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Recent developments

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Australia signs the Singapore Convention on mediation

On 10 September 2021, the government signed the *United Nations Convention on International Settlement Agreements Resulting from Mediation*, also known as the Singapore Convention. Australia is the 55th signatory to the Singapore Convention. Other signatories include the US, China, Singapore and the Philippines.

The Convention is a multilateral treaty which establishes a uniform framework for the enforcement of international settlement agreements resulting from mediation, enabling disputing parties easily to enforce and invoke settlement agreements across borders, essentially enabling local courts to be bound to enforce a settlement agreement reached in an international commercial mediation.

The signing of the Convention reinforces the government's commitment to mediation as a method of international commercial dispute resolution. It is a significant milestone in Australia's development of its international dispute resolution framework and in increasing access to justice in commercial disputes, said the Attorney-General, the Hon Michaelia Cash MP.

'A widely adopted Singapore Convention will promote efficiency in the use of judicial resources by encouraging parties to resolve their cross-border disputes outside of courts.'

The Convention ensures that privately mediated settlement agreements are able to be readily recognised by law, said the Minister for Foreign Affairs, the Hon Marise Payne.

The government will now begin work on implementing the Convention in Australia.

<https://www.attorneygeneral.gov.au/media/media-releases/australia-signs-singapore-convention-mediation-30-september-2021>

Government welcomes interim preliminary interim report of the National Commissioner

The preliminary interim report of the interim National Commissioner for Defence and Veteran Suicide Prevention was tabled in Parliament on the 29 September 2021.

The interim National Commissioner, Dr Bernadette Boss CSC, commenced her work on the Independent Review of Past Defence and Veteran Suicides on 16 November 2020. This report includes Dr Boss's preliminary findings and initial recommendations and will form an important part of the work of the Royal Commission into Defence and Veteran Suicide, which was established in July 2021.

The report examines issues related to Australian Defence Force member and veteran wellbeing, mental health and suicide and makes findings on prevalence, risk and protective factors. The report also highlights areas which require closer examination and change in this area.

In preparing the report, the interim National Commissioner conducted 36 private meetings with individual families, defence members and veterans and held 29 roundtables with more than 150 ex-service members and support organisations. Extensive information and documents produced by the Department of Veterans' Affairs and the Department of Defence relating to policies, practices and information about specific cases was also considered.

The Attorney-General, the Hon Michaelia Cash MP, welcomed the report as invaluable to the government in preventing future deaths by suicide in the veteran community as well as in assisting the Royal Commission as it commences its own inquiries.

The Veterans' Affairs and Defence Personnel Minister, the Hon Andrew Gee MP, indicated that the Department of Veterans' Affairs and the Department of Defence have already been directed to commence reforms in light of Dr Boss's recommendations, even before the conclusion of the Royal Commission.

<https://www.attorneygeneral.gov.au/media/media-releases/government-welcomes-interim-national-commissioners-preliminary-interim-report>

Appointment of Deputy Chief Judges of the Federal Circuit Court and Family Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of Deputy Chief Justice Robert McClelland as Deputy Chief Judge (Family Law) of the Federal Circuit and Family Court of Australia (FCFC) and the appointment of Judge Patrizia Mercuri as Deputy Chief Judge (General and Fair Work) of the FCFC.

Deputy Chief Justice McClelland has been appointed to the Sydney Registry and will commence on 17 September 2021. He was appointed Judge of the FCFC (Division 1) (formally the Family Court of Australia) in 2015 and elevated to Deputy Chief Justice in 2018.

Judge Mercuri has been appointed to the Melbourne Registry and will commence on 17 September 2021. Since 2017, she has served as a Judge of the FCFC (Division 2) (formerly the Federal Circuit Court of Australia).

In these roles, Deputy Chief Justice McClelland and Judge Mercuri will support the Chief Judge, Justice William Alstergren, in ensuring that matters in each of these jurisdictions are managed efficiently and effectively.

We congratulate Deputy Chief Justice McClelland and Judge Mercuri on their appointments.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-deputy-chief-judges-federal-circuit-and-family-court-australia>

Appointment of Human Rights Commissioner

The Attorney-General, the Hon Michaelia Cash MP, has announced the appointment of

Ms Lorraine Finlay as the new Human Rights Commissioner, responsible for protecting and promoting traditional rights and freedoms in Australia.

Ms Finlay will commence her appointment on 22 November 2021 for a five-year tenure, replacing former Human Rights Commissioner, Edward Santow.

Ms Finlay holds a Bachelor of Arts and a Bachelor of Laws from the University of Western Australia. She has a dual Masters in Law and the Global Economy (concentrating on Justice and Human Rights) from New York University School of Law and in International & Comparative Law from the National University of Singapore. Ms Finlay is a Senior Human Trafficking Specialist with the Australian Mission to the Association of Southeast Asian Nations (ASEAN), Department of Foreign Affairs and Trade. She has also been an adjunct senior lecturer at the University of Notre Dame Australia since 2017 and a lecturer at Murdoch University's School of Law since 2010. Prior to this, Ms Finlay was a State Prosecutor with the Officer of the Director of Public Prosecutions for Western Australia.

We congratulate Ms Finlay on her appointment.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-human-rights-commissioner-5-september-2021>

Commencement of the Federal Circuit and Family Court of Australia

The Attorney-General, the Hon Michaelia Cash MP, has announced the commencement of the new Federal Circuit and Family Court of Australia (FCFC), in line with the *Federal Circuit and Family Court of Australia Act 2021* and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Arrangements) Act 2021*, which passed through Parliament on 18 February 2021. This new Court brings together the Family Court of Australia and the Federal Circuit Court under a unified administrative structure which will help address the confusion, costs and delays that Australian families experienced under the previous two-court structure for federal family law matters.

The FCFC will provide a single point of entry to the family courts with a consistent set of rules, processes and procedures, which will also provide for a more efficient case management system to support simpler, faster and cheaper proceedings, while maintaining a focus on the safety of everyone affected.

The FCFC will comprise two divisions:

- The FCFC (Division 1) will be a continuation of the Family Court of Australia and will comprise the existing judges of the Family Court.
- The FCFC (Division 2) will be a continuation of the Federal Circuit Court of Australia.

All judges of the FCFC (Division 1) will be able to hear appeals, ensuring more appeal matters are finalised more quickly.

Appointment criteria for family law judges have also been strengthened. Judges hearing family law matters in either division must satisfy additional appointment criteria to ensure they are suitable to deal with family law matters, including family violence.

The Attorney-General congratulated Chief Justice Alstergren and the judges of the family courts and court staff for 'their significant achievement in preparing for the commencement of the new structure'.

The Court website can be found at <https://www.fcfcoa.gov.au/>.

<https://www.attorneygeneral.gov.au/media/media-releases/federal-circuit-and-family-court-of-australia-1-september-2021>

Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021

The Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021 was passed by Parliament on 23 August 2021. The Morrison government has welcomed the passage of this legislation as an important part in ensuring the continuation of critical powers which are a necessary component of Australia's counter-terrorism framework and needed to assist in Australia's response to the evolving threat posed by terrorism.

Specifically, the Bill provides for the continuation of key counter-terrorism powers that have been in place for many years but subject to sunsetting clauses. These powers include control orders; preventative detention orders; and stop, search and seizure powers that were to expire this year but have now been extended for a further 15 months, until 7 December 2022, under the Bill. These provisions are, however, still subject to review by the Parliamentary Joint Committee on Intelligence and Security.

Extension of the control order provisions, in particular, are seen as vital in continuing to manage the terrorist risk posed by persons of concern, allowing a Federal Court to impose conditions on a person in the community. Since September 2014, 21 control orders have been issued, the majority of which have been sought for terrorist offenders on their release from prison.

The Bill will extend the reporting date for the Independent National Security Legislation Monitor's review of continuing detention order provisions, which has been delayed by COVID-19 complications.

The Bill also extends the declared areas offences under the *Criminal Code Act 1995*, which prohibit the entering or remaining in a declared area (that is, an area where the Minister for Foreign Affairs is satisfied that a listed terrorist organisation is engaging in a hostile activity) of a foreign country, for a further three years, until 7 September 2024.

Text of the Bill and information regarding its passage through Parliament can be found at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1310>.

<https://www.attorneygeneral.gov.au/media/media-releases/counter-terrorism-legislation-amendment-24-august-2021>

Reappointments to the Administrative Appeals Tribunal

The Attorney-General, the Hon Michaelia Cash MP, has announced the following reappointments to the Administrative Appeals Tribunal (AAT).

Full-time senior members:

- Mr John Cipolla; and
- Ms Kira Raif.

Part-time members:

- Mr Sean Erik Baker; and
- Ms Mila Foster.

The AAT serves an important function in providing independent merits review of government decisions and the government is committed to ensuring the AAT has the resources it needs to provide high-quality merits review with minimum delay.

The appointees are highly qualified to undertake the important task of merits review of government decisions.

We congratulate the members on their reappointments.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointments-administrative-appeals-tribunal-20-august-2021>

Government response to the Tune review

The government has released its response to the Functional and Efficiency Review of the National Archives of Australia, undertaken by Mr David Tune AO PSM (the Tune review). The review was commissioned to strengthen the position of the National Archives of Australia as the custodian of Australia's historical records. It focused on enhancing the National Archives' capabilities into the future and made 20 recommendations for consideration.

The government has agreed in full or in principle to all the review's recommendations and has outlined a reform package to ensure the National Archives can continue its vital work. This package includes the $67.7 million in funding announced by the Attorney-General in July to address the National Archives' immediate needs, in addition to the $75.6 million provided in the 2021 Budget.

The funding will go specifically towards:

- digitisation and preservation of the National Archives' at-risk collection over an accelerated four-year digitisation program;
- additional staffing and capability to address backlogs for access applications for Commonwealth records and provide improved Digitisation on Demand services; and
- investment in cybersecurity and further development of the National Archives' Next Generation Digital Archive to facilitate secure and timely transfer of records to the National Archives' custody, their preservation and digital access.

The response is the government's next step to secure the future of this important institution and will ensure records vital to our history are preserved and made more readily available, said the Attorney-General.

More information about the government's response to the Tune review can be found at <https://www.ag.gov.au/rights-and-protections/publications/australian-government-response-tune-review>.

<https://www.attorneygeneral.gov.au/media/media-releases/government-response-tune-review-19-august-2021>

Nomination to the International Court of Justice

The Australian Government has supported the nomination of Professor Hilary Charlesworth AM FASSA for election as a Judge of the International Court of Justice by the independent Australian National Group — a body of eminent Australian jurists who serve as members of the Permanent Court of Arbitration in The Hague.

Professor Charlesworth is a leading scholar and jurist who has made a significant contribution to the study and practice of international law. She has served as a judge ad hoc at the International Court of Justice and is currently the Harrison Moore Chair in Law and Laureate Professor at Melbourne Law School, and Distinguished Professor at the Australian National University. Professor Charlesworth has been the visiting professor at several law schools in the United States, France and the United Kingdom and has held both an Australian Research Council Federation Fellowship and a Laureate Fellowship. She has been President of the Australian and New Zealand Society of International Law and has been closely engaged with the Asian Society of International Law and the American Society of International Law. She is a graduate of the University of Melbourne and has a Doctor of Juridical Science from Harvard Law School.

The election will take place at the United Nations headquarters in New York on 5 November to fill the vacancy resulting from the passing of Judge James Richard Crawford LLD FBA AC SC on 31 May 2021, whose term was due to conclude on 5 February 2024.

<https://www.attorneygeneral.gov.au/media/media-releases/nomination-international-court-justice-11-august-2021>

Significant new funding for the justice system to close the gap

The government has announced the release of the Commonwealth's fist Implementation Plan under the new National Agreement on Closing the Gap that was established July 2020. The plan includes a commitment of more than $1 billion to support Australian Government actions towards achieving priority reforms and socio-economic outcomes for Indigenous Australians over the coming decade. It also provides an overview of the Commonwealth's existing actions that contribute to the Closing the Gap program, as well as new investment and areas of future work.

Under the plan more than $25 million will be directed towards reducing the overrepresentation of adult and youth Aboriginal and Torres Strait Islander people in the criminal justice system.

Specifically, the plan includes:

- $9.3 million in funding for Aboriginal and Torres Strait Islander Legal Services (ATSILS) for expensive and complex cases and to support criminal justice reform through coronial inquiries;
- $8.3 million in funding for culturally safe and appropriate family dispute resolution for Aboriginal and Torres Strait Islander people;
- $7.6 million in funding to establish and support the Justice Policy Partnership between all Australian governments and Indigenous representatives; and
- funding to provide support for jurisdictional implementation of the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT).

The investment in the Justice Policy Partnership is considered an important step in improving justice outcomes through an Australia-wide approach and is in line with the commitment under Priority Reform One of the National Agreement, to build and strengthen structures that empower Aboriginal and Torres Strait Islander people to share decision-making authority with governments. This funding includes support for Aboriginal and Torres Strait Islander organisations and experts to participate in the partnership; data and evidence gathering to inform the partnership; and resources for secretariat and policy support functions across the National Indigenous Australians Agency and the Attorney-General's Department.

'By working in true partnership with Aboriginal and Torres Strait Islander people and bringing all levels of Government together with the Justice Policy Partnership, we are providing support people need to reduce their contact with the justice system which will have long-term positive flow on effects for individuals, families and communities', said the Minister for Indigenous Australians, the Hon Ken Wyatt MP.

The Commonwealth Closing the Gap Implementation Plan can be found at <https://www.niaa.gov.au/indigenous-affairs/closing-gap>.

<https://www.attorneygeneral.gov.au/media/media-releases/significant-new-funding-justice-system-close-gap-7-august-2021>

Reappointment of Australian Information Commissioner and Privacy Commissioner

The Attorney-General, the Hon Michaelia Cash MP, has announced the reappointment of Ms Angelene Falk as the Australian Information Commissioner and Privacy Commissioner for a further three-year period.

Since her appointment in 2018, Ms Falk has effectively led the Office of the Australian Information Commissioner (OAIC), working to increase the Australian public's trust and confidence in the protection of personal information by promoting the understanding of privacy issues and effectively resolving privacy complaints and investigations.

Under Ms Falk's leadership, the OAIC has launched its first civil penalty proceedings for an interference with privacy, implemented the Consumer Data Right privacy safeguards, increased international regulatory cooperation, and provided guidance on a range of privacy issues that have emerged throughout the course of the COVID-19 pandemic.

Ms Falk has held senior positions in the OAIC since 2012. Her experience extends across industries and areas of expertise, including data breach prevention and management, data sharing, credit reporting, digital health, and access to information.

More information about the work of the OAIC can be found at <https://www.oaic.gov.au/>.

We congratulate Ms Falk on her reappointment.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointment-australian-information-commissioner-and-privacy-commissioner-6-august-2021>

Review of decisions for citizens of Afghanistan

The Administrative Appeals Tribunal has indicated that, in light of the recent events in Afghanistan and the impact on visa holders and applicants, the Tribunal will assign priority to cases involving review of family or partner visas where the visa applicant resides in Afghanistan.

In reviewing these cases, the Tribunal will be guided by a range of considerations, including any advice provided or position adopted by the UN High Commissioner for Refugees and as currently set out in the UNHCR Position on Returns to Afghanistan at <https://www.refworld.org/docid/611a4c5c4.html> for active protection cases involving visa applicants within Australia.

<https://www.aat.gov.au/news/review-of-decisions-for-citizens-of-afghanistan>

New Common Law Division chief appointed to the New South Wales Supreme Court

The NSW Attorney-General, Mr Mark Speakman, has announced the appointment of the Hon Justice Robert Beech-Jones as Chief Judge of the Common Law Division of the Supreme Court of NSW and a Judge of Appeal.

Justice Beech-Jones has had a 'long and exceptional legal career', said Mr Speakman, which equips his Honour well for his new role.

Justice Beech-Jones gained a law degree from the Australian National University, also graduating with a Bachelor of Science. He was admitted as a solicitor in 1988 and was called to the Bar in 1992. During his time at the Bar, Justice Beech-Jones had carriage of a wide range of matters, including criminal law, immigration law, social security and administrative law and commercial law. He was appointed a Judge of the Supreme Court of NSW in 2012.

Justice Beech-Jones replaced the retiring Chief Judge at Common Law, the Hon Justice Clifton Hoeben AM RFD, on 31 August 2021.

We congratulate Justice Beech-Jones on his appointment.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/new-common-law-chief-appointed-to-supreme-court>

Views sought for reforms of Western Australia's anti-discrimination laws

The Law Reform Commission (LRC) of Western Australia has released a discussion paper on its review of the *Equal Opportunity Act 1984* (WA).

The *Equal Opportunity Act 1984* was enacted to ensure people were treated equally and to prevent discrimination based on their race, religion, sex, sexual orientation, impairment or other characteristic. Despite this law, many people in Western Australia continue to report experiences of discrimination. Against this background the Attorney-General of Western Australia, John Quigley, referred to the LRC the task of determining whether there is a need for reform of the Act and, if so, the scope of any reform required.

The discussion paper notes that more can be done to protect and encourage equal treatment, helping to ensure Western Australia continues to be a fair, respectful and non-discriminatory community. The paper sets out the potential changes and additions that should be made to the current Act, making references to comparable laws in other states and territories, and those of the Commonwealth. It also cites preliminary views sought from a range of stakeholders.

Potential areas for reform identified in the paper include:

- expanding protections to include gender identity;

- including physical features as a ground for discrimination;
- removing the disadvantage requirement for sexual and racial harassment;
- changing exemptions for religious bodies and schools, charities and voluntary groups; and
- increasing or removing the $40,000 cap for compensation.

The LRC is now accepting submissions on the discussion paper until 29 October 2021.

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2021/08/Views-sought-for-reforms-of-anti-discrimination-laws.aspx>

Recent decisions

The mere appearance of bias is enough

Charisteas v Charisteas [2021] HCA 29

On 6 October 2021, the High Court handed down its decision in *Charisteas v Charisteas*. Kiefel CJ and Gageler, Keane, Gordon and Gleeson JJ, in a majority judgment, set aside the orders of the Full Court of the Family Court of Australia made on 10 July 2021.

The matter concerned the appellant (the husband) who had married the first respondent (the wife) in 1979 and separated in 2005. In 2006, the appellant commenced proceedings under s 79 of the *Family Law Act 1975* (Cth) for orders settling the property of the parties to the marriage. After a long-running litany of applications and hearings, in 2011 Crisford J of the Family Court of Western Australia made property settlement orders under s 79 of the Act (the 2011 Property Orders) which also included orders for the early vesting of an identified trust (the Early Vesting Orders). In 2013 the Full Court of the Family Court set aside the Early Vesting Order on the basis that one of the beneficiaries of the trust was denied procedural fairness but then failed to make orders whether to remit the issue for rehearing or otherwise.

In February 2015, Walters J (the trial judge) of the Family Court of Western Australia published a judgment in which his Honour held that the 2011 Property Orders were not final orders and that the Court retained power to make property settlement orders under s 79 of the Act. Walters J listed the matter to determine what the orders should be. A decision was delivered on 12 February 2018 which purported to make orders under s 79 of the Act (the 2018 Property Orders).

The 2018 Property Orders did not set aside or vary the 2011 Property Orders; rather, they were inconsistent with them. On 12 March 2018, the appellant appealed to the Full Court of the Family Court of Australia against the 2018 Property Orders on the ground that the power under s 79 of the Act had already been exercised when the 2011 Property Orders were made. It subsequently came to light that the first respondent's barrister had met with the trial judge on several occasions during the Family Court proceedings. However, the

barrister stated that the 'communications' with the trial judge did not concern the 'substance of the … case'. The appellant filed an amended notice of appeal adding a ground alleging apprehended bias.

The grounds of appeal before the Full Court were whether the 2018 Property Orders should be set aside on the ground of reasonable apprehension of bias arising from the trial judge's communications with the first respondent's barrister, and whether the power under s 79 of the Act was capable of being exercised by the trial judge when the 2011 Property Orders had already been made. By majority (Strickland and Ryan JJ; Alstergren CJ dissenting), the Full Court rejected the allegations of apprehended bias and dismissed the appeal against the 2018 Property Orders.

The appeal to the High Court raised the same issues decided by the Full Court.

In relation to the allegation of apprehension of bias, the High Court articulated the application of the apprehension of bias principle, which reflects 'the fundamental requirement of the common law system of adversarial trial — that it is conducted by an independent and impartial tribunal' ([11]). Importantly, the principle requires the 'identification of what it is said that might lead a judge … to decide a case other than on its legal and factual merits'; and, secondly, the articulation of a 'logical connection' between the matter and the feared departure from the judge deciding the case on its merits ([11]). Once those two steps have been taken, the Court noted that 'the reasonableness of the asserted apprehended bias can then be ultimately assessed' in the context of ordinary judicial practice. The Court affirmed the definition of 'ordinary judicial practice' taken by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 346, 350−1 — namely, save in the most exceptional of cases, there should be no communication or association between the judge and one of the parties 'otherwise than in the presence of or with the previous knowledge and consent of the other party' ([13]). In this case, the Court noted that there were no exceptional circumstances that would warrant the communications between the barrister and trial judge otherwise than in the presence of or with the knowledge and consent of the other party.

The Court stated that the apprehension of bias principle is so important to perceptions of independence and impartiality 'that even the *appearance* of departure from it is prohibited lest the integrity of the judicial system be undermined' ([18]). Thus, the Full Court's reasoning that, because the trial judge and the barrister were aware of some of their obligations not to communicate during the course of the trial, a hypothetical observer would not conclude that the communications were sinister, was consequently erroneous.

Moreover, the hypothetical lay observer is not a lawyer but, rather, a member of the public served by the courts. Their knowledge of the Bar and judiciary would not enable them to 'tolerate' some degree of private communication between a judge and a legal representative of only one party, even if undisclosed, as held by the Full Court. Rather, the hypothetical lay observer 'is a standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence which are essential to the maintenance of public confidence in the judicial system' ([21]).

In consideration of the second issue, could the 2018 Property Orders be made? The High Court found that the s 79 power had been exercised and exhausted by Crisford J in making the 2011 Property Orders. The Early Vesting Orders, however, had been set aside by the Full Court, but the power under s 79 had not been re-exercised in respect of them and the Full Court did not remit the early Vesting Orders for further hearing, such that the power under s 79 to deal with the property the subject of the Early Vesting Orders had not yet been spent. Consequently, this was an issue for the Family Court on remittal.

The Court allowed the appeal, remitting the matter for rehearing before the Family Court of Western Australia.

The conditional discretionary power

Waraich v Minister for Home Affairs [2021] FCAFC 155

On 26 August 2021, the Full Court of the Federal Court handed down its decision in *Waraich v Minister for Home Affairs*, affirming the decision of the primary judge, Justice Anastassiou, and dismissing the appeal.

The appellant, Randeep Singh Waraich, is a former Australian citizen who presently holds an ex-citizen visa. He appealed the Federal Court decision setting aside the decision of the Administrative Appeals Tribunal which reversed the decision of the Minister for Home Affairs to revoke his citizenship.

The appellant first came to Australia in 1998 under a sub-class 560 student visa. At that time the appellant used the name Amardeep Singh. In December 1999, the appellant applied for, but was unsuccessful in obtaining, a protection visa. He subsequently left Australia in June 2002 as an unlawful non-citizen.

In June 2004, the appellant returned to Australia under the name of Randeep Singh Waraich, as a dependent on his wife's student visa. On 14 November 2009, the appellant was conferred Australian citizenship in the name of Randeep Singh Waraich. In March 2009, while registering with the Victorian Department of Births, Deaths and Marriages, the appellant's name change was discovered by VicRoads. VicRoads referred its discovery to the Department of Immigration and Citizenship and the appellant was subsequently interviewed by the department in 2012.

The appellant was subsequently charged and convicted on 27 November 2013 of:

a. an offence under s 50(1) of the *Australian Citizenship Act 2007* (Cth) (Citizenship Act) for making a statement in relation to an application for Australian citizenship knowing the statement to be false and misleading in a material particular; and

b. two offences under s 234(1)(c) of the *Migration Act 1958* (Cth) for furnishing or causing to be furnished for official purposes a document containing a statement or information that was false or misleading in a material particular.

On 9 January 2018, the appellant's citizenship was revoked by the Minister for Home Affairs under s 34(2) of the Citizenship Act because the appellant had been convicted and sentenced for offences under s 50(1) of the Citizenship Act and s 234(1)(c) of the Migration Act and was satisfied that it would be contrary to the public interest for the appellant to remain an Australian citizen. The appellant now resides in Australia on an ex-citizen visa which enables him to live, work and study in Australia, but he cannot return to Australia if he leaves.

The appellant sought review of the Minister's decision in the Tribunal. On 5 December 2018, the Tribunal set aside the Minister's decision and substituted a decision that the appellant was entitled to have the revocation of his Australian citizenship reversed. The Tribunal was satisfied that the criteria in s 34(2)(a) and (b) of the Citizenship Act were met — namely, the appellant was an Australian citizen, had been convicted under s 50 of the Citizenship Act in relation to the appellant's application to become an Australian citizen, and had obtained the Minister's approval to become an Australian citizen as a result of migration-related fraud, which includes a conviction of an offence against s 234 of the Migration Act. However, the Tribunal was not satisfied that the public interest condition in s 34(2)(c) had been met such that the revocation power could not be exercised 'as a matter of discretion'.

The Minister appealed the Tribunal's decision to the Federal Court, setting out five errors of law. Grounds 1 to 3 addressed the Tribunal's alleged failure to consider significant and important evidence and to respond to a substantial argument advanced by the Minister — namely, the appellant's admitted instances of dishonesty that were not directly subject of his convictions under the Citizenship Act and Migration Act but which were relevant to an assessment of the appellant's prospects of re-offending, his character and remorse. Grounds 4 and 5 alleged the Tribunal had erred in its construction of s 34(2)(c) of the Citizenship Act by drawing a distinction between whether it is 'contrary to the public interest for a person to remain an Australian citizen' and whether it is 'in the public interest for a person no longer to remain an Australian citizen'. The distinction made by the Tribunal was that to be 'contrary' to the public interest it was necessary to show more than the mere fact of a conviction, which, the Tribunal held, the Minister had not done. On 21 October 2020, the primary judge upheld the Minister's appeal on all five grounds.

The appellant appealed to the Full Court on four questions of law. All four grounds were dismissed by the Court.

Ground 1 concerned the public interest condition in s 34(2)(c) of the Citizenship Act. The appellant argued that, while the Tribunal had erred in its construction of the public interest condition in making a distinction between whether it is contrary to the public interest for a person to remain an Australian citizen and whether it is in the public interest for a person no longer to remain an Australian citizen, this error was not material. The Tribunal had, nonetheless, addressed the required statutory test in s 34(2) of the Citizenship Act.

The Court, however, found that the reasoning of the primary judge, in finding the false distinction drawn by the Tribunal was in fact material, was correct for two reasons. First, the Tribunal expressly stated that the distinction was 'significant and critical' such that the Tribunal's decision must have been imbued with that characterisation; and, secondly, the

Tribunal excluded from its consideration matters it thought might only bear on what was 'in' the public interest as opposed to contrary to the public interest.

In relation to materiality, the appellant argued that the discretion to revoke citizenship under s 34(2) of the Citizenship Act could be exercised in a way that was not dependent on the satisfaction of the public interest condition. The Court rejected this.

Section 34(2) of the Citizenship Act is structured to confer a discretionary power on the Minister to revoke the citizenship of a person which is conditioned on three matters in ss 34(2)(a)–(c). The residual discretion in s 34(2), 'the Minister may, by writing, revoke a person's Australian citizenship', is only enlivened after these three matters are met. In other words, the jurisdictional facts under ss 34(2)(a)−(c) must first be established before the discretion could be exercised. The Court did take note of the conclusion of Derrington J in *Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation (No 5)* (2019) 167 ALD 492 [71], that 'the satisfaction of the jurisdictional fact goes some considerable way to influencing the exercise of the discretion'; once the jurisdictional fact exists 'there must necessarily be some inclination towards exercising the discretion'.

There was no argument that the conditions in ss 34(2)(a) and (b) were met. However, as the Tribunal erred in construing the public interest condition in s 34(2)(c), the Court held that it could not therefore form a state of satisfaction about the public interest — a mandatory prerequisite for exercising the residual discretion under s 34(2) of the Citizenship Act. The error of the Tribunal was consequently material to its decision, such that the Tribunal's discretion was not enlivened.

Even though not considered necessary, in light of the Court's conclusion regarding ground 1, the Court went on to consider the remaining appeal grounds. Grounds 2 to 4 concerned the finding that the Tribunal erred in law in overlooking the Minister's submission as to the risk of re-offending and in not addressing evidence regarding the appellant's dishonesty over and above that which resulted in his citizenship and migration convictions.

The Court upheld the primary judge's decision that the Tribunal's reasons did not demonstrate an active engagement in the Minister's case — namely, the appellant's concessions that he had made false statements in his protection visa application and failed to consider the Minister's broader dishonesty submission as a relevant consideration was an error of law.

The Court held the primary judge was correct in concluding that the Tribunal had erred in law in applying an 'unduly narrow approach to s 34(2)' by limiting its consideration to conduct or matters which had resulted in convictions only within the ambit of s 34(2) and failing to take into consideration the broader framing of the appellant's dishonesty which the Minister had clearly articulated ([67]). As noted by the primary judge, s 34(2)(c) of the Citizenship Act contains no such limitation on the consideration of the appellant's conduct. As such, the Tribunal was legally required to consider the broader evidence of dishonesty in deciding whether to revoke the cancellation decisions but failed to do so, despite the fact this evidence was found by the primary judge to be 'seriously advanced' and 'worthy of consideration' ([35]). In applying the Full Court's reasoning in relation to jurisdictional

error occasioned by overlooking a substantial, clearly articulated argument in *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492 [47], the primary judge found that this narrow view taken by the Tribunal was an error of law.

The failure of the Tribunal to consider the Minister's submissions was also evident in the fact that the Tribunal considered it had not reached the requisite state of satisfaction under s 34(2)(c) to exercise the discretion coupled with its statement that there was 'no reason to expect' that the appellant would re-offend and it was 'not argued that there would be any such risk'. As such, the Tribunal did not appear to deal with the Minister's case on the assessed likelihood for the appellant to re-offend given his proven propensity to be dishonest where convenient.

The Court found no error in respect of the decision by the primary judge in relation to grounds 2 to 4.

Broad ministerial discretion for act of grace payments

Ogawa v Finance Minister [2021] FCAFC 149

Ogawa v Finance Minister concerned an appeal from the decision of the Federal Court in *Ogawa v Finance Minister* [2021] FCA 59, whereby the primary judge dismissed the appellant's application for judicial review of a decision of the respondent, the Finance Minister, not to authorise an 'act of grace payment' under s 65 of the *Public Governance and Accountability Act 2013* (Cth) (PGPA Act).

In 2014, the Australian Human Rights Commission (AHRC) published a report recommending that the appellant be paid compensation of $50,000 in respect of a period in 2006 when she was detained in immigration detention (AHRC Report). The detention was considered by the AHRC to be 'arbitrary detention' within the meaning of Article 9 of the *International Convention on Civil and Political Rights* (ICCPR) because the appellant should have been placed in a less restrictive form of detention.

In 2019, the appellant applied to the Minister under s 65(1) of the PGPA Act for an act of grace payment of $50,000. Section 65(1) of the PGPA Act confers a broad discretionary power on the Minister to authorise payment to a person where it is considered appropriate to do so because of 'special circumstances'. On 21 May 2020, the Minister's delegate made a decision declining to authorise an act of grace payment. The appellant applied to the Federal Court to judicially review the delegate's decision. The primary judge dismissed the application.

On 27 February 2021, the appellant appealed to the Full Court of the Federal Court on the sole ground that the primary judge failed to afford procedural fairness by misconceiving the appellant's claim and failing to consider the actual claim advanced — namely, that the delegate in his decision failed to have regard to the findings of the AHRC Report that the appellant's detention was arbitrary under Article 9 of the ICCPR and then to take account of the recommendation that an ex gratia payment should be awarded to her. The

appellant submitted that it was not open to the delegate to simply reject the findings and recommendations of the AHRC Report and to do so would result in the Commonwealth of Australia being in breach of Article 2(3) of the ICCPR.

The Court unanimously rejected the appeal, finding there was no substance to the allegation that the primary judge failed to afford procedural fairness to the appellant by misconceiving the appellant's claim for two reasons.

First, as noted by the primary judge, the delegate's decision did make specific reference to the findings and recommendations in the AHRC Report. The decision also referred to the submissions by the Department of Home Affairs that the appellant's detention was lawful and a correct and proportionate measure and there were no special circumstances warranting an act of grace payment.

Secondly, the primary judge correctly found that the decision to award an act of grace payment turned upon the exercise of the delegate's discretion whether there were special circumstances that warranted a payment under s 65(1) of the PGPA Act, as opposed to any supposed requirements in the ICCPR. The Court found that the delegate's discretion under s 65(1) of the PGPA Act hinged on whether a payment was considered 'appropriate' because of 'special circumstances'. There were no other caveats. Moreover, while this discretion was so broad that lawful occasion for making an act of grace payment might have been found by the delegate based on the recommendation in the AHRC Report, the delegate was not bound to accept that recommendation. Rather, the delegate was entitled to reach his own conclusion as to whether their existed special circumstances, including whether there had been any unlawful arbitrary detention of the appellant.

Application of the High Court's decision in Forest & Forest: there is no room for noncompliance or cutting corners with essential preliminaries

Onslow Resources Pty Ltd v Minister for Mines and Petroleum [2021] WASCA 151

On 16 August 2021, the Court of Appeal of Western Australia handed down its decision in *Onslow Resources Pty Ltd v Minister for Mines and Petroleum*, dismissing the appeal of the appellant and affirming the decision of the primary judge, Smith J, in the Supreme Court proceedings below in *Onslow Resources Ltd v Minister for Mines and Petroleum* [2020] WASC 310.

The issue for review was a decision of an officer of the then Department of Mines and Petroleum made on the 11 October 2017, to record that the appellant's application for a mining lease (Application M09/150) was null and void. The decision was made following the High Court's decision in *Forest & Forest Pty Ltd v Wilson* (2017) 262 CLR 510 (*Forest & Forest*), on the basis that the application was not accompanied by a statement in accordance with s 74(1a) of the *Mining Act 1978* (WA), as required by s 74(1)(ca)(ii) of the Act (the mining operations statement).

On 25 May 2012, the appellant lodged Application M09/150, which was accompanied by a mineralisation report and a letter of the 25 May 2012 signed by the Director, Warren Slater (the

25 May 2012 letter). On 22 August 2012, the appellant lodged a revised mineralisation report and a document entitled, 'Supporting Statement For a Mining Lease Application M09/150' (Supporting Statement). The Supporting Statement and a revised version dated 29 August 2012 (Revised Supporting Statement) set out the information required by s 74(1a) of the Act. Neither the Supporting Statement nor the Revised Supporting Statement accompanied Application M09/150 when it was lodged.

On 13 September 2012, the Karratha Mining Registrar recommended the grant of the mining lease in respect of Application M09/150 but did not forward the report containing the recommendation to the Minister as required by s 75(2) of the Act. This was in part due to some outstanding issues arising under the *Native Title Act 1993* (Cth) which required the agreement of the affected Native Title group before the Minister could determine the application. Negotiations with the Native Title group did not conclude until October 2017.

In the meantime, on 17 August 2017, the High Court delivered its decision in *Forest & Forest. Forest & Forest* was concerned with a mining lease application which had not been lodged with a mineralisation report. The Court held that s 74(1)(ca)(ii) of the Act imposed 'essential preliminaries' to the exercise of the Minister's power to grant a mining lease under s 71 of the Act. This was made clear by the express terms of the provision and the structure of the provision as 'sequential steps in an integrated process leading to the possibility of the grant of a mining lease by the Minister'. Moreover, s 74(1)(ca)(ii) was both 'precise and prescriptive, conveying an intention not to countenance any degree of non-compliance' with the requirement that the documentation relied on must be lodged at the same time as the application.

On 17 October 2017, the appellant was informed by the department that a decision had been made, in light of *Forest & Forest*, to amend the register to record that Application M09/150 was null and void on the basis that it was not accompanied by a mining operations statement.

The appellant sought judicial review of the decision on the ground that a mining operations statement did in fact accompany Application M09/150 when it was lodged. The appellant claimed that the 25 May 2012 letter was a mining operations statement within in the meaning of s 74(1)(ca)(ii) of the Act, albeit a noncompliant mining operations statement, as it did not contain all the necessary information required under s 74(1a) of the Act. Nonetheless, it was sufficient to satisfy the essential preliminaries of the Minister's power to grant a mining lease. The primary judge rejected the appellant's contention, finding 'as a jurisdictional fact, that no mining operations statement accompanied the mining application as required by s 74(1)(ca)(ii) of the Act'. The primary judge went on to find that, even if the 25 May 2012 letter could be regarded as a partially compliant mining operations statement, it was not open to the Registrar to conclude that the appellant had complied in all respects with the provisions of the Act as required by s 75(3) of the Act such that the Registrar could recommend to the Minister to grant the mining lease.

The appellant sought review of the primary judge's decision in the Court of Appeal on two grounds. The first ground was that the primary judge had erred in law in determining that the 25 May 2012 letter that accompanied Application M09/150 was not a mining operations statement. The second ground was that the primary judge erred in law in determining that

a mining registrar had no power to disregard noncompliance and that it was not open to the Registrar to recommend that a mining lease be granted.

Regarding the first ground, the Court concluded that the primary judge was entirely correct to conclude that the 25 May 2012 letter was not a mining operations statement for several reasons: the letter itself purported to be something else, namely a mineralisation report, as was expressly stated in the letter itself; and the 25 May 2012 letter contained none of the information required by s 74(1a) of the Act, such as when mining is likely to commence, the most likely method of mining, the location, and the area of land that is likely to be required for mining activities.

Regarding the second ground, the Court also concluded that the primary judge was correct to find what she did. Turning to the decision in *Forest & Forest,* the Court held that the High Court's construction of the Act did not admit of the notion of a 'noncompliant' mining operations statement, in the sense that a document partially meets the description of the statement required by s 74(1a) of the Act. A statement lodged with a mining lease application either meets the criterion in s 74(1)(ca)(ii) — that is, a statement in accordance with s 74(1a) — or it does not. If a mining lease application is noncompliant because it is not accompanied by a mining operations statement that meets the requirements of, and thus is in accordance with, s 74(1a), the Registrar is nether empowered nor obliged to request further information to make it 'compliant'.

Administrative law and welfare rights: a 40-year story from *Green v Daniels* to 'robot debt recovery' — closing the chapter

*Peter Hanks**

Four years ago, I posed a question:

> Can administrative law (through its principles and processes) be deployed to vindicate the rights of the members of our community who, from time to time, depend on social security payments for their income? How can administrative law ensure that those rights are not ignored or overridden by politicians, senior officials and decision-makers driven by concern about 'welfare cheats' or demands for expenditure savings — in outlays on transfer payments and in the employment costs involved in administering those payments?[1]

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.

I was prompted to raise that question after Katie Miller, then working with Victoria Legal Aid (VLA), asked me to advise whether there was a basis for challenging the practice adopted by the Department of Human Services (DHS) of raising debts against social security recipients by reference to their annual taxable income as recorded by the Australian Taxation Office (ATO).

I took as my model the High Court judgment in *Green v Daniels*,[2] in which Stephen J found that a government policy, introduced at the end of 1976, to deny unemployment benefits to young school leavers for the period from when they left school until the next school year started conflicted with the legislation (the *Social Services Act 1947*), which fixed eligibility for those benefits; and with the obligation of the Director-General to consider Karen Green's circumstances by reference to the criteria in the legislation without being distracted by the government policy.

Back in July 2017, I observed that *Green v Daniels* demonstrated that judicial review could deliver a relatively quick and clear correction of unlawful executive action. From commencement to decision, the case occupied 16 weeks and could apply strategically — the decision put an end to the unlawful policy, although that strategic effect owed a great deal to the respect that the government paid to the decision. Sending the current

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1 The question was asked when I delivered the National Lecture on Administrative Law, 'Administrative Law and Welfare Rights: the 40-Year Story from *Green v Daniels* to Robot Debt Recovery', at the Australian Institute of Administrative Law National Conference, Canberra, on 21 July 2017: see P Hanks, 'Administrative Law and Welfare Rights: A 40-Year Story from *Green v Daniels* to 'Robot Debt Recovery' (2017) 89 AIAL Forum 1. On 23 July 2021, in answer to a question after I delivered this paper, I accepted that the chapter cannot really be closed until the shameful story of the introduction of the 'robodebt' program is investigated and exposed. However, that story is so shameful and is likely to damage the reputations of so many people of importance (at least in their own eyes), that we should not expect that investigation and exposure any time soon.

2 *Green v Daniels* (1977) 51 ALJR 463.

Solicitor-General, Marcel Byers, to defend the policy in the High Court was a mark of that respect — so was refraining from granting unemployment benefits to Karen Green before the case was argued (so as to derail the litigation) — and there was no suggestion, once the High Court ruled in Karen Green's favour, that the model litigant would continue to apply the policy to other school leavers.

Robodebt: how to conjure a debt out of nothing

I then turned to 'robodebt' — the name applied by journalists to the new method for raising and recovering what Centrelink chose to describe as 'debts', introduced in July 2016:

- That system was described by the acting Ombudsman in a 2017 report as the 'online compliance intervention (OCI) system for raising and recovering debts'.
- It started with ATO records of annual taxable income of social security recipients.
- The OCI system spread that annual income into 26 equal fortnightly components (through the 'cost-effective' use of an automated process — doing away with the expensive method of applying a human brain to the task) and then matched the resulting figure to the fortnightly income of each recipient reported by that recipient to Centrelink.
- Finally, if the average income for any fortnight was higher than the reported income for that fortnight, the system required each recipient to confirm or update her or his income. If a recipient could not provide complete information, the recipient's income was taken to be the amount produced by the averaged ATO data and a 'debt' was calculated accordingly.

There were four critical problems with the OCI system.

First, the design of the system assumed that annual income could be turned into fortnightly income by taking the average. However, most social security recipients, if they worked at all, worked in casual jobs, where the earnings fluctuated from one fortnight to another. It was actual income in each fortnight that, according to the income test in the *Social Security Act 1991*, controlled a person's entitlements — not assumed (or fictional) income in each fortnight. The OCI system worked on averaging annual income, when the Social Security Act allowed averaging only in very narrow situations, none of which was relevant to this task, and almost universally worked on actual income in each fortnight. Typically, income for the purpose of applying the income test and calculating entitlements did not show up as a straight line on the yearly graph.

Secondly, the system placed the burden of proving that there had been no overpayment, and thus no debt, on the person to whom benefits had been paid. However, the Social Security Act very definitely (and not surprisingly) cast on the Commonwealth the burden of proving the existence of a debt to the Commonwealth.[3] Section 1222A(a) provided that an amount that had been paid by way of social security payment 'is a debt due to the Commonwealth if, and only if … a provision of this Act … expressly provides that it is'.

For the purposes of s 122A(a), the operative provision was s 1223(1), which provided that:

3 *Social Security Act 1991* (Cth) ss 122A(a), 1223(1).

… if:

(a) a social security payment is made; and

(b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

Thirdly, and compounding the second problem, the system did not take account of the fact that DHS might have no way of actually informing the benefit recipient that he or she now had to prove there was no debt. Many social security recipients were on the books for only a short time. Once they went off the books, they had no obligation (and no incentive) to keep DHS informed of their address. A presumptive debt might be raised years later — how could the individual then be informed that he or she was facing the risk of a large debt? That defect in the system was revealed in the second challenge discussed below, brought on behalf of Ms Amato.

Fourthly, the system did not make any use of the extensive information-gathering powers given to officers in DHS (including Centrelink), which involved issuing individual notices — that is, addressed to individuals such as benefit recipients and employers — requiring the furnishing of information, on pain of criminal penalty, to the department. Of course, using those powers required a lot of staff: it would be much cheaper to outsource the information-gathering to the many thousands of social security recipients, even if doing that converted the Social Security Act's insistence that the burden of proving the *existence* of a debt fell on the Commonwealth into a burden cast on the social security recipients to prove the *absence* of an assumed debt.

The Ombudsman's failure

In July 2017, I lamented that the Commonwealth Ombudsman, which had recently completed a report on the new debt recovery system,[4] had said nothing about the question whether that system was lawful — despite one of the Ombudsman's statutory terms of reference being to report on whether action taken by a department 'appears to have been contrary to law'.[5] There was no suggestion in the Ombudsman's report that the radical shift of functions imposed by the DHS's adoption of the OCI might lack support in, even contradict the requirements of, the Social Security Act.

Perhaps the most striking thing about the Ombudsman's report (at least to someone who starts with the simple edict: 'read the Act!') was what it failed to say. The report said nothing about the legislative context in which the OCI operated; it did not offer any comment on the question whether a debt can be created presumptively; and it did not ask whether DHS could shift the function of complex fact-finding to the individual and require the individual to disprove the existence of a debt.

4 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (April 2017) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.

5 *Ombudsman Act 1976* (Cth) s 15(1)(a)(i).

Options for challenging robodebt

In my 2017 address, I considered how the unlawful OCI system might be challenged and stopped.

I dismissed the suggestion that the Ombudsman could provide a useful means of doing that. I said that the April 2017 report offered little reassurance that the processes of that office could deal with the fundamental question — whether the OCI system matched, or ignored, the constraints in the Social Security Act.

I was sceptical that the Administrative Appeals Tribunal could address the strategic question of whether the OCI system was lawful.

I now know that I was both wrong and right. Justice Murphy pointed out, in the reasons for approving the settlement of the class action delivered on 11 June 2021, that the Tribunal had made many decisions, rejecting income averaging based on ATO data as a basis for asserting a social security debt.[6] But the Commonwealth simply bent before the wind: it challenged none of those decisions in the Federal Court by way of appeal under s 44 of the *Administrative Appeals Tribunal Act 1975*, so the OCI system kept rolling on its way, undistracted by occasional flea-bites from the Tribunal.

Four years ago, I came down in favour of judicial review, largely inspired by the power of the High Court's judgment in *Green v Daniels*, because the critical question presented by the OCI system was a question of law: did DHS have the legal authority to proceed to the raising of a debt by using the OCI system? Judicial review, 'the enforcement of the rule of law over executive action',[7] I said, was the ideal means of answering that question. I concluded:

> a carefully crafted declaration (if made by the Federal Court in the exercise of its jurisdiction under s 6 of the ADJR Act or its jurisdiction under s 39B(1A)(c) of the Judiciary Act) would provide a definitive ruling on the legitimacy of the OCI system. That is, judicial review could produce a definitive ruling on a precise question of law in the way that it did 40 years ago, in *Green v Daniels*.[8]

Masterton v The Commonwealth

Implementing that strategy was, necessarily, a slow and deliberate process.

In August 2018, after a year of searching for a suitable applicant, VLA, which acted as solicitor throughout the litigation, identified Ms Masterton as a person who:

a. had been told by DHS on 12 June 2018 that she had a debt of $4,094 as a result of the OCI system; and

b. qualified for legal aid.

6 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [10].
7 As Brennan J put it in *Church of Scientology v Woodward* (1982) 154 CLR 25, 70, quoted by Gleeson CJ in *Plaintiff S157 of 2002 v The Commonwealth* (2003) 211 CLR 476 [31].
8 Hanks (n 1) 13.

VLA collected a slab of documents relating to Ms Masterton's alleged debt and drafted a 19-page affidavit to explain the process that led to Ms Masterton receiving a demand that she repay a 'debt' of $4,094, which it was alleged she had been overpaid between 2011 and 2016 by way of Youth Allowance.

My colleague Frances Gordon and I prepared an originating application in the Federal Court, which asked the Court to make a declaration that the alleged debt, demanded by the Commonwealth Government from Ms Masterton on 12 June 2018:

a. was not a debt to the Commonwealth as required by s 1222A and s 1223 of the Social Security Act; and

b. could not lawfully be demanded by the Commonwealth from Ms Masterton.

The originating application and the supporting affidavit were filed on 5 February 2019, launching Federal Court proceeding VID 73/2019.

I should stop at this point and emphasise the modest (although, as it turned out 10 months later, fundamental) nature of the declaration we were seeking:

1. We did not ask the Federal Court to find that Ms Masterton owed no debt to the Commonwealth.

2. We did not assert that the amount demanded was too high.

3. We only asked for a declaration that the particular demand made on behalf of the Commonwealth on 12 June 2018 was unlawful.

4. We were ready to justify that proposition by taking the Court to the provisions in the Social Security Act that defined the only circumstances in which a debt could arise under that Act and then pointing out that DHS had investigated none of those circumstances but had adopted an irrelevant short-cut — averaging ATO-derived data, by reference to the OCI system.

Preliminary skirmishes

Perhaps the design of our case was so simple that it confused the Commonwealth, because almost the first thing that the Australian Government Solicitor (AGS) did was to write to VLA and invite Ms Masterton to assist in recalculating the amount of any debt that might be owed. The letter, written on 18 March 2019, asked her to provide eight categories of documents relating to three periods between 2011 and 2016: pay slips, group certificates, bank statements, time sheets and so on. At this stage, perhaps I should remind everyone that:

- the Social Security Act gave the Commonwealth extensive powers of compelling employers and banks to provide relevant information; and

- of course, the Commonwealth carried the burden of proving the existence of any debt.

Intriguingly (as we shall see shortly), AGS wrote a few days later, on 22 March 2019, 'Our client [that is the Commonwealth] did not have access to the documents sought from your client prior to issuing the June Notice [that is the demand made on 12 June 2018 that Ms Masterton repay a debt of $4,094]'.

VLA responded on 27 March 2019. Reading it now, 28 months later, I can see that some thought went into that letter.

First, VLA wrote that the Federal Court proceeding had one focus: whether the June 2018 demand was unlawful. It was quite unclear how the documents now sought by the Commonwealth could be relevant to that question.

The VLA letter then picked up on the statement in the AGS letter of 22 March 2019, that the Commonwealth had none of documents now sought from Ms Masterton when it made the demand in June 2018. VLA wrote that, if the Commonwealth did not have those documents in June 2018, and if the information was required to calculate the amount of any debt owed by Ms Masterton, the Commonwealth should now acknowledge that the June demand was unlawful.

VLA's 'palpable hit' produced a limp response on 29 March 2019: the invitation 'to provide information to inform the recalculation of the debt does not imply any concession as to the lawfulness of the debt'.

And why doesn't it imply that concession? The Social Security Act established minimum requirements before a debt could be raised. One of those requirements was that the individual had received a payment to which she was not entitled. The burden of proving that fact lay on the alleged creditor — the Commonwealth. How could the Commonwealth, through DHS, conjure a debt out of thin air? As a general proposition, you and I cannot simply say to another person, 'You owe me $4,000; prove that you don't!' The Commonwealth is no different; and debt raising under the Social Security Act is built on that simple foundation.

VLA returned to the core of the case on 3 April 2019, when it wrote to AGS saying that the Federal Court proceeding was focused on the lawfulness of the demand made on 12 June 2018 and that issue could not be affected by any recalculation of the alleged debt.

A 'masterstroke' from the Commonwealth: there is no debt

But then, on 12 April 2019, AGS retreated from the request that Ms Masterton provide the eight categories of documents needed to calculate or recalculate the alleged debt and produced a rabbit out of its hat: DHS had reviewed and recalculated Ms Masterton's debt using 'your client's previously reported income to Centrelink' and, wonder of wonders, Ms Masterton owed *no* debt to the Commonwealth, as there had been *no* overpayment. That meant, AGS wrote on 12 April 2019, 'there is no continuing utility in the present Proceeding'. In other words, 'go away'.

So, despite lacking the documents that were said to be necessary to calculate the debt, DHS had not only been able to demand (on 12 June 2018) that Ms Masterton repay a debt of

$4,094 but also was now able to say (on 12 April 2019) that there was no debt. Some marks for flexibility, perhaps?

Is it surprising that Ms Masterton's lawyers were sceptical? Perhaps we were over-cynical when we concluded that the Commonwealth had just pulled a rabbit from its hat — and a remarkably mangy rabbit at that — in an effort to avoid Ms Masterton's case proceeding to a hearing (and going on, we were confident, to the inevitable defeat of the OCI system).

We told the judge on whose docket our case had been entered that Ms Masterton was not giving up and that we were ready to prove that there was still some utility in the Court declaring that the June 2018 demand had been unlawful.

But we also launched another case in the Federal Court as an insurance policy: if the Commonwealth (through DHS) wanted to derail our first case, we knew that we had a large reservoir of potential applicants. (We did not then appreciate that, as the later class action revealed, there were approximately 433,000 of them, but we were confident there were thousands in Victoria alone.)

Amato v The Commonwealth

VLA located Ms Amato, who had been paid Austudy for six fortnights in April, May and June 2012 while studying at university and working part-time.

After June 2012, Ms Amato had no occasion to maintain contact with DHS because her last payment of Austudy was for June 2012.

A little more than five years later, DHS received from the ATO information about Ms Amato's taxable income for 2011−12 and attempted to contact Ms Amato because there seemed to be a mismatch between Ms Amato's income as reported to DHS for those three months and her taxable income for the full 12 months of the tax year.

The contact attempt was unsuccessful, mainly because Ms Amato had left the place where she had been living in June 2012 and, because she had then stopped being a 'client' of DHS, she had not felt any need to keep DHS informed of her current address.

Acting on the basis that Ms Amato needed to explain what DHS saw as a discrepancy between her reported income in April, May and June 2012 and the fortnightly 'average' of her annual taxable income, DHS calculated that Ms Amato had been overpaid $2,924 in Austudy.

The absurd process used by DHS to calculate the overpayment involved dividing Ms Amato's annual taxable income by 366 (allowing for the leap year in 2012) to 'identify' a daily amount of income; multiplying that amount by 14 — because Austudy was calculated on the basis of a fortnightly income test; then using that imagined amount of Ms Amato's fortnightly income to calculate her imagined entitlement to Austudy for each of the six fortnights in April, May and June 2012; and finally deducting that imagined entitlement from the amount that Ms Amato had actually received to produce an imagined 'debt'.

DHS then:

a. added a 'recovery fee' of $291 to the $2,924 'debt';

b. wrote a letter to Ms Amato, which was never delivered (because she had moved years earlier), requiring that Ms Amato prove that she had not been overpaid;

c. decided in March 2018, when Ms Amato did not respond to the letter that she had not received, that she had been overpaid $2,924 Austudy in 2012 and should also be charged the $291 'recovery fee'; and

d. then, in September 2018, recovered $1,709 of the 'debt' by garnisheeing all of Ms Amato's tax refund for the 2018 tax year — that is, requiring the ATO to pay the refund to the Commonwealth rather than to Ms Amato.

The first that Ms Amato know of an alleged debt was when the tax refund she had been counting on did not arrive early in 2019. Ms Amato's accountant told her that DHS had garnisheed the tax refund to recover part of the alleged social security debt.

In March 2019, DHS had another look at its calculations and reduced Ms Amato's 'debt' to $2,754, which included an 'overpayment' of $2,504 and a 'recovery fee' of $250. That modest reduction came about after DHS realised that Ms Amato had been paid Austudy for one less fortnight in 2012. Of course, the reduction did not affect the $1,709 tax refund that DHS had swallowed in September 2018.

On 6 June 2019, VLA filed a new originating application, with Ms Amato as the applicant, in which the relief sought against the Commonwealth was similar to the relief sought in the Masterton case — but with one important addition.

The primary relief sought was a declaration that the initial demand made in October 208 and the revised demand made on 6 March 2019 had not been lawfully made, with the consequence that the demand for the payment of a recovery fee and the garnishee notice given to the ATO were not lawfully made.

The second (and additional) relief was an order that the Commonwealth pay to Ms Amato the money taken from her tax refund by way of the garnishee notice plus interest under s 51A of the *Federal Court of Australia Act 1976*.

Another recalculation — suddenly, there is no debt

The Commonwealth then went through much the same process as it had with Ms Masterton. In late August 2019, DHS reviewed Ms Amato's debt, decided that her debt was $1.48 and waived that debt (although, this time, the Commonwealth did not first ask Ms Amato to produce a swag of documents). A week later, the Commonwealth paid Ms Amato the amount it had recovered from her tax refund (plus $60 that she had paid off her 'debt' in late April 2019). But that was where the reckoning stopped: nothing was paid by way of interest on Ms Amato's money that the Commonwealth had grabbed and held onto for 11 months.

This time, the Commonwealth did not submit to the Court that there was no utility in Ms Amato's case proceeding to a hearing. The explanation offered for the difference was that there was an outstanding dispute between Ms Amato and the Commonwealth about whether she was entitled to interest on the money taken from her tax refund. But it is possible that the model litigant had an attack of conscience over its tricky behaviour in Ms Masterton's case. It is also possible that the Commonwealth understood that, if it put off the day of reckoning by neutralising a second case, VLA would find a third applicant and then a fourth applicant and so on until the Commonwealth's tactics would become indefensible. It is possible that the Commonwealth now wanted a hearing so that it could defend the OCI system. Who knows?

The Federal Court set a timetable for a hearing of Ms Amato's claims on 2 December 2019, including the exchange of written submissions, Ms Amato's legal team going first. By that stage, Frances Gordon was on maternity leave and had been replaced by Kateena O'Gorman and Glyn Ayres.

We (Kateena O'Gorman, Glyn Ayres and I) produced 40 pages of tightly argued submissions explaining why the EIC program (the rebranded OCI system), which had been used to raise the debt against Ms Amato, was inconsistent with the provisions of the Social Security Act regulating overpayments. In summary, the submissions made the following points:

- The Commonwealth's demands that Ms Amato pay the alleged debt were unlawful because the demands were made without any proper assessment of the question whether the preconditions for a debt were present but relied on apportioned data from the ATO that could not provide a rational basis for determining whether Ms Amato had received social security payments to which she was not entitled. Evidence about Ms Amato's income for a full year (1 July 2011 to 30 June 2012) could not establish her income for the six relevant fortnights in April, May and June 2012.
- The effect of the EIC program was contrary to the requirements of the Social Security Act because that program reversed the burden of proof established by that Act and required a person who had received social security payments to prove to the Commonwealth that she or he was entitled to those payments.
- Using the EIC program to establish assumed 'debts' flouted the systems prescribed in the Social Security Act for compelling the provision of accurate information on fortnightly income: the prescription of those systems indicated that the Act did not permit the Commonwealth to use non-probative, speculative information in order to purport to determine a person's income.
- Similarly, the Social Security Act identified specific and narrow circumstances in which the Commonwealth could use averaged financial data. None of those circumstances was present in Ms Amato's case. Accordingly, the use of averaged financial data as the basis for raising a debt against Ms Amato was precluded by the Social Security Act.
- The recovery fee was unlawfully added to the alleged debt because there was no debt due to the Commonwealth, as required by s 1228B of the Social Security Act; and none of the specific preconditions required by s 1228B was present.
- The garnishee notice was unlawfully issued because there was no debt due to

the Commonwealth, as required by s 1230C of the Social Security Act; and the Commonwealth had done nothing to attempt to reach a payment arrangement with Ms Amato before issuing the garnishee notice, as required by s 1230C(2).

- Because the Commonwealth had unlawfully denied Ms Amato the use of her tax refund for 11 months, she was entitled to interest on the amount unlawfully diverted by the Commonwealth.

The Commonwealth flies the white flag

Ms Amato's submissions were filed on 11 November 2019 (three weeks before the scheduled trial date). The Commonwealth's answering submissions were due on 22 November 2019. But, on 18 November 2019, AGS wrote to VLA saying that the Commonwealth 'would consent to orders being made in substantially the terms sought by the Applicant in this proceeding'. The next day, 19 November 2019, DHS informed its staff that it would stop raising debts based on the averaging of financial data from the ATO.[9] So Ms Amato had not only won her case (because the Commonwealth could find no answer to her written submissions) but she had also destroyed 'robodebt'.

On 27 November 2019, after a week's negotiation between VLA and AGS as to the terms of the order and an accompanying note to be endorsed by the Court, the Court declared by consent that:

- the two demands for payment of an alleged debt (one on 2 March 2018 and the other on 6 March 2019) were not validly made because the information on which the DHS decision-maker had relied was incapable of establishing that the conditions prescribed by the Social Security Act were met so as to raise a debt or attach a recovery fee; and

- the garnishee notice given to the ATO was not lawfully issued.

The Court also ordered, by consent, that:

- the Commonwealth pay Ms Amato $92.06 by way of interest for the period during which the Commonwealth retained Ms Amato's tax refund pursuant to the garnishee notice given to the ATO; and

- the Commonwealth pay Ms Amato's legal costs.

Attached to those orders was an explanation (the result of a week's negotiation between the parties), which was adopted by the Court as explaining the consent declarations and orders. The explanation noted that:

- the conclusion that Ms Amato had received social security benefits to which she was not entitled had been based on ATO data about her income for income tax purposes during the 2012 financial year;

9 Paul Farrell, 'Government Halting Key Part of Robodebt Scheme, Will Freeze Debts for Some Welfare Recipients', *ABC News*, online, 19 November 2019 <https://mobile.abc.net.au/news/2019-11-19/robodebt-scheme-human-services-department-halts-existing-debts/11717188?pfmredir=sm>.

- the data had then been converted into notional fortnightly income by, first, dividing the annual amount by 366 and, secondly, multiplying the result by 14;
- Ms Amato's notional entitlement to Austudy in the relevant fortnights (in April, May and June 2012) had then been calculated on the assumption that the notional fortnightly income was Ms Amato's actual income in each fortnight;
- the calculations had been made in accordance with general instructions developed by the Commonwealth; and
- similarly, the recovery fee was added to the alleged debt pursuant to general instructions developed by the Commonwealth.

The explanation continued that the conclusion reached by DHS, that Ms Amato had been overpaid in the amount of the alleged debts, was not open because:

- there was no basis on which the decision-maker could assume that Ms Amato's income in any fortnight could be derived from her annual taxable income;
- on the contrary, there was material (in Ms Amato's regular reports of income) which indicated that Ms Amato had not received the assumed income in any of the relevant fortnights; and
- it followed that there was no material before the decision-maker capable of supporting the conclusion that a debt had arisen under the Social Security Act.

The explanation concluded that, because it was not open to the Commonwealth to determine that Ms Amato had been overpaid, there was no foundation for attaching the recovery fee or for giving a garnishee notice to the ATO. It followed that Ms Amato was entitled to recover interest for the period during which the Commonwealth held onto Ms Amato's tax refund.

Comments

One of the mysteries associated with the OCI system (later branded the EIC program) is whether the people responsible for its introduction ever considered how it could be reconciled with the Social Security Act.

It is, I admit, hard to believe that the major restructuring of debt recovery that promised very cost-effective returns (because it largely eliminated the need for staff resources) was introduced without getting legal advice.

But I think that is very likely what happened — because any lawyer who bothered to look at the Social Security Act must have seen immediately that:

- averaging annual income could not produce fortnightly income — which is the only criterion that matters for calculating the level of income support payments under the Social Security Act; and
- the burden of proving no debt could not be placed on the imagined debtor.

I believe that it was only when the AGS and independent counsel were required to look at the Social Security Act in November 2019 (in order to answer Ms Amato's written submissions) that the Commonwealth was given clear legal advice: what you have been doing for more than three years is unlawful and cannot be defended.

If my theory is correct, it provides a massive indictment of the architects of the OCI system: they developed and introduced a system for imagining the existence of recoverable 'debts' from some of the most economically vulnerable members of our society without even bothering to ask whether that system was consistent with the Act regulating debt recovery. The comments made by Murphy J on 11 June 2021 strike me as fair and acute. Speaking when approving the settlement of the representative proceeding brought against the Commonwealth on behalf of 648,000 group members, his Honour said:

> The proceeding has exposed a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration. It should have been obvious to the senior public servants charged with overseeing the Robodebt system and to the responsible Minister at different points that many social security recipients do not earn a stable or constant income, and any employment they obtain may be casual, part-time, sessional, or intermittent and may not continue throughout the year. Where a social security recipient does not earn a constant fortnightly wage, does not earn income every fortnight, or only works for intermittent periods in a year, their notional or assumed fortnightly income based on income averaging is unlikely to be the same as their actual fortnightly income. It should have been plain that in such circumstances the automated Robodebt system may indicate an overpayment of social security benefits when that was not in fact the case. Yet, in the absence of further information from social security recipients, that is the basis upon which the automated Robodebt system raised and recovered debts for asserted overpayments of social security benefits.
>
> ...
>
> It is fundamental that before the state asserts that its citizens have a legal obligation to pay a debt to it, and before it recovers those debts, the debts have a proper basis in law. The group of Australians who, from time to time, find themselves in need of support through the provision of social security benefits is broad and includes many who are marginalised or vulnerable and ill-equipped to properly understand or to challenge the basis of the asserted debts so as to protect their own legal rights. Having regard to that, and the profound asymmetry in resources, capacity and information that existed between them and the Commonwealth, it is self-evident that before the Commonwealth raised, demanded and recovered asserted social security debts, it ought to have ensured that it had a proper legal basis to do so. The proceeding revealed that the Commonwealth completely failed in fulfilling that obligation. Its failure was particularly acute given that many people who faced demands for repayment of unlawfully asserted debts could ill afford to repay those amounts.[10]

10 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [5], [7]. The settlement confirmed that the Commonwealth had unlawfully asserted debts of at least $1.763 billion against approximately 433,000 people and had recovered approximately $751 million from about 381,000 people. The settlement also confirmed that the Commonwealth would pay $112 million inclusive of legal costs, which would be distributed (after deduction of the legal costs, which the judge understood to be $8.4 million) amongst 194,000 people. The legal basis for the payment of the $112 million was 'unjust enrichment'. The judge found that an additional claim, that the Commonwealth had breached a duty of care that it owed to the group members, was weak and, even if that claim had been accepted, would have added little to the unjust enrichment claim.

Justice Murphy also said that, although it might be proved that responsible Ministers and senior public servants *should* have known that income averaging based on ATO data was an unreliable basis for raising and recovering debts from social security recipients, it was quite another thing to be able to prove to the requisite standard that they actually knew that the operation of the robodebt system was unlawful:

> I am reminded of the aphorism that, given a choice between a stuff-up (even a massive one) and a conspiracy, one should usually choose a stuff-up.[11]

I can only observe, in conclusion, that the introduction of the OCI system ('robodebt') was a disgraceful venture in public administration, exploiting many vulnerable members of our society and flouting the clear requirements of the Social Security Act — in an attempt to imagine and then recover, at minimal cost, 'debts' that did not exist. The Commonwealth then compounded that disgraceful venture when it sought to avoid being called to account by 'recalculating' Ms Masterton's debt to nil (after saying that recalculation was not possible without eight categories of documents — which the Commonwealth did not have when it undertook the 'recalculation').

Eventually, the Commonwealth was forced (perhaps under pressure from its own legal advisers) to face legal reality. It turns out that I was right when I said, in 2017, that judicial review could produce a definitive ruling on a precise question of law posed by robodebt, in the way that it did 40 years ago, in *Green v Daniels*.

11 *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 [6].

Legal advice to government, and the long voyage of the *Vondel* through Australian public law

*Robert Orr**

> [O]ur Constitution [contains] … extremely general language … It necessarily sketches outlines rather than fills in details ...
>
> Alfred Deakin[1]
>
> [H]e takes out his evening's work and begins on it, methodical, tapping the papers into place. His bills are passed but there is always another bill. When you are writing laws you are testing words to find their utmost power. Like spells, they have to make things happen in the real world, and like spells, they only work if people believe in them.
>
> Hilary Mantel, *Wolf Hall*[2]

The *Vondel*, a three-masted Dutch trading ship,[3] first left Liverpool, England, for a voyage to Adelaide, Australia, in October 1900. It had to turn back. It left again several times more, at last successfully, in April 1901 and arrived at Adelaide in August 1901.[4] During this difficult journey Australia became a nation, with a written constitution, and the issues arising from the voyage gave rise to some tension between the Netherlands and Great Britain and between the newly created Commonwealth of Australia and the newly created state, formerly colony, of South Australia (SA).

Since 1901, following the tradition in Great Britain and the Australian colonies, the Commonwealth executive government has been assisted by lawyers who advise it in relation to the *Constitution* and public law issues more generally. In this article I call such advice 'executive opinions'. One executive opinion was given by Alfred Deakin as Attorney-General on 12 November 1902.[5] It concerned the international tension arising from a complaint by the Netherlands as to the conduct of SA officials on the arrival of the *Vondel*, and intra-Australian tension concerning how such a complaint should be dealt with (Vondel opinion). One key dispute was the extent of the non-statutory executive power of the new Commonwealth government — in particular, to ask for information from SA to provide to Britain to enable it to deal with the complaint by the Netherlands.

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1 In a debate on requests for amendments by the Senate to the Customs Tariff Bill 1901 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 1902, 15678.

2 (Fourth Estate, 2009) 574, describing Thomas Cromwell in 1534.

3 The *Vondel* was launched in November 1895 in Amsterdam: 'Vondel', Heritage Education Centre (Web Page) <https://www.hec.lrfoundation.org.uk/archive-library/ships/vondel-1895>. It was apparently named after Joost van den Vondel (1587–1679), the Dutch poet and playwright. After what proved to be an unlucky change of name to *Schulau*, it sank in Tierra del Fuego in 1910: 'SV Schulau', Wrecksite (Web Page) <https://www.wrecksite.eu/wreck.aspx?155064>.

4 *The Advertiser* (Adelaide, 12 August 1901) 4.

5 Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901−14* (AGPS, 1981) 129, opinion no 107 (Vondel opinion). I have numbered the paragraphs and use these for ease of reference.

In this article I first consider the Vondel opinion itself. The mechanisms for providing such executive opinions within the Commonwealth government have developed significantly since 1902, though the basic characteristics have been maintained. Second, I look at the Vondel opinion as an example of the nature and role of such executive opinions within the Commonwealth government. In doing so, I draw and reflect on my personal experience as a Commonwealth government lawyer, noting that this gives me a particular perspective. The views expressed by Deakin in the Vondel opinion formed the basis for a range of Commonwealth actions from then on; his position became, for practical purposes, part of the public law of Australia. But the extent of the non-statutory executive power of the Commonwealth has in recent years been considered by the High Court in a series of cases concerning government spending — in particular, *Williams v Commonwealth*[6] (*Williams [No 1]*) and also the previous *Pape v Federal Commissioner of Taxation*[7] (*Pape*) and the later, second, *Williams v Commonwealth*[8] (*Williams [No 2]*). This consideration disagreed with a key aspect of Deakin's view. Third, I look at the use and status of the Vondel opinion in the Court's deliberations. This consideration raises some interesting broader issues about modern constitutional interpretation and the differences in the approach to this task by the executive and the courts. Finally, I summarise some of the key features of executive opinions and their relationship with judicial decisions.

The Vondel opinion

The Vondel *in Adelaide*

JA La Nauze described the initial dispute in relation to the *Vondel* as between its belligerent Captain W Catlander and his deserting crew.[9] It appears that, when the *Vondel* arrived in Adelaide, Captain Catlander had trouble with certain of his crew who refused duty; they had signed up to return to Europe, but no doubt in light of the difficult voyage, and perhaps the enticements of Adelaide, wanted to depart there and be paid off.[10] The consul for the Netherlands in Adelaide and the captain made requests to the local stipendiary magistrate, W Johnstone, for the sailors to be arrested,[11] apparently under arts 10 and 12 of the relevant convention between Great Britain and the Netherlands of 1856 (1856 Convention).[12] These requests were refused, initially because an act of desertion was required, not just refusal of duty. Further, even when the sailors had left the *Vondel*, the magistrate took the view that he could only act on a 'sworn information'.[13] Two seamen then sued the captain for unpaid wages. The magistrate, Mr Johnstone again, found that, because the consul had

6 (2012) 248 CLR 156.
7 (2009) 238 CLR 1.
8 (2014) 252 CLR 416.
9 JA La Nauze, *Alfred Deakin A Biography, Volume 1* (Melbourne University Press, 1965) (La Nauze, *Deakin*) 266−7.
10 JH Gordon, Attorney-General (SA), *Report re Action of South Australian Authorities in Connection with Crew of Ship 'Vondel'*, (Parliamentary Paper No 84, House of Assembly, 1 October 1902) 5−6, document no 10.
11 Ibid 3, document nos 1 and 2.
12 *Convention between Great Britain and The Netherlands, for the Reciprocal Admission of Consuls of the One Party to the Colonies and Foreign Possessions of the Other*, signed at The Hague, 6 March 1856, in Lewis Hertslet, *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting between Great Britain and Foreign Powers, Volume 10* (Butterworths, 1859) 476, 479.
13 A reference perhaps to the terms of art 10 of the 1856 Convention and also s 238 of the *Merchant Shipping Act 1894* (Imp); Gordon (n 10) 1−2, 7, and document no 14.

decided the matter, it was outside the Court's jurisdiction and, perhaps exaggerating a little, that their claim was opposed to common sense and reason.[14] Netherlands' officials continued to complain not only that they had not been properly assisted but also that in the proceedings the consul was 'insulted in public court by the solicitor for the disobedient crew'.[15] The Attorney-General of SA in his later report stated that there was no contempt and 'it is the privilege of counsel to make statements based on his client's instructions, even if such statements made elsewhere might be slanderous'.[16]

Following on from these events, the Netherlands government wrote to the government of the United Kingdom that the SA authorities had not assisted the Dutch consul to arrest the men as required by the 1856 Convention. The Secretary of State for the Colonies, Joseph Chamberlain, sent the inquiry to the Governor-General of the Commonwealth, who in turn forwarded it to Alfred Deakin as acting Minister for External Affairs, who then asked the SA government for a report.[17]

The SA government objected to this inquiry through the Commonwealth government and suggested that it should have been made by Chamberlain directly to SA through its Governor.[18] The development of a dispute between the new Commonwealth and SA in relation to this issue and its broader significance has been set out elsewhere,[19] but it is important to note that it caused considerable debate within the new federation. Partly this arose because the Commonwealth and states were developing their new roles and the incident highlighted tensions in this regard, extending to the fundamental nature of the federation. The way the issue played out demonstrated the role of executive opinions in such questions, which is the focus of this consideration.

SA position

The principal SA executive opinion was signed by the Premier, JG Jenkins, on 23 September 1902, though apparently written by the Attorney-General, John Gordon.[20] Gordon was a lawyer. He had attended the 1891 and 1897−1898 constitutional conventions, was appointed to the SA Supreme Court in 1903, and in 1913 declined an invitation to move to

14 Gordon (n 10) 9, document no 21.
15 Ibid 5−6, document no 10.
16 Ibid 2.
17 Commonwealth, *Ship 'Vondel', Correspondence between Secretary of State for Colonies, and Governments of the Commonwealth and South Australia* (Parliamentary Paper No 1149, Senate, 2 July 1903) document nos 1−3.
18 Ibid document nos 6, 10, 12, 14, 17.
19 Ibid; La Nauze, *Deakin* (n 9) 266−70; Geoffrey Sawer, *Australian Federal Politics and Law 1901−1929* (Melbourne University Press,1956) 31−2; Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 1, 16−22; DI Wright, *Shadow of Dispute: Aspects of Commonwealth State Relations, 1901−1910* (ANU Press, 1970) 14−21. See also Robert French, 'Australian Nationhood and the Interaction between International and Domestic Law' [2005] *Federal Judicial Scholarship* 12 [32]−[39]; Anne Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs' in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) 37, 48.
20 Commonwealth (n 17) enclosure to document no 17; Brazil and Mitchell (eds) (n 5) [1].

the High Court.[21] Deakin described him as 'a graceful speaker' but one who had 'a dread of centralization' and 'a preference for a Confederacy as distinguished from a Federal Government' with 'the new central authority as far as possible dependent upon the States'.[22] Deakin wrote, somewhat triumphantly, that this view was out of sympathy with most of the delegates at the conventions, implying that it did not find its way into the *Constitution* itself.[23] As this article discusses, perhaps he spoke too soon. Resolution of even some of the most fundamental constitutional issues is to some extent provisional, subject to development and review and sometimes even involving a return to an earlier, neglected position but for new reasons.

In outline, SA put forward the following legal position in the opinion:[24]

- The Commonwealth government is the proper channel of communication with the Imperial government only on matters 'connected with Departments actually transferred' to the Commonwealth and also those 'upon which the Commonwealth Parliament has power to make laws *and has made laws'* (emphasis added). This reflects a view that the Commonwealth government is in most respects not able to act even in a non-compulsive way without legislation — in particular, without the approval of the states' chamber, the Senate, and that Australia is therefore more like a confederation in which the Commonwealth government is comparatively weak, unlike the British government and the state governments.[25]
- On all other matters 'the relations which existed between the States and the Imperial Government before federation has [sic] been preserved by the *Constitution*'.
- The extent of the external affairs power (s 51(xxix) of the *Constitution*) is vague, but no relevant law has been made.

The subject of the request did not therefore come within the grasp of Commonwealth executive power.

Commonwealth position

The principal response from the Commonwealth was the Vondel opinion by Deakin, which in summary argued as follows:[26]

- After discussing the text of s 61 of the *Constitution* it is said that the scope of the executive authority of the Commonwealth is to be deduced from the '*Constitution* as a whole' and 'it must obviously include the power … to effectively administer the whole Government

21 Graham Loughlin, 'Gordon, Sir John Hannah (1850−1923)' *Australian Dictionary of Biography, Volume 9* (Melbourne University Press, 1983); Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield et al (eds),*The Oxford Companion to the High Court* (Oxford University Press, 2001) 23, 24.

22 Alfred Deakin, *The Federal Story* (Robertson & Mullens, 1944) 36, 41; see also Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 98−9.

23 Deakin (n 22) 77.

24 See n 20.

25 Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 19−20, 28−32, which notes at 148 that the Federal Council of Australasia which operated before the Commonwealth had been overwhelmingly confederal.

26 Brazil and Mitchell (eds) (n 5).

of which the Parliament is the legislative department'.[27] The executive authority of the Commonwealth is derived in the first instance from the Crown and is independent of legislation, and 'its scope must be *at least* equal to that of the legislative power — exercised or unexercised'.[28] Regard is had to the history of s 61 to support this view.[29] This discussion reflects three important points. First, the reference to 'at least' indicates that there are arguments for broader powers — in particular, that the Commonwealth government has the same capacities as a natural person. Second, the narrower 'at least' power is linked to the Commonwealth Parliament's law-making power within a federal structure — in this case, in relation to external affairs (s 51(xxix)) and trade and commerce (s 51(i)). But third, within this limitation, the Commonwealth government is comparatively strong, a 'complete' or 'national' executive. It is like the British government and the state governments and able to act in a non-compulsive way without legislation — in particular, without the approval of the states' chamber, the Senate.[30]

- The whole body of the prerogative (apparently in its broad sense) in relation to the affairs of the Commonwealth is exercisable in accordance with the principles of responsible government. Shorn of such prerogative powers, the Commonwealth executive would be 'a mere appendage to the Parliament', not a national body but 'a municipal body, for making and executing continental by-laws'.[31]

- Further, here the Commonwealth is only inquiring into the facts involving international relations and trade and commerce. If 'power' becomes necessary, that is compulsive power, the *Royal Commissions Act 1902* (Cth) gives relevant statutory powers.[32]

Deakin wrote this opinion towards the end of a very difficult year.[33] He had tried to resign from Cabinet in May 1902, when his wife Pattie had been ill. Edmund Barton then went away to attend the coronation of Edward VII and Deakin was acting Prime Minister and Minister for External Affairs. Further, back in October 1901, the government's tariff proposals had been introduced as part of the budget.[34] Tariff policy was a major political issue, and it had significant implications for the finances of the Commonwealth and the states; it was not until the Bills were passed that the Commonwealth would have a secure revenue. But debate on the Customs Tariff Bill 1901 took nearly a year, with a hostile Senate repeatedly requesting amendments under s 53 of the *Constitution*. It seems likely Deakin suffered a breakdown from nervous exhaustion after the passage. Not known for exaggeration, Deakin wrote in the *Morning Post* that the 'Commonwealth has never accomplished a more perilous piece of steering among the quicksands which surround it' and that 'the Union itself can scarcely again be exposed to such a crucial trial'.[35]

27 Ibid [12].
28 Ibid [14] (emphasis added).
29 Ibid [18]−[21].
30 Aroney (n 25) 28−32, and 116−117 discussing Samuel Griffith's views.
31 Brazil and Mitchell (eds) (n 5) [15]−[16].
32 Ibid [24]−[25].
33 In relation to this paragraph, see La Nauze, *Deakin* (n 9) 283−7; Sawer (n 19) 24; Judith Brett, *The Enigmatic Mr Deakin* (Text Publishing, 2017) 271−8; Al Gabay, *The Mystic Life of Alfred Deakin* (Cambridge University Press, 1992) 145−6; Stuart McIntyre, *The Oxford History of Australia Volume 1, 1901–1942* (Oxford University Press, 1986), 89.
34 These became the *Customs Tariff Act 1902* (Cth) and the *Excise Tariff Act 1902* (Cth).
35 Alfred Deakin, *Federated Australia: Selections from Letters to the Morning Post 1900−1910* (Melbourne University Press, 1968) (Deakin, *Federated Australia*) 106.

La Nauze looked at the file in relation to the Vondel opinion when writing his biography of Deakin and noted that there were two drafts — one in Robert Garran's hand, the first draft; and one typed — and that both had extensive alterations and additions by Deakin. He stated that the advice is an 'excellent illustration of Deakin's personal handling of a semi-legal, semi-diplomatic matter'. On the one hand Deakin strengthened the assertion of principle of the competence and paramountcy of the Commonwealth, both legislative and executive, in matters which fell within external affairs. On the other, he made it clear with careful courtesy that this larger principle was not involved in this instance; only the authority of the Commonwealth to enquire.[36] Garran refers to working with Deakin on drafting opinions in his autobiography. He recalls lively discussions 'with rapier thrusts … putting me to desperate shifts in its defence', regular redrafting, and a final opinion 'more satisfying to myself and, I hope, more convincing to others'.[37] It is likely that this was the approach taken with the Vondel opinion.

The opinion was sent by Deakin to Barton, now returned, and then to the Governor-General for forwarding to the Secretary of State for the Colonies. Barton clearly indicated he supported the opinion and could not restrain himself from adding significant additional comments. In particular these concerned the nature of the Commonwealth, which he said was 'more than the addition of a seventh legislative authority, with such executive power merely as arises out of legislation'. At any rate the method of communication was a matter for the Colonial Office, 'which cannot await the decision of the High Court', even if 'a decision of the Court could bind the Colonial Office'.[38]

British position

Joseph Chamberlain provided two opinions in response to the controversy. Chamberlain was not a lawyer but was Secretary of State for the Colonies from 1895 to 1903 and, as such, had carriage of the *Australian Constitution* through the British Parliament. Deakin described him in 1900 as 'practically the master of the House of Commons' and also noted the British law officer's entire submission to Chamberlain's position of absolute supremacy. The opinions reflect Deakin's description of Chamberlain's style of writing, as of speech, as 'peremptory, incisive, clear and in the nature of an ultimatum'.[39]

In an opinion dated 25 November 1902,[40] Chamberlain stated that all matters declared by the *Constitution* to be of federal concern rested on the federal government, the sphere within which His Majesty's government should communicate with the federal government was 'co-extensive with the responsibility and power of the Commonwealth', and there does not appear to be anything in the *Constitution* which would justify limiting it to matters connected with departments actually transferred or matters upon which the Commonwealth Parliament has power to make laws and has made laws. SA did not give up and Gordon tried again, now as acting Premier — in particular, arguing that the Commonwealth only had powers the *Constitution* specifically conferred on it.[41] Chamberlain was unmoved and, in a second

36 La Nauze, *Deakin* (n 9) 269. I attempted to look at this file, but, sadly, it cannot now be found.
37 Garran (n 22) 155.
38 Commonwealth (n 17) document no 27.
39 Deakin (n 22) 126, 133, 141.
40 Commonwealth (n 17) document no 29.
41 Ibid, enclosure with document no 31 dated 13 February 1903.

response dated 15 April 1903, stated that the view of the SA Ministers would, if adopted, 'reduce the Commonwealth to the position of a Federal League, not a Federation', and this appeared to Chamberlain 'to be entirely opposed not only to the spirit but to the letter of the Act'.[42]

Characteristics of executive opinions and their status in the Commonwealth government

Section 61 of the *Constitution* provides for the executive power of the Commonwealth and that this extends to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. The Commonwealth government needs significant legal advice to determine and exercise this power.[43] The means whereby this advice is obtained has developed since the Vondel opinion was written. On 12 July 1901 there were four staff in the Attorney-General's Department and by 1 January 1903 this had risen to only seven. This staff was primarily providing legal advice; providing legal policy advice, including on the development of legislation; and drafting that legislation. Litigation by the Commonwealth was principally undertaken by private firms and counsel.[44]

Today, the Commonwealth government has a vast array of legal advisers. For 2019−20 the total legal services expenditure reported by Commonwealth agencies was about $1.02 billion.[45] The complexity of Commonwealth activity and number of Commonwealth laws is far greater now. But some of the characteristics and approaches evident in the Vondel opinion remain relevant to the legal advisers of the Commonwealth today, and I discuss these here.

Legal advice

By lawyers

It may seem an obvious point, but it is important to note that the Vondel opinion has the characteristics of legal advice, operating within the context of government administration. First, the Vondel opinion was given by trained lawyers. Deakin was a barrister, though he had recently devoted himself mainly to the politics of the federal movement and then the new Commonwealth as member for Ballarat, leading Protectionist and Attorney-General. Further, he was supported in his role as Attorney-General by Garran as Secretary of the

42 Ibid, document no 32.

43 The role of government lawyers in Australia is considered in Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart, 2016) (Appleby, *Solicitor-General*); Gabrielle Appleby et al (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014); Michael Barker, 'What Makes a Good Government Lawyer' [2010] *Federal Judicial Scholarship* 26; LJ Curtis and G Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights' (1975) 49 *Australian Law Journal* 335; Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114. Recent works about particular government lawyers are Michael Sexton, *On the Edges of History: A Memoir of Law, Books and Politics* (Connor Court Publishing, 2015); Carmel Meiklejohn, *Without Fear or Favour: The Life of Dennis John Rose AM QC* (AGS, 2016).

44 Attorney-General's Department (Cth), *100 Years Achieving a Just and Secure Society* (2001) 177; Garran (n 22) 151−3; HE Renfree, *History of the Crown Solicitor's Office* (Attorney-General's Department (Cth), 1970) 5.

45 Attorney-General's Department (Cth), *Legal Services Expenditure Report 2019−20* (2021) (Legal Services Report) 3.

Attorney-General's Department and also a barrister. Both came close to being appointed to the High Court.[46]

The modern lawyers to the Commonwealth include many more people, but also there is a greater delineation between them and other public servants and advisers. Most of the legal advice to the Commonwealth is provided by lawyers who have only that role. This includes the Solicitor-General and their office,[47] and the Australian Government Solicitor (AGS) in the Attorney-General's Department.[48] The Office of General Counsel (OGC) in AGS provides constitutional and public law advice and conducts constitutional litigation. There are other lawyers in the Attorney-General's Department providing legal advice — in particular, the Office of International Law. There are a range of policy lawyers within the department, including the Office of Constitutional Law, which provides policy advice in relation to the *Constitution*. There are also a large number of in-house lawyers within particular departments and agencies. The Australian Government Legal Service has recently been established as the formal professional network for all Commonwealth government lawyers. Private solicitors and barristers are regularly engaged by the Commonwealth.[49]

This range of legal advisers is regulated in a number of ways but in particular by the *Legal Services Directions 2017* (Cth) made under s 55ZF of the *Judiciary Act 1903* (Cth). These set out areas of tied work; most relevantly, legal work involving constitutional law issues is tied to — that is, can generally only be performed by — AGS and the Attorney-General's Department, and counsel and other experts such as academics briefed through them, in addition to the Attorney-General and Solicitor-General.[50]

Applying legal principles

Second, the Vondel opinion addressed a legal issue using traditional legal principles and approaches. Deakin was advising on why the Commonwealth request was lawful. He did so by looking at a range of provisions of the *Constitution* — in particular, s 61 concerning executive power, s 70 the transfer of powers, and s 75(i) the original jurisdiction of the High Court, though not yet in existence. Regard was also had to the purpose of s 61 and its history; and to the nature of the Commonwealth government established by the *Constitution*.

Judicial decisions are generally applied in executive opinions as statements of legal principle. The Vondel opinion contains no reference to any case law, but this was because s 61 was not yet two years old and there had been none. In the absence of judicial authority, Deakin brings to bear the law of statutory interpretation. To a large extent he is seeking to anticipate what a court would decide if the matter came before it from the perspective of the Commonwealth Attorney-General wanting to exercise the full reach of Commonwealth powers. In relation to the range of issues where there is no judicial determination, the

46 Simpson (n 21) 24.

47 *Law Officers Act 1964* (Cth).

48 *Judiciary Act 1903* (Cth), pt VIIIB; see also ss 55E and 55F concerning Attorney-General's lawyers.

49 Attorney-General's Department (Cth), *Annual Report 2019−20* (2020) 8−9, 23−4; Attorney-General's Department, Legal Services Report (n 45).

50 *Legal Services Directions 2017* (Cth), sch 1, paras 2, 10A, 12(3)(a), and Appendix A, paras 1(a), 3A, 3B, 4, 5. See also Attorney-General's Department (Cth), *Guidance Note 5, Principles of Constitutional Litigation* (2018) and *Guidance Note 10, Advice on Constitutional Law Matters* (2018).

Commonwealth has more scope to articulate and implement a position which reflects its view of the basic constitutional principles.[51] Even if it were possible, the advice does not look for potential but unexpressed judicial limitations.

Fundamentally, government lawyers then and now are assisting the Commonwealth to implement its policies lawfully. In the absence of judicial determination, they determine that law and manage the tension between the core constitutional principles of democratic government and the rule of law.

Within legal ethical obligations

Third, the opinion did so in accordance with a lawyer's ethical obligations.[52] Particularly important is the duty of diligence — that is, as currently formulated by the Law Council of Australia — to act in the best interest of a client and deliver legal services competently and diligently.[53] The Australian Public Service (APS) Code of Conduct sets out similar principles when it provides that an APS employee must behave honestly and with integrity, and must act with care and diligence, in connection with APS employment.[54]

To facts?

Fourth, the Vondel opinion applied the law to a particular factual situation — namely, the request by the Commonwealth for information from SA. Much but not all legal advice does this. Government legal advice often addresses general legal issues not linked to any facts — in particular, in policy development contexts. This can involve consideration of whether an issue can be addressed by the Commonwealth and, if so, how. This can range from just saying something, doing something or entering into an agreement for others to do something to changing the law or making a new law. Much legal advice within government involves developing and assessing various options to address a policy issue. Of course, all judicial decisions are linked to particular disputes; in Australia, at least in the exercise of federal judicial power, there can be no 'advisory' judicial decisions.[55]

51 Bradley Selway, 'The Rule of Law, Invalidity and the Executive' (1998) 9 *Public Law Review* 196, 198. There is a very significant amount of material on the position of executive opinions in the different context of the United States of America, with a further impetus for considering these issues from the torture opinions of 2002 (see eg Karen Greenberg (ed), *The Torture Debate in America* (Cambridge University Press, 2006)). To note just two American approaches, John McGinnis has developed models of the various American positions for executive opinions: a 'court-centred model' where executive views are bound by judicial precedent; an 'independent authority model' which provides for an interpretation by the executive of the law that articulates the President's jurisprudential principles rather than those of the courts; and a 'situational model' which provides for an interpretation which most advances the President's political or situational interests — see 'Models of the Opinion Function of the Attorney-General: A Normative, Descriptive, and Historical Prolegomenon' (1993) 15 *Cardozo Law Review* 375, 377. Also, there is the concept of internal separation of powers, by which in particular the executive is checked by internal mechanisms where Congress and the courts cannot or have not done so, of which executive opinions are a key example — see Gillian Metzger, 'The Interdependent Relationship Between Internal and External Separation of Powers' (2009) 59 *Emory Law Review* 423.

52 See now *Judiciary Act* 1903 (Cth) ss 55E and 55Q.

53 Law Council of Australia, *Australian Solicitors Conduct Rules* (2015) s 4.1.

54 *Public Service Act 1999* (Cth) s 13(1), (2).

55 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

With wider implications

But, fifth, while it is true that the Vondel opinion begins by considering a particular issue in a particular factual context, it articulates a strong concern for the wider implications of the SA position. As Deakin stated, although Gordon was 'professedly dealing with questions as to the channel of communication …, his propositions take a much wider scope, and involve much more fundamental consideration', which 'would, if upheld, seriously affect the Commonwealth'.[56] Apart from its introduction, the Vondel opinion scarcely addresses the Commonwealth request for information at all and, indeed, Gordon had published a report before the opinion was finalised.[57] It is as if Deakin himself has limited concern for this particular issue but great concern in relation to the general principle underlying the SA position and its effect on the Commonwealth.[58] Deakin seemed particularly concerned to allow the Commonwealth government to act quickly to address issues, without the need for the passage of legislation. He may also have thought it appropriate that the requirements for such action should be readily ascertainable by reference to the Commonwealth's express legislative powers. This concern for the wider implications of advice continues to be true of many executive opinions. The particular facts and issue are important, but often it is the underlying principle and the effect on the Commonwealth and its ability to act in the future which are also important.

In the context of ongoing relationships

Sixth, what was also important were the relationships involved — that is, the wider implications of the Vondel opinion included the effect of the issue on the relationships between the Commonwealth, SA and the other states, and Great Britain. In 1902, the Commonwealth was a newly created body, but it was a permanent body and one which would need to relate to SA, the other states and Great Britain over a very extended period. The framers generally underestimated how much cooperation there would be between the states and the Commonwealth.[59] Also, from a modern perspective, it can be misleading to see the constitutional history of Australia since federation through the lens only of the key disputes which are resolved by High Court litigation, significant as they are. Often there is cooperation, or at least civil dealing, between the Commonwealth and the states which develops policies and laws and resolves disagreements without litigation. In the Vondel opinion Deakin seems conscious of the importance of these ongoing relationships. He does not attempt to overreach in the propositions put forward. To some extent this reflects Deakin's personal conciliatory style.[60] But it also reflects the general need for government lawyers and their clients to be working within significant ongoing relationships and seeking to find the sensible middle ground on contentious issues, putting a position which is not overcautious in protecting and promoting the position of the Commonwealth executive but consistent with the role of other institutions. Of course, others, like Gordon and his successors, may have had a different perspective, and notoriously there have been many major disagreements which the courts have had to resolve.

56 Brazil and Mitchell (eds) (n 5) [2]−[3].
57 Gordon (n 10).
58 Brazil and Mitchell (eds) (n 5) [26].
59 JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) (La Nauze, *Constitution*) 288.
60 La Nauze, *Deakin* (n 9) 251; Brett (n 33) 218, 241; Walter Murdoch, *Alfred Deakin* (Bookman Press, 1999) 48−9, 195.

With broad public interest

Seventh, the wider implications also involve the people of Australia. At the time of the Vondel opinion some Australians had recently voted in referendums in the constitution-making process, participated in the federation celebrations, voted in the first Commonwealth elections, and watched the new institutions begin to address national issues. By the end of 1902 there had emerged some level of disenchantment with the new arrangements — in particular, because the state governments had begun to realise that the federal union was necessarily curbing local independence. Perhaps because of this, the issues around the Vondel opinion were, somewhat surprisingly to modern eyes, matters of very significant public concern.[61] Executive opinions are often the subject of great public interest and engagement — in particular, when they are related to major policy or political disputes.

Not policy, ethical or political advice

The Vondel opinion is not one of the other various forms of advice which are given within and to government, including policy advice — that is, was the request to SA an appropriate action for the Commonwealth to take; ethical advice — that is, was it in accord with some fundamental principle not incorporated in the law; or political advice —that is, was it a position which had democratic support. These distinctions need some further consideration, noting that they raise complex issues which can only be touched on briefly here.

Policy advice

Actions of the government generally seek to implement a policy as the request by the Commonwealth to SA did. This link is particularly evident in the development of laws; all laws seek to implement a policy, to use governmental language, or have a purpose, to use more legal language. At least in theory there is a distinction between the development of the policy, legal advice in relation to that policy, implementation of that policy in action or legislation, and the interpretation of that legislation. In reality these processes are intertwined, each influencing the others.

From the beginning, Commonwealth Attorneys-General and their department had the roles of providing policy development, legal advice in relation to that policy, and the implementation of that policy in legal form. In the early years of the federation, including when the Vondel opinion was written, Deakin, Garran and others were themselves carrying out all these roles in relation to the major endeavour of establishing the foundational laws of the new Commonwealth. They had worked on the *Royal Commissions Act 1902* (Cth), which was mentioned in the Vondel opinion. They were working on the *Judiciary Act 1903* (Cth), which established the High Court and a range of other fundamental provisions for Australia's new legal system.[62]

Policy development often relies on legal advice — in particular, because the *Constitution* limits the powers of the Commonwealth Parliament in a range of ways and also because

61 La Nauze, *Deakin* (n 9) 269; Brett (n 33) 270.
62 La Nauze, *Deakin* (n 9) 265−6, 287−96; Brett (n 33) 270−1, 281; Murdoch (n 60) 210−12.

any proposed law will sit within the broad legal landscape of other laws; and its operation will be influenced by this landscape and will in turn influence it.[63] Such advice can be extrinsic material for the purposes of interpretation of the new law.[64] Some of the most significant executive opinions have concerned the constitutional support for major and controversial Commonwealth initiatives. Policy development and legal advice can be linked in a range of other ways. For example, past advice often influences and even prompts policy development. In the second reading speech for the Judiciary Bill, Deakin used the Vondel issue as support for creating the High Court to deal with matters arising under treaty, implying that it would have been inappropriate for the issue to have been dealt with by the SA Supreme Court.[65] His experience in relation to the Vondel opinion informed his development and defence of the Judiciary Bill.

The Vondel opinion is not policy advice concerned with what the *Constitution* should say but a view about what the *Constitution* provides. As a matter of practice, advice on what a law means to the Commonwealth shares some features with the law-making task itself. In saying what the *Constitution* meant in the Vondel opinion, Deakin was affecting how the Commonwealth behaved. It is an example of practical or working constitutionalism, or constitutional realism. Matthew Palmer has written that a realist understanding of a constitution — in that case, the more disbursed New Zealand constitution — identifies not only the substantive elements of the constitution but also those who interpret and apply those elements.[66] Here the interpretation by Deakin of the Commonwealth's executive power was applied in a developing range of circumstances by lawyers and public servants for well over a hundred years, with significant practical impact on the government and the people of Australia.

Today within the Commonwealth there is a much stronger division between policy developers (generally Ministers and departmental officials, who also often take the executive action), drafters (in the Office of Parliamentary Counsel) and legal advisers (the Solicitor-General, AGS and other lawyers). These are each generally more specialist roles in separate administrative structures. But there is still significant interaction between the various roles.[67]

Ethical advice

The Vondel opinion was not ethical advice — that is, it did not assess the Commonwealth's request on the basis of some fundamental moral principle not incorporated in the law. But several brief points can be made about the opinion and ethics. First, the opinion was given in accordance with the specific ethical obligations of a lawyer — in particular, the duty of diligence, noted above.

63 An early example is at Brazil and Mitchell (eds) (n 5) 23, opinion no 12.
64 See, for example, *Wilkie v Commonwealth* (2017) 263 CLR 487, 534−5 [100]−[104].
65 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 600, involving exchanges between Deakin, Sir John Quick, and Patrick Glynn.
66 Matthew SR Palmer, 'What is New Zealand's Constitution and Who Interprets it?: Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *Public Law Review* 133, 134; Appleby, *Solicitor-General* (n 43) 3−7.
67 *Parliamentary Counsel Act 1970* (Cth); Office of Parliamentary Counsel (Cth), *Drafting Direction No 4.5: Legal Advice on Issues Arising During Drafting* (2015); Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel (Cth), 2011).

Second, lawyers, like anyone else, have broader ethical views. Deakin is an example of someone who had strong moral and spiritual concerns.[68] Indeed, there was some drift from his broader ethical views into his views of federation.[69] But in the Vondel opinion Deakin was expressly providing only legal advice on the *Constitution* in accordance with his lawyer's duty of diligence. Difficult issues may arise if a government lawyer has personal ethical views which interfere with them fulfilling their duty of diligence.[70]

Third, there is considerable discussion, particularly in the United States of America, as to whether government lawyers have an obligation to take into account broader ethical concerns, public interests or non-legal principles as part of their legal advice.[71] The Australian tradition of executive opinions does not generally include considering such issues as part of legal advice unless asked. While lawyers may be able to assist in identifying and analysing broader ethical considerations, all public servants are able to consider these, as can Ministers and with greater democratic accountability.

But, fourth, the law itself often deals with key ethical issues and reflects fundamental values. In the Vondel opinion, Deakin made clear that the executive power to investigate issues was limited to requesting information and that if compulsion or punishment was required then legislation was necessary.[72] This rule reflects a basic concern about the appropriate impact of government actions on individuals. The legal approach of the SA authorities in relation to the crew of the *Vondel* also reveals a concern that a person could only be arrested with clear authority and fair process.[73]

Political advice

The Vondel opinion is not political advice; it is not an assessment of the democratic support for the action taken by the Commonwealth. Of course, the executive government is elected by the people, albeit indirectly, and supported by the Parliament to develop and implement its policies, and it is accountable to them for this. The fundamental role of government lawyers is to assist the development and implementation of those policies lawfully. But the ongoing political support for a policy is not relevant to the interpretation of the *Constitution* or legislation. The Vondel opinion does not take account of the current views of the people as to the issue of whether the request should or could be made. It only takes account of those views indirectly as they were expressed in the *Constitution* itself. Of course, in deciding whether actually to take an action supported by legal advice, political considerations may be very important for the executive government.

Deakin's position about the relationship of legal and political considerations was demonstrated dramatically at the very end of his first term as Prime Minister in the Protectionist and Labour coalition after the election held on 16 December 1903. The Conciliation and Arbitration

68 Gabay (n 33).

69 As Walter Murdoch noted, he preached federation as a religion and sought to erect a constitutional edifice as 'sacred as a shrine': Murdoch (n 60) 162, 175.

70 Law Society of NSW, *A Guide to Ethical Issues for Government Lawyers* (3rd edition, 2015) 15−16 [2.5]; see also the 1st edition of this publication (2003) at 'On Guide 3.3'.

71 Appleby, *Solicitor-General* (n 43) 139−43, 151−2; see also n 51.

72 Brazil and Mitchell (eds) (n 5) [25], [29].

73 See the discussion at n 13.

Bill his government presented again expressly excluded from its benefits employees of industries, such as railways, run by state governments. The second reading speech by Deakin on this Bill included in effect a detailed legal advice as to why this limitation reflected the constitutional arrangements.[74] He stated that 'State rights, if they are put forward simply as demands, making for their independence of the Union, deserve to be resisted', perhaps reflecting on the Vondel controversy. But 'State rights, when they are requested only in order to preserve the integrity of its units and their place in the Union, ought to be as dear to us as the rights which we claim for the Federal authority'.[75]

On 19 April 1904, Andrew Fisher, leader of the Labour Party, moved an amendment extending the proposed provisions to such state employees,[76] which was carried on 21 April 1904[77] and treated by Deakin as a matter of confidence leading to his resignation as Prime Minister. Other issues were at play here in addition to the *Constitution*, but nonetheless it is clear that the decision of the House of Representatives to prefer the Bill's application to state government industries did not override Deakin's view that this was unconstitutional.[78] For him it was essential that this policy, important as it was, be implemented lawfully, even if his view had only minority support in the Parliament and meant loss of the prime ministership.[79]

Concluding comments on other advice

Of course, these different types of advice are all generally relevant to a decision to be taken by the government. Such a decision can have legal, policy, ethical and political aspects, and more. In government considerations, and in public discussions, these different aspects can become muddled. It is the role of the legal adviser to identify the legal issues and address these in the decision-making process, while recognising the other perspectives and broader context. Lawyers can also assist with policy, ethical and political issues if asked but need to make clear this is not legal advice;[80] Deakin may well have given these other types of advice, but the Vondel opinion was only legal advice. It is also often the role of government lawyers to explain in this process how various legal accountability mechanisms work, such as judicial review, and later to explain to accountability bodies, such as courts, how these legal issues were addressed and the broader context in which they arose. Government lawyers often need to translate legal issues for government decision-makers and then translate the multi-faceted issues in a decision for legal review bodies.

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1904, 776−91.
75 Ibid 786.
76 Ibid, 19 April 1904, 1043.
77 Ibid, 21 April 1904, 1243−4.
78 Sawer (n 19) 37−8; Brett (n 33) 293−6; La Nauze, *Deakin* (n 9) 320; JA La Nauze, *Alfred Deakin A Biography, Volume 2* (Melbourne University Press, 1965) 364−6.
79 In due course the Bill became the *Commonwealth Conciliation and Arbitration Act 1904* (Cth). There is an interesting advice by Josiah Simon as Attorney-General as to whether he should advise the Governor-General to give royal assent in light of doubts about its constitutional validity: Brazil and Mitchell (eds) (n 5) 238, opinion no 203.
80 Law Society of NSW (2015) (n 70) 44−7 [6].

Consistent

Across the Commonwealth

Significant efforts are made to ensure that legal advice is consistent across the Commonwealth. As noted, it is wrong to see the Vondel opinion as only one person's view. Even in these early days of the federation, both Deakin and Garran had significant involvement in the opinion and Barton as Prime Minister agreed with it. It is possible that others in the department at that time also contributed.

Even with the growth in the number of those providing legal advice to the Commonwealth, this collegial approach has continued. As noted, legal work involving constitutional law issues is tied to AGS — in particular, OGC and the Attorney-General's Department in addition to the Attorney-General and Solicitor-General. This facilitates consistency in and coordination of constitutional advice. In relation to advice given by OGC, there is a system of second counselling, under which all advice is checked by another, generally more senior, lawyer. Significant advice is prepared by or with the supervision of senior lawyers, if not the Solicitor-General, and often co-authored. The modern practice is to discuss the advice with the relevant policy officers, and often provide them with a draft, to ensure it addresses their questions and concerns. Further external advice is sometimes obtained.[81] More generally, the Legal Services Directions promote consultation on legal advice across the Commonwealth by other mechanisms. A department which administers particular legislation must generally be consulted in relation to legal advice on that legislation.[82]

Across time

This consistency is also pursued across time. Even the early Vondel opinion had itself followed previous advice — in particular, an opinion of 28 May 1901.[83] In turn, the Vondel opinion was treated as authoritative within the executive government. It informed the approach which the Commonwealth took in its ongoing dealings with SA, the other states and Great Britain. It also formed the basis of, and was implemented and developed in, further legal advice on the extent of non-statutory executive power. An opinion on 27 November 1907 concerning the landing of foreign troops or crews noted that 'as far as the Commonwealth Government is concerned, it must be taken to be settled law that the executive power of the Commonwealth is co-extensive with … its legislative powers, … exercised or unexercised …'.[84]

But with the decision in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[85] (*Wool Tops case*) in 1922, there was a discernible shift. In an opinion dated 27 February 1923 Garran considered whether the Commonwealth could give a guarantee in support of the Commonwealth Bank in relation to what was called the Fruit Pool.[86] He stated that in light

81 See, for example, James Faulkner and Robert Orr (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 3: 1923−45* (Commonwealth, 2013) 217, opinion no 1461, by W Harrison-Moore and WK Fullagar.
82 *Legal Services Directions 2017* (Cth), sch 1, para 10.
83 Brazil and Mitchell (eds) (n 5) 2, opinion no 2.
84 Ibid 358, 360, opinion no 293.
85 (1922) 31 CLR 421.
86 Faulkner and Orr (eds) (n 81) 10, opinion no 1320.

of the *Wool Tops case* the executive government had no power apart from the *Constitution* itself or some statutory authority to enter into agreements for the payment of money. This suggests a quite cautious response to the High Court's decision. The issue of guarantees became important in the Great Depression from 1929, and opinions then still suggested legislation was required.[87] Other opinions allowed contracts incidental to the administration of a department, provided there was an appropriation.[88]

However, this approach eased over time. By 1933 John Latham as Attorney-General was advising that, under the *Constitution*, the Commonwealth may acquire by agreement any property which it requires for any public purpose, and he goes on to note it may also legislate to do so.[89] This shows Latham bringing a more robust view of executive power to the issue and possibly reliance on the concept of purposes of the Commonwealth in s 81 of the *Constitution. Victoria v Commonwealth*[90] (*AAP case*) provided some High Court support for this more robust view of the non-statutory power of the Commonwealth to enter into agreements, as discussed extensively in *Williams [No 1]*. More broadly, the Vondel opinion was cited and adopted regularly in other executive opinions, including by Sir Maurice Byers in his opinion as Solicitor-General on 5 September 1975 about the Governor-General's Instructions, where he noted it as support for the proposition that the *Constitution* brought into existence a nation, not a colony.[91]

In the absence of a new relevant judicial decision, the Commonwealth seeks to maintain consistency of legal advice over time. Of course, there may be other reasons for a change, but a reason is needed. Generally the change needs to be made by someone at least at the level of the original adviser. It is difficult to see that the Vondel opinion by Deakin and Garran, reflecting the position of Griffith, approved by Barton and Chamberlain and followed by many others, which provided for a practically important level of non-legislative executive power but limited to the legislative powers of the Commonwealth, and therefore reflecting the federal arrangements, would have been overturned except by a clear High Court decision like *Williams [No 1]*.

Written, reasoned record

The provision of written, reasoned advice facilitates this consistency. Of course, it has always been the case that much legal advice is initially given orally. But the practice in OGC is that, if the advice is significant, it should be reduced to writing. In this modern age, much advice is given by email, not in more formal documents like the Vondel opinion. But, whatever the form, there is practice of recording the advice and its reasons. These written advices are captured in a systematic form. This was originally in Opinion Books; the Vondel opinion was in Volume 2 at p 404. Over time, card indices were developed. Since 1982, there has been an electronic searchable database.[92]

87 Ibid 273, opinion no 1498.
88 Ibid 56, opinion no 1353.
89 Ibid 332, opinion no 1532.
90 (1975) 134 CLR 338.
91 National Archives of Australia, Attorney-General's Department, Solicitor-General's Opinions – Byers 1973−76, A3177, 290, 298.
92 Attorney-General's Department (Cth) (n 44) 124, 130.

These advices are generally confidential within the Commonwealth. Current advices are sometimes published by the government but generally not.[93] Some correspondence on the Vondel dispute was tabled in the House in September 1902,[94] and the Vondel opinion itself was tabled in the Senate on 2 July 1903, together with a range of relevant correspondence including the SA and British opinions.[95] This reflected the public interest in the issue. Historical advices have been published in hard copy[96] and more recently online and with additional material.[97] Such historical advices can continue to have a significant impact on Commonwealth administration, and their publication enables them to be used in constitutional texts and in the courts. It was in this hard copy published format that the Vondel opinion was referred to in the High Court in *Pape* and then in *Williams [No 1]*.

Accountable

Legal advice to the Commonwealth is subject to a range of review mechanisms, though generally through decisions made based on the advice; as noted, the legal opinions themselves are generally not made public. These mechanisms make up much of the content of Australian public law and take up a significant amount of time and effort of government lawyers.

There are review mechanisms within the executive. The fact that legal advice is sought in relation to decisions is itself a check on unlawful executive action. As noted, the Vondel opinion was drafted by Garran and perhaps others, checked and amended by Deakin and agreed to by Barton. Similar review mechanisms in relation to legal advice have existed since then, though often with less illustrious players. For the majority of executive decisions, this is the only legal review mechanism. Independent agencies within the executive can review decisions taken on the basis of the legal advice. As to spending in particular, the *Auditor-General Act 1997* (Cth) provides for an Auditor-General. The Ombudsman provides another important review mechanism.[98] There is now also extensive merits review of decisions made on the basis of legal advice — in particular, by the Administrative Appeals Tribunal, though this is of decisions made under legislation.[99]

The Attorney-General is responsible to the Parliament for advice given and the relevant Minister is responsible for actions taken. Decisions made on the basis of executive opinions can be the subject of significant parliamentary scrutiny, including the exercise of non-statutory executive power. Deakin impliedly acknowledged this in the Vondel opinion when he referred to the principles of English constitutional law, including responsible government, which was far more clearly established in the Commonwealth *Constitution* than the state constitutions.[100]

93 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (2015) [4.8].
94 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1902, 16205.
95 Commonwealth, *Parliamentary Debates*, Senate, 2 July 1903, 1664.
96 Brazil and Mitchell (eds) (n 5); Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 2: 1914−23* (AGPS, 1988); Faulkner and Orr (eds) (n 81).
97 *Selected Opinions of Attorneys-General of the Commonwealth of Australia 1901−50*, AGS (Web Page) <http://www.legalopinions.ags.gov.au>.
98 *Ombudsman Act 1976* (Cth).
99 *Administrative Appeals Tribunal Act 1975* (Cth); see esp s 25.
100 Brazil and Mitchell (eds) (n 5) [16].

There is also significant review by the public, press and academia. The Vondel matter was the subject of extensive press coverage and debate. Deakin himself wrote for the press on this issue and typically, but surprisingly to modern observers, did so anonymously for the *Morning Post* in England in the edition on 4 March 1903.[101]

Actions taken on the basis of executive opinions can be subject to judicial review. It seems that SA at least threatened to bring legal proceedings in relation to the Vondel opinion issues, probably in the SA Supreme Court, since Deakin mentions this in his second reading speech for the Judiciary Bill.[102] This would now include judicial review in the High Court, Federal Court and Federal Circuit and Family Court. The issue of judicial review of non-statutory executive acts raises particular issues,[103] but, as *Williams [No 1]* demonstrates, these are not insurmountable. Challenges to the provision of a benefit or a consensual agreement are infrequent, and the strong concerns of Mr Pape and Mr Williams provided some rare opportunities for such review. In conducting any litigation the Commonwealth is subject to the model litigant principles.[104]

Of course, some issues are non-justiciable or will not be dealt with by courts or tribunals for a range of reasons. Deakin thought that there were arguments about the justiciability of at least some issues raised by the Vondel opinion.[105] But this was not a relevant factor for Deakin in the opinion. He advised on the basis of the legality of the action — that is, how he thought a court would address the issue if it could and did do so, whether or not there was in fact jurisdiction or a challenge. The tradition of Commonwealth government lawyers is to treat as irrelevant whether an issue will be challenged in the courts or, indeed, could be challenged in the courts. The obligation to act lawfully remains and, in fact, is most significant in such circumstances.[106]

But not always right

The principles and processes for writing the Vondel opinion, and subsequent executive opinions, seek to ensure that they are correct and will be upheld in review mechanisms — in particular, the courts. But advice is sometimes not sought. These principles and processes are sometimes not complied with. Even when they are, at times opinions are for many possible reasons not as thorough or careful as they should be. And the courts sometimes take a different view. Deakin stated in relation to his advice on the Conciliation and Arbitration Bill that 'until the Courts have decided, it is a matter of opinion'.[107] In *Williams [No 1]*, a majority of the High Court disagreed with a key part of the Vondel opinion. In the balance of this article, I examine how the Court dealt with the Vondel opinion in reaching this conclusion.

101 Deakin, *Federated Australia* (n 35) 298; La Nauze, *Deakin* (n 9) 269−70.
102 See n 65.
103 Amanda Sapienza, *Judicial Review of Non-statutory Executive Action* (Federation Press, 2020); Chris Horan, 'Judicial Review of Non-statutory Executive Powers' (2003) 31 *Federal Law Review* 551.
104 *Legal Services Directions 2017* (Cth), sch 1, paras 4.2, 6.2, 12.3, and Appendix B.
105 See n 65.
106 Appleby, *Solicitor-General* (n 43) 150.
107 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1904, 778.

Status of executive opinions in the High Court

Williams [No 1]

Pape, Williams [No 1] and *Williams [No 2]* were complex cases raising a range of legal issues. A key issue particularly in *Williams [No 1]* was the Commonwealth's executive power to enter into agreements and make grants without legislative support other than an appropriation. Mr Williams' children attended Darling Heights State School in Queensland, and there was with respect to the school an agreement as part of the National School Chaplaincy Programme (NSCP) under which the Commonwealth provided funding to Scripture Union Queensland (a company limited by guarantee) for chaplaincy services to the school, to which Mr Williams objected.[108]

The original basis for the challenge was that the NSCP was outside the Commonwealth's non-legislative executive power, as it was not within the relevant legislative powers to make laws with respect to 'benefits to students' (in s 51(xxiiiA) of the *Constitution*) or trading corporations (in s 51(xx)). At the beginning of the hearing, the plaintiff, the Commonwealth and the other defendants, and all the interveners, accepted what the Court labelled the 'common assumption' — namely, that, subject to there being an appropriation, the Commonwealth may lawfully spend public moneys on any subject matter falling within a head of Commonwealth legislative power. It was also argued that the NSCP was inconsistent with s 116 of the *Constitution*, which provides in part that no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[109]

But during the oral submissions of counsel for the plaintiff, French CJ asked where is there support for the proposition that the executive has power to engage in activities that the Parliament could have, as distinct from has, authorised it to undertake. Counsel for Mr Williams responded that it was the *AAP case*.[110] As French CJ noted in his judgment, the unanimity of the common assumption did not survive oral argument. In the end, the plaintiff and some states argued that the common assumption was in fact incorrect.[111] When Queensland was putting its updated argument, Gummow J stated that it may be right but that the contrary view was one of long standing that starts with an opinion by Deakin as Attorney-General in 1902. 'Do you challenge that?' he asked. 'Yes', replied the counsel for Queensland.[112]

The Court went on to hold by a majority that the Commonwealth required legislation, beyond an appropriation, to authorise executive expenditure on the NSCP, which legislation did not exist. In summary, there were three competing positions concerning the funding agreement. The first was that the Commonwealth government can enter into the agreement under the NSCP on the basis it can do anything a natural person can (broad Commonwealth view). The second was that the Commonwealth can do so because the subject of the agreement was included in the legislative power of the Commonwealth Parliament (the narrow

108 *Williams [No 1]* (n 6) 156−7; and 180−181 [2]−[7] (French CJ).
109 Ibid 160−4; and 179 [3] (French CJ)
110 Ibid 161.
111 Ibid 160, 170−1,175−6; and 179 [3] (French CJ).
112 Ibid 171; see also 228 [125] (Gummow and Bell JJ).

Commonwealth view, expressed by Deakin in the Vondel opinion). The third was that this sort of agreement can only be entered into if supported by Commonwealth legislation, in addition to an appropriation, which has to be within the legislative power of the Commonwealth (the position adopted during *Williams No 1* by the plaintiff and some of the states). The decision in *Williams [No 1]* saw a majority of French CJ,[113] Gummow and Bell JJ[114] and Crennan J[115] take the third position — that is, that the NSCP required legislation in addition to an appropriation. Hayne J[116] and Kiefel J[117] rejected the broad Commonwealth view and found that the NSCP could not have been authorised by legislation, so it was not necessary for them to decide whether the narrow Commonwealth view was correct. Heydon J took the second position and found that the NSCP did fall within power.[118] It should be noted that the majority justices took the view that legislation other than an appropriation is not required to support expenditure on a limited category of ordinary departmental activities, the narrow concept of prerogative powers (that is, those not shared with citizens), and actions which are peculiarly adapted to the government of the nation, which would include some emergency and defence measures.[119] It seems likely that the specific issue in the Vondel opinion of a request for information in relation to external affairs would fall within the category of ordinary departmental activity. In reaching these conclusions the Court considered the Vondel opinion in a number of contexts, which I now discuss.[120]

History of the drafting of the Constitution

In the Vondel opinion Deakin had regard to the drafting history of s 61 of the *Constitution*. Until the decision in *Cole v Whitfield*[121] the High Court was generally reluctant to look at the history of constitutional provisions, but in that case it stated that reference to history could be made for the purpose of identifying the contemporary meaning of language and determining 'the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'. In *Pape*, French CJ referred to the Vondel opinion[122] in the context of examining the development of s 61 of the *Constitution*, and in *Williams [No 1]* he returned to the opinion[123] in the context of a more detailed consideration of this development. Heydon J also paid particular attention to the drafting history.[124]

113 Ibid 179−80 [4], 216−17 [83]−[84].
114 Ibid 232−3 [135]−[137], 239 [161] [163].
115 Ibid 353 [524], 358−9, [544] [548].
116 Ibid 244 [183], 271 [253], 280−1 [286]−[290], though Hayne J notes the 'desirability' of the third position at 281 [288].
117 Ibid 366 [569], 373−4 [594]−[598].
118 Ibid 321 [406], 333 [441].
119 Ibid 180 [4], 191 [34], 211 [74], 216−17 [83] (French CJ); 233−4 [139]−[141] (Gummow and Bell JJ); 353−5 [525]−[534] (Crennan J).
120 There are a large number of articles on Commonwealth executive power and issues arising from *Pape, Williams [No 1]* and *[Williams No 2]*. For example, and because they raise issues related to this article, see Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455; Peter Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry' (2018) 37 *University of Queensland Law Journal* 191; Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams Case*' (2013) 39 *Monash University Law Review* 348.
121 (1988) 165 CLR 360, 385 [9].
122 *Pape* (n 7) 57 [118], and see also 59 [124].
123 *Williams [No 1]* (n 6) 199−200 [50].
124 Ibid 296−7 [346]−[347].

The key event in this history was Samuel Griffith's amendment to omit from a proposed provision concerning what the executive power and authority of the Commonwealth extends to the words 'all matters with respect to which the Legislative powers of the Parliament may be exercised, excepting only matters, being within the Legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers', which amendment he stated 'does not alter its intention'. There was no debate on the change which was accepted.[125] Deakin was at the Convention and appears to have been present for this moment; certainly his opinion highlighted the words 'may be exercised' in the original version of the provision and stated, summarising Griffith, that the 'form was altered, to avoid even a negative limitation, but the intention remained the same'.[126]

French CJ, however, found that the stated equivalence of the original and amended forms raised more questions than it answered and that, as amended, 'the clause did not, in terms or by any stretch of textual analysis, describe an executive power to do any act dealing with a subject matter falling within a head of Commonwealth legislative power'.[127]

Contemporary views at the time of federation

The principle stated in *Cole v Whitfield* can apply also to the language of lawyers at a time roughly contemporary with federation, and it is in this context that a number of justices had regard to the Vondel opinion and other sources.[128]

The discussion by French CJ in particular highlights some of the issues which arise in using the drafting history and contemporary views. First, in relation to Griffith's amendment, it is clear what the provisions and Griffith said. But, as French CJ stated, 'no explanation emerged at the time of what was meant by an executive power extending to matters with respect to which the legislative powers of the Parliament could be exercised' in the original draft.[129] French CJ set up a tension between the stated purpose of the drafters and the meaning found by him as a judicial interpreter. Deakin himself had recognised that 'what the [Constitutional] Convention intended and what the *Constitution* provides may be two different things'.[130]

Second, the historical record is limited. For example, much of Deakin's time at the conventions was spent outside the formal process negotiating compromises. As La Nauze has noted, what happens overnight 'may be as important as what is said in debate'.[131] Third, the debates and contemporary discussions took place within the accepted and often unexpressed views

125 Ibid 196−7 [46]−[47]; *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 777−8.

126 Brazil and Mitchell (eds) (n 5) [18]−[21].

127 *Williams [No 1]* (n 6) 198 [47]; see also 226−7 [121] (Gummow and Bell JJ); Michael Crommelin, 'The Executive', in Gregory Craven (ed), *The Convention Debates 1891−1898: Commentaries, Indices and Guide* (Legal Books, 1986) 127, 130−1.

128 *XYZ v The Commonwealth* (2006) 227 CLR 532, 583−91 [153]−[173] (Callinan and Heydon JJ); *Williams [No 1]* (n 6) 199−205 [50]−[60] (French CJ); 228 [125] (Gummow and Bell JJ); 250 [194] (Hayne J); 297−300 [348]−[354] (Heydon J); 357 [541] (Crennan J); 362−3 [561] (Kiefel J).

129 *Williams [No 1]* (n 6) 197 [46]; see also 363 [563] (Kiefel J).

130 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1904, 784−5.

131 La Nauze, *Constitution* (n 59) 44.

of those taking part and focused on the issues they were concerned about.[132] For whatever reason, the issue which arose in *Williams [No 1]* was not one of them.

Fourth, even where there is a record, a range of views can generally be found. French CJ opens his judgment with a quote from Andrew Inglis Clark which refers to 'a truly federal government' with 'the preservation of the separate existence and corporate life of each of the component States'.[133] He then quotes the Vondel opinion, setting out what Deakin saw as one effect of his position — namely, that 'as a general rule, wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced'. French CJ accepted both views[134] but rejected Deakin's actual position as to what the terms of s 61 meant.

For Commonwealth government lawyers, the view of Deakin and Garran, reflecting statements of Griffith, and with the agreement of Barton and Chamberlain, had been persuasive within their legal tradition. But for French CJ the view of Inglis Clark also needed to be considered; and he could also have added that of Gordon, the principal author of the SA opinions in the Vondel dispute.

Opinions of writers

There is extensive discussion of the opinions of writers in *Williams [No 1]*. The decisions of most of the justices refer to many academic writers and a range of others. The Vondel opinion and other formal opinions to government can also be included in this category. And government lawyers writing publicly are also included — indeed, the justices seem to particularly remark on these where they point against the argument being put by the Commonwealth. French CJ noted that Garran, with John Quick, wrote that state approval (by the Senate) as well as popular approval (by the House of Representatives) should apply to executive action.[135]

Long-held view

Gummow and Bell JJ referred to the position that the executive power must be at least equal to that of the legislative power as the 'proposition articulated by Deakin and since maintained by the Commonwealth' but said that the case should be determined on a narrower footing.[136] Gummow and Bell JJ also referred to the 'tenacity of his successors to the views of Sir Robert Garran' for the broad view of Commonwealth spending, linked to the broad power to tax.[137] For them, therefore, the fact that the Commonwealth's views were long-held was relevant in some way, though perhaps this was not necessarily a positive quality.

Of course, it was not just the Commonwealth which had long held the view. Many of the judgments spend significant time assessing the existence of this long-held view and common

132 Ibid 271−2.
133 *Williams [No 1]* (n 6) 178 [1]. See also another quote from Inglis Clark at 200 [50].
134 Ibid 216−17 [83].
135 Ibid 204 [59]; John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 706.
136 *Williams [No 1]* (n 6) 249−50 [194]; see also 249−50 [194] (Hayne J).
137 Ibid 238 [157]; see also *Williams [No 2]* (n 8) 466 [71].

assumption amongst a wide range of sources. But even Heydon J, who put particular emphasis on this factor, stated that an agreement between parties does not bind the courts and that adherence to the common assumption does not demonstrate or constitute the law.[138] This was so even though the view was not only common but long-held. The discussions suggest that, while the long-held view was not decisive, it was relevant.

Longstanding practice

Crennan J expressly considered the fact that the Commonwealth had acted on the basis of Deakin's view; in effect it was the positon under the practical *Constitution*.[139] Crennan J noted that, in oral argument, examples were given of circumstances in which the Commonwealth was said to have acted on the basis that it may engage in executive activities involving contracting and spending without the need for any statutory authority. Her Honour queried these examples and then went on to note more generally that if the fact 'that Parliament *could* pass valid Commonwealth legislation were sufficient authorisation of any expenditure … the Commonwealth's capacities to contract and spend would operate, in practice, indistinguishably from the … exercise of a prerogative power'. Together with the constitutional relationship between the executive and the Parliament, this led Crennan J to further discount any longstanding practice.[140] None of the other majority justices referred at length to the practice of the Commonwealth. Rather, as noted below, how things had been operating in practice seems to have been of some concern to the majority and prompted them to consider the underlying principles in the modern context.

In other contexts, the practical operation of the *Constitution* has been considered by the Court. In *Re Patterson; Ex parte Taylor*[141] Gleeson CJ noted that the practice of appointing Ministers and Assistant Ministers was well established, here and in the United Kingdom, in a challenge to that very practice. But the judgment went on to note the issue concerned in substance requirements of responsible government — a concept based upon a combination of law, convention and political practice, the characteristics of which are not immutable. Further, when the Court reviews its own previous decisions, a range of considerations, some of them practical, can be relevant and support overruling.[142] But in this context, while executive opinions and their implementation over time had significant impact in the practical sphere, they had only a weak impact as a factor in constitutional interpretation by the Court.

Also, tellingly for some members of the Court, there were other practices which supported another view. One was the way in which the Commonwealth generally funded education, which was through legislation such as the *Schools Assistance Act 2008* (Cth) and *Nation-building Funds Act 2008* (Cth) and the mechanism in s 96 of the *Constitution*.[143]

138 *Williams [No 1]* (n 6) 296 [344].
139 See text at n 66.
140 *Williams [No 1]* (n 6) 358 [543]−[544].
141 (2001) 207 CLR 391, 403 [21].
142 *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56−8; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438−9. The Commonwealth sought such reconsideration of *Williams [No 1]* (n 6) in *Williams [No 2]* (n 8) 463−70 [57]−[87].
143 *Williams [No 1]* (n 6) 221 [100] (Gummow and Bell JJ); 347−8 [502] (Crennan J); 360−1 [555], 373 [592] (Kiefel J); Gerangelos (n 120) 219−21.

Views of the Commonwealth

There is no indication in the judgments that as a matter of substance, the mere fact that a particular view was held by the Commonwealth executive was determinative. Such a position could be arrived at in a range of ways. One way would be if the actions of the executive were 'non-justiciable' in this regard, but here this was not the case. Deakin did make some comments suggesting that he thought the issues dealt with in the Vondel opinion may be non-justiciable, but that seems to be on the basis that they involved international relations between governments.[144] There was an issue about whether Mr Williams had standing to bring part of his claim, but the Court held that he did.[145]

Another way would be if the Court showed 'deference' to, or 'respect' for, or restraint from interfering with, the executive interpretation of the *Constitution*.[146] The Court clearly has regard to the Vondel opinion in various ways. But it also clearly did not consider it as determinative. The concept of deference to the views of the executive as used in the United States in relation to statutory interpretation, in the context of judicial review of administrative decisions, has been generally thought inappropriate in Australia, noting that there are nonetheless limits to judicial review here which cannot trespass into merits review.[147] In this regard, a number of members of the Court made it clear that the decision in *Williams [No 1]* was not about the merits of the policy and decision involved. Crennan J noted that her conclusions did not involve any assessment of the wisdom of the NSCP.[148] Even as to the substantive issue, Hayne J stated that he thought legislation for such programs desirable, even if not legally required,[149] though the majority went further.

While the Court took into account the Vondel opinion and seemed to recognise that the executive was entitled to have and act on its own legal advice, it saw its own role as to determine finally the legal boundaries of the executive government's power in the particular case. Gummow and Bell JJ quoted the Vondel opinion but stated that it requires consideration before it could be accepted by the Court.[150] Crennan J referred to the opinion as expressed in 'general, absolute or otherwise imperfect' terms which should not be taken to imply legislation was not needed.[151] Kiefel J noted Deakin's view and added, quoting him, that the 'scope of executive authority of the Commonwealth is therefore "to be deduced from the Constitution as a whole"', but clearly the final deduction was for the Court, not Deakin and his successors.[152]

Whilst not determinative, the Commonwealth had a right to have its view heard. In this case it was a defendant. But many constitutional issues arise where the Commonwealth is not a

144 See n 65.
145 *Williams [No 1]* (n 6) 374−5.
146 Stephen Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151; Janina Boughey, 'Re-evaluating the Doctrine of Deference in Administrative Law' (2017) 45 *Federal Law Review* 597.
147 *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984); *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; both discussed at ibid.
148 *Williams [No 1]* (n 6) 337 [457]; see also 179 [4] (French CJ).
149 Ibid 281 [288].
150 Ibid 228 [125].
151 Ibid 357 [542].
152 Ibid 362−3 [561]; Brazil and Mitchell (eds) (n 5) [12]; and referring also to herself and Hayne J in *Pape* (n 7) 119 [337]; see also Heydon J in *Williams [No 1]* (n 6) 296 [344].

party. In these cases, s 78B of the Judiciary Act provides for notice to be given in 'a matter arising under the Constitution or involving its interpretation' to the Attorneys-General of the Commonwealth and the states, Australian Capital Territory and Northern Territory, and s 78A provides to them a right to intervene in the proceedings. Prior to 1976 an Attorney-General could intervene in a proceeding that raised a constitutional matter only by leave of the court. These sections were added to the Judiciary Act by the *Judiciary Amendment Act 1976* (Cth). Attorneys-General do so to a modest degree — from 1996 to 2000 the Commonwealth Attorneys-General intervened on average in response to 7.8 per cent of notices in relation to all courts — and they do so on the basis of a range of considerations.[153]

Whether the Commonwealth or the Attorney-General is a party or an intervener, it is unusual for an issue to be raised which has not been the subject of a past executive opinion. Often that advice is not public. In *Williams [No 1]* the Commonwealth's submissions were able to refer back to the published Vondel opinion.[154]

Fundamental principles

What the majority justices found determinative was a particular approach to the fundamental principles or values within the *Constitution*, sometimes called a functional approach — namely, the principles of responsible government, representative democracy and federalism, noting that there was some divergence in this regard amongst them.[155] These principles are used to fill in the constitutional sketch, to use Deakin's terms.[156] The task of interpretation by the courts is an exercise of judicial power provided for by the *Constitution* and thereby fundamentally different to that by the executive. But there is also a difference in interpreter's perspective,[157] and my concern is to look at the differences in perspective between executive opinions and High Court judgments.

Efficiency and practicality

One factor which seems to have led Deakin and Garran as Commonwealth government advisers to their view was that it provided a convenient and efficient way of dealing with the issue discussed in the Vondel opinion, certainly more convenient and efficient than the passage of legislation. Further, the test they proposed could be practically implemented by the growing number of Commonwealth lawyers and officials referring to the Commonwealth's express legislative powers. But generally the Court had little regard to convenience and efficiency, though some room was left for these concepts in matters of national concern and general administration.[158] As to the practicality of the test, a number of justices were clearly not persuaded of this. French CJ stated that the 'location of the contractual capacity

153 Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (2001, Report 92) chs 13, 14; Enid Campbell 'Interventions in Constitutional Cases' (1998) 9 *Public Law Review* 255.

154 Commonwealth, 'Submissions of First, Second and Third Defendants in Response to Further Written Submissions of Tasmania and SA', Submissions in *Williams [No 1]* (n 6), S307 of 2010, 1 September 2011, [1.3], [8.2].

155 Dixon (n 120) 484−90; Lindell (n 120) 370−2; Gerangelos (n 120) 211.

156 See n 1.

157 Justice WMC Gummow, 'Statutes: The Sir Maurice Byers Annual Address' (2005) 26 *Australian Bar Review* 121,123; quoting William N Eskridge, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2000) 222.

158 *Williams [No 1]* (n 6) 214 [79] (French CJ); 348 [504] (Crennan J). See also *Williams [No 2]* (n 8) 464−5 [65].

of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise, is not a means by which to judge its scope'.[159] Gummow and Bell JJ also emphasised that in their view many heads of legislative power are quite inapt for exercise by the executive, such as taxation, marriage and divorce, and bankruptcy and insolvency.[160]

National government

For Deakin, the ability to act without legislation was seen as a feature of a true and complete government, like the states, and a national government, like the British. In 1902 the Commonwealth was only beginning to find a role in its international relations and was struggling in its relations with the states and its financial security. The Vondel opinion played a part in those struggles. But today there is no doubt as to the Commonwealth's status as a full national government on the international stage, with significant powers and financial resources on the domestic front. Of course, these developments have given rise to an expectation that the Commonwealth can fulfil these roles. Within this context the majority justices seemed to allow for Commonwealth executive power without legislation to extend to departmental expenditure, the narrow concept of prerogative powers, and powers peculiarly adapted to the government of the nation.[161] But beyond this it was limited by other fundamental principles.

Responsible government and representative democracy

Gummow and Bell JJ noted the basal assumption of legislative predominance, inherited from the United Kingdom and in Australia reflected in the relationship between Ch I and Ch II of the *Constitution*. In this regard they stated that considerations of representative as well as responsible government arise where an executive spending scheme has no legislative engagement other than an appropriation where the role of the Senate is limited.[162] Crennan J referred to the 'paramountcy of the Commonwealth Parliament'.[163] Kiefel J stated that the relationship the *Constitution* establishes between the Parliament and the executive may be described as one where the former is superior to the latter and noted that, whatever the scope of Commonwealth executive power, it is susceptible of control by statute.[164] But, for the majority, such susceptibility of control was not enough.

Interestingly, it seems that a number of developments since federation were relevant to the majority position. One was the growth of executive control of the House of Representatives and to a lesser extent the Senate. French CJ quoted with apparent agreement the comment that the parliamentary wing of a political party now dominates the Parliament and directs most exercises of legislative power, but he stated that, however firmly established, that system 'has not resulted in any constitutional inflation' of executive power.[165] Crennan J noted that in practice the party system results in close identification of the Parliament and the executive,

159 *Williams [No 1]* (n 6) 192 [36].
160 Ibid 232 [135].
161 Ibid 180 [4], 191 [34], 216−17 [83] (French CJ); 233−4 [139]−[141] (Gummow and Bell JJ); 342 [484]−[485], 348 [503]−[504] (Crennan J).
162 Ibid 232−3 [136].
163 Ibid 344 [488]; see also 358 [544].
164 Ibid 369 [579].
165 Ibid 205 [61].

but s 61 is still 'limited by the system of government under the *Constitution*'.[166] This suggests a tension between current practice and fundamental principles and an implication that, while in theory the Parliament could assert itself if it so wished, in practice its power to do so had been eclipsed by the executive and that the practical power of the executive in relation to the Parliament and its accountability to the Parliament should now be reviewed in light of constitutional principles.

But one's assessment of the practical power of the executive and its accountability to Parliament is influenced to some extent by an interpreter's perspective. Deakin was one of the few predictors of the growth of such party and executive control.[167] But at the time the Vondel opinion was written the Protectionist government of Barton controlled neither the House nor the Senate nor at times itself.[168] The government had laboured for a year to have its tariff legislation accepted by the Senate, notwithstanding the Senate's limited power under s 53. Deakin noted the government's accountability to Parliament in the Vondel opinion but clearly did not think this was in need of bolstering by a requirement for legislative support for executive action. Similarly, when *Williams [No 1]* was argued and decided, the Labor government of Julia Gillard controlled neither the House nor the Senate.[169] In these and more normal times, much of the work of government lawyers involves assisting with developing, implementing, and managing the wide range of accountability mechanisms in relation to, executive actions. These can be major endeavours in which the relationship between the executive government and the Parliament is experienced as complex and difficult. The *Williams [No 1]* decision reinforces that government legal advisers need to balance their difficult practical experiences of government processes with a recognition that judges may take a different view of such processes.

Another development relied on by the majority was that the government contract is now a powerful tool of public administration which can have a significant impact on the states and Australians.[170] Crennan J discussed the ability of Commonwealth contracts to be utilised to regulate activity.[171] In effect Crennan J seems to find that such contracting should be added to the category of coercive powers, like the power to compel information, which requires legislative support. Centrally for Crennan J, if it was enough support for such contracts that Parliament *could* pass valid legislation then the executive power was equivalent to the legislative power, and the constitutional relationship between the executive and the Parliament was disregarded.[172]

Generally it seems that the majority thought that the principles of representative and responsible government together with the rise of executive control of Parliament and the delivery of policy and therefore regulation through agreements suggested a requirement for legislation in addition to appropriations thereby giving, by constitutional interpretation, the Parliament greater oversight and power, and limiting the power of the executive to act alone.

166 Ibid 352 [517].
167 La Nauze, *Constitution* (n 59) 287.
168 Sawer (n 19) 18.
169 Nicholas Horne, 'Hung Parliaments and Minority Governments' (Background Notes, Parliamentary Library, Parliament of Australia, 23 December 2010) 2−3.
170 *Williams [No 1]* (n 6) 193 [38], 205 [59] (French CJ).
171 Ibid 352 [521].
172 Ibid 358 [544].

Federalism

Considerations of federalism were also key. Some of the majority justices were concerned that a broad ability to contract without legislation other than an appropriation would permit the Commonwealth to intrude into areas of responsibility of the states, and without the mechanism of s 109 to resolve conflicts. For example, French CJ noted that expenditure by the Commonwealth executive in fields within the competence of the states has 'the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their fields of operation'.[173]

Several comments can be made about this line of reasoning. First, the concern is that there could be diminution of the role of, or disputes with, the states, though no example of any diminution or dispute, whether generally or in relation to the NSCP, was provided. Little weight seems to be given to the fact that this issue had been practically managed by cooperative arrangements between the Commonwealth and the states themselves without the need for judicial intervention.[174] Like Deakin in the Vondel opinion, it seems that the Court was looking principally to future possible disputes.

Second, for the majority, a telling factor was s 96 of the *Constitution*, which provides that the Parliament may grant financial assistance to any state, which it was noted the Commonwealth had used to provide funding to schools, including targeted expenditure similar to the NSCP.[175] The availability of an alternative mechanism was not only relevant to the interpretation of s 61 but also provided the Commonwealth government with another way to implement its policy.

Third, a key development since federation was also the financial dominance of the Commonwealth in relation to the states.[176] In a sense this financial dominance fed into a practical dominance through Commonwealth agreement making. Again it seems to have been thought that, while in theory the states (and the Senate on their behalf) could assert themselves if they so wished, in practice their power had been eclipsed and should now be reviewed. Much of the work of government lawyers involves developing, implementing and managing laws and programs with the states within complex and sometimes difficult relationships. Again government legal advisers need to balance their practical experience of these relationships with a recognition that these may be seen differently when analysed by a court in the context of a specific dispute challenging the constitutional validity of executive action.

Fourth, a key concern in this regard was the role of the Senate. As French CJ noted, the function of the Senate to protect the interests of the states may now be vestigial,[177] but it remains in theory the states' House and a federal brake on Commonwealth power. A telling concern of the majority was the limited powers of the Senate under s 53 to deal with some appropriations, taxation and charges or burdens.[178] What became s 53 was one of the most

173 Ibid 193 [37]; see also 234−5 [144]−[146] (Gummow and Bell JJ); 372 [590] (Kiefel J).
174 See also *Williams [No 2]* (n 8) 467 [73]−[74].
175 See n 143.
176 *Williams [No 1]* (n 6) 204 [59] (French CJ); as also predicted by Deakin — see La Nauze, *Constitution* (n 59) 215.
177 *Williams [No 1]* (n 6) 205 [61].
178 Lindell (n 120) 371−2.

debated issues in the constitutional conventions, because it went to the tension between democracy and federalism; between the popularly elected House and the states' House.[179] Deakin had a significant role in resolving this issue in s 53. He along with other Victorians had argued strongly for the limitations in s 53 in light of their experience of the obstructionist behaviour of their Legislative Council in relation to many measures, including democratic reforms and social policy legislation.[180] And as noted he had significant experience of the operation of s 53 in relation to the first tariff bills. Section 53 is not mentioned in the Vondel opinion, but it is not difficult to imagine that the prospect of having to manoeuvre legislative authority for executive spending through the House and Senate, in addition to the necessary appropriation, would have been of major concern to Deakin. But members of the majority in *Williams [No 1]* in part used the limitations on the role of the Senate in s 53 to provide support for their conclusion that Commonwealth spending and agreements need legislation unbound by those limitations.[181] This suggests that the majority of the Court is in effect providing for a new constitutional arrangement in relation to the power of the Senate and through it the states — one which adjusts the heavily negotiated compromise in s 53, bolsters the power of the Senate and reduces the power of the executive government in light of basic constitutional principles and the development since federation of an increase in the power of the executive over Parliament and the Commonwealth over the states.

Bigger history

After his retirement from the High Court, former Chief Justice French wrote a fascinating article entitled 'Executive Power in Australia: Nurtured and Bound in Anxiety', in which he looked at these issues, in part through the lenses of culture and broader constitutional history.[182] It is interesting to consider whether cultural presentations of executive power, and major historical movements, influence judicial, and executive, thinking. He noted Dixon J's comment in *Australian Communist Party v Commonwealth*[183] that history 'shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power', and the same can be said of acts of genocide and crimes against humanity. Partly in light of this, a key theme of the history of England, Great Britain and Australia has been the reduction of the power of the Crown and executive government and the growth of democratic parliaments. Is *Williams [No 1]* another chapter in this big story?

The aftermath

Immediately after the decision in *Williams [No 1]*, the Commonwealth government urgently introduced into Parliament legislation to provide statutory support for the NSCP and a wide range of other programs. This was passed by the House of Representatives, which the

179 La Nauze, *Constitution* (n 59) 71, 126, 139−49; Brian Galligan and James Warden, 'The Design of the Senate' in Craven (n 127) 113.

180 Beverley Kingston, *The Oxford History of Australia, Volume 3, 1860-1900: Glad, Confident Morning* (Oxford University Press, 1988) 260−1; Brett (n 34) 115−17; La Nauze, *Deakin* (n 9) 83−4.

181 *Williams [No 1]* (n 6) 205 [60] (French CJ); 232−3 [136], 235 [145] (Gummow and Bell JJ); 343 [487], 355 [532] (Crennan J); see also the comments of Heydon J at 316−17 [396].

182 (2018) 43 *University of Western Australia Law Review* 16, 16−20. Another literary depiction of executive power is n 2.

183 (1951) 83 CLR 1, 187.

government did not control, and the Senate, which it also did not control.[184] In *Williams [No 2]* the Court heard a challenge to the NSCP even with this legislative support. In these proceedings the Commonwealth sought to reopen the decision in *Williams [No 1]*. The Court declined to do so and held that the legislation in relation to the NSCP and supporting the funding agreement was not within a head of Commonwealth legislative power and was therefore invalid to this extent.[185] After this, the Commonwealth then funded the NSCP through grants to the states under s 96 of the *Constitution*.[186]

Conclusion

On the basis of this consideration, a number of summary points can be made as to executive opinions and their relationship to judicial decisions.

First, the courts are the final arbiter of constitutional and public law issues. This was clearly accepted by the executive in the *Vondel* controversy itself and the history of the Vondel opinion's role within the executive. It was further made clear in the executive's response to the *Williams [No 1]* decision, its position in *Williams [No 2]* and its response to that decision, which demonstrated the fundamental acceptance by the government that its previous position had been held to be incorrect and that the position outlined by the High Court needed to be complied with and could only be overturned by a further judicial decision.

But, second, in the absence of judicial determination, the Commonwealth government's position is determined by executive opinions, like the Vondel opinion. As Deakin noted, the *Constitution* contains 'extremely general language … [and] it necessarily sketches outlines rather than fills in the details'.[187] Sawer and La Nauze have discussed the *Constitution's* generality — indeed, its silences, one of which they thought was 'whether the Commonwealth could spend its money how it pleased, or only on matters otherwise within its competence'.[188] And even when it speaks, it now does so in significantly changed circumstances to those when it was drafted. Executive opinions need to address these and the broad range of public law issues. In doing so, they reflect the practical constitutional and public law position with regard to executive actions and to that extent have legal effect. They do 'make things happen in the real world' because 'people believe in them'.[189] The role of executive opinions reinforces the need for the government to obtain and follow such opinions; for such opinions to be based on legal reasoning by lawyers under a duty of diligence, not be policy, ethical or political advice, and be consistent across the Commonwealth and through time with a written, reasoned record; and that decisions taken based on them need to be subject to a range of accountability mechanisms.

184 *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which in part inserted sch 1AA into the *Financial Management and Accountability Regulations 1997* (Cth) — see item 407.013; see n 169.

185 *Williams [No 2]* (n 8).

186 Commonwealth, 'Project Agreement for the National School Chaplaincy Program, 2019−2022', Council on Federal Relations (Web Page) <https://www.federalfinancialrelations.gov.au/content/npa/education.aspx>.

187 See n 1.

188 La Nauze, *Constitution* (n 59) 271; Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 12.

189 See n 2.

Third, where one method of implementation of a government policy is not legally possible, the executive and its legal advisers can pursue other means which they think are possible. The history of the Vondel opinion and the response to *Williams [No 1]* and *Williams [No 2]* demonstrate this. The practical reality was that the NSCP was thought to have policy and democratic support, and the government therefore sought to continue it by means within the confines of *Williams [No 1]* and then *Williams [No 2]*. The Court recognised this and, indeed, impliedly suggested it.[190]

Fourth, executive opinions are given within a context where particular factors properly impact on the advising process. They are often given because a government wants to take action based on a policy impetus and democratic support, and the legal adviser's role is to assist in doing so lawfully. There are often options as to how to implement a policy, and issues arise as to what are efficient and practical ways of acting. Further regard is often had to consistency with historical advice and actions — that is, with how the *Constitution* and public law system has operated in practice, and the acceptance of an approach by those with whom the executive has important ongoing relations, such as the states. Executive opinions are given with the broad range of accountability mechanisms in mind. Like Deakin in the Vondel opinion, the executive and its advisers are generally looking to maintain principles which will enable the government to continue to address policy issues in the future.

But, fifth, the courts will not necessarily see these factors as particularly relevant and may rather emphasise foundational principles, such as responsible and representative government and federalism, in the modern context. While the High Court acknowledged the relevance of the Vondel opinion in *Williams [No 1]* — indeed, to some extent it was a key contradictor in the case — the majority rejected one of its conclusions on the basis of a different balancing of the underlying principles of the *Constitution*, a balancing which seems to have been influenced to some extent by developments since 1901, and a desire to establish in light of these more appropriate accountability and federal arrangements.

Sixth, these processes are iterative. After *Williams [No 1]* and *Williams [No 2]* executive opinions need to implement these decisions (points 1 and 5), but (as summarised in points 2, 3 and 4) this will occur in light of the purpose for which, and practice and context in relation to which, executive opinions are given.[191]

190 See n 150; *Williams [No 2]* (n 8) 467 [74].
191 Department of Finance (Cth), *Guide to Appropriations (RMG 100)* (2020) [18].

Compulsory notices in royal commissions and other statutory inquiries: justice with efficiency or mission creep?

*Peter Gray QC and Eliza Bergin**

Use of statutory notices to compel the production of information is an essential step in many investigations and inquiries. Typically, the source of compulsion is the prospect of penalties for failure to comply with a valid notice. There will be time pressures and other factors which make it challenging to ascertain the boundaries of validity. Given the gravity of the risks of noncompliance, advisers will need to be nimble and well-informed as to the rights and obligations of recipients of a compulsory notice in order to identify areas of potential challenge or objection and to advise accordingly. In this article, we set out the permissible contents of a compulsory notice from a royal commission or other ad hoc statutory inquiry under general inquiries legislation in all states and territories and the Commonwealth. We describe the statutory and other bases for objection to the request for production of information or documents. We argue that the principles developed in case law on compulsory notices issued by standing or permanent inquiry bodies should be applied to notices issued by ad hoc boards and commissions of inquiry (including royal commissions) appointed under the general inquiry legislation of the Commonwealth, states and territories (royal commissions and inquiries). Tables 1 and 2 below summarise the relevant provisions of the royal commissions and inquiries legislation of the Commonwealth, and of each state and territory, as a quick reference tool for the assistance of advisers.

Our article is subtitled 'Justice with efficiency or mission creep'. This subtitle refers to the potential tension between the appropriate use of compulsory notices and their overuse. They are a powerful tool for revealing facts but can impose significant burdens not only on persons required to comply with them but also on those to whom the task of analysis of the product falls. There is an ever-present risk of overreach, and a balance to be found between the efficient disclosure of facts relevant to the particular inquiry and the imposition of compliance and analysis burdens for questionable returns.

It can be difficult for clients to determine whether to question apparent overreach of powers in the face of time pressures and the desire to be (and to be seen to be) cooperative with the inquiry. This article intends to serve the adviser by providing a current and comprehensive review of the powers of compulsory production by notice.

Following a brief comment on the historical use and objectives of compulsory production by royal commissions and inquiries, we discuss and summarise all current state, territory and Commonwealth powers to order production by notice under the Royal Commissions and Inquiries legislation. We argue that the general law supplements the legislation. The general law establishes principles that apply to compulsory notices in the context of other regimes such as trade practices. Finally, we discuss the options for derivative use of information and suggest that the role of advisers extends to discussions with those assisting a royal commission or inquiry about what information is sought and for what purpose. The scope

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of our articles is limited to temporary royal commissions and inquiries. We do not consider permanent inquiry bodies (such as the Independent Broad-based Anti-corruption Commission (IBAC) and the Independent Commission Against Corruption (ICAC)) in any detail.

History, use and objectives of statutory notices in royal commissions or inquiries

It is tempting for us to draw a conclusion based on recent experience that there has been a proliferation in royal commissions and inquiries since the 2009 Victorian Bushfires Royal Commission. However, a short examination of history confirms that there have been other peaks in popularity. It is reported that between 1832 and 1844, 150 royal commissions of inquiry were at work.[1]

Accurate knowledge of a government's 'subjects' is said to be an essential condition of success in government and a motivating factor behind establishing royal commissions and inquiries:

> How early this was appreciated in our history, and how deep it has cut in our institutions is seen in those Norman inquests which have given us on one side the jury, on the other the 'great inquest of the nation', Parliament itself. The King desired to be informed; he caused his justices to make inquiry by sworn men. These jurors would make presentment to the justices of crimes and of other facts which the King desired to know, or which the country desired to bring before him.
>
> …
>
> Directly the Council or the Star Chamber exercised powers of inquiry which in practice knew no limit save the discretion of the authority itself.[2]

In Australia, royal commissions and inquiries are said to be particularly popular,[3] although popularity has waxed and waned from time to time. Among the reasons posited for their popularity is Australia's history as a penal colony.[4] Since 1864, it is reported that there has been legislation in continuous operation in Victoria conferring coercive powers on royal commissions and inquiries.[5] The first Victorian statute was the Commission of Inquiry Statute 1854.[6] In Victoria, between 1856 and 1960 there were 124 boards of inquiry and 150 royal commissions.[7]

Royal commissions and inquiries cover an incredibly diverse array of topics which cannot necessarily be synthesised or even likened to each other. Broadly, in this article we consider four functions or areas of focus associated with royal commissions and inquiries:

- first, the fact-finding function. Inquiries will often focus on a past event and ask, 'what happened?' or be called upon to describe the current status of a particular matter;

1 WH Moore, 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500, 501.
2 Ibid.
3 G Gilligan, 'Royal Commissions of Inquiry' (2002) 35(3) *The Australian and New Zealand Journal of Criminology* 289−307.
4 Ibid; RC Tadgell, quoted in L Hallett, *Royal Commissions and Boards of Inquiry* (LBC, 1983) 90, 111−13, explains that democratic government was not the basis for the penal colony in Australia. Therefore, the need for coercive powers was more deeply rooted in Australia than the United Kingdom, particularly in New South Wales and Victoria.
5 Hallett (n 4) 90.
6 Ibid. This statute is described as innovative for its time.
7 Ibid 332−3.

- secondly, a policy or recommendatory function or area of focus. An inquiry that has a policy focus asks, 'what should be done?' and explores public policy reforms or solutions to problems arising in a policy setting within the constitutional limits that are set by the terms of reference;
- thirdly, compulsory powers to compel the attendance of witnesses to answer questions and require the production of factual material. This article focuses on the latter. Compulsory notices for production have traditionally been used for the production of documents or things (and, in more recent times, information) to elicit facts in relation to the inquiry's terms of reference; and
- fourthly, the use of notices for production to elicit information beyond that of a strictly factual nature, extending to policy matters and opinions.

As to the fourth function outlined above, there is room for debate about the extent to which opinions should be restricted to opinions from experts, such as the leading experts in the policy field that the royal commission or inquiry is charged with investigating. Following recent amendments to the Commonwealth legislation, there is power to elicit information in the form of a statement in writing.[8] Does this mean a royal commission can compel a person to form an opinion and produce it in statement form? We address this question in a little more detail below.

Royal commissions and inquiries exercise executive and not judicial power. They are not bound by the rules of evidence. However, they may be guided by those rules and findings may be made on the basis of the civil standard of proof, varying according to the seriousness of the allegation.[9] In the *Report of the Royal Commission into the Home Insulation Program*, Mr Ian Hanger AM QC identified the applicable principles guiding the fact-finding role, drawing on reports of earlier royal commissions:[10]

> In the Royal Commission into the Building and Construction Industry, Commissioner Cole QC observed that the law does not mandate any particular level of satisfaction that must be achieved before a finding of fact — which carries no legal consequence — may be made by a Royal Commission.[11] The HIH Royal Commission considered that facts are to be found from the viewpoint that the result must be 'intellectually sustainable,' tempered by restraint and guided by the general principle that the standard varies with the seriousness of the matter in question.[12]

8 Section 2(3C) of the *Royal Commissions Act 1902* (Cth) provides that a member of a commission may, by written notice served (as prescribed) on a person, require the person to give information, or a statement, in writing to a person by the time, and at the place or in the manner, specified in the notice. The explanatory memorandum to the Prime Minister and Cabinet Legislation Amendment (2017 Measures No 1) Bill 2017 states that sch 5 implements a recommendation by Mr Ian Hanger AM QC in the *Report of the Royal Commission into the Home Insulation Program:* see Royal Commission into the Home Insulation Program, *Report of the Royal Commission into the Home Insulation Program* (2014) [1.3.36]−[1.3.41], p 12.

9 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–3 (Dixon J); *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 [325]. The Court noted the seriousness of finding that an asserted spiritual belief of a group of people is fabricated in relation to a royal commission under the *Royal Commissions Act 1917* (SA) regarding the construction of the Goolwa to Hindmarsh Island bridge.

10 Royal Commission into the Home Insulation Program (n 8) [1.8.1], p 18.

11 Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 2, ch 5, [9].

12 Royal Commission into Certain Matters Relating to the Failure of HIH Insurance Group, *Report* (2003), pt 1, 1.2.6.

As a model a royal commission is typically adaptable and flexible, appointed to investigate and report upon issues, topics and questions set out in the royal commission's terms of reference and approved under jurisdictional legislation and the royal prerogative in the letters patent that appoint the commissioners. While not binding or enforceable, the conclusions or findings of a royal commission may have a significant impact upon those who are the subject of them.[13]

Across the different states and territories, royal commissions and inquiries legislation is at different stages of development. In 1912, the *Royal Commissions Act 1912* (SA) was described as 'a very drastic act'.[14] Recently, Chief Justice Doyle of the Supreme Court of South Australia described the *Royal Commissions Act 1917* (SA) as having an 'antiquated air to it' and appearing to be a 'patchwork of provisions borrowed from similar legislation elsewhere in Australia'.[15] In Victoria, one of the recommendations of the 2009 Victorian Bushfires Royal Commission was for the development of inquiries legislation.[16] This recommendation was implemented, resulting in cutting-edge jurisdictional royal commissions and inquiries legislation in 2014.[17]

Although royal commissions and inquiries legislation is at different stages of development across the different states and territories, the compulsory notice is the most heavily utilised tool and is relatively uniform in its form across the board. The notice may seek 'information' as well as documents (broadly defined). As a tool, the notice is well suited to obtaining information about factual occurrences. Arguably it may also be used for opinion-based inquiries.

Royal commissions and inquiries are rarely purely 'factual'. For example, the Royal Commission Into Aboriginal Deaths in Custody (1991) and the Royal Commission into HIH Insurance (2003) were both primarily tasked to address wrongdoing. However, they each made broad recommendations directed towards reform of the criminal justice and corporate governance systems.[18] Perhaps then there is room for use of compulsory notices in both styles of reform analysis.

Of all forms of executive inquiry, royal commissions have the broadest range of coercive powers and, in practice, are likely to be conducted with the greatest level of formality.[19] Royal commissions are used for the most significant matters. Other models of inquiries have a narrower range of coercive powers than royal commissions.[20] They are conducted less formally than royal commissions and are intended to be a less expensive and time-consuming form of inquiry.

13 Royal Commission into Aged Care Quality and Safety, *Final Report*, 4a, 4.
14 Harrison Moore 'Executive Commissions of Inquiry' (1913) 13 *Columbia Law Review* 500, 508−9, quoted in *X v APRA* [2007] HCA 4 [32].
15 A Vanstone, *Review of the Royal Commissions Act 1917* (2020) 3, quoting Doyle CJ, Full Court of the Supreme Court of South Australia, in *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 [112].
16 Ibid.
17 *Inquiries Act 2014* (Vic).
18 Australian Law Reform Commission, *Making Inquiries* (Report No 111, 2009) 110.
19 Inquiries Bill 2014 (Vic) cl 1.
20 Ibid.

What can be compelled?

Documents or things, and attendance and answers under examination

Each jurisdiction provides power for a royal commission or inquiry to compel documents or things to be provided to it by compulsory notice.[21] 'Document' extends to electronic records through interpretation legislation.[22] Each jurisdiction has the complementary power for a witness to be compelled to attend for examination.[23]

Compellability

Royal commissions and inquiries are empowered, and generally required, to engage in a far broader forensic process than is available in ordinary litigation — 'they must go on what are called 'fishing expeditions'.'[24] Civil procedure rules for litigation prevent 'fishing expeditions'. When first appointed, it may not be apparent to those conducting the investigation what documentary material is relevant and available for production. Arguably a royal commission or inquiry ought only seek production of information where it appears reasonably likely to assist the resolution of the issues in the terms of reference and where the production can occur within a reasonable time frame. However, what is reasonable in the circumstances may vary with the length of time it has available for investigation before its reporting deadline.[25] The duration of royal commissions and inquiries vary enormously — some last for a few months[26] and others for a few years.[27]

Care is required in the drafting of notices to produce. The documents required to be produced must be specified with the necessary degree of legal precision. An unclear summons may be set aside. It would be unreasonable to sanction a person for not producing a particular document in the absence of a clear requirement that the document be produced.[28] The principles that apply to requests for compulsory production are set out below, including what is reasonable.

The use of notices is 'coercive' or 'compulsory' because fear of sanction induces cooperation.[29] For example, s 6O of the *Royal Commissions Act 1902* (Cth) provides the offence of contempt. A refusal to answer a question or to produce a document that appears

21 See Table 1 below.

22 For example, coupled with the definition of 'document' in s 1B of the *Royal Commissions Act 1902* (Cth) and 'record' in s 25 of the *Acts Interpretation Act 1901 Document*, includes information stored or recorded in a computer. State or territory interpretation legislation should be checked at a point in time.

23 See Table 1 below.

24 Hallett (n 4) 97.

25 'Information gathering is carried out against a background of the unrelenting public inquiry life-cycle with specified and limited timeframes which put considerable pressure on members and staff to move quickly. Public inquiries are not long-term studies where the client is remote and the final product subject to limited review': S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006) 6.26.

26 The Review of the Implementation of the Whole of Government Information Technology Outsourcing Initiative (2000) took two months: Prasser, ibid.

27 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability is due to report four years after commencement: the first public hearing was in September 2019 and the final report is currently due in September 2023 (Commonwealth Letters Patent amended 24 June 2021).

28 Hallett (n 4) 98.

29 S Donoghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 63.

to be a 'wilful contempt' in the face of a commission is contrary to s 6O(1) and an offence.[30] Section 60(1) uses broad language: 'Any person who … is in any manner guilty of any wilful contempt of a Royal Commission, shall be guilty of an offence'. Some states set out a special purpose offence for wilful contempt.[31] Legislation may specifically refer to the criminal courts for implementation. A royal commission or inquiry is not a court and therefore could not determine a charge of contempt.[32] That said, s 11 of the *Royal Commissions Act 1917* (SA) purports to invest the royal commission with the role of informant, prosecutor and judge for the contempt offences. This may violate Article 14 of the *International Covenant on Civil and Political Rights*.[33] While a recent review found it was desirable to retain a power in the royal commission to deal with contempt, it should not retain power to itself to penalise for contempt. Rather, the royal commission should be entitled to apply to the Supreme Court so that the Court may deal with the matter.[34] A reasonable excuse is a defence to an allegation of contempt or a failure to produce information in most jurisdictions.[35] Whether or not an excuse is a 'reasonable' excuse varies across jurisdictions and is discussed below.

Information in the form of statements

Recently, as noted above, the Commonwealth has provided royal commissions with express power to compel information to be provided in the form of a statement in writing.[36] Similar power exists in Western Australia, Tasmania and Queensland. The extent of what may be compelled is debatable. For example, if a person has not, as yet, formed an opinion on the questions posed in a notice, it is not clear that a royal commission or inquiry has power to elicit a fresh opinion by notice. Of course, experts in a field may be content to prepare opinions to assist. However, if they choose to object, there is likely to be a basis for them to do so.

The extrinsic material surrounding the amendment does not address this issue. The amendment to the *Royal Commissions Act 1902* (Cth) came after strong statements of Commissioner Ian Hanger AM QC in the Royal Commission into the Home Insultation Program (2014), including the suggestion that Commonwealth witnesses may have been deterred from cooperating voluntarily with the inquiry by the perception of a risk that they might breach reg 2.1 of the *Public Service Regulations 1999* and s 70 of the *Crimes Act 1914* (Cth) by doing so.[37] In 2014, Commissioner Hanger pointed to a series of earlier recommendations for the conferral of power to compel the production of a statement, dating

30 Ibid 68.

31 Section 11 of the *Inquiries Act 1945* (NT) creates an offence of contempt 'if: (a) the person intentionally engages in conduct; and (b) the conduct constitutes contempt of a Board or Commissioner and the person was reckless in relation to that circumstance. (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse'.

32 For example, in the Australian Capital Territory (ACT), the Criminal Code (ch 2) applies to an offence against the *Inquiries Act 1991* (s 4). The ACT also has an offence of contempt of a board under s 36 of the *Inquiries Act 1991*.

33 Vanstone (n 15) 36.

34 Ibid 38.

35 See Table 2 below.

36 *Royal Commissions Act 1902* (Cth), s 2(3C), added by sch 5 to the *Prime Minister and Cabinet Legislation (2017 Measures No 1) Act 2018* (Cth).

37 Royal Commission into the Home Insulation Program (n 8) [1.3.36]−[1.3.41], p 12.

back to the Royal Commission into the Building and Construction Industry.[38] In 2009, the Australian Law Reform Commission recommended the power to receive information in the form of a written statement.[39] This recommendation was made to avoid the need for attendance at a hearing, be more efficient and cost effective and allow for more rigorous fact-finding.[40] The provision of a statement in writing may add to the efficiency of a royal commission or inquiry. Information provided in compliance with a notice can be circulated to counsel assisting or other inquiry participants in order to determine whether the person providing it should be required to give evidence orally. Although the state and territory legislation does not contain the same express power, provision of a document in the form of a statement appears to attract the protections of legislation and is therefore used as a tool in reliance on the general compulsory notice head of power. Following the commencement of the amendments in February 2018 (with application to royal commissions established after that time[41]), the Royal Commission into Aged Care Quality and Safety was the first royal commission to exercise the power to require information or a statement in writing.[42] One of the benefits of providing information or documents in response to a compulsory notice is that certain protections then apply to the use (and, in some cases, derivative use) of that information or documents.

What statutory protections or rights of objection are available?

Reasonable excuse

The primary basis for objecting to a statutory notice in this context is that the person has a reasonable excuse. Some jurisdictions define 'reasonable excuse' with more precision than others. In Table 2 below, we summarise the bases on which a person may refuse to give information or documents to a royal commission or inquiry. There are differences from state to state and as between royal commissions and inquiries.

In a Commonwealth royal commission, 'reasonable excuse' is a reason that would excuse an equivalent person in a court of law.[43] This may therefore include privileges and public interest immunity.[44] In New South Wales, the definition is similar to the Commonwealth for special commissions of inquiry and royal commissions.[45] Queensland, the Northern Territory and Western Australia also extend a 'reasonable excuse' to that which would be open to a witness or person summoned before a court.[46] In Victoria, a 'reasonable excuse' has a more detailed inclusive definition which includes other privileges and immunities.[47]

A lawyer advising a client responding to a compulsory notice issued by a royal commission or inquiry should consider the circumstances in which a client may have a sound basis to

38 Royal Commission into the Building and Construction Industry (n 11) vol 2, recommendation 1(a).
39 Australian Law Reform Commission (n 18) 270.
40 Ibid 271.
41 *Prime Minister and Cabinet Legislation (2017 Measures No 1) Act 2018* (Cth) sch 5, item 47.
42 Royal Commission into Aged Care Quality and Safety (n 13) p 185.
43 *Royal Commissions Act 1902* (Cth) s 1B.
44 Ibid.
45 *Royal Commissions Act 1923* (NSW) s 4; *Special Commissions of Inquiry Act 1983* (NSW) s 3.
46 *Commissions of Inquiry Act 1950* (Qld) s 4; *Inquiries Act 1945* (NT) s 3; *Royal Commissions Act 1968* (WA) s 13(4).
47 *Inquiries Act 2014* (Vic) ss 18 and 65.

object to a notice. Nonetheless, it may be that the client chooses to cooperate, even if there are grounds to object.

Whether or not a 'reasonable excuse' incorporates privileges or immunities may be open to debate (save for the jurisdictions where this is expressly stated, such as Victoria).[48] In 1912, the intention was to confine 'reasonable excuse' solely to physical and practical excuses.[49] However, a more modern view is that a 'reasonable excuse' includes a justification that would excuse a person from providing information to a court.[50] The Australian Law Reform Commission recommended a non-exhaustive list of the circumstances which constitute a reasonable excuse would assist to clarify what this term means.[51] The fact that it is impossible or impractical for a person to give evidence for physical or practical reasons is clearly an example of a 'reasonable excuse'. However, it is not confined to such reasons: 'reasonable excuse' is now held to bear its ordinary meaning, which encompasses legal excuses.[52]

The procedure for determining a claim to 'reasonable excuse' is less than clear.[53] It seems unfortunate that, in the absence of practice directions, a person may have to institute court proceedings in some jurisdictions to determine their claim to a 'reasonable excuse' if not accepted by those assisting the royal commission or the royal commissioners. If there is a claim to a reasonable excuse, in the interests of efficiency a royal commission or inquiry should be able to examine the reasons for the claim and decide whether compliance is required.[54]

48 Ibid.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, Second Reading Speech (W Hughes — Attorney-General):

> In another clause 'reasonable excuse' is defined — and I do not think any one will say that it is not high time it was defined — to mean exactly what it means in a Court of law. There it means such an excuse as physically prevents a person from attending. If a. man on his way to the Court meets with an accident, that is a reasonable excuse for not attending. If a man's employer says to him, 'If you attend I shall discharge you,' that is not a reasonable excuse. If a man's wife were ill, that might be held to be a reasonable excuse. If the man were ill himself, it certainly would be. It would, however, not be a reasonable excuse, before a Royal Commission any more than before a Court of law, to say that a witness did not like the Judge, or had an idea that the Judge had treated him or his friends unfairly. Clause 4 amends section 5 of the Act, making the penalty for non-attendance *£500* instead of £50. A penalty of *£50* might be incurred in the case of a great corporation with impunity. A man might say, 'I would rather pay £50 than give information.' It is, therefore; proposed to make the penalty *£500*.

50 Professor Enid Campbell: H Coombs and others, *Royal Commission on Australian Government Administration* (1976) appendix 4K, [8.2].

51 Australian Law Reform Commission (n 18) 503.

52 *AWB Ltd v Cole* (2006) 152 FCR 382 [49]. In *Re HIH Insurance Limited* [2002] NSWSC 231 [12], Barrett J said that the non-application of the definition of 'reasonable excuse' in s 1B to a person served with a s 2(3A) notice seems to mean that the term 'reasonable excuse' in s 3(5) is confined to physical or practical difficulties of complying and does not extend to matters such as legal professional privilege. However, that view has since been rejected. For example, in *AWB Ltd v Cole*, Young J held that 'the legislature intended that the expression "reasonable excuse" should carry its ordinary meaning in s 3(5). That meaning may be wider than the definition in s 1B; certainly it is wide enough to cover any matter, including absence of intention, which the law acknowledges by way of answer, defence, justification or excuse for refusing or failing to produce the specified documents: see *Yuill* at 338−339 per Gaudron J'. See also *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436 (Kirby P); *Bank of the Valletta plc v National Crime Authority* (1999) 164 ALR 45, 55 [42] (Hely J).

53 This is discussed below under 'What non-statutory rights of objection may be available?'.

54 Australian Law Reform Commission (n 18) 504.

The question of whether there is a 'reasonable excuse' is a question of law. Judicial review may be available in the absence of a favourable determination by a royal commission.[55] The case of *X v APRA*[56] (discussed below) is an example of administrative law review of the use of information provided pursuant to a compulsory notice.

Privilege against self-incrimination (with a use immunity)

In Victoria, royal commissions and inquiries apply the privilege against self-incrimination with different results. The High Court has also clarified that the privilege against self-incrimination applies to court proceedings but not to disciplinary proceedings. In a royal commission, in Victoria, the privilege does not amount to a reasonable excuse unless a person has been charged or proceedings are underway.[57] However, legal professional privilege and the privilege against self-incrimination apply in an inquiry.[58] The Explanatory Memorandum states that boards of inquiry have a narrower range of coercive powers than royal commissions:

> Consistent with the current position under the *Evidence (Miscellaneous Provisions) Act 1958*, the Bill abrogates legal professional privilege and partially abrogates the privilege against self-incrimination. These privileges are only abrogated for the purposes of Royal Commissions, and not Boards of Inquiry or Formal Reviews.
>
> While these privileges are abrogated, a Royal Commission could elect not to require the production of evidence to which these privileges apply. Further, where privileged evidence is provided, the Bill allows the Royal Commission to take steps to ensure that privilege is maintained in other contexts. For example, a Royal Commission could receive privileged testimony in private or make orders to prohibit the publication of privileged evidence. The confidentiality obligations on Royal Commission officers and the offence for taking advantage of information in clause 45 also protect against the misuse of privileged evidence.[59]

The case of *X v APRA*[60] dealt with the question of the use of information provided pursuant to a compulsory notice. X was an employee of the Z — a foreign corporation incorporated in Germany. Z conducted business in Australia as a foreign general insurer. Z produced documents to the Royal Commission into HIH Insurance pursuant to a notice issued under s 2 of the *Royal Commissions Act 1902* (Cth). X and another employee, Y, travelled to Australia and gave oral evidence. Following evidence, the Australian Prudential Regulation Authority (APRA) relied on documents and oral evidence given to the HIH Royal Commission. APRA wrote a show cause letter to X and Y asking why they were not fit and proper persons to hold senior insurance roles, referencing documents provided to the HIH Royal Commission and to X and Y's oral testimony. X and Y claimed that any action by APRA would be unlawful and an offence under the *Royal Commissions Act 1902* (Cth). The appeal to the High Court was concerned with the question: if APRA disqualified X or Y, would APRA cause a disadvantage 'for or on account of' evidence given to the HIH Royal Commission, which is forbidden under s 6M of the *Royal Commissions Act 1902* (Cth)?

The Court commented that there is no difference between detriment suffered by reason of

55 For example, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1).
56 [2007] HCA 4.
57 *Inquiries Act 2014* (Vic) s 33.
58 Ibid s 65(2)(a).
59 Explanatory Memorandum, Inquiries Bill 2014 (Vic) div 7.
60 [2007] HCA 4.

a party having given evidence about particular matters and detriment suffered by reason of the content of that evidence.[61] Therefore, either ground will protect those who provide information in response to a compulsory notice:

> There was no difference between punishing a man for giving evidence and punishing him for the content of his evidence or the manner in which he gave evidence. If one was contempt so must the other be. Both were calculated to interfere with the course of justice and to deter witnesses from coming forward and telling the truth plainly and frankly as they saw it.[62]

The High Court held that s 6M was not enlivened because what APRA proposed to do was for the proper discharge of APRA's statutory powers and functions. Therefore, the connection between APRA's proposed steps (set out in the show cause letter) and the attendance of X and Y at the commission, or the evidence they gave, lacked the requisite connection captured by the expression 'for or on account of'.[63]

At best, the cloak of protection provided by the *Royal Commissions Act 1902* (Cth) is therefore limited to a use immunity within court proceedings but does not extend to administrative action such as disciplinary proceedings, which are a proper discharge of statutory powers and functions. This is particularly relevant to the employment context. The privilege against self-incrimination and use immunity is abrogated in legislation governing inquiries in all but two Australian jurisdictions (South Australia and the Northern Territory), as discussed below and described in Table 2 below.

Legal professional privilege

In a Commonwealth royal commission, a claim to legal professional privilege is a reasonable excuse if accepted by the commission or a court.[64] If the claim is accepted, the document is returned or disregarded for the purposes of any report or decision of the royal commission. Similar processes and principles apply to inquiries in Victoria (but not royal commissions), royal commissions and special commissions of inquiry in New South Wales, Western Australia, Queensland, the Northern Territory, Tasmania and South Australia.

Prior to an amendment of the *Royal Commissions Act 1902* (Cth) in 2006, there was uncertainty about the powers of the royal commission once a claim of legal processional privilege had been made; and the process by which the claimant of legal professional privilege and/or the royal commission could establish the status of the document the subject of the claim. The questions were raised in the context of a legal professional privilege claim during the Inquiry into Certain Australian Companies in Relation to the UN Oil for Food Programme (2006). In *AWB Ltd v Cole*,[65] the Federal Court (Young J) confirmed that legal

61 *X v APRA* (n 14) [27].

62 *Attorney General v Royal Society for the Prevention of Cruelty to Animals*, *The Times*, Law Report, 22 June 1985 (Lloyd LJ) in *X v APRA* (n 14) [27].

63 Kirby J dissenting considered that while the evidence could be used for administrative, disciplinary or other purposes such as that proposed by APRA, and the legislation should be read in its context. A witness should not be able to be victimised for giving evidence to a royal commission during court proceedings. He said it is 'improbable that the framers of the [the Royal Commissions Act] could have intended to insert a provision which has virtually no practical effect'. Accordingly, s 6M must be read in light of s 6DD.

64 *Royal Commissions Act 1902* (Cth) s 6AA.

65 *AWB Ltd v Cole* (n 52).

professional privilege was not abrogated by the Commonwealth Royal Commissions Act.[66] However, Young J's reasons for judgment cast doubt on whether a Commonwealth royal commission had the power to require the production of a document for inspection where a claim of legal professional privilege had been made. Following that decision, the position at a Commonwealth level was clarified by legislative amendment in 2006.[67]

The Royal Commissions Amendment Bill 2006 introduced amendments to:

a. provide that a defence of reasonable excuse on the ground of legal professional privilege is not available unless legal professional privilege was claimed before the commissioner or a court has found the document to be subject to legal professional privilege;

b. make plain that a commissioner can make a decision whether or not to accept such a claim;

c. clarify a commissioner's powers in this context, particularly with respect to requiring production of documents for inspection; and

d. provide for the consequences of a commissioner's decision about a legal professional privilege claim.[68]

In Victoria, legal professional privilege is abrogated in a royal commission, in the sense that it is not a reasonable excuse for a person to refuse to provide a document on the basis that it is subject to legal professional privilege.[69] The language of the Victorian statute seems to be an example of 'clear and unmistakeable language' described in *AWB Ltd v Cole*,[70] where a compulsory notice should be construed as requiring the production of legally privileged documents and permitting their use in the inquiry.[71]

The 2006 amendments to the *Royal Commissions Act 1902* (Cth) could perhaps be regarded as making some inroads on legal professional privilege in that they 'put beyond doubt that a Commissioner may require the production of a document in respect of which LPP is claimed', but they only do so 'for the limited purpose of [the Commissioner] making a finding about that claim, that is, deciding to accept or reject it, for the purposes of the Commission'.[72]

The position under the *Inquiries Act 2014* (Vic) is radically different. Section 32 of the *Inquiries Act 2014* (Vic) provides (emphasis added):

66 (2006) 152 FCR 382 [34].
67 Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth) I.
68 Ibid 2.
69 *Inquiries Act 2014* (Vic) s 32(1).
70 *AWB v Cole* (n 52) [51].
71 The Explanatory Memorandum to cl 32 of the Inquiries Bill 2014 is headed 'Clause 32 abrogates legal professional privilege'.
72 Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth) p 1 and items 4 and 5, on pp 4−6, inserting s 2(5) and s 6AA of the *Royal Commissions Act 1902* (Cth).

32 Legal professional privilege does not apply

(1) *It is not a reasonable excuse* for a person to refuse or fail to comply with a requirement under this Act to give information (including answering a question) or produce a document or other thing to a Royal Commission that the information, document or other thing is the subject of legal professional privilege.

(2) Information or a document or other thing *does not cease to be the subject of legal professional privilege only because it is given or produced* to a Royal Commission in accordance with a requirement to do so under this Act.

Questions can arise about the practical content of the obligations placed upon the royal commission by s 32(2), and the intersection of that provision with the reporting obligations of the royal commission,[73] and the government's and Parliament's functions once a report has been received.[74] Some such questions arose in June 2021 during the public hearings of the Royal Commission into the Casino Operator and Licence in Victoria. The Commissioner proposed to hear certain testimony in camera because of the likelihood that it would reveal information subject to claims by the casino operator of legal professional privilege. The Commissioner foreshadowed that there would be a process of redaction of the transcript and non-publication orders over redacted sections to ensure no destruction of privileged information. However, the Commissioner also noted the possibility that in giving his report to the Governor he would be compelled to reveal some such material, thus potentially precipitating the loss of the privilege. The following is an edited version of exchanges on these issues between the Commissioner and senior counsel for the casino operator:

> COMMISSIONER: Mr Borsky, one reason for the next witness's evidence to be, as it were, in-camera, is because it is likely, if not inevitable, that questions that will be covered by legal privilege will arise. I wanted to avoid a stop/start because it might be difficult to divide it up and have a proportion of the evidence on non-privileged topics and a portion on privileged topics. … My present intention … is to proceed on that basis, that is take the evidence without anybody present, and then when the evidence is done, go over the transcript or somebody will go over the transcript, delete bits that are the subject of privilege, and you will be able, of course, to have an input in that and then make the transcript available publicly. …
>
> MR BORSKY: … We don't seek to be heard against that. Just for clarification, of course we've conceded a narrow waiver of privilege and you have accepted that. … And so anything not within the scope of that conceded and accepted partial waiver … insofar as it touches on privileged information will be redacted?
>
> COMMISSIONER: The answer is yes, but I should say the answer to that, I think at the moment, not only for the evidence this afternoon but for all privileged material, *is yes for the time being.* In due course it may be necessary to publish large medium or small portions of what would otherwise be privileged material. If it comes to that, I will let anybody who has a claim to privilege know and they can speak against it, but some parts of the report that I'm obliged to prepare and give to the Governor will not make sense, I fear, unless privileged material is disclosed. If parts of the report are not going to make sense without the disclosure of privileged material, I intend to publish a report that makes sense, if you understand where I'm getting at.
>
> MR BORSKY: I do.
>
> COMMISSIONER: All I can't say is I don't know now what that is and how far the disclosure might have to be made, but if disclosure has to be made for there to be a comprehensive and comprehensible report, disclosure will be made regardless*. In other words, I will take away the privilege*.

73 *Inquiries Act 2014* (Vic) s 35.
74 Ibid s 37.

> MR BORSKY: Well, I've understood we will have an opportunity to be heard before any such step
>
> COMMISSIONER: I just said that.
>
> MR BORSKY: — and of course if the Commission requires information to be published, then that requirement may have continuing significance for our purposes under section 32(2).
>
> COMMISSIONER: It might.
>
> MR BORSKY: It might. That is an argument for another day.
>
> COMMISSIONER: It won't be an argument with me in any event.[75]

Public interest immunity

Public interest immunity is in a special category. The general law formulation of principle underlying public interest immunity is:

> [T]he court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so.[76]

The doctrine is not limited to judicial officers; it applies with equal force to officers constituting non-curial tribunals and inquiries. All such judicial officers or commissioners on notice of the existence of public interest reasons have a discretion to satisfy themselves that the public interest would not be harmed by the disclosure of the relevant information, even if the state does not take the point.[77] In this respect, although the *Evidence Act 1995* (Cth) may refer to it as a form of 'privilege', it differs from other privileges in that it cannot be waived by the person who enjoys it.

In some but not all jurisdictions, royal commissions and inquiries legislation expressly provides for the making of claims of public interest immunity as an excuse for omitting to produce documents or information the subject of a statutory notice or refusing to answer questions. New South Wales does not expressly refer to public interest immunity (or any other specific form of privilege) as a basis for refusing to answer a question or produce any document to a royal commission or inquiry but does contemplate refusal if there is a 'reasonable excuse'.[78] Queensland is the same.[79] In Western Australia, powers to collect information may be exercised despite a claim to public interest immunity.[80] Claims are open at a federal level and in every state but New South Wales, Western Australia and Queensland require that the test of reasonable excuse is met. In Victoria, royal commissions and inquiries expressly permit claims of public interest immunity as an excuse for not complying with a notice. The Commonwealth, the Northern Territory, South Australia and Tasmania are silent.

75 *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).
76 Ibid.
77 *Evidence Act 1995* (Cth) s 130(1), (4); S Odgers, *Uniform Evidence Law* (12th ed, 2016) 1105 notes the adducing of confidential information provided to a statutory authority in connection with its obligation to protect sacred Aboriginal sites may be seen to prejudice the proper functioning of government, citing *Chapman v Luminis Pty Ltd* [No 2] (2000) 100 FCR [53]−[58] (von Doussa J). On this a different view was taken under the common law in *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 10 FCR 104, 114 (Woodward J but not Bowen CJ and Toohey J).
78 Table 2 below.
79 Ibid.
80 Ibid.

The position in South Australia is unclear as to whether a witness before a commission can claim public interest immunity in relation to the production of documents or the giving of evidence.[81] It is submitted that, even in those jurisdictions which do not expressly pick up a reference to public interest immunity, the compulsive powers of the royal commission are to be read as being subject to a requirement not to take steps that would derogate from the confidentiality of documents and information that are subject to public interest immunity.

The test for establishing public interest immunity is found in case law. Courts limit the disclosure of information or documents on the basis that the public interest against disclosure outweighs the need for disclosure to ensure justice in a particular case. A claim to public interest immunity must 'pass an initial hurdle first, that is, to establish that the class of documents in question … are governmental in character';[82] secondly, a balancing process applies to determine whether the claim of immunity should be upheld. In *The Commonwealth v Northern Land Council*,[83] Mason CJ and Brennan, Deane, Dawson, Gaudron and McHugh JJ stated that:

> The classification of claims for public interest immunity in relation to documents into 'class' claims and 'contents' claims has been described as 'rough but accepted'. It serves to differentiate those documents the disclosure of which would be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents.

Whether a claim of public interest immunity may be made over particular documents caught by a particular statutory notice will require close analysis including consideration of the case law which has developed relevant to particular factual scenarios. The question is whether release of certain information would undermine the capacity of the state. For a class claim, the classic statement of the relevant question is whether release would threaten 'the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind'.[84] The most obvious category of documents that attract public interest immunity are cabinet-in-confidence documents.

Statutory secrecy, religious confessions, market sensitive information about profits or financial position and other confidential matters

Some statutes contain particular secrecy provisions.[85] Statutory secrecy provisions come in various forms. The drafting of provisions differs across the jurisdictions and according to subject-matter. In this case (and in all cases) it may be possible to provide redacted documents to the royal commission or inquiry with a claim to confidentiality or other basis for secrecy.

Other secrets include religious confessions, which are dealt with specifically in a single jurisdiction — New South Wales.[86] By contrast, in general it is accepted that at common

81 Vanstone (n 15) 3.
82 *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 31−2 (Maxwell P).
83 (1993) 176 CLR 604, 616.
84 *Conway v Rimmer* [1968] 1 All ER 888.
85 For example, the *Children Youth Families Act 2005* (Vic) s 492A(2), relating to secrecy of security arrangements at youth justice facilities.
86 See Table 2.

law there is no privilege that protects a priest or member of the clergy from being required to divulge a religious confession.[87] The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that laws concerning mandatory reporting to child protection authorities do not exempt people in religious ministry from being required to report knowledge or suspicions formed in whole or in part on the basis of information disclosed in or in connection with a religious confession.[88] The Royal Commission heard about priests misusing the practice of religious confession to facilitate child sexual abuse or to silence victims.[89] It recommended that:

> 35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 [Failure to report offence] addresses religious confessions as follows:
>
> (a) The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.
>
> (b) The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.
>
> (c) Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.[90]

Information about profits or financial position is a further category of secret which may provide an excuse for non-production. In the Commonwealth and Western Australia, provision is made for evidence to be taken in private in some circumstances. In Western Australia, that provision is supplemented with clarification that taking the evidence in public would be unfairly prejudicial to the interests of the person. In Queensland and New South Wales, a 'reasonable excuse' must be established. Absent a specific provision, this is another area in which a royal commission or inquiry has a discretion to permit non-disclosure of certain information (for example by allowing a party to redact their documents).

Concurrent/combined royal commissions

It is not clear what is to be done where a combined royal commission is exercising concurrent powers under multi-jurisdictional royal commissions and inquiries legislation that confers powers and protections in different terms. A conservative approach would be only to exercise the most limited form of powers and allow the most expansive form of objections. It will be important to adopt a uniform approach across a single royal commission.

87 Donoghue (n 29) 134 and authorities cited at footnote 134.
88 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) recommendation 7.4.
89 Ibid 52, 55, 73.
90 Ibid 158, 203.

What non-statutory rights of objection may be available?

Relevance and general principles

There are limits on the permissible content of compulsory notices, including those dictated by the relevant terms of reference, the need for reasonable certainty and other general law grounds that apply to statutory notices. If the notice seeks information outside the scope of the terms of reference of the inquiry, the recipient of the notice could refuse to answer the questions. The test is one of relevance.[91] Questions can only be 'relevant' in respect of a particular subject-matter. The terms of reference determine the scope or 'jurisdiction' of any inquiry.[92]

It has not been definitively established that the rules which apply in a court of law to a subpoena also apply to a notice to produce documents to a royal commission or inquiry. However, some of the principles derived in cases relating to production of material pursuant to subpoenas provide helpful guidance. Some of those principles have been applied in disputes about production of information to permanent inquiries such as ICAC. There is also a significant body of principles that have been developed in cases concerning statutory notices issued by standing or permanent inquiry bodies and regulators. In these cases the courts have regularly stressed the importance of clarity and precision in such statutory notices.[93] These existing bodies of case law and principle are a useful starting point for approaching the legality of notices issued by a royal commission or inquiry.[94]

For example, the general principles for assessing a typical statutory notice were identified by Davies J of the Supreme Court of New South Wales in *Harris v Mathieson*.[95] In that case, notices under the *Water Management Act 2000* (NSW) were issued by the Natural Resources Access Regulator. As required by the empowering legislation, the notices stated the purpose for which they were issued, which was to determine whether there had been compliance with or contravention of certain provisions of the legislation. Davies J held that certain questions in the second notice did not relate to alleged contraventions and went beyond the power to require information and records. His Honour drew on the principles derived from cases under s 155 of the *Trade Practices Act 1974* (Cth), which he distilled as follows:[96]

a. The notice must convey with reasonable clarity to the recipient what information he/she is required to furnish or what documents are required to be produced.[97]

b. The documents sought must be capable of being properly regarded as related to the potential contravention.[98]

91 This is the test applied in the United Kingdom: Hallett (n 4) 106 and footnote 55 therein.
92 Ibid.
93 *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 39 ALR 565 *(Pyneboard)* 568−72; 57 FLR 368, 371−7.
94 Hallett (n 4) 99.
95 *Harris v Mathieson in his capacity as an authorised officer under the Water Management Act 2000 (NSW)* [2019] NSWSC 1064.
96 Ibid [24].
97 *Pyneboard* (n 93) 568−72; 374.
98 Ibid; *SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105; 23 FCR 357, 370; *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490.

c. The notice must disclose the relationship between the information sought and the matter in respect of which the information is sought.[99]

d. These requirements (in (a), (b) and (c) above) are not to be applied in a precious, over-technical or hypercritical way.[100]

e. Provided the necessary relationship exists between the matter and the information and documents required, the notice is not open to objection on the ground that it is burdensome to furnish the information or to produce the documents.[101]

f. The power conferred is in aid of a function of investigation, not proof of an allegation, and it is not possible to define a priori the limits of an investigation which might properly be made. In that way the power should not be narrowly confined.[102]

g. The power may properly be exercised to ascertain facts which may merely indicate a further line of inquiry.[103]

h. The invalidity of one question or requirement to produce will not lead to the invalidity of other independent questions unless the blue pencil deletion of what is invalid is not practicable or, if it is, would result in a substantially different question.

i. Objection may be taken to production on the ground of relevance.[104]

j. The possibility, even the certainty, that the notice will cover documents which are not relevant to the investigation is not a basis for setting aside the notice.[105]

Recently, in *Australian Securities and Investments Commission (ASIC) v Maxi EFX Global AU Pty Ltd*,[106] the Federal Court (Wigney J) considered the validity of a notice issued by ASIC. Wigney J applied *Harris v Mathieson* (among other authorities) and added the following further principles:

a. A notice which is 'couched in such wide and general terms that a proper exercise of the investigatory power could not support the requirement in question' would be invalid.

b. Notices are 'to be reasonably, not preciously, construed and the terms used in notices will ordinarily take their meaning from the commercial circumstances in which the notices are given'.

99 *Pyneboard* (n 93) 568−72; 376; *SA Brewing Holdings Ltd v Baxt* (1989) 89 ALR 105; 23 FCR 357.
100 *Pyneboard* (n 93) 572; 376.
101 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519, 529−31; 47 FLR 163, 172−5; *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 561, 567; 31 FLR 129, 136.
102 Ibid.
103 Ibid 529−31; 174.
104 *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240; [2014] NSWCA 414 [4].
105 Ibid [34].
106 (2020) 148 ACSR 123; [2020] FCA 1263.

c. Validity of notices should not be approached 'carpingly by engaging in a narrow analysis of each word in an attempt to find some latent ambiguity in it'.

d. Use of expressions such as 'relating to' 'referring to' or 'recording' does not mean that a notice lacks sufficient clarity or precision; much will depend on the context in which the expression is used.[107]

We suggest that these principles ought to be applied to compulsory notices issued by royal commissions and inquiries. If some or all of the principles are infringed, redrafting or withdrawal of the notice may be requested in the appropriate circumstance on the basis that it is open to reasonable challenge.

How to challenge a notice

The process for challenging a notice issued by a royal commission is not clear in every jurisdiction. However, as a starting point, a royal commission is bound to follow the rules of natural justice and procedural fairness. Therefore, in responding to any challenge to a notice, those rules of administrative law apply.

In the Royal Commission into the Building and Construction Industry, Commissioner Cole recommended that:

> [The *Royal Commission Act 1902* (Cth) should be amended t]o provide that no challenge may be made to a notice or summons on the basis that the information sought does not fall within the Terms of Reference of a Royal Commission, except on the basis that the notice or summons is not a bona fide attempt to investigate matters into which the Commission is authorised to inquire.[108]

Commissioner Cole considered that this recommendation, if implemented, would codify the common law. He considered it was necessary to define the rules as precisely as possible to avoid the delays caused by legal challenges.

In 2009, the Australian Law Reform Commission did not adopt that recommendation, noting that the courts properly ensure the legality of administrative action. The Australian Law Reform Commission noted that the power to compel evidence may only be exercised for the purposes of a particular investigation. However, courts have tended to take an expansive view of the relevance of any information sought to be compelled and the subject of the inquiry.[109] For example, in *Ross v Costigan (No 2)*,[110] the Full Court of the Federal Court stated, 'what the Commissioner can look to is what he bona fide believes will assist him in his Inquiry'. In *Douglas v Pindling*,[111] the Privy Council stated:

> If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, them it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result …

107 Ibid [90]–[94] (citations omitted).
108 Royal Commission into the Building and Construction Industry (n 11) vol 2, 81.
109 Australian Law Reform Commission (n 18) 361.
110 (1982) 64 FLR 55, 69.
111 [1996] AC 890, 904.

> [T]he decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at.[112]

Commonly royal commissions and inquiries draft their own procedures as an early first step. Such procedures often outline how to challenge a notice. For example, in the recent Royal Commission into the Casino Operator and Licence, Practice Direction 3 set out the process for claims to reasonable excuse or legal professional privilege in response to notices.[113]

How will the information be used?

One of the factors to weigh in advising on a notice issued by a royal commission or inquiry is the use of the information to be provided. Victorian legislation specifies that a board that proposes to make an adverse finding is required to afford procedural fairness.[114] All royal commissions and inquiries are bound by the rules of procedural fairness or natural justice unless specifically and clearly excluded by the legislature.[115] It may be appropriate to ask in the particular case whether the royal commission or inquiry proposes any adverse findings arising based on the particular documents or information which have been requested. Depending on its scope, a royal commission may receive vast swathes of evidence over many months or years. It is obviously not the case that a finding will be made based upon each relevant aspect of every item of evidence that is received.

Conclusions

Advisers responding to notices in short time frames should be mindful of both the rights and obligations associated with statutory notices. Advisers may be called upon at short notice and during the running of a royal commission or inquiry, even mid-hearing, to advise on compulsory notices. It is prudent to consider well in advance of a brief or request for advice what rights and obligations apply. Each royal commission or inquiry has the flexibility to adopt its own procedures including timing for response to notices. What is reasonable and appropriate will depend on all the circumstances, including whether it is a fact-finding inquiry (such as Special Commission of Inquiry into the Ruby Princess) or a policy inquiry (such as the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability). We have endeavoured to provide you with a roadmap for use in such circumstances so that all advisers are well informed if providing legal advice about a compulsory notice issued by a royal commission or inquiry to a tight timetable.

112 Ibid.
113 Royal Commission into the Casino Operator and Licence, *Practice Direction 3: Production of Documents and Document Management Protocol* (18 May 2021) 2−3.
114 *Inquiries Act 2014* (Vic) ss 36 and 76.
115 *Mahon v Air New Zealand Ltd* [1984] AC 808; *Annetts v McCann* (1990) 170 CLR 596.

Table 1: What powers does a royal commission or inquiry have to obtain information through compulsory process?

	Cth	Vic	NSW	WA	Qld	NT	Tas	ACT	SA
Legislation	*Royal Commissions Act 1902* (Cth)	*Inquiries Act 2014* (Vic)	*Special Commissions of Inquiry Act 1983* (NSW) *Royal Commissions Act 1923* (NSW)	*Royal Commissions Act 1968* (WA)	*Commissions of Inquiry Act 1950* (Qld)	*Inquiries Act 1945* (NT)	*Commissions of Inquiry Act 1995* (Tas)	*Inquiries Act 1991* (ACT) *Royal Commissions Act 1991* (ACT)	*Royal Commissions Act 1917* (SA)
Notice/summons/ subpoena to produce documents	Require a document or thing to be produced at a particular time and place (s 2(3A))	By written notice, require a person to produce a specified document or other thing at a particular time and place (RC s 17(1)(a); inquiry s 64(1)(a))	Summon a person to produce any document or other thing in the person's custody or control which is required by the summons (RC s 11(1)(c))	Written notice may be served requiring specified documents, books, writings or things to be produced (s 8B(1)(b))	By writing under the chairperson's hand, require a person to produce books, documents, writings and records or property or things of whatever description in the person's custody or control as are specified in the writing (s 5(1)(b))	In writing, summon a person to produce any books, documents and writings in the person's possession or control which the person is required by the summons to produce (s 9(1))	By notice served, require a person to produce any document or thing in the person's possession or control which the commission considers relevant (s 22(1))	In writing, a person may be required to produce a document or thing relevant to a hearing (inquiry, s 26(1)) Require a person by subpoena to appear and give evidence or produce a stated document or other thing (s 34(1))	Require by summons the production of any books, papers, documents or records (s 10(c))
Notice to produce information or a statement	Require information or a statement in writing (s 2(3C))	n/a	n/a	Written notice may be served requiring a statement from a public authority or public officer (s 8A(2))	By writing under the chairperson's hand, require a person to give written information (s 5(1)(d))	n/a	By notice, require a document or statement to the commission containing the information known by the person in respect of the matter specified in the notice (s 23(1))	n/a	n/a

Table 2: What reasonable excuse or other statutory basis for objection may be available in response to a compulsory notice?

	Cth	Vic	NSW	WA	Qld	NT	Tas	ACT	SA
Legal professional privilege (LPP)	Yes, if claim is accepted by a member of the commission or a court (s 6AA)	For an RC, no (s 32(1)), but documents/information produced do not cease to be the subject of LPP (s 32(2)) For an inquiry, yes (s 65(2)(c))	No excuse on the ground of privilege or any other ground (RC s 17(1); SC s 23(1))	(Reasonable excuse) (RC s 13(4)).	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse) (s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A)	An Act must be interpreted to preserve the common law privilege in relation to LPP (s 171 *Legislation Act 2001* (ACT))	*Royal Commissions Act 1917* s 10(c) (commission's summons to produce documents) and s 11A(1) (magistrate's summons subject to reasonable excuse) impliedly subject to LPP
Public interest immunity (PII)	n/a	Yes (RC s 18(2)(c); inquiry s 65(2)(d))	No excuse on the ground of privilege or any other ground (RC s 17(1); SC s 23(1))	No, powers to collect information from a public authority/public officer may be exercised despite a claim to PII (s 8A(5)(a))	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse) (s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A)		As above
Parliamentary privilege	Yes, parliamentary privilege applies to documents or information supplied to an RC which prevents use of the information for drawing certain inferences (s 16 of *Parliamentary Privileges Act 1987*). An RC is a 'tribunal' for the purposes of the *Parliamentary Privileges Act 1987*	Yes (RC s 18(2)(b); inquiry s 65(2)(b))	Regard should not be had to parliamentary privilege to the extent that it is waived (SC s 9(5)) No excuse on the ground of privilege or any other ground (RC s 17(1); SC s 23(1))	Yes, parliamentary privilege is not abrogated (s 8A(5), (6), *Parliamentary Privileges Act 1891*)	n/a	(Reasonable excuse) (s 11(1), 12(b)(iv))	A claim to a privilege may be assessed by the commission (s 23A)		As above

	Cth	Vic	NSW	WA	Qld	NT	Tas	ACT	SA
Self-incrimination	Yes, but only if the person has been charged and proceeding not yet dealt with or proceedings have commenced (s 6A)	Yes, for an RC, but only if the person has been charged or proceedings are underway (s 18(2)(a), s 33(2)) Yes, for an inquiry (s 65(2)(a))	No excuse on the ground that answers or documents may criminate or tend to criminate, or on the ground of privilege or any other ground (RC s 17(1); SC s 23(1))	No, this is not a reasonable excuse (s 13(4)(a)) No ground to refuse to answer that the answer might incriminate or tend to incriminate the person or render the person liable to a penalty (s 14(2))	No ground to refuse to produce a document or thing that to do so may incriminate a person (s 14(1A))	(Reasonable excuse) (s 11(1), 12(b)(iv))	No, a person is not excused from answering a question asked by a commission or from producing a document or thing to a commission on the ground that the answer to the question or the production of the document or thing might incriminate or tend to incriminate that person (s 26)	No, a person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question (Inquiries Act s 19(2); Royal Commissions Act s 24(2))	Yes, a statement or disclosure made to the commission is not admissible in other civil or criminal proceedings against the witness (s 16)
Religious confessions	n/a	n/a	Yes (RC s 11; SC s 17)	n/a	n/a	n/a	A claim to a privilege may be assessed by the commission (s 23A)	n/a	n/a
Secrets	Yes, it is not compulsory to disclose any secret process of manufacture (s 6D(1))	Not a reasonable excuse that the document information or thing imposes a duty of confidentiality on a person (ss 34(1), 34(3), 74(1))	Yes, if it would disclosure a secret process of manufacture (RC s 11(2)(b); SC s 11(2)(b)). Not on the ground of a duty of secrecy or other restriction on disclosure (RC s 17(1)).	For a public officer, no, powers to collect information may be exercised despite a claim to a duty of secrecy or other restriction on disclosure (s 8A(5)(c)) No, breach of an obligation not to disclose information, or not to disclose the existence or contents of a document is not a reasonable excuse (s 13(4)(b)) Yes, it is not compulsory for a witness before a Commission to disclose to the commission any secret process of manufacture (s 19(1))	Not compulsory to disclose any secret process of manufacture (s 14(1)(a))	(Reasonable excuse) (s 11(1), 12(b)(iv))	n/a		No, a secret process of manufacture is not required to be disclosed (s 14)
Profits or financial position	On request such evidence may be taken in private (s 6D(2))	n/a	(Reasonable excuse) (RC s 11(2)(a); SC s 17(2)).	Evidence may be taken in private because the evidence relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person (s 19(2))	(Reasonable excuse) (s 14(1)(b))	(Reasonable excuse) (s 11(1), 12(b)(iv))	n/a	n/a	n/a
Relevance	It is a defence to a charge for failure to produce document, give information or statement as required by notice that the information or statement was not relevant (ss 3(3), 3(6C))	RC/inquiry may conduct its inquiry in any manner that it considers appropriate subject to the requirements of procedural fairness, the letters patent, the order establishing the RC/inquiry (ss 12, 59)	Only receive evidence that appears to relate to a matter specified in the relevant commission (SC s 9(2)) Only permit to be given in evidence matters likely to be admissible in evidence in civil proceedings (SC s 9(3)) It is a defence to a prosecution for failing without reasonable excuse to produce any books, documents or writings if the defendant proves that the books, documents or writings were not relevant (RC s 19(2); SC s 25(2))	Defence to contempt that the document or thing was not relevant to the inquiry (s 15B(8))					*Royal Commissions Act 1917* s 10(c) (commission's summons to produce documents) and s 11A (magistrate's summons expressly subject to reasonable excuse) documents summonsed must be 'relevant to the inquiry'

RC: Royal commission

SC: Special commission of inquiry (NSW)

Inquiry: other inquiry, commission of inquiry or board of inquiry

Apprehended bias: the nuclear option

*Lachlan McIntyre**

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd[1] (*Oakey*) concerned a mine expansion development application lodged by Acland some 14 years ago and opposed by a small community action group known as Oakey Coal Alliance (Oakey). In the wake of this decision, parties to future judicial review cases should be aware of the opportunities and dangers that might be presented where a claim of reasonable apprehension of bias is raised, especially on appeal. The High Court has demonstrated an emphasis on legal formalism in this area, using procedural fairness as a linchpin for further review where fairness, circumstances and justice as between the parties might dictate otherwise. Arguably, this approach stands at odds with the inquisitorial nature[2] of the administrative bodies that judicial review is intended to oversee.

The application of the rule against apprehended bias may be as diverse as human frailty itself. In an extreme example, the initial decision-maker in this case provided in his reasons a self-described 'epilogue' of his personal life circumstances, going to the 'difficulties of [his] judicial task' and 'struggles' against negative press coverage at the time. Yet the unpredictability of raising even self-evident apprehended bias should not be understated. The respondent's decision to cross-appeal on the basis of apprehended bias in the Court of Appeal — in which New Acland Coal Pty Ltd (Acland) was otherwise wholly successful — would later force a full rehearing of the matter, which had originally consumed over 100 days of court time and cost $25 million and in which 66 witnesses were called. The High Court has demonstrated an unforgiving flare of legal formalism in this area, acknowledging the 'nuclear' option of pursuing such a claim but placing slimmer weight on practical justice than might be otherwise expected within an administrative law context.

Background

In the High Court proceedings,[3] Oakey appealed the making of a declaration by the Queensland Court of Appeal[4] that Acland had not been afforded procedural fairness by Member Smith, the decision-maker in the original Land Court inquiry proceedings.[5] Those

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1 [2021] HCA 2.

2 Sasha Baglay and Laverne Jacobs, *The Nature of Inquisitorial Processes in Administrative Regimes* (Ashgate Publishing, 2nd ed, 2016) 8. In inquisitorial bodies, the decision-maker actively participates in the investigation and collection of evidence and controls the proceedings. The learned authors explain that, while 'those from the adversarial tradition sometimes question the ability of the inquisitorial decision-maker to guarantee procedural fairness', the reliance of the adversarial tradition on procedural fairness and the rules of evidence mean that 'the wider public interest … may be neglected'. Judicial review proceedings can be considered adversarial in nature.

3 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 (*Oakey*).

4 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271; [2019] QCA 184 (*Oakey COA1*); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [No 2]* (2019) 2 QR 312; [2019] QCA 238 (*Oakey COA2*).

5 *New Acland Coal Pty Ltd v Ashman [No 4]* [2017] QLC 24. The Land Court proceedings are administrative proceedings governed by statute and can be considered inquisitorial in nature.

proceedings were commenced in March 2016 to progress Acland's mine development application in accordance with statutory requirements. It is a peculiar result of this case that Oakey's success on this limited issue would have the effect of forcing a full rehearing of the matter by the Land Court once more.

Queensland Land Court — original proceedings

The original inquiry before Member Smith was significantly delayed and the subject of considerable public scrutiny. In the High Court, the proceedings were referred to as 'complex'[6] and their history 'unfortunate'.[7] Although errors of law were identified and successfully prosecuted in judicial review proceedings, bias was also raised at first instance.

On 2 February 2017, following media reports that the proceedings' extensive delays had been caused by both administrative blunders and the presiding member's holiday arrangements, Member Smith remarked on his 'personal cut', accused counsel of 'playing tricks' and, in the Court of Appeal's view, baselessly threatened to cause the bringing of contempt proceedings against Acland.[8]

Acland did not press for an application for the member to recuse himself when the bias issue arose at the time.[9] However, the issue of apprehended bias was revived in the member's written reasons which gallantly included an 'epilogue' describing the personal difficulties of his judicial task.

In the High Court it was common ground that the member had breached the rule against apprehended bias, as was established by the Court of Appeal. The test in *Ebner v Official Trustee in Bankruptcy*[10] (*Ebner*) applied, with the Court considering 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide'.[11]

Procedural fairness is an inherent requirement of bodies established by legislation as a court, and therefore the test applied equally to Member Smith as it would to a judge.[12] This is despite the fact that procedural fairness requirements in administrative law are somewhat 'flexible' in applying norms of natural justice to decision-making.[13]

Queensland Supreme Court

Member Smith's judgment recommended against Acland's development application.

Acland later commenced judicial review proceedings in the Supreme Court of Queensland

6 *Oakey* (n 3) [11].
7 Ibid [72] (Edelman J).
8 *Oakey CO1* (n 4) [44], [48].
9 *Oakey* (n 3) [66].
10 (2000) 205 CLR 337 (*Ebner*).
11 Ibid 350 [33] (Gleeson CJ; McHugh, Gummow and Hayne JJ).
12 *Oakey* (n 3) [47].
13 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 460 [70]; Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 124.

on the bases of error of law and apprehended bias.[14] Acland was successful on only the first ground, although bias would become relevant in the Court of Appeal. Bowskill J made orders setting aside Member Smith's recommendations and remitting three limited issues to the Land Court for redetermination: relating to groundwater, intergenerational equity and noise.[15] Neither party opposed or appealed the making of those remittal orders at any stage.

Queensland Land Court — remitted proceedings

President Kingham of the Land Court heard from the parties on the remitted issues and found in Acland's favour.[16] Her Honour issued new recommendations in Acland's favour and Acland obtained the first tranche of development approvals required by the Department of Environment to progress the mine expansion application.

Queensland Court of Appeal

Shortly before the handing down of Kingham P's orders, Oakey lodged an appeal in the Queensland Court of Appeal against Bowskill J's findings on the error of law ground.[17]

Acland also cross-appealed the findings of Bowskill J on the basis that the Court had erred in declining to find that Member Smith had breached the rule against apprehended bias. That cross-appeal was brought only following significant hesitation and a failed application to cross-appeal conditionally (that is, only in the event of the success of Oakey's appeal).

Ultimately, the Court of Appeal allowed the cross-appeal for bias but not Oakey's appeal.[18] However by the time of judgment, Acland had already been granted the valuable development approvals which were a result of Kingham P's orders in its favour.

At a separate hearing to give effect to the Court of Appeal's primary judgment,[19] Acland persuaded the Court to simply grant a declaration that procedural fairness had not been afforded by Member Smith. That result would avoid the remittal of the matter for another costly rehearing in circumstances where Oakey had failed in its appeal and had never appealed the orders of Kingham P in any event, meaning Acland's cross-appeal was, at least in retrospect, superfluous.

The Court reasoned that the declaration could be made because Bowskill J's orders were 'spent'; because the orders of Kingham P were 'valid' and 'binding'; and for discretionary reasons.[20] Oakey challenged this reasoning in the High Court.

The Court's reasoning

In the High Court, apprehended bias was not analysed directly but still impacted all three

14 *New Acland Coal Pty Ltd v Smith* (2018) 230 LGERA 88; [2018] QSC 88.
15 Ibid [17].
16 *New Acland Coal Pty Ltd v Ashman [No 7]* [2018] QLC 41.
17 *Oakey COA1* (n 4).
18 *Oakey* (n 3) [29].
19 *Oakey COA2* (n 4).
20 Ibid 314 [SR17].

grounds of appeal in both judgments. It is treated with profound gravity and inflexibility which arguably places justice as between the parties as a secondary consideration.

Appeal ground 1

Arguments of the parties

The first issue was whether the recommendations of Kingham P in Acland's favour and the subsequent development approvals obtained were 'affected by the same apprehended bias' of Member Smith.[21] Oakey argued that they would be if Bowskill J's orders were set aside[22] — an argument that was ultimately accepted by Acland.[23] However, the Court had first to deal with the fact that neither the orders of Kingham P nor those of Bowskill J had been appealed and that the remitted issues before Kingham P were not the issues originally before Member Smith.

The Court's reasoning: Edelman J

Edelman J resolved the issue by finding that Kingham P was herself tainted by 'indirect' apprehended bias without the 'protection' of the orders of Bowskill J which had limited the scope of the issues remitted to the Land Court. His Honour reasoned:

> *The unusual manner in which the decision-making by Kingham P gives rise to an apprehension of bias is a consequence of her Honour, in accordance with order 5 of Bowskill J's orders, quite properly treating herself as bound by the findings and conclusions of the Member* in relation to all issues other than 'groundwater, intergenerational equity (as it relates to groundwater) and noise'. The dependence by which Kingham P decided those issues was both required and justified by order 5. Order 5 specifically required (i) that the parties before the Land Court be 'bound' by, and (ii) that the Land Court 'proceed on the basis of', all findings and conclusions of the Member other than in relation to 'groundwater, intergenerational equity (as it relates to groundwater) and noise'. But once the Court of Appeal concluded that there was apprehended bias on the part of the Member then it followed as a matter of logic that order 5 could not stand. *And without the justification of order 5, the decision of Kingham P must be taken to be the subject of unjustified dependence and therefore apprehended bias*.[24]

With respect, his Honour's creative approach has cleverly avoided an expansion of the apprehended bias rule to decision-making *processes* — a logical progression that might restore common sense and flexibility to the otherwise formalistic treatment of apprehended bias by the Court.

His Honour specifically avoids the 'large question'[25] presented by *Hot Holdings Pty Ltd v Creasy*[26] (*Hot Holdings 2002*) of whether bias could taint a decision-making process itself. In that case, the respondent sought to 'depersonalise the act of decision-making' in which two public servants had interests in a ministerial decision.[27] The Court avoided that submission and the issues

21 *Oakey* (n 3) [31].
22 Oakey Coal Action Alliance Inc, 'Grounds of Appeal', Submission in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (ACN 081 022 380)*, B34/2020, 5 June 2020, 2 (Grounds of Appeal).
23 *Oakey* (n 3) [33].
24 Ibid [83] (emphasis added).
25 Ibid [79] (Edelman J).
26 (2002) 210 CLR 438.
27 Ibid 445 [13].

presented by it by reference to those servants' 'peripheral' role to the Minister's state of mind.[28] In *Oakey*, Edelman J similarly refuses to 'extend the ground' of apprehended bias,[29] which his Honour argues is concerned with 'mindset'[30] whilst 'processes have no thought processes'.[31]

Despite his Honour's reasoning, in my view Kingham P's *mindset* could never have been 'corrupted' given her Honour undoubtedly brought an independent mind to the issues and displayed no apprehended bias herself. That much was common ground between the parties. To quote the test in *Ebner*,[32] her Honour brought 'an impartial mind to the resolution of the question [she] was required to decide'.

Furthermore, the very ability of Bowskill J's orders to permit Kingham P to 'depend'[33] upon the member's findings indicates that a decision-making and appeal *process*, rather than *mindset*, is being assessed for bias. That fact may abrade the reasoning of Edelman J.

The Court's reasoning: joint judgment

The joint judgment does not directly address the establishment of Kingham P's bias, admitted by Acland. However, the Court does analyse the effect of bias on the Land Court's jurisdiction. It was held that the statutes conferring jurisdiction on the Court for the making of the recommendations imported inherent statutory preconditions of independence and impartiality.[34] This should be considered uncontroversial given the statutory basis of all administrative powers.[35]

However, those requirements of procedural fairness are rigidly applied, demonstrating the High Court's special emphasis on legal formalism in this area. The duties are said to apply to 'administrative functions no less than … judicial functions'.[36] This is an interesting result, given the High Court seemingly brushes off other concerns that Bowskill J's orders went beyond the Land Court's jurisdiction on the simple basis that the 'issue is not raised as an issue in the appeal'.[37] The High Court was also willing to look beyond its inability formally to set aside the orders of Kingham P,[38] in what might also be considered a flexible approach.

Practical outcome and judicial review's functions and values

The success of this ground of appeal had the practical effect of invalidating the orders of both Bowskill J (which were not originally objected to)[39] and Kingham P (who was not joined to the appeal).[40]

28 Ibid 448 [24].
29 *Oakey* (n 3) [80] (Edelman J).
30 Ibid [81] (Edelman J).
31 Ibid.
32 *Ebner* (n 10) [33].
33 *Oakey* (n 3) [83] (Edelman J).
34 Ibid [49].
35 Cane, McDonald and Rundle (n 13) 20.
36 *Oakey* (n 3) [47].
37 Ibid [42].
38 Ibid [85] (Edelman J).
39 Ibid [19].
40 Ibid [85] (Edelman J).

Thus, Acland's reluctant pursuit of a fair hearing has had the 'nuclear'[41] effect of tarnishing all recommendations and decisions favourable to it, despite being successful in the Court of Appeal.

This illustrates the stringent approach of the High Court to judicial review, and particularly the rule of apprehended bias. This is apparent in the joint judgment's special emphasis on procedural fairness in the statutory conferral of jurisdiction. This is also evident in Edelman J's reluctance to accept that decision-making *processes* can become tainted by bias, which may have allowed Acland to better grasp the unpredictability of appealing on the basis of bias[42] or for the issue to have been fully addressed at the earliest stage possible, as the Law Reform Commission suggests.[43]

That being said, this reluctance may itself stem from a fear of the 'nuclear effect' of apprehended bias infecting a whole raft of governmental decisions. Still, that effect could be ameliorated through a practical and judicious use of the court's discretion to grant appropriate remedies. As will be argued, those practical considerations were given little weight in the High Court — at least when compared to the Court of Appeal's more pragmatic approach.

Appeal ground 2

Arguments of the parties

The second issue was whether the Court could 'interfere'[44] with the unappealed orders of Kingham P and the subsequent government approvals, each affected by apprehended bias.[45]

Oakey argued that the orders were neither valid nor binding given the Land Court relies on statutory rather than inherent jurisdiction. Thus, on Oakey's case, the empowering statutes could not be construed as allowing either Kingham P or the Department of Environment to make decisions regarding Acland's development application upon a finding of apprehended bias at any stage in the matter.[46]

Acland argued that the *New South Wales v Kable*[47] (*Kable [No 2]*) doctrine validated Bowskill J's orders (even if erroneous) and the recommendations and approvals dependent on them.[48] Edelman J explains the potential effect of that doctrine:

> In *Kable [No 2]*, it was held that a judicial order for detention of Mr Kable made by a superior court of record in excess of the jurisdiction of that court provided lawful authority for the executive act of detention of Mr Kable, until the order was set aside. Although the court order was later quashed as being outside jurisdiction, it provided interim support for the act of detention, which would otherwise have been without

41 Ibid [101] (Edelman J).
42 John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *38 Federal Law Review* 353, 353.
43 Australian Law Reform Commission, 'Judicial Impartiality Enquiry — Recusal and Self-Disqualification (JI2)' (Consultation Paper, March 2021) 3.
44 *Grounds of Appeal* (n 22) 2.
45 *Oakey* (n 3) [33].
46 Ibid [87] (Edelman J).
47 (2013) 252 CLR 118 (*Kable [No 2]*).
48 *Oakey* (n 3) [33], [87] (Edelman J).

> authority. *New Acland Coal submitted that order 5 of the Supreme Court of Queensland, a superior court of record, was therefore equally capable of providing lawful authority for the administrative decision of Kingham P in the Land Court, until order 5 was set aside*.[49]

Acland's alternative argument was that, even if those orders were a legal nullity, their very existence satisfied the statutory precondition for the government approval.[50]

The Court's reasoning: Edelman J

Edelman J did not address Oakey's argument, which his Honour believed falsely to assume how Acland sought to apply the *Kable [No 2]* doctrine.[51] Acland's first argument was accepted with the caveat that prospective validity would be terminated if the Supreme Court orders were set aside (as they would come to be by the High Court).[52] In the result, the orders of Kingham P were considered a legal nullity.[53]

Acland's alternative argument was addressed through a statutory lens. Edelman J held that the Land Court's empowering statutes did not provide the 'unusual' circumstance where preconditions performed in fact but not in law were sufficient to enable secondary administrative decisions.[54]

The Court's reasoning: joint judgment

Oakey's primary argument prevailed, with the Court finding that Bowskill J's orders gave no 'additional force or effect' to those of Kingham P.[55]

Acland's alternative argument was addressed through the lens of apprehended bias. Here, the Court again demonstrates its inflexibility. In referring to *Hot Holdings v Creasy*[56] (*Hot Holdings 1996*) in its submissions, Acland appears to argue that the isolation of intermediary decisions in the statutory process should cut both ways — to permit certiorari for invalid preliminary decisions but also to prevent the spread of bias to second actors.[57] This argument would be supported by *Hot Holdings 2002* if a *process* could be viewed holistically to ascertain whether it had been tainted by bias,[58] such that the recommendations of Kingham P and government approval might be quarantined. The Court's rejection of these relevant cases in a single paragraph[59] propounds a steadfast desire to prioritise a formalistic application of the bias rule.

49 Ibid [86] (emphasis added).
50 Ibid.
51 Ibid [87] (Edelman J).
52 Ibid [88] (Edelman J).
53 Ibid.
54 Ibid [94] (Edelman J).
55 Ibid [44].
56 185 CLR 149.
57 *Oakey* (n 3) [59]; New Acland Coal Pty Ltd, 'Respondent's Submissions', Submission in *Oakey Coal Action Alliance Inc v New Acland Coal Ptd Ltd (ACN 081 022 380)*, B34/2020, 21 August 2020, [31].
58 *Hot Holdings 2002* (n 26); *Oakey* (n 3) [79] (Edelman J).
59 *Oakey* (n 3) [59].

Practical outcome and judicial review's functions and values

Oakey was successful on this second ground, with the Court finding that, owing to Member Smith's bias, Kingham P's orders were not validated by Bowskill J's orders and could not be relied upon for the purposes of the development approvals. This illustrates the profound scope of the flow-on effects of apprehended bias that the Court will tolerate in formalistically applying procedural fairness rules. This is evident in the shunning of both Acland's alternative arguments and the possibility of reopening the doctrine of apprehended bias potentially to apply to processes.

This is despite the existence of other rules that protect procedural fairness while striking a balance with practicality. For instance, the doctrine of waiver estops parties aggrieved by bias who elect to not act on it but also allows for bias to be revived if the final judgment conveys a 'fresh apprehension'[60] of impermissible bias.[61] That element of the doctrine of apprehend bias applied to Acland in the Court of Appeal decision.

Appeal ground 3

Arguments of the parties

The final issue was whether discretionary factors arose to justify not ordering a full reconsideration of the matter given the presence of apprehended bias.[62] Acland argues that they did and Oakey argues that they did not.

Resolution of the Court: Edelman J

Edelman J recognised the Court's ability to refuse to order a full rehearing and also to invalidate the government approval.[63] However, such discretion would only be exercised in a 'highly exceptional' case.[64] Interestingly, that threshold was not met by Acland, despite long delays of over 100 days;[65] costs of $25 million in reliance;[66] and practical considerations, including the intermediatory nature of Kingham P's orders and the concessions obtained by Oakey and given Oakey had had 'its day in court'.[67]

Resolution of the Court: joint judgment

The joint judgment also declined to exercise the Court's discretion to refuse to order a full rehearing but identified some circumstances where it might. These included where a more convenient remedy existed; if no useful result would ensue; or if there was bad faith on the applicant's part.[68] Specifically excluded was 'practical inconvenience'.[69]

60 *Oakey COA1* (n 4) 299 [76].
61 *Vakauta v Kelly* (1989) 167 CLR 568, 573.
62 *Oakey* (n 3) [34]; *Grounds of Appeal* (n 22) 2.
63 *Oakey* (n 3) [99] (Edelman J).
64 Ibid [101] (Edelman J).
65 Ibid [74] (Edelman J).
66 Ibid [100] (Edelman J).
67 Ibid.
68 Ibid [68].
69 Ibid.

Practical outcome and judicial review's functions and values

While the Court of Appeal's consequential orders cite a lack of 'utility' as justification for not ordering the matter's full reconsideration,[70] that result cannot be divorced from that Court's preferable approach of considering the decision's practical effects on Acland (the successful party), balanced with the imperative of a fair trial.

That balancing exercise may appear to be lacking in the High Court's decision, evincing a formalistic application of the apprehended bias rule. The practical result of the judgment is to force the rehearing of material never expressly desired by either party to be retried, which had consumed approximately 100 court days and included thousands of exhibits and 66 witnesses. It seems arguable that the circumstances of the case would constitute the 'highly exceptional'[71] case envisioned by Edelman J — for which the Court of Appeal's decision surely provided a 'more convenient' or more 'useful' result (the joint judgment test).[72] It is intriguing that this crucial issue is addressed in such little detail.

Parties to judicial review cases should be therefore be aware that the Court may tenaciously extinguish a claim of bias, which it cites as striking at the 'validity and acceptability of the trial and its outcome'.[73] It appears to be of no relevance which party raises the issue,[74] with Edelman J even implicitly blaming Acland for pursuing the 'nuclear' option of appealing on the basis of apprehended bias.[75] *Oakey* illustrates, as Aronson, Groves and Weeks warn, that judicial review is far more likely to 'favour affected individuals' in particular circumstances than to provide 'positive systemic impact' for justice generally.[76]

Thus, fairness as between the parties, which may be paramount in the administrative proceedings that judicial review oversees, may be overlooked and lead to results that are inevitably sporadic or peripheral.[77] That fact is no better demonstrated than by Oakey's insolvency, at least before the handing down of the High Court result,[78] and the great expense it will undoubtedly face in its hard-fought, yet never pleaded for, rehearing in the Land Court.

70 *Oakey COA2* (n 4) 314 [17].
71 *Oakey* (n 3) [101] (Edelman J).
72 Ibid [68].
73 Oakey Coal Action Alliance Inc, 'Appellant's Submissions', Submission in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (ACN 081 022 380)*, B34/2020, 24 July 2020, [29]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 590 [61].
74 Anna Olijnyk, 'Apprehended Bias and Interlocutory Judgments' (2013) *35 Sydney Law Review* 761, 768.
75 *Oakey* (n 3) [101] (Edelman J).
76 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thompson Reuters, 7th ed, 2017) 2−3.
77 Ibid; J Evans, *de Smith's Judicial Review of Administrative Action* (Stevens, 4th ed, 1980) 3.
78 On 22 July 2020, Davies J made orders staying Acland's application to wind up Oakey on the insolvency ground pending judgment of the High Court: see *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2020] QSC 212. On 27 August 2021, Kingham P made case management directions in the remitted Land Court proceedings in which Oakey was still active, although the present solvency or otherwise of Oakey is not addressed: see *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2021] QLC 29.

Is technology killing freedom of information?

*Mick Batskos**

Advances in technology have consequences, particularly where there are crossovers between platforms as technology develops. Many of us have lived to see that:

- in music, vinyl records were overtaken by CDs, which have in turn largely been overtaken by online streaming services like Spotify;
- super 8 movie film was overtaken by Beta and VHS videotapes, which in turn were overtaken by DVDs and Blu-ray discs, which have largely been overtaken by online streaming services like Netflix; and
- with 'Video killed the radio star',[1] music videos gave birth to MTV.

Similar developments have taken place in visual communications in the worlds of business and government, moving from letters (or snail mail) to telegrams, telegrams to telexes, telexes to faxes and now to the most common form of communication in visual form: emails. We have also seen a move from security-related CCTV being recorded on tape to being recorded and stored electronically on computer drives or similar hardware.[2]

When it comes to the business of government, technological advances have caused — and continue to cause — challenges to records managers, particularly in light of obligations on government bodies to ensure full and accurate records of the business of the agency be created and kept.[3] This is especially challenging in the context of the numerous types of electronic devices on which information relating to agency business can be generated, stored and communicated, as well as the format — namely, audio and visual, including text and images (still and moving).

This article will look at how some freedom of information (FOI) legislation, developed in the 1970s and originally enacted in the 1980s, grapples with some aspects of those technological advances — in particular, whether FOI legislation adequately copes with advances in technology when it comes to providing access to electronically stored information.

The focus of this article will be on the *Freedom of Information Act 1982* (Vic) (Vic FOI Act) and the *Freedom of Information Act 1982* (Cth) (Cth FOI Act).

After looking at some definitions and structural or operational differences between those two Acts, we will look at how each of those Acts might deal with three different fact scenarios and, particularly, the types of issues that can arise for agencies relating to:

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1 Song, The Buggles (1980).

2 For present purposes I will ignore oral communications and the more recent move from telephone calls to videoconferencing.

3 See, for example, *Public Records Act 1973* (Vic) s 13.

a. form of access;

b. partial access; and

c. access charges.

Document or information

In looking at how FOI legislation copes with electronically stored information, it is first necessary to look at how the legislation treats or categorises electronically stored information, bearing in mind the objects of each Act.

Interestingly, although both the Vic FOI Act and Cth FOI Act include in their title the reference to freedom of 'information', the operational provisions in both have an emphasis on 'documents' rather than information as such.

Object — Vic FOI Act

The object clause in the Vic FOI Act has remained unchanged since it was enacted in 1982.[4] It states that:

> [The object of the Vic FOI Act is] to extend as far as possible the right of the community to access to *information* in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes.[5]

This is done, among other things, as follows:

> a general right of access to *information in documentary form* in the possession of Ministers and agencies [is created,] limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.[6]

The section then reiterates that it is Parliament's intention that the Act be interpreted in a way to further the object and that 'any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of *information*'.[7]

The right of access created in s 13 of the Vic FOI Act then goes on to state that the right of access that exists in every person is to obtain access in accordance with the Act to 'a document of an agency other than an exempt document'. Section 17 sets out the requirements for a person wishing to obtain access to 'a document of an agency' or Minister: access requests can in certain circumstances be transferred to any agency which has a 'copy of the document' sought;[8] only upon payment of any access charges is access given to

4 *Freedom of Information Act 1982* (Vic) (Vic FOI Act) s 3.
5 Ibid (emphasis added).
6 Ibid (emphasis added).
7 Ibid (emphasis added). See also s 16(1).
8 Ibid s 18.

'the document';[9] s 23 sets out the forms of access to a document; s 25 sets out when access may be given to part of a document with exempt or irrelevant matter deleted; and pt IV sets out when a document is an exempt document.

Object — Cth FOI Act

It is interesting to note that the object clause in the Cth FOI Act has changed over time. When first enacted in 1982, it was in almost identical terms to the subsequently enacted Vic FOI Act described earlier.

With the introduction of the Information Commissioner review regime in 2010, the old objects clause was repealed and substituted by two new provisions.[10] The key aspects of the new objects clauses relevant for present purposes are as follows:[11]

1. The objects are to give the Australian community access to information held by the government by publishing certain *information* and 'providing a right of access to *documents*'.

2. Parliament's intention is to 'increase recognition that *information* held by the government is to be managed for public purposes, and is a *national resource*'.

3. Parliament's intention is that powers and functions under the Cth FOI Act are exercised and performed as far as possible to 'facilitate and promote public access to information, promptly and at the lowest reasonable cost'.

4. They emphasise that the Cth FOI Act is not intended to affect any potential power of an agency officer to publish or give access to information or a document.

As with the Vic FOI Act, under the Cth FOI Act the right of access created in s 11 states that the right of access that exists in every person is to obtain access in accordance with the Act to 'a document of an agency other than an exempt document'. Section 15 sets out the requirements for a person wishing to obtain access to 'a document of an agency' or Minister: access requests can in certain circumstances be transferred to any agency which as a 'copy of the document' sought;[12] only upon payment of access charges payable must access be given to 'the document';[13] s 20 sets out the forms of access to a document; s 22 sets out when access may be given to part of a document with exempt or irrelevant matter deleted; and pt IV sets out when a document is an exempt document (either fully or conditionally).

Given that under both the Vic FOI Act and the Cth FOI Act the emphasis and structure of the operational provisions is on access to 'documents' and not 'information' as such, it is important to see how electronically stored information is treated under each Act.

9 Ibid ss 20, 22.
10 See *Freedom of Information Amendment (Reform) Act 2010* (Cth) s 3 and sch 1, inserting a new s 3 and s 3A into the *Freedom of Information Act 1982* (Cth) (Cth FOI Act).
11 Emphasis added. The other changes to the objects clause emphasised the democratic basis for FOI and greater access.
12 Cth FOI Act s 16.
13 Ibid s 11A.

Document — Vic FOI Act

Under the Vic FOI Act a 'document' is defined in s 5(1):

> **document** includes, in addition to a document in writing —
>
> (a) any book map plan graph or drawing; and
>
> (b) any photograph; and
>
> (c) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever; and
>
> (d) any disc tape sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
>
> (e) any film negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and
>
> (f) anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning to persons conversant with them; and
>
> (g) any copy, reproduction or duplicate of any thing referred to in paragraphs (a) to (f); and
>
> (h) any part of a copy, reproduction or duplicate referred to in paragraph (g) —
>
> but does not include such library material as is maintained for reference purposes;

Some important and interesting features of this definition of 'document' for present purposes include the following. First, the definition is an inclusive one. It includes items (a) to (h) 'in addition to a document in writing'. That in itself starts to raise immediate questions as to what is meant by 'a document in writing'.

Secondly, it includes any *disc or other device* in which sounds or other data (not being visual images) are embodied so as to be capable of being reproduced from the disc or other device with or without the aid of some other equipment.[14] The important thing to note that if this paragraph of the definition applies to a situation, it is the disc or device which is the 'document'.

Thirdly, when it comes to visual images stored electronically, that is, not on a film, negative or tape, the document is the device in which the visual images are embodied so as to be capable of being reproduced from the device, with or without the aid of some other equipment.[15]

Fourthly, when it comes to copies, a 'document' also includes a copy, duplicate or reproduction of any 'thing' referred to in an earlier paragraph of the definition. In the case of the devices in which data or images are embodied, the 'thing' must therefore, be a reference to 'the device' in which the data or images are embodied. What is a copy of the device?

14 Ibid s 5(1) para (d).
15 Ibid para (e).

Fifthly, a 'document' includes a part of a copy. Bearing in mind a copy is a copy of any 'thing', and for many paragraphs of the definition of 'document' the thing is the device, how can you have part of a device?[16]

Document — Cth FOI Act

So how does the Cth FOI Act define a document? Section 4 of the Cth FOI Act defines 'document' in the following terms:

> **document** includes:
>
> (a) any of, or any part of any of, the following things:
>
> (i) any paper or other material on which there is writing;
>
> (ii) a map, plan, drawing or photograph;
>
> (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
>
> (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
>
> (v) any article on which information has been stored or recorded, either mechanically or electronically;
>
> (vi) any other record of information; or
>
> (b) any copy, reproduction or duplicate of such a thing; or
>
> (c) any part of such a copy, reproduction or duplicate;
>
> but does not include:
>
> (d) material maintained for reference purposes that is otherwise publicly available; or
>
> (e) Cabinet notebooks.

Some interesting features of this inclusive definition of 'document', when compared to the definition in the Vic Cth Act, include the following. First, the definition comprises a list of 'things' which can be a document. One of them is 'any paper or other *material* on which there is writing'.[17]

Secondly, a document includes *any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device*.[18] It may or may not be significant, but it is noticeable that a distinction is potentially made between an 'article' and a 'device'. Therefore, for example, can an article from which writings are capable of being reproduced be different from a device? This might be of importance for other parts of the definition of 'document' as well.

16 Note that it has been held that, although a 'document' includes a copy or part of a copy, it might not include a part of a document for all purposes under the Vic FOI Act: *University of Melbourne v McKean* [2008] VSC 325 [26] (Kyrou J).
17 Cth FOI Act s 4, para (a)(i).
18 Ibid para (a)(iv).

Thirdly, a document includes any article on which information has been stored or recorded, either mechanically or electronically.[19] Does this help clarify the meaning of 'article' or 'device' in the previous paragraph? When it comes to electronically stored information, the 'thing' which is the document in this paragraph is the article 'on' which information has been stored electronically.

Fourthly, another 'thing' which can be a document is 'any other record of information'.[20] Note it does not refer to 'any' record of information; rather it is any 'other' record of information, presumably other than the previous references to records of information in the definition. The *FOI Guidelines*[21] suggests that 'document' can include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices.[22]

Requests involving use of computers et cetera

Both of the FOI Acts examined in this article have a specific section which exists to deal potentially with some of the issues arising in relation to information stored electronically. We will have a look at each of them before examining how each Act copes with requests for particular types of information.

Vic FOI Act

Section 19(1) of the Vic FOI Act provides:

> (1) Where —
>
> (a) a request is duly made to an agency;
>
> (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
>
> (c) the agency could produce a written document containing the information in discrete form by —
>
> (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
>
> (ii) the making of a transcript from a sound recording held in the agency —
>
> the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

Some important features of this provision are as follows. First, this is the first section in the Vic FOI Act which places an emphasis on a request seeking access to 'information' as distinct from 'documents'. As we saw earlier, the emphasis is on the right of access

19 Ibid para (a)(v).
20 Ibid para (a)(vi).
21 Office of the Australian Information Commissioner, *FOI Guidelines* (June 2020). Under the Cth FOI Act, s 93A, regard must be had to the *FOI Guidelines* for the purposes of performance of a function or exercise of a power under that Act. See generally Mick Batskos, 'The Unsettled Status of *FOI Guidelines* of the Australian Information Commissioner' (2021) 101 *AIAL Forum* 65.
22 Office of the Australian Information Commissioner (n 21) [2.30].

to documents or information in document form. There is a bit of incongruence here when you note that for s 19 to come into consideration there must first be a 'duly made request'. Presumably, this is a reference to a request made in accordance with the requirements in s 17 of the Vic FOI Act.[23] We saw earlier that one of the requirements is for the request to provide such information as is reasonably necessary to enable the agency to identify the 'document' sought, not the *information* sought.

Secondly, it must appear from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency. Note that it does not say that the information is not available in *written* documents of the agency.[24]

Thirdly, the agency could produce a *written* document containing the information in discrete form by use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information.

If all three requirements in s 19 are satisfied then there is an obligation on the agency to deal with the request as if it were a request for access to the 'written document so produced and containing that information'. The 'written document so produced' is treated as the document in possession of the agency for the purposes of dealing with the request under the Act.

Cth FOI Act

Section 17(1) of the Cth FOI Act provides:

> (1) Where:
>
> (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
>
> (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
>
> (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
>
> (c) the agency could produce a written document containing the information in discrete form by:
>
> (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
>
> (ii) the making of a transcript from a sound recording held in the agency;
>
> the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

As with s 19 of the Vic FOI Act, s 17 of the Cth FOI Act anticipates that there is a request made in accordance with the formal requirements of the Act — here, s 15(2) of the Cth FOI Act. First, the same incongruence exists here, with s 15 requiring information concerning

23 Note also s 5(1) of the Vic FOI Act defines 'request' to mean one made in accordance with s 17.
24 Compare with Cth FOI Act s 17.

the 'document' sought to enable it to be identified — it is not about access to information as such.

Secondly, it appears from the request that the applicant's desire is for information that is not available in discrete form in *written* documents of the agency. By contrast, the Vic FOI Act asks whether the information sought is not available in discrete form in 'documents', not limited to *written* documents. The insertion of the reference to 'written' document occurred in the October 1991 amendments to the Cth FOI Act.[25]

Thirdly, there is an additional requirement which does not have an equivalent in the Vic FOI Act — that is, it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information sought is recorded. This was also inserted in the 1991 amendments to the Cth FOI Act.[26]

These amendments to s 17 in 1991 were made in direct response to and acceptance of a December 1987 recommendation of the Senate Standing Committee on Legal and Constitutional Affairs.[27] That Senate committee recommended that the Act be amended to provide for access in the form of provision by an agency or Minister of a computer tape or disk containing a copy of the requested document.[28] It accepted that:

> In some cases, it will be both cheaper for agencies and more useful for applicants if access is given to the document requested by providing access to a tape or disk containing a copy of the document (information) rather than to that information in printed form. The Committee considers that the Act should provide for such access.[29]

The effect of these provisions is that, if it appears from a request that an applicant seeks access to a computer disk containing the information, s 17 will have no role to play, as access can be provided in that form rather than requiring that it be provided in a written (that is, printed) form. However, it is interesting to note that s 20 of the Cth FOI Act, which deals with forms of access, was not amended to make this clearer.

Fourthly, as with the Vic FOI Act, there is requirement that the agency could produce a *written* document containing the information in discrete form by use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information.

If all four requirements are satisfied then, as in Victoria, s 17 of the Cth FOI Act provides that there is an obligation on the agency to deal with the request as if it were a request for access for the written document so produced containing that information. The written document so produced is treated as the document in possession of the agency for the purposes of dealing with the request under the Act.

25 *Freedom of Information Amendment Act 1991* (Cth) s 12.
26 Ibid.
27 Commonwealth, *Parliamentary Debates*, Senate, 14 August 1991, p 302, second reading speech for Freedom of Information Amendment Bill 1991.
28 Senate Standing Committee on Legal and Constitutional Affairs, *A Report on the Operation and Administration of the Freedom of Information Legislation* (December 1987) p 91, [6.9].
29 Ibid p 90, [6.8].

Scenarios

As foreshadowed above, we will now look at issues which may arise for agencies in dealing with requests for access in three different scenarios involving electronically stored information or data. In each situation, we will assume that there are no hard copy written records or documents; nothing has been printed out or exists in hard copy. We also assume that what is sought by the FOI applicant only exists as electronically stored information within an agency, on hard drives on computers of the agency or on cloud storage.

For each of the three scenarios, we will consider issues which might arise depending on whether the agency is a Victorian agency or Commonwealth agency. The types of issues considered relate to:

- form of access;
- partial access; and
- access charges.

Scenario 1 — data

Your agency commissioned a private company to develop an online survey which comprised individual participants responding to about 20 questions once they had provided some basic information about things like gender, suburb, age range and ethnicity. Each question results in a response from 1 to 10, where 1 indicates 'strongly disagree' and 10 indicates 'strongly agree' — that is, the results are a numerical score and not a written, qualitative response.

The survey was conducted online and the 12,236 individual responses were recorded on your agency's computers in a proprietary database developed by the company but which your agency purchased to use under licence. Some senior IT staff in your agency were thoroughly trained on how to deal with the database, including conducting interrogation of the database, generating reports which could be displayed on screen or printed and, if necessary, performing minor tweaks to the coding of the database to enable different types of interrogation of the data not already provided for in the standard version of the database.

Your agency was proud of this achievement and published the 20 questions and a summary of *all* the total responses. A journalist, known to be on a crusade about discrimination against Arabic speaking people in Australia, has now sent in an FOI request seeking information about 10 of the questions, broken down by suburb, gender, and ethnicity. He seeks not just a summary of all the responses to those questions but also the individual responses themselves. He seeks a copy of that information in an Excel spreadsheet with .xlsx format and asks that it be sent to him on a USB stick.

Preliminary inquiries indicate that, with minor tweaking of the database program, your agency is able to produce the information sought either electronically in the format requested or as a printed document (the latter would be about 5,000 pages long).

Victoria — form of access

The form of access requires understanding what is the 'document' sought by the applicant. Based on the definition of 'document' in s 5(1) that we saw earlier, the document in this case is likely to be the device on which the data is embodied and capable of being reproduced therefrom.

Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the 'document' — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on the computer device — in this case, the agency's computers.

Given that this involves consideration of information stored on computers, the precise role of s 19 is relevant before coming to a final view about the form of access. Section 19 of the Vic FOI Act deals with requests for information (that is, not documents) involving computers and other equipment. It is arguable that the request for data from the database is for information. It is also arguable that the information, which is stored on computer devices with a lot of other information of the agency, is not 'available' in discrete form in documents (that is, devices) of the agency.[30]

Assuming that to be correct, the question becomes whether the agency could produce a *written* document containing the information sought by use of computer or other equipment that is ordinarily available for retrieving or collating stored information. If the agency can produce such a written document using its computers or other equipment that is ordinarily available then it must do so, and that written document is treated as the one sought by the applicant for the purposes of the FOI Act. The computer or other equipment that is ordinarily available must be capable of functioning independently to collate or retrieve stored information and to produce the requested written document.[31] This can include situations where an existing program could easily be modified or where the agency routinely commissions or retains staff to produce new computer programs of the necessary kind.[32]

If a new computer program is required to be written so as to produce the document then a computer is not being used in a manner that is ordinarily available to the agency, because an extraordinary step is required to be taken.[33] It is similarly not required to do so where it would be a departure from the agency's ordinary or usual conduct and operation.[34]

From our fact scenario, it appears that the agency can and is required to produce a *written* document containing the information sought. Section 19 requires that to happen for the agency to treat that written document as the document sought for the purposes of the Vic FOI Act. This has a direct impact on the form of access.

30 This will depend on what is meant by 'available' and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

31 *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCFCA 67 [44].

32 *Proudfoot v Victoria University (No 2)* [2018] VCAT 612 [72].

33 *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720 [20], [22] (Marshall J); *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCFCA 67 [49], [52].

34 *Neilson v Secretary, Services Australia* [2020] AATA 1435 [36].

Under s 23 we know that usually where an applicant has requested access in a particular form, access shall be given in that form.[35] This right is subject to s 19, which has required in our fact scenario that the agency produce a *written* document and treat that as the document sought, regardless of the request for access to a copy in Excel spreadsheet format.

We also know that the forms of access provided for in the Vic FOI Act are those in s 23 and that it has been held (albeit in another jurisdiction) that, although an applicant may request a particular *form* of access (for example, a copy), they cannot require a particular *format*; it is a matter for the discretion of the agency as to the format in which access will be provided.[36] For example, an applicant cannot ask for a copy on pink paper with blue ink, just as they cannot ask for a copy in .xlsx format.

Therefore, the inadequacy of the Vic FOI Act in this fact scenario is that it requires the information sought to be provided as a copy of a *written* document, which most probably means a hard copy printed document of about 5,000 pages in length, rather than providing a copy in the electronic format requested. This would probably be frustrating for the applicant, who may have sought the electronic version to be able to do further assessment or manipulation of the underlying data in the requested Excel format.

A query arises as to whether, in light of the obligation to produce the written document, the agency could nevertheless provide access in the requested format.

Victoria — partial access

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information 'deleted'; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought, but it does not appear to be an issue because the agency has indicated that it can produce the document with all of the information sought. Other issues may arise if the agency cannot produce all of the information sought or can only produce a document with more than what is sought, and the applicant has not indicated that they are willing to receive access to documents with irrelevant information deleted.

Victoria — access charges

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the *Freedom of Information (Access Charges) Regulations 2014* (Vic) (Access Regulations).

In this fact scenario, s 19 of the Vic FOI Act requires the production of a written document.

35 Vic FOI Act s 23(2).
36 *QVFT v Secretary, Department of Immigration and Citizenship* [2011] AATA 763 [119]–[120].

The access charges payable would include[37] the reasonable costs incurred by the agency in providing the written document.[38] At the very least, that would include the internal staff cost of the agency in producing and providing the written document.[39] One case has suggested that it surely must include the salaries of those involved in gathering the information and producing the document; and any included direct on-costs (such as payroll tax, superannuation, WorkCover, holiday loading, long service leave provision, and administrative and operating expenses).[40]

If, however, an agency ignores the technical legal position and provides a copy of the information in the format requested by the applicant, it is arguable that the charge payable would be the reasonable costs incurred by the agency in providing the copy.[41]

Even though a 'document' includes any article on which information has been stored electronically (which would appear to trigger similar difficulties as in the Vic FOI Act definition about the document being the device), it is important to note that a 'document' in the Cth FOI Act includes 'any other record of information'. The *FOI Guidelines* explains that this can include information held on computer servers.[42]

When you turn to s 17 of the Cth FOI Act — which deals with requests involving information on computers — to see how it deals with the fact scenario, it is notable that the obligation to create a written document only operates where, among other things, it does not appear from the request that the applicant wishes to be provided with a computer disk on which the information is recorded. In this scenario the applicant has expressly sought that the information be provided on a USB stick (which may fall within what would be considered as a computer disk). Therefore, s 17 is not triggered to require production of a written document.

The requested form of access in this fact scenario is a copy of the information on USB stick. Therefore, such a copy would be required to be provided in that form.[43]

If access was not sought by provision of information on a computer disk, s 17 would have required the agency to generate a written document containing the information sought. The same limitations, constraints and disappointments which might arise under s 19 of the Vic FOI Act would also most likely arise in that scenario.

Commonwealth — partial access

Under s 22 of the Cth FOI Act, partial access to a document need only be granted with exempt or irrelevant information deleted if the following requirements are met: the agency has decided that a document is exempt or would disclose irrelevant information; it is possible and reasonably practicable to provide access to an edited copy; and there is nothing in the

37 Subject to any exclusions arising from Vic FOI Act s 22.
38 *Freedom of Information (Access Charges) Regulations 2014* (Vic) (Access Regulations), schedule, item 7. Note that search time under item 1 is excluded where item 7 applies.
39 *Clark v Department of Justice* [2015] VCAT 1348.
40 *Mickelburough v Victoria Police* [2016] VCAT 732 [22], [27].
41 Access Regulations, schedule, item 4.
42 Office of the Australian Information Commissioner (n 21) [2.30].
43 See Cth FOI Act s 20(1) and (2).

request or consultations with the applicant to make it apparent that the applicant would decline access to an edited copy.

This last requirement is an important difference to the Vic FOI Act, which places the onus on an applicant to indicate if they seek partial access. Under the Cth FOI Act, the onus is reversed and the agency must provide partial access unless the request or subsequent consultations suggest otherwise.

There is nothing in the request in this fact scenario to suggest that the applicant would not accept access to an edited copy.

Commonwealth — access charges

Under s 29 of the Cth FOI Act, an agency may decide to impose charges in respect of request for access and/or in respect of provision of access to documents. Those charges are as set out in the *Freedom of Information (Charges) Regulations 2019* (Cth) (Charges Regulations). The *FOI Guidelines* explain that there are two types of charges payable: charges related to making a decision on a request;[44] and charges for giving access to the documents.[45]

The access charges that could be payable in this scenario are likely to be the sum of:

a. a charge in respect of the production of the document containing the information, for an amount not exceeding the actual cost incurred by the agency in producing the document;[46]

b. a charge for deciding whether to refuse or grant access or partial access at $20 per hour if it takes more than five hours;[47]

c. where information is available in a document produced for the request by using computer equipment, and deletions were required which could not be practicably done other than by using computer equipment, a charge in respect of the production by the computer or other equipment of a copy of the document with those deletions, not exceeding the actual costs incurred by the relevant agency in producing a copy of the document;[48]

d. a charge for the production by an agency of a copy of a document in the form of a computer disk, for an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document; and[49]

44 See *Freedom of Information (Charges) Regulations 2019* (Cth) (Charges Regulations), sch 1, pt 1.
45 Ibid pt 2.
46 Ibid pt 1, item 2. See also Office of the Australian Information Commissioner (n 21) [4.36].
47 Charges Regulations, sch 1, pt 1, item 4. Compare to the Victorian regime which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).
48 Charges Regulations, sch 1, pt 2, item 4.
49 Ibid item 5.

e. a charge for postage or delivery of the document (that is, the USB stick) to the applicant if it is requested it be posted or delivered to the applicant.[50]

Scenario 2 — emails and PDFs

Your agency is striving to be as paperless as possible. Nothing is printed out unless absolutely necessary. Any hard copy correspondence (which is rare these days) or other documents are 'scanned to email' and saved as a .pdf, and then the hard copy is destroyed. Emails and any documents 'scanned to email' are stored electronically on Google Gmail servers overseas or on the agency's hard drives in Australia. Your agency has a contract with Google which ensures that your agency retains legal control and rights over the data so stored; Google does not have any legal control or other rights over that information.

A disgruntled former employee, whose position was terminated during the probation period under the employment contract, makes an FOI request for a copy of all emails held by the agency which refer to him or relate to his employment or termination.

Victoria — form of access

The form of access requires understanding what is the 'document' sought by the applicant. Based on the definition of 'document' in s 5(1) that we saw earlier, unless this is considered a 'document in writing', the document in this case is probably the device on which the data comprising the email is embodied and capable of being reproduced therefrom.

This is because emails may not be 'documents' in the sense defined under the Vic FOI Act but only *documents* in our everyday language. We also know from statutory interpretation principles that if a term is defined in legislation then any dictionary or ordinary meaning that may otherwise exist is notionally displaced by the act of defining the term.[51] Further, it is impermissible to construe a definition by reference to the term defined (and would be circular to do so).[52] In the present context, it is arguably impermissible to construe the defined term 'document' by reference to the ordinary meaning of the word 'document'. Generally, a defined term is given a special meaning by a statute, which must be applied whether or not it accords with the ordinary meaning.[53]

Further, the Supreme Court has held in relation to the definition of 'document' in the FOI Act:

> It makes it clear that where the same information appears in different forms, such as a 'document in writing', a 'disc', a 'tape' or a 'device' such as a computer server, each form of the information is a separate document. A copy of a document can be a separate document from the original. Where a request seeks access to all documents containing particular information …, all forms in which that information appears fall within the request. However, where the request seeks access to a particular document …, only that document falls within the request notwithstanding that the same information may appear in other documents.[54]

50 Ibid item 9.
51 *Office of the Premier v Herald and Weekly Times Pty Ltd* [2013] VSCA 79 [61]. See also D Pearce and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th edition, 2014) p 309, [6.59].
52 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* [1994] HCA 54 [26]; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30 [3] (Gibbs J).
53 *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30 [3]
54 *University of Melbourne v McKean* [2008] VSC 325 [25] (Kyrou J).

Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the 'document' — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on computer devices — in this case, the agency hard drives or Google's Gmail servers. Further, it is not about words being recorded but, rather, about data.

The applicant asked for a copy, but providing a copy is not possible, as you cannot give a copy of the device. We also know that, if the form of access requested would not be appropriate, having regard to the physical nature of the document, access can be refused in the form requested and given in another form.[55]

We also saw that the form of access in s 23, and the ability of the applicant to nominate the form of access, is subject to s 19.[56] Therefore, we need to consider if s 19 requires a written document to be produced.

As you may recall, s 19 deals with requests for information (not documents) involving computers and other equipment. Assuming that the request was validly (duly) made, the next question is whether the request for emails can be considered as a request for information that is not available in discrete form in documents of the agency. It is arguable that the request is for information. It is also arguable that the information, which is stored on computer devices here and/or overseas with a lot of other information of the agency and others, is not 'available' in discrete form in documents (that is, devices) of the agency. If the information sought (such as an email electronically stored) is only part of the information stored on a device, access may not be available under s 23 of the Vic FOI Act.[57] In particular, to the extent that the information is stored on Google Gmail servers overseas, these devices are not devices of the agency; only some of the information on them is information of the agency.

Section 19 then asks whether it is possible for the agency to produce a *written* document containing the information, in discrete form, by use of computer and other equipment that is ordinarily available to the agency for retrieving or collating stored information. It does not require that the computers or other equipment be devices of the agency. In this fact scenario, given the contractual arrangements with Google, the answer is yes. They merely need to be identified, the agency presses print, and they come out of another device — that is, the agency printer. There would be no need to obtain additional equipment or reprogram existing equipment or write a specific program to enable a database to be interrogated in order to respond to this FOI request.[58]

Accordingly, s 19 would probably require the agency to produce[59] the emails as written documents and treat those written documents as if they were the ones sought — the email information having been extracted from the 'document', which in this case is the computer

55 Vic FOI Act s 23(3).
56 Ibid s 23(2).
57 This will depend on what is meant by 'available' and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.
58 *Dimitrijev v Department of Education* [1998] QICmr 14 [24].
59 That is, bring into existence: *Australian Concise Oxford Dictionary* (6th edition, 2018).

or other device. Section 19 then deems the applicant's FOI request as being a request for access to that *written document* so produced and the agency is obliged to deal with it under the Vic FOI Act as if the agency had that written document in its possession when the request was received, and as if the request was for that written document.

Once the *written document* has been prepared, only then can access be given in one of the relevant forms of access in s 23, in this case the requested copy.

Victoria — partial access

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information 'deleted'; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought because there is nothing to suggest that the applicant stated in the request, as required by s 25(c), a wish to receive such an edited copy. What would happen if partial access *was* sought? What other issues could arise?

If s 19 operates as above then no issue arises, because once the written copy of the emails is printed it can be edited to remove any exempt or irrelevant information, if practicable.

However, what happens if s 19 does not operate to require a written document to be created? This might be the case, for example, if it is considered that the electronically stored emails are already documents 'in writing' and there is no need to resort to that part of the definition of 'document' that steers you to the device storing the information as the document. On this argument, the electronically stored emails are already information that is available in discrete form in documents of the agency. But available for what? You might be able to provide access to the complete emails by making arrangements for them to be viewed, but how do you provide partial access to something which is only viewed on a screen? How do you provide a copy? Is the Vic FOI Act sophisticated enough to cope with this using the current language in the Act?

Victoria — access charges

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the Access Regulations. Note that s 22(1)(h) provides that, even if the request is for access to a document containing information relating to the personal affairs of the applicant, an agency can still impose a charge for the reasonable costs incurred by the agency in making a written document in accordance with s 19.

Therefore, if an agency sticks to the strict legal position of relying on s 19 to produce written documents, the charges arguably payable would include[60] the reasonable costs incurred

60 Subject to any exclusions arising from the Vic FOI Act s 22.

by the agency in providing the written document.[61] At the very least, this would be the internal staff cost of the agency in producing and providing the written document.[62] One case has suggested that it surely must include the salaries of those involved in gathering the information and producing the document; and any included direct oncosts (such as payroll tax, superannuation, WorkCover, holiday loading, long service leave provision, and administrative and operating expenses).[63]

If access is provided other than because of the operation of s 19, the access charges will depend on how access was provided and an appropriate charge would need to be calculated in accordance with the schedule to the Access Regulations.

Commonwealth — form of access

Even though a 'document' includes any article on which information has been stored electronically (which would appear to trigger similar difficulties as in the Vic FOI Act definition about the document being the device), it is important to note that a 'document' in the Cth FOI Act includes 'any other record of information'. The *FOI Guidelines* explains that this can include information held on computer servers[64] and that the reference in s 17 of the Cth FOI Act to information recorded on a computer tape or disk should be taken to include information recorded in an email or on electronic storage media.[65]

Under s 17 of the Cth FOI Act, in this scenario it is arguable that the information in the emails is not available in discrete form in written documents of the agency, that no request was made to include the emails on a computer disk, and presumably that a written document containing the information sought can be made using the computer equipment ordinarily available to the agency for storing or collating information (by pressing print).[66]

In such circumstances, it would appear that the agency would be required to generate the written documents and deal with them as if they were the documents in its possession that were sought by the request. As the applicant sought a copy, access to a copy must be provided.[67]

Commonwealth — partial access

There is nothing in the requests to suggest that the applicant would not wish to have access to edited copies of documents, with exempt or irrelevant matter deleted. Accordingly, partial access does not appear to give rise to any difficulties in this fact scenario, should any of the information in the subject emails turn out to be exempt or irrelevant.

61 Access Regulations, schedule, item 7. Note that search time under item 1 is excluded where item 7 applies. But compare with s 22(1)(h) where it is about information of the applicant — is this different to the reasonable costs incurred in making the written document?

62 *Clark v Department of Justice* [2015] VCAT 1348. But contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

63 *Mickelburough v Victoria Police* [2016] VCAT 732 [22], [27].

64 Office of the Australian Information Commissioner (n 21) [2.30].

65 Ibid [3.205].

66 Assuming this is able to be done without substantially and unreasonably diverting the agency's resources.

67 Unless one of the exceptions in s 20(3) applied or s 22 applied to not require partial access be given (if any part of the emails was irrelevant or comprised exempt matter).

Commonwealth — access charges

Some of the conundrums under the Vic FOI Act in relation to access charges in this scenario do not arise under the Cth FOI Act. This is because s 7(1) of the Charges Regulations makes it clear that there is no charge in respect of provision of access to a document that contains personal information of the applicant.

Scenario 3 — CCTV footage

The agency has a series of CCTV cameras outside and within its offices, including at the front entrance of the offices. The cameras are constantly recording and the recorded footage is stored on computers of the agency. The footage includes date and time stamps and is stored on local hard drives in a server of the agency for about three months before it is uploaded to cloud storage.

The FOI applicant is an individual who has been arrested for a serious offence which allegedly occurred three weeks ago. She claims that she is innocent and is trying to establish an alibi that she was at your agency at about the time the offence was allegedly committed. Through her lawyer, she lodges a validly made FOI request which requests a copy of the complete CCTV footage taken continuously and without any breaks or deletions, over a two-hour period on the relevant date, from the camera placed at the front entrance of your offices. She hopes it will show when she arrived and when she left, as conclusive proof that she could not have committed the offence for which she has been charged.

Victoria — form of access

The form of access requires understanding what is the 'document' sought by the applicant. Based on the definition of 'document' in s 5(1) that we saw earlier, the document in this case is the device on which visual images are embodied and capable of being reproduced therefrom.

Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the 'document' — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on the computer device — in this case, the server. Further, it is not about words being recorded but, rather, about images.

The solution appears to be in s 23(1)(c) of Vic FOI Act which provides that access may be given 'in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images'.

We also know that usually, where an applicant has requested access in a particular form, access shall be given in that form.[68] This right is subject to ss 19, 25 and the remainder of s 23. Here, the applicant asked for a copy. But providing a copy is not possible as you cannot give a copy of the device. We also know that if the form of access requested would not be

68 Vic FOI Act s 23(2).

appropriate, having regard to the physical nature of the document, access can be refused in the form requested and given in another form.[69]

Therefore, on a present reading of the Vic FOI Act the applicant should arguably never be able to obtain a *copy* of CCTV footage sought but, rather, would have to settle for being able to view the visual images. This is not a satisfactory state of affairs.

Numerous Victorian Civil and Administrative Tribunal (VCAT) cases about CCTV footage have failed to undertake this analysis and appear to just assume that the footage sought can be extracted and put onto a device, like a USB stick, and given to the applicant (subject to exemptions and other considerations about partial access). But there may be no legal basis for doing so.

Another aspect of difficulty is the operation of s 19 of the Vic FOI Act, which deals with requests for information (not documents) involving computers and other equipment. It is arguable that the request is for information. It is also arguable that the information, which is stored on computer devices with a lot of other information of the agency, is not 'available' in discrete form in documents (that is, devices) of the agency.[70] The problem, however, is that the agency cannot produce a *written* document containing the information sought by use of computer or other equipment that is ordinarily available for retrieving or collating stored information. How do you create a written document for moving images in CCTV footage electronically stored?

Part of this problem could be alleviated if the reference to 'written' document was removed, such that the agency is able to produce a document (that is, a device such as a USB stick) containing the information sought by using its ordinarily available computer or other equipment.

Victoria — partial access

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information 'deleted'; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought because of the references to complete footage taken continuously and without any breaks or deletions.[71] Therefore, it need not be contemplated in determining questions about access. What would happen if partial access *was* sought? What other issues could arise?

An issue under the Vic FOI Act is the inconsistency which exists in decided VCAT cases on whether, in providing partial access — for example, because CCTV footage might

69 Ibid s 23(3).

70 This will depend on what is meant by 'available' and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

71 *Parker v Court Services Victoria* [2021] VCAT 461; *AQ5 and Court Services Victoria* [2019] VICmr 149.

unreasonably disclose information relating to the personal affairs of individuals in the footage[72] — pixilation can be applied. On one hand, there are cases which expressly address the question and make it clear that pixilation is not the same as deletion (which is what s 25 anticipates) and that s 25 does not mandate pixilation.[73] Yet there are other cases which, unfortunately, do not (obviously) turn their mind to the question and just assume that pixilation is okay for the purposes of providing partial access under s 25 of the Vic FOI Act.[74]

Whether it is deletion or pixilation that is being contemplated, issues can arise as to whether granting partial access to CCTV footage is practicable. This can depend on factors such as whether:

a. what would result is no longer meaningful or of any assistance to an applicant;[75]

b. the necessary process would divert an agency from its more urgent core work; and[76]

c. even though the pixilation or deletion of footage would be possible, the estimated cost would place to great a burden on the taxpayer.[77]

Victoria — access charges

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the Access Regulations.

If an agency sticks to the strict legal position of only granting access by way of making arrangements to view visual images, the charges payable would include:[78]

a. routine search time at 1.5 fee units per hour or part of an hour;[79]

b. a charge for supervision of viewing the visual images of 1.5 fee units per hour (calculated per quarter hour or part of a quarter hour); and[80]

72 Vic FOI Act s 33(1).

73 *Rogers v Chief Commissioner of Police* [2009] VCAT 2526 [56]; *Lonigro v Victoria Police* [2013] VCAT 1003 [57].

74 See eg *Willner v City of Port Phillip* [2015] VCAT 1320; *Willner v Department of Economic Development, Jobs, Transport and Resources* [2015] VCAT 669; *BL3 and Victoria Police* [2020] VICmr 109; *AT5 and Victoria Police* [2019] VICmr 177; *AD1 and Department of Education* [2019] VICmr 28.

75 *Brygel v Victoria Police* [2014] VCAT 119 [59]; *Lonigro v Victoria Police* [2014] VCAT 1003 [57]; *AD1 and Department of Education* [2019] VICmr 28; *AJ3 and The Royal Children's Hospital* [2019] VICmr 84.

76 *Brygel v Victoria Police* [2014] VCAT 1199 at [59]; *Lonigro v Victoria Police* [2014] VCAT 1003 [58]; *Willner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 [35].

77 *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [72], [77]; *Willner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 [39]. By contrast, the Information Commissioner has suggested that the fact that an agency does not have the technical capability to pixelate footage is not sufficient justification alone to deem it impracticable from a resources point of view to create an edited version where there are commercially available programs available for minimal cost to enable an agency to redact or edit CCTV footage: *AJ4 and Victorian WorkCover Authority* [2019] VICmr 85.

78 Subject to any exclusions arising from the Vic FOI Act s 22.

79 Access Regulations, schedule, item 1. Note that from 1 July 2021 a fee unit is $15.03.

80 Ibid item 2. Note that from 1 July 2021 a fee unit is $15.03.

c. the reasonable costs incurred by the agency in making arrangements for the applicant to view the visual images.[81]

Of course, the position will be different if a copy of extracted CCTV footage is being given (contrary to the strict legal position). Access charges payable in that situation would include:[82]

a. routine search time at 1.5 fee units per hour or part of an hour; and[83]

b. the reasonable costs incurred by the agency in providing other than a black and white photocopy.[84]

Commonwealth — form of access

Looking first to determine what is the 'document', defined in the Cth FOI Act, that is being dealt with in this fact scenario, an issue arises because it could be any or all of:

a. any article from which images are capable of being reproduced;

b. any article on which information has been stored or recorded electronically; and

c. any other record of information.

Interestingly, the *FOI Guidelines* tends to gloss over the reference to an 'article' but focuses instead on the collection of information — in this case, the CCTV footage which has been recorded on a device. They expressly provide that the definition of 'document' includes 'video footage' and 'information stored on computer tapes, disks, DVDs and portable hard drives and devices' and information held on computer servers.[85] It is probably logically easier to deal with the record of information as being the 'document' rather than the device. Given that the CCTV footage is stored on the agency's computer servers, consideration will need to be given to whether s 17 of the Cth FOI Act applies. Assuming that the request is valid, the information sought is not available in discrete form in *written* documents of the agency, and the request does not expressly request the information on a computer disk, it is fair to conclude that the agency cannot produce a written document containing the CCTV footage on it. Therefore, s 17 does not apply. There is no written document required to be generated to which the applicant could be given a copy. But does that preclude some other copy being provided?

Section 20 of the Cth FOI Act, setting out the forms of access contemplated by the Act, specifically includes a form of access to address the situation where the 'document' is the article from which visual images are capable of being produced. It provides that access can be by making arrangements for the applicant to view the visual images. But that would not satisfy the applicant's request to have a copy.

81 Ibid item 5.
82 Subject to any exclusions arising from the Vic FOI Act s 22.
83 Access Regulations, schedule, item 1. Note that from 1 July 2021 a fee unit is $15.03.
84 Ibid item 4.
85 Office of the Information Commissioner (s 21) [2.29].

If, however, we focus on the possibility that the 'document' is the CCTV footage, being any other recorded information, perhaps the provisions are broad enough to facilitate a copy being provided. There is nothing to suggest that providing a copy cannot be done by extracting that information and providing it separately on a computer disc or other storage device (such as a USB stick). It is still, arguably, providing a copy of 'the document' — namely, the collection of other information recorded which was sought — the particular CCTV footage.

This approach would be supported if s 17 were amended to delete the second reference to 'written' and require the production of a 'document' containing the information sought, not a 'written document' containing the information.

So, the outcome with respect to form of access is clearly affected by what is considered to be the 'document' when it comes to considering CCTV footage electronically stored.

Commonwealth — partial access

Where CCTV footage might give rise to issues about exempt or irrelevant information being contained within it, the question of partial access comes up for consideration. In this fact scenario it is arguable that the strong words of the request might give rise to a conclusion under s 22(1)(d) of the Cth FOI Act that it is apparent from the request that the applicant *would* decline access to an edited copy, modified by deletion of exempt or irrelevant material. If in doubt, it is always best to ask the applicant — there can be subsequent consultations with the applicant in which the wishes of the applicant can be clarified.

If the applicant did subsequently indicate a wish to receive partial access with deletions from the CCTV footage, it is important to note a position taken under the Cth FOI Act on pixilation, which is different to that in Victoria. The Acting Australian Information Commissioner has previously concluded that pixilation, blurring or blacking out of information from a copy of CCTV footage 'is a deletion of part of a moving image within the ordinary meaning of the word, provided the [exempt] information is removed'.[86] He disagreed with the Victorian FOI cases put to him on the basis that the personal information exemption was sufficiently different in each jurisdiction.

Only the least amount of pixilation should be done — that is, 'apply the least possible redaction that would make the document non-exempt' so that access to the edited copy would be required to be given.[87]

Commonwealth — access charges

The access charges payable if access is given to the CCTV footage on a USB stick can be quite confusing and could include the sum of:

a. a charge in respect of the production of the document containing the information, for an amount not exceeding the actual cost incurred by the agency in producing the document;[88]

86 *Healy and Australia Post* [2016] AICmr 23 [37], [39]. See also *Whish-Wilson v Australian Fisheries Management Authority* [2016] AICmr 29; *Bissett and Department of Human Services* [2015] AICmr 10.

87 *Bissett and Department of Human Services* [2015] AICmr 10 [33].

88 Charges Regulations, sch 1, pt 1, item 2. See also Office of the Information Commissioner (n 21) [4.36].

b. a charge for deciding whether to refuse or grant access or partial access at $20 per hour if it takes more than five hours;[89]

c. where access is for a document which is an article or thing from which visual images are capable of being produced, and access is given to a copy, a charge for the production of a copy, for an amount not exceeding the actual costs incurred by the relevant agency in producing the copy;[90]

d. a charge for the production by an agency of a copy of a document in the form of a computer disk, for an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document; and[91]

e. a charge for postage or delivery of the document (that is, the disk) to the applicant if it is requested it be posted or delivered to the applicant.[92]

However, if access is given by way of arranging a viewing of the visual images, the charges that could be payable are likely to be the sum of:

a. a charge for deciding whether to refuse or grant access or partial access at $20 per hour if it takes more than five hours;[93]

b. where information is available in a document produced for the request, by using computer equipment, and deletions were required which could not be practicably done other than by using computer equipment, a charge in respect of the production by the computer or other equipment of a copy of the document with those deletions, not exceeding the actual costs incurred by the relevant agency in producing a copy of the document;[94]

c. when making arrangements for viewing under supervision, the cost of supervision by an officer at $6.25 for the first half hour (or less) and $6.25 per every half hour or part of a half hour after the first half hour; and[95]

d. charges in respect of any other arrangements for the viewing of the visual images (apart from supervision of the viewing) at an amount not exceeding the actual costs incurred by the relevant agency in respect of the arrangements.[96]

89 Charges Regulations, sch 1, pt 1, item 4. Compare to the Victorian regime, which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).
90 Charges Regulations, sch 1, pt 2, item 7.
91 Ibid item 5.
92 Ibid item 9.
93 Ibid item 4. Compare to the Victorian regime, which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).
94 Charges Regulations, sch 1, pt 2, item 4.
95 Ibid item 1.
96 Ibid item 6.

Concluding comments

From the above it is possible to draw a few conclusions:

1. The ability of the FOI legislation to cope with access to electronically stored information may depend on what the Act defines as a 'document' — does it anticipate that it can be any recorded information or is it fixated on archaic notions of the device storing the information?

2. As technology has developed, is there still a need for there to be a distinction between a 'written' document and a document 'in writing'; and can electronically stored information be a 'written' document or a document 'in writing'?

3. Where the document sought is an article or device which stores information, there may be resultant limitations and inconsistencies in the form of access that can legally be provided under an FOI Act, depending on which Act is being referred to.

4. The potential for more than one form of access to be provided under an FOI Act from the same set of circumstances or different sets of circumstances, and the lack of certainty as to how an agency should treat electronically stored information, can give rise to confusion and inconsistent results between and within agencies.

5. Where access is available by way of inspection, it may give rise to technological issues about granting partial access. The different presumptions as to whether partial access must be contemplated or not can be frustrating and confusing, particularly for frequent users of FOI legalisation around the country.

6. Access charges that may be payable for electronically stored information can vary dramatically depending on what is treated as the document sought, what form of access is sought, and whether the form of access sought can be provided.

7. There is definitely uncertainty and lack of clarity as to what access charges are payable for the provision of access to electronically stored information.

Although it may be a bit dramatic and premature to say that technology is killing FOI, it is definitely making it more difficult to deal with requests for access to electronically stored information where the emphasis in the legislation is on 'documents'.

It is probably high time that Australian jurisdictions review their legislation to make obligations associated with requests for access to electronically stored information easier for agencies to understand and facilitate. This is not a new concept.

In Victoria, at least, it is interesting that there have been VCAT decisions which have highlighted that, when it comes to dealing with electronically stored information, responding to FOI requests can be problematic, little explored, and the 'Victorian Government may wish to consider whether clarification by legislative amendment is desirable'.[97]

97 *Smeaton v Victorian WorkCover Authority* [2012] VCAT 521 [29]; *EBT v Monash University* [2020] VCAT 440 [51].

The Curate's Egg: when illogical premises infect ultimate conclusions

*Douglas McDonald-Norman**

Right Reverend Host: *'I'm afraid you've got a bad Egg, Mr Jones!'*

The Curate: *'Oh no, my Lord, I assure you! Parts of it are excellent!'*

George du Maurier, 'True Humility', *Punch*, 9 November 1895

A decision may be affected by jurisdictional error because it is materially affected by illogical or irrational reasoning. But a conclusion that an individual finding in a decision-maker's reasons is 'illogical' or 'irrational' is not of itself determinative of whether the ultimate exercise of power is affected by jurisdictional error. In many cases, courts will need to determine whether an illogical or irrational finding is sufficient to give rise to jurisdictional error when there are *other* findings made by a decision-maker which are not illogical or irrational. If, for example, a decision-maker concludes that an applicant is not credible and gives four reasons for this, and some but not all of those reasons are 'illogical or irrational', is the ultimate conclusion that the applicant is not credible similarly 'illogical or irrational', and can the decision be said to be affected by jurisdictional error?

This will always be a case-specific inquiry. It cannot be determined by reference to fixed categories or formulae. However, there are multiple approaches to resolving the broader question of when 'illogical' or 'irrational' premises for ultimate conclusions infect the conclusion itself. On one approach, if illogical or irrational 'subsidiary' premises are not significant, or if other facts and circumstances found by the decision-maker were capable of logically and rationally supporting the adverse credibility finding, then the ultimate finding may not be 'illogical or irrational' even if some of its premises are. In some cases, this will be apparent on the face of the reasons itself. But, in other cases, the courts have recognised subsidiary premises as 'cumulative' or 'intermingled', finding that where the decision-maker relied upon a series of adverse findings, or otherwise 'weighed' such findings against each other and against positive aspects of an applicant's account, those aspects of a decision-maker's findings which are not open to it cannot readily be severed from those which are.

This raises further questions. In what circumstances can it be said that subsidiary premises are 'intermingled' or separate from one another? How can courts determine that a decision-maker has 'weighed' subsidiary premises against each other? What role should courts play in assessing whether that weighing process has taken place and speculating as to how it might have functioned differently? Is judging whether irrational subsidiary premises formed part of the basis for the ultimate conclusion an element in the broader process of determining whether errors of law are 'material' to the exercise of power or is it a distinct inquiry?

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This article examines when and how illogicality or irrationality in 'subsidiary' premises for ultimate findings will 'infect' those ultimate findings and hence potentially result in jurisdictional error. In particular, the article discusses and analyses the Federal Court's jurisprudence on this subject, including identification of points of consistency and contradiction. It argues for greater clarity in this area through common standards of construction in respect of findings on credibility — whereby clear and cogent language should be required before the courts can comfortably infer that illogical or irrational premises played no material role in the ultimate assessment of an applicant's credibility.

The article is principally concerned with how these errors arise in the context of decisions made pursuant to, or for the purposes of, the *Migration Act 1958* (Cth) in light of the large body of case law in relation to these questions under that scheme and given the unusual centrality of questions of credibility in that field of administrative law.

What are 'illogical or irrational findings'?

SZMDS

In *Minister for Immigration and Citizenship v SZMDS*[1] (*SZMDS*), Crennan and Bell JJ stated that 'illogicality' or 'irrationality' can potentially give rise to jurisdictional error where a decision-maker's decision 'is one at which no rational or logical decision-maker could arrive on the same evidence'.[2] This is a high bar. Crennan and Bell JJ emphasised that not every 'lapse of logic' will give rise to jurisdictional error.[3] It is not enough that the relevant finding is one on which different minds might reach different conclusions, even if one may emphatically disagree with the decision-maker's reasoning.[4]

Instead, 'illogicality' or 'irrationality' in the relevant sense requires something more; it must be shown that there is no room for a logical or rational person to reach the same 'decision' (in their Honours' words) on the material before the decision-maker. Crennan and Bell JJ gave several examples: if there is only one conclusion open on the evidence, and the decision-maker does not come to that conclusion; if the decision to which the decision-maker came was simply not open on the evidence; or if there is no logical connection between the evidence and the inferences or conclusions drawn.[5]

In *SZMDS*, Crennan and Bell JJ spoke of illogicality or irrationality affecting 'the decision'. This prompted initial controversy as to whether it must be shown that *the decision itself* (that is, the manner in which power has ultimately been exercised) is 'illogical' or 'irrational' in the relevant sense or whether these grounds of review look at the *findings and reasoning process leading up to* the ultimate exercise of power. In the years since *SZMDS*, this has

1 (2010) 240 CLR 611 (*SZMDS*).
2 Ibid [130]. For the historical and legal context of *SZMDS*, see Mark Robinson and Juliet Lucy, 'Fact-Finding in the 21st Century and Beyond' (2018) 93 *AIAL Forum* 46, 52−3.
3 *SZMDS* (n 1) [130].
4 Ibid [131], [135].
5 Ibid [135].

been addressed and resolved by single judges and appellate benches of Federal Court:[6] contemporary review for 'illogicality' or 'irrationality' is not limited to the end result of the decision-making process but includes review of findings made along the way *towards* that end result — albeit that the overarching question is whether the decision itself is affected by jurisdictional error. Indeed, Crennan and Bell JJ's judgment in *SZMDS* itself described the relevant inquiry as being 'to decide whether the Tribunal's conclusion about the state of satisfaction required by s 65 and *its findings on the way to that conclusion* revealed illogicality or irrationality amounting to jurisdictional error'.[7]

However, this line of authority is not universally accepted. In the submissions of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs to the High Court in the matter of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*, the Minister contends that review for illogicality or irrationality goes to whether the relevant state of satisfaction formed by a decision-maker (for example, whether there is 'another reason' why cancellation of a visa should be revoked) 'is rationally defensible in light of the material before the decision-maker' — and not to 'the actual reasoning process of the decision-maker' or 'the particular findings of fact supporting that reasoning'.[8] If this contention is accepted by the High Court then the question of whether individual illogical findings of fact may give rise to jurisdictional error would potentially be superseded. The matter had been heard by the High Court at the time of publication of this article.

If, contrary to the Minister's submissions in *Viane*, illogicality and irrationality permit review of individual findings or subsidiary premises for ultimate conclusions, this may also provide a basis for distinguishing review for 'illogicality' or 'irrationality' from review for 'unreasonableness'. 'Illogicality' and 'irrationality' grounds of review examine findings leading to the formation of a state of satisfaction required by statute (such as, for example, whether criteria for a visa are satisfied); where those findings are illogical or irrational, they may vitiate the formation of the relevant state of satisfaction.[9] On the other hand, on this view, review for 'unreasonableness' looks at whether the exercise of a discretionary power, or the process of reasoning adopted in the exercise of a discretionary power, was unreasonable.[10] (This may include where the exercise of power is clearly affected by some form of error but where the point at which that error has occurred cannot be identified — whereas irrationality or illogicality turn upon clearly identified defects of reasoning.) Some judgments have *also* described findings of fact as unreasonable or have used the terms 'unreasonableness', 'illogicality'

6 See eg *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 (*SZRKT*) [150]−[156]; *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 [60]−[62]; *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 [47]; *CGA15 v Minister for Home Affairs* [2019] FCAFC 46 [58]−[61]; *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94 [143]; *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175 (DAO16) [30](4).

7 *SZMDS* (n 1) [132] (emphasis added).

8 Appellant's Submissions, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* S34/2021, [39] <https://cdn.hcourt.gov.au/assets/cases/08-Sydney/S34-2021/MICMSMA-Viane_App.pdf>.

9 *Singh v Minister for Home Affairs* [2020] FCAFC 7 [92].

10 See eg *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [23], [30] (French CJ); *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200 [33]−[35]. This was the Minister's position in *BFH16 v Minister for Immigration and Border Protection* [2020] FCAFC 54 (*BFH16*) [27]−[29].

and 'irrationality' interchangeably.[11] On this form of analysis, that would be erroneous, as the terms 'unreasonableness' and 'illogicality/irrationality' may have different work to do. But the Full Court has noted that this distinction 'has not been widely embraced' and sits counter to the 'considerable weight of authority against the adoption of rigid categories and formulae in the explication of principles of jurisdictional error', albeit while finding it unnecessary to resolve this question of terminology.[12]

After SZMDS

Since *SZMDS*, the courts have tended to use the same categories of 'illogicality' or 'irrationality' identified by Crennan and Bell JJ: failure to come to the one conclusion open on the evidence, conclusions not open on the evidence, and a lack of logical connection between evidence and the inferences or conclusions drawn from that evidence. These are not, however, fixed categories. The principal additional form of illogicality addressed in jurisprudence to date (which may merely be a different way of describing the categories identified by Crennan and Bell JJ) is the use of *unexpressed and unwarranted assumptions not based in any evidence* in decision-making.

The criticism of 'assumptions' in this regard predates *SZMDS*. In *WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,[13] for example, Lee and RD Nicholson JJ found that '[t]he unwarranted assumptions of the tribunal as to matters relevant to formation of a view on the credibility of the corroborative witness caused the tribunal to disbelieve and disregard that evidence and constituted a failure by the tribunal to duly consider the question raised by the material put before it'.[14] Allowing that descriptors of various forms of jurisdictional error are 'servants rather than masters' and do not give rise to fixed categories or formulae,[15] this could also be described as a failure to give 'real, genuine and proper' consideration to evidence. But reliance upon unwarranted assumptions could also be characterised, separately or additionally, as a form of illogical or irrational reasoning. (Further, the two forms of error do not necessarily operate separately from one another. For example, in *BYH19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[16] Anastassiou J found that the Tribunal 'failed to give real, genuine and proper consideration to relevant material before it … and thereby engaged in illogical or irrational reasoning'. Alternatively, (a) reliance on an unwarranted assumption — a form of illogical reasoning[17] — may in turn lead to (b) a failure to consider substantial and cogent material before the decision-maker, which would in turn lead to (c) a failure to form a state of satisfaction required by the statute conferring the power to be exercised. The 'error' could

11 See eg *AYQ18 v Minister for Home Affairs* [2019] FCA 1751 [43]−[47], [50]. See also Robinson and Lucy (n 2) 55: '[W]here a factual finding is irrational or illogical, and it is critical to a decision-maker's ultimate conclusion, the ensuing decision may be set aside on the ground of legal unreasonableness.'
12 *BFH16* (n 10) [30], [35].
13 (2002) 194 ALR 676; [2002] FCAFC 437.
14 Ibid [54]. See also *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 [22].
15 *SZRKT* (n 6) [77].
16 [2021] FCA 157 (*BYH19*).
17 Ibid [29].

be identified at any or all of stages (a), (b) and (c).[18])

Two instances of 'unwarranted assumptions' as a form of illogical reasoning may be found in 2018 judgments of the Full Court of the Federal Court involving claims for refugee status based on sexual orientation. In *DAO16 v Minister for Immigration and Border Protection*,[19] the Tribunal expressed disbelief as to the 'the polygamous nature of some of the sexual relationships between the appellant and a number of the witnesses'.[20] The Full Court described this as an 'unexpressed and unwarranted assumptio[n] … not based in any evidence'.[21] Further, in evaluating the appellant's witnesses, the Tribunal took into account 'the lack of independent witnesses until recently, despite the fact that the applicant lives in a city which has a sizeable and visible homosexual population'.[22] The Full Federal Court described this reasoning as 'underpinned by an unwarranted assumption that if the appellant had truly been homosexual, he would have engaged in sexual relationships with a larger number of men'.[23] Further examples arose in *BZD17 v Minister for Immigration and Border Protection*,[24] in which the appellant claimed that his first same-sex sexual experience had been with another boy in his school's bathroom. The Tribunal found this to be implausible, in part, because it found that 'it would be unusual for a teacher to allow two students to leave the classroom at the same time to go to the toilet'.[25] The Full Federal Court described this assumption as 'curious and unfounded'.[26]

Arguably, the use of the language of 'unexpressed and unwarranted assumptions' is another way of describing the same essential error as that in *SZMDS*: that there is no logical connection between the evidence and the inferences or conclusions drawn. The fact that these assumptions have no evidentiary basis is what makes the resulting inferences illogical or irrational. There is an obvious overlap between this form of error and cases where findings have been held to lack a probative basis because they are based on nothing more than speculation and stereotyping.[27]

But the existence of illogicality or irrationality will, in every case, turn upon the nature of

18 Another example may be found in *Hedari v Minister for Immigration and Border Protection* [2020] FCA 298. In that case, the Tribunal found that the Department of Foreign Affairs and Trade's travel advice for the city of Quetta was limited to 'reconsider your need to travel'. However, the department's travel advice for the province of Balochistan, of which Quetta is the capital, was 'do not travel'. The error could be characterised as failure to have regard to substantial or consequential material before the Tribunal (in that the Tribunal failed to consider the critical part of the country information relating to travel to Balochistan), illogicality (that there was no logical connection between the actual contents of the DFAT travel advice and the inferences or findings made in respect of that advice) and/or to a failure to form the state of satisfaction required by the statute (in that that state of satisfaction required the Tribunal to proceed with a consciousness and consideration of material before it relevant to the task): *Hedari v Minister for Immigration and Border Protection* [2020] FCA 298 [8]. These characterisations of error are each directed towards how the same error affected the Tribunal's approach at different stages in the decision-making process.

19 *DAO16* (n 6).

20 Ibid [45].

21 Ibid.

22 Ibid.

23 Ibid.

24 (2018) 161 ALD 441; [2018] FCAFC 94 (*BZD17*).

25 Ibid [59].

26 Ibid.

27 *DQM18 v Minister for Home Affairs* (2020) 278 FCR 529 [52]–[53]; *AWU16 v Minister for Immigration and Border Protection* [2020] FCA 513 (AWU16) [46].

the evidence involved and the nature of the decision-maker's findings. Findings are not necessarily illogical in and of themselves, viewed in a vacuum; they are illogical because they lie beyond the permissible range of a decision-maker's decisional freedom in light of the evidence and contentions before that individual decision-maker. There are limits to how far judges or advocates can or should be restricted by rigid categories of what is or is not 'illogical' or how much assistance can be drawn from what has been found to be 'illogical' in the past.

When will an illogical or irrational finding infect the ultimate conclusion?

SZWCO and SZUXN

For an error to give rise to jurisdictional error it must be material to the exercise of power — that is, the applicant must establish that there is a realistic possibility that, if the error had not happened, the decision-maker could have made a different decision.[28] The threshold for a 'realistic' possibility is not high and cannot be used to import a de facto merits review into the process of identifying jurisdictional error.[29] Instead, the word 'realistic' 'is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable, no more than that'.[30]

Even prior to the High Court's exposition of the test of materiality in *Hossain v Minister for Immigration and Border Protection*[31] (*Hossain*) and *Minister for Immigration and Border Protection v SZMTA*[32] (*SZMTA*), the courts wrestled with the question of whether an illogical or irrational finding necessarily means that the decision as a whole is affected:

a. when illogical findings infect other findings which are not illogical; or

b. when illogical findings infect conclusions based on a combination of logical and illogical findings.

Two of the key authorities in this field were decided by Wigney J of the Federal Court in 2016: *SZWCO v Minister for Immigration and Border Protection*[33] (*SZWCO*) and *Minister for Immigration and Border Protection v SZUXN*[34] (*SZUXN*). Both judgments have been frequently cited, including by the Full Court of the Federal Court.[35]

28 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (Hossain) [29]−[31]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (*SZMTA*) [45]−[47]; *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 (*MZAPC*) [2]−[3].

29 *Nguyen v Minister for Home Affairs* [2020] FCA 127 [91].

30 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66 [66].

31 *Hossain* (n 28).

32 *SZMTA* (n 28).

33 [2016] FCA 51 (*SZWCO*).

34 [2016] FCA 516 (*SZUXN*).

35 See eg *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496 [60]; *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200 [35](6); *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 (Gill) [82]; *DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33 [19]; *Singh v Minister for Home Affairs* [2020] FCAFC 7 [92]−[93]; *CRU18 v Minister for Home Affairs* [2020] FCAFC 129 [35]−[36]; *BHD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 151 [29].

In *SZWCO*, the appellant challenged several findings or reasons given for the Tribunal's ultimate conclusion that the appellant was not a credible witness. Wigney J emphasised that it will not necessarily be the case that a decision is affected by jurisdictional error if *any* finding made, or any reasoning employed, by the decision-maker on the way to that ultimate decision is illogical or irrational.[36] Wigney J acknowledged that each case and each decision must be considered having regard to the particular facts and circumstances of the case.[37] His Honour cautioned against an overprescriptive approach in this regard:

> [i]t is not desirable, and perhaps not possible, to come up with a single test or form of words to determine or describe when some illogical or irrational fact-finding or reasoning on the way to arriving at the ultimate decision can be said to sufficiently infect the final decision so as to constitute jurisdictional error.[38]

But his Honour nonetheless identified certain key principles in *SZWCO* and *SZUXN*:

- *First*, even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if (as expressed in *SZUXN*) that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result,[39] or (as expressed in *SZWCO*) if 'the degree and nature of the illogicality was not significant'.[40]

- *Secondly*, where (as expressed in *SZUXN*) the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion or (as expressed in *SZWCO*) 'other facts and circumstances found by the Tribunal were capable of logically and rationally supporting the adverse credibility finding',[41] jurisdictional error will generally not be made out.[42]

In *SZWCO*, Wigney J concluded that even if any of the 10 particulars of supposed illogicality or irrationality alleged in that case involved in any illogicality or irrationality ('which in most, if not all, cases is doubtful'), 'the nature and degree of the illogicality was not serious and certainly not such as to infect the Tribunal's ultimate decision'.[43] Of the two particulars which could potentially have given rise to illogicality, the first concerned the availability of state protection, in circumstances where the Tribunal was not satisfied that the applicant needed state protection.[44] (This could be characterised as an immaterial error in the *Hossain* sense — that is, that there was a completely separate and independent basis for the Tribunal's conclusion in that regard.[45]) The second particular concerned the applicant's ability to leave Sri Lanka on his own passport — a matter which 'was only one of the many facts and circumstances that led the Tribunal to conclude that the appellant was not seen by the Sri Lankan authorities as having any connection with the LTTE' and which was hence only one basis for an ultimate conclusion which was 'logically and rationally supported by the material

36 *SZWCO* (n 33) [66].
37 Ibid [65] and [67].
38 Ibid [65].
39 *SZUXN* (n 34) [55].
40 *SZWCO* (n 33) [66].
41 Ibid.
42 *SZUXN* (n 34) [55].
43 *SZWCO* (n 33) [68].
44 Ibid [69].
45 Compare *Hossain* (n 28) [35].

before the Tribunal'.[46] (It is the reasoning in respect of the second particular — as one of a number of factors which led to an ultimate conclusion — which is relevant for present purposes.)

In *SZUXN*, the Tribunal was found at first instance to have engaged in illogical or irrational reasoning in respect of a 'critical' or 'foundational' element of the Tribunal's adverse credibility finding.[47] On the Minister's appeal, Wigney J noted that the Tribunal's impugned adverse credibility conclusion arose for two main reasons: 'first, because he gave inconsistent evidence about various matters; and second, because he had not referred to significant aspects of his claims at the earliest opportunities'.[48] The alleged illogicality or irrationality was not a 'critical or foundational element' in the first reason for the Tribunal's conclusion and was not the only basis for the second reason.[49] His Honour emphasised, in this regard, that the Tribunal 'made a number of other significant findings and gave a number of other detailed reasons that provided independent support to its findings concerning the credibility of [the asylum seeker] and his evidence', that the illogicality 'played only a minor role' in the ultimate adverse conclusion, and that '[t]he Tribunal's other findings were sufficient to sustain its conclusion'.[50]

Respectfully, there is a deceptive clarity to some of the principles expressed in *SZWCO* and *SZUXN*. When Wigney J refers to the 'nature and degree' of the relevant illogicality, does his Honour mean that a finding may be illogical but not *very* illogical or is this instead a reference to the importance of the illogical finding in the context of the decision as a whole? When Wigney J refers to a number of findings that independently *may* have led to the Tribunal's ultimate conclusion, should this to be taken to refer to findings which *genuinely* did independently lead to the Tribunal's ultimate conclusion or does this principle allow a decision to be preserved on the basis of findings that *could* have provided a logical or rational basis for that conclusion even if the illogical or irrational findings had not been made? That is, when a finding is said to be 'independent', does that mean that it *was used* in an independent way by the decision-maker or that it *could have been used* in an independent way (if the decision had *not* contained illogical findings)? Respectfully, the plain text of Wigney J's reasoning in *SZWCO* would suggest the latter. But the way in which the case law has evolved since then suggests the former.

As noted, Wigney J's emphasis on whether a given finding is 'immaterial' predates the High Court's judgments in *Hossain* and *SZMTA*. There has yet to be a decisive judicial pronouncement as to whether Wigney J's test in *SZUXN* and *SZWCO* is just an aspect of 'materiality' as it applies to jurisdictional error in general or whether it is a unique and more stringent test applicable to illogicality and irrationality. As set out below, the better view from recent judgments is that Wigney J's test has been absorbed by the test in *Hossain* and *SZMTA*.

Building on *SZWCO* and *SZUXN*, there has been a significant number of cases in which the courts have held that errors of fact or logic were not material to the decision-maker's

46 *SZWCO* (n 33) [70].
47 *SZUXN* (n 34) [64].
48 Ibid [66].
49 Ibid [67]−[68].
50 Ibid [71].

reasoning — for example, where those errors are said to have been relied upon in 'only a peripheral way'.[51] *SZVHP v Minister for Immigration and Border Protection*[52] is emblematic in this regard. In that case, an incorrect finding of fact was found not to have been of 'central logical importance' to the Tribunal's overall finding as to credibility, but 'merely provided additional support for a conclusion as to credibility that the judge had reached on other grounds'.[53] Rares J found, in that regard, that '[w]here the error is not one about some fact vital to the resolution of the case or is not of such a nature as to have a cascading effect on the judge's resolution of the larger issues in the case, the error will not undermine the overall finding'.[54] His Honour hence concluded that the ultimate conclusion reached by the Tribunal was open to it on the basis of its 'alternate findings' and that '[t]he Tribunal's reasoning did not suggest that it had engaged in a process of reasoning susceptible to a finding of jurisdictional error in the circumstances of this case'.[55]

A more recent example of this form of reasoning may be found in the Full Federal Court's judgment in *BQQ15 v Minister for Home Affairs*[56] (*BQQ15*). The Tribunal did not believe that the appellant had provided a credible account of his experiences in Sri Lanka. It gave a plethora of reasons for this. One was that he had given an inconsistent account of where he worked as a fisherman in Sri Lanka. The Full Court found that these inconsistencies were 'more apparent than real' — and hence there was no rational basis to find that there were, in fact, inconsistencies of this kind.[57] But the Full Court did not accept that this finding gave rise to jurisdictional error — concluding instead that these findings of inconsistency were 'peripheral to the Tribunal's assessment of the [appellant's] claims', given that there were numerous other reasons why the Tribunal did not accept the appellant's claims about his experiences in Sri Lanka.[58] The Full Court reasoned that, '[g]iven the [other] findings made by the Tribunal about those claims, which we consider were open to the Tribunal', the Tribunal's erroneous findings about inconsistencies in the appellant's evidence did not 'depriv[e] the [appellant] of a realistic possibility of a successful outcome' (citing *Hossain* in support).[59] The Full Court's citation of *Hossain* in this regard may suggest that Wigney J's test in *SZUXN* and *SZWCO* is now merely part of the broader focus on materiality required of *all* errors.

Weighing and 'infection'

In contrast to the above, there have nonetheless been numerous cases where decisions have been affected by jurisdictional error because of illogical or irrational fact-finding, even though some of the reasons provided for those decisions were *not* illogical or irrational. This has occurred even in judgments which have approvingly cited *SZWCO* and *SZUXN*.

An early example may be found in the Full Federal Court's judgment in *Gill v Minister for*

51 *MZXSA v Minister for Immigration and Citizenship* [2010] FCA 123 [85] ('the Tribunal appears to have relied on its misunderstanding in only a peripheral way').
52 [2016] FCA 270 (*SZVHP*).
53 Ibid [38].
54 Ibid.
55 Ibid [42].
56 [2019] FCAFC 128 (*BQQ15*).
57 Ibid [85].
58 Ibid [86].
59 Ibid.

Immigration and Border Protection[60] (*Gill*). In *Gill*, the Tribunal had found that the appellant was lying about his claimed prior work experience as a chef. Some of those reasons were illogical or irrational — for example, misunderstanding the appellant's answer about the recipe for 'rissoles' as a recipe for 'risotto' because of how he pronounced the word ('r-i-z-o-l-o').[61] But other reasons for the Tribunal's conclusion that the appellant was not telling the truth were *not* illogical or irrational.

The Full Court was conscious of Wigney J's reasoning in *SZWCO* — indeed, it described his judgment as a 'helpful analysis'.[62] But it emphasised that the Tribunal's 'reasoning process' in not believing Mr Gill involved a weighing exercise — weighing those factors which counted *against* the appellant's credibility on one hand and those factors which counted *for* his credibility on the other and ultimately deciding to reject his claims after that 'weighing exercise'. The Full Court ultimately concluded that 'it cannot be said that the weighing exercise would have produced the same outcome if the Tribunal had not taken into account its illogical and erroneous findings of fact' – and hence allowed the appeal even though there were other logical, rational reasons for disbelieving the appellant.[63] (As noted above, there is a potential tension between the plain text of *SZWCO* and (especially) *SZUXN* and this mode of analysis.)

More recent decisions have spoken not just about the weighing process in which the decision-maker engaged but, more broadly, of the relationship between particular findings. In *CGA15 v Minister for Home Affairs,*[64] the Tribunal gave three reasons for finding that the appellant could relocate within Pakistan. One of those reasons assessed the risks that the appellant would face by comparing the number of attacks to the Shi'a Muslim population of Pakistan as a whole.

In deciding whether the illogical or irrational reasoning was 'material', the Full Federal Court cited Hossain and *SZMTA* — a further indication that Wigney J's test from *SZWCO* and *SZUXN* has been absorbed by the new emphasis on 'materiality' in respect of *all* jurisdictional errors, although the Full Court did not explicitly say so.[65] Even though other reasons were given for why the appellant could relocate within Pakistan, the Full Court found that it could be 'safely inferred' that that analysis materially contributed to the Tribunal's conclusion in that regard — and that '[w]here a decision relies on intermingled findings or matters in coming to an ultimate conclusion and there is no proper basis for one of the findings, jurisdictional error may result'.[66] The erroneous reason could not 'easily be severed' from the Tribunal's other reasons for its ultimate conclusion that the appellant faced only a remote chance of harm.[67]

60 *Gill* (n 35).
61 Ibid [69]−[72].
62 Ibid [82].
63 Ibid.
64 (2019) 268 FCR 362; [2019] FCAFC 46 (*CGA15*)
65 Ibid [59].
66 Ibid [61].
67 Ibid.

Similar questions arose in *BFH16 v Minister for Immigration and Border Protection*[68] (*BFH16*). In *BFH16*, two premises supporting the Tribunal's finding that the appellants had lied about their sexual orientation were found to be illogical or irrational.[69] There were other premises challenged in the appeal which were *not* illogical or irrational, even though the probative value of some of these premises was slight.[70] As in *BQQ15*, Murphy and O'Bryan JJ characterised the Court's resulting task as of one of materiality — 'whether the Tribunal's erroneous reasoning deprived the appellants of the possibility of a successful outcome; in other words, was the erroneous aspect of the Tribunal's reasoning sufficiently significant that it could have made a difference to the decision that was made'.[71] Their Honours' conclusion that the errors *were* material considered, in this regard, the balance and force of the remaining premises open to the Tribunal:

> In context, the erroneous reasoning was one of a relatively small number of circumstantial matters from which the Tribunal concluded that the appellants were not homosexual as claimed. The second matter relied on by the Tribunal … could only be regarded as having slight probative value on the ultimate fact in issue. The third matter … had only modest probative value. This is not a case in which the erroneous findings were trivial and the balance of the findings made by the Tribunal could be regarded as providing overwhelming support for the Tribunal's ultimate conclusion. The opposite is the case.[72]

Respectfully, these cases demonstrate some of the difficulties inherent in the approach in *SZWCO* and *SZUXN*:

- When a decision-maker is assessing the credibility of a witness, it is rare for findings *not* to be intermingled with each other. A decision-maker's conclusion that an applicant has shown a tendency to lie about one part of their evidence will almost invariably affect whether they assess other perceived lies — either in whether they believe an applicant on that point or how much weight to give to the other findings.[73] Findings that a person has lied seldom sit in 'hermetically sealed boxes' separate from one another.[74] (Indeed, as Lee J put it in *SZTFQ v Minister for Immigration and Border Protection*,[75] the assessment of credibility may be 'necessarily an impressionistic one, which, if properly formed, takes into account all of the evidence'.[76]) If it is enough for findings to be 'intermingled' or 'weighed' against each other then it will be difficult to find instances in which there is *not* some degree of cross-contamination.

- One of the potential areas of ambiguity is what is meant by whether other findings provide an 'independent basis' for the ultimate conclusion: is it enough that *another decision-maker* could have used those findings to reach the ultimate conclusion? If the courts are asked to decide how much weight those other findings would have been given *without* the illogical or irrational findings, this could effectively amount to the courts making their *own* assessment of whether those findings would have led to a

68 *BFH16* (n 10).
69 Ibid [42]−[49].
70 Ibid [55].
71 Ibid [60], citing *Hossain* (n 28) [29]−[31] and *SZMTA* (n 28) [45].
72 *BFH16* (n 10) [61].
73 [2017] FCA 562 (*SZTFQ*) [44]−[47].
74 Ibid [44].
75 Ibid.
76 Ibid [44].

broader adverse conclusion when the decision-maker did not, in fact, reason in that way. This process of severing parts of the decision and crafting an effectively new chain of reasoning based on the remaining portions creates dangers. If a decision was, in truth, based on four integers, and the Court 'severs' one and reaches its own view as to the salience of the remaining three, one may query whether the decision-maker's original reasoning has in fact been preserved. Mortimer J, in particular, has bluntly stated that this process of speculation as to whether *other* reasons for an ultimate conclusion could or would have led to that conclusion if the erroneous reasons were severed would involve 'the Court itself entering into a fact-finding exercise'[77] (even if this 'fact-finding' exercise occurs through the preservation or severance of individual findings made by the original decision-maker). The Full Court's assessment in *BFH16* of the 'probative value' of other findings by the Tribunal, respectfully, illustrates the potential for such debates to reach the limits of the courts' institutional competence.

PQSM

Some of these difficulties are illustrated by the Full Court's judgment in *PQSM v Minister for Home Affairs*[78] (*PQSM FCAFC*) (albeit that judgment did not involve illogical or irrational forms of reasoning).

In *PQSM*, it had been found at first instance (and it was not challenged on appeal) that the Tribunal had failed to have regard to 'the separate consideration of the effect on the applicant's partner and his adult children if the cancellation of his visa was not revoked', impermissibly restricting its consideration to 'the extent of the applicant's ties to those people and … the effects upon him'.[79] At first instance, Colvin J found that this failure to comply with the relevant Direction did not give rise to jurisdictional error — because, '[h]aving regard to the reasons given for the particular exercise of decision-making power by the Tribunal in this case, the limited nature of the failure to comply with the Direction and the material that would have been considered if there had been compliance', the applicant had not established that any failure by the Tribunal was material to its exercise of power (in the sense that it had denied him a realistic possibility of another result).[80]

On appeal, Mortimer J (in dissent) was critical of that approach, stating that 'where, as here, what is involved is the question of the weight to be given to particular considerations, it is not for the Court to "guess" … what the Tribunal, properly instructed and applying an open mind… might have decided'.[81] Her Honour stated, in this regard, that the primary judge had in substance found that 'the Tribunal would not have changed its mind because the Tribunal had given so much weight to the nature and risk of offending that nothing would have persuaded it out of that view'.[82] This, in her Honour's analysis, overstepped the bounds of materiality analysis — '[s]uch an exercise necessarily involves the supervising court placing itself not in the shoes but in the mind of the Tribunal, and concluding that, on the findings as the Tribunal has subjectively made them, realistically nothing would have changed this

77 *AWU16* (n 27) [98].
78 (2020) 382 ALR 195; [2020] FCAFC 125 (*PQSM FCAFC*).
79 Ibid [62] (Mortimer J), citing *PQSM v Minister for Home Affairs* [2019] FCA 1540 (*PQSM FCA*) [49].
80 *PQSM FCA* (n 79) [67].
81 *PQSM FCAFC* (n 78) [72] (Mortimer J).
82 Ibid [70].

Tribunal's mind'.[83] To do so would be to place the Court itself in the position of the Tribunal in this manner and to effectively 're-conduct' the weighing exercise that the Tribunal was required to conduct.[84]

The majority judges in *PQSM FCAFC* — Banks-Smith and Jackson JJ — disagreed with Mortimer J. Their Honours noted that '[w]here a decision-maker has failed to address a mandatory consideration, the task of determining whether taking it into account could realistically have made a difference will sometimes be difficult' — given that, unlike mere failure to consider specific documents or information, failure to address an entire consideration may mean that a wide range of factual material was not properly assessed in light of that consideration.[85] Their Honours acknowledged that, in conducting an evaluation of materiality in such circumstances, 'the line between judicial review and merits review may be difficult to discern' and that 'it will sometimes be difficult to evaluate the Tribunal's reasoning without substituting the court's own reasoning'.[86] Nonetheless, their Honours resolved that, following *SZMTA*, materiality is an ordinary question of fact — and hence a question for resolution by the Court, 'on the basis of the evidence and inferences available, including the reasons of the Tribunal or other decision-maker'.[87] Their Honours concluded that the primary judge had conducted an objective assessment of the material that was not considered; had concluded that that evidence, 'in the context of the Tribunal's actual reasons for decision', was not sufficient to give rise to a realistic possibility of the Tribunal reaching a different conclusion; and had not erred in this regard.[88]

Since *PQSM*, the High Court majority in *MZAPC v Minister for Immigration and Border Protection*[89] (*MZAPC*) has clarified that the 'counterfactual' question involved in materiality analysis 'cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made'.[90] In doing so, however, the majority warned that 'a court called upon to determine whether jurisdictional error has occurred must be careful not to assume the function of the decision-maker'.[91] A similar warning was given in *SZMTA* — that '[t]he court must be careful not to intrude into the fact-finding function of the Tribunal'.[92]

Respectfully, even following this rearticulation of doctrine, Banks-Smith and Jackson JJ's approach encounters practical difficulties. Mortimer J proceeded on the basis that the weight to be afforded to the effect of the Tribunal's decision on the applicant's wife and children was a matter for the Tribunal to determine; it was not a matter upon which the Court could readily speculate, even on the basis of the documentary record of the Tribunal proceedings. This approach did not involve a departure from the true inquiry being as to how the Tribunal in fact made its decision. It merely supposed that strong findings made by the Tribunal could have been weighed differently (or viewed in a different light) had the Tribunal correctly understood

83 Ibid [71].
84 Ibid [75].
85 Ibid [150].
86 Ibid.
87 Ibid [151].
88 Ibid [152]−[153].
89 *MZAPC* (n 28).
90 Ibid [38].
91 Ibid [51].
92 *SZMTA* (n 28) [48].

its task under the Direction. To posit otherwise is to 're-run' the weighing process in an environment of judicial review, without the institutional or practical advantages enjoyed by the original decision-maker.

DTN16

A potential way forward in resolving disputes about infection arises from Beach J's judgment in *DTN16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[93] (*DTN16*). In *DTN16*, the Tribunal again gave multiple reasons for doubting the first appellant's credibility. Several of these findings involved 'exaggeration' of her evidence or a tendency to increase the severity of her claims over time. Of these, one — found to be the most significant — was accepted to be in error, based on a misunderstanding of relevant evidence.

In resolving whether this error was 'material', Beach J set out a series of hypotheticals. If a tribunal makes a decision because of the combination of facts A, B and C, and fact C is incorrect, then prima facie that is a material error. (His Honour emphasised that this is only the prima facie position — because 'although that may be the starting point for a consideration of materiality, it may not be the end point for such a determination').[94] But if a tribunal makes its decision because of facts A, B *or* C, or because there is a contradiction between A *and* B *and* C, and C is shown to be incorrect, then prima facie that error might not be material.[95]

Beach J describes these as 'easy examples'.[96] But, as his Honour proceeded to observe, more complex scenarios can be imagined. If, for example, fact C is used to make an adverse credibility finding then that *type* of credibility finding — for example, exaggeration — is common to the foundations of facts A, B or C, and the error in respect of fact C might 'infect' the findings of facts A or B. That is, a finding that an applicant has a *tendency* to exaggerate, based in part upon the incorrect finding about fact C, might have affected either the conclusion that facts A or B were similar 'exaggerations' or the weight given to those findings.[97] In other words, it may have the potential to *infect* other findings that might have been open to the decision-maker.

Beach J emphasised, of course, that these are mere examples — how they apply to any given case is entirely driven by context and circumstances.[98] But, in the particular context of *DTN16*, his Honour found that the finding of exaggeration in one respect affected the Tribunal's apparent assessment of a *tendency* towards exaggeration. Although there were other findings of a lack of credibility, Beach J was scathing as to their real or potential strength, describing the finding that it was implausible that the first appellant could practise secretly as a Shi'a Muslim as 'tissue-thin'.[99] His Honour concluded that, considering their common basis of 'exaggeration', the 'exaggeration' findings could not be separated from one another — and it could not be inferred that there was any independent basis for the decision

93 [2019] FCA 1525 (*DTN16*).
94 Ibid [46].
95 Ibid [47].
96 Ibid [48].
97 Ibid [49]−[50].
98 Ibid [50].
99 Ibid [58].

beyond that. Thus his Honour upheld the appeal.

DTN16 has since been frequently cited by the Federal Court.[100] It is not immune to some of the concerns identified above. As in *BFH16*, his Honour's critique of the Tribunal's other findings as to credibility and as to their real or potential strength potentially draws the Court beyond the assessment of whether findings were open to the Tribunal and into the field of the weight which ought to have been, or could have been, attributed to those findings. Respectfully, it would have sufficed for the Court to note that the Tribunal's other findings did not dictate an ultimate adverse conclusion (if illogical premises were removed from the weighing exercise) without more. However, his Honour's examples as to the interrelationship between findings, and his Honour's analysis of the commonality of the nature of a finding as a potential basis for 'infection', provide a useful analytical tool.

Common standards of construction

The High Court's recent judgment in *MZABP v Minister for Immigration and Border Protection*[101] reaffirms and reiterates that the onus in providing materiality of an error lies on parties seeking judicial review of administrative decisions. But these principles will not necessarily operate in the same way in all cases.[102] As the High Court majority noted in *MZAPC*, '[t]here is no reason to think that the ease or difficulty of discharging the burden of proof should in practice be the same for a plaintiff in each category of case'.[103] Common approaches to the construction of reasons for administrative decisions may legitimately assist decision-makers in this regard, even while not rising to the level of interpretive 'presumptions'.

As noted above, credibility findings may be uniquely capable of informing and influencing one another; as Lee J observed in *SZTFQ*, '[t]o be too confident that emphatic disbelief on one issue would not inform, even subconsciously, the approach taken to weighing other evidence of the person disbelieved is … to underplay the complexity of the anatomy of decision-making'.[104] Findings that a person has lied are not necessarily capable of strict separation between different factual integers, but — given the nature of the exercise — may be 'impressionistic', based on a broader evaluation of the manner and form of the evidence before the tribunal.[105] To return to the hypothetical identified at the outset of the article — a decision-maker who concludes that an applicant is not credible and gives four reasons for this — those reasons would ordinarily not operate in isolation from one another and suffice, independently, to support that conclusion. Instead, as in *DTN16*, a finding that an applicant has been inconsistent about one issue may lend greater weight to findings of inconsistency on other issues (by identifying a consistent pattern of behaviour); alternatively, contrary to

100 See eg *CRL18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 917 [80]; *AWU16* (n 27) [20]; *CBY15 v Minister for Immigration and Border Protection* [2020] FCA 878 [144]−[146]; *BAU18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1169 [23]−[25]; *BYH19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 157 [34].

101 [2021] HCA 17.

102 See eg *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 [59]−[60]; *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555 [45]−[54]. But see also *MZAPC* (n 28) [59].

103 *MZAPC* (n 28) [66].

104 *SZTFQ* (n 73) [45]. See also *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 [81] (Kirby J).

105 *SZTFQ* (n 73) [44].

the hypotheticals in *DTN16*, a finding that an account is both inconsistent *and* implausible may lead inconsistencies within an account to be afforded greater significance or may render a decision-maker less likely to forgive a strained or unlikely account.[106]

In this context, there may be utility in common standards of construction — that, where a credibility finding is made through an undifferentiated reference to several factors (without any express or implied indication that the decision would have been made if a particular factor had been left out of account), it can be inferred that all of these factors were relevant to any resulting exercise of power, unless there is a clear (express or implied) textual basis in the reasons for decision to the contrary. This would not amount to a shifting of the onus involved in materiality as a whole. The onus would be on the applicant to establish that there was a realistic possibility that the decision could have been different but for the error. But it would inform the courts' inquiry as to what weight other credibility findings could, or would, have borne if the error had not been made — through a common understanding that a positive inference may be drawn from reasons of this kind that factors identified by a decision-maker in reference to a universal credibility finding were given some weight in making that finding. It would still remain open to courts to conclude that illogical credibility findings were not, in fact, material — but that conclusion would need to be reached in a context in which findings of that kind would, in the ordinary course, inform the manner in which a decision-maker evaluated the evidence of an applicant as a whole.

Conclusion

Every judge who has examined this field has cautioned against the dangers of looking at this in terms of formulae or rigid categories. Whether findings are 'independent' or 'intermingled' cannot just be examined by comparing decisions to how *previous* decisions have been scrutinised by the courts; it will always depend upon the text of each individual decision, including its structure and how the decision-maker reasoned in practice.

Even within those constraints, however, the way forward in this field may be a clearer conversation between decision-makers, advocates and judges. The 'conversation' between decision-makers and judges is potentially made harder by judges' attempts to determine after the fact which findings are material and which are not. If certain findings are purely ancillary or 'minor', or provide support to a conclusion which has already been independently reached on other bases, clear and cogent language to this effect should be used. If, on the other hand, a conclusion is *cumulative* and the sum total of all that went before, this again should be made explicit rather than just left to be inferred from circumstances. Judges, in turn, need to be clear as to what the relevant standard is and engage closely with the reasons given for individual decisions, so as to provide clearer benchmarks for which forms of expression potentially raise difficulties and which are capable of supporting conclusions that findings are 'independent' or 'intermingled'. The chief utility of common standards of construction in this regard would be to assist clear communication between interested parties and to ensure that the courts remain within the limits of their competence to determine the real or potential weight of adverse findings.

106 Of course, simply because an account is implausible does not mean that it is, for that reason, untrue. Indeed, it is often in the nature of persecution itself for victims to suffer arbitrary, capricious or unusual treatment: compare *Adam v Secretary of State for the Home Department* [2003] EWCA Civ 265 [14].