'reasonableness' of a decision. The assessment of whether the exercise of a particular power based on a particular understanding of the facts constitutes a reasonable exercise of power naturally gives rise to considerations of proportionality.

The present debate though is in relation to the impact of the three-tier proportionality test which has its origins in European law. Of some interest perhaps is the fact that in *McCloy* itself the court was unanimous in its result. The application of three-tiered proportionality applied by some of the judges gave exactly the same result as the application of the *Lange* principles without applying the rigour of standardised proportionality. That in itself indicates that proportionality reasoning is probably inherent in the *Lange* test in any event.

The real issue over time will be the extent to which proportionality reasoning impacts upon *Wednesbury* reasonableness. At present, there is not a huge appetite for that approach at either trial or intermediate Court of Appeal level. That is hardly surprising, though, as any seismic shift in a test which has had so much attention from the High Court must surely come from the High Court itself or the legislature.

111 (2011) 245 CLR 1.

Models for safeguarding the independence of integrity agencies

*Sarah Wyatt**

This article explores how the independence of New South Wales (NSW) integrity agencies can be safeguarded having regard to how independence is protected in other jurisdictions, such as Victoria and New Zealand. The NSW integrity agencies referred to in this article include the Auditor-General, the Ombudsman, the Independent Commission Against Corruption (ICAC) and counterparts in other jurisdictions, including Victoria and New Zealand. The author has consulted these agencies in undertaking research for this article. While the article examines these agencies in particular, other integrity agencies are also discussed and referred to and some of the options to safeguard independence may also apply to those agencies.

Integrity agencies constitute a significant accountability tool to ensure that the government and Members of Parliament act properly and in the public interest. The effectiveness of integrity agencies in discharging this important role may be curtailed where their independence is compromised by government action.

The article examines key concepts, including the meaning of 'integrity'; the key features of 'integrity agencies' and 'Officers of Parliament', and the benefits of these entities. Also explored in the article is the meaning of 'independence' for integrity agencies. The article then examines the impact of the separation of powers doctrine on the independence of integrity agencies.

The article goes on to explore ways to safeguard the independence of integrity agencies through several legal options:

- amendment of the *Constitution Act 1902* (NSW) to recognise the independence of integrity agencies having regard to the equivalent Act in Victoria;
- legislative change through the establishment of an 'Officers of Parliament Act' which defines particular integrity agencies as 'Officers of Parliament' and the general functions of these agencies, provides an express statement of the independence of the agencies, provides for the appointment and removal of the agency head and staffing arrangements for the agency, and provides information-sharing mechanisms between integrity agencies and funding arrangements; and
- a new funding model drawing on examples from Victoria, New Zealand, NSW and the Australian Capital Territory (ACT).

The article concludes that an available option to safeguard independence of NSW integrity agencies could be the development of a new funding model together with a new 'Officers

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of Parliament Act' that describes the funding process and details a consistent approach to various procedural matters noted above. Any new funding model and associated legislative change would also need to address the fact that Members of Parliament may be subject to investigation and oversight by the ICAC, which could threaten the ICAC's independence (in the same as the executive, whom it also oversights) if Parliament were to determine or make recommendations about the ICAC's budget.

The meaning of 'integrity'

The word 'integrity' is often used loosely.[1] Creyke has identified that the term 'integrity' has a behavioural and a systemic meaning.[2] The behavioural dimensions of 'integrity' involve characteristics of accountability, honesty, ethics, trust and incorruptibility.[3] A system or institution with integrity is one that is 'whole and healthy, that is functioning well, as intended'.[4] In considering the effectiveness of an integrity system, it is important to assess the operation of the overall system along with the behaviour of the individuals who contribute to or maintain the system.[5]

McMillan notes that 'the label "integrity" is applied to convey that our expectations of government and business go beyond legal compliance and incorporate other expectations such as good decision-making, respect for values that underpin institutional integrity and public virtue, fidelity to the public interest, and lack of corruption'.[6]

Ensuring integrity in government is particularly important where the functions of government expand and change, including through use of outsourced service delivery to the public; use of digital platforms for service delivery that leverage the personal information of the public; and functions that involve coercive or covert powers.[7] Because of 'this expansion of the role of government, citizens have come to expect more of government, and perhaps place greater reliance on government, and in turn, integrity agencies'.[8] Therefore, behaviours and systems of integrity are significant to ensure a healthy democracy, where the government is accountable to the public and acts in their interest.

Integrity agencies and their benefits

'NSW has a plethora of bodies which fulfil integrity functions.'[9] Those bodies are part of the system of integrity but also promote behaviours of integrity through the exercise of their functions. Wheeler notes the complexity of the 'integrity environment'. Some agencies are

1 Robin Creyke, 'An "Integrity" Branch' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 33.
2 Ibid 34; Chris Field, 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19−20 July 2012) 24.
3 Creyke, above n 1.
4 Ibid.
5 Ibid 34.
6 John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 438−439.
7 Field, above n 2, 26.
8 Ibid.
9 TF Bathurst and NA Wootton, 'The Courts and Integrity Bodies: Constitutional Conundrums' [2018] The Journal of the NSW Bar Association 9.

'avenues of review for people aggrieved by administrative decision-making' (such as the Ombudsman), whereas others have a 'largely quasi-law enforcement type role of uncovering crime, corruption, fraud … Different again would be auditors general who are neither avenues of review … nor quasi-law enforcement bodies'.[10]

The terms, 'integrity agency' and 'oversight agency' are often used interchangeably in the academic literature. However, I prefer to use the term 'integrity agency' rather than 'oversight agency' because the function of oversight may be one of many functions of an integrity agency. Indeed, as the NSW Ombudsman has observed, the NSW Electoral Commission, 'for example, does not just oversight elections: it also runs them'.[11] So to describe the Electoral Commission as an 'oversight agency' would not adequately capture its role.

An integrity agency is one that is instrumental in upholding the systemic and behavioural qualities of integrity, that underpins responsible government, and that is accountable to the public. Categorising agencies as 'integrity agencies' better signals their role than use of the word 'oversight'.

The key features of integrity agencies in general are:

- They are established by statute (made by Parliament) which sets out their functions.
- The heads of integrity agencies are appointed by the Governor on advice from the government (executive).
- Agency heads have fixed terms and there is usually parliamentary control of their dismissal.
- Their functions involve checking and oversight on the exercise of public power and the use of public money.
- They have investigative powers and functions, including coercive powers.
- They report to Parliament through annual reporting and are accountable to oversight committees of Parliament.[12]

Integrity agencies strengthen the system of responsible government and they:

- improve public trust in government;
- enhance accountability of the government to the public;
- enhance the quality of government decision-making and processes through the availability to the public of review and law enforcement mechanisms;

10 Chris Wheeler, 'Response to the 2013 Whitmore Lecture by the Hon Wayne Martin AC, Chief Justice of Western Australia' (2014) 88 *Australian Law Journal* 746.

11 NSW Ombudsman, Submission No 8 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 18 November 2019, 6.

12 Ibid 8–9.

- set standards for appropriate behaviour, decision-making and systems that are implemented to effectively serve the public; and
- enable the development of specialised independent agencies with core expertise that function more efficiently and effectively than if the scrutiny function were undertaken by the Parliament.[13]

Officers of Parliament

Independent Officers of Parliament are types of integrity agencies established by statute that are independent of the executive and assist Parliament in carrying out its responsibilities of scrutinising the actions of the government.[14] Officers of Parliament usually include the Ombudsman, the Auditor-General and the Electoral Commissioner. In Victoria, 'the Auditor-General, the Ombudsman, the Electoral Commissioner, the Victorian Inspector and the Independent Broad-Based Anti-Corruption Commission (IBAC) Commissioner are currently all designated Independent Officers of Parliament under various pieces of legislation'.[15] The NSW Audit Office (NSWAO) has identified Australian jurisdictions that have Officers of Parliament. These include Victoria, Queensland, Western Australia and the ACT. New Zealand also has Officers of Parliament.[16]

The NSW Ombudsman suggests 'there would be benefit in pursuing broader reform that recognises the special status of integrity agencies as Officers of Parliament'.[17] The ICAC has also identified a symbiotic relationship between itself and the Parliament and considers that the role of the ICAC is 'directed to, and assists, the Parliament in securing public accountability through the Commission's use, as required, of its substantial coercive powers to investigate those in the governmental system'[18] (which significantly includes ministers and Members of Parliament). It is important to note here that the threat to independence (referred to below) where integrity agencies investigate the executive also occurs in respect of the Parliament, as the ICAC can investigate politicians. Accordingly, where the funding of integrity agencies is determined by either the executive or the Parliament, similar impacts upon the independence to investigate may arise.

In the 'Westminster-style Parliaments, ["Officer of Parliament"] has come to imply a special relationship of accountability to Parliament and an independence from the Executive'.[19]

In 1989, the New Zealand Parliament's Finance and Expenditure Committee developed five criteria for creating an Officer of Parliament:

13 Jaimie Baxter, 'From Integrity Agency to Accountability Network: The Political Economy of Public Sector Oversight in Canada' (2014) 46 *Ottawa Law Review* 259.
14 Jon Breukel et al, *Independence of Parliament* (Research Paper No 3, Parliamentary Library & Information Service, Department of Parliamentary Services, Parliament of Victoria, 2017) 19.
15 Ibid.
16 Audit Office of New South Wales, *The Effectiveness of the Financial Arrangements and Management Practices in Four Integrity Agencies* (Special Report, 2020) 13.
17 NSW Ombudsman, above n 11, 7. It is noted that the Commonwealth Auditor-General and the Ombudsman are officers of Parliament under their respective legislation.
18 NSW Independent Commission Against Corruption, *A Parliamentary Solution to a Funding Model for the ICAC* (Special Report, 2020) 10.
19 Lesley Ferguson, 'Parliament's Watchdogs — New Zealand's Officers of Parliament' (2010) 25 *Australasian Parliamentary Review* 133.

- An Officer of Parliament must only be created to provide a check on executive power.
- An Officer of Parliament must only discharge functions that the Parliament, if it so wished, might carry out (this excludes entities exercising judicial functions). An Officer of Parliament is therefore 'an arm of the legislative branch'.[20] This criterion aligns with the separation of powers paradigm.
- An Officer of Parliament should be created only rarely — in other words, it should not apply to the plethora of bodies which fulfil integrity functions in the jurisdiction.
- Parliament should periodically review the appropriateness of each Officer of Parliament's status.
- Each Officer of Parliament should be created in separate legislation principally devoted to that position.[21]

The key characteristics of the Officer of Parliament model are:

- The Officers are established by an Act of Parliament.
- There is parliamentary involvement in their appointment and dismissal — this is directed to minimising politically partisan appointments. In New Zealand, the Officer is appointed and removed by the Governor-General on recommendation and address respectively to the Governor-General by the Parliament.
- There is a statutory parliamentary committee responsible for budget approval and oversight of Officers of Parliament.
- There is a specific parliamentary committee to whom the Officer of Parliament is required to report.[22]

The meaning of 'independence'

'Independence' denotes at a minimum that integrity agencies are not accountable to a minister. If they were, there would be a 'direct tension' affecting the 'ability of the agency to effectively review the actions' of the executive.[23] Independence means these agencies can 'exercise significant discretion in how they undertake their role of integrity oversight'.[24] This aligns with their role (akin to that of the Parliament) of keeping 'a check on the government' and reporting back to Parliament.[25]

The ICAC has referred to the former Premier's (the Hon Nick Greiner MP) second reading speech for the Independent Commission Against Corruption Bill, which describes the independence of the ICAC:

20 Ibid 134.
21 Ibid 135; Public Accounts and Estimates Committee, Parliament of Victoria, *Report on a Legislative Framework for Independent Officers of Parliament* (2006) 31.
22 Public Accounts and Estimates Committee, above n 21, 33.
23 Wayne Martin, 'Forewarned and Four-Armed: Administrative Law Values and the Fourth Arm of Government' (2014) 88 *Australian Law Journal* 121.
24 Field, above n 2, 30.
25 Breukel et al, above n 14, 2.

> The Commission will have independent discretion, and will decide what should be investigated and how it should be investigated. That is the whole point of having a commission independent of the Executive Government and responsible only to Parliament.[26]

The NSW Ombudsman observes that integrity agencies should not be 'entirely independent in the sense of being accountable to no-one'.[27] Indeed, the functions of these agencies are limited by statute and they are generally accountable to Parliament.[28] The ICAC and the Law Enforcement Conduct Commission (LECC) are oversighted by inspectors that report to Parliament (ss 57B, 77A and 77B of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act); and ss 122, 140 and 141 of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act)). Independence from the executive must be balanced by accountability to Parliament.[29] The NSW Ombudsman goes onto observe that independence from the executive is conditional, where the executive controls the budget process for integrity agencies.[30]

Stuhmcke observes that 'independence of an Ombudsman is a "cherished norm" … independence of an Ombudsman allows a powerless individual to question a powerful government on an equal footing. Without independence, or the perception of independence, this ethical or therapeutic element of an ombudsman's role is diminished'.[31] Stuhmcke goes on to observe that the Ombudsman investigates a 'split executive' — the political, elected government and the unelected, 'relatively unaccountable' public service:

> It is here that the Ombudsman renders the unaccountable accountable. For this to work citizens must share belief in the independence of the ombudsman … as investigations are usually carried out in the absence of the public and the credibility of ombudsman therefore is related to an ability to be perceived to be separate from the State.[32]

Baxter notes four dimensions of formal independence of integrity agencies:

- the status of the agency head, including their term of office, appointment, dismissal and renewal procedures;
- the agency's relationship with elected politicians (that is, the executive and the Parliament), including statutory declarations of independence, obligations and duties, and whether the agency's decisions can be overturned;
- the agency's financial and organisational arrangements, including its source of budget, internal organisation and control over human resources; and
- the agency's regulatory competencies, including its powers to set policy, monitor or investigate performance and sanction misbehavior.[33]

26 NSW Independent Commission Against Corruption, Submission No 2 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 6 November 2019, 6.
27 NSW Ombudsman, above n 11, 6.
28 Ibid.
29 Ibid 8.
30 Ibid 10.
31 Anita Stuhmcke, 'Australian Ombudsman: A Call to Take Care' (2016) 44 *Federal Law Review* 546.
32 Ibid 547.
33 Baxter, above n 13, 241.

A fifth dimension of independence was identified by the Victorian Public Accounts and Estimates Committee in 2006 — namely, 'the reporting requirements for the agency and whether its performance is monitored'.[34]

The Australasian Council of Auditors General (ACAG) has examined[35] Australian and New Zealand audit legislation against eight core independence principles identified by the International Organisation of Supreme Audit Institutions (INTOSAI) as essential for public sector auditing. These principles are:

1. an effective statutory legal framework;
2. independence and security of tenure for the head of the audit institution;
3. full discretion to exercise a broad audit mandate;
4. unrestricted access to information;
5. a right and obligation to report on audit work;
6. freedom to decide the content and timing of audit reports and to publish them;
7. appropriate mechanisms to follow-up on audit recommendations; and
8. financial, managerial and administrative autonomy and availability of appropriate resources.[36]

ACAG has observed that the ACT[37] has the strongest independence safeguards, followed by New Zealand[38] and Victoria;[39] and 'Independence safeguards continue to be less well developed in NSW'.[40]

The impact of the separation of powers doctrine on the independence of integrity agencies

Separation of powers doctrine

The doctrine of the separation of powers was developed during the Enlightenment of the 18th century. This was a period when political philosophers were developing modern democratic theory. In 1748 one of them, Baron de Montesquieu, identified three branches

34 Public Accounts and Estimates Committee, above n 21, 9. Ferguson describes this as Thomas' five indices of independence: Ferguson, above n 19, 141.

35 The purpose of this examination is to identify and compare a range of independence safeguards for auditors general across the jurisdictions.

36 Australasian Council of Auditors General, *Independence of Auditors General: A 2020 Update of Australian and New Zealand Legislation* (2020) 1.

37 The ACT has 'improved safeguards in its statutory framework, appointment and immunity mandate and discretion, follow-up mechanisms and office autonomy': ibid 12.

38 ACAG has noted 'New Zealand's overall position continues to be strongly supported by its safeguards over appointment and immunity, wide mandate and office autonomy': ibid 12.

39 Of Victoria, ACAG observes that it 'retains its constitutional protection from Executive influence and has added new protections through its significantly expanded mandate and greater access to information': ibid 12.

40 Australian Council of Auditors General, above n 36, 11.

of government in the separation of powers. He considered that effective separation required functional separation (no branch of government should exercise a function belonging to the other) and physical separation (no individual should be able to be a member of more than one branch of government at the same time).[41]

The separation of powers is an important doctrine underpinning democracy:

> [It will reduce] abuse of power and prevent tyranny or oppression from occurring, as might be the case under a dictatorship or when undemocratically elected governments hold power. According to this principle, the three main institutions of government: the legislature, executive and judiciary, are maintained as separate entities in order to provide effective checks and balances upon each other, thus preventing power from becoming centralised in any one entity. To protect and preserve the democratic system, these three bodies must remain separate and independent and be respected for their independent status.[42]

In Australia there is a separation of legislative, executive and judicial power in in the structure and text of the *Australian Constitution*.[43] Chapter I of the *Constitution* vests legislative power in the Parliament — that is, the Parliament has the power to make laws. Chapter II provides that the Governor-General (as the Queen's representative) and on advice of the Executive Council (being responsible ministers of the Crown) exercises executive power. This is the power to administer laws. Chapter III gives, among other things, judicial power to the High Court of Australia and other federal courts. Courts decide whether the law has been correctly formulated and applied in determining disputes.

McMillan observes that the separation of powers is the 'most important doctrine in analysing government legal accountability'.[44]

There is an 'increasing trend towards executive dominance' in the tripartite paradigm, with members of the executive being Members of Parliament and able to control and dominate Parliament.[45] Anita Stuhmcke has observed that parliaments are generally under the thrall of the executive, except where the government is a minority in the upper house or dependent on the support of independents or minority parties in the lower house.[46] Parliaments 'have become mere rubber stamps of approval for legislation and other enactments formulated by Cabinet'.[47] These observations are significant because, if the funding model of integrity agencies in NSW is to change to include a greater role for the Parliament (see below), there will still be issues with political partisanship. Funding of integrity agencies cannot in my view be an apolitical process, but it can be a more transparent one. In this regard, I note the ICAC can investigate both ministers and Members of Parliament who are 'public officials' under the ICAC Act. This is significant because any funding model that involves the executive or the

41 Bede Harris, *Constitutional Law Guidebook* (Oxford University Press, 2015) 25; Peter Cane, 'Executive Primacy, Populism and Public Law' (2019) 28 *Washington International Law Journal* 546.
42 Breukel et al, above n 14, 4.
43 There is no formal separation of powers in NSW under the *Constitution Act 1902* (NSW): Anne Twomey, *The Constitution of New South Wales* (The Federation Press, 2004) 203.
44 McMillan, above n 6, 423.
45 Breukel et al, above n 14, 9.
46 Anita Stuhmcke, 'Australian Ombudsmen: Drafting a Blueprint for Reform (2017) 24 *Australian Journal of Administrative Law* 55.
47 Ibid.

Parliament may threaten this agency's investigative independence where it can investigate politicians who may also make decisions about its funding.

The executive generally decides who is appointed — whether as heads of integrity agencies or judicial appointments. The executive decides how the branches are funded via the annual appropriation process, which accords with constitutional requirements. The ultimate dependency of the other branches on government endorsement through appointments and funding may affect their independence and the ability to freely supervise. This impact on independence has been examined in various Australian jurisdictions, including NSW and Victoria.[48] Ways to address this are explored further below.

On 'separation of powers analysis', integrity agencies are generally positioned in the executive branch. This positioning could potentially compromise their independence from the government, whom they oversight. This article explores the alignment of integrity agencies with the Parliament, which under the tripartite paradigm arguably better fits with their function of holding government to account. That said, similar tensions may exist between the integrity agencies and the Parliament where integrity agencies have power to oversight members of Parliament.

McMillan notes the academic discourse about the Ombudsman not being independent because they are appointed by the Governor for a fixed term; and they rely 'on an annual budget,' as well as practising 'a close working relationship with agencies'.[49] However, McMillan extends this discourse by observing:

> There is no obvious empirical evidence on which to conclude that those features weaken the independence of the Office, and indeed high public profile of the Office for being an accountability 'watchdog' suggests the contrary. If anything, the history of the Office in Australia suggests the need for a more sophisticated and contemporary understanding of principles such as 'independence' and 'accountability'.[50]

McMillan's observation is important because it demonstrates that the relationship between integrity agencies and the three branches is complex and overlapping. The ways integrity agencies can be independent and accountable may be understood not only by their relationship with the executive under constitutional principles but also having regard to the broader workings of the public sector and the other arms of responsible government.

Wherever integrity agencies are positioned in the tripartite paradigm, their essential role in the integrity system should involve functional independence from the government and championing, in the public interest, oversight of government.

Justice McHugh has observed that a strict separation of powers is difficult to implement, and in Australia:

> the system of party politics, the doctrine of responsible government and the Executive's desire for an efficient and practical working government have combined to weaken and to some extent erode, the

48 Breukel et al, above n 14, 19.
49 McMillan, above n 6, 437.
50 Ibid.

> doctrine of the separation of powers. If there was a pure separation of governmental power, effective government would be impossible.[51]

The executive and the legislature cannot in practice operate separately because 'gridlock' in the conduct of government business would ensue if they could not agree.[52] This is an important observation — while the doctrine is key to understanding governmental power and ensuring that the exercise of that power is balanced and monitored, in my view it cannot be slavishly followed in a 21st century democracy.

Accordingly, as Creyke observes, 'the tripartite division has been under strain. This has forced a rethink of our foundational beliefs about the optimum structure of government'.[53] I take up McMillan's invitation to rethink the separation of powers doctrine.[54] In my view, the tripartite separation of powers does not adequately reflect systems of government and justice in Australia. As Justice Gummow has observed, 'the emergence of the modern regulatory state and of the bureaucracy to run it only serves to demonstrate that the tripartite division of powers, sourced 250 years ago in the Enlightenment, today provides an inadequate constitutional structure'.[55] As Weeks suggests, perhaps it is a political arrangement that should be renegotiated by the branches to better reflect what they do and how government operates.[56] Cane has also observed that:

> We might conclude that while Montesquieu's tripartite analysis of government was a work of genius in the eighteenth century, it now hinders public lawyers from understanding and analysing modern government. Instead of three powers, we have identified at least six: electoral power; coercive power; executive power; bureaucratic power; legislative power; and judicial power.[57]

Separation of powers — integrity agencies

Dennis Pearce, former Commonwealth Ombudsman, observed in 1991 that 'during my period as Commonwealth Ombudsman, I felt that I stood in a position that was part-way between the Executive and the Judiciary'.[58] In this regard, Stuhmcke observes that the critical issue is whether the integrity agency is 'perceived as part of the machinery of government' or whether it advances 'the political autonomy of the ability of a citizen to argue against government decision-making'.[59]

The separation of powers necessitates tension between the branches and, as Stuhmcke has observed, it is 'indicative of a well-oiled government'.[60] However:

> [If the] tension persists, it damages the public interest. For example, if the Ombudsman is continually criticized, the authority of its role may be undermined and public confidence in the integrity and impartiality

51 MH McHugh, 'Tensions Between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 569.
52 Ibid.
53 Creyke, above n 1.
54 McMillan, above n 6.
55 WMC Gummow, 'A Fourth Branch of Government?' (Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 20.
56 Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 318.
57 Cane, above n 41, 559.
58 Stuhmcke, above n 31, 544.
59 Ibid.
60 Ibid 551.

> of the Ombudsman may be diminished. Continuing conflict is also likely to induce the Executive … to prevail on the Legislature to review, reduce or abolish the jurisdiction of the Ombudsman with the result that the rule of law may be undermined.[61]

McMillan notes that a fourth branch of government comprising a variety of independent oversight bodies may be considered a way of 'institutionalising the concept of integrity in government'. But he goes on to say that it 'is premature — perhaps idle — to think of a fourth branch as having a constitutional footing (although that is now the case in Victoria for the Auditor-General and Ombudsman)'.[62] Thinking about a fourth branch in respect of the separation of powers is a means to analyse the relationship of integrity agencies with the various arms of government.

Former NSW Chief Justice James Spigelman observed that:

> the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.[63]

The Chief Justice 'says it is not a separate, distinct branch, because many of the three recognised branches of government, including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government'.[64] Accordingly, it is arguable that the separation of powers doctrine supports the maintenance of a system of integrity to which integrity agencies are but one significant part.

Separation of powers — independence

It is clear from the foregoing analysis that the thinking about how integrity agencies can operate independently must be considered having regard to the separation of powers. To be a check and balance on governmental power, an integrity agency needs to be functionally separate from the executive. If, in order to safeguard their independence, integrity agencies are to be classified as Officers of Parliament (defined above) or their funding determined by Parliament then this should be considered having regard to the legislature being separate to the executive and having a key role in scrutinising the government.

While it is recognised by academics and lawyers that the paradigm may be an oversimplification and not a current reflection of the nuances and complexities of modern governmental power, the separation of powers paradigm nonetheless assists to identify the importance of the independence of integrity agencies in performing oversight and holding the government to account in the public interest. Further, the paradigm enables us to consider the position of integrity agencies in the broader system of government in which each arm is directed to integrity and accountability of itself and each other.

61 Ibid.
62 McMillan, above n 6, 441.
63 James Spigelman 'The Integrity Branch of Government' (2001) 31 *AIAL Forum* 2−3.
64 David Solomon, 'What is the Integrity Branch?' (Conference Paper, Australian Institute of Administrative Law 2012 National Administrative Law Conference, Adelaide, 19 July 2012) 26.

Safeguarding independence — legislative change

Constitution Act

Stuhmcke observes that across 'Federal, State and Territory jurisdictions there is an absence of constitutional protection or sanction for either the traditional functions of the office' of the Ombudsman or for its ongoing transformation of function.[65]

Victoria, however, is an example of an Australian jurisdiction in which there is constitutional recognition of integrity agencies. The Victorian Auditor-General's status and the Ombudsman's status are protected in ss 94B and 94E respectively of the *Constitution Act 1975* (Vic). The sections expressly state that each is an independent Officer of the Parliament. Under s 18, a referendum would be required to change these provisions in the Victorian *Constitution*.[66]

In Victoria, the Auditor-General was made an independent Officer of Parliament in 1997 following amendments to the *Audit Act 1994* (Vic). The position was embedded in the *Constitution Act 1975* (Vic), which:

- enshrined provisions relating to the appointment, independence and tenure, remuneration,[67] suspension and dismissal of the Auditor-General;
- enshrined the discretionary power for the Auditor-General to carry out audits in any way considered appropriate; and
- strengthened the relationship between the Auditor-General and the Parliament.[68]

The Ombudsman and the Electoral Commissioner are also independent Officers of Parliament under the Victorian *Constitution*, but, unlike the Auditor-General, the *Constitution* only specifies the arrangements relating to their discretion in performance or exercise of their functions or powers, and suspension and dismissal arrangements. All other arrangements are specified in their respective enabling legislation.[69]

The difficulty in changing how the Victorian Auditor-General is appointed, for example, is that the appointment provision is enshrined in the *Constitution*, requiring a referendum to amend under s 18 of the Victorian Constitution Act. It is therefore not easy to adapt legislatively to changing requirements for integrity agencies where the relevant provisions are entrenched in the *Constitution*.[70]

65 Stuhmcke, above n 31, 537.
66 ACAG observes that '[a]lthough relatively rare in Westminster-style governments, constitutional provision is used much more widely internationally. An INTOSAI survey found that 79 of 113 Supreme Audit Institutions are established and have the mandates enshrined in their countries' Constitution': Australasian Council of Auditors General, above n 36, 15.
67 In Victoria, the *Constitution* mandates appropriation of the Auditor General's remuneration. The *Constitution* protects the Auditor General's remuneration from being reduced.
68 Breukel et al, above n 14, 21.
69 Public Accounts and Estimates Committee, above n 21, 7.
70 Ibid 72.

Following a referendum in 1995, the *Constitution Act 1902* (NSW) was amended to entrench the independence of the judiciary so that a judicial officer may only be removed by address of both houses of Parliament for proved misbehavior or incapacity.[71] Both houses must reach agreement and then jointly petition the Governor. The provisions in the NSW *Constitution* protecting the independence of the judiciary can only be changed by referendum.[72]

It may be possible to include similar provisions in the NSW Constitution Act for integrity agencies. However, there is less flexibility to change legislative provisions entrenched in the *Constitution*. It is arguable that there is a need for legislative flexibility for integrity agencies given their evolving functions and the changing nature of government and bureaucracies.

Amendment of the NSW Constitution Act to include integrity agencies may be seen as a powerful symbolic gesture but may not of itself necessarily achieve practical independence for those agencies (as is evident from the experience in Victoria, where the same concerns about independent funding have been raised as in NSW).

While it is open to amend the NSW Constitution Act to recognise the independence of integrity agencies, this article examines other options to safeguard independence.

Officers of Parliament Act

Each integrity agency explored in this article is established by separate legislation. Each Act is slightly different in how it describes the agency, its functions, whether there is an express statement of independence of the agency, how the head of the agency is appointed and removed, staffing arrangements and information sharing with other agencies.

There is scope to consider development of a new 'Officers of Parliament Act' in NSW that sets out these requirements and ensures they are consistent. It would harmonise the powers of those agencies (for example, Royal Commission powers; power to obtain Cabinet information). The 'Officers of Parliament Act' could sit alongside the existing Acts under which the integrity agencies are constituted, and where their functions are set out. The author acknowledges the work of the former NSW Ombudsman and now NSW Crime Commissioner, Mr Michael Barnes, on these issues.

The Victorian Auditor-General, Ombudsman and IBAC Commissioner have previously stated:

> We propose consistency in provisions governing the appointment, tenure, immunity, removal and remuneration of our roles and seek to maximise the involvement of the Parliament rather than the Executive in these areas. This is particularly important for the process of allocated budgets: the Parliament, not the Government, should determine funding and other resources for independent officers.[73]

There is an accountability benefit of such procedural legislation applying consistently to integrity agencies, as it makes it easier to assess whether they are doing the right thing — that is, acting within power and independently.

71 Twomey, above n 43, 308.
72 Ibid 309; *Constitution Act 1902* (NSW) s 7B.
73 Breukel et al, above n 14, 21.

It is suggested that the following could be included in a new 'Officers of Parliament Act' in NSW:

- an express statement of independence of integrity agencies — that they cannot be directed on the exercise of discretionary powers or operational matters.[74] It is noted that the NSWAO does not have standalone audit legislation where the independence of the Auditor-General is explicitly mandated.[75] Similarly, the *Ombudsman Act 1974* (NSW) does not expressly state the Ombudsman is independent. A legislative example of such a statement is in s 2A of the ICAC Act, which provides that 'the principal objects of this Act are to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body' with specified functions. See also s 22 of the LECC Act, which provides for the independence of the LECC and commissioners. The section says, 'The Commission and Commissioners are not subject to the control or direction of the Minister in the exercise of their functions';

- a definition of 'Officer of Parliament' indicating what agencies the Act applies to. An example of this kind of definition in legislation is the definition of 'investigating authority' in s 4 of the *Public Interests Disclosures Act 1994* (NSW). The former NSW Ombudsman Mr Michael Barnes suggested the following NSW agencies as suitable Officers of Parliament: Auditor-General, Electoral Commissioner, ICAC and ICAC Inspector, Information Commissioner, Inspector of Custodial Services, LECC, LECC Inspector, Ombudsman and Privacy Commissioner. In identifying these agencies, he noted that their role is to provide a check on executive power and/or support the operation of the Parliament.[76] This is a broader category than that identified in New Zealand;

- the agency head of the integrity agency is appointed and removed by the Parliament as opposed to the Governor on advice from the executive. Stuhmcke suggests they could be appointed by unanimous resolution of Parliament.[77] ACAG observes that if 'the appointment is made directly by or on the recommendation of the Parliament or a Committee of Parliament, it ensures that the appointee has the confidence of the Parliament and enhances the transparency of the appointment process'.[78] There should also be clearly stated grounds for removal. A legislative example of removal with parliamentary involvement is cl 4 of Sch 2 of the *Electoral Act 2017* (NSW); cl 7 of

74 ACAG considers that legislation 'that explicitly mandates the independence' of the Auditor-General is 'an essential component of an effective legislative framework': Australasian Council of Auditors General, above n 36, 15.

75 Evidence to Public Accountability Committee, NSW Parliament, Sydney, 23 October 2020 (Auditor-General for New South Wales) 2.

76 Michael Barnes, 'Parliamentary Statutory Officers — Who, How and Why' (Conference Paper, Legalwise Seminar — Practice, Procedure and the Law of Parliament, Sydney, 27 March 2019).

77 Stuhmcke, above n 46, 57.

78 Australasian Council of Auditors General, above n 36, 21. The ACAG observes that the ACT, Northern Territory, New Zealand and Victoria are the only jurisdictions that ensure the appointment of the Auditor-General is made on a recommendation of the Parliament or a parliamentary committee. By contrast, the Commonwealth and NSW continue to enable a parliamentary veto of an appointment proposed by executive.

Sch 1 of the ICAC Act; cll 5 and 6 of Sch 1 of the *Government Sector Audit Act 1983* (NSW); and cl 4 of Sch 3 of the *Public Audit Act 2001* (NZ);

- agency head tenure — Stuhmcke suggests the ideal term should be longer than the usual term of Parliament.[79] This provides agency heads with tenure security, 'freeing them from the potential pressures and conflicts involved in seeking reappointment'.[80] ACAG suggests, '[t]he duration or term of appointments is a significant contributor to independence. The term needs to be long enough to enable the development of independence and to enable the incumbent to effectively "steer" the Audit Office. There is also a case to be argued for keeping the term short enough to avoid the incumbent becoming complacent or "stale" in the role and to enable the introduction of contemporary thinking'.[81] As to reappointment of the agency head, ACAG suggests reappointment is 'undesirable … because it might compromise independence. Where an incumbent is eligible for reappointment, as the time for reappointment approaches, the incumbent could become reluctant to criticise, or seek prominence by being overly critical or controversial. An option for reappointment could also enable the Executive to exert pressure on an incumbent. This is more likely if the Executive makes the appointment';[82]

- agency head remuneration — see, for example, s 6 of the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act); see also cl 5, Sch 3 of the *Public Audit Act 2001* (NZ). ACAG notes that remuneration in New Zealand, the Commonwealth, NSW, Western Australia and the ACT is determined by an independent tribunal;[83]

- the agency reports to Parliament on functions through annual and special reports, which are tabled and publicly available, 'thereby improving the public's ability to participate in agency monitoring'.[84] See, for example, the special and annual reports provisions in ss 75 and 76 of the ICAC Act;

- staff of the agency are employed by the agency head, who has employer functions. It is noted that staff of the ICAC and the NSWAO are not employed under the *Government Sector Employment Act 2013* (NSW) (GSE Act) but under their respective Acts: s 5 of the GSE Act. Similarly, in New Zealand, staff are employed by the Chief Ombudsman and not under public sector legislation: s 11 of the *Ombudsman Act 1975* (NZ). ACAG suggests this is a 'truly independent staffing model'.[85] An agency's independence could be diminished if anyone other than the agency head has control over agency staff, including the power to dismiss them;

79 Stuhmcke, above n 46, 57.
80 Baxter, above n 13, 242.
81 Australasian Council of Auditors General, above n 36, 22.
82 Ibid.
83 Ibid 16.
84 Baxter, above n 13, 245.
85 Australasian Council of Auditors General, above n 36, 47. ACAG notes that NSW remains the only Australian jurisdiction to have removed its Audit Office from the public service and created it as a statutory body. The Audit Office is also defined as a 'separate GSF agency' under the GSF Act. Being defined as a separate GSF agency brings with it an ability to not comply with a direction from the Treasurer or a Minister if the Auditor-General considers that the requirement is not consistent with the exercise of the statutory functions of the agency: Australasian Council of Auditors General, above n 36, 48−49.

- information sharing permitted between integrity agencies — see, for example, the information-sharing provisions in Div 5 of Pt 3 of the GIIC Act. ACAG suggests that auditors-general 'should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information for the proper discharge of their statutory responsibilities. The information they obtain using their information gathering powers should be protected from inappropriate disclosure';[86]

- funding of the agency — see discussion of funding models below.

Safeguarding independence — changing the funding model

Threats to the independence of integrity agencies in NSW

In its October 2020 special report the NSWAO observed that the current funding model in NSW for integrity agencies 'poses a threat to their independence'.[87] The LECC and the ICAC have expressed support for the NSWAO's findings in that report.[88] Key threats to independence identified by the NSWAO include:

- providing of additional funding from the Department of Premier and Cabinet (DPC) to integrity agencies (namely, those in the DPC cluster). The government has stated it has provided additional funding to the ICAC having regard to the agency's 'essential role in preserving the health of our democracy'.[89] The issue with this particular threat to independence, as the NSW Ombudsman has highlighted, is that it 'confers on the Secretary of DPC a de facto discretion to approve or veto the exercise of particular functions' by the integrity agency.[90] The NSW Ombudsman observes that, even if 'the Secretary provides the funding, the perception that his or her approval was needed at all undermines the perception of independent and impartial oversight'.[91] The NSW Government has acknowledged the 'theoretical risk to the independence of the integrity agencies relating to the provision of additional funding from DPC … this theoretical risk has never materialised or eventuated in practice. The ICAC, for example, has received supplementary funding from the Government on every occasion that the ICAC has requested it for at least the last ten years'.[92] This pattern of supporting supplementary funding requests suggests a very low risk that a request for supplementary funding from an integrity agency would be refused, particularly where refusal could lead to a perception of interference with the activities of that integrity agency;

- applying efficiency dividends and budget savings to integrity agencies. The government has indicated that practically budget savings have not been required of integrity agencies within the DPC cluster for 2019−20;[93]

86 Ibid 33.
87 Audit Office of New South Wales, above n 16, 1.
88 Law Enforcement Conduct Commission, Submission No 10a to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 30 September 2020; NSW Independent Commission Against Corruption, above n 18, 5.
89 NSW Government, Submission No 56 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 10 December 2019, 5, 7.
90 NSW Ombudsman, above n 11, 20.
91 Ibid.
92 Audit Office of New South Wales, above n 16, 57.
93 NSW Government, Answers to Questions on Notice to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 30 January 2020, 3.

- requiring integrity agencies to report to DPC on activities and outcomes. In her evidence before the NSW Parliamentary Accountability Committee Inquiry, the Auditor-General observed that her office has been 'requested to participate in outcomes budget reporting as part of the DPC cluster arrangements … it is a request not a direction'.[94] Outcomes budgeting is described in the NSW Treasury *Policy Paper 18-09*. Outcome budgeting provides a 'common framework that covers total budget spend' to 'increase transparency and accountability for public funds and promote greater value from public spending'.[95] The Auditor-General in her evidence before the committee expressed support 'in general terms' for the outcome budgeting process.[96]

The NSWAO has said that:

> The current approach to determining annual funding for the integrity agencies presents threats to their independent status. The approach is consistent with the legislative and *Constitutional* framework for financial management in New South Wales, but it does not sufficiently recognise that the roles and functions of the integrity agencies … are different to other departments and agencies.[97]

This observation is significant because, while it refers to the threat to independence caused by the current funding model, the NSWAO also notes that the current funding model for annual appropriation is lawful and constitutional. Further, of the current financial management arrangements in NSW, the NSWAO has previously opined that ministers are lawfully entitled to withhold approval for expenditure to agencies, including integrity agencies.[98]

As to the above observation about threats to independence, the NSWAO goes on to say that the NSW financial management system is designed to determine funding for departments and agencies responsible to ministers.[99] There is insufficient separation in terms of the interests of the executive and the functions of the integrity agency, and the tension between these manifests in funding decisions. In this regard, the NSWAO identifies 'the risk that funding decisions could be influenced by previous or planned investigations by the integrity agencies. This risk has the potential to limit the ability of the integrity agencies to fulfil their legislative mandate'.[100]

The NSW Ombudsman has observed of the current funding model that:

> A process of budget setting for independent oversight bodies that involves directly trading their funding requirements against all of the other funding options available to Government for its manifold activities fails to recognise that:
>
> - the functions of these bodies comprise an essential institutional infrastructure that is necessary to assure that any of those other activities can be pursued with public trust and legitimacy; and
>
> - the mandates of the independent oversight bodies are immutable (at least in the absence of long-term legislative amendment); they are distinct from and transcend whatever

94 Evidence to Public Accountability Committee, above n 75, 12.
95 NSW Treasury *Policy Paper 18-09 Outcome Budgeting* (December 2018) 1.
96 Evidence to Public Accountability Committee, above n 75, 14.
97 Audit Office of New South Wales, above n 16, 4.
98 NSW Government, above n 93, 2; Audit Office of New South Wales, *Compliance of Expenditure with Section 12A of the Public Finance and Audit Act 1983* (Special Report, 2019).
99 Audit Office of New South Wales, above n 16, 4.
100 Ibid.

> happens to be the political mandate, objectives and priorities of the Government of the day.[101]

Where funding for integrity agencies derives from annual appropriation in NSW and is determined by the government,[102] this indelibly links integrity agencies to the executive and 'subordinates' them to the executive where the latter makes determinations about financial resourcing of integrity agencies.[103] This creates a 'perception that these bodies really are part of the machinery of the Executive government'.[104]

The NSW Ombudsman has identified the following threats to independence:

- the impact of financial dependency on the executive, which may cause integrity agencies to 'go soft' when scrutinising government agencies; and
- the inability to investigate because of limited funding where funding competes against funding for other government priorities.[105]

The potential to 'go soft' when an integrity agency exercises its scrutiny function because of the funding paradigm may occur not only in respect of government agencies but also it could arise in respect of corrupt government and non-government Members of Parliament who may participate in the parliamentary committee that determines funding (see discussion of funding models below). This scenario may be realised in circumstances where a parliamentary committee determines or makes recommendations about funding for the ICAC because the ICAC is empowered to investigate corrupt Members of Parliament.

Ultimately, integrity agencies need adequate funding to fulfil their legislative mandate and an 'under-resourced office is unable to carry out [its] mandate effectively. It risks becoming part of the problem — namely an unsatisfactory interaction between a citizen and the agencies of government — rather than a means by which that relationship can be improved, and injustice avoided when disputes or misunderstandings arise'.[106]

The NSWAO has identified 'threats' to independence but has not stated that any of these have eventuated, although the ICAC has suggested that the risk to independence is real, noting the 2016 budget cuts caused it to reduce staff, which in turn impacted its ability to conduct investigations and discharge its statutory functions.[107] In its November 2020 special

101 NSW Ombudsman, above n 11, 10−11.

102 Section 5A of the *Constitution Act 1902* (NSW) provides that, in circumstances where there is disagreement or deadlock between the houses of Parliament about an Appropriation Bill, the Legislative Council 'has the power to suggest amendments' by message to the Legislative Assembly: Twomey, above n 43, 571. However, the section goes on to provide that 'the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor … and shall become an Act of the Legislature upon the Royal Assent … notwithstanding that the Legislative Council has not consented to the Bill'.

103 NSW Independent Commission Against Corruption, *The Need for a New Independent Funding Model for the ICAC* (Special Report, 2020) 29.

104 NSW Ombudsman, above n 11, 13.

105 Ibid 14.

106 Ibid 13.

107 Evidence to Public Accountability Committee, NSW Parliament, Sydney, 12 December 2019 (Independent Commission Against Corruption; Law Enforcement Conduct Commission; NSW Electoral Commission; NSW Ombudsman; NSW Parliament) 4.

report, the ICAC also observed that the risk to independence identified as theoretical 'fails to address the underpinning legal framework for the Commission, which prohibits any risk — theoretical, potential and actual — arising from the activity of the Executive Government'.[108]

Interestingly, the NSWAO is different from the other integrity agencies explored in this article, as it is largely self-funded, deriving revenue from charging auditees for the cost of financial audits.[109] The NSWAO receives a government contribution to cover the cost of carrying out performance audits and the cost of reporting to Parliament on the results of financial audits.[110] However, even with this self-funded model, there may be constraints on independence where, for example, the NSWAO may experience pressure to tailor the findings of the financial audit to the expectations of the agency that is paying for the audit. However, the author is not aware that this has ever actually occurred.

Existing safeguards to protect independence may not be enough

The NSWAO has identified limitations to existing safeguards to independence, namely:

- The annual Appropriation Bill must be approved by Parliament — on its face this enables parliamentary oversight of funding by government. However, Members of Parliament do not see the initial budget proposals from the agency and are not aware of what proposals have been rejected or partially approved after Treasury and Expenditure Review Committee (ERC) decisions. The NSW Government submission to the Parliamentary Accountability Committee Inquiry touched on the Parliament's role in the budget process and through its oversight committees. However, ICAC has observed that 'there is no effective action that members of the Legislative Council can take to change the amounts set out in the Appropriation Bill' introduced by the Legislative Assembly[111] (other than suggest amendments under s 5A of the *Constitution Act 1902* (NSW)).

- Agencies may raise issues with Parliament about funding or operations through annual and special reports, appearances before oversight committees or via the annual budget estimates hearings in Parliament — this is an important accountability measure to ensure, among other things, that integrity agencies are 'accountable for the use of public resources' and the way in which finances are managed.[112] However, these avenues do not enable the Parliament to change or reconsider funding amounts or the funding process, as that is not currently their role.[113] While the committees do not make funding decisions, they can make recommendations to government and may report to both houses of Parliament on any matter relating to the integrity agencies they oversight, including funding matters. In its final report, the NSW Public Accountability Committee considered parliamentary oversight committees should be empowered to review

108 NSW Independent Commission Against Corruption, above n 18, 6.
109 NSW Legislative Council Public Accountability Committee, Parliament of NSW, *Budget Process for Independent Oversight Bodies and the Parliament of NSW — Final Report* (2021) 29.
110 Auditor-General of New South Wales, Submission No 57 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 16 October 2020, 4. ACAG notes NSW 'is the only jurisdiction to make provision for additional resources to be made available for directed audits, but at the discretion of the Treasurer': Australasian Council of Auditors General, above n 36, 32.
111 NSW Independent Commission Against Corruption, above n 103, 29.
112 NSW Government, above n 89, 8.
113 Audit Office of New South Wales, above n 16, 3, 12, 20.

the annual budget submissions of each agency and make recommendations as to funding priorities.[114]

A new funding model in NSW that increases transparency

The current funding process lacks transparency because of Cabinet confidentiality. In this regard, the Audit Office has described the NSW budget process and appropriation framework in its October 2020 special report. Key elements of the current budget process are:

- integrity agencies are grouped with departments for budget purposes;
- integrity agency budgets are included in annual budget papers as well as their likely budgets for the following three years ('forward estimates');
- if an integrity agency wants an increase to its appropriation funding from the amount in the forward estimates, it must prepare a budget proposal to NSW Treasury;
- as 'independent entities' integrity agencies can make their proposals directly to Treasury rather than via the DPC cluster (like other cluster agencies);
- once submitted, the integrity agency proposals are subject to the same processes and considerations as other agencies and departments — for example, Treasury may choose not to progress a proposal to the ERC if it considers the proposal does not meet budget guidelines;
- after integrity agency proposals are submitted, Treasury briefs the ERC on the proposals that have been progressed for consideration and the ERC makes the final decision about budgets for integrity agencies;
- ERC discussions are Cabinet-in-confidence, which means the reasons for decisions made by the ERC are not made public or provided to integrity agencies. The briefings Treasury provides to the ERC are also Cabinet-in-confidence and are not made public or shared with the integrity agencies;
- the decisions made during the budget development process are reflected in the annual Appropriation Bill that specifies amounts withdrawn from the Consolidated Fund in line with the *Constitution Act 1902* (NSW);
- the Appropriation Bill is introduced in the Legislative Assembly by the Treasurer. A Bill relating to appropriations can become law even without approval of the Legislative Council, consistent with the constitutional requirement for the government to initiate appropriation legislation;
- while Parliament is provided with the Bill and budget papers with information about funding amounts specified in the Bill, Parliament is not involved in the process of developing the annual NSW budget and does not see budget proposals that were made by integrity agencies during the budget development process; and

114 NSW Legislative Council Public Accountability Committee, above n 109, recommendation 1, ix.

- the annual appropriation appropriates funding to the Premier, not directly to the integrity agencies, and reflects the principle that ministers are accountable to Parliament for expenditure of public funds. In practice, the Premier delegates expenditure of money to the head of each integrity agency in the cluster under the *Government Sector Finance Act 2018* (NSW) (GSF Act).

Transparency is desirable for the NSW budget process for integrity agencies. This is to ensure that the agencies and the public have visibility of funding decisions. This is important for integrity agencies who play a significant role in holding the government and Members of Parliament to account. If decisions about their funding impact the agency's ability to discharge their integrity functions, it is necessary that the government is accountable for that to the public in whose interest the government (and the integrity agencies) act.

Increasing transparency in the funding of integrity agencies would go some way to demonstrate how the government is funding them and the sector from the Consolidated Fund, having regard to the 'State's broader financial position and the need to ensure that all essential services are provided to a standard that meets public expectations'.[115] Transparency leads to accountability of funding decisions across government.

In its October 2020 special report the NSWAO suggests that there should be an accountable NSW funding model for integrity agencies where the current threats to independence are overcome.[116] A key element of this suggested increased transparency is increasing the role of Parliament and separating integrity agencies from inclusion in the NSW financial management paradigm, which includes clusters, efficiency dividends and outcomes budgeting.

Funding integrity agencies — the New Zealand model

A funding model supported by some NSW integrity agencies, including the NSWAO and the NSW Ombudsman, is the New Zealand approach (adopted by their unicameral Parliament). In New Zealand, there are three Officers of Parliament: the Controller and Auditor General, the Ombudsman and the Parliamentary Commissioner for the Environment.[117] The application of appropriations in New Zealand as they apply to Offices of Parliament is set out in s 26E of the *Public Finance Act 1989* (NZ).

Ferguson has described the funding process in New Zealand for Officers of Parliament thus:

- The Minister of Finance initiates the annual funding process with Officers of Parliament by asking them to submit directly to the Officers of Parliament Committee (of Parliament) an estimate of expenses and capital expenditure for the next financial year and any top-up funds required for the current financial year.
- The Officers' budget bids are submitted to the Officers of Parliament Committee for consideration and report.

115 NSW Government, above n 89, 7.
116 Audit Office of New South Wales, above n 16, 9.
117 NSW Ombudsman, above n 11, 28.

- The committee hears evidence from the officers (in private) and asks Treasury for advice on the appropriateness of the budget bids. Treasury also advises the committee on the criteria issued by the Cabinet within which Budget bids are to be considered.
- The Officers of Parliament Committee reports to the House. The NSW Audit Office also noted that the committee assesses financial and performance matters of the Officers, including recommending appointments of agency heads, appointing external auditors and developing or reviewing codes of conduct.[118]
- The House recommends to the Governor-General by way of address that the estimates be included for each Officer of Parliament in the Annual Appropriation Bill. This is a pre-budget approval of each officer's appropriation before their estimates are presented to the House.[119]

Significantly under the New Zealand model, the 'funding process for officers of Parliament is determined by the House because the functions to be funded are those of the House itself, if it wished it might perform'.[120] The New Zealand Parliament does not make decisions about entities that do not perform functions of a parliamentary nature.[121] Officers of Parliament are not part of the government under the New Zealand model.

Under the New Zealand model spending and performance of Officers of Parliament are reviewed by separate subject select committees.[122] There is a case for the oversight committee of the Officer of Parliament to be the same committee that reviews the budget. This ensures the committee has oversight of financial, operational and performance matters and centralises functional and financial accountability of integrity agencies.

The New Zealand Officers of Parliament Committee is chaired by the Speaker, 'thus ensuring that it is seen as an important parliamentary committee, rather than one dominated by the Executive'.[123] There are four government members and four opposition members on the committee as well as the Speaker and assistant speaker.[124]

This alternative funding model enables transparency of funding (where Parliament can see the budget) and disentangles the funding of integrity agencies from funding for other government priorities.

New Zealand is ranked first with Denmark on the Corruption Perceptions Index, which means the perception of public sector corruption is low.[125] Australia is ranked 11th on the

118 Audit Office of New South Wales, above n 16, 13.
119 Ferguson, above n 19, 136−137.
120 Ibid 140.
121 Ibid.
122 Ibid 144; Oonagh Gay, 'Officers of Parliament — A Comparative Perspective' (Research Paper No 03/77, Parliament and Constitution Centre, House of Commons Library, 2003) 19.
123 Gay, above n 122, 19.
124 Ibid.
125 Transparency International, Corruption Perceptions Index 2020 <https://www.transparency.org/en/cpi/2020/index/nzl>.

index with Canada, Hong Kong and the United Kingdom.[126] Transparency and accountability of government has a significant impact on the perception of corruption in government.

Bret Walker, in his advice to ICAC, has opined that:

> the constitutional responsibility of the Houses of Parliament in relation to appropriations provides the obvious cue for a better funding model for ICAC …
>
> Apart from the indispensable formal role of the Executive in proposing legislation, particularly for an appropriation, it follows that the Houses are the best suited of all available centres of political power in New South Wales to devise and promulgate a better ICAC funding model … I would stress that the importance of their role partly comes from the inappropriateness of the Executive, including senior public servants in DPC and Treasury, having any substantive role in devising let alone implementing a proper ICAC funding model.[127]

Although there is transparency under the New Zealand model, it is important to note the constitutional convention of budget secrecy which protects budget-related information from disclosure during the preparation of the budget. However, the question of disclosure in this regard is subject to a balancing exercise weighing prejudice to the budget's effective preparation against the public interest in favour of disclosure.[128] It is now usual for the New Zealand Government to release budget papers one month after budget day.[129]

Funding integrity agencies — the Victorian model

The role of Parliament in funding decisions for integrity agencies is also operative in Victoria, where the budget of the IBAC, Ombudsman and Victorian Inspectorate is determined each year in consultation with the Parliamentary Integrity and Oversight Committee.[130] The IBAC differentiates in its budget between 'core work' and additional projects considered on a case-by-case basis.[131] A business case must be submitted to the committee for consideration if IBAC believes it requires more funding for additional work during the year.[132]

On 1 July 2020, legislative changes came into effect in Victoria under Pt 5 of the *Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019*. In her second reading speech on the Bill, the Victorian Attorney-General, Minister for Workplace Safety, the Hon Ms Hennessy MP, said:

> This Bill will amend the budget processes of the IBAC Commissioner, Ombudsman and Victorian Inspector to require: the Ombudsman's, IBAC's and the Victorian Inspectorate's draft budgets to be determined in consultation with the Integrity and Oversight Committee; the Ombudsman, IBAC and the Victorian Inspectorate to prepare an annual plan to be considered in conjunction with the draft budget by the Integrity and Oversight Committee; and the Ombudsman's, IBAC's and Victorian Inspectorate's annual appropriations to be specified in the Parliament Appropriation Bill. These reforms aim to strengthen

126 Ibid.
127 Audit Office of New South Wales, above n 16, 53−54.
128 New Zealand Parliament, 'Chapter 33 The Process of Supply' in *Parliamentary Practice in New Zealand* (2017) <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-33-the-process-of-supply/>.
129 Ibid.
130 NSW Ombudsman, above n 11, 30; NSW Audit Office, above n 16, 12.
131 Audit Office of New South Wales, above n 16, 12.
132 Ibid.

> the independence of these bodies in a manner that accords with their status as 'independent officers of Parliament'. The Ombudsman, IBAC and the Victorian Inspectorate will no longer appear under the Department of Premier and Cabinet's annual appropriation. They will be vested with full responsibility for the financial management and financial services that support their annual appropriation allocation. The reforms will strengthen their relationship with Parliament and bring their budget processes in line with other independent officers of Parliament, namely the Auditor General and the Parliamentary Budget Officer …

The Victorian Auditor-General's Office (VAGO) already received its annual appropriation within Parliament's annual Appropriation Act.[133] However, the Bill comes directly from Treasury. Therefore, the Parliament Appropriation Bill may be seen as 'nothing more than a symbolic concession to Parliament — as it has not resulted in greater protection of its independence from the Executive'.[134] Section 77 of the *Audit Act 1994* (Vic) provides that the Auditor-General's budget for each financial year is to be determined in consultation with the parliamentary committee concurrently with the annual plan under s 73.

Significantly, despite these recent funding reforms in Victoria, the Victorian Ombudsman has observed in the *Annual Report 2019−20* that:

> The independence of my budget, while welcome, does not ensure it, and once again my ongoing funding has fallen substantially short of what is needed to respond to public expectations of my office. The funding of integrity agencies should be above the politics of the day — a principle even more important given our mandate to investigate the Government. Trust in Government risks being fundamentally diminished, as the Ombudsman's independence is widely known and respected, and new powers without funding are a meaningless gesture.[135]

Similarly, the IBAC Commissioner commented in October 2020:

> Securing our budget independence, which came into effect on July 1 this year, was an important step as it ended our previous direct financial relationships with any department. However, adequate resourcing of IBAC remains an ongoing concern … Exposing and preventing corruption cannot be adequately done on a static, inadequate budget …[136]

This commentary suggests that, even though there is direct appropriation to integrity agencies in Victoria, there remains concern about the amount of money allocated and that the decision about the amount of funding allocated resides with Treasury and thus independence of the integrity agencies may be compromised.

In a recent research paper the Victorian Parliament proposed that independent Officers of Parliament (described above) are 'funded under the Parliamentary Appropriation Bill and for their appointments to be made by Parliament through its Presiding Officers, rather than by the government. This would separate them from the executive and delineate their functions more clearly under Parliament'.[137] The paper goes on to say that, in 'order for these entities to be truly independent, the Parliamentary Appropriation Bill would need

133 Breukel et al, above n 14, 22.
134 Ibid 55.
135 Victorian Ombudsman, *Annual Report 2019−20 (2020)* <https://assets.ombudsman.vic.gov.au/assets/Reports/Annual-Reports/Annual-Report-2019-20-and-Annual-Plan-2020-21.pdf?mtime=20201202085254>.
136 Independent Broad-Based Anti-Corruption Commission, 'Message from the Commissioner — October 2020', IBAC Insights, Issue 25, October 2020 <https://www.ibac.vic.gov.au/publications-and-resources/ibac-insights/issue-25/message-from-the-commissioner---october-2020>.
137 Breukel et al, above n 14, 19.

to be determined in consultation with each entity and delivered not by the government, but by the Speaker of Parliament'.[138] In its March 2020 and February 2021 reports the NSW Public Accountability Committee suggested funding be allocated to integrity agencies directly through the appropriation legislation rather than to the relevant minister: recommendation 3. This recommendation was made so integrity agencies are not subject to funding reductions in the financial year. This approach to funding is also supported by the NSW Electoral Commissioner.[139]

Other funding models

The ACT Electoral Commission receives ongoing recurrent funding that is determined in consultation with the Parliamentary Committee for the Electoral Commission.[140] The Treasurer can veto the amount sought but must table a document that explains the reasons.[141]

In the ACT, specified officers have been designated under legislation as 'Officers of the Assembly' — namely, the Auditor-General, Ombudsman, Integrity Commissioner, Inspector of the Integrity Commission and members of the ACT Electoral Commission.[142] These officers have special status because 'they perform independent oversight and integrity roles which require a high degree of separation from Executive government'.[143] They are appointed by the Speaker with agreement of the relevant standing committee. Budget protocols have been developed between the Speaker and the Treasurer, which establish procedures for the development of budgets for Officers of the Assembly.[144]

Another funding model identified is the 'judicial council' for funding of courts, seen in South Australia and Victoria.[145] These states have implemented centralised funding to minimise the executive's control of court's financial arrangements.[146] The judicial council is established by legislation and comprises representatives from state courts and tribunals: 'The executive determines the amount of funding, which is paid to the judicial council, which then has autonomous powers to administer and fund the courts.'[147]

A further funding model example is the Court Services Victoria (CSV) established under the *Court Services Victoria Act 2014* (Vic) as an independent statutory body. The CSV provides administrative services to Victoria's courts and tribunals.[148] Victoria's courts and tribunals are independent from the executive and are accountable to Parliament for their appropriation

138 Ibid 19−21.
139 Evidence to Public Accountability Committee, above n 107, 27.
140 Audit Office of New South Wales, above n 16, 12.
141 Ibid.
142 Office of the Legislative Assembly for the Australian Capital Territory, Submission No 3 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 7 November 2019, 2.
143 Ibid.
144 ACAG has observed that the ACT now has the strongest independence safeguards because of the 2020 legislative amendments making the Auditor General an Officer of the Legislative Assembly: Australasian Council of Auditors General, above n 36, 11.
145 Breukel et al, above n 14, 18.
146 Ibid.
147 Ibid.
148 Ibid.

and operations.[149] Control and responsibility for funding and administration of courts sits with the CSV and no longer the Department of Justice and Regulation (the executive).[150]

Funding models proposed by the ICAC and the NSW Ombudsman

The ICAC has also proposed a model which involves Parliament scrutinising and determining appropriations assisted by an independent expert assessment. In this regard, the NSWAO has observed that integrity agencies are 'there to service the Parliament of the day and the citizens of NSW'. It is that distinction that requires unique funding arrangements for integrity agencies.[151]

The ICAC proposes that the Presiding Officers of Parliament appoint an 'eminent person' as the ICAC's budget assessor to establish the ICAC's fixed core annual budget and report to the Presiding Officers. This report would be tabled in Parliament and Parliament would approve the budget to be appropriated.[152] The April 2020 opinion that Mr Bret Walker gave to the ICAC considers that a 'parliamentary solution' best supports institutional independence and accountability of the ICAC.[153] Mr Walker opines that a 'parliamentary solution need not involve legislation only, as the procedures of the Houses' can also be utilised.[154]

The ICAC has referred to existing statutory models in NSW that are like the funding model the ICAC proposes — namely, the Statutory and Other Officers Remuneration Tribunal (SOORT) under the *Statutory and Other Officers Remuneration Act 1975* (NSW). The SOORT is a person appointed by the Governor to determine remuneration ranges for statutory and other officers with the support of two assessors. The SOORT provides reports to the responsible Minister, which are published in the *Gazette* by the Minister. They are laid before both houses of Parliament, which can pass a resolution to disallow the determination. The SOORT is also required to give effect to government policy on remuneration that also applies to the NSW Industrial Relations Commission.[155]

Similar is the Parliamentary Remuneration Tribunal established under the *Parliamentary Remuneration Act 1989* (NSW).[156] This Tribunal also consists of one person appointed by the Governor, with others appointed to assist the Tribunal. The Tribunal reports on determinations about salaries, expenses, and allowances payable to members of Parliament. The report is tabled in each house of Parliament and published in the *Gazette*. The Tribunal can conduct inquiries and invite submissions.[157]

The ICAC model allows for a flexible component — supplementary funding to meet unforeseen contingencies. If satisfied the supplementary funding is required, the ICAC budget assessor can publish in the *Gazette* and in a special report to Parliament the additional funds

149 Ibid.
150 Ibid.
151 Evidence to Public Accountability Committee, above n 75, 3.
152 NSW Independent Commission Against Corruption, above n 103, 5.
153 Ibid 17.
154 Ibid.
155 NSW Independent Commission Against Corruption, above n 26, 39.
156 Ibid.
157 Ibid.

to be provided. The additional funds would be appropriated without the need for special appropriation legislation.[158]

The ICAC suggests the fixed and flexible funding amounts should not be subject to efficiency dividends or other cost-saving measures imposed by the government. The ICAC draws on a Commonwealth precedent where the Office of the Inspector-General of Intelligence and Security was exempted from the application of efficiency dividends imposed on Commonwealth agencies in the 2015−16 budget.[159] Similarly, the LECC suggests it should not be 'subject to the wholesale "one size fits all" budget cuts which are applied across the public service'. The LECC suggests a 'more nuanced approach' is taken to determining its budget, having regard to its functions.[160]

The NSW Ombudsman proposes the following 'alternative or enhanced budget process'[161] largely derived from the New Zealand model:

- The budget-setting process should be overseen by a parliamentary committee rather than by Treasury/Cabinet — the committee should be broadly representative of Parliament, with members who are not ministers.
- Treasury and the government must be given the opportunity to provide advice on funding, and all advice should be made public. Once the committee has considered all advice (including Treasury advice) and has set the funding amount, that amount should not be reopened by the government.
- The budgets for integrity agencies and the Parliament should be set in advance of the government budget-setting process.
- The budgets for integrity agencies and the Parliament should be assessed separately — if a single funding allocation was made to Parliament and then split amongst the integrity agencies, this would not address the current tensions and issues with budget allocations.
- In setting budgets for integrity agencies and the Parliament, advice from Treasury and the government on the overall fiscal position of the State may be relevant.
- The government should be able to approve additional grant funding where the work of integrity agencies contributes to the Premier's Priorities and other government priorities or outcomes.
- Budgets for integrity agencies need to be set having regard to their specific statutory mandates and business models — even though the same budget process may be applied to all integrity agencies, the way those agencies are funded may differ.
- Funding of integrity agencies should be considered and adjusted whenever their functions or jurisdiction changes.

158 NSW Independent Commission Against Corruption, above n 103, 30.
159 Ibid 31.
160 Law Enforcement Conduct Commission, Submission No 10 to Public Accountability Committee, *Budget Process for Independent Oversight Bodies and the Parliament of NSW*, 18 November 2019, 5−6.
161 NSW Ombudsman, above n 11, 31−35.

- Quarterly reviews should be conducted to allow for repurposing of unused contingency funding and supplementary funding requests — as to the latter, see, for example, s 4.13 of the GSF Act. This aspect of the proposed process would support the ICAC, which has identified an inability to 'undertake accurate forecasting given the nature of corruption investigations'.[162] It is suggested that there needs to be inbuilt flexibility in the process that allows for supplementary funding requests to be made and transparently considered. The Public Accountability Committee, in its March 2020 and February 2021 reports, suggested the annual budget include a set contingency fund to address unbudgeted financial demands: recommendation 2.
- The budget-setting process should be embedded in legislation.
- Integrity agencies should continue to be held accountable for their financial management and performance — the parliamentary oversight committee should consider and report on the activities of the integrity agency against its budget plans. Consideration may be given to the committee obtaining expert advice on performance and expenditure of funds.
- Integrity agencies should no longer be publicly represented as being part of the 'DPC cluster'. In its March 2020 and February 2021 reports, the Public Accountability Committee agreed with this: recommendation 4.

In its March 2020 and February 2021 reports the Public Accountability Committee noted there were a number of problems with the current funding arrangements for integrity agencies and suggested 'the relevant parliamentary oversight committee established for each body should be allowed to review the budget submission for each agency' and make recommendations as to the funding priorities: recommendation 1.

Conclusion

This article has explored several options for safeguarding the independence of NSW integrity agencies having regard to how independence is protected in other jurisdictions, such as Victoria and New Zealand.

A new funding model, together with legislative changes, may offer an opportunity to further support independence of integrity agencies in NSW.

A possible funding model could draw on the model proposed by the NSW Ombudsman but align with the fundamental principles of representative and responsible government where the government of the day is politically and electorally accountable for the management of the State's finances.[163]

'Fundamental to the system of government in New South Wales is the capacity of the Executive to impose taxation for the purposes of raising revenue and to appropriate that revenue for

162 NSW Independent Commission Against Corruption, above n 103, 25.
163 NSW Government, above n 89, 7.

the provision of public services and the implementation of government policies.'[164] As s 5A of the *Constitution Act 1902* (NSW) makes clear, in circumstances where there is disagreement or deadlock between the houses of Parliament about an Appropriation Bill, although the Legislative Council 'has the power to suggest amendments', the Legislative Assembly may direct that the Bill (with or without any amendment suggested by the Legislative Council) be presented to the Governor to become an Act of Parliament. Accordingly, any new funding model must align with constitutional requirements and the primacy of the government for Appropriation Bills.

Further, any funding model that involves oversight by a parliamentary committee would also need to address the fact that Members of Parliament may be subject to investigation and oversight by the ICAC. It would potentially pose a threat to the ICAC's independence (in the same way as the executive, whom it also oversights) if the parliamentary committee were to determine or make recommendations about the ICAC's budget. A possible new model could therefore allow for referral of the ICAC's budget to an independent person to assess the ICAC's funding requirements.[165]

The importance of preserving the independence of integrity agencies is to enable them to effectively discharge their important role of oversighting government and Members of Parliament to ensure they act properly and in the public interest.

164 NSW Legislative Council, 'Chapter 17, Financial Legislation' in *NSW Legislative Council Practice* (2008) <https://www.parliament.nsw.gov.au/lc/proceduralpublications/Documents/Chapter%2017%20Financial%20legislation.pdf>.

165 The ICAC has suggested that this person could be 'an independent officer of the Parliament appointed by the Presiding Officers of Parliament. The mechanism could be similar to that under which the Parliamentary Budget Officer is appointed': NSW Independent Commission Against Corruption, above n 103, 33−34. The ICAC sets out the proposed role of the 'ICAC Budget Assessor' in its May 2020 Special Report: ibid 35–36.

The Administrative Appeals Tribunal: why we are here

*Deputy President Peter Britten-Jones**

Sometimes it is helpful to reflect on what we are doing and how we are doing it. This desire to reflect perhaps comes about because we are (hopefully) coming out of a pandemic that has disrupted our daily way of life. On a more personal level, perhaps, it comes about because of my move from Adelaide to Melbourne and the disruption that has caused my family and me. Is it worth all the effort? I certainly believe it is.

I could have made the title of this article 'Why are we here?', but I wanted to avoid the uncertainty of a question. I am a firm believer in the work of the Administrative Appeals Tribunal. What is it that the Tribunal does and why does it do it? There are numerous ways to approach these questions:

1. Taking a narrow approach, Tribunal members are here to make decisions.
2. Taking a broader approach, they are here to provide access to justice for those impacted by administrative decisions.
3. At another level, they are here to improve the quality of, and instil greater public confidence in, public administration.

I wish to expand upon each of these three answers.

Making decisions

Section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for a review by the Tribunal of certain decisions. When reviewing a decision, s 43 provides that the Tribunal may affirm, vary or set aside and substitute the decision under review. We are to make the correct or preferable decision[1] that balances the need to be fair, just, economical, informal and quick with the obligation to be proportionate to the importance and complexity of the matter.[2]

The High Court considered the nature of merits review in *Frugtniet v Australian Securities and Investments Commission*.[3] Chief Justice Kiefel and Keane and Nettle JJ said:

> The enactment of the AAT Act established a new and substantially unprecedented regime of administrative merits review, distinguished principally by the AAT's jurisdiction to re-exercise the functions of original administrative decision-makers. *The question for determination by the AAT on the review of an administrative decision under s 25 of the AAT Act is thus whether the decision is the correct or preferable decision.* That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker. As Bowen CJ and Deane J held in *Drake v Minister for Immigration and Ethnic Affairs*, however, and has since been affirmed by this Court in *Shi v Migration Agents Registration Authority*, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant

* Peter Britten-Jones is Deputy President of the Administrative Appeals Tribunal. This is an edited version of a speech to a meeting of the Melbourne Tribunal members and conference registrars on 9 March 2021.

1 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

2 The objectives of the Tribunal are set out in s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

3 [2019] HCA 16; (2019) 93 ALJR 629.

function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.

Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker.[4]

Justices Bell, Gageler, Gordon and Edelman said:

the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is *to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made* in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints.

…

The AAT and the primary decision-maker exist within an administrative continuum. The AAT has no jurisdiction to make a decision on the material before it taking into account a consideration which could not have been taken into account by the primary decision-maker in making the decision under review.[5]

Providing access to merits review

The Administrative Appeals Tribunal exists to provide redress for persons not satisfied with a government decision. Tens of millions of decisions that affect people's lives are made each year by government decision-makers at various levels. Very few of these decisions are made by our elected representatives; most are made by public servants. The Tribunal is an important mechanism for delivering individual justice to those disgruntled applicants.

The COVID-19 pandemic has provided challenges to the Tribunal in terms of providing access to the public services we offer. The Tribunal has had to adapt to ensure that we can continue to provide access to the extent possible and in as fair a way as possible. The physical constraint of not being able to offer in-person hearings raised real concerns as to whether procedural fairness could be achieved using telephone and video facilities. The Tribunal reacted quickly by improving its processes and its technology such that remote hearings have been largely accepted by the parties and their representatives, who have an overarching preference to have their matter heard rather than delayed. The new processes adopted by the Tribunal were set out in the COVID-19 Special Measures Practice Direction. Members now have access to a fully digitised file and parties can lodge all documents electronically. An example of the practical approach taken by members and staff in delivering a remote hearing via MS Teams is helpfully set out in the decision of Members Ward, Durkin and Stephan in *Chugha and Comcare* (Compensation).[6]

4 Ibid [14] (emphasis added and footnotes removed).
5 Ibid [51]−[53] (emphasis added).
6 [2020] AATA 2835.

Improving the quality of, and instilling greater public confidence in, public administration

The establishment of the Tribunal over 40 years ago and the progressive expansion of its jurisdiction since then are each the result of successive, parliamentary value judgements as to a need to improve the quality of, and instil greater public confidence in, public administration.[7]

It was Sir Anthony Mason, when Commonwealth Solicitor-General, who put to the then Commonwealth Attorney-General, Sir Nigel Bowen, in 1968 that there was such a need. This was a view shared by Sir Nigel. The result was the establishment of the Commonwealth Administrative Review Committee, of which Sir Anthony was a member. Though this occurred during a period of Coalition government, the work of that committee and a successor was taken up and enacted as the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) during a period when a Labor government held office. In turn, the AAT Act commenced, and its first President, Sir Gerard Brennan, took office on 1 July 1976 when a Coalition government was again in office. The point of mentioning this history is that the existence of the Tribunal is the result of a bipartisan consensus.

Sir Anthony Mason wrote a paper recalling this history and the experience of the first dozen years of the Tribunal and reforms during that period. He identified five features of administrative decision-making by ministers and their departments which fell short of the judicial model and led to such decision-making never achieving the level of acceptance of the judicial model:

> First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. Fourthly, the administrator does not have to give reasons for his decision.
>
> That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[8]

The Tribunal was deliberately established with features of the judicial model to address these deficiencies. In general, we sit in public, we are required to observe procedural fairness, we must give proper reasons for our decisions and base them on material before us which is logically supportive of them, we have power to stay the operation of decisions under review and we have power to summon persons to give evidence or to produce documents. Conduct which would amount to a contempt of court if the Tribunal were a court is made a federal offence. The judicial analogy is not complete, as the model adopted for the Tribunal places a member(s) constituting the Tribunal in place of the administrator who made the decision under review and confers on the member all the powers and discretions of that administrator.

7 Material in this section was sourced from a letter to members and staff from Acting President Justice Logan in 2017.

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

The need to instil greater confidence in public administration is all the more important in these times when pressure on our democratic model is rising. Professor Grayling, in his book *Democracy and its Crisis*, raises concerns about growing dissatisfaction in western democracies, citing the election of Donald Trump in the USA and the Brexit referendum in the UK. He says that democracy is only part of what makes for sound government. Representative democracy is important but not by itself sufficient. More is needed. He refers to the need for constitutional checks and balances placing limits on the power of both legislature and executive, and providing remedies when the limits are breached.[9]

The Administrative Appeals Tribunal is part of the 'more' that is needed. It plays an important role as an institution that not only provides checks and balances on the power of the executive but also results in improved decision-making. An individual can take comfort that there is an independent body to exercise a review of the merits of a decision made by the executive. The decision made by the Tribunal on review and its reasons will shape the future exercise of power by the executive. It is important that we take a comprehensive and diligent approach to every review carried out so that applicants are satisfied that they have been heard and their issue has been properly considered; and so that the decision-maker can learn from the outcome.

9 AC Grayling, *Democracy and its Crisis* (Oneworld Publications, 2018).

The riddle of s 5(2)(a) of the *Human Rights Act 2019* (Qld): when are courts and tribunals required to apply human rights directly?

*Kent Blore**

Some of the most obvious impacts on human rights — both positive and negative — come at the hands of courts and tribunals wielding judicial power. Every day, courts vindicate rights to property, deprive people of their liberty and safeguard the right to a fair hearing. The 'dialogue model' adopted by the *Human Rights Act 2019* (Qld) gives the judiciary a role to play in protecting and promoting human rights.[1] One aspect of that role which remains unclear is the question of when courts and tribunals are required to apply human rights themselves in the exercise of judicial power. Cryptically, s 5(2)(a) of the Human Rights Act hints that courts and tribunals are required to apply some human rights sometimes, but it gives no further guidance as to which human rights or in what circumstances the obligation arises. This article sets out the competing approaches that have been put forward with respect to the equivalent provision in s 6(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The article then sets out the approach Queensland courts have taken to s 5(2)(a) to date. On the whole, practitioners and courts in Queensland have so far failed to grapple with s 5(2)(a) as well as the case law from Victoria. Each time s 5(2)(a) has been overlooked represents a missed opportunity for the protection and promotion of human rights.

Structure of the Human Rights Act

The human rights set out in the Human Rights Act do not have freestanding operation. Instead, the Human Rights Act 'stat[es] the human rights Parliament specifically seeks to protect and promote' and then sets out detailed operative provisions by which those rights are to be protected and promoted (s 4).[2] One of the key operative provisions is s 58, which requires public entities to act compatibly with human rights and to consider human rights when making a decision. Courts and tribunals are not public entities subject to these requirements when they are acting in a judicial capacity. This is because s 9(4)(b) provides that courts and tribunals are only public entities to the extent they are 'acting in an administrative capacity'. Whether a court or tribunal is acting in an administrative capacity turns on the traditional divide between judicial and administrative functions.[3] So, for example, when the Industrial Relations Commission decides whether to grant an exemption under the *Anti-Discrimination Act 1991* (Qld),[4] or the Queensland Civil and Administrative Tribunal (QCAT)

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1 Explanatory Note, Human Rights Bill 2018 (Qld) 6; George Williams, 'The Distinctive Features of Australia's Human Rights Charter' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (The Federation Press, 2017) 22, 23.

2 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [197] (Ryan J). See also in respect of the equivalent legislation in Victoria and the ACT: Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, 2nd ed, 2019) 6 [0.70]; *Nona v The Queen* (2013) 8 ACTLR 168, 187 [95] (Penfold J).

3 *Sabet v Medical Practitioners Board* (2008) 20 VR 414, 432−433 [119]−[127] (Hollingworth J); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 68 [282] (Bell J); *Slaveski v The Queen* (2012) 40 VR 1, 24 [75] (Warren CJ), 31 [106]−[108] (Nettle and Redlich JJA).

4 *Re Ipswich City Council* [2020] QIRC 194 [29]−[30] (Merrell DP).

exercises its merits review jurisdiction,[5] it will generally be exercising an administrative function and therefore be bound by the Human Rights Act as a 'public entity'. Outside of their administrative functions, courts and tribunals escape the human rights obligations of public entities by virtue of s 9(4)(b). For example, when QCAT is exercising its original jurisdiction it will generally be exercising a judicial function[6] and therefore be a 'tribunal'[7] to which the carve-out in s 9(4)(b) applies.

However, this neat carve-out for courts and tribunals is complicated by a provision tucked away at the beginning of the Act. Under s 5(2)(a), the Human Rights Act also applies to courts and tribunals 'to the extent the court or tribunal has functions under part 2 and part 3, division 3'. In the dictionary to the Act, 'function' includes a 'power'. Part 3, Div 3 of the Act contains obvious functions for courts, such as the obligation to interpret legislation, if possible, in a way that is compatible with human rights (s 48) and the power of the Supreme Court to issue a declaration of incompatibility in the event that such an interpretation is not possible (s 53). The reason for the reference to Pt 2 in s 5(2)(a) is less clear. Part 2 sets out the protected human rights.

The broad, intermediate and narrow constructions of s 5(2)(a)

According to the Victorian authorities on the equivalent provision of the Victorian Charter, 'Given that [s 5(2)(a)] refers to both the interpretive functions of courts and tribunals in pt 3, div 3, and to their functions under pt 2, it appears that [s 5(2)(a)] implicitly reads down [s 9(4)(b)], so that pt 2 applies directly to courts and tribunals'.[8]

As to what that direct application of human rights entails, three possible interpretations have been advanced in Victoria:[9]

1. the broad construction, which holds that the function of courts is to enforce directly *any and all* of the rights enumerated in Pt 2;

2. the intermediate construction, which holds that the function is to enforce directly only those rights enumerated in Pt 2 that *relate* to court proceedings; and

5 *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [38]−[45], [439] (Member Stepniak); *RE and RL v Department of Child Safety, Youth and Women* [2020] QCAT 151 [22]−[23] (Members Murray, Allen and Garner).

6 *Re Director of Housing and Sudi* (2010) 33 VAR 139, 164 [119] (Bell J) (overturned on appeal, but not on this point).

7 Although QCAT is a 'court' (see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164; *Owen v Menzies* [2013] 2 Qd R 327), 'court' is defined in the schedule to the Human Rights Act in a way that does not include QCAT. While 'tribunal' is not defined in the Act, in the context of the Victorian Charter it has been held to mean 'a person or body who, under a statute, operates independently of government and possesses a limited and specified jurisdiction or authority to make particular decisions of a judicial or administrative character applying general principles of law or policy': *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 72 [305] (Bell J).

8 *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237, 247 [52] (Neave JA and Williams AJA), cited with approval in *Slaveski v Smith* (2012) 34 VR 206, 221 [54] n 27 (Warren CJ, Nettle and Redlich JJA). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [220] (Ryan J).

9 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246] (Tate JA). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [221] (Ryan J).

3. the narrow construction, which holds that the function of courts is to enforce directly only those rights that are *explicitly and exclusively* addressed to the courts.

Although the Victorian Court of Appeal has left open which approach is correct,[10] courts in Victoria have generally applied the intermediate construction,[11] perhaps under the influence of the Goldilocks effect. The intermediate construction gives the impression that it gives s 5(2)(a) neither too little work to do nor too much.

There are, in any event, good reasons to doubt that the other two constructions are open. A broad construction would require courts to apply all human rights in all cases, effectively erasing the explicit carve-out from the definition of 'public entity' in s 9(4)(b) for courts and tribunals exercising a judicial function.[12] If courts and tribunals were required to apply all human rights regardless of whether they were exercising a judicial or administrative function, there would be no need for s 9(4)(b).

The narrow construction would only bring in the handful of rights which are specifically directed to courts, namely:[13]

- the right of a person arrested or detained to be released if they are not promptly brought before a court or brought to trial without unreasonable delay (s 29(5)(c));
- the right of a person awaiting trial not to be automatically detained (s 29(6));
- the right to have the lawfulness of one's detention determined by a court (s 29(7));
- the right not to be imprisoned only because of an inability to perform a contractual obligation (s 29(8));
- the open justice principle (s 31(2)); and
- the requirement to publish judgements and decisions (s 31(3)).

The narrow construction is so narrow that it would not even include the right to a fair hearing (s 31(1)), as that right is not 'explicitly and exclusively' directed at courts, nor would it include the criminal process rights set out in ss 32−34.[14] If the intention behind s 5(2)(a) were merely to require courts to apply ss 29(5)(c), (6)−(8) and 31(2)−(3) directly, and no other rights, a far simpler drafting technique would have been to say so.[15]

10 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [248] (Tate JA). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 90 [162] (Gummow J).

11 See the examples collected in *Cemino v Cannan* (2018) 56 VR 480, 514−515 [110] n 71 (Ginnane J). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 204 [525] (Crennan and Kiefel JJ).

12 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 n 275 (Tate JA); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 62 [244]−[246] (Bell J).

13 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246] n 277 (Tate JA), quoting Caroline Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis, 2008) 13 [1.43].

14 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 80−81 [246] n 277 (Tate JA), quoting Evans and Evans, above n 13, 14 [1.44].

15 See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 62 [242]−[248] (Bell J).

The 'list of rights' and functional approaches to the intermediate construction

Under the intermediate construction, the relevant 'functions' of courts and tribunals under Pt 2 of the Human Rights Act specified in s 5(2)(a) are 'the functions of applying or enforcing those human rights that relate to court and tribunal proceedings'.[16] The authorities in Victoria have again divided on how to go about identifying these rights that relate to court proceedings. The early approach was to focus on the nature of the right to determine whether it confers a function on the court (the so-called 'list of rights' approach).[17] More recently, Victorian courts have instead focused on the nature of the function the court is performing (the so-called 'functional' approach).[18]

The list of rights approach has the advantage of certainty. In addition to the rights that a narrow construction would bring in, the functional approach would include:[19]

- (in the context of sentencing) the right not to be punished in a cruel, inhuman or degrading way (s 17(c));
- the right to a fair hearing (s 31(1));
- rights in criminal proceedings (s 32);
- the right of child defendants to be brought to trial as quickly as possible (s 33(2));
- the right of a convicted child to be treated in a way that is appropriate for their age (s 33(3));
- the double jeopardy right (s 34); and
- rights relating to retrospective criminal laws (s 35).

Again, if Parliament only intended to capture those rights in ss 17(c); 29(5)(c), (6), (7) and (8); 31; 32; 33(2) and (3); 34; and 35, and no others, it could easily have listed those provisions in s 5(2)(a).

The functional approach has the advantage of allowing the court to apply human rights which have an obvious bearing on its work — for example, the right to equality before the law in s 15(3),[20] freedom of expression in s 21 in the context of deciding whether to make a suppression order,[21] or even cultural rights in ss 27 and 28 when deciding bail conditions for

16 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37] (Bell J).
17 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 68 [253]−[254] (Bell J).
18 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37]−[39] (Bell J). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [225]−[230] (Ryan J).
19 Adapting the list from *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 63−64 [253]−[254] (Bell J).
20 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636−638 [40]−[46] (Bell J).
21 *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533, 538−540 [34]−[45] (Vickery J); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 259 [38] (Warren CJ and Byrne AJA).

an Indigenous defendant[22] or whether to transfer a proceeding to the Murri Court.[23] However, taking a functional approach risks collapsing the intermediate construction into the broad construction. If the court is to apply any human right which has a bearing on the task before it then potentially any and all human rights in Pt 2 are capable of being caught by s 5(2)(a).[24]

The drafting error construction

A fourth possible construction is to put the inclusion of 'Part 2' in s 5(2)(a) down to a slip of the drafter's pen. By including the reference to Pt 2, perhaps the drafter only meant to recognise that courts and tribunals will necessarily apply the rights in Pt 2 in the process of interpreting legislation compatibly with those rights pursuant to s 48. The problem with that explanation is that Parliament and public entities are also conferred with functions by s 5(2)(b) and (c), without any reference to Pt 2. Both Parliament and public entities have human rights obligations which necessarily call up the rights in Pt 2. The explicit reference to Pt 2 for courts and tribunals in s 5(2)(a) must be given work to do.

Courts and commentators have both rejected the drafting error approach to s 6(2)(b) of the Victorian Charter.[25] The drafting error approach is even more difficult to sustain in Queensland. The Queensland Parliament adopted the same wording as s 6(2)(b) of the Charter *after* the difficulties of that provision had been pointed out by commentators and *after* courts in Victoria had offered their reading of what the provision means. Where the Parliament of one jurisdiction adopts the law of another jurisdiction, it generally also intends to adopt the interpretation that has been given to that law.[26] Even if s 6(2)(b) of the Victorian Charter was a mistake, the choice to pick up that mistake in Queensland must have been by design.

Approach of Queensland courts to s 5(2)(a)

So how have courts and tribunals in Queensland approached the puzzle presented by s 5(2)(a) of the Human Rights Act? With one notable exception, they have tended to ignore the existence of s 5(2)(a) altogether, as well as the Victorian authority on point.

In two early cases — *R v Logan*[27] and *R v NGK*[28] — the District Court ruled that a no-jury order under s 614 of the *Criminal Code* involves an exercise of judicial power, such that the District Court was not a public entity and therefore not required to take human rights into account. In neither case did the Court consider whether the Court might be required to apply

22 *DPP (Vic) v SE* [2017] VSC 13, [21] (Bell J). See also, in the context of bail, *Re HL* [2016] VSC 750 [68]−[72] (Elliott J); *Re HL [No 2]* [2017] VSC 1 [134] (Elliott J).

23 In respect of the Koori Court, see *Cemino v Cannan* (2018) 56 VR 480, 483 [11], 515−517 [111]−[122], 523 [147]−[149] (Ginnane J).

24 Timothy Lau, 'Section 6(2)(b) of the Victorian Charter: A Problematic Provision' (2012) 23 *Public Law Review* 181, 188, 193.

25 *Cemino v Cannan* [2018] VSC 535; (2018) 56 VR 480, 513−515 [107], [110] (Ginnane J); Lau, above n 24, 189, 190−191.

26 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236, 1243−1244 [19] (Kiefel CJ), 1250 [52] (Bell, Keane, Nettle and Edelman JJ)

27 *R v Logan* [2020] QDCPR 67.

28 *R v NGK* [2020] QDCPR 77.

human rights directly by force of s 5(2)(a).[29] One might have thought that the right to a fair hearing in s 31(1) of the Human Rights Act would be relevant to the question of whether to order a no-jury trial. On any view bar the narrow construction, the right to a fair hearing would have been capable of direct application by the District Court under s 5(2)(a).[30]

In *R v Morrison*,[31] the Court of Appeal appeared to treat the right to liberty and security of the person in s 29 as a right which courts must apply directly. In that case, the appellant sought to rely on the right to liberty under s 29 in his appeal against sentence. Justice Davis (with whom Sofronoff P and Philippides JA agreed) noted that '[m]any of the provisions of the Human Rights Act apply to the exercise of executive power. Few apply to the exercise of judicial power, although s 29 is one that does'.[32] If his Honour meant only the rights in s 29(5)−(8) then his Honour's observation is consistent with the narrow construction, as well as the list of rights approach to the intermediate construction. However, his Honour went on to find that the Human Rights Act 'ha[d] no relevance to the appeal', because '[t]he applicant's liberty ha[d] been deprived pursuant to a criminal process'.[33] In any event, the Court did not refer to s 5(2)(a) or any other operative provision in the Human Rights Act.

Justice Davis made an oblique reference to s 5(2)(a) in *Re JMT*, which concerned an application for bail. His Honour noted that:

> [The Human Rights Act] primarily casts obligations upon the executive and the parliament[34] and only impacts the exercise of judicial power in limited ways.[35] Obligations under the Human Rights Act may fall upon the Chief Executive. Whether any alleged failure by the Chief Executive to honour his obligations under the Human Rights Act (which is not alleged here) is a matter relevant to bail is a matter that need not be considered on this application.[36]

Presumably, his Honour's attention was not drawn to the Victorian authorities in which human rights were applied directly by courts in the context of deciding bail applications.[37]

In *Attorney-General (Qld) v Sri*,[38] Applegarth J took into account freedom of movement (s 19) and the right of peaceful assembly (s 22) when deciding whether to grant an injunction to restrain an unlawful protest.[39] Unless human rights are freestanding norms of conduct, the only way that those rights might have been relevant to the Court's task was via s 5(2)(a) of the Human Rights Act, although Applegarth J did not refer to that provision. Seen through

29 *R v Logan* [2020] QDCPR 67 [12]−[17] (Horneman-Wren SC DCJ); *R v NGK* [2020] QDCPR 77 [14]−[15] (Long DCJ).
30 *AB v CD & EF* [2017] VSCA 338 [170] (Ferguson CJ, Osborn and McLeish JJA); *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237, 247 [51]-[52] (Neave JA and Williams AJA).
31 *R v Morrison* [2020] QCA 187.
32 Ibid [75] (Davis J, Sofronoff P and Philippides JA agreeing).
33 Ibid [79] (Davis J, Sofronoff P and Philippides JA agreeing).
34 Sections 4, 5(2), 9, Pt 3, Divs 1, 2 and 4.
35 See cases such as *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 68 [282]; and *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 625, 633−634 [32].
36 *Re JMT* [2020] QSC 72 [68] (Davis J).
37 *DPP (Vic) v SE* [2017] VSC 13, [21] (Bell J); *Re HL* [2016] VSC 750 [68]−[72] (Elliott J); *Re HL [No 2]* [2017] VSC 1 [134] (Elliott J).
38 *Attorney-General (Qld) v Sri* [2020] QSC 246.
39 Ibid [27]−[29] (Applegarth J).

the prism of the Victorian authorities, his Honour adopted the functional approach to the intermediate construction.

Finally, s 5(2)(a) received detailed attention for the first time in Queensland in *Innes v Electoral Commission of Queensland [No 2]*[40] (*Innes*). That case concerned a dispute of the result in a local government election. In the absence of detailed human rights submissions from the applicant candidate, Ryan J considered that the matter was not 'an appropriate vehicle for reaching solid conclusions about the operation of the [Human Rights Act] in Queensland'.[41] Nonetheless, her Honour considered the Victorian authorities on the equivalent of s 5(2)(a) in depth.

Her Honour decided to apply the 'intermediate construction', according to which 'the functions under Part 2 referred to in [s 5(2)(a)] are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings'.[42] To identify the relevant functions, her Honour also applied the 'functional approach', which 'focuses upon the functions that are performed by a court or tribunal in legal proceedings in a given case' rather than by reference to the nature of the human right.[43]

Her Honour then identified the function of the Court of Disputed Returns as vindication of the right to take part in public life by ensuring that the election reflects the free expression of the will of the electors. The various rights in s 23 of the Human Rights Act — including the right to vote — are 'promoted by the proper exercise of the Court's discretion'.[44] Ultimately, 'responsibility for the enforcement of s 23 rights underpins the role of the Court of Disputed Returns'.[45] It follows that the Court of Disputed Returns applies the right in s 23 directly by force of s 5(2)(a).

Conclusion — what does it matter?

Curiously, having concluded that the Court of Disputed Returns applies the right to take part in public life directly, Ryan J did not go on to apply that right in *Innes*. It would seem that, for her Honour, any appropriate exercise of the Court's powers would be consistent with that right. Indeed, it might be wondered whether the application of human rights via s 5(2)(a) could ever alter the result in a disputed election. Given that courts and tribunals are required to act judicially, there will usually be a principled (and therefore justifiable) basis for any limit they impose on human rights. Accordingly, thinking of pre-existing legal problems in human rights terms should not alter the result in the vast majority of cases.

Why then should we bother with the riddle of s 5(2)(a) of the Human Rights Act? First, courts and tribunals do not get to pick and choose which legislation to apply. Parliament has spoken. By enacting s 5(2)(a) of the Human Rights Act, Parliament has directed courts

40 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293.
41 Ibid [202] (Ryan J). See also at [242].
42 Ibid [222]−[224] (Ryan J), quoting *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63 [250] (Bell P).
43 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [229]−[230] (Ryan J), quoting *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37] (Bell J).
44 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [237] (Ryan J).
45 Ibid [238] (Ryan J).

and tribunals to think in human rights terms, at least for some human rights sometimes. It is up to courts and tribunals to interpret that direction and comply with it as best they can. Secondly, there may be value in seeing old problems through a human rights lens. Human rights bring a renewed focus on the dignity and autonomy of the individual.[46] When it comes to justifying limits on human rights, the proportionality test in s 13 may also give courts and tribunals new tools of analysis to reason through old problems. The analytical rigour of structured proportionality may even help to identify errors in reasoning.[47] Thirdly, while the Human Rights Act does not spell out the consequences if a court or tribunal does not apply human rights directly via s 5(2)(a), failure to do so may give rise to judicial review or an appeal.[48] Finally, the protection of human rights is enhanced if courts and tribunals themselves observe human rights rather than merely *enforce* the human rights obligations of others.[49] How we solve the riddle of s 5(2)(a) therefore has far-reaching consequences for the role that courts and tribunals play under the Human Rights Act and the extent to which human rights are protected and promoted. We can only begin to solve that riddle if we are aware of it. Unfortunately, the first year of case law under the Human Rights Act reveals that, with a few exceptions, s 5(2)(a) has not yet been raised in proceedings or considered by courts and tribunals.

46 *PJB v Melbourne Health* (2011) 39 VR 373, 448−449 [333] (Bell J).
47 See *Clubb v Edwards* (2019) 267 CLR 171, 199 [64], 200−201 [70] (Kiefel CJ; Bell and Keane JJ).
48 Lau, above n 24, 185.
49 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 61−62 [243] (Bell J) (albeit in the context of discussing the broad construction).

Case note: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17*

*Brodie Dario Logue**

On 4 March 2021, the High Court of Australia (HCA) handed down judgement in the case *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 and Anor*.[1] The case broadly considered whether the first respondent — a self-represented litigant who could not speak English — was denied procedural fairness in his case. In the original jurisdiction *ex tempore* reasons for judgement were delivered in English only, they were not translated for him and he was not provided a translated transcript of proceedings which would have contained those reasons. He claimed that procedural fairness was denied to him because he could not ascertain whether there was a reviewable or appealable error in the original court's reasons for judgement.[2]

Background and issues

Background of the case

The first respondent was a citizen of Pakistan who had pursued long-running proceedings against a decision of a delegate of the Minister's ('appellant') to deny him a Protection (Class XA) visa. His case first failed at the Administrative Appeals Tribunal (AAT), so he launched judicial review proceedings in the Federal Circuit Court of Australia (FCCA) which were heard before Street J, but they were also unsuccessful.[3]

There were issues relating to the delivery of reasons after the hearing by Street J which provided a further avenue of appeal for the first respondent. The hearing in the FCCA occurred on 16 May 2019 and lasted for one hour. At its conclusion Street J delivered *ex tempore* reasons and published orders dismissing the application. While the accompanying orders were translated, the *ex tempore* reasons for those orders were not translated when they were handed down. This was, of course, problematic: the first respondent was self-represented and could not speak English; hence, he could not understand them at the time of their delivery.[4] Additionally, at no point thereafter did the first respondent receive a translated copy of the transcript of proceedings containing the *ex tempore* reasons. However, he did not seek to obtain it.[5] On 18 July 2019, written reasons were subsequently published by Street J, but this occurred over a month after he filed a notice of appeal in the Federal Court of Australia (FCA); that is, well after the expiration of the period within which a notice of appeal has to be filed.[6] It should be noted from the outset, however, that there was time

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1 [2021] HCA 6 (*AAM17*).
2 Ibid 5 [5]−[6] (Steward J).
3 Ibid. See further *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCCA 1567.
4 Ibid 7 [9].
5 Ibid 6 [8] cf 7 [10].
6 Ibid 5−6 [5]−[8].

to amend the appeal between the publication of written reasons and actual hearing of the appeal.[7]

On 6 November 2019, the appeal was heard by Mortimer J in the FCA on procedural fairness grounds. Her Honour allowed the appeal on those grounds.[8] She held, *inter alia*, that failing to translate reasons for judgement to a self-represented litigant who could not speak English, and then not publishing written reasons as soon as possible following the delivery of orders, constituted procedural unfairness.[9] It followed that her Honour considered this was no proper exercise of judicial power and the orders of the FCCA had to therefore be set aside so the matter could be remitted for re-hearing by another judge of that court.[10] Yet, as we know now, the Minister appealed to the HCA. The appeal was allowed.[11]

Summary of issues before the High Court

Overall, there were three interrelated, key issues considered by the HCA:

1. whether the way in which *ex tempore* reasons were handed down by Street J was procedurally unfair, so far as the first respondent was consequently unable to examine whether there was an appealable or reviewable error in his case;[12]

2. collateral to issue (1), whether the subsequent written reasons published by Street J were in fact the true and authentic reasons of the FCCA, given they were published well after the time frame within which the first respondent was required to file a notice of appeal;[13]

3. whether it was necessary for Mortimer J in the FCA to set aside Street J's reasons and remit the case for re-hearing in the FCCA.[14]

Reasons for judgement in the High Court

The newly elevated Steward J wrote the judgement; Kiefel CJ, Keane, Gordon and Edelman JJ agreed with him.[15] Notwithstanding his Honour's acknowledgement that giving adequate and accessible reasons for judgement is an essential tenet of the proper exercise of judicial power,[16] he emphasised that this was not a case where the court was *generally* considering if Street J denied procedural fairness to the first respondent for either failing to give reasons or failing to give adequate reasons.[17] That is to say, the court was not considering some general principle that self-represented non-English speaking litigants are entitled to translated reasons, be they oral or written or a combination of both, as part of their at-large procedural fairness rights. The reasons for this become apparent once one

7 Ibid 7 [10].
8 See *AAM17 v Minister for Immigration, Citizenship, Immigration and Multicultural Affairs* [2019] FCA 1951.
9 [2021] HCA 6, 8 [11].
10 Ibid 9−10 [13].
11 Ibid 23 [46].
12 See ibid 14 [22].
13 See ibid 17−18 [32].
14 See ibid 21 [40].
15 Ibid 1−5.
16 Ibid 10 [14].
17 Ibid 15 [25].

closely observes the procedural history of the case and the facts militating against the first respondent's want for procedural fairness.

Fundamentally, the specific failures of Street J which the first respondent complained of did not fall within the 'range of matters' which the concept of procedural fairness covers.[18] It is established that the doctrine of procedural fairness only relates to the process leading up to a decision and whether unfairness in that process produces a practical injustice that deprives a litigant of a chance at a successful outcome in their case.[19] Therefore, the way in which reasons for a decision are delivered after a hearing — that is, after the close of final submissions — is irrelevant.[20]

Here, the delivery of *ex tempore* reasons occurred after the close of final submissions in the FCCA. It followed that the first respondent could not argue that the delivery of the *ex tempore* reasons deprived him of his chance at a successful outcome in the preceding FCCA hearing.[21] Rather, to argue procedural unfairness, he had to demonstrate that he was deprived of the chance to succeed *in his subsequent appeal* to the FCA.[22] This was an important point of contrast, given the HCA only focused on this appeal rights question, yet Mortimer J allowed the appeal in the FCA on the basis of a much broader range of general procedural fairness principles.[23] Notably, the first respondent did not advance, as appeal grounds, Mortimer J's general finding that procedural fairness would have required Street J to publish translated written reasons as soon as practicable after he gave judgement and not just, presumably, in response to the filing of a notice of appeal.[24]

In view of the fact written reasons were belatedly published by Street J, the first respondent began by contending that the *ex tempore* reasons delivered immediately following the hearing were in fact the main or 'operative' reasons of the court,[25] positing that, because the *ex tempore* reasons were delivered directly following the hearing and contemporaneously with the court's orders, they were the only true account of Street J's reasoning process at the time of decision-making.[26] This allowed him to claim that his full rights of appeal were undermined because those 'operative' *ex tempore* reasons could not possibly be understood by him, nor could he be expected, as a self-represented non-English speaking litigant, to know that he could obtain a transcript containing those reasons. In any event, he argued, he was unable to decipher between the written and *ex tempore* reasons in preparing his appeal, this inability to decipher being sufficient proof *in itself* that Mortimer J was also therefore not in a position to determine which set of reasons were the true reasons of the court.[27]

18 Ibid 14 [22].
19 Ibid.
20 Ibid, citing *Public Service Board of New South Whales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ).
21 Ibid 14 [22].
22 Ibid 12 [18] cf 10 [14]−[15]. See also AAM17, 'First Respondent's Submissions', Submissions in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, P23/2020,13 August 2020 [15]−[17], [25] ('First Respondent's Submissions').
23 Ibid 12 [17], 15 [22].
24 Ibid 12 [17].
25 Ibid 12 [19].
26 First Respondent's Submissions, above n 22, [13]−[15].
27 See especially [2021] HCA 6, 12−13 [20].

Resultantly, the FCA had no choice but to set aside Street J's orders and remit the matter for re-hearing.[28]

His Honour rejected the first respondent's above submissions in their conceptual entirety. He held that, because written reasons were provided and certified by Streets J's associate,[29] they must be regarded as being the *prima facie* authentic reasons for judgement. There is a sole exception to this presumption, but it is only enlivened if a litigant discharges the onus of proving that there is a 'material deviation' between the *ex tempore* reasons and later written reasons. The litigant's inability to decipher alone is not enough. In this vein, his Honour endorsed the principle espoused by Willmer LJ in *Bromley v Bromley*, where his Lordship said that the court would be reluctant to go 'behind the official transcript' to explore any discrepancy between *ex tempore* and subsequent written reasons, unless it could be demonstrated by a litigant that the judge had 'in substance rewritten his judgment'.[30]

Even though the first respondent was not given a transcript of proceedings in the FCCA hearing, it remained that he had sufficient material before him at the time to demonstrate a 'material deviation' in the sense described above. Accordingly, he could have done this by calling for the transcript in the FCA (which he did not do when lodging his appeal)[31] or by making reference to other recordings or materials like counsel's notes or by obtaining evidence from counsel present at the hearing in lieu of such notes.[32] It was also fatal that he did not amend his appeal after the publication of written reasons.[33]

His Honour was persuaded by the fact there is nothing in the FCCA statute or rules[34] which require the Court to translate *ex tempore* reasons for litigants who cannot speak English or publish written reasons.[35] His Honour's conclusion in this respect was supported by the imperative for justice to be done in an efficient manner, as set out in the various parts of the Court's statutes and rules.[36] It was also supported by the nature of the FCCA's jurisdiction as an inferior federal court; hence, in efficaciously exercising that jurisdiction, it is not only appropriate but also in the interests of justice that *ex tempore* reasons are immediately provided and then more carefully written reasons subsequently provided, if appropriate. It was also noted that English is Australia's official language.[37] As explained above, there is only an issue when there is a discrepancy in substance between the two sets of reasons.[38]

In turn, his Honour exposed the first respondent's failure to take full advantage of the FCA rules on appeal, which would have assisted him as both a self-represented and a non-English speaking litigant and also helped him avoid any practical injustice which arose.

28 Ibid 12−13 [19]−[20] cf 20−21 [21].
29 Ibid 7 [10].
30 [2021] HCA 6, 18−19 [32]−[34].
31 Ibid 7 [10].
32 Ibid 17 [31]−[32], 19 [34].
33 Ibid 11 [15].
34 *Federal Circuit Court of Australia Act 1999* (Cth) ss 5, 42, 57, 74, 75; *Federal Circuit Court Rules 2001* (Cth) rr 15.27, 16.01, 16.02.
35 [2021] HCA 6, 15 [26], 17 [29].
36 Ibid.
37 Ibid 16 [27].
38 Ibid 17 [30].

Case law was cited in support of this expectation.[39] Accordingly, he could have extended the time to file his notice of appeal or sought amendment of his appeal before it was heard.[40]

Finally, his Honour was led to conclude that Mortimer J did not need to set aside Streets J's orders and remit the matter, for she could have remedied any practical injustice occasioned by directing the respondent to amend his appeal grounds based on the written reasons or, alternatively, by adjourning the hearing to obtain the transcript of proceedings within which a record of the *ex tempore* reasons would be found.[41]

Conclusion

The HCA has clearly demonstrated its commitment to the doctrinal limits of natural justice. It has also indicated that it is for the courts and the Parliament of Australia to determine whether or not special procedures should be adopted to ensure non-English speaking litigants are given a fairer hearing in the federal court system. There also seems to be support for the principle that appeal courts should cure practical injustices where possible.

39 Ibid 19 [35].
40 Ibid, citing *Federal Court Rules 2011* (Cth) rr 36.05, 36.11(2)(b).
41 Ibid 21 [40]−[41].

Authorisation and accountability of automated government decisions under Australian administrative law

*Samuel White**

The delegation of government decision-making can be a 'practical administrative necessity'[1] for effective governance, due to the time and resource constraints that public agencies face on a day-to-day basis. Due to these very same resource constraints, there is significant interest in deploying automated tools to assist or take over government decision-making processes. The promise of automation, in theory, includes increased efficiencies and cost savings for government, as well as more prompt service for the public.[2]

Automated decision-making processes have been noted to have caught administrative lawyers off-guard,[3] and significant public attention has been placed on these tools in Australia due to questions about the fairness and legality of automated processes — concerns that are central to the concept of administrative justice.[4] This public concern was perhaps most obvious in response to Centrelink's 'Robodebt' online compliance initiative, in which automated debt collection notices were sent to social security payment recipients who purportedly under-declared their income. The calculation of these debts was found to be deficient in a test case that found a Robodebt decision to be unlawful on grounds of irrationality.[5] The Australian Government, subsequently, has made the decision to refund all debts levied under the scheme at a cost of $720 million.[6]

There has been much academic work on the automation of administrative decisions in Australia. The highly pertinent work of Ng and O'Sullivan[7] considered the Federal Court's decision in *Pintarich v Deputy Commissioner of Taxation*[8] (*Pintarich*) and argued that there must be a 'modern interpretation of existing administrative law principles' that does not exclude automated decisions from the scope of review under the *Administrative*

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1 *Re Reference; ex parte D-G Social Services* (1979) 2 ALD 86.

2 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation — When is a Decision a "Decision"?' (2019) 26 *Australian Journal of Administrative Law* 21, 21.

3 Justice Melissa Perry, 'iDecide: Administrative Decision-Making in the Digital World' (2017) 91 *Australian Law Journal* 29−34, which developed on the earlier work of Justice Melissa Perry, 'iDecide' (Speech, Cambridge University, Cambridge Centre for Public Law Conference, 2014); see further considering the specific issue of the delegation of administrative decisions to an automated decision-maker and whether current statutory authorisations to employ automated systems stand up to existing Australian administrative law principles.

4 Robin Creyke, 'Administrative Justice — Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705.

5 Orders of 27 November 2019 by Davies J in *Amato v Commonwealth* [2019] FCA.

6 Luke Henriques-Gomes, 'Robodebt: Government to Refund 470,000 Unlawful Centrelink Debts Worth $721m', *The Guardian* (online, 29 May 2020) <https://www.theguardian.com/australia-news/2020/may/29/robodebt-government-to-repay-470000-unlawful-centrelink-debts-worth-721m>.

7 Ng and O'Sullivan, above n 2.

8 *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79.

Decisions (Judicial Review) Act 1977 (Cth). Dominique Hogan-Doran SC[9] and Justice Melissa Perry[10] have also written on the key principles of administrative law that will apply to automated decisions and the potential grounds of review that could be made against an automated decision.

This article considers the specific issue of whether current statutory authorisations for the use of automated systems stand up to existing Australian administrative law principles, as well as potential risks posed by the current approach. It is necessary to expand upon how automated decisions are made before considering the legal principles that govern delegations and authorisations. The article examines existing attempts to deal with the use of automated systems, which deem an automated system to be one made by a senior government official; and considers how these provisions will be construed and whether any risks exists. Finally, the article presents observations and conclusions.

Automated decision systems in government

Automated decision-making systems are becoming more prevalent in government processes around the world, in areas as diverse as the administration of social security, taxation, criminal sentencing and migration.[11] These systems are most likely to be deployed in branches of government that must cope with a high caseload volume, as well as repetitive assessments against prescriptive criteria.

However, as will be shown below, automated systems can vary in nature, which is likely to have implications for the manner in which they are authorised or delegated, as well as the risks that might be posed by indiscriminate use of those systems.

How are automated decision systems used in government?

Automated systems can be designed in different forms and may employ decision-making processes that rely on explicitly coded logic or logic that is developed through machine learning techniques.

Expert systems have been used for a number of decades[12] and typically consist of pre-programmed rules[13] that recommend a particular outcome to users of the system when a set of facts are input. For example, medical expert systems may allow a physician to search or input certain observations of a patient into the system, and the system can provide a provisional diagnosis based on those input facts. A legal expert system may similarly provide a legal 'diagnosis', based on input facts, by identifying whether any legal issues arise or whether the elements of a cause of action are likely to be met.

9 Dominique Hogan-Doran SC, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13 *The Judicial Review* 1, 9.

10 Perry, above n 3, 29, 30.

11 Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *Modern Law Review* 425.

12 See Kevin Ashley, 'Case-Based Reasoning and its Implications for Legal Expert Systems' (1992) 1 *Artificial Intelligence and Law* 113; Paul Hynes, 'Doctors, Devices and Defects: Products Liability for Defective Medical Expert Systems in Australia' (2004) 15 *Journal of Law, Information and Science* 7.

13 Zalnieriute, Moses and Williams, above n 11, 433.

Typically, this generation of expert system relied on pre-programmed rules or symbolic logic[14] that operated in a deterministic manner. Critically, the logic which these expert systems followed can usually be traced back to the explicit coding choices of the software developer.[15]

By contrast, software that employs machine learning techniques is able to make a prediction or decision about something in the world without the need for human intervention.[16] Using this programming technique, software engineers enable the algorithm to learn from historical data, such as past cases, fed to it by example and through its own trial and error experience. On the basis of this learned experience, the algorithm programs its own internal decision logic as to what the optimal way to complete a task is.

Machine learning is very good for very specific tasks. Machine learning algorithms use probabilistic reasoning and can be implemented so that they recommend or choose a particular course of action based on a particular degree of confidence.

These are algorithms that have an adaptive quality,[17] as they can develop their recommendations, and improve their outputs, over time as they are exposed to more training data. Through the development of the algorithm, a large amount of data is used to teach the algorithm how to come to a decision while reducing the likelihood of predicting or recommending a false positive or false negative.

Machine learning software is particularly powerful at increasing the efficiency of decision-making processes and has been implemented by governments outside of Australia. One particularly well-known example is COMPAS, which is a machine learning system that conducts a recidivism risk assessment for the purposes of criminal sentencing by predicting an individual's likelihood of reoffending.[18] The factors which lead to a prediction that an individual has a high likelihood of reoffending are notoriously opaque and restricted by intellectual property rights;[19] however, the system has received widespread criticism for correlating factors such as race or postcode with a risk of recidivism, without taking into account the causal factors and systemic inequalities that may lead to recidivism rates within a minority community.[20]

14 Hynes, above n 12.
15 David Vladeck, 'Machines Without Principals: Liability Rules and Artificial Intelligence' (2014) 89(1) *Washington Law Review* 117.
16 Andreas Matthias, 'The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata' (2004) 6 *Ethics and Information Technology* 175.
17 Emad Dahiyat, 'Intelligent Agents and Liability: Is It a Doctrinal Problem or Merely a Problem of Explanation?' (2010) 18(1) *Artificial Intelligence & Law* 103, 106.
18 Cynthia Rudin, Caroline Wang and Beau Coker, 'The Age of Secrecy and Unfairness in Recidivism Prediction' (2020) 2(1) *Harvard Data Science Review* 1.
19 Zalnieriute, Moses and Williams, above n 11, 441.
20 Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, 'Machine Bias', *ProPublica* (online, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

However, another critical factor that may determine the risk profile of using automated systems for government decisions is the *manner* in which the software is deployed and the extent to which a human has input into the decision-making process.[21]

Automated systems may assist government officials to make administrative decisions to a variety of different degrees. For example, their level of input may include making the decision; recommending a decision to the decision-maker; guiding a user through relevant facts, legislation and policy; and providing useful commentary as a decision support system.[22]

A general distinction may be drawn between systems that are deployed to provide mere decision support to a human decision-maker and systems that are deployed so that there is no human input into the decision at all. Of course, systems that arrive at an administrative decision or levy a penalty without human input have been in existence for some time. For example, speed monitoring cameras have been used on our roads for many years. They automatically detect potential speeding offences, and fines may be subsequently issued to the address of a vehicle's registered owner. This use of an automated system is largely uncontroversial and, while there have been occasional malfunctions, this does not cause a significant risk to the rights and interests of individuals in the general public.

Perhaps of more concern is where automated systems are implemented without human oversight in realms of significant consequence to the individual concerned. For instance, in 2018 the Parliamentary Joint Committee on Human Rights raised concerns about the use of automation to make decisions about who is a 'non-citizen' and application of the 'public interest test' under the *Migration Act 1956* (Cth).[23] In the Parliamentary Joint Committee on Human Rights Report 7 of 2018, the committee noted:

> it appears that under the 2018 instrument some matters which could be subject to decision by computer program may involve complex or discretionary considerations. Specifically, for the minister to determine whether a person is an 'eligible non-citizen' involves a decision as to whether the minister thinks such a determination would be in the 'public interest'. By contrast, it is noted that, in relation to other provisions of the Migration Act that involve consideration of the 'public interest', the Migration Act has exempted such determinations from being 'designated migration law' (that is, the decision cannot be made by computer). It is unclear why subsection 72(2)(e) of the Migration Act is not similarly exempted from the 'designated migration law' or excluded from the 2018 instrument.[24]

The Minister for Immigration responded by clarifying that the Minister's personal decision-making powers are not automated through departmental computer programs and that the computer program could only *grant* the relevant visa — it could not make a decision to *refuse*. The Minister clarified that:

21 Anna Huggins, 'We Need Human Oversight of Machine Decisions to Stop Robo-debt Drama', *The Conversation* (online, 2 July 2019) <https://theconversation.com/we-need-human-oversight-of-machine-decisions-to-stop-robo-debt-drama-118691>.

22 Australian Government, *Automated Assistance in Administrative Decision-Making: Better Practice Guide* (2007) 4.

23 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 7 of 2018); Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 11 of 2018).

24 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 7 of 2018) 7–8, [1.40]−[1.41].

> In instances where the online application 'hits' against risk systems, or where binary responses provided by an applicant do not support an immediate auto-grant decision, the computer program will refer the BV [bridging visa] application to a departmental decision maker to manually decide upon the application. The computer program is designed to grant BVs in association with substantive applications in the majority of straightforward cases. Instances in which the BV application cannot be immediately granted by the computer program, including where there are public interest considerations, are always considered by a delegate or the Minister.[25]

This position is still maintained by the Department of Home Affairs.[26] It does not seem far-fetched, however, that automated decision-making can and will extend to deny rights, such as an automatic visa cancellation for not being of good character.[27] In such high-stakes cases, there should arguably be a human that is charged with overseeing an automated system recommendation and, following careful consideration, decides to affirm or reject the recommendation. This human intervention is critical to minimise risk and to provide a degree of accountability for automated decisions so that affected individuals may have a right to challenge the decision or, at a minimum, receive an explanation as to the reasoning behind an administrative decision. This contention is discussed further below.

However, there are definitive challenges with respect to machine learning. One such challenge is the nature in which machine learning is to be trained. The human mind is a complex and barely understood machine. Being able to crack how the human mind learns and being able to apply that process to algorithms is an ongoing challenge. A person is uniquely designed to be able to take a small piece of data and be able to extrapolate that data to identify similarities. If a child was shown a picture of a kangaroo (even a non-realistic one), they can either immediately or quickly learn to identify another example of a kangaroo. Current machine learning algorithms require large amounts of verified data to be able to do the same thing to the degree of a child. This creates a problem with designing algorithms — there is a need to have large datasets, and a human to verify that dataset, to properly train and verify the output of the algorithm.

The previously mentioned supervised learning is an intensive method of teaching an algorithm as there are four classifications[28] of the algorithm identifying inputs:

- **True positive —** correct identification of a correct input
- **True negative** — correct identification of an incorrect input

25 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 11 of 2018) — responses from legislation proponents, [1.43].

26 Australian Government, Department of Home Affairs, 'The Administration of the Immigration and Citizenship Program' (Background Paper, 4th ed, February 2020) 28 [173] states: 'Importantly, no adverse visa decision is ever made by a machine. ... The officer might be prompted and assisted by the latest technology and automated analytical tools, but it is a person who will be the decision-maker'. This so-called golden rule is discussed in Jake Goldenfein, 'Algorithmic Transparency and Decision-Making Accountability: Thoughts for Buying Machine Learning Algorithms' in Cliff Bertram, Asher Gibson and Adriana Nugent (eds), *Closer to the Machine: Technical, Social, and Legal Aspects of AI* (Office of the Victorian Information Commissioner, August 2019) 41, 48.

27 Such as those made under s 501 of the *Migration Act 1958* (Cth); see Samuel White, 'Godlike Powers: Unfettered Ministerial Discretion' (2020) 41(1) *Adelaide Law Review* 1−38.

28 Machine Learning Crash Course, 'Classification: True vs False and Positive vs Negative' (Web Page) <https://developers.google.com/machine-learning/crash-course/classification/true-false-positive-negative>.

- **False positive** — incorrect identification a correct input
- **False negative** — incorrect identification of an incorrect input.

The false negative and positive are the key areas that must be verified by the supervisor. This is usually done through the use of validated datasets and identifying how often the algorithm produces a false response. Depending on the classification method used (such as decision tree or Bayesian[29]) different levels of input will be required. As an example, a decision tree is simple and fast and supports incremental learning, but it requires very accurate data and a long training time to get an effective output. A machine learning technique that is trained on particular labelled datasets or data domain may not be suitable for another dataset or data domain given that the classification may not be robust over different datasets or data domains.[30] This means that there would need to be an algorithm developed for each area, especially if there is a narrow output required.

Kline and Kahneman created a theory on the validation of the environment when it came to being able to intuitively predict an outcome in an environment based on the regularity of variables.[31] This idea breaks down intuition and how it can and cannot be applied to different environments. Two extremes of this scale would be firefighting and the share market. A firefighter with many years of experience can use their intuition to determine whether it is safe to enter a building or even when to stop fighting a fire. This can be based on the number of variables that determine how a fire acts — this is easier to validate and a person who experiences a large number of fires can learn to see what variables must exist to determine how it will act. This is where fire modelling is used to determine flashpoints and how a fire will act[32] and can determine the action taken. This can be classified as a high validation environment. The stock market, on the other hand, would be considered low validation, as there are so many variables from the economic to human behaviour it is currently impossible to develop intuition about the market — guessing is just as accurate as experience. Applying this idea to machine learning brings up the question: can we ensure that all the variables that a human would consider can be plugged into an algorithm to give us the best decision?

Equally, bias in machine learning is a significant issue that can have long-term effects on the organisation.[33] An algorithm is developed with a particular outcome in mind, but the bias of those who develop the algorithm through the design process and how it is trained can affect

29 H Bhavsar and A Ganatra, 'A Comparative Study of Training Algorithms for Supervised Machine Learning' (2012) 2(4) *International Journal of Soft Computing and Engineering* 2231−2307 <https://www.researchgate.net/profile/Amit_Ganatra2/publication/265068741_A_Comparative_Study_of_Training_Algorithms_for_Supervised_Machine_Learning/links/5780b65f08ae9485a43ba431.pdf>.

30 S Suthaharan, Big Data Classification: Problems and Challenges in Network Intrusion Prediction with Machine Learning' (2014) 41(4) *ACM SIGMETRICS Performance Evaluation Review* 70−73 <http://delivery.acm.org.wwwproxy1.library.unsw.edu.au/10.1145/2630000/2627557/p70-suthaharan.pdf?ip=149.171.67.148&id=2627557&acc=ACTIVE%20SERVICE&key=65D80644F295BC0D%2EB-811333C2AA88C82%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&__acm__=1575083898_ec66f9123f4f58ee8fa5f9d7406aa94c>.

31 'Kahneman and Klein On Expertise', *Judgment and Decision Making* (Blog, 28 July 2013) <https://j-dm.org/archives/793>.

32 E Ronchi and D Nilsson, 'Fire Evacuation in High-rise Buildings: A Review of Human Behaviour and Modelling Research (2013) 2(1) *Fire Science Reviews* 7.

33 Suraj Acharya, 'Tackling Bias in Machine Learning', *Insight Data Science* (online), 19 March 2019 <https://blog.insightdatascience.com/tackling-discrimination-in-machine-learning-5c95fde95e95>.

how it produces an output. If it is trained on only data that soldiers who commit assault are not promoted and have been in for three years then it will have a bias against soldiers who meet that criteria regardless of other variables.

There is opportunity in bias if it is deliberately introduced in a controlled way. Inductive bias can be used to help develop an algorithm that can deal with new situations. This is a human trait — we can come to a conclusion without knowing all the information about a situation. For a machine to do this, an inductive leap would need to be possible[34] whereby it can deliberately invoke biases for choosing one generalisation of the situation over another.

A final issue with the utilisation of machine learning is the transparency and consistency of the data that is being used. This can make it hard to challenge, especially for individuals who lack technical or hardware knowledge.[35] Unless you are a software engineer, how are you going to understand how the algorithm got the decision it did? The current system of human decision-making can often be perplexing, but you are able to find the individual and unpick their logic. It is much harder to unpick the logic of hundreds of lines of computer code. This creates a fear of the unknown — after all, who do you hold to account for a decision that was created by an algorithm? These are issues that deserve thorough attention, although they are outside the scope of this article.

Authorised automated decision-making under Australian administrative law

It is critical to ensure that automated tools which assist the government decision-making process are designed in a way which will ensure proper outcomes under the principles of administrative law. There are requirements under Australian administrative law that govern who may lawfully make an administrative decision. But before looking at who is permitted to make an administrative decision, it is necessary to look at just exactly what a decision is.

Pintarich *and the reviewability of automated decisions*

Decisions 'of an administrative character' are sometimes difficult to distinguish from legislative decision. As the Full Court of the Federal Court noted in *Federal Airports Corporation v Aerolineas Argentinas*,[36] general tests for characterisation of acts — as either administrative, or legislative — are unfortunately of limited utility and viability. Administrative and legislative acts can be difficult to differentiate. Accordingly, they must be characterised on *context and subject matter*. The relevance of this is that, where decisions are made by artificial intelligence (AI) and increasingly are made by AI, it might be that there is initial difficulty in the justiciabilty of such decisions.

34 TM Mitchell, 'The Need for Biases in Learning Generalizations' (Department of Computer Science, Laboratory for Computer Science Research, Rutgers University, 1980) 184−191 <http://dml.cs.byu.edu/~cgc/docs/mldm_tools/Reading/Need%20for%20Bias.pdf>.

35 See Australian Administrative Review Council, *Automated Assistance in Administrative Decision-making* (2004). See further M Perry and A Smith, 'iDecide: The Legal Implications of Automated Decision-making' [2014] *Federal Judicial Scholarship* 17 <www.austlii.edu.au/au/journals/FedJSchol/2014/17.html>.

36 (1997) 76 FCR 582.

It would be remiss to not reflect on the topic of government automated decisions without discussing the recent *Pintarich*[37] decision by a Full Court of the Federal Court of Australia. The majority found that a decision had not been made for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) because, even though an automated tool has issued an outcome letter to a taxpayer, the Deputy Commissioner had not undertaken a process of deliberation, assessment or analysis.[38] However, we expect that this case is likely to be distinguished or departed from over time, as government administration will increasingly rely on automated systems and decisions.

A detailed discussion of the *Pintarich* decision is outside of the scope of this article. However, Ng and O'Sullivan[39] have considered the *Pintarich* decision in depth. They argue that there must be a 'modern interpretation of existing administrative law principles' that does not exclude automated decisions from the scope of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The author agrees with the arguments of Ng and O'Sullivan — administrative decisions should not be immune from review solely because they have been delivered through a computerised medium.

Current Australian principles governing authorised decision-makers

There are clear requirements in Australian administrative law that govern who is permitted to exercise administrative power. These requirements stem from the principle of legality — the principle that government agents require a positive justification, or legal authority, for any action undertaken, particularly where such action has a detrimental effect on the rights or legal interests of an individual.[40] This principle has a number of functions, including the fostering of accountability and transparency of government action; and upholding the rule of law.

The validity of an administrative decision, in part, depends on whether it has been made by a particular person that is authorised in statute.[41] The historical principle is encapsulated in the Latin maxim, *delegatus non potest delegare* — one who is vested with a statutory power must exercise it personally rather than delegate it.[42] The underlying rationale for this principle is to ensure that only individuals whom Parliament has empowered with decision-making authority exercise the relevant public power.

The implications for failing to understand the self-imposed legislative limitations could result in an *ultra vires* decision and the decision being challenged in judicial review proceedings. Specifically, under s 5(1)(c) of the Administrative Decisions (Judicial Review) Act,[43] a decision may be challenged on the ground that 'the person who purported to make the decision did

37 *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79 (Moshinsky and Derrington JJ; Kerr J dissenting).
38 Ibid [56].
39 Ng and O'Sullivan, above n 2.
40 Perry, above n 3, 31. See also Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012) 389.
41 *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex Parte Director-General of Social Services* (1979) 2 ALD 86 [458] (Brennan J).
42 See John Willis, 'Delgatus Non Potest Delegare' (1943) 21 *Canadian Business Review* 257.
43 *Administrative Decisions (Judicial Review) Act 1977* (Cth).

not have jurisdiction to make the decision'. However, in practice, as Robin Creyke observes, the modern reality in large government agencies is that it is 'seldom practical for a principal nominated in legislation to personally make all decisions'.[44] As a result, a number of principles have emerged in statute and in case law that enable the nominated authority to delegate their decision-making power.

The case law that governs permissible delegations of administrative power recognise a distinction between *express* delegations and an *implied* authority to delegate. In relation to express delegations, the validity of an administrative decision turns upon 'the identity of the authority and the doer of the act'.[45] Typically, a statute will expressly provide that the principal decision-maker is authorised to delegate the power to another person,[46] and this is executed by way of a written delegation instrument.[47]

Implied authorities to delegate may arise where the power is not expressly delegable, but the nominated person 'could not have been expected by the Parliament to have exercised it personally in the multitude of instances where its exercise would be required'.[48] Immigration matters come to mind here — particularly instances where a visa is to be revoked.[49] The key question in relation to implied delegations is whether a power consigned by statute to an authorised person requires the power to be personally exercised by its designated repository or a delegate.[50] This is typically a matter of statutory construction[51] and depends on the nature of the power itself and other circumstances of the case.[52] Such circumstances may include that Parliament could have assumed knowledge of a 'practical administrative necessity' that required the power to be delegated[53] or whether the power in question would adversely affect the rights of individuals.[54]

The current approach to authorising automated government decisions

A key problem exists with the application of these delegation principles to automated systems, particularly where an automated system has been deployed in a way that it makes decisions with human input. Specifically, there is no human 'decision-maker' to whom an express delegation may take place.[55] To navigate this state of affairs, in the early 2000s the legislature sought to pre-empt this issue[56] by deeming any decision made by a computer

44 Creyke and McMillan, above n 40, 456.
45 *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex Parte Director-General of Social Services* (1979) 2 ALD 86, 93 (Brennan J).
46 See, eg, *Migration Act 1958* (Cth) s 496.
47 Creyke and McMillan, above n 40, 456.
48 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 506, 563 (Lord Greene MR); *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex Parte Director-General of Social Services* (1979) 2 ALD 86, 93 (Brennan J).
49 *Migration Act 1958* (Cth) s 501.
50 *Pattenden v Commissioner of Taxation* [2008] FCA 1590 [42] (Logan J).
51 *O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1 [10] (Gibbs CJ).
52 Ibid; *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86, 93 (Brennan J).
53 *Pattenden v Commissioner of Taxation* [2008] FCA 1590 [42] (Logan J).
54 *O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1 [12] (Gibbs CJ).
55 Perry, above n 3, 31.
56 See, eg, *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (Cth).

to be one made by a senior member of the executive, typically either a minister or the departmental secretary.[57] This is in accordance with the principle of responsible government and places the risk of any decision on the relevant minister. There are an increasing number of legislative provisions that delegate authority for decision-making to computers.[58] For example, s 495A of the *Migration Act 1956* (Cth) provides that:[59]

> (1) The Minister may arrange for the use, under the Minister's control, of computer programs for any purposes for which the Minister may, or must, under the designated migration law:
>
> (a) make a decision; or
>
> (b) exercise any power, or comply with any obligation; or
>
> (c) do anything else related to making a decision, exercising a power, or complying with an obligation.
>
> (2) The Minister is taken to have:
>
> (a) made a decision; or
>
> (b) exercised a power, or complied with an obligation; or
>
> (c) done something else related to the making of a decision, the exercise of a power, or the compliance with an obligation;
>
> that was made, exercised, complied with, or done (as the case requires) by the operation of a computer program …

The *Migration Act 1958* (Cth) further provides that, where the computer malfunctions, the minister may substitute a computer-based decision with one that is more favourable to the applicant.[60] Ng and O'Sullivan observe that these provisions constitute an 'accountability structure that involves an individual', which might be interpreted as an intent on behalf of Parliament to preserve review rights in relation to automated decisions.[61] Furthermore, the Administrative Review Council found that, where a computerised system is simply used as a decision support tool for a human officer who makes the actual decision, it would appear that such a legislative authority is not necessary.[62]

Provisions such as s 495A of the Migration Act provide a legal authorisation[63] for the use of automated computer systems in the decision-making process. Specifically, the provisions grant the minister with a power to arrange for the use of computer programs for the making of a decision, where that takes place under the minister's control. This is despite the aforementioned golden rule.

57 See, eg, *Social Security (Administration) Act 1999* (Cth) s 6A, which provides that '[t]he 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' and that a 'decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary'.

58 See *Social Security (Administration) Act 1999* (Cth) s 6A, (deems such computer-generated decisions to be made by the Secretary); or the *Therapeutic Goods Act 1989* (Cth) s 7C.

59 *Migration Act 1958* (Cth) s 495A.

60 Ibid s 495B.

61 Ng and O'Sullivan, above n 2, 31.

62 Administrative Review Council, above n 35, pt 5.1.

63 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(d).

However, it may be uncertain whether these provisions provide an authorisation for the use of automated systems where a minister or secretary does not have 'control'[64] over a *specific* decision — particularly where there is no human input before the decision is communicated to the individual and where the system relies on adaptive machine-learned logic. The term 'under the minister's control' could be interpreted as requiring that the minister have either *organisational* control over the department that implements the automated system or control over how an automated system approaches a *particular decision*, and exercise of power or an obligation. This would be a matter of statutory interpretation for the courts.

When undertaking an exercise of statutory interpretation, a court will seek to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.[65] This will principally involve a consideration of the literal meaning of the text but may also require consideration of the context and purpose of the provision.[66] Unfortunately, the Explanatory Memorandum relevant to s 495A of the Migration Act does not indicate what level of control Parliament may have intended a minister to hold over computer-based decision-making systems.[67] Furthermore, as the Bill was passed in 2000, it is unlikely that the legislature contemplated that automated systems could make decisions on the basis of an adaptive logic, as is the case with the current generation of machine learning based systems that have become widespread over the past five years. In light of the above, there is perhaps a risk that the implementation of a machine learning system to make administrative decisions, without any human input, could be invalidated on the basis that it is not used 'under the minister's control'.

In interpreting the requirement for computerised decision-making systems to be 'under the minister's control', a possible approach the courts could adopt would be to require a level of control that is *proportionate* to potential harms of the decision being made. In particular, a higher level of control and oversight should be due for decisions that are likely to have a major impact on the rights and interests of individuals (for example, a criminal sentencing decision). This higher level of control could constitute a human approval of a decision by a government officer or a specific amount of testing to validate the systems' results and legal alignment with statute.

Equally, as found within the *Therapeutic Goods Act 1989* (Cth), it might be that the oversight of the relevant human — in this case, the secretary — is statutorily barred from correcting a decision made by a computer:

> **7C 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 this Act or the regulations.
>
> (2) A decision made by the operation of a computer program under such an arrangement is taken to be a decision made by the Secretary.

64 Ng and O'Sullivan, above n 2, 31.
65 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.
66 Ibid.
67 Explanatory Memorandum, Migration Legislation Amendment (Electronic Transaction and Methods of Notification) Bill, 14 [64]–[69].

(3) The Secretary may substitute a decision (the *substituted decision*) for a decision (the *initial decision*) made by the operation of a computer program under such an arrangement if the Secretary is satisfied that the initial decision is incorrect.

(4) However, the substituted decision may only be made before the end of the period of 60 days beginning on the day the initial decision is made.

Sixty days is perhaps sufficient time currently for a workload managed by humans, at a set rate of possible decisions a day. However, when automated, this workload can infinitely expand, and there is significant risk in maintaining a human-centric time frame to supplementing decisions, when the statute clearly envisages automated decision-making capability.

Current approach: risks and fixes

The current 'deemed decision' approach poses a number of risks, including:

(a) that there is lack of clear accountability for automated decisions, which may erode the rule of law in Australia; and

(b) that this lack of accountability may lead to organisational and national risks for improperly supervised automated decisions.

A drawback of the current approach is that it offers a limited level of accountability for automated decisions, as well as poor transparency as to how an automated decision has been reached. Both limbs have the potential to erode fundamental aspects of the rule of law.[68] To the first limb: if an automated government decision is deemed to be made by the secretary or minister, who may or may not be aware of a particular decision, it is not clear who holds ownership of that decision. A lack of clear ownership can have multiple socio-legal effects. First, the decision-maker may be incorrectly identified, making review and appeals difficult for the affected individual (thereby reducing confidence in the system and raising discontent with government). Secondly, even when the decision-maker is identified, if the reasons given for the decision are not in a manner that is intelligible, finding grounds of appeal or jurisdictional error might also be impracticable — indeed, it might take machine learning to identify jurisdictional errors in the future. Even though a decision made by an algorithm has the potential to, on its face, be *more* transparent (in that the actual reasons, relevant and irrelevant considerations included, will be visible) it still remains a large point of risk. One solution which seems rather common sense is to ensure that reasons given by algorithms are in a manner that is comprehensible — 'plain English' in its most basic meaning.

Furthermore, leaving the review or overturning of automated decisions to a high-ranking government official such as the secretary or minister is unlikely to be a scalable approach in the long term, particularly as an increasing number of decisions in government departments are processed by automated means. It might that, just as implied delegation has come to be accepted, implied review by algorithms may have to occur. Such a process is known as adversarial machine learning — although it is similar to the idea of 'let us make a super super AI to watch this super AI'. An easier process is to create a 'dumb AI' system that randomly

68 Zalnieriute, Moses and Williams, above n 11.

audits the decisions made. It does not seek to improve the process but simply, like a random number generator, takes decisions made and offers them for human approval.

A preferable approach could be to implement, by statute, a requirement that certain government officials hold a delegable obligation of 'independently justifying automated decisions',[69] where a provision requires discretionary decision-making and is likely to have a high impact on the rights and interests of individuals. Such an approach could have a number of benefits. First, it would ensure that an accountable person reviews the output of an automated system and may provide a check and balance against systems that may be malfunctioning or may be operating with improper training data (that is, data bias). More broadly, it would confine and structure the use of automated systems that can encroach on fundamental rights and interests[70] and promote the ongoing consideration of whether a provision is amenable to be automated and whether the system is of a suitable quality to be used in that case. Finally, it would have an additional benefit of providing an avenue for transparency, in that the human reviewer would have the opportunity to provide reasons for the decision being made.

Without this, there is potential that the current approach cannot assure an appropriate level of oversight over automated decisions. There are both organisational and national risks to a lack of accountability and oversight. At an organisational level, there is the potential for a department to suffer reputational harm, as well as financial harm, if automated decisions are executed on a widespread scale without sufficient oversight in a department. At a national level, there is the possibility that there is a loss in trust in government in a broader sense.

Conclusion

Under such an esoteric maze of uncertainties, it is not unreasonable that governmental accountability and transparency will be lost. Without clear authorisations and structure in the legislation, it is likely that individuals will, in the face of an apathetic Leviathan (as Hobbes would know it), simply accept a decision rather than believe they can contest it. This was by all accounts the logic of many individuals affected by Robodebt.

What is the solution then? There are many, and looking to other countries is perhaps the best option. In Sweden, it is clear that 'a human (must) confirm and take responsibility for each decision'. This reflects not only the European Union's recognised right to not be subject to automated decision-making but would also appear an approach most in line with the Australian Government's 'golden rule'. Leaving legislation open-ended in a bid to preserve flexibility has some benefits in areas that require it due to their quick evolution — such as pandemic responses. Administrative decision-making, with its emphasis on the individual, is not one.

69 Ibid 445.

70 Creyke and McMillan, above n 40, 466. The comments of Professors Creyke and McMillan were made in relation to the arguments for public law delegation principles; however, the author contends that these arguments would also be relevant for the development of clearer accountability principles for automated decisions.