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Recent developments

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Government response to the independent review of the coal mining industry long service leave framework

The government released its response to the independent review of the Coal Mining Industry (Long Service Leave Funding) scheme ('Coal LSL scheme'). Established in 1949, the scheme has over $2.1 billion in funds under management on behalf of over 130,000 employees.

The independent review was undertaken by KMPG, commencing in June 2021, to look at the arrangements through the scheme that provide for portable long service leave entitlements in the black coal mining industry. The review report, *Enhancing Certainty and Fairness: Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*, was handed to government in December 2021.

The review found that, for the large majority of employees engaged in permanent positions in the black coal mining industry, the Coal LSL scheme meets its fundamental objective by connecting eligible employees with their portable long service leave entitlement. However, the review also identified that the scheme has areas for improvement and made 20 recommendations.

The government has accepted all 10 of the recommendations directed to it and will take action to legislate based on the suggested reforms set out in the report. These reforms are aimed at safeguarding employee entitlements, including casual employees covered by the scheme; removing unnecessary administrative burdens on businesses and individuals; and positioning the scheme to meet the needs of the industry in the future.

The government will support the scheme in implementing the remaining recommendations, which will make it easier for employees and employers to understand and comply with the scheme. The government has also undertaken to work with stakeholders to implement the recommendations in a timely manner.

'The government is focused on having the right settings in place to make sure that hard-working coal workers receive their lawful long service leave entitlements through the Coal LSL scheme', said Senator Amanda Stoker.

The report can be accessed at <https://www.ag.gov.au/industrial-relations/independent-review-coal-lsl-scheme>.

The government's response can be accessed at <https://ministers.ag.gov.au/media-centre/government-response-independent-review-coal-mining-industry-long-service-leave-framework-ag-16-02-2022>.

Next level for the National Archives' digitisation

An industrial-scale digitisation hub has been announced as part of a $67.7 million funding package from the government to boost the critical functions of the National Archives.

The digitisation hub will be a state-of-the-art facility which will enable the fast-track of digital preservation of at-risk records, making them available online for all Australians now and into the future.

The additional $67.7 million in funding is part of the government's response to the Functional and Efficiency Review of the National Archives of Australia ('Tune review'). It represents a substantial investment in the functions and activities of the National Archives, providing for:

- digitisation and preservation of the National Archives' at-risk collection over an accelerated four-year time frame;
- additional staffing and capability to address backlogs of 'access applications' for Commonwealth records and to provide improved digitise-on-demand services;
- improved guidance for agencies to assure better management of government information, data and records; and
- investment in cybersecurity capacity and further development of the National Archives next-generation digital archive, to facilitate the secure and timely transfer of records to National Archives' custody as well as their preservation and digital access.

The digitisation hub follows the Tune review's recommendation to implement centralised storage and preservation of the national archival collection. The industrial-scale digitisation hub will digitise collection material, relocated from across the nation, into storage facilities with significantly improved preservation and digitisation capacity.

The new hub will be located in Mitchell, Canberra, at the National Archives repository.

<https://ministers.ag.gov.au/media-centre/next-level-national-archives-digitisation-14-02-2022>

Public consultation to progress further Respect@Work recommendations

The government has commenced public consultations on options for further legislative reforms recommended as part of the Sex Discrimination Commissioner's Respect@Work report, which can be found at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

The Respect@Work report made 13 recommendations to amend Commonwealth legislation. Six of these recommendations have already been implemented through the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), which commenced on 11 September 2021.

The current consultation process will inform the government's next steps in legislative reform for the remaining recommendations that will protect Australians from sexual harassment at work.

The proposals for consultation are to:

- provide that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited (recommendation 16(c));
- introduce a positive duty on employers to prevent sexual harassment from occurring, provide the Australian Human Rights Commission with the function of assessing compliance with the positive duty, and equip the commission appropriately to enforce that duty (recommendations 17 and 18);
- provide the Australian Human Rights Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including sexual harassment (recommendation 19);
- allow unions and other representative groups to bring representative claims to court (recommendation 23); and
- insert a cost provision into the *Australian Human Rights Commission Act 1986* (Cth) to provide that a party to proceedings may only be ordered to pay the other party's costs in limited circumstances (recommendation 25).

The Attorney-General said that the government is seeking views on whether these legislative recommendations can and should be implemented and, if so, what are the options and practical challenges associated with implementation.

To follow the implementation progress of the recommendations, visit <https://www.ag.gov.au/rights-and-protections/publications/implementation-governments-roadmap-respect-detailed-status-update>.

A consultation paper outlining the options to progress the legislative recommendations has been released and can be accessed at <https://consultations.ag.gov.au/rights-and-protections/respect-at-work/user_uploads/consultation-paper-respect-at-work.pdf>.

The accompanying survey (<https://consultations.ag.gov.au/rights-and-protections/respect-at-work/consultation/>) is now open and will close on Friday, 18 March 2022.

<https://ministers.ag.gov.au/media-centre/public-consultation-progress-further-respectwork-recommendations-14-02-2022>

Appointments to the Administrative Appeals Tribunal

The Attorney-General, Senator the Hon Michaelia Cash, has announced the reappointment of Mr Terrence Baxter OAM as a part-time member and the promotion of Ms Simone Burford to full-time Senior Member at the Administrative Appeals Tribunal.

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

We congratulate Mr Baxter and Ms Burford on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-administrative-appeals-tribunal-11-02-2022>

Statement regarding the President of the Administrative Appeals Tribunal, the Hon Justice David Thomas

The Attorney-General, Senator the Hon Michaelia Cash, has announced the resignation of the Hon Justice David Thomas as President of the Administrative Appeals Tribunal (AAT).

Justice Thomas was appointed as President of the AAT and a judge of the Federal Court of Australia on 27 June 2017. He will remain as a judge of the Federal Court.

Arrangements are in place for Federal Court judges the Hon Justice Susan Kenny AM and the Hon Justice Berna Collier to act as AAT President.

<https://ministers.ag.gov.au/media-centre/statement-regarding-president-administrative-appeals-tribunal-hon-justice-david-thomas-31-01-2022>

Appointment to the Defence Force Discipline Appeal Tribunal

The Hon Justice Michael John Slattery has been appointed as a member of the Defence Force Discipline Appeal Tribunal. The Tribunal hears appeals from persons who have been convicted or who have been acquitted of a service offence by a court martial or Defence Force magistrate.

Justice Slattery is a judge of the Supreme Court of New South Wales since 2009. He has previously served as Judge Advocate General of the Australian Defence Force and Judge Advocate General of the Royal Australian Navy.

We congratulate Justice Slattery on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-defence-force-discipline-appeal-tribunal-12-01-2022>

Appointment of Independent Reviewer of Adverse Security Assessments

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of Mr Philip Moss AM as the new Independent Reviewer of Adverse Security Assessments. Mr Moss's appointment will be for three years commencing on 17 January 2022, replacing Mr Robert Cornall, who has been in the role of Independent Reviewer of Adverse Security Assessments since 2015.

As the independent reviewer, Mr Moss will conduct reviews of the Australian Security Intelligence Organisation's adverse security assessments given to the Department of Home Affairs in relation to people who:

- remain in immigration detention;
- have been found by the Department of Home Affairs to be owed protection obligations under international law; and
- are ineligible for a permanent protection visa, or have had their permanent protection visa cancelled, because they are the subject of an adverse security assessment.

Mr Moss brings a wealth of expertise and knowledge to the role, having been in legal practice and government administration. He is a former Integrity Commissioner and head of the Australian Commission for Law Enforcement Integrity. Mr Moss is currently a part-time judicial member of the ACT Sentencing Administration Board and an Air Force Reserve Group Captain legal officer attached to the Afghanistan Inquiry Response Task Force.

We congratulate Mr Moss on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-independent-reviewer-adverse-security-assessments-12-01-2022>

Appointment to the Federal Court of Australia

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of his Honour Judge Patrick O'Sullivan to the Federal Court of Australia. Judge O'Sullivan has been appointed to the Adelaide registry and his appointment commenced on 20 January 2022.

Judge O'Sullivan was admitted as a solicitor and barrister of the Supreme Court of South Australia in 1981, after graduating with a Bachelor of Laws from the University of Adelaide and completing a Diploma in Legal Practice from the South Australian Institute of Technology. In 1988, he was appointed Crown Counsel to the Hong Kong government and later Senior

Crown Counsel in 1990. He was appointed Queen's Counsel in 2008 and is a past president of both the Australian Bar Association and the South Australian Bar Association. Judge O'Sullivan was appointed as a judge of the District Court of South Australia in 2018.

We congratulate Judge O'Sullivan on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-federal-court-australia-10-12-2021>

Reappointment of Solicitor-General

Dr Stephen Donaghue QC has been reappointed Solicitor-General for a term of five years.

Dr Donaghue has served as the Commonwealth Solicitor-General, the second law officer of the Commonwealth, and the principal legal counsel to the Australian Government since he was first appointed in December 2016 and took up the position in January 2017. During his current tenure, Dr Donaghue has appeared before courts in significant litigation and provided trusted advice on key government policies and on questions of law; in particular, on constitutional and other public law matters. He has also played an active role in identifying, raising and managing awareness of whole-of-government legal risk, including through his role on the Significant Legal Issues Committee.

Dr Donaghue holds a doctorate of philosophy from the University of Oxford as well as a Bachelor of Laws (First Class Honours) and a Bachelor of Arts from the University of Melbourne. Prior to his appointment as Solicitor-General, Dr Donaghue had practised as a barrister at the Victorian Bar since 2001. He was appointed Senior Counsel in 2011 and subsequently Queen's Counsel in 2014.

We congratulate Dr Donaghue on his reappointment.

<https://ministers.ag.gov.au/media-centre/reappointment-solicitor-general-26-11-2021>

Keeping Australia safe from high-risk terrorist offenders

The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021, designed to continue to protect the Australian community from the evolving threat opposed by convicted terrorist offenders, has been passed by Parliament.

The Bill establishes an extended supervision order ('ESO') scheme which enables terrorist offenders released into the community at the end of their custodial sentence to be subject to tailored close supervision, based on the level of risk they pose to the community.

'Such individuals are typically radicalised and do not change their extremist views while in prison, despite deradicalisation efforts', said the Attorney-General, Senator the Hon Michaelia Cash. Minister for Home Affairs, the Hon Karen Andrews MP, stated that this Bill will 'ensure the police have the powers they need to keep the community safe and manage individuals who remain high risk'.

Under an ESO, a state or territory Supreme Court may impose conditions on a terrorist offender at the end of their sentence proportionate to the risk they pose to the community. Conditions include restrictions on movement and access to devices, requirements to not associate with particular individuals, and participation in specified rehabilitation and treatment programs. A breach of a condition will be an offence punishable by up to five years imprisonment.

This Bill comes at an important time where there is a significant number of convicted terrorist offenders reaching the conclusion of their prison sentences and due for release in the coming years. Since 2001, 95 people have been convicted of terrorism-related offences. Fifty-four of these people are currently serving custodial sentences, 18 of whom are due to be released over the next five years.

<https://ministers.ag.gov.au/media-centre/keeping-australia-safe-high-risk-terrorist-offenders-22-11-2021>

Professor Hilary Charlesworth AM elected to the International Court of Justice

Professor Hilary Charlesworth has been elected to the International Court of Justice.

Professor Charlesworth was nominated for election 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.

The election took place at the United Nations headquarters in New York on 5 November 2021 to fill the vacancy resulting from the passing of Australian judge his Honour Judge James Crawford AC SC, whose term was due to conclude on 5 February 2024.

<https://ministers.ag.gov.au/media-centre/professor-hilary-charlesworth-am-elected-international-court-justice-06-11-2021>

Commonwealth Ombudsman investigation into the Department of Veterans' Affairs' communication with veterans making claims for compensation

The Acting Commonwealth Ombudsman, Ms Penny McKay, has released the report *The Department of Veterans' Affairs' Communication with Veterans Making Claims for Compensation*. The report examines the appropriateness of the Department of Veterans' Affairs' (DVA) administrative framework to support its communication with veterans making claims for compensation for injuries or conditions related to their service, including DVA's approach to communicating with and assisting at-risk veterans.

Ms McKay acknowledged in the report that DVA had progressed several initiatives to improve service delivery and the administrative framework guiding communication with veterans throughout the claims process.

The report makes eight recommendations aimed at improving transparency and quality of information provided to the veteran community and guidance for DVA staff in supporting roles. All eight recommendations have been accepted by DVA.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2022/20-january-2022-commonwealth-ombudsman-investigation-into-the-department-of-veterans-affairs-communication-with-veterans-making-claims-for-compensation>

Monitoring whistleblowing in NSW depends on good reporting and compliance

The NSW Ombudsman annual report for the 2020–2021 financial year, *Oversight of the Public Interest Disclosures Act 1994*, has been released. The report shows that investigating agencies (which include the Independent Commission Against Corruption ('ICAC'), the Ombudsman and the Law Enforcement Conduct Commission) received 964 public interest disclosures ('PIDs') in the 2020–21 financial year.

Six hundred and seventy-nine of those PIDs were made to ICAC by heads of public sector agencies who are required by law to report evidence of possible corrupt conduct.

Three hundred and forty-five PIDs were received by public authorities concerning reports of wrongdoing from their own staff.

In presenting the report to Parliament, the NSW Ombudsman, Paul Miller, highlighted the ongoing importance of whistleblowing as a means of exposing corrupt conduct and other forms of wrongdoing.

The report also raises concerns that not all public authorities are complying with their obligations under the *Public Interest Disclosure Act 2013* (Cth) to report information about PIDs to the Ombudsman.

'The accuracy of the data we report relies on public authorities properly identifying and recording internal disclosures of wrongdoing as PIDs', said Mr Miller.

The report can be accessed at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/123651/Oversight-of-Public-Interest-Disclosures-Act-1994_Annual-Report-2020-21.pdf>.

<https://www.ombo.nsw.gov.au/news-and-publications/news/monitoring-whistleblowing-in-nsw-depends-on-good-reporting-and-compliance>

Victorian Ombudsman launches investigation into public and community housing complaint handling

The Victorian Ombudsman has launched an investigation into how public and community housing complaints are handled, to improve processes and ensure fairness.

The investigation will examine whether the current complaint-handling processes are effective, fair, and sufficiently tenant-focused.

The office of the Ombudsman has received more than 1,000 complaints within the last year about public and community housing. Some of these complaints concerned the lack of basic

necessities, such as running water and electricity, and reasonably maintained, clean and safe premises. Others are around lack of information concerning how to complain or that tenants feel they are not being listened to when they raise concerns.

The issues raised by these complaints will also be considered in light of the Review of Social Housing Regulation which was commissioned by the Victorian Government. While the Ombudsman's investigation, findings and recommendations are independent, it will aim to contribute to the complaints-handling aspect of this review.

The investigation will focus on how complaints from public and community housing tenants are handled. It aims to meet with both the tenants themselves and community services, as well as the Department of Families, Fairness and Housing and the Housing Registrar.

A report will be made public during the first half of the year.

<https://www.ombudsman.vic.gov.au/our-impact/news/victorian-ombudsman-launches-investigation-into-public-and-community-housing-complaint-handling/>

'Unjust' — Victorian Ombudsman findings on Department of Health border exemption scheme

The Victorian Ombudsman's report on its investigation into decisions made under the Victorian Border Crossing Permit Directions, made in response to the COVID-19 pandemic, has been tabled in Parliament.

The report found that the narrow exercise of discretion under the border exemption scheme resulted in unjust outcomes and has recommended that the government publicly acknowledge the distress caused to affected people.

Victoria operated a traffic light system from January 2021, where every person wanting to enter the state required a permit or an exemption. In July changes were made to this model and, when the border between Victoria and New South Wales was shut, thousands of people were left stranded and unable to get an exemption.

The investigation revealed that, of the 33,252 exemption applications to the Department of Health that were received between 9 July and 14 September 2021, only eight per cent were granted.

The Ombudsman, Ms Deborah Glass OBE, did not criticise the decision to close the borders as the decision was made in light of public health advice, in consideration of the human rights implications, and allowed for the exercise of discretion. However, while a discretion to approve exemptions was available, it was exercised narrowly and most applications did not even reach a decision-maker. The consequence of this was 'vast, and unfair, for many thousands of people stuck across the border', said the Ombudsman, and that it appeared 'the Department put significant resources into keeping people out rather than helping them find safe ways to get home'.

The team responsible for border exemptions was increased from 20 staff in early July 2021 to 285 staff in September 2021. Nonetheless, those responsible for categorising and prioritising applications were expected to complete 50 per hour — an average of almost one every 30 seconds. Moreover, the evidence needed to grant an exemption was extensive: from statutory declarations and proof of residence or ownership of animals to letters from doctors. The effect of a complex and constrained bureaucracy led to some outcomes that 'were downright unjust, even inhumane'.

The result 'was some of the most questionable decisions I have seen in my over seven years as Ombudsman', said Ms Glass.

The Ombudsman has recommended that the State government improve policy and guidance for future similar schemes and consider ex gratia payments on application to help cover the financial costs of not being able to travel home.

The report can be accessed at <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-decision-making-under-the-victorian-border-crossing-permit-directions>.

<https://www.ombudsman.vic.gov.au/our-impact/news/unjust-victorian-ombudsman-findings-on-department-of-health-border-exemption-scheme/>

Ombudsman Western Australia appointed for a further five-year term

Mr Chris Field, the Ombudsman Western Australia, has been appointed for a fourth five-year term commencing 26 March 2022. Mr Field was first appointed to the position in 2007. He is Australia's longest serving Ombudsman and the only Ombudsman in the 50-year history of the Ombudsman institution in Australia to be appointed to four terms of office.

Mr Field is also President of the International Ombudsman Institute. On 27 May 2021, he commenced his four-year term as president. Mr Field is the first Australian to be elected as president in the International Ombudsman Institute's 43-year history. The institute, established in 1978, is the global organisation for the cooperation of 205 independent Ombudsman institutions from more than 100 countries worldwide.

Over Mr Field's next term, the office of the Ombudsman will commence a range of important new functions, including a national preventive mechanism under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* as well as continuing to assist in the consideration of a range of proposed functions. Two new roles will also be created: an Assistant Ombudsman for Aboriginal Engagement and Collaboration; and a research, policy and projects officer with a special focus on ensuring the office stands with the LGBTIQA+ community. The new and proposed functions will see the office grow to over 100 staff.

The office of the Ombudsman will also continue its program of major own-initiative investigations in relation to key human rights issues, undertaken with all the powers of a standing royal commission.

We congratulate Mr Field on his reappointment.

<https://www.theioi.org/ioi-news/current-news/western-australia-ombudsman-appointed-for-a-further-five-year-term>

Recent decisions

Australia's international obligations can, as a matter of reasonableness, be part of the national interest consideration

Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20 [2021] FCAFC 195

This decision concerned two matters. One was *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (*'CWY20'*), on appeal from a judgment of the Federal Court, *CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1855. The other was *QJMV v Minister for Home Affairs* (*'QJMV'*), concerning two grounds (Grounds 5 and 5A) in an originating application for judicial review within the Court's original jurisdiction. Both appeal and application concerned a decision made respectively under s 501A(2) of the *Migration Act 1958* (Cth): the decision of the Acting Minister in *CWY20* to refuse a visa application; and the decision by the Minister in *QJMV* to cancel a visa.

CWY20 is a national of Afghanistan who arrived at Christmas Island in July 2013 and was taken to immigration detention. He was granted a bridging visa on 21 August 2013 and released into the community. In December 2013, he was charged with multiple offences of a sexual nature against children. He was remanded in custody and his bridging visa was cancelled. On 3 March 2014, the respondent was convicted and sentenced to a term of imprisonment. Upon serving his sentence, the respondent applied for a Safe Haven Enterprise (Class XE) visa. This application was initially refused by the then Minister for Home Affairs and the decision was subsequently set aside by the Administrative Appeals Tribunal.

On 16 July 2020, the then Acting Minister set aside the Tribunal's decision under s 501A(2) of the Migration Act, refusing the visa application. In making his decision the Acting Minister was aware that the respondent was a national of Afghanistan and consequently a person in respect of whom Australia had protection obligations, such that to remove the respondent to Afghanistan would be in breach of Australia's international non-refoulement obligations. The Acting Minister concluded that it was in the national interest to refuse to grant the respondent's application for a visa. Consideration of Australia's international non-refoulement obligations was a 'countervailing consideration' but was not considered specifically as part of the national interest under s 501A(2)(e) of the Act.

The Acting Minister's decision of 16 July 2020 was subject to judicial review before Griffith J in the Federal Court of Australia. Griffith J set aside the Acting Minister's decision on the ground that the Acting Minister made a jurisdictional error in failing to consider the implications of Australia being in breach of its international non-refoulement obligations as part of the national interest consideration, which was a precondition to the exercise of power to refuse to grant the visa. Specifically, the primary judge found that the Acting Minister was required to address all relevant components of the national interest which arose squarely on the material before the decision-maker, and in the particular circumstances of this case this included Australia's international obligations relating to non-refoulement.

QJMV is also a national of Afghanistan. Between July 2011 and February 2020, he lived in Australia as a holder of a permanent resident visa. In late 2015, the applicant was found guilty of two charges of 'indecent act with child under 16' and was subject to a community correction order. He was subsequently convicted in April 2017 of contravening the order. On 6 February 2020, a delegate of the Minister cancelled the applicant's visa under s 501A(2) of the Migration Act. On 7 May 2020, the Administrative Appeals Tribunal set aside the delegate's decision. On 7 December 2020, under s 501A(2) of the Migration Act, the Minister set aside the decision of the Tribunal and cancelled the applicant's visa.

In making the decision the Minister was aware that the respondent was, as a national of Afghanistan, a person in respect of whom Australia had protection obligations such that to remove the respondent to Afghanistan would be in breach of Australia's international non-refoulement obligations. The Minister concluded, similarly to the Acting Minister's reasons, that it was in the national interest to refuse to grant the respondent's application for a visa. Consideration of Australia's international non-refoulement obligations was a 'countervailing consideration' but was not considered specifically as part of the national interest under s 501A(2)(e) of the Act.

On 9 November 2021, the Full Court of the Federal Court of Australia handed down its decision in both cases, dismissing the appeal in *CWY20* on all five grounds raised and rejecting the two grounds under the application in *QJMV* for consideration. The issues raised in these matters before the Full Court were as follows.

The notice of contention in the appeal and Ground 5 in the application submitted that the decisions of the Acting Minister and Minister respectively were affected by jurisdictional error because they had asked themselves the wrong question: namely, s 501A(2) provided the decision-maker with a residual discretion to set aside the original decision and cancel a visa that had been granted to a person or refuse an application for a visa where the Minister was satisfied of each of the three subjective jurisdictional facts referred to in s 501A(2)(c), (d) and (e) — that is, the Minister reasonably suspects the person does not pass the character test; the person does not satisfy the Minister that the person passes the character test; and refusal or cancellation is in the national interest. In both matters it was submitted that, on the proper construction of s 501A(2), no residual discretion is conferred on the decision-maker as to whether to refuse to grant or cancel a visa.

The Full Court found that there is in fact a discretion under s 501A(2) to refuse or cancel a visa and, contrary to the respondent's and applicant's arguments, this discretion arises after the matters in s 501A(2)(c), (d) and (e) have been considered. According to the Full Court, this conclusion is supported by the use of the word 'may' in s 501A(2), contrasted with the fact that the word 'must' has been used elsewhere in pt 9 in situations where it is clear Parliament intended to create an obligation. Moreover, the High Court in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 [58] had proceeded on the basis that s 501A(2) conferred a discretion subsequent to the matters in s 501A(2)(c), (d) and (e) being satisfied.

Under Grounds 1A and 2B of the appeal it was submitted that the primary judge had erred in finding that the Acting Minister had not considered the significance of Australia's non-refoulement obligations in his assessment of the national interest, just because it was not material to his assessment of that particular subject. The Full Court found that the primary judge was correct in concluding that Australia's non-refoulement obligations should have received active consideration on part of the Acting Minister in considering the national interest element. Moreover, it was clear that this had not occurred as a matter of fact from the Acting Minister's reasons, which nowhere suggested that these considerations were relevant to the Acting Minister's state of mind concerning the national interest. Grounds 1, 2A and 3 in the appeal and Ground 5A in the application were concerned with whether the Acting Minister and Minister had made a jurisdictional error in not considering the implications of Australia's non-refoulement obligations as part of determining whether they were satisfied that a refusal or cancellation of the respective visa was in the national interest, such that the Acting Minister's and Minister's reasoning was unreasonable.

The Full Court held that, once the issue of the character test is determined, the power in s 501A(2) is exercised by reference to broad criteria. It is a power that may only be exercised by the Minister personally (s 501A(5)) and it is a non-compellable power — that is, the Minister does not have a duty to consider whether to exercise the power, whether or not the Minister is requested to do so or in any other circumstances (s 501A(6)).

Where the Minister elects to exercise their discretion, the relevant criteria in s 501A(2)(c), (d) and (e) must be met. The criterion in s 501A(2)(e) that the Minister is satisfied that the refusal or cancellation is in the national interest is broad one, and it is largely for the Minister, and not the courts, to determine what is and what is not in the national interest. Nonetheless, that power has boundaries and it is the responsibility of the court to identify those boundaries when required.

The Court noted that, in reaching that state of satisfaction as to the national interest, it must be attained reasonably ([140]), as identified by the primary judge in *CWY20* (see [53], [141]). In the particular circumstances of these matters, it was necessary for the Acting Minister and Minister to recognise the implications of Australia breaching its non-refoulement obligations in their assessment of the national interest, although the precise weight to be accorded to it and how it was to be balanced against other relevant factors was for the Acting Minister and Minister alone. Nonetheless, failure to consider these implications gave rise to a possible distortion in the subsequent balancing exercise, as was noted by the primary judge in *CWY20.*

While the weighing process is clearly a matter for the Minister, the Full Court held that a Minister, 'acting rationally and reasonably, could not have concluded that Australia's breach of its international legal obligations was immaterial to his assessment of Australia's national interest' ([166]) in the particular circumstances of both *CWY20* and *QJMV*.

While it was not argued before the primary judge that Australia's non-refoulement obligations were a mandatory relevant consideration in the consideration of the national interest under s 501A(2)(e), the primary judge did emphasise the significance of the particular circumstances in *CWY20* that did indicate it was a reasonable consideration, which was affirmed by the Full Court and also applied in *QJMV*— namely, in both the appeal and application, both persons were recognised as persons to whom Australia owes protection obligations; and refusing or cancelling their respective visas would put Australia in breach of those obligations because they would have to be returned to their country of origin where there was an accepted risk that they would be killed. The decisions made by the Acting Minister and Minister, respectively, meant that the respondent and applicant would be refouled in breach of Australia's obligations under international law. Moreover, an adverse decision to the person in each case meant that they are unable to make any application for a visa in the future. The significance of these issues was raised in the decision-making process, albeit just not considered as an aspect of national interest.

The Court concluded that compliance with international law obligations was an aspect of the national interest consideration in both cases, albeit it is not a mandatory relevant consideration in respect of the power in s 501A(2) in the sense of a consideration to be taken into account in every case ([155]).

Agreeing with Besanko J's judgment, Allsop CJ stated that Australia's international obligations and violations of those obligations can 'be seen to bear directly and naturally on the conception of the "national interest"' ([10]) and were 'intrinsically and inherently a matter of national interest' ([15]).

Breadth of health orders not affected by the principle of legality

Kassam v Hazzard [2021] NSWCA 299

On 8 December 2021, the New South Wales Court of Appeal handed down a unanimous decision, dismissing the appeal.

Between 20 August and 23 November 2021 the NSW Minister for Health and Medical Research made three orders ('the Orders') under s 7(2) of the *Public Health Act 2010* (NSW) in response to the emergence of the delta strain of the COVID-19 virus:

- Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (Order No 2) 2021 ('Order No 2');
- Public Health (COVID-19 Aged Care Facilities) Order 2021 ('Aged Care Order'); and
- Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 ('Education Order').

Under s 7(5) of the Public Health Act, each of the Orders expired at the end of 90 days after it was made, unless repealed earlier. Order No 2 was repealed on 11 October 2021, the Aged Care Order was repealed on 1 November 2021 and the Education Order was scheduled to expire on 23 December 2021.

Order No 2 conditioned the movement of 'authorised workers' residing in 'areas of concern' from leaving the designated area in which they resided for the purposes of their work or employment, upon having received at least one dose of an approved COVID-19 vaccine or having been issued with a medical certificate exempting them from the requirement to be at least partially vaccinated.

The Aged Care Order and the Education Order had a similar effect, albeit they applied to 'authorised workers' at aged care facilities and schools irrespective of where they resided. At first instance, the plaintiffs contended that their orders were invalid on several grounds, all of which were dismissed by Beech-Jones CJ at common law.

The issues brought before the Court of Appeal were:

i. whether the applicants warranted the grant of leave to appeal;

ii. the significance of whether the Orders were characterised as administrative or legislative; and

iii. whether the Orders were authorised under s 7 of the Public Health Act.

In relation to the leave to appeal issue, Bell P, with Meagher and Leeming JJA agreeing, granted leave to appeal only in relation to those grounds in each of the appellant's submissions which involved the proper construction of s 7 of the Public Health Act, as this concerned a matter of public importance. Specifically, questions of construction in relation to s 7 of the Public Health Act have ongoing significance given the continuation of the Education Order at the time of the hearing and the fact that the COVID-19 virus continues to mutate and the risk to public health caused by the pandemic has not abated. In respect of the other grounds raised by the appellants, these involved challenges to the process by which the Orders were made, or the legal reasonableness of those orders and the Minister's purpose in making them. The Court held that an appeal on these grounds would manifestly lack utility as Order No 2 and the Aged Care Order had been repealed and the Education Order was set to shortly expire.

The second issue raised by the appellants was that s 7 of the Public Health Act only authorised administrative action but, as the Orders were legislative in their effect, they were invalid. Bell P held that, while there are some circumstances where the characterisation of an action, instrument or order as either administrative or legislative is rendered important by statue — for example, where an instrument of a particular character needs to be laid before Parliament — this was not the case here. Rather, the question of validity of the Orders did not turn on whether they were of an administrative or legislative character: the question is simply whether the Orders were authorised by s 7 of the Public Health Act. Bell P noted that the power in s 7 of the Public Health Act was rather broad and, in conjunction with the subject matter and nature of the risk it is designed to address, should not be narrowly construed.

The appellants also contended that the Orders were not authorised by s 7 of the Public Health Act because they amount to or resulted in an interference with six fundamental rights contrary to the principle of legality — that is, the courts must not impute to the legislature an intention to interfere with fundamental rights; such an intention must be clearly manifested by unmistakeable and unambiguous language. Bell P noted that the principle of legality is subject to much debate and controversy concerning its nature and sphere of operation, such that it should be kept in perspective and applied with care. More specifically, the principle will not necessarily be engaged or enlivened if the interference with fundamental rights authorised by a statute is slight or indirect or temporary. Bell P went on to deal with each of the rights alleged to have been infringed.

Right to bodily integrity

The right to bodily integrity is recognised at common law. However, Bell P concurred with the primary judge that this right was not infringed or impaired by the Orders. The Orders proceeded on the basis that there will be citizens who chose not to be vaccinated. Vaccination was not a requirement under the Orders; rather, it was a condition on which a worker would be able to take advantage of an exemption — namely, to leave a particular area under Order No 2 or to enter a particular place under the Aged Care Order or the Education Order. Nothing in the Orders required, still less coerced, workers to be vaccinated. Consequently, the right to bodily integrity was not impaired by any of the Orders and they were not rendered invalid on the basis that, contrary to the principle of legality, such impairment was not expressly or impliedly authorised.

Right to earn a living or a right to work

In agreement with the primary judge, Bell P found that there is no common law right to work in any strict sense which would engage the principle of legality. Bell P drew on the observation of Barwick CJ in *Forbes v New South Wales Trotting Club Limited* (1973) 143 CLR 242, 260–1, which has been subsequently cited with approval, that 'to convert the doctrine that … there should be no unreasonable restraint on employment into a doctrine that every man has a "right to work", is, in my opinion, to depart radically from … the common law'. Consequently, to the extent that people's ability to work was directly or indirectly affected by the Orders, they were not invalid by reason of the principle of legality.

Right not to be discriminated against

Bell P similarly agreed with the primary judge's reasoning that 'protection from discrimination is not a right, freedom or immunity protected by the principle of legality. The failure of the common law to protect against discrimination is reflected in the necessity for legislation to be passed to prohibit it'.

Right to privacy

As with the right to work, the right to privacy was not considered a right which the common law has to date recognised such that it could engage the principle of legality.

Privilege against self-incrimination

Bell P agreed with the conclusion of the primary judge that the privilege against self-incrimination did enliven the principle of legality. However, it was not violated by any of the Orders which required workers to provide evidence of identity, residence and vaccination status in order to travel outside a specified area or to participate in certain types of work. On a proper construction of the Orders it could not sensibly be said that the purpose of requiring the production of evidence was in order to obtain admissions of criminal conduct.

Right to silence

The right to silence may only engage the principle of legality where it is used in the context of the right to refuse to answer questions from law enforcement officers or judicial officers, which is similar to the privilege against self-incrimination; it could not sensibly be seen to have been infringed by any of the Orders.

State Emergency and Rescue Management Act definition of 'emergency'

Lastly, the appellants argued that the COVID-19 pandemic was an 'emergency' within the meaning of s 4 of the *State Emergency and Rescue Management Act 1989* (NSW) ('SERM Act') such that any orders to address that emergency should have been made under s 8 of the Public Health Act. However, as reasoned by Bell P, s 8 of the Public Health Act is only engaged where there is a 'state of emergency' that arises following a declaration by the Premier that a state of emergency exists, which is different from an 'emergency' in the definition under s 4 of the SERM Act. Moreover, this distinction makes clear the interrelationship between s 7 and s 8 of the Public Health Act and when each section will be applicable. Consequently, where there is a declaration of a 'state of emergency' the power in s 8 is invoked as opposed to s 7. In this case, in the absence of a declaration by the Premier of a state of emergency, s 8 was not an available source of power to make any of the Orders. Consequently, this argument was held to fail.

Defining 'decisions' under the Administrative Law Act 1978 (Vic)

Keasey v Director of Housing [2022] VSCA 7

On 2 February 2022, the Victoria Court of Appeal handed down its unanimous decision, agreeing with the decision of the primary judge, Derham AsJ, and refusing leave to appeal.

In response to the COVID-19 pandemic, the *Residential Tenancies Act 1997* (Vic) was amended by the insertion of pt 16, headed 'COVID-19 temporary measures'. The effect of this amendment changed the process by which a landlord could evict a tenant under a residential tenancy agreement, essentially making it harder, while also giving to the Victorian

Civil and Administrative Tribunal ('VCAT') a greater decision-making role in the process. Under the provisions, a landlord is prohibited from issuing a notice to vacate to a tenant and any notice given is of no effect. A tenancy agreement is not terminated unless, relevantly (amongst other things), the landlord applies to the VCAT for an order terminating a tenancy agreement under s 548 of the *Residential Tenancies Act 1997* (Vic) and the VCAT makes an order under s 549(1) of the Act, where satisfied of various stipulated matters, terminating the tenancy agreement. The VCAT can also make a possession order if it is reasonable and proportionate to do so.

The applicant and another person are tenants under a tenancy agreement, with the respondent being the Director of Housing. The tenancy agreement is governed by the Residential Tenancies Act. On 11 May 2020, following the laying of criminal charges against the applicant, the Director of Housing, as landlord, filed an application in the VCAT under s 548 of the Residential Tenancies Act, seeking to terminate the applicant's tenancy agreement on the basis that the rental property was being used by the tenant or another person for an illegal activity and as a place in which to traffic heroin.

The Director of Housing also sought a possession order under s 549(4). At the time of the hearing at first instance, the criminal charges were yet to be heard.

The applicant requested under s 8 of the *Administrative Law Act 1978* (Vic) that the Director provide reasons in writing for the decision to commence the application in the VCAT. The question in the application for leave to appeal was whether the decision of the Director to apply to the VCAT under s 548 of the Residential Tenancies Act was a 'decision' under the Administrative Law Act with the consequence that the Director was, on request, obligated to give reasons.

The applicant submitted that a decision to make an application under s 548 of the Residential Tenancies Act is a decision under the Administrative Law Act. Although anterior to any ultimate decision that the VCAT may make, the decision to apply to the VCAT determined a question affecting their rights because it was sufficiently related to any VCAT decision that may be made such that certiorari may issue.

The Court, in its joint judgment, agreed with the reasoning and conclusions reached by Derham AsJ, at first instance, that making an application under s 548 of the Residential Tenancies Act was not a decision under the Administrative Law Act, such that leave to appeal must be refused.

The Court noted that the correct starting position was to determine what was meant by 'decision' as defined in s 2 of the Administrative Law Act, rather than the principles as to when certiorari might be available for anterior decisions. The Court held there were three elements to this definition of 'decision': first, a decision has a degree of finality about it; second, the decision has some legal force derived from either the common law or statute; and, third, it must be determinative of a question affecting rights.

The making of the application by the Director to the VCAT did not determine how the application was to be decided, as this was a matter for the VCAT to determine having heard from the parties. The VCAT does not review the decision of the Director to make an application but decides for itself on the merits whether an order terminating the tenancy should be made.

The Court acknowledged that the application was a precondition to the VCAT being able to make an order under the Residential Tenancies Act, but the mere fact of the application did not influence, let alone determine, how the application would be determined on its merits. The VCAT, in arriving at its decision, is not concerned with why the Director commenced proceedings; neither was it bound by the Director's belief that the rental premises were being used in the trafficking of heroin. The VCAT is required to focus on whether it is satisfied that the statutory conditions for terminating the tenancy agreement have been met based on the evidence and submissions before it. The Director, in making an application under s 548 of the Residential Tenancies Act, will have to consider whether there is a proper basis for making the application, including whether the VCAT could be satisfied that it is reasonable and proportionate to make the orders sought. However, in doing so, the Director does not determine these matters and is not making a decision as defined in the Administrative Law Act.

Additionally, the making of the application to the VCAT did not change the applicant's rights under the tenancy agreement. It neither deprived the applicant of property nor interfered with the applicant's rights under the tenancy agreement. Rather, the tenancy agreement continued on foot and was unaffected by the application; it was 'neither less secure nor conditional' as a result of the application. The making of the application did not alter the Director's rights or otherwise alter or reduce the rights of the applicant to remain as a tenant and continue to enjoy exclusive possession.

Consequently, the decision to commence proceedings was not legally operative to determine any question that materially affected the rights of the applicant. It put in train a process, but in doing so it did not, in itself, determine or affect the rights of the applicant or any other person.

It was conceded that in certain contexts it is possible for a decision which is legally operative and relevantly determinative to be made before an ultimate decision is made such that some decision processes may yield more than one decision. However, in approaching construction of the Administrative Law Act the Court noted that the Act is facultative in nature and designed to overcome technical requirements associated with the common law writs; thus must be construed in that context.

Here, an overly inclusive approach to the meaning of 'decision' in the Administrative Law Act would be liable to 'encourage the atomisation of a single decision-making process into a series of separate decisions each giving rise to an obligation to provide reasons, potentially disrupting the orderly decision-making sequence' such that, in light of the Court's reasoning above, 'it is plain that the decision of the Director to commence an application' under s 548 of the Residential Tenancies Act in the VCAT is not a decision for the purpose of the Administrative Law Act ([26]).

Datafin: endgame

*Chris Bleby**

R v Panel on Take-overs and Mergers; Ex parte Datafin Plc[1] ('*Datafin*') is a member of that club of rare cases that have become eponymous in the description of a principle of law. Calling it the '*Datafin* principle' tends to cast it as an add-on to orthodox administrative law principles. My ultimate proposition is that the *Datafin* principle is not only orthodox but also inevitable. I will try to make good that proposition along the way to making some broader observations about the principle.

First, I will summarise the principle and sketch out what I think must be its scope. I will then refer to a cross-section of cases in Australia that have had cause to refer to it and which have offered some perspective as to whether the principle can or should be said to apply in Australia. I hope to then put those observations into a degree of historical context, manifested in the broadly understood division between public law and private law.

Much has been written about that division, and much of that has been critical. My sketch in this article will not pretend to do the scholarship justice. Rather, I shall skip through some of the key manifestations of this distinction and then offer a brief historical perspective on the contingency of the identity of wielders of public power. I will do this by reference to the scholarship of PP Craig.

Finally, I hope to use this contingency as a platform for concluding that not only should the *Datafin* principle be recognised as a principle of Australian law but also it is rather difficult to see how it cannot be. As a matter of principle, at least, its recognition is inevitable. Its scope of application is another matter.

The *Datafin* principle

Datafin concerned the functions of the Panel of Take-overs and Mergers. Sir John Donaldson MR described this as a 'truly remarkable body'.[2] It was an unincorporated association without legal personality. It had 12 members, appointed by and representative of various associations of industry: banking, insurance, finance, accountants and more. It had no statutory, prerogative or common law powers. It had no contractual relationship with any part of the financial market, over which it had a function of regulation.

This function of regulation lay in its role of 'devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions'.[3]

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1 [1987] QB 815.

2 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 824.

3 Ibid 826.

It performed, in essence, a role of self-regulation in the UK financial market. The introduction to the code explained the process of investigating an alleged breach of the code by the panel — then, on a finding of a breach, the recourse to private reprimand or public censure or, in serious cases, further action 'designed to deprive the offender temporarily or permanently of his ability to enjoy the facilities of the securities markets'. There was the facility of appeal to its appeal panel. Standing behind its findings was the possibility of the Department of Trade and Industry, or the stock exchange, acting on its findings to penalise an offender. The effective regulatory power of the panel over participants in the UK financial market was tremendous.

Datafin plc and another company, Prudential-Bache, made a complaint to the panel about two other companies having, contrary to the code, 'acted in concert' — a suitably British euphemism for where entities agree to cooperate actively to obtain shares in a company to obtain control of the company. The panel dismissed the complaint. Datafin and Prudential-Bache sought judicial review.

The Master of the Rolls examined, briefly, the unique history of the panel, which performed a function regulated by statute in just about every other comparable market. This history was essentially of the City of London regulating itself by professional opinion. The increasingly understood need for intervention to prevent fraud caused government to reinforce the institutions capable of doing so but also building on what was already there. This included accepting the self-regulatory role of the panel. As the Court then put it:

> The issue is thus whether the historic supervisory jurisdiction of the Queen's courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system.[4]

The clearest statement in answer to this question appears in the judgment of Lloyd LJ, who described the bodies that were the object of the question not as 'private' bodies but by reference to the source of their power, falling between the two extremes of statute or subordinate legislation on the one hand and contractual on the other. As he put it:

> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.[5]

4 Ibid 836.
5 Ibid 847.

He rejected the proposition that the sole test of whether a body is subject to judicial review is the source of its power. Where a source of power was purely contractual, such as that of a private arbitral tribunal, this was historically regarded as disqualifying the function as being characterised by a public duty.[6] Otherwise, however, while the source of power was a relevant part of the inquiry, ultimately:

> [t]he distinction must lie in the nature of the duty imposed, whether expressly or by implication. If the duty is a public duty, then the body in question is subject to public law.[7]

So the application of the principle to a body whose power is sourced not in statute or contract (nor, I would add, the prerogative) requires ascertaining whether a duty is a public duty.

In *Datafin*, the application was refused. The Court observed that the panel combined the functions of legislator, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code.[8] It held that there was little scope for intervention on the basis that it had promulgated rules that were ultra vires or on the interpretation of its own rules. The panel had a discretion to dispense with operation of the rules. As to its disciplinary function, there was an internal right of appeal, and Sir John Donaldson MR observed that, if the allegation was of a breach of its rules, the Court would be reluctant to intervene absent any credible allegation of lack of bona fides. He concluded:

> The only circumstances in which I would anticipate the use of the remedies of certiorari and mandamus would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice — in other words, unfairly.[9]

So, notwithstanding the amenability of the panel to judicial review in the exercise of its public functions, the scope of intervention was narrow.

Peeking ahead, we can already see the basis of ambivalence for application of the principle in Australia. The Take-overs and Mergers Panel was an unincorporated association whose powers were without statutory or contractual foundation. It was a product of an organic development of governance in the City of London that can be traced back to the rise of the livery companies from the 12th century, more commonly known as the guilds. The guilds had extraordinary powers of governance in the City and still have a role today. The panel in *Datafin* does not appear to have been a creation of the old guilds themselves; but, as a creation of a group of trading and financial associations with a view to self-regulation, it stems from that tradition of governance.

6 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864, 882 (Lord Parker CJ); *R v Industrial Court, Ex parte ASSET* [1965] 1 QB 377, 389 (Lord Parker CJ).
7 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 848.
8 Ibid 841.
9 Ibid 842.

Australia's tradition of governance comes from the original grants of letter patent, imperial Acts introducing responsible government such as the *Australian Constitutions Act 1850* (Imp) and the ground zero of federation. Our starting point is different: it would not be surprising to find fewer instances providing conditions for the potential operation of the *Datafin* principle. We have a different historical tradition of governmentality. Having said that, Australia is not immune to the attractions of industry self-regulation.

Australian ambivalence

In 1988, *Datafin* was applied in the Supreme Court of New South Wales, in *Typing Centre of New South Wales v Toose & Others*[10] ('*Toose*'). The Advertising Standards Council ('ASC') had been established by charter in 1974 by the Media Council of Australia ('Media Council'), the Australian Association of National Advertisers and the Advertising Federation of Australia. Its functions related to the promotion, maintenance and improvement of standards and ethics in the advertising industry. It had the power to determine complaints of breaches of advertising standards, set out in various advertising codes promulgated by the Media Council. The Media Council had been established in 1967 and its membership included most of the commercial media companies in Australia.

The ASC had established procedures for determination of a complaint of a breach of advertising standards. If it upheld the complaint, it would bring the matter to the attention of the Media Council, which in turn could impose sanctions on any advertising agency. That could include fining the agency or even removing its accreditation. It would not sanction the advertisers themselves, but, in the event of a contravention, no media owner would accept the advertisement for publication because of their membership of the Media Council and obligation to comply with its rules. Because of the restrictive effect on competition that this scheme had, the Media Council obtained authorisations from the Trade Practices Commission.

In 1986, a detailed complaint was made about a press advertisement inserted by the Typing Centre of New South Wales ('Typing Centre'), a business college. The advertisement was said to be misleading in the extreme. The secretary of the ASC sent a copy of the complaint to the Typing Centre, which responded by rejecting the allegations in general terms. It did not attempt to answer the specific complaints. In 1987, the ASC upheld the complaint, holding that the advertisement was in breach of the clause of the Advertising Code of Ethics which provided that '[a]dvertisements must be truthful and shall not be misleading or deceptive'.

The Typing Centre sought to appeal and, for the first time, to respond to the specific complaints. The ASC declined to review its determination but said it would consider any further evidence submitted. The solicitors for the Typing Centre made a number of allegations of denial of procedural fairness in the original letter. The ASC did, in the event, agree to consider the matter afresh and once again upheld the complaint. The Typing Centre sought judicial review, complaining of a denial of natural justice.[11]

10 *Typing Centre of New South Wales v Toose & Others* (Supreme Court of New South Wales, Matthews J, No 25025 of 1988, 15 December 1988).

11 Ibid.

Whether the ASC was amenable to judicial review was squarely in issue. Its powers derived from neither statute nor contract. Matthews J of the Supreme Court of New South Wales, after reviewing Datafin, characterised the issue as being whether the ASC exercised public functions, or functions which have public consequences. She held:

> The answer, in my view, is overwhelmingly in the affirmative. The ASC has power, through its complaints procedures, to interpret and mould the various advertising Codes in precisely the same way as the courts can interpret and mould Acts of Parliament. This, to my mind, is a very public function indeed. And it goes further than this. Many provisions of the Codes, (including the one we are concerned with in this case), do little more than restate the existing law. In relation to these provisions, the ASC is, in effect, providing an alternative forum for dealing with matters which might otherwise need to be litigated in the courts. And all this in relation to people or organisations who need do no more than insert a single media advertisement in order to attract the ASC's jurisdiction.[12]

Her Honour went on to comment on the central role of advertising in a society dependent on a system of mass communication. However, she held that, on any view, the importance of advertising in the community was so self-evident that it was clear that the ASC must be treated as a public body and, in appropriate cases, subject to judicial review.[13] She found it was bound to apply the rules of natural justice.[14] In the event, she found that there was no breach of the rules of natural justice and found for the ASC.

Toose is one of a number of cases which, between 1988 and the early 2000s, effectively referred to *Datafin* with approval and assumed its operation in Australia, without interrogating whether or not the principle applied. Emilios Kyrou, a Justice of the Supreme Court of Victoria, undertook a most helpful review and analysis of these cases in an article published in the *Australian Law Journal* in 2012.[15] In addition to *Toose,* his Honour identified:

- *Norths Ltd v McCaughan Dyson Capel Cure Ltd,*[16] relating to the Australian Stock Exchange;
- *Victoria v Master Builders' Association of Victoria;*[17]
- *MBA Land Holdings Pty Ltd v Gungahlin Development Authority;*[18]
- *McClelland v Burning Palms Surf Life Saving Club;*[19] and
- *Whitehead v Griffith University.*[20]

12 Ibid 19 (Matthews J).
13 Ibid 20 (Matthews J).
14 Ibid 21 (Matthews J).
15 E Kyrou, 'Judicial Review of Decisions of Non-governmental Bodies Exercising Governmental Powers: Is *Datafin* Part of Australian Law?' (2012) 86 *Australian Law Journal* 20.
16 (1988) 12 ACLR 739.
17 [1995] 2 VR 121.
18 (2000) 206 FLR 120.
19 (2002) 191 ALR 759.
20 [2003] 1 Qd R 220.

In 2002, in *Minister for Local Government v South Sydney City Council*,[21] Spiegelman CJ expressed the view that the common law basis for the duty to accord procedural fairness was the basis for the extension of the principles of judicial review to private bodies that make decisions of a public character, citing *Datafin*.

It was on the basis of these cases that in the 2004 case of *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd [No 2]*[22] Shaw J of the Supreme Court of New South Wales concluded that *Datafin* was applicable in Australia and that decisions of the Financial Industry Complaints Service, a body incorporated under the *Corporations Act 2001* (Cth), were amenable to judicial review.

Shortly before this, in *NEAT Domestic Trading Pty Ltd v AWB Ltd*,[23] the High Court considered whether a decision of a private body, AWB (International) Ltd, was made under the *Wheat Marketing Act 1989* (Cth). This would determine justiciability of its decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). Under the Wheat Marketing Act, the Wheat Marketing Authority required the approval of AWB before giving consent to export wheat from Australia. Therefore, should AWB withhold its consent (which it did), it could curtail the powers of the WMA insofar as the WMA would be compelled, by the Wheat Marketing Act, to reject an application for the export of wheat.

McHugh, Hayne and Callinan JJ raised the question of 'whether public law remedies may be granted against private bodies'[24] but declined to resolve it. They ultimately found that decisions by the AWB were not made under an enactment for the purposes of the ADJR Act.[25]

Gleeson CJ preferred the view that the decision of AWB was made under an enactment but would have dismissed the application on its merits. He further said, however:

> While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of what; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly on wheat; or, in legal terms, it has the power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the Trade Practices Act.[26]

Kirby J (in dissent) referred to *Datafin* in the context of 'whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law'.[27] His Honour then said in reference to *Datafin*:

21 (2002) 55 NSWLR 381 [7].
22 (2004) 50 ACSR 554.
23 (2003) 216 CLR 277.
24 (2003) 216 CLR 277 [49]–[50].
25 (2003) 216 CLR 277 [52]–[55].
26 (2003) 216 CLR 277 [27].
27 (2003) 216 CLR 277 [67].

> Whether or not the criterion of the exercise of 'public power' is sufficiently precise to be accepted as the basis for review of decisions under the common law, the observations about the nature of the power identified in cases such as *Forbes* and *Datafin* are helpful in analysing whether particular decisions are of an 'administrative character'.[28]

Kirby J identified what ultimately might be said to be the hard question in the potential application of *Datafin* in any contest — that is, what can be said to amount to public power where that question is not answered by reference to the power having a statutory or prerogative source. I will return to this question shortly.

In 2010, in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,[29] the New South Wales Court of Appeal reviewed the authorities in Australia engaging with the *Datafin* principle. Basten JA concluded that there was an absence of authority in Australia that actually addressed whether *Datafin* applied.[30] In *CECA Institute Pty Ltd v Australian Council for Private Education & Training*,[31] published shortly after this, Kyrou J of the Supreme Court of Victoria acknowledged that most of the cases that had referred to *Datafin* with approval had done so in obiter but maintained that it had been the basis of relief in *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd [No 2]*.[32]

The article by Emilios Kyrou in the *Australian Law Journal* addresses these cases, and it is not necessary for me to recite them all here. I note the decision of the Supreme Court of South Australia in *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide*,[33] which concerned a failure by the Corporation of the City of Adelaide to renew a licence of a stall holder in the Adelaide Central Market. One ground of review was that the corporation had breached the rules of natural justice. Vanstone J held that the decision was made in the course of a conventional commercial relationship. She said:

> The mere fact that the power to contract is found in the LGA [Local Government Authority] does not mean that any decision taken relevant to a contract is amenable to judicial review. Not every decision taken by a statutory corporation pursuant to a general power to contract is liable to judicial review; only administrative decisions affecting rights, interests and legitimate expectations …[34]

She expressed the view that *Datafin* had not yet been accepted in Australia.[35] In doing so, she located that principle in the need to find a sufficient 'public element or flavour' to the decision,[36] which she considered that, in any event, did not exist in that matter.

Then, in 2012, the Victorian Court of Appeal in *Mickovski v Financial Ombudsman Service Ltd*[37] was faced with a submission that the decision-making of the Financial Ombudsman Service ('FOS') was amenable to judicial review on the basis of the *Datafin* principle. The

28 (2003) 216 CLR 277 [115], referring to *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.
29 (2010) 78 NSWLR 393.
30 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 [81].
31 (2010) 30 VR 555.
32 (2004) 50 ACSR 554. See *CECA Institute Pty Ltd v Australian Council for Private Education & Training* (2010) 30 VR 555 [86].
33 (2011) 110 SASR 235.
34 Ibid [17].
35 Ibid [26], [30].
36 Ibid [22], citing *Hampshire County Council v Beer* [2004] 1 WLR 233, 247.
37 (2012) 36 VR 456.

FOS conducted an alternative dispute resolution system for the superannuation industry, on behalf of its members. It did so pursuant to a scheme approved by the Australian Securities and Investments Commission, pursuant to s 912A(1)(g) of the *Corporations Act 2001* (Cth). Mr Mickovski had lodged a complaint with the FOS about the rejection by Metlife of his claim for total and permanent disability benefits. On the submission of the application of the *Datafin* principle to the FOS, the Court said:

> Arguably, there is some force in those submissions. Putting aside doctrinal difficulties which it has been suggested could stand in the way of extending judicial review beyond the realms of statutory and prerogative decision making, the *Datafin* principle is appealing. In face of increasing privatisation of governmental functions in Australia, there is a need for the availability of judicial review in relation to a wider range of public and administrative functions. The *Datafin* principle offers a logical, if still to be perfected, approach towards the satisfaction of that requirement. There have also been a number of first instance decisions in which it has been held or suggested that the *Datafin* principle does apply in Australia, and indeed in the past there has been some limited recognition given to the principle in this court.
>
> That said, however, the clear implication of the High Court's decision in *NEAT Domestic Trading Pty Ltd v AWB Ltd* and of the observations of *Gummow and Kirby JJ in Gould v Magarey* is that we should avoid making a decision about the application of Datafin unless and until it is necessary to do so. In this case, we do not consider that it is necessary to do so.[38]

Finally, in the 2017 case of *L v South Australia*,[39] the Chief Justice reviewed the authorities to date on the application of *Datafin* in Australia, observing that the difficulty with the criteria for identifying that the body was exercising the necessary public function was that, in many cases, the result would point to the power having a statutory or prerogative source on the one hand or a contractual source on the other.[40] That is an unsurprising observation, given the Australian governmental tradition.

The Chief Justice also waded into the thicket of characterising public power for the purpose of the application of *Datafin*. He considered *Victoria v The Master Builders' Association of Victoria*, [41] where the Victorian Government had established a task force, being a non-statutory organisation directed 'to pursue remedial action against contractors who have engaged in collusive tendering on state government projects'. The task force could place contractors who did not respond satisfactorily to a letter setting out the terms of future engagement and inviting them to provide a statutory declaration denying involvement in collusive practices over the past six years. Eames J had held:

> [T]here can be no doubt that the state, in acting through the task force, is acting pursuant to a perceived public duty. The task force is applying the coercive force of the state, thus benefiting from the position of dominance in the industry which the state has and which no individual corporation, of whatever size, or any individual, possesses. In pursuing this course the state is undoubtedly seeking to address a matter of public importance. … Furthermore, the impact of the decisions of the task force upon public companies must have public law consequences, if only because the well-being of the corporate sector is related to the financial stability of the state.
>
> I conclude, therefore, that there is no impediment to this court reviewing the decisions …[42]

38 Ibid [31]–[32] (footnotes removed).
39 (2017) 129 SASC 180.
40 *L v South Australia* (2017) 129 SASC 180 [141]–[142] (Kourakis CJ, Parker and Doyle JJ agreeing).
41 [1995] 2 VR 121.
42 Ibid 164.

Kourakis CJ criticised this conclusion from the perspective of the nature of the power being exercised:

> With respect the decision of the Full Court in the MBA [Master Builders' Association] case appears to conflate the question of practical economic and social power with a legal power to affect existing rights and interests. As a result, it subjected the voluntary investigations of public servants in the Department of Justice and the communication of the results of those investigations to judicial review for legality even though they had not exercised any legal power in doing so. They were not acting in aid of an exercise of a true prerogative power. Nor were they engaging in any legal power like the power to contract, which they held in common with all persons. Nor did their conduct operate as a condition precedent to conferral of a legal right, privilege or power.[43]

This criticism strikes directly at conceptions of what can be characterised as public power. It raises legitimate questions as to its content by reference, in the first instance, to both the source and object of the power under consideration. Its reference to the need for a legal power to affect existing rights or interests brings into the mix the question of standing, which adds a further dimension to the issue.

Public power and the public–private divide

Let us come back, then, to the concern of Kirby J about the precision of the criterion of 'public power' as an obstacle to the implementation of *Datafin* and, it might be said, to its adoption. This problem is well recognised, and grappled with, in the UK, where the principle is accepted. In *R (Tucker) v Director General of the National Crime Squad*,[44] Scott Baker LJ said:

> The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances … The starting point, as it seems to me, is that there is no single test or criterion by which the question can be determined.[45]

Unsurprisingly, Aronson et al devote considerable attention to the principle. Acknowledging the lack of precision of the test, they say:

> *Datafin* and its British progeny have propounded an admittedly indeterminate test, but we believe that this is part of the price that must inevitably be paid for recognising the changing shape of the state. Even identifying the state can sometimes present difficulties. *Datafin's* headline test (public function) looks beyond the decision-maker's identity (public or private) to its function (governmental). But as in *Datafin* itself, the English cases also look on occasion to whether the so-called private entity is in fact doing 'the

43 *L v South Australia* (2017) 129 SASC 180 [152] (Kourakis CJ, Parker and Doyle JJ agreeing).
44 [2003] ICR 599.
45 Ibid [13].

> government's' bidding in much the same way as 'the administration' itself. The doctrinal difficulties are somewhat lessened where the entity in question can be said to be in partnership with the government itself.[46]

So, let us move back to the tools we have to conceive of public power. Public power is a historical conception that helps define what is broadly and problematically described as the 'public–private law distinction'.

I expect that we all share fairly consistent understandings of the disciplines that fall within the spheres of public law and private law, respectively. When we phrase the distinction in terms of law, we are talking about the manifestations of an abstraction. These manifestations are usually expressed in terms of available causes of action, remedies and standing. The controversy about *Datafin* itself can be expressed as whether a non-governmental body is amenable to relief that takes the form of the old prerogative writs.

This is one example of what has been described as the 'interface' between public and private,[47] where there is some basis for challenging the accepted classification of a matter as public or private. There are other manifestations of this interface. There is, for example, a history of litigation that has attempted to impose liability in tort on account of the exercise of public powers. *Graham Barclay Oysters Pty Ltd v Ryan*[48] concerned a claim that extended to a local and state government for the contamination of oysters with faecal matter. As Gleeson CJ put it:

> Accepting that local government authorities, and State governments, have responsibilities for public health and safety, those responsibilities are owed to the public. Mr Ryan must establish that the State, and the Council, owed a duty of care to him, as a consumer of Wallis Lake oysters. If such a duty exists, then presumably a similar duty is owed to all consumers of all potentially contaminated food and, perhaps, to all person whose health and safety might be offered in consequence of governmental action or inaction. What is the content of the duty owed to Mr Ryan, or to oyster consumers? If it is not possible to answer that question with reasonable clarity, that may cast doubt on the existence of the duty.[49]

As we know, the Court held that no duty of care arose in that case.

Pyrenees Shire Council v Day[50] concerned a fire caused by a latent defect in a chimney, of which the local council had been aware. The council had advised the tenant of the time by letter but had not exercised its statutory powers to ensure compliance with the direction given in the letter. A majority of the High Court held the council liable, Gummow and Kirby JJ holding that the council had breached a duty of care owed to the tenants at the time of the fire. Gummow J noted the adage of the difference between public and private law, referring to the judgment of Dixon CJ in *South Australia v The Commonwealth*,[51] but added:

46 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2001) [3.190] (footnotes removed).
47 E Rock, 'Resolving Conflicts at the Interface of Public and Private Law' (2020) 94 *Australian Law Journal* 381.
48 (2002) 211 CLR 540
49 Ibid [8] (Gleeson CJ).
50 (1998) 192 CLR 330.
51 (1962) 108 CLR 130.

> This is not to deny that the law of tort, with its concerns for compensation, deterrence and 'loss spreading', may bear directly upon the conduct of public administration. The established actions for breach of statutory duty and for misfeasance in public office counter any such general proposition. Again, significant questions of public law have been determined as issues in actions in tort, particularly in trespass.[52]

Most recently, of course, we have had the judgment of Bromberg J, currently on appeal to the Full Court of the Federal Court of Australia, in *Sharma v Minister for the Environment*.[53] Bromberg J found that the Minister owed a duty of care when considering whether to give a statutory approval for the extraction of coal from a coal mine, in relation to the avoidance of personal injury to the children applicants. I do not propose to analyse that decision here, but I note that one of the arguments that Bromberg J rejected was that to find a duty of care would be incoherent with administrative law principles, as it would be inconsistent with the limited role of the courts in supervising the legality of statutory decision-making.[54]

Other areas of the 'interface' between public and private creating a need to resolve potential incoherence are where conduct amounts to both a criminal offence and a civil wrong, and in the event of claims for misfeasance in public office, as already noted above.

Dr Ellen Rock has recently written an excellent article examining the various tools used to resolve the tensions arising at the interface. These include the doctrine against collateral attack, estoppel by record and the court's inherent power to stay proceedings.[55]

These various facilities, in context, tend to resolve the tension by putting in fence posts to maintain the public–private distinction and indicating the point at which the fence may not be crossed or by closely guarding the gate. This may be done, for example, by circumscribing the content of the duty of care held by a decision-maker or identifying criteria by reference to which collateral attack may be permitted.[56]

Datafin does not kick the fence down completely, either, as we can see from its refusal to enter the field of contractual relations. However, by focusing on the character of the function, it potentially cuts a much bigger hole in the fence than we are used to.

The inevitability of *Datafin*

Pluralist democratic theory

I share the view of Aronson et al that this particular hole in the fence is inevitable. The public–private divide is a product of a theory of government that developed in the 18th and 19th centuries. Dicey's Hobbesian conception of parliamentary sovereignty had a critical impact upon administrative law. I cannot do justice to this history here, but I do recommend the seminal work by PP Craig, *Public Law and Democracy in the United Kingdom and the*

52 Ibid 140.
53 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560.
54 Ibid [419]–[427].
55 Rock (n 47).
56 See, eg, J*acobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568 [93] (Besanko J).

United States of America.[57] Dicey's conception, very summarily put, was one of representative democracy justifying the transferring of supreme power from the King to the Commons. He held to a belief in legislative monopoly in Parliament, assuming that:

> [t]he Commons did control the executive and that all significant governmental power was and should be directed through Parliament. The state was unitary, with all real public power being concentrated in the duly elected Parliament.[58]

This view of legislative monopoly had profound consequences for administrative law. As Craig describes it:

> It is apparent that the execution of the legislative will may require the grant of power to a minister or administrative agency. Herein lies the modern conceptual justification for non-constitutional review. It was designed to ensure that the sovereign will of Parliament was not transgressed by those to whom such grants of power were made. If authority had been delegated to a minister to perform certain tasks upon certain conditions, the courts' function was, in the event of challenge, to check that only those tasks were performed and only where the conditions were present. It there were defects on either level, the challenged decision would be declared null. For the courts not to have intervened would have been to accord a 'legislative' power to the minister or agency by allowing them authority in areas not specified by the real legislature, Parliament. The less well-known face of sovereignty, that of parliamentary monopoly, thus demanded an institution to police the boundaries which Parliament had stipulated. It was this frontier which the courts patrolled through non-constitutional review.[59]

Craig is at pains to explain that this was not how the judiciary originally conceived of judicial review, the prerogative writs existing in form much earlier than the advent of Dicey's theory of legislative monopoly. The writs existed to ensure the regular courts' dominion over inferior tribunals and to provide remedies for those illegally or unjustly treated. Moreover, privative clauses have always been construed creatively, in order to be got around. But gradually judicial review became framed in terms of giving effect to the will of Parliament.[60]

One further consequence of the parliamentary monopoly on public power was the need for a private right to obtain relief against the executive. Executive power was required to be kept within its boundaries. But the role of the courts in keeping these boundaries proceeded on the assumption that only those who had private law rights had access to those processes. As Craig describes it:

> The gateways to administrative law, whether they be natural justice, standing, or the ability to apply for relief, were barred to those who did not possess such rights. Courts acted on the assumption that they were simply settling an ordinary private dispute in contract, tort, etc., in which one of the litigants happened to be a public body. The sole judicial function was to delimit the ambit of private autonomy by demarcating the area in which the public body could legitimately operate.[61]

57 PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990).
58 Ibid 20–1.
59 Ibid 21–2.
60 Ibid 22–3.
61 Ibid 27.

It followed that decisions relating to social welfare and licensing, for example, which do not rely on the traditional formulations of private rights, were excluded from judicial review. Moreover, limiting the scope of judicial review in this way denied any sense that its concern was with the legitimate ambit of the regulating legislation.[62]

The development of the pluralist theory of democracy in the 20th century threw down a fundamental challenge to this Diceyan vision. This theory recognised that legislation is made after negotiation with interest groups and also had an understanding that Parliament does not actually scrutinise the legislation it creates. Parliament is a far less coordinated public power than Dicey would have it. It is dominated by the executive. It is subject to a system of interest representation. It is a key understanding of the theory of pluralist democracy that other institutions and bodies exercise public power.

Craig explains that this theory challenges the Diceyan vision of legislative monopoly with empirical evidence:

> *Constitutiona*l conventions should be founded on some measure of empirical evidence. If our theoretical constructs depart too much from reality, they risk becoming at best empty vessels; at worst they serve as invalid premises for the development of more particular rules of conduct. Few can seriously maintain that the picture of power and legislative monopoly ascribed to Parliament accords with reality. A more accurate portrayal of our political system would highlight two themes, both of which have direct relevance to the issue of participation: the growth in the power of the executive, and the increasingly complex nature of public decision-making. The former undermines the ideal of parliamentary power, and thereby places the value of primary participation, in the form of the vote, in its true perspective. The latter challenges both the ideal of parliamentary power and the legislative monopoly of Parliament. In doing so, it raises the question of whether other forms of participation are warranted.[63]

Craig is an English scholar, and his work focuses on the evolution of institutions in the UK, but he describes the post-war growth of governmental agencies that do not adhere to the old departmental norm in a fashion that is recognisable enough in Australia.[64] He describes quangos and various fringe organisations but also the growth of government contracting, which has a substantial impact on policy-making.

From this idea of pluralist democracy, we can recognise the impact of corporatism, which has been defined as follows:

> Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non- competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.[65]

62 PP Craig, *Administrative Law* (Sweet & Maxwell, 2nd ed, 1989) 15.
63 Craig (n 57) 167– 8.
64 Ibid 169.
65 PC Schmitter, 'Still the Century of Corporatism?' in PC Schmitter and G Lehmbruch (eds), *Trends toward Corporatist Intermediation* (SAGE, 1979) 13, quoted in Craig (n 57) 148.

The relevance of theories of pluralism and corporatism here is to recognise that the state is not unitary in any meaningful sense. What follows from this is that a unitary theory of the state and public power is insufficient to ensure *accountability* in public decision-making. The model recognises that public power is exercised by a diverse range of institutions and individuals.

One major consequence of the development of pluralist theory was that it did not support the notion that an affected private right was a precondition to challenging a decision on the basis that it was unauthorised — that is, the model has profound consequences for rules of standing, once it is understood that the focus is on the accountability for the exercise of public power and not the vindication of private rights against the executive.

That does not mean that rules of standing have been done away with. The facility of the relator action has endured, explained by Lord Wilberforce in *Gouriet v Union of Post Office Workers*.[66] That case identified the continuing need for a 'special interest'. Lord Denning had quite a different view.[67] So did Murphy J in *Onus v Alcoa*,[68] while the majority in that case granted standing on the basis of a 'special interest' on the part of the Aboriginal claimants.[69] Questions of standing continue to trouble, not least because of the risk of conflation of the public interest and governmental interests in the ameliorating facility of relator actions.[70]

The logic of pluralist theories of public power had further consequences. Under the Diceyan model, the answer to the question of against whom administrative remedies should be applied was easy: it was those bureaucratic bodies that stepped outside the boundaries allocated by Parliament. But once all the influences that play on the legislative processes came to be recognised, the issue was no longer one of enforcing private rights against the executive on the basis that the executive had exceeded the power granted to it. It began to extend to accountability for the exercise of public power. Craig observes, in consequence:

> It may be argued that any distinction between public and private law is impossible to draw, or more moderately, that which bodies should be subject to public law will have to be defined on an ad hoc basis.[71]

This understanding of public power immediately throws up a direct challenge to the logic of *not* accepting *Datafin* as a necessary principle of judicial review.

I have not, of course, been able to do the theories of pluralist democracy justice by any means. The point is that, while the available scope of *Datafin* in Australia will depend on our own contingencies of organisation of public power, there is nothing in post-Diceyan conceptions of public power that closes off its application. In other words, the historical importance of *Datafin* is that it represented a fundamental departure from a necessary consequence of the Diceyan theory of parliamentary monopoly on public power.

66 [1978] AC 435, 477.
67 Lord Denning, *The Discipline of Law* (Butterworths, 1979) 144.
68 (1981) 149 CLR 27, 44.
69 Ibid 37 (Gibbs CJ)
70 See, eg, *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 425–426 (McHugh J 449–450, Kirby J 475–476, Callinan J).
71 Craig (n 62) 29.

The effect of Kirk

The consequences of *Datafin* for Dicey's conception in English administrative law necessarily lay in non-constitutional judicial review, and they were expressed to do so. However, in Australia over the last 25 years, administrative law has been relentlessly constitutionalised. For present purposes, let me just refer to the now well-known statement of the High Court in *Kirk v Industrial Court of New South Wales*:

> There is but one common law of Australia[72]. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of *State executive and judicial power by persons and bodies other than that Court* would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'[73]. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[74]

This passage quite deliberately leaves it open as to who or what in any given instance might be exercising state executive power. Its very logic — that there must not be islands of power immune from supervision and restraint, and that this is a consequence of a defining characteristic of state Supreme Courts — necessarily challenges principled resistance to the proposition that *Datafin* applies in Australia. *Datafin* is, at its essence, a case about the facility to challenge the lawfulness of the exercise of public power, no matter its source.

The content of the principle in Australia — what amounts to an exercise of public power — is more problematic. The cases that have grappled with the issue tend to rely on instinctive understandings of public power, as indeed did *Datafin*. However, the constitutionalised framework of judicial review in Australia would seem to require placing the question of content, being the nature of public power, on a defensible theoretical foundation. I will briefly try to illustrate my thinking, which is still somewhat formative and necessarily expressed at a high level of abstraction.

In any given case, the nature of the 'public power' in question will affect the type of error capable of being committed by a private body in the context of its esoteric function and the type of remedy that may then be available. In *Datafin*, the reviewable obligation of the panel when exercising its functions was held to be confined to the requirement that the panel give procedural fairness. The Court of Appeal contemplated, in this context, the possibilities of relief taking the forms of certiorari and mandamus.

The High Court has confirmed that the entrenched supervisory role of the Supreme Courts extends to the grant of mandamus.[75] Mandamus in the context of the *Datafin* principle raises the prospect of circumstances where a private body is found to have a duty to exercise a public function but has failed to exercise that function at all. In such a case, resolution of the

72 *Lipohar v R* (1999) 200 CLR 485, 505 [43].
73 (1957) 70 *Harvard Law Review* 953, 963.
74 (2010) 239 CLR 531 [99] (emphasis added).
75 *Public Service Association of South Australia v Industrial Relations Commission* (2012) 249 CLR 398 [62]–[63].

question of content would require identifying the public function that has gone unperformed. That identification determines precisely, in the context of the case, the scope of the court's supervisory jurisdiction. It thereby gives content to a defining characteristic of state Supreme Courts.

A properly developed, judicially accepted theory of public power that addresses the question of content, therefore, necessarily also addresses an aspect of that defining characteristic. To leave that constitutional conception to instinctive understandings of the nature of public power would, it seems to me, be unsatisfactory in the extreme.

Conclusion

Datafin itself was an instinctive, common law manifestation of pluralist democratic theory. In Australia, the constitutionalisation of administrative law, at both the federal and state levels, severs the historical relationship between administrative law and whatever might remain of the Diceyan conception of parliamentary monopoly on public power. This, it seems to me, likely demands the inevitability of accepting the *Datafin* principle in Australia.

Recognising this requires us to engage directly with the nature of public power. The cases show an instinctive tendency to assume that which pluralist democratic theory and its offshoots attempt to express. I would like to think that there is scope in Australia to develop, judicially, our understanding of public power with some degree of reference to contemporary, empirically based theoretical frameworks. Indeed, constitutional coherence might be thought to demand this, as our understanding of public power determines an aspect of a defining characteristic of our constitutionally guaranteed state Supreme Courts.

Know your industry; know your regulator

*Katie Miller**

Regulators have a Goldilocks problem — they are expected to have industry knowledge and expertise to be able to regulate effectively, yet they can also be accused of being 'captured' if seen to be too understanding of a regulated population. What is a regulator to do? Being too fatalistic about the likelihood of criticism risks developing a self-referential standard which sets regulators on a course away from public legitimacy and towards increased insularity, defensiveness and, ultimately, a loss of public confidence and social licence. Adopting a responsive, reflexive approach can mean running hot or cold depending on the course of public debate, without any substantive foundation.

Neither approach is sustainable or conducive to public understanding or regulatory compliance. In this article, I propose a path out of the Goldilocks problem by anchoring the relevance of industry knowledge and engagement in the safe harbour of administrative law. My thesis is a relatively simple one: that, in order to perform their functions effectively, regulators need to know their industry; and, equally, for regulation to be efficient, industry needs to know their regulator.

In this article, I provide an overview of the reasons why a regulator needs to know their industry; and, conversely, the reasons why an industry needs to know their regulator. I then connect those needs to administrative law doctrines and values and address some of the potential pitfalls and challenges of regulators engaging with industry. In doing so, I draw on experiences from my professional practice, including racing integrity, police oversight and regulating to protect against the risks of money laundering and terrorism financing.

Know your industry — because the Act requires it

The starting point for any regulator (or anyone who wields public power) is their Act. For some regulators, knowing your industry is required by the Act, either expressly or impliedly. Where an Act confers a decision-making power on an administrative official, it is expected that that official will give 'proper, genuine and realistic consideration to the merits of the case'.[1] The application and requirements of many regulatory schemes turn on questions about the operation, organisation or status of a regulated entity.

For example, whether an entity has obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF Act') turns on whether the entity provides a 'designated service'.[2] Understanding which, if any, designated services are being

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1 *Khan v Minister for Immigration, Local Government and Ethnic Affairs* (1987) 14 ALD 291, 292.

2 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AML/CTF Act'), ss 4 and 5, definition of 'reporting entity'.

provided requires a not inconsiderable amount of information about the operation of the entity and its approach to delivering the relevant services. Due to technological innovation in the financial sector, new entities are emerging that provide services in different ways. Subtle differences in how an entity provides a service can have a significant effect on how the law applies to that entity. In order to give 'proper, genuine and realistic consideration' to the exercise of powers in respect of such entities, it is necessary to 'know the business' — the who, what, how, and sometimes even why.

A regulator's exercise of statutory powers will often be conditional on the consideration of certain factors or the assessment of statutory tests. Tests that use the language of 'reasonableness' or 'all of the circumstances' arguably require consideration of more than the facts of a specific event or instance of conduct. 'Reasonableness' has long been accepted as incapable of fixed expression and adaptable to the circumstances, as well as depending on your perspective.[3] In order to assess what is reasonable in the context of a particular industry, a regulator needs to have some sense of the standards, practices and norms of that industry.[4] Considering all of the circumstances of particular events or conduct requires consideration of the context in which those events occurred — you have to 'know the business' before you can assess its compliance.

The need to know your industry is even stronger in regulatory schemes involving decisions that involve expertise from different disciplines. For example, energy regulators are tasked with making decisions on pricing and tariffs, which involves expertise from economics, law and engineering, as well as matters of principle and methodology of approach.[5] Such decisions require a regulator to exercise judgment on 'numerous interrelated and complex matters, ranging from general principles to findings on specific facts'.[6] The exercise of such judgment requires an in-depth knowledge of the industry, as well as the ways in which different decisions may shape and influence both the industry as a whole and individual participants.

While not nearly as complex as pricing decisions, Acts are increasingly adopting matters that are more a matter of judgment than clear-cut fact. Drawing again from the AML/CTF Act as an example, the Act provides for a risk-based regulatory scheme, in which regulated entities are required to have programs that identify, mitigate and manage risks of money laundering to which the entity and its services may be exposed.[7] Such risk assessments are inherently fact- and circumstance-specific, requiring regulator knowledge of not just the entity but also the broader industry sector in which the entity operates.

Some regulators are also involved in the elaboration of the regulatory framework through regulation and rule-making powers. AUSTRAC has both power to make statutory rules and powers to modify the application of the Act and rules or exempt a particular entity from the

3 Chris Wheeler, 'What Is "Fair" and "Reasonable" Depends a Lot on Your Perspective' (2014) 22 *Australian Journal of Administrative Law* 63.

4 Simon Cohen, 'Fair and Reasonable An Industry Ombudsman's Guiding Principle' (2010) *AIAL Forum* <http://classic.austlii.edu.au/au/journals/AIAdminLawF/2010/18.pdf>.

5 John Tamblyn, 'Administrative Law Meets the Regulatory Agencies: Tournament of the Incompatible?' (2005) 46 *AIAL Forum* 39, 43.

6 Ibid 52.

7 AML/CTF Act ss 81, 84.

Act or rules.[8] The conferral by Parliament of powers to make statutory rules is an express form of 'the incomplete statute', whereby the legislation sets out 'basic policy parameters' and leaves most of the 'considerable detail' to the regulator.[9]

Setting regulatory standards rarely occurs in a vacuum and established industry practices will usually already exist. A regulator tasked with fleshing out the detail of a regulatory framework will need to understand existing practices in order to assess, in the first instance, whether they need to be addressed in the delegated legislation. Industry knowledge can assist in identifying whether there are problems, risks or harms associated with existing practices that need to be controlled or corralled in the regulatory framework. Equally, industry knowledge can identify practices that are suitable for adopting into a regulatory framework, providing clarity for new and existing participants while avoiding the problem of reinventing the wheel.

In addition to rule-making powers and the statutory tests and preconditions to the exercise of powers, Acts increasingly provide expressly for forms of industry engagement. It is common for the functions of regulatory bodies to include 'soft' regulatory tools, such as advice, assistance, education, information and anything else that promotes compliance with the regulatory scheme.[10] On one view, industry engagement may be seen as an obligation on the regulator to provide opportunities for industry to know their regulator. As a matter of practicality, such benefits are rarely unidirectional and both formal and informal industry engagement provide significant opportunities for the regulator to learn about industry practices, challenges, norms and cultures. As a Deputy Commissioner at the Independent Broad-based Anti-corruption Commission ('IBAC'), I regularly presented at the Victoria Police Academy. Each time I visited the academy, I gained a greater insight into policing culture, practices and priorities. This was useful in both scrutinising and questioning the conduct of members who I examined, as well as understanding elements of the policing environment which enabled, or protected against, acts of police misconduct.

Know your industry — because it supports efficient regulation

Effective and efficient regulation can be enhanced through trust between regulator and regulated.[11] Even where coercive powers exist, trust and candour provide a more efficient and effective use of those powers for both regulator and regulated. It is a truth, more often whispered than spoken aloud, that if everyone took every point in a regulatory scheme it would quickly grind to a halt and then collapse.[12] Regulated entities are more likely to be circumspect in their candour if they do not trust the regulator or regulatory scheme.

8 AML/CTF Act ss 229, 247, 248.

9 Mark Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through Westlaw AU' (2021) 28 *Australian Journal of Administrative Law* 6, 14; Peter Nicholas, 'Administrative Law in the Energy Sector: Accountability, Complexity and Current Developments' (2008) 59 *AIAL Forum* 73.

10 See, eg, AML/CTF Act s 212(e); *Independent Broad-based Anti-corruption Commission Act* 2011 (Vic) s 15(5).

11 John Braithwaite and Toni Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society* 1; Adrian Cherney, 'Trust as a Regulatory Strategy: A Theoretical Review' (1997) 9 *Current Issues in Criminal Justice* 71; Valerie Braithwaite, 'Closing the Gap between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 25 <http://press-files.anu.edu.au/downloads/press/n2304/pdf/ch02.pdf>.

12 Described by Braithwaite as the motivational posture of 'disengagement', a defiant posture of dismissiveness to the regulator's authority: Braithwaite (n 11) 34.

Regulators taking the time to learn their industry can assist in building trust in both the regulator and the regulatory scheme itself. An industry that feels heard and respected is more likely to exhibit trust and candour. Regulators build credibility by learning from the 'knowledge and experience of those closest to the intricacies' of the regulated industry.[13] While a regulator is unlikely to ever know as much as a lifelong industry participant, that is a feature (not a bug) of the design. While knowing your industry can narrow the gap between industry and regulator knowledge, a gap must be preserved to ensure that the regulator can act in the public interest by both bringing its own mind and incorporating perspectives from outside of industry into its decision-making.

Mr Sal Perna AM, Victoria's inaugural Racing Integrity Commissioner, is an exemplar of a regulator who made an art form of 'know your industry, know your regulator'. After 11 years in the role, there is hardly an industry participant in thoroughbred, harness or greyhound racing with whom Perna has not met. He has an equal knowledge and appreciation of the practices of multi-million-dollar horse studs as he does of the practices of a trainer in Melbourne's outer suburbs who raced a few dogs on the weekend. Mr Perna is so synonymous with industry engagement that it may surprise some that, under the *Racing Act 1958* (Vic), the Racing Integrity Commissioner does not have an express industry information and engagement function. Regulators do not need statutory authority to know their industry — it is just good practice.

Finally, knowing your industry provides the regulator to properly scrutinise and assess a regulator's information, compliance and candour. Knowing how an industry normally operates is necessary to asking the right, probing questions to break through the gloss of a regulated entity's justifications or assurances of changed behaviour and compliance. Efficient and effective regulation relies on a mixture of both trust and institutional distrust. An effective regulator is not one that accepts without question the positions and claims made by regulated entities. Some challenge and testing are required — and, indeed, expected by the public.

Knowing your regulator

The benefits to industry of knowing their regulator(s) are largely to do with efficiency of compliance. Knowing what the regulatory requirements are, the regulator's position on any contestable issues and the regulator's approach to monitoring compliance provides regulated entities with greater certainty in the development and operation of their systems and procedures for compliance.[14] Uncertainty is expensive, so the greater the clarity and understanding, the lower the costs of compliance.

Where a regulated entity seeks to know their regulator, the success of such efforts will be greatly influenced by the transparency of the regulator. The types of things that regulated entities are likely to be interested in include a regulator's priorities, approach to regulation and, where relevant, approach to complaint handling. Such information can contribute to consistency in the approach to similar matters by both the regulated and the regulator.[15] In

13 Gail Pearson, 'Business Self-Regulation' (2012) 20 *Australian Journal of Administrative Law* 34, 36.
14 Braithwaite (n 11) 28–9.
15 Cohen (n 4) 23.

some regulatory schemes, knowledge of the decisions made by the regulator in individual cases will also be relevant, especially where such decisions lead to new or refined standards or expectations.[16] The Information Commissioners at both state and federal level are particularly good at this approach, regularly publishing decisions that provide guidance in the factually dependent contexts of freedom of information and information privacy.[17]

Regulated entities knowing their regulator also provides a form of accountability to regulators. Providing regulated entities (and the public more broadly) with a clear sense of what can be expected from a regulator enables an assessment of the regulator's performance against their own commitments and objectives, thereby facilitating informed public scrutiny.[18]

Learning about your industry and regulator

Regulators and regulated can build their knowledge of each other through formal and informal processes, such as meetings, industry consultation and education.

Industry education through forums and workshops is now a standard practice amongst regulators. Such education can be adapted to the resources of the regulator and circumstances of the industry. The Victorian Racing Integrity Commissioner has had a long-standing practice of roadshows, with the commissioner touring Victoria for weeks at a time presenting to industry participants at their local racing clubs.[19] In COVID times, regulators are increasingly using technology to deliver education. AUSTRAC has introduced a monthly induction program involving virtual workshops for new regulated entities.[20] In addition to raising entity awareness of their regulatory obligations, education provides regulators with an opportunity to meet and hear directly from industry participants.

Industry consultations also provide a regular and formal opportunity for industry engagement. Consultation is regularly used to test draft guidance and statutory rules against the realities of industry practice. Some regulators use industry advisory bodies to provide an ongoing opportunity for industry and regulator to exchange views about the operation of the regulatory framework.

Industry engagement does not need to be resource intensive or particularly formal. Some of the most effective engagements between regulated and regulator occur in meetings between representatives of the two bodies. Meetings are a significant regulatory and information-gathering tool because they are flexible and adaptable to the needs and circumstances of regulated and regulator. When there are compliance issues, they can provide close and continuing scrutiny of remediation efforts, as well as providing a regulator with the opportunity to literally eyeball the entity and test their commitment to do better in

16 Ibid 27.

17 See, eg, 'Decisions', *Office of the Victorian Information Commissioner* (Web Page) <https://ovic.vic.gov.au/decision/>; and 'Information Commissioner review decisions', Office of the Australian Information Commissioner (Web Page) <https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions/information-commissioner-review-decisions/>.

18 Graeme Orr and Joo-Cheong Tham, 'Work and Employment: Accountability and the Fair Work Ombudsman' (2011) 13 *Australian Journal of Administrative Law* 127, 131.

19 Racing Integrity Commissioner, *Annual Report* 2019–20 (2020) 8.

20 'Induction program for new reporting entities', *AUSTRAC* (Web Page, 2021) <https://www.austrac.gov.au/induction-program-new-reporting-entities>.

the future. As a tool, meetings are available to be deployed by either regulated or regulator and there are many regulated entities — at state and federal level — who are not shy about picking up the phone to introduce themselves to a new regulator.

Monitoring and supervision activities also provide opportunities for in-depth exchange of information between regulator and regulated, especially where they take place on the premises of the regulated entity. The ability to see an entity's operations and ask questions directly can provide a regulator with significant insights, as well as an opportunity for timely — even on-the-spot — feedback about the entity's compliance. The Australian Securities and Investments Commission ('ASIC') has taken the onsite inspection approach a step further by embedding regulatory staff with regulated entities through its Close and Continuing Monitoring program.[21] This program seeks to identify behaviours, environments and cultures that contribute to the risk of misconduct, regulatory breaches and unethical conduct, before such conduct and breaches occur.[22]

Finally, most regulators also have statutory powers to compel a regulated entity to produce information and documents. Such tools are used not only to obtain evidence of particular instances of noncompliance, but also to gather contextual information about the entity's governance, structure and operations.

Knowing your industry and administrative law

I have argued that a regulator needs to know their industry because it is required by their Act. I now turn to establishing this connection through the lens of normative principles of administrative law as reflected in individual grounds of judicial review.[23] While it will ultimately depend on the text, context and purpose of the specific legislation expressing the regulatory scheme,[24] some general observations can be made.

First, the use of context-specific standards such as 'reasonableness' and the use of principles or risk-based regulation implies that industry knowledge may be a mandatory relevant consideration. It would almost be a meaningless nonsense for a regulator to make a decision about the reasonableness of certain conduct, or assess the management of risks, without any knowledge of the relevant industry or business. The prospect that a regulator could make decisions that are ignorant of industry circumstances becomes more remote as Acts continue to provide for industry participation and consultation.

Second, industry knowledge may be seen as either a requirement of or, at the very least, consistent with the obligation to afford procedural fairness. Procedural fairness requires a decision-maker to provide a person affected by a decision with an opportunity to comment

21 Vicky Comino, 'Culture Is Key — An Analysis of Culture-Focused Techniques and Tools in the Regulation of Corporations and Financial Institutions' (2021) 49 *Australian Business Law Review* 6, 13.
22 Ibid 14.
23 Aronson (n 9) 18.
24 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.

on adverse information that is credible, relevant and significant.[25] The obligation to give procedural fairness has also been described by the shorthand of a person being notified of the case against them.[26]

Each of these formulations involves concepts of the affected person and the decision-maker having a shared understanding of the facts relevant and significant to the decision-maker's decision. Procedural fairness can therefore be seen as narrowing the gap in knowledge and understanding between decision-maker and affected person, thus '[promoting] a sense of congruence between the decision-maker and the affected person in the decision-making process'.[27] A regulator that knows their industry and can understand relevant information in context may have a smaller gap between their own understanding and that of the regulated entity. From an instrumentalist perspective, this may influence the nature of responses from regulated entities to any invitation to comment on adverse information, with greater willingness to accept breaches and a focus on what is required for remediation and deterrence.

While the individual grounds of judicial review provide a clear reason for a regulator to know their industry, they are limited to the points at which a regulator makes a decision about a particular regulated entity. Such an approach may be sufficient when considering activities that are transactional, such as deciding applications for payments or licences. It is less so for regulation, which is not a series of transactions but a continuous and ongoing activity. Outside of statutory rule-making powers, most decisions by regulators affect only a small proportion of regulated entities and represent a fraction of the work of any regulator. While they do not attract the same headlines as the exercise of coercive and enforcement powers, the most significant work of a regulator — education and engagement — is done long before a particular administrative decision needs to be made.

To understand industry engagement activities within the frame of administrative law, it is necessary to move beyond discrete grounds of review to conceptual and theoretical perspectives.

I advocate that regulation is a relational activity and that knowing your industry and knowing your regulator provides the respect, trust and shared understanding necessary for a productive relationship. Compared to the more transactional nature of the work of law enforcement agencies, regulators and regulated are in it for the life of the business.

By construing regulation as a relational activity, I position regulation within the dignitarian approach to administrative law, in which administrative authority is construed as a relationship between those who possess government power and those who are subject to it.[28] If a regulator seeks to influence and change behaviour within an industry then it should, as a matter of respect, know something about the dynamics, norms and circumstances of that industry.

25 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

26 Daniel Stewart, 'Taking the Brakes Off: Applying Procedural Fairness to Administrative Investigations' (1997) 13 *AIAL Forum* 3, 4.

27 *R (Osborn) v Parole Board* [2014] AC 1115, 1150 [71].

28 Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23 *Australian Journal of Administrative Law* 164, 165.

Dignity is not just an end in itself but has an instrumentalist function. Arie Freiberg has observed that 'regulatees [who] are treated in a procedurally fair manner are more likely to comply'.[29] Groves has identified the 'fairness effect', drawing on studies that a person's perception of the fairness of their treatment can influence their willingness to change their behaviour.[30]

Finally, enabling a regulated entity to know their regulator is consistent with the administrative law value of transparency.[31] As already discussed, Parliament often leaves much of the detail of regulation to the discretion and expertise of the regulator. Entities may not be able to ascertain a regulator's approach to regulation from the legislation alone. Proactively publishing information about regulatory priorities and approach ensures that regulated entities not only know the case against them but also how that case may be prioritised, pursued and resolved. Again, this can only be conducive to an efficient and effective response to regulation.

Pitfalls and challenges

Having canvassed the benefits and reasons why a regulator should know their industry, and vice versa, it is necessary to make a few observations about the pitfalls and challenges of industry knowledge.

The obvious challenge is that of 'regulatory capture'. This phrase conveys a wide range of criticisms about the nature of a regulator's relationship with the regulated. It can be a conclusionary term reflecting a loss of confidence in the regulator's ability or performance. The more extreme versions of regulatory capture involve a power imbalance in favour of the regulated to such a degree that the regulator is considered to be unable to exercise effectively its statutory powers to control or limit the harms to which the regulatory scheme is directed.[32] Another version of the criticism is that the regulator has shifted from being a 'watchdog' or 'corporate cop' to being a champion or proponent for the industry which it is supposed to regulate. Milder versions of the criticism were seen in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission), where ASIC was criticised for preferring enforcement actions that were negotiated with regulated entities, rather than litigated before courts, where public censure of entities' conduct could be expressed.[33]

29 Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017) 1, 492.
30 Matthew Groves 'The Unfolding Purpose of Fairness' (2017) 45 *Federal Law Review* 653, 675–9.
31 Andrew Edgar, 'Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy' (2016) 40 *Melbourne University Law Review* 738, 740.
32 Daniel Carpenter, 'Detecting and Measuring Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP, 2013).
33 Kenneth Hayne, *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019) 424.

At the heart of the criticism is the concern that a regulator is no longer exercising public power to protect the public or promote the public interest but is instead exercising — or refraining from exercising — public power in ways that benefit the regulated entities. Such a regulator is considered to have lost the independence that is 'fundamental to the effectiveness and legitimacy' of regulators.[34]

To be seen as credible, regulators must both be and be perceived to be impartial on an institutional and operational level.[35] As such, the risk of regulatory capture is one that all regulators must be aware of and actively monitor. Regulators need to be active in challenging themselves and their staff to ensure that they are not seeing the world and the regulatory scheme solely from the perspective of regulated entities. While regulation is not an adversarial exercise, it may sometimes be necessary for a regulator to identify, evaluate and take into account the case that is counter to that put by the regulated entity.[36]

Structures within an organisation can also assist in protecting against being 'susceptible to capture'.[37] For example, regulators may wish to separate decision-makers from those who have regular engagement with industry, as well as separate those who investigate and analyse from those who make decisions.[38] Regular rotation of staff within an agency can also assist in protecting against intimacy with particular industry sectors and participants. Robust and enforced policies and guidance on conflicts of interest, gifts and hospitality also support both perceived and actual regulatory independence.

Regulatory independence is necessary to distinguish state-based regulation from self-regulation. A regulator that sees only the industry perspective provides no greater utility than that which can be achieved through self-regulation.

Expressing the problem as one of perspective also suggests a solution. Regulators need to incorporate a broad range of views about and of the industry. This can include engaging with a broad range of regulated entities and not just the largest, noisiest or most risky. It means engaging with industry participants who may not be regulated entities, such as clients and consumers, advisors and experts, ancillary services, and (depending on the industry and regulatory scheme) unions.[39]

Regulators also need to find ways of engaging with views and perspectives of an industry that sit outside of the industry and yet still provide meaningful information. Such information can come from organisations and people who sit at the edges of a regulated industry but are independent of that industry. Such sources may not be independent in the strict sense, as

34 Stephen Free, 'Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry' (1999) 21 *AIAL Forum* 26, 20.
35 Ibid 20–1.
36 Tamblyn (n 5) 43.
37 Hayne (n 33) 424.
38 Tamblyn (n 5) 44.
39 Orr and Tham (n 18) 131.

they are likely to reflect the interests of their clients or their own business. It is not necessary to find independent perspectives (assuming it is even possible for them to exist) or even the 'right' or 'authoritative' perspective. Rather, it is about the mix. The greater the number of different perspectives a regulator can access, the richer and more comprehensive will be the regulator's understanding of the industry.

Academics may be another source of different views and can be particularly helpful in understanding the operation of systems and individual behaviours within those systems. In my experience, academics are an underutilised source of information and perspective for regulators. The reasons for this are not entirely clear. The public is another important source of information, although it can be a challenging source to access in an effective and efficient way. Advisory groups and stakeholder groups can be a more manageable way of understanding public experience of an industry than engaging with the public at large.

Getting a perspective outside of that of the regulated entity is particularly challenging when the regulator is responsible for a single regulated entity, such as occurs in police oversight jurisdictions. When overseeing police, the standard of acceptable conduct is usually that set by the police themselves. Police training, operations, powers and equipment create a highly specialised operational environment which is difficult to understand without first understanding a great deal about the particular police force and environment. Having done so, how does an 'independent' police oversight body bring views and perspectives that are independent of, but informed about, policing?

One way is to engage with other regulators that regulate the same entity. Different regulators will have different lenses through which to understand and scrutinise the regulated entity's conduct and the standards against which they operate. When I was Deputy Commissioner of IBAC, I found the role of the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') to be a particularly useful and critical one. The commission's work on sexual harassment and sex discrimination in Victoria Police[40] remains an exemplar of how a regulator can influence behavioural change at an organisational level. While we had different jurisdictions and focuses, my engagement with VEOHRC often produced useful understandings and insights into Victoria Police, as well as very practical information such as the most appropriate people to invite to a meeting — a not insignificant contribution when faced with a hierarchical organisation of over 20,000 people.

Conclusion

Regulators need to know their industry because it is required by the Acts that establish and confer powers on a regulator and it promotes efficient and effective regulation. By an industry knowing their regulator, efficient compliance and business practices are supported. Depending on the text, context and purpose of an Act, industry knowledge may rise to the

40 Victorian Equal Opportunity and Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment*, *Including Predatory Behaviour in Victoria Police: Final Review and Audit (Phase 3)* (2019).

level of a mandatory relevant consideration and is relevant to a regulator's obligation to afford procedural fairness. Knowing your industry and knowing your regulator reflects a dignitarian concept of administrative authority and has instrumentalist functions in promoting compliance.

Regulators can facilitate this shared learning through publication of information about their priorities and approaches to regulation and through workshops, forums, consultation, advisory groups, onsite inspections and meetings with regulated entities. Industry knowledge is necessary, but not sufficient, for an independent regulator. Regulators who seek to avoid the pitfall of regulatory capture need to keep their understanding of industry broad and reflective of more than the industry's own view of itself.

Reviewing judicial power for jurisdictional error: some recent migration cases

*Justice Craig Colvin**

At its heart, administrative law deals with the limits of governmental power. It concerns both the field of exercise of power and the manner in which power is exercised within that field. It does not concern what I will refer to as the content of the exercise of power. To intrude into matters of content would be to usurp power and undermine the very foundation on which the principles of administrative law rest. It would accrete to the court the power to do that which is entrusted by the law to others.

The three dimensions I have just described assume significance for these remarks: first, the field of power, sometimes termed 'jurisdiction'; second, the manner in which power is to be exercised, which requires an understanding of the characteristics of the power to be exercised, sometimes described, in the context of the statutory conferral of power, as 'the statutory task'; and, third, the content of the exercise of power, often referred to as 'the merits'.

Administrative law is concerned with the first and the second but not the third. Confusion can arise because jurisdictional error in its modern understanding, as developed in the context of the statutory conferral of power, concerns both the first (jurisdiction) and the second (the nature of the statutory task). Administrative law is the name given to the legal principles that concern keeping those with power within the limits of the conferral of that power, both as to its scope, in terms of subject matter and other pre-conditions; and its character, or attributes. The exercise of power must conform to the requirements of its conferral.

The fundamental importance of administrative law is not widely understood. Perhaps this is because it is a long time since we have experienced what it is like to live in a society where power is concentrated and can be exercised without any real constraint.

Fragmentation of power

Nevertheless, one of the keys to the success of modern democratic societies is the fragmentation of power. We are taught that power is separated into three arms — legislative, judicial and executive — but the intricacies of the division of power are far more delicate and detailed than is suggested by that broad sweep. Administrative law is important in keeping those divisions in place.

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In a moment I will focus on the limits upon judicial power, especially where there are specific legislative limits to jurisdiction. Before I do so, I thought I would try and place into context the way in which the fragmentation of power, and the marking out of its boundaries or limits, is fundamental to modern democracy. It ensures that no single actor or group of actors can dictate the course of government or the way in which society, ideas and culture develop over time. In very fundamental respects, our freedoms are not afforded by enforceable rights but rather by the curtailment of the exercise of power to interfere with them.

We are familiar with the idea of the Crown as the singular source of political and executive power. Our political history can be marked out by the course of events by which absolute sovereign power has been gradually pressed back, where the space created is then occupied by a vastly complex system in which power is divided up and spread thinly.

The Crown persists as the ultimate conceptual source of power, but the Queen has no ability to bring the divisions of power together. So in Australia our state and federal governments, despite their shared fount, each have separate constitutional existences and limits manifested in the understanding of the separation between the Crown in right of the Commonwealth and the Crown in right of each of the states. The Commonwealth *Constitution* marks out the boundaries of lawmaking and executive authority in a way that means the states have no say in the government of the Commonwealth and the Commonwealth has no power to control the governance of the states. Coordinated activities by all of them require intergovernmental agreement. The recent activities of what has been termed 'the National Cabinet' manifest these boundaries.

Her Majesty is a member of Parliament, but she sends her representative and by long tradition is no longer involved in parliamentary affairs. No minister, including the Prime Minister, takes executive power without being so appointed by Her Majesty's representative; and no law comes into effect without assent. The exercise of those remanent requirements of magisterial power is greatly limited by convention. However, if there were unconventional circumstances, the power of the sovereign and her governors has not been extinguished — a prospect which itself may be a protection against extreme excess in the exercise of power.

The elected members of Parliament do not bring forth their successors. Ultimately, it is for the electors of the country to choose the next members of Parliament. Importantly, the existing holders of power have no say in the conduct of the election. It is conducted by officials who act without interference and supervise a process the validity of which is subject to adjudication by the courts.

Those who are elected then choose, usually by a majority of their majority parliamentarians, the Prime Minister, who then determines the ministers by a process which itself is rarely autocratic.

We immediately see how intricate and complex the steps are and the many points at which there are, as Montesquieu would say, 'checks and balances'. They permeate democratic institutions.

Yet the fragmentation of power does not end with the establishment of our parliamentary system. It permeates the whole of society. There is a vast array of circumstances that give rise to issues about limits of power and degrees of independence. They include contexts as diverse as the exercise of police powers; the commencement of criminal prosecutions; the supervision of the conduct of members of the armed forces; the powers of corruption commissions; the availability of access to governmental records; the expenditure of public funds; the imposition of taxation; the characteristics of citizenship; the content of school curricula; the regulation of commerce; the allocation of public housing and mining rights; access to water and fisheries; and the extent to which there is freedom to speak on political affairs or freedom of movement in the course of a pandemic.

Not only is power fragmented in this way but the nature and characteristics of power that may be exercised is also curtailed. Just because I may be the Minister for Mines does not mean that I have free reign to decide who will be entitled to the grants of mining tenements and interests. Even where I have power to grant tenements in the public interest, it is a power that must be exercised in a particular way with regard to particular considerations. I cannot decide the allocation by the toss of a coin. If I purported to do so, I would be within the field of my jurisdiction but would not be exercising the kind of power that I had been given. I would not be undertaking the required task. The way in which the power entrusted to me was to be exercised would require a judgement or assessment to be made by reference to matters of public interest indicated by the subject matter of the Act. It is a particular kind of power and I would have no authority to exercise a different type of power.

It is this curtailment of power that is just as fundamental as the fragmentation of power. It ensures that those entrusted with power exercise it properly, for proper purposes and in the manner and respects in which it was entrusted. That is, it ensures that they exercise the kind of power they have been given and not some other type of power.[1]

Exercise of power

Democracy depends upon both the fragmented and the curtailed exercise of power. Those with power must be kept within the field of their jurisdiction and must conform to the requirements as to the manner of exercise of power.

However, just as fundamentally, the merits or content of the exercise of power are entirely a matter for the repository of the power. In keeping the boundaries as to the exercise of power, it is essential that judges do not, in the name of upholding the law, appropriate to themselves the discharge of the power entrusted to others.[2] Otherwise, power could be usurped and all the efforts at fragmentation and curtailment would be brought undone. The authority of those who have been entrusted by law with the responsibility to formulate the policies, form the judgements, assess the available material and reach the conclusions as to whether power should be exercised in a particular instance must be respected. It forms part of the

1 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J). Even a power to conduct a lottery in order to determine which amongst competing applicants was to be allocated a mining tenement where priority was ordinarily afforded to the applicant who was first in time might give rise to questions as to whether there was uncertainty about whether the applications were lodged at the same time: *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149.

2 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

fundamental insights expressed by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[3] as to the role of policy in guiding the decision-making process by an independent statutory tribunal acting in the shoes of another who has authority to formulate such policies.

These are all reasons why it is both interesting and fundamentally important to practise in the field of administrative law and why its other name, 'public law', is apt. It is the field of law that protects people from excesses in the exercise of power. It means that many institutions must come together before there can be fundamental change. It protects against tyranny and dictatorship and limits the extent to which there are islands of power that are free from scrutiny or oversight.[4]

Exercise of judicial power for jurisdictional error

I will turn now to the main subject of this article, which concerns the review of the exercise of judicial power for jurisdictional error, as addressed in some recent migration cases. I speak on the topic because I have been involved in the making of some of those decisions. It is for others to bring analysis and critique. However, I will seek to place them within the wider arc of what has been happening in administrative law.

As has been recently stated, the contemporary understanding of jurisdictional error is the product of propositions embraced incrementally in decisions of the High Court in the final decade of the last century. Its exposition was described by Kiefel CJ and Gageler, Keane and Gleeson JJ in the recent decision in *MZAPC v Minister for Immigration and Border Protection*[5] ('*MZAPC*') in the following terms:

> Though the concept of jurisdictional error is rooted in our constitutional history, only in this century has jurisdictional error come to be articulated as an explanation of the scope of the constitutionally entrenched original jurisdiction of this Court to engage in judicial review of the actions of Commonwealth judicial and executive officers, and hence the scope of the statutory jurisdiction conferred in identical terms on other courts created by the Commonwealth Parliament, and as an explanation of the scope of the constitutionally entrenched supervisory jurisdiction of State Supreme Courts to engage in judicial review of the actions of State judicial and executive officers.[6]

The reference to 'the scope of the statutory jurisdiction conferred in identical terms' is to provisions in the *Migration Act 1958* (Cth). It is the use of that statutory technique in s 476 and s 476A that has generated a large body of case law concerned with the nature and extent of review for jurisdictional error. It is why migration cases have significance for the fundamentals of administrative law. Section 476 confers upon the Federal Circuit and Family Court of Australia ('Curcuit Court') the same jurisdiction as the High Court under the

3 (1979) 2 ALD 634.
4 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 575 [99] ('*Kirk*').
5 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17.
6 Ibid [27] (citations omitted).

Constitution in respect of migration decisions as defined. Section 476A overrides s 39B of the *Judiciary Act* 1903 (Cth) and s 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and limits the jurisdiction of the Federal Court in the same way, in respect of certain other decisions under the Migration Act.

The practical effect of these two provisions is that in many instances the rights of parties to seek review in respect of decisions made under the Migration Act are confined to those instances where those parties can demonstrate jurisdictional error.

The decisions to which I will make particular reference today concern what may be viewed as a further limitation. It is expressed in s 477 of the Migration Act and says that any application to the Circuit Court for a remedy in the exercise of the jurisdiction conferred by s 476 must be made to the Court within 35 days of the date of the migration decision. Section 477(2) then provides that time may be extended if an application is made in writing and the Court is satisfied that it is necessary in the interests of justice to make an order extending time. In short, it is a provision that governs the circumstances in which an applicant can review a migration decision once 35 days has passed from the making of the decision. It is a relatively short period of time, especially for an applicant who is in detention and may face language and cultural difficulties in obtaining assistance. The protection afforded by s 477(2) preserves the jurisdiction of the court, in the sense that it ensures that it is not brought to an end simply by the expiry of time.[7] It enables the merits of a claim of jurisdictional error to be brought to account in determining whether to extend time.

There is no right of appeal from a decision of the Circuit Court refusing to extend time. This has led to a number of applications to review, for alleged jurisdictional error, decisions made by Circuit Court judges refusing to extend time.

The cases raise interesting issues as to the characteristics of judicial power and the extent to which judicial decisions that do not have the standing of a superior court of record (generally labelled 'inferior courts') are amenable to review for jurisdictional error.

In *MZAPC* the core propositions of the contemporary understanding of jurisdictional error in relation to 'administrative decisions made by an executive officer whose decision-making authority is conferred by statute' were expressed by the majority in the following terms:

> The constitutionally entrenched jurisdiction of a court to engage in judicial review of the decision, where that jurisdiction is regularly invoked, is no more and no less than to ensure that the decision-maker stays within the limits of the decision-making authority conferred by the statute through declaration and enforcement of the law that sets those limits. To say that the decision is affected by jurisdictional error is to say no more and no less than that the decision-maker exceeded the limits of the decision-making authority conferred by the statute in making the decision. The decision for that reason lacks statutory force. Because the decision lacks statutory force, the decision is invalid without need for any court to have determined that the decision is invalid.[8]

7 *Cf Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476, 537 [173] (Callinan J); *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 671–2 [53]–[55].

8 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 [29] (citations omitted).

The last sentence just quoted sums up a significant reformulation of the approach to invalidity that has been developed by the High Court in recent cases. Invalidity is not a question that is tacked on at the end. Rather, it is a consequence of the analysis as to whether there has been jurisdictional error. If a limit to power is exceeded in a way that is material then it lacks

authority and is therefore invalid. For administrative decision-makers exercising authority conferred by statute, invalidity and excess of jurisdiction are the joint outcome of a single process of analysis.[9]

In *MZAPC* their Honours then continued:

> The statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation. Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation.[10]

Notice the significance given to the terms in which power is conferred by statute and the description of the principles of statutory interpretation as evolving common law principles. We have seen natural justice, unreasonableness and materiality each cast as matters of statutory interpretation. We have also seen the development of the principle of legality when it comes to statutory construction, which often assumes significance when it comes to understanding the ambit of statutory authority that is conferred in a particular instance.

The summary given in *MZAPC* makes clear that we should not see jurisdictional error as an external body of common law principles compliance with which is imposed upon statutory decision-makers. In that respect, it is not like the law of negligence or enforceable promises. Rather, it is a body of law that is concerned with understanding the legal limits to the conferral of power and the keeping of repositories of power within those limits. It recognises that, in the present day and age, particularly in the field of Commonwealth law, the source of the authority being exercised by the executive is often conferred by legislation or circumscribed by legislation or both. As a result, administrative law is not a constraint upon legislative power. Rather, it recognises that the extent of the exercise of legislative power is manifested by words. Parliament does not confer power beyond the language used. The principle of legality says that if Parliament wants to interfere with fundamental existing rights then it must do so plainly.[11]

It also means that the questions to be considered when jurisdictional error is alleged are contextual. They are posed by the particular characteristics of the power being exercised

9 There remain instances where it may be necessary to consider whether the failure to conform to a statutory requirement that does not involve the exercise of a power of discretion may result in invalidity. See, eg, *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510 [61]–[66] (Kiefel CJ; Bell, Gageler and Keane JJ).

10 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 [30].

11 *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 [19]–[20] (Gleeson CJ); *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196, 307–311 [307]–[314] (Gageler and Keane JJ).

and the terms (often statutory) in which it is conferred.[12] If Parliament's expression is to be carried into effect then the repository of the statutory power must be kept to the requirements of the statute. Equally, the decisional freedom of the repository must be respected.

Repositories of power

As important as the terms in which decision-making power is expressed are the characteristics of the repository of that power. Power may be conferred on many different types of bodies. For example, it may be conferred on a minister, a statutory officer, a statutory corporation, an independent statutory tribunal, a specialist tribunal, an inferior court or a superior court of record. The characteristics of the repository of the power tell you something about the quality or character of the power to be exercised. If power is conferred on a court then a particular type of decision is required to be made. It will have particular qualities and characteristics. It is not enough that the court acts within the limit of its jurisdiction and only decides the types of cases that it is authorised to determine. There is a further dimension involved, which concerns the way in which the court decides and the manner in which it exercises its authority. These characteristics of its authority must also be met if it is to act within jurisdiction.

In the case of judicial powers this has an expansive aspect. Courts make final determinations of the facts and the law. They have authority to do so. The authority is necessary in order for the decisions of courts to have the finality that is characteristic of a judicial determination. The authority of a judge is more ample than that of an administrative decision-maker. Put another way, the extent of the merits jurisdiction of a court is ample or considerable. It is greater than that of an administrative tribunal. If Parliament entrusts a decision to a court then the extent of that authority must be respected by all others, including other courts. As Brennan J said in *Attorney-General (NSW) v Quin*[13] in dealing with administrative decisions:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.[14]

12 The approach is not confined to the exercise of statutory power and applies also to the exercise of prerogative power: *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1992) 31 CLR 421; *Williams v Commonwealth of Australia* [2012] HCA 23; (2012) 248 CLR 156; and *Williams v Commonwealth of Australia (No 2)* [2014] HCA 23; (2014) 252 CLR 416.

13 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

14 Ibid 36.

Equally, it may be said that one court has no power to correct error by another court in decision-making. Correction of error is a matter for appeal.[15] If there is no right of appeal then judicial decisions speak with finality of a kind that is characteristic of judicial power.[16] Judges identify the issues and determine the facts and the law to be applied. The judicial determination brings further debate to an end. Judges have authority to make a final decision on the matters that need to be determined in order to deal with the subject matter in dispute.

Principles of jurisdiction and jurisdictional error as applied to inferior courts

This brings us to the specifics of our present topic: the statutorily conferred jurisdiction of inferior courts; in particular, the extent to which principles of jurisdictional error apply to the decisions made by judges of those courts. By using 'inferior' I adopt the terminology of hierarchy that is usual in this particular field, to distinguish the nature of such courts from superior courts of record.

We need to begin with the High Court's decision in *Craig v South Australia* ('*Craig*'),[17] which differentiated between inferior courts and other tribunals. The following passage from the decision has been quoted often:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.[18]

Notice the two distinct aspects of jurisdictional error: first, a mistaken assertion or denial of jurisdiction — that is, a court acting outside the field of its authority or not acting on the basis of an incorrect view that it lacks authority; and, second, a misapprehension by the court of the nature or limits of its functions or powers in cases where it does have authority. This is a reference to what I have described as being the characteristics of the power being exercised by the decision-maker; those matters which curtail the power being exercised. What we see is that jurisdictional error by inferior courts is not confined to instances where the court exceeds the limits of what would generally be described as its jurisdiction: *there can be jurisdictional error by a court even when it has jurisdiction.*

It is this second aspect that can give rise to difficulty. When will there be jurisdictional error by a court that has jurisdiction to deal with the particular application that is before it? The reasons in *Craig* go on to say that jurisdictional error is at its most obvious where an inferior court acts wholly or partly outside 'the theoretical limits of its functions and powers'.[19] Their Honours give the example of an inferior court with civil jurisdiction hearing a criminal charge or making an order which it lacked power to make, such as where the only remedy it could give was damages. That is the first aspect.

15 *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle and Edelman JJ); *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301, 316–18 [45]–[53] (Perram J, Allsop CJ and Markovic J agreeing); *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424, 432–40 [11]–[39] (Allsop J, Drummond and Mansfield JJ agreeing).

16 *State of New South Wales v Kable (No 2)* [2013] HCA 13; (2013) 252 CLR 118 [34].

17 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').

18 Ibid 177.

19 Ibid.

Importantly, for our purposes today, the reasons go on to deal with what are described as less obvious instances. They deal with preconditions to jurisdiction and then they say:

> Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues [the statute conferring its jurisdiction] and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.[20]

This is not concerned with going outside the jurisdiction of the court. It is concerned with making a decision which is based upon a misunderstanding of the nature of the functions and powers of the court.

The cases we are concerned with today are in that territory where the line is difficult to draw. Importantly, their Honours also described what was within jurisdiction for an inferior court. They said that the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, where they involve matters which the court has jurisdiction to determine.[21] Therefore, errors in the identification of relevant issues, in the formulation of relevant questions and in the determination of what is and what is not relevant evidence, will not ordinarily constitute jurisdictional error. They are usual characteristics of judicial power. They form part of the authority conferred upon a court. It is why judicial power is sometimes described as ample.

So, if an inferior court is within jurisdiction, a misconstruction of a statute will only be jurisdictional if it causes a misconception of the nature and extent of the judicial power that is being exercised. Otherwise, errors as to the legal principles to be brought to bear in deciding the case will not be jurisdictional.

In *Kirk v Industrial Court (NSW)*[22] (‘*Kirk*’) the High Court reaffirmed the statement of principle in *Craig* but cautioned against viewing *Craig* ‘as providing a rigid taxonomy of jurisdictional error’.[23] The court in *Kirk* also stated that there was a ‘need to focus upon the limits of [the inferior court’s] functions and powers’. It said that those limits are real ‘and are to be identified from the relevant statute establishing [the inferior court] and regulating its work’.[24] That terminology is significant because of what was then said by the court.

The principles expressed in *Craig* were affirmed in *Kirk* in a manner that appears to give emphasis to the second category of jurisdictional error. In *Kirk*, the examples given in *Craig* of less obvious jurisdictional error were restated in the following terms:[25]

20 Ibid 177–8.
21 Ibid 179–80.
22 *Kirk* (n 4).
23 Ibid 574 [73].
24 Ibid 573–4 [72].
25 Ibid 573–4 [73].

a. the absence of a jurisdictional fact;

b. disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored);

c. misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

The point was again made that it may be particularly difficult to delineate jurisdictional error from mere error where a court's misconstruction of a statute results in it misconceiving the nature of the function that it is performing or the extent of its powers in the circumstances of a particular case. The restatement of these principles by reference to the 'relevant statute' being the statute establishing and regulating the work of the inferior court is significant.

I note in passing that the caution expressed in *Craig* has significance for those instances where a statutory conferral of power on an administrative decision-maker is found to include authority to determine a question of law.[26] It is not always the case that an error of law by an administrative decision-maker will give rise to jurisdictional error.[27]

But returning to the issue at hand, in what circumstances might there be jurisdictional error in the exercise of judicial power by an inferior court? In particular, in what instances will there be a misconstruction of the relevant statute, thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case?

We are now ready to consider the first of our cases, *CZA19 v Federal Circuit Court of Australia* ('*CZA19*').[28]

The applicant was in immigration detention. His protection visa application was refused. The decision was affirmed by the Administrative Appeals Tribunal. Section 476 applied to the decision, so review in the Circuit Court was relevantly confined to jurisdictional error. Under s 477 any application to review was required to be within 35 days. An application was brought, but it was a few days late. As has been indicated, the Circuit Court can extend time if it is satisfied that it is necessary in the interests of the administration of justice to do so.

The Circuit Court judge approached the matter on the basis that the application was 34 days out of time (being a period calculated by reference to the day when it was accepted for filing, not when it was filed) and also on the mistaken assumption that there had been an application to review without any application for an extension of time. On that mistaken assumption, an oral application for an extension of time was permitted. The matter was adjourned to allow the application to be heard. The application was heard and refused.

26 See, for example, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; (2018) 264 CLR 1.

27 *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225, 235 [40].

28 *CZA19 v Federal Circuit Court of Australia* [2021] FCAFC 57 ('*CZA19*').

An application for review of the decision of the Circuit Court judge was heard by a bench of three judges that comprised the Chief Justice, Markovic J and me. It was observed that an error of law as to the scope of the provision that conferred jurisdiction was different from an error as to the law to be applied in the course of the exercise of judicial authority. Then, s 477(2) was found to confer jurisdiction in the relevant sense. It was described as a provision that conferred authority to extend the time within which a review could be undertaken. The authority that was conferred was to extend the time within which to undertake a review where 'it is necessary in the interests of the administration of justice'.

It might be said that the relevant jurisdiction of the Circuit Court was conferred by s 476 and that s 477 simply regulates the procedure by which that jurisdiction may be accessed.[29] Whether that is the practical effect of s 477 might have significance for constitutional purposes where a provision like s 477 concerns the jurisdiction of a Ch III court. It might also have significance for whether s 476B of the Migration Act can operate according to its terms. It provides that the High Court must not remit a matter that relates to a migration decision to any court other than the Circuit Court.

However, even if s 476 states the extent of the relevant jurisdiction of the Circuit Court and s 477 regulates the procedure by which that jurisdiction may be accessed, s 477 operates as a limitation on the exercise of that jurisdiction. It is a power that is found in the statutory provisions that, in the language of *Kirk*, establish the body and regulate its work; and, in the case of migration decisions, that jurisdiction and its procedural regulation are conferred by s 476 and s 477.

In *CZA19* there were two grounds. The first was a complaint that the merits of the grounds of review had not been considered. That ground was not upheld. In making that finding, we said:

> In cases like the present, there is an important distinction between a claim that the Federal Circuit Court judge did not deal with the nature of the application that was made (on the one hand) and a claim that the Court on review should conclude that the Federal Circuit Court judge misunderstood the nature of the review grounds the subject of the application or their merit (on the other hand). A claim of the latter kind is unlikely to be a claim of jurisdictional error because to seek to identify the nature of the grounds and to assess whether they have merit for the purpose of determining whether it was necessary in the interests of justice to extend time is at the heart of performance of the (within jurisdiction) judicial task. Therefore, the mere fact that a proposed ground may not have been considered in the sense that a different view may be taken by other judges as to the nature and scope of the grounds is not jurisdictional. What is required in order to demonstrate jurisdictional error in such instances is a fundamental misunderstanding of the nature of the application such as where a judge addresses the wrong grounds, overlooks part of the grounds altogether or so fundamentally misunderstands the basis for the application that in effect the application is not considered.[30]

29 *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 671–2 [53]–[55].

30 *CZA19* (n 28) [34].

The second ground concerned the approach of the Circuit Court to the explanation for delay. We upheld that ground, finding:

> There was one application for an extension of time. The Federal Circuit Court judge thought it was oral and 34 days out of time; in fact it was in writing four days out of time. His Honour dealt with it on the basis of the former, not the latter. The fundamental nature of the misconception can be seen by the way his Honour expressed himself about it in [73]–[76] of his reasons: see [47] above. It was, from the nature of the application, a material misconception as to what the applicant was seeking the Court to determine.
>
> Consequently, the nature and character of the application has been so fundamentally misunderstood by the Federal Circuit Court judge as to lead to the conclusion that he was not dealing with the matter as placed before the Court.[31]

The decision in *CZA19* came after a number of single instance decisions where jurisdictional error had been found in the making of a decision to refuse to extend time under s 477(2).

In *EXU17 v Minister for Immigration and Border Protection*[32] Griffiths J allowed an application to review for jurisdictional error where an extension of time had been refused. The primary judge incorporated the principles as to an extension of time in which to appeal into the s 477(2) statutory task. There was no reference to the language of s 477(2) by the Circuit Court judge. Some of the reasons advanced in support of the application were not referred to in the reasons. His Honour found that the reasons evinced no appreciation of the statutory test to be applied under s 477(2) in determining such an application. His Honour said, 'In some cases the reasons for judgment may otherwise reveal that the primary judge sufficiently appreciated the terms and effect of a relevant statutory provision, but that is not the case here'.[33] His Honour went on to find:

> Nor do I consider that it may safely be inferred that a Judge of the FCCA would know these matters because of that court's heavy migration workload. The task of dealing with multiple migration cases serves to highlight the need for a primary judge to pause and reflect upon the significance of the immediate and relevant statutory framework within which judicial power is being exercised.[34]

In *Huynh v Federal Circuit Court of Australia*[35] I upheld an application to review for jurisdictional error where an extension of time was refused. In that case there had been a delay of 70 days. The application had been made on the basis of reasons that included the evidence of the applicant that she had not received the notification of the Tribunal's reasons because she had changed address. The reasons of the Circuit Court judge were to the effect that the applicant's explanation was that she was overwhelmed and this delayed the seeking of assistance to pursue an appeal. The evidence as to the change of address and the failure to receive notification was not considered. I found that the judge misunderstood in a fundamental way the factual basis for which the extension of time was sought.[36]

31 Ibid [57]–[58].
32 *EXU17 v Minister for Immigration and Border Protection* [2018] FCA 1675; (2018) 267 FCR 305.
33 Ibid 316–17 [46].
34 Ibid 317 [47].
35 *Huynh v Federal Circuit Court of Australia* [2019] FCA 891.
36 Ibid [47].

In *CKX16 v Judge of the Federal Circuit Court of Australia*[37] Steward J granted relief in a case where an extension of time had been refused. His Honour said, 'If the FCC were to mistake its function under s 477(2), or if it were to apply an incorrect construction of the words of the provision, it would commit jurisdictional error'.[38] His Honour held that there had been a constructive failure to exercise jurisdiction because the decision had been made without considering the merit of a proposed ground of review as to the application of the complementary provisions of the Migration Act.[39]

Returning to *CZA19*, we said that these cases should be seen to be at the borderline and that:

> [t]hey do not establish a general principle that a failure to consider a ground that might be discerned after the event by a court on review as not having been addressed demonstrates jurisdictional error in cases where an applicant seeks to invoke the jurisdiction conferred by s 477(2) to extend time.[40]

Next, I turn to the decision in *MZABP v Minister for Immigration and Border Protection*.[41] In that case, an application for an extension of time under s 477 was refused in the Circuit Court. On review for jurisdictional error in the Federal Court, it was argued for the applicant (first raised in reply submissions) that there was error because the Circuit Court judge had considered whether the applicant 'could succeed' on any of the grounds when the correct legal test was whether any of the grounds were reasonably arguable or had reasonable prospects of success. Of course, the statutory provision makes no reference to whether grounds are arguable or have prospects of success. The argument was not reflected in the grounds and was found to be a matter that could not be considered as a basis for relief. Nevertheless, it was the subject of consideration in the reasons.

Mortimer J considered the various formulations concerning the degree to which merit in an application would need to be demonstrated on an application for an extension of time under s 477. Her Honour then said:

> Whichever description is chosen, the approach taken under s 477(2) should not be transformed into a de facto full hearing, especially where the outcome is not subject to any appeal as of right. The subject matter of s 477(2) is whether time for bringing a judicial review application, which is to be heard and determined in the ordinary course of the processes of the Federal Circuit Court, should be extended. The subject matter is not whether the applicant will ultimately be successful in impugning the merits review decision.[42]

In that respect, agreement was expressed by her Honour with similar views expressed by Wigney J in *SZTES v Minister for Immigration and Border Protection*.[43] Mortimer J observed that the reasons of the Circuit Court could be viewed as finally determining the grounds of review. Her Honour then said that whether the adoption of such an approach could properly be characterised as exceeding jurisdiction was a 'difficult question' and observed:

37 *CKX16 v Judge of the Federal Circuit Court of Australia* [2018] FCA 400.
38 Ibid [23].
39 Ibid [32].
40 *CZA19* (n 28) [35].
41 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585 (Mortimer J).
42 Ibid 598 [63].
43 *SZTES v Minister for Immigration and Border Protection* [2015] FCA 719 [82]–[85], [102].

> If, for example, [the Circuit Court judge] in the present case could be said to have taken the approach that it would only be in 'the interests of the administration of justice' to extend time if persuaded a ground of review would succeed, then this would in my opinion reflect such a fundamental misunderstanding of the discretion in s 477(2) as to represent a misapprehension of the nature of the power there conferred.[44]

The example given would be one where the extent of the jurisdiction was approached on the basis that it was narrower than a correct interpretation of the statute would indicate. Therefore, it would be an obvious case of jurisdictional error.

Jurisdiction to adopt a 'higher bar'

The more difficult question is whether it would be jurisdictional to adopt a higher bar than would be indicated by authorities concerned with what is required when evaluating the interests of the administration of justice; or whether, at its highest, it would be an error of law that is within jurisdiction, because an assessment of the degree of merit to be demonstrated was part of the authority of a person exercising judicial power.

I should say that in this area there has been some debate about the extent to which the appropriate approach is to adopt an impressionistic assessment and whether the cases concerned with the grant of leave to appeal out of time should be applied by analogy. In that regard, I note the following statement by the five-member bench in *Porter as former trustee of the estates of Ghasemi and Kakhsaz v Ghasemi*:

> In most instances the Court undertakes a rough and ready assessment of the merits in considering whether to grant leave [to appeal]. It does so for the reasons explained in *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516. However, the degree to which there is close consideration of the merits will depend on the circumstances. A determination of a different character is made where the application is for an extension of time in which to review whether administrative action exceeds the bounds of statutory authority: see *BJM15 v Minister for Immigration and Border Protection* [2021] FCA 786 at [43]. In such cases, the party has not had the benefit of a judicial determination with its attendant characteristic of finality, an aspect which may affect the approach to both merit and delay in deciding whether it is in the interests of justice to extend time.[45]

The issue of whether demonstrating merit by applying a higher bar than was indicated by the authorities might amount to jurisdictional error was considered by Gageler J in a single-judge decision in the original jurisdiction of the High Court in *EBT16 v Minister for Home Affairs* ('*EBT16*').[46] In that case, a Circuit Court judge refused an application for an extension of time under s 477. It was claimed in the High Court that the Circuit Court had misunderstood the nature of the power to extend time because, amongst other things, the judge 'impermissibly decided the full merits of the plaintiff's case as opposed to making its decision based upon a preliminary assessment of the merits'.[47]

44 *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; (2015) 242 FCR 585, 599 [68].
45 *Porter as former trustee of the estates of Ghasemi and Kakhsaz v Ghasemi* [2021] FCAFC 144 [40] (Allsop CJ; Markovic, Derrington, Colvin and Anastassiou JJ).
46 *EBT16 v Minister for Home Affairs* [2019] HCA 44.
47 Ibid [4].

However, in that case the Circuit Court judge found that the applicant had failed to demonstrate that there was any merit in the un-particularised grounds that the Tribunal had committed jurisdictional error. Understood in that light, Gageler J found that 'the Federal Circuit Court's decision to refuse the plaintiff an extension of time cannot be said to have gone beyond a threshold assessment of merit'.[48]

Significantly, though, given the present topic, his Honour went on to say:

> By rejecting the arguability of the second ground of the application on the basis on which it is put, I should not be understood to be expressing any view as to the correctness of the proposition, adopted by the Full Court of the Federal Court in *MZABP* … and accepted with circumspection by a differently constituted Full Court in *DMI16* … that the Federal Circuit Court would exceed its jurisdiction were the Federal Circuit Court to conclude that it was not necessary in the interests of the administration of justice to make an order under s 477(2) after undertaking a full assessment of the merits … Were I to have considered the proposition adopted in *MZABP* to have been dispositive of the present application, and were I to have entertained doubt about its correctness, the appropriate course would have been for me to refer the application or the relevant part of it to the Full Court of the High Court …[49]

This exposes the importance of considering closely the extent to which a failure to conform with what might be an accepted legal approach to the exercise of the power conferred by s 477 might be jurisdictional.

In the case referred to by Gageler J, *DMI16 v Federal Circuit Court of Australia*, [50] the members of the Full Court had said:

> The Minister accepted that, in the context of an application for extension of time, the Federal Circuit Court would fall into jurisdictional error if it approached the prospects of success as if it were making a final decision: *MZABP* at [62] (Mortimer J), whose approach was approved on appeal in *MZABP v Minister for Immigration and Border Protection* [2016] FCA 110 … Even assuming that the Minister's concession was rightly made (which it is unnecessary to decide), in our view the primary judge did not err in holding that the Federal Circuit Court examined the grounds at a 'reasonably impressionistic level' in considering whether … Ground 2 had any reasonable prospects of success. Nor was the reasoning of the Federal Circuit Court irrational.[51]

I note that in *EBT16* Gageler J found separately that it was not necessary to determine a question as to whether s 477 limits the exercise of the jurisdiction conferred by s 476 or whether it limits the scope of that jurisdiction. No doubt there remain issues to be determined as to the extent to which there can be review for jurisdictional error of decisions to refuse to extend time under s 477. In particular, there are issues as to whether there can be jurisdictional error by applying a standard that might be said to be too high, when considering the merits of the proposed grounds of review in the course of deciding whether the interests of justice mean that it is necessary to extend time.

48 Ibid [7].
49 Ibid [8].
50 *DMI16 v Federal Circuit Court of Australia* [2018] FCAFC 95; (2018) 264 FCR 454.
51 Ibid 471 [62].

Conclusion

The significant point for today's purposes is that the exercise of judicial power by inferior courts can be the subject of review for jurisdictional error, even where the decision is within the jurisdiction of the court. The circumstances in which such review may be open will depend upon the nature of the function or power being exercised by the court and the terms in which that function or power is conferred by the relevant Act. The conduct that may amount to jurisdictional error will be affected by the nature of the task. The exercise of subject matter jurisdiction gives rise to different questions to the exercise of a power to extend time that forms part of the conferral of jurisdiction expressed in s 476 and s 477 of the Migration Act.

The relevance of procedural fairness and practical injustice to materiality as an element of jurisdictional error

*Holly Ashburner**

In 2018 the High Court articulated a new threshold of materiality to determine whether a mistake is grave enough to amount to a jurisdictional error.[1] However, its precise content and interaction with existing common law norms of administrative review and jurisdictional error are yet to be crystallised in the Australian legal context. The content and significance of 'materiality', and its role in the concept of jurisdictional error, are both contested. The doubts expressed by Nettle and Gordon JJ in the High Court materiality cases are but one example.[2]

This article pursues deepening insight into the concept of materiality and its interaction with procedural fairness. Specifically, it questions what the materiality threshold looks like for the fair hearing rule and considers whether materiality has a meaningful role to play in this context. The bias rule is not examined, as materiality is considered irrelevant to establishing a breach on the grounds of actual or apprehended bias a point I will expand on later.[3] First, I outline the development of both jurisdictional error and materiality, noting persistent criticisms of materiality as an emerging concept. I then reflect on procedural fairness and its interaction with materiality by analysing the content of the fair hearing rule in light of emerging materiality principles. Finally, I consider the narrow factual circumstances of prominent materiality cases to demonstrate that an inquiry under the fair hearing rule would produce identical results. Upon comparison of the 'materiality' threshold and the practical injustice test for the fair hearing rule, it is apparent that the content of these tests is substantially identical. Consequently, a breach of the fair hearing rule, if made out, will almost always result in a jurisdictional error.

Jurisdictional error: pathways to the modern approach

Jurisdictional error is at the heart of modern Australian judicial review.[4] It is a term that has been adopted to mark the difference between a breach of an administrative law norm that results in an invalid exercise of a decision-maker's power and a breach that is merely unlawful.[5] An invalid decision is void ab initio, whereas an unlawful one is invalidated only prospectively.[6] Jurisdictional error is both a conclusion and a starting point from which the

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1 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*'Hossain'*).

2 See, eg, *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 ('*SZMTA*'), 455 [81], 460 [95] (Nettle and Gordon JJ).

3 *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 (*'MZAPC'*), 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ) 637–8 [182] (Edelman J).

4 Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18, 20–2.

5 Ibid 20.

6 Lisa Burton Crawford, 'Materiality and the Interpretation of Executive Power' (2021) 28 *Australian Journal of Administrative Law* 166, 167.

effects of a mistake are determined.[7] Accordingly, its precise meaning remains elusive; like many administrative law concepts jurisdictional error is necessarily flexible, and the courts have resisted boxing it into a rigid test.[8]

The recent significance of jurisdictional error can be tied to Australia's administrative law history, which originally centred on the availability of the prerogative writs.[9] Now, the constitutional significance of the concept of jurisdictional error in Australia is tied to the availability of the constitutional writs.[10] Jurisdictional error holds a firm place in judicial review, with the central question for courts engaging in s 75(v)/39B jurisdiction being: does the alleged breach go beyond the scope of the decision-maker's power, such that Parliament intends it to invalidate the decision?[11] To understand its place in judicial review, and indeed to set the scene for considering 'materiality', I will briefly turn to the development of the concept to place it firmly in its uniquely Australian context.

Craig v South Australia[12] ('*Craig*') was the first modern attempt to develop a set of grounds whose breach led presumptively to a finding of jurisdictional error.[13] Although its emphasis on distinguishing between 'inferior courts' and 'administrative tribunals' as a determinant of a narrower/broader test of jurisdictional error has since been superseded by a functional test, the decision was significant for two reasons.[14] First, it recognised, although in rudimentary form, that the test for jurisdictional error was receptive to the nature of the power purportedly being exercised and the character of the body exercising it;[15] that is, the threshold for jurisdictional error has never been set in stone and will sometimes be difficult to discern depending on 'the circumstances of the particular case'.[16] Second, *Craig* set out a list of errors it identified as being 'jurisdictional',[17] with the result that the purported exercise of administrative power was invalid.[18]

Kirk v Industrial Court (NSW)[19] ('*Kirk*') clarified elements of *Craig*. Importantly, it noted that jurisdictional error was not confined to the list of errors set out in that case.[20] *Kirk* confirmed that jurisdictional error would have continual significance in Australian administrative law by finding that the constitutional writs of prohibition and mandamus are available only where a jurisdictional error is made out. In doing so, the High Court tied the concept of jurisdictional

7 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) 789 [13.20]; *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 [27].
8 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ('*Kirk*'), 574 [73].
9 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 128.
10 Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 96.
11 Crawford and Boughey (n 4) 20.
12 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').
13 JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 83.
14 *Craig* (n 12) 177, 179.
15 Ibid 176–8.
16 Ibid 177.
17 Ibid 176–80.
18 Ibid 179.
19 *Kirk* (n 8).
20 Ibid 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

error to the jurisdiction to grant remedies under s 75(v).[21] Consequently, jurisdictional error is an essential precondition for mandamus and prohibition, as well as certiorari as an ancillary remedy,[22] to issue. The court further expanded its application by holding that the constitutional writs are entrenched in the supervisory jurisdiction of state Supreme Courts by virtue of s 73, and, importantly, that these writs are similarly responsive to jurisdictional error[23] — that is, the supervisory jurisdiction to correct jurisdictional error is a defining characteristic of state Supreme Courts.

Further cases have refined the reasons for which remedies can be granted for identifying whether an error is jurisdictional and thus invalidates a decision. The distinction is important in a modern administrative law context because it not only acts as a threshold or gateway to the granting of certain remedies, as noted above, but also has consequences for the status of the impugned decision.[24]

The modern approach to identifying jurisdictional error has shifted in emphasis from the classification-based test in *Craig*; however, the practical approach has remained similar. The courts focus on the context and purpose of a provision to determine whether an error is jurisdictional, through a process of statutory interpretation.[25] Justice Mortimer (in the Federal Court) in *Hossain v Minister for Immigration and Border Protection*[26] ('*Hossain*') set out the reasoning for this construction-based approach, which focuses on the specific provision within the context of administrative law norms such as procedural fairness and unreasonableness.[27] Her Honour reasoned that jurisdictional error is an exercise in statutory construction, as a finding of jurisdictional error depends on the 'terms, nature and extent of the power in issue'.[28] Boughey and Crawford reason that, under this statute-driven approach, the original 'functional considerations' (impact of the breach, public policy issues, and consequences stemming from labelling an error 'jurisdictional') are still considered but through the process of interpretation rather than as distinct considerations.[29]

Emerging principles of materiality as a threshold test of jurisdictional error

Materiality is a recent addition to the concept of jurisdictional error. Due to the centrality of jurisdictional error in judicial review,[30] it has drawn considerable attention in the academic community. Its development is outlined below, as is demonstrated through the three High

21 Ibid 580–1 [98]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Spigelman (n 13) 77.
22 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [62]–[63], quoting *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (*'Aala'*), 90–1 [14].
23 *Kirk* (n 8) 580 [98]; 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
24 Boughey, Rock and Weeks (n 9) 128.
25 *MZAPC* (n 3) 597 [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *Plaintiff S10/2011 v Minister for Immigration and Citizenship* 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).
26 *Hossain* (n 1).
27 Leighton McDonald, 'Jurisdictional Error as Conceptual Totem' (2019) 42 *UNSW Law Journal* 1019, 1021
28 *Minister for Immigration and Border Protection v Hossain* [2017] 252 FCR 31, 46 [57].
29 Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 395, 404.
30 Crawford and Boughey (n 4) 20–2.

Court cases of *Hossain, Minister for Immigration and Border Protection v SZMTA*[31] ('*SZMTA*') *and MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*').[32]

Hossain v Minister for Immigration and Border Protection

Hossain was a unique case where an error that would otherwise have been deemed as jurisdictional was held to be non-jurisdictional because an alternative, legally sound means for denying the visa existed, such that the error made no difference to the outcome.[33] *Hossain* involved the appeal of an unsuccessful partner visa application.[34] The Minister for Immigration and Border Protection, and later the Administrative Appeals Tribunal ('AAT'), found that the applicant had failed to satisfy two criteria necessary to the granting of the visa.[35] First, Hossain allegedly failed to lodge his application within the requisite time frame;[36] and, second, he had outstanding debts to the Commonwealth.[37] The Full Court of the Federal Court on appeal found that the Tribunal had erred when considering whether there were 'compelling reasons for not applying' the first (timing) criterion, as the AAT determined this with regard to whether such reasons existed at the time of the application.[38] The regulation instead required the Tribunal to assess this criterion at the time the Tribunal made its decision.[39]

On appeal, the High Court found the error to be non-jurisdictional.[40] The majority clarified that a 'decision involving jurisdictional error and a decision wanting in authority' are the same.[41] In doing so, the court articulated a threshold of materiality that is ordinarily a necessary component for establishing jurisdictional error[42] — that is, whether an error of law is jurisdictional depends on the gravity of the error[43] as determined by a process of statutory construction.[44] In this case, the AAT had an alternative basis for refusing the partner visa (the public interest criterion) which was not infected by jurisdictional error.[45] Therefore, the error concerning the timing criteria was not sufficiently grave as to amount to a jurisdictional error — it was neither a fundamental error nor an error capable of affecting the final decision.[46] Although *Hossain* was not a procedural fairness case, it remains relevant as the first articulation of materiality as a threshold for establishing jurisdictional error.

31 *SZMTA* (n 2).
32 *MZAPC* (n 3).
33 *Hossain* (n 1) 136 [35] (Kiefel CJ, Gageler and Keane JJ), 137 [41] (Nettle J), 149 [79] (Edelman J).
34 Ibid 127 [4] (Kiefel CJ, Gageler and Keane JJ), 138 [44] (Edelman J).
35 Ibid 128 [5]–[6] (Kiefel CJ, Gageler and Keane JJ), 138 [44] (Edelman J).
36 Ibid 128 [7] (Kiefel CJ, Gageler and Keane JJ), 140 [53] (Edelman J).
37 Ibid 128 [8] (Kiefel CJ, Gageler and Keane JJ), 140 [54] (Edelman J).
38 Ibid 129 [10] (Kiefel CJ, Gageler and Keane JJ), 140 [56] (Edelman J).
39 Ibid 130 [15] (Kiefel CJ, Gageler and Keane JJ), 140 [56] (Edelman J).
40 Ibid 136 [37] (Kiefel CJ, Gageler and Keane JJ), 138 [43] (Nettle J), 150 [80] (Edelman J).
41 Ibid 133 [26] (Kiefel CJ, Gageler and Keane JJ).
42 Ibid 134 [29] (Kiefel CJ, Gageler and Keane JJ).
43 Ibid 133 [25] (Kiefel CJ, Gageler and Keane JJ).
44 Ibid 133 [27] (Kiefel CJ, Gageler and Keane JJ), 146 [67] (Edelman J).
45 Ibid 137 [41] (Nettle J), 149 [79] (Edelman J).
46 Ibid 136 [35] (Kiefel CJ, Gageler and Keane JJ), 137 [41] (Nettle J), 149 [79] (Edelman J).

Minister for Immigration and Border Protection v SZMTA

In *SZMTA*, the High Court attempted to clarify the content and practical implications of materiality. The case involved a protection visa application which was refused by the Minister's delegate.[47] The decision was appealed on the basis that a notification to the Tribunal concerning the fact that certain documents fell within the ambit of s 438 of the *Migration Act 1958* (Cth) was not disclosed to the applicant.[48] The documents that the notification concerned had previously been provided to the applicant following a freedom of information request.[49]

The majority held that, despite the Minister's concession that the breach amounted to a denial of procedural fairness,[50] the failure to disclose the notification was not a jurisdictional error. That is because the documents' contents 'were of such marginal significance' that the applicant's lost opportunity to make submissions with the knowledge of the notification 'could not realistically have made any difference to the result'.[51] Although the majority mentioned the 'practical injustice' test, the satisfaction of which ordinarily results in jurisdictional error,[52] they seemed to address it primarily through the lens of materiality rather than as a separate inquiry.[53] The majority view confirmed that materiality is an aspect of jurisdictional error[54] rather than a factor in remedial discretion.[55]

This reasoning confirmed that the central inquiry of materiality is whether 'compliance could realistically have resulted in a different decision'.[56] The majority further clarified that the onus of establishing materiality rests with the party asserting jurisdictional error.[57] Nettle and Gordon JJ issued a cautionary dissent, arguing that a materiality type of inquiry should occur as part of the court's discretion to award remedies to avoid an impermissible intrusion into judicial merits review rather than as a threshold to establishing jurisdictional error.[58] They further took issue with the circumstance-sensitivity of materiality, which supposedly subverts the entitlement of a plaintiff to 'know where they stand'.[59] However, as they formed the minority, the judgment in *SZMTA* confirmed that materiality will remain a central feature of jurisdictional error for the foreseeable future.

47 *SZMTA* (n 2) 450 [64] (Bell, Gageler and Keane JJ), 468 [124] (Nettle and Gordon JJ).
48 Ibid 450 [66] (Bell, Gageler and Keane JJ).
49 Ibid 450 [66] (Bell, Gageler and Keane JJ).
50 Ibid 440 [27] (Bell, Gageler and Keane JJ).
51 Ibid 452 [72] (Bell, Gageler and Keane JJ).
52 Ibid 443 [38] (Bell, Gageler and Keane JJ).
53 Ibid 443–6 [39]–[51] (Bell, Gageler and Keane JJ).
54 Ibid 445 [45] (Bell, Gageler and Keane JJ).
55 Ibid 458 [90] (Nettle and Gordon JJ).
56 Ibid 445 [45] (Bell, Gageler and Keane JJ).
57 Ibid 445 [46] (Bell, Gageler and Keane JJ).
58 Ibid 460 [95] (Nettle and Gordon JJ).
59 Ibid 458 [88] (Nettle and Gordon JJ).

MZAPC v Minister for Immigration and Border Protection

In the latest edition in the materiality saga, handed down in May 2021,[60] the court upheld *SZMTA's* conception of materiality, confirming that the central inquiry is whether 'compliance could realistically have resulted in a different decision'.[61] *MZAPC* involved yet another refused protection visa.[62] In denying the visa, the Tribunal did not disclose to the applicant that it had acquired the details of his criminal history, which included a dishonesty offence.[63] The decision was appealed to the Federal Court on the ground that the Tribunal had failed to accord the applicant procedural fairness, as the dishonesty offence went to the assessment of the applicant's credibility — the central issue being whether materiality could be made out.[64] On appeal to the High Court, the Minister had already conceded that there had been a denial of procedural fairness,[65] and thus the court focused its inquiry on who correctly bore the onus of establishing materiality; and what materiality required in the circumstances of the case.[66] However, as the Tribunal had accepted the applicant's story as the truth and denied the visa on the basis that he did not have a well-founded fear of persecution should he return to India,[67] the Court found the error to be immaterial and upheld the finding of the Federal Court.[68]

Beyond its immediate facts, *MZAPC* confirmed the interpretive technique which concludes that Parliament will not intend an administrative action to be invalidated by an immaterial error.[69] The Court expanded on materiality generally, noting situations where materiality would not form part of the jurisdictional error inquiry. Materiality is not relevant to determining a breach on grounds of 'unreasonableness, but also actual or apprehended bias, and situations where "lack of respect for the dignity of the individual results in a denial of procedural fairness"'.[70] The Court also confirmed, albeit by a slim majority, that the onus of proving materiality rests with the applicant.[71] When describing the materiality principle, the majority incorporated language from the fair hearing rule by 'recognising that the legislature is not likely to have intended that a breach that occasions no "practical injustice"' will be invalid.[72] By contrast, Edelman J set out a segregated three-step test which involved a 'procedural irregularity', the practical injustice threshold, and the further materiality threshold; however, he was in the minority.[73] Consequently, the High Court has attempted to crystallise the materiality threshold

60 *MZAPC* (n 3).
61 Ibid 598 [35] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
62 Ibid 593 [7] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 622 [124] (Gordon and Steward JJ).
63 Ibid 593 [10] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 623 [128] (Gordon and Steward JJ).
64 Ibid 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [133]–[134] (Gordon and Steward JJ).
65 Ibid 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [134] (Gordon and Steward JJ), 643 [201] (Edelman J).
66 Ibid 592 [1] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [135] (Gordon and Steward JJ).
67 Ibid 609 [76] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [151] (Gordon and Steward JJ).
68 Ibid 610 [82] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [152]–[153] (Gordon and Steward JJ), 646 [209]–[210] (Edelman J).
69 Crawford (n 6) 168; Crawford and Boughey (n 4) 26.
70 Crawford (n 6) 168; MZAPC (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 637–8 [181]–[182] (Edelman J), 614–15 [100] (Gordon and Steward JJ).
71 MZAPC (n 3) 605 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
72 Ibid 601–2 [46] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
73 Ibid 630–2 [160]–[164] (Edelman J).

as an emerging pillar of jurisdictional error by balancing the need to hold decision-makers accountable with the need to avoid holding decision-makers to an impossible, impractical standard in cases where the result would not alter.[74]

The salient point from these cases is that the threshold of materiality further confirms an ambulatory approach to determining the limits of administrative action.[75] It follows the trend away from the original examples of breaches outlined in *Craig*[76] and makes the inquiry for jurisdictional error context-specific.[77] Consequently, while precedential decisions may be useful to determine the content of a decision-maker's obligations (for example, the content of the fair hearing rule in a specific statutory context), the circumstances of a case now hold greater significance.[78]

Materiality represents a step towards a more coherent test for jurisdictional error — one which further builds upon the traditional grounds of review and is focused primarily on statute and circumstance. While Crawford notes that some grounds of review represent errors that will always have an impact on the outcome of a decision,[79] both Edelman J and Nettle J contend that the threshold of materiality cannot be the same in every circumstance.[80] These observations tie back to the reasoning in *Craig*, further elaborated upon in *Kirk* — namely, that the threshold for establishing jurisdictional error is not fixed in place.[81] Ultimately, while jurisdiction is a binary label — it either is or is not present — establishing a jurisdictional error has been and remains dependent on the circumstances of the decision.

Criticisms of materiality

There remain persistent criticisms of materiality as an emerging concept. While this article is primarily concerned with the interplay between materiality and procedural fairness, it is important briefly to acknowledge these criticisms to place materiality in its proper context.

Critics such as Aniulis decry materiality as a 'tangled threshold' or a step too far[82] — a concern that is overstated in the context of ever-changing judicial principles. I will address these concerns briefly, noting that others have already dealt with these issues at length. Aronson documents significant judicial shifts, where the courts 'spring a surprise on the drafters', and argues that there is nothing 'new' or 'radical' about materiality: normative and practical-based statutory interpretation has and will continue to form a part of judges' roles.[83] *Kioa v West*,[84]

74 *Aala* (n 22) 90–1 [14] (Gleeson CJ).
75 Lisa Burton Crawford, 'Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power' (2019) 30 *Public Law Review* 281, 284.
76 *Craig* (n 12) 176–80.
77 Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42 *Sydney Law Review* 209, 210.
78 *Hossain* (n 1) 134–5 [30]–[31] (Kiefel CJ, Gageler and Keane JJ).
79 Crawford (n 75) 289.
80 *Hossain* (n 1) 137 [40] (Nettle J), 147 [72] (Edelman J).
81 *Craig* (n 12) 176–8; Kirk (n 8) 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
82 Harry Aniulis, 'Materiality: Marking the Metes and Bounds of Jurisdictional Error?' (2020) 27 *Australian Journal of Administrative Law* 88, 101.
83 Mark Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 28 *Australian Journal of Administrative Law* 6, 10.
84 (1985) 159 CLR 550 ('*Kioa*').

Plaintiff S157/2002 v Commonwealth[85] ('*Plaintiff S157*') and *Hossain* represent significant changes to the judicial canon, the development of which is expected of the judiciary.[86] Emerging common law principles or, rather, the explicit articulation of their centrality are 'no threat to the survival of the generic principles'.[87]

Second, the concern that materiality represents an impermissible intrusion by the courts into merits review is generally unsubstantiated.[88] First, similar practices in judicial review on the grounds of unreasonableness, procedural fairness and jurisdictional facts are widely accepted as constitutionally permissible. In the case of the latter, where the legislature has made the existence of an objective fact a jurisdictional threshold, the question of its existence is a legal question determined by statutory interpretation.[89] Second, Robert French, writing extra-curially, explained that:

> Ultimately both [judicial review and merits review] are concerned with the merits of the case. A decision which is bad in law is bad on its merits. A better distinction might be drawn by using the term 'factual merits review' and 'legal merits review'.[90]

Groves has interpreted this quote as a recognition that, although the separation of powers indicates the judiciary will not engage with any form of the substantive value or merits of a decision, the practical reality is that merits and legality cannot be artificially separated from one another.[91] Both courts and tribunals consider the quality of the decision, referable to different standards, but this will necessarily involve issues of both factual and legal merit in both cases.[92] Practically, the High Court is usually the first body to avoid anything that leads to improper merits review, as to do so raises questions of their continuing legitimacy within the Ch III court system. The central inquiry of materiality is not whether a circumstance is factually material but whether an *error of law is legally* material such that it could realistically affect the outcome of a decision.

In summary, although materiality has only recently become an element of jurisdictional error, as a concept it is neither radical nor ahistorical. The High Court majority's articulation of the principles of materiality in *Hossain* was within its purpose of determining the content of law.[93] Similarly, materiality as an element of determining jurisdictional error represents no threat to separation of powers or judicial integrity principles because it goes to the effect of the legal error under consideration. It applies as a mechanism to determine the legal consequence of existing grounds of judicial review by imposing a threshold below which legal errors cannot be considered jurisdictional.

85 211 CLR 476 ('*Plaintiff S157*').
86 Ibid 13; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 366 [13] (Brennan J).
87 Aronson (n 83) 6.
88 Aniulis (n 82) 104.
89 Boughey, Rock and Weeks (n 9) 113.
90 Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Australian Administrative Law — Concepts and Context* (Cambridge University Press, 2014) 34.
91 Matthew Groves, 'The Unfolding Purpose of Fairness' (2017) 45 *Federal Law Review* 653, 669.
92 Ibid.
93 Aronson (n 83) 10.

Procedural fairness and jurisdictional error

Following *MZAPC*, it is clear that materiality is not universal, neither is it intended to form part of the inquiry for jurisdictional error for every ground of review.[94] In that case, the majority comprised of Kiefel CJ and Gageler, Keane and Gleeson JJ, with Edelman J concurring separately in the result, recognised that several grounds, or 'common law principles', already encompass a materiality component, such that adding materiality as a further step would be meaningless in the circumstances. These grounds included the rule against actual or apprehended bias and the requirement that all decisions be legally reasonable.[95] Extending this reasoning, it is uncontroversial that a decision made in bad faith will, 'by definition, involve an error that is not trivial or harmless'.[96] Previously, in Hossain, Edelman J and Nettle J had identified other circumstances where materiality has no role to play.[97] These included where the error was so fundamental to the exercise of statutory power that its breach would automatically result in invalidity[98] and circumstances where a jurisdictional error should be found for dignitarian purposes.[99]

The rationale behind materiality is that Parliament would not intend an unlawful yet immaterial exercise of power to result in an invalid decision — a line of reasoning that can be traced back to *Stead v State Commissioner of Taxation*[100] ('*Stead*'). Accordingly, a materiality inquiry is an exercise based on close statutory interpretation and examination of the particular factual circumstances.[101] The grounds listed above will always be material, as it is unthinkable that Parliament would intend that a decision infected by bias, for example, be legally valid. For Parliament to authorise such bias (that is, to render it immaterial), they would have to legislate to abrogate the rule against bias with 'irresistible' clarity.[102]

Although *Craig's* classification-based test has been superseded as a threshold for jurisdictional error that is receptive to the functional circumstances of the impugned decision, it recognised that the test for jurisdictional error was not one-size-fits-all.[103] *Kirk* further expanded on this notion, adding that determining whether an error is jurisdictional is 'almost entirely functional'.[104] The emerging materiality doctrine draws upon these foundational principles, acting as a tangible manifestation of the threshold for jurisdictional error as a sliding scale; that is, in some cases the threshold of materiality — and thus the threshold for establishing jurisdictional error — will be higher, and in other cases it will be lower. In the *Craig* era, this threshold was determined by reference to the type of institution (inferior court or administrative

94 Crawford (n 75) 289.
95 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 637–8 [181]–[182] (Edelman J).
96 Ibid 637 [181] (Edelman J); *WAVF v Refugee Review Tribunal* (2003) 125 FLR 351, 368 [41] (French J), quoting De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 553.
97 *Hossain* (n 1) 137 [40] (Nettle J), 147 [72] (Edelman J).
98 Ibid 147 [72] (Edelman J).
99 Ibid 137 [40] (Nettle J).
100 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 ('*Stead*'), 145–6.
101 *MZAPC* (n 3) 625 [136], 619 [113], 610 [84] (Gordon and Steward JJ), 597 [30]–[31], 598 [34] (Kiefel CJ, Gageler, Keane and Gleeson JJ), quoting *Hossain* (n 1) 134–5 [30] (Kiefel CJ, Gageler and Keane JJ).
102 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('*Saeed*'), 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
103 *Craig* (n 12) 176–8.
104 Aronson (n 83) 15, quoting *Kirk* (n 8) 570 [64], quoting L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

tribunal);[105] and in *Kirk* the court articulated the scale in terms of the functions and powers of the repository.[106] Now, the High Court is beginning to articulate a threshold of materiality that is both context-sensitive and referable to the grounds of review.

In a procedural fairness context, the rule against bias has already been deemed not to require a materiality analysis to establish jurisdictional error.[107] I seek to argue that the other arm of procedural fairness — the fair hearing rule — demands a similarly low threshold for materiality, albeit not one that results in no materiality inquiry at all. In doing so, I first examine the rationale for procedural fairness, recognising that it holds a privileged position in judicial review. I next review the content of the fair hearing rule, arguing that the 'practical injustice' standard is the functional equivalent of materiality, thus rendering the role of materiality much lower in a procedural fairness context.

Procedural fairness — rationales

The ground of procedural fairness developed through the natural justice cases from the 17th century,[108] and its modern history begins with *Cooper v Wandsworth Board of Works*.[109] It holds a special place in the context of administrative decision-making, and the obligation to accord procedural fairness always exists 'in the absence of clear, contrary legislative intention'.[110] More specifically, procedural fairness is determined through the two arms of the fair hearing rule and the rule against bias. The tests for establishing a breach of either arm are highly flexible,[111] and it is clear since *Re Refugee Review Tribunal; Ex parte Aala*[112] ('*Aala*') that procedural fairness is a ground that if made out will normally establish jurisdictional error.[113] However, up until 1963,[114] procedural fairness was associated primarily with proprietary rights, rather than lesser varieties of 'interest'.[115] It is only since the case of *Ridge v Baldwin* that procedural fairness has been considered necessary to the function of administrative decision-making.

The maxim of procedural fairness, first articulated in *John v Rees*, posited that, even where the result seems obvious, natural justice should be accorded.[116] In that case, Megarry J said, 'the path of the law is strewn with examples of open and shut cases which, somehow, were not'.[117] Following this decision, Australian courts have expanded the notion of procedural fairness to recognise its value in the judicial review context. The fair hearing rule and the rule

105 *Craig* (n 12) 177.
106 *Kirk* (n 8) 574–5 [74]–[75] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
107 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
108 Groves (n 91) 654.
109 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
110 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 ('*WZARH*'), 335 [30] (Kiefel, Bell and Keane JJ).
111 Boughey, Rock and Weeks (n 9) 116–17.
112 *Aala* (n 22).
113 Ibid 101 [41] (Gaudron and Gummow JJ).
114 *Ridge v Baldwin* [1964] AC 40; Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 104.
115 See, eg, *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
116 *John v Rees* [1969] 2 All ER 274.
117 Ibid 309; *Stead* (n 100) 145.

against bias are valuable for their utilitarian purpose in promoting good decision-making. Beyond this, they recognise the obvious relationship between the decision-maker and applicant in the context of administrative action.[118]

Procedural fairness holds a special place in judicial review of administrative action. This special place is founded on several rationales. First, affording procedural fairness to applicants of judicial review realises the rule of law. The main thrust of the rule of law is that nobody is above the law, regardless of their position in society.[119] This reasoning is particularly relevant in a judicial review context because the review of administrative actions of government decision-makers is concerned with judging a purported exercise of executive power against a set of standard principles. In Australia, s 75(v) of the *Constitution* is considered to '[secure] a basic element of the rule of law' by subjecting executive action to judicial review by the High Court.[120] As Robert French noted extra-curially, the incredible power wielded by the executive is not unlimited: its exercise is dependent on compliance with norms of decision-making.[121] These norms include that the use of power is fair, rational, lawful and exercised in good faith.[122]

Ensuring there is procedural fairness in executive action achieves the aims of the rule of law. Lord Reed recognised that procedural fairness obligations promote 'congruence between the actions of the decision-maker and the law which should govern their actions'.[123] In the absence of such accountability, the subjects of our constitutional system lose faith in its validity. Groves, commenting on the purpose of fairness in judicial review of administrative action, argues that this promotes an 'intangible benefit', which bolsters regime legitimacy.[124] Consistency in the regulation of executive action — particularly administrative decision-making, which involves determining issues that directly impact constituents — enhances the legitimacy of the decisions, and by extension, the government itself.[125] Maintaining fairness of procedure in accordance with processes that are understood by those subject to them therefore bolsters the rule of law.

Second, the dignitarian purpose realised by procedural fairness forms the basis for the presumption of legality — that is, procedural fairness can only be abrogated with clear legislative intent.[126] Upholding procedural fairness rules respects the dignity of the public, who are directly 'affected by the exercise of official power'.[127] Further, there is a moral value achieved by ensuring that procedures treat subjects of the law with dignity.[128] As

118 Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position' (2016) 23 *Australian Journal of Administrative Law* 164, 173.
119 Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence' (2017) 44 *Brief* 19, 22.
120 *Plaintiff S157* (n 85) 482 [5] (Gleeson CJ); M Gleeson, *2000 Boyer Lectures: the Rule of Law and the Constitution* (ABC Books, 2000) 67, quoted in Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 13 *Judicial Review* 261, 263.
121 French (n 119) 22.
122 Ibid.
123 *Osborn v Parole Board* [2014] 1 All ER 369 ('*Osborn*'), 395 [71] (Lord Reed).
124 Groves (n 91) 671.
125 Ibid.
126 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
127 Groves (n 91) 671.
128 Lon L Fuller, *The Morality of Law* (Yale University Press, 1969) 162.

contended by TRS Allan, even if procedural fairness does not lead to a higher incidence of correct or preferable decision-making, treating applicants with respect recognises a separate, intangible virtue[129] — that is, it acknowledges that we as humans value equality, respect and fairness.[130] The principle of legality is predicated on these values and serves to 'protect substantive or basic fundamental rights'.[131] It follows that these values are of legal importance, as they form the basis for this presumption of procedural fairness that forms part of the statutory construction process.[132]

In the UK case of *Osborn v Parole Board*,[133] Lord Reed provided a compelling overview of why dignitarian justifications underpin the importance of procedural fairness. His Lordship noted that the way we subconsciously perceive justice necessarily requires respect for the persons affected by executive or judicial decisions through the procedure in making the decision.[134] In that case, his Lordship argued that this respect requires that those who 'have something to say which is relevant to the decision' should be granted an audience; an opportunity to participate in this procedure.[135] Lord Reed emphasised the importance of fair process regardless of practical impact by referring to the obiter in *R v University of Cambridge (Dr Bentley's Case)*:[136]

> The point of the dictum … is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making.[137]

As Groves notes, Australian courts have picked up on this language and increasingly make explicit reference to dignitarian principles in their judgments.[138] Both the dignitarian and rule of law rationales discussed above demonstrate that ensuring procedural fairness in administrative decision-making is consistent with values that we collectively deem important. Upholding the dignity of applicants and maintaining the rule of law are cornerstone features of our Australian democracy — the former recognises that the subjects of law are human and deserve a minimum level of respect, and the latter ensures the integrity of the judiciary in the exercise of its Ch III powers. More than any other ground, procedural fairness holds a special place within judicial review because it supports these fundamental aspects of administrative accountability.

129 Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 77–87, cited in Groves (n 91) 671.
130 Rundle (n 118) 166, quoting Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.
131 *R v Secretary of State for the Home Department, ex parte Pierson* [1997] All ER 577, 605 (Lord Lloyd), cited in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
132 *Saeed* (n 102) 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
133 *Osborn* (n 123).
134 Ibid 394 [68] (Lord Reed).
135 Ibid
136 (1723) 92 ER 370.
137 *Osborn* (n 123) 394 [69] (Lord Reed).
138 Groves (n 91) 672.

The fair hearing rule — 'practical injustice' performs a similar function to a materiality inquiry

As noted above, the majority in *MZAPC* observed that a decision that contravened the rule against bias would of itself constitute a jurisdictional error.[139] The court had previously distinguished the bias test, which is determined by reference to the reasonable apprehension of an hypothetical observer, from materiality, which involves a counter-factual analysis about what might happen[140] — that is, in the context of actual or apprehended bias, materiality has no role to play in determining whether an error is jurisdictional.[141] Indeed, given that the test for bias is judged according to what an observer might think, it would undermine public faith in the law if a court could determine the existence of bias and later judge it to be immaterial.[142] It follows that materiality applies with various levels of strength in different circumstances.

For these reasons, the scope of my inquiry is limited to the fair hearing rule. Specifically, what does materiality demand in the context of the fair hearing rule?

The content of the fair hearing rule is already highly context specific. It asks, 'what is required in order to ensure that the decision is made fairly in the circumstances, having regard to the legal framework within which the decision is to be made?'.[143] In *Kioa v West*, the High Court framed their standing inquiry in terms of how a person is affected by administrative decision-making, rather than merely by the nature of their interest.[144] Relevantly, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [145] ('*Lam*') established that an applicant asserting a breach of the fair hearing rule must demonstrate that they have suffered some 'practical injustice' that results in a detriment to the applicant.[146] In that case, Gleeson CJ reasoned that this threshold recognises that fairness does not exist in the abstract it must have a practical element.[147] Later, in *Minister for Immigration and Border Protection v WZARH*[148] ('*WZARH*'), the Court confirmed that this inquiry is to be conducted in terms of fair process in the overall circumstances of the case, rather than confining it to fairness concerning a particular expectation or interest.[149]

Rundle highlights that the practical element of the fair hearing rule refers to a lack of fairness in the loss of opportunity to be heard.[150] The inquiry, she contends, should be directed to before a decision is made, rather than towards a decision's *outcome*.[151] Judicial review

139 *MZAPC* (n 3) 598 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
140 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 ('*CNY17*'), 94–5 [47] (Kiefel CJ and Gageler J).
141 Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44(2) *Melbourne University Law Review* 565, 598.
142 Ibid 598–9.
143 *WZARH* (n 110) 335 [30] (Kiefel, Bell and Keane JJ), quoted in Boughey, Rock and Weeks (n 9) 116–17.
144 *Kioa* (n 84) 619–22; Groves (n 91) 656.
145 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*'),
146 Ibid 13 [36] (Gleeson CJ).
147 Ibid [37].
148 *WZARH* (n 110).
149 Groves (n 91) 665–6.
150 Rundle (n 118) 170.
151 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 663 (Gibbs CJ).

indeed turns on actions taken in making a decision, not those that follow in consequence.[152] However, in *Stead*, a case that is repeatedly cited for its articulation of a minimum threshold to the natural justice test, the central inquiry was whether the breach deprived the applicant of the 'possibility of a successful outcome'.[153] It follows that the lost opportunity should be judged in the context of the final decision. The requirement that there be some 'practical injustice', then, balances the dignitarian values underpinning procedural fairness (discussed above) with utilitarian views that prioritise 'decision-making [as] a function of the real world'.[154]

The narrow factual circumstances of High Court materiality cases demonstrate the similarity between 'materiality' and 'practical injustice'

The three seminal materiality cases, as well as the pre-materiality procedural fairness case of *Lam*, were all decided on very narrow factual bases. In the three cases which involved procedural fairness, concessions made by either counsel meant that 'practical injustice' did not sit at the centre of the inquiry. Revisiting these cases demonstrates that they are exceptions to the general trend of cases decided in accordance with the fair hearing rule, in which even relatively minor departures from that rule are material for the reasons discussed above. *Lam* is a useful example for discussing the threshold for whether a mistake is grave enough to amount to a jurisdictional error, even though the lack of practical injustice was conceded.[155]

In the context of materiality, the narrow factual bases of these cases support a lower threshold of materiality when establishing jurisdictional error on the ground of procedural fairness. Simply put, due to the onerous and context-specific nature of the 'practical injustice' test, courts will observe a higher bar for establishing *immateriality* of the breach. Where procedural fairness is conceded at the outset, courts will go through a similar process as is required by the 'practical injustice' test but will now label their inquiry with reference to materiality.

Lam *demonstrates the narrow circumstances where a breach will not result in practical injustice*

Lam involved a visa cancellation on character grounds, following a series of offences committed by the appellant, which included heroin trafficking.[156] When the decision-maker was determining whether to cancel the visa, the applicant received a letter outlining the cancellation decision process and the matters they would consider, which relevantly included 'the best interests of any children with whom you have an involvement'.[157] Following a written submission in which the appellant enclosed a letter in his support from his children's carer, Ms Tran, along with her contact details,[158] the appellant received a further letter from the

152 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 388 ALR 257 [22].
153 *Stead* (n 98) 147.
154 *Hossain* (n 1) 134 [28] (Kiefel CJ, Gageler and Keane JJ).
155 *Transcript of Proceedings, Lam* (n 145) 23–4 [995]–[1000] (Mr Walker).
156 *Lam* (n 145) 4 [1]–[2] (Gleeson CJ).
157 Ibid 5 [6] (Gleeson CJ).
158 Ibid 5–6 [8] (Gleeson CJ).

Character Assessment Unit requesting these same details.[159] Despite these representations, the department did not decide to contact Ms Tran.[160] The appellant argued that the decision not to contact her amounted to procedural unfairness, arising from the fact that Lam had not been informed of the decision.[161]

In argument, Bret Walker SC, counsel for the appellant, conceded that the appellant would not have acted differently whether or not the Tribunal contacted Ms Tran,[162] thus confining the content of the complaint to the fact that there was no notice of the decision not to contact Ms Tran, rather than any specific opportunity denied to the appellant.[163] In doing so, counsel for the appellant destroyed any chance of success in this appeal. The as-yet unarticulated test for the fair hearing rule, which required some 'practical injustice' to be suffered by the party asserting breach, was completely conceded:

> Your Honours, may I once and for all concede it. He was not denied any opportunity. If I measure it by what he put in, no complaint. If I measure it about the amplitude of an invitation to put in material, no complaint. If I measure it by what he could have said had he been told before the decision, 'Look, we don't have time. We don't have enough officers' or, 'On reflection, we don't think it is going to help. We are not going to be in touch with the children's carers or their mother', then I do not say that he could have said more on his account from his perception than he already said.[164]

Had Mr Walker not been forced to concede this point, and instead was able to advance the case on the basis that procedural fairness was not afforded, it is likely the outcome of the case would have been different. This is because the appellant could have argued that he lost the opportunity to make further submissions about his relationship with his children, with the benefit of knowing that the Tribunal would not contact their carer, Ms Tran. *Lam's* case, although cited primarily for its departure from the 'legitimate expectation' language,[165] and its articulation of a 'practical injustice' requirement that is necessary to establish a breach of procedural fairness,[166] is also an example of the narrow circumstances where a court will find that a mistake involving procedural fairness will not amount to a jurisdictional error. Here, conceding that the mistake bore no implication for the appellant's behaviour was critical to establishing these narrow circumstances.[167]

Hossain's *unique facts reduce its analogical relevance going forward*

As noted above, *Hossain* involved highly specific factual circumstances. Upon interpretation of the statutory scheme under which the decision was made, the court determined that the Tribunal's error regarding the timing criterion did not impact the validity of the public interest criterion[168] — that is, because there were two bases upon which the visa was refused, an error involving one of those bases did not have any practical implications for the ultimate

159 Ibid 6 [9] (Gleeson CJ).
160 Ibid 6–7 [12] (Gleeson CJ).
161 Ibid 8 [18] (Gleeson CJ).
162 Transcript of Proceedings, *Lam* (n 145) 6 [230] (Mr Walker).
163 Ibid 26 [1120] (Hayne J).
164 Ibid 23–4 [995]–[1000] (Mr Walker).
165 *Lam* (n 145) 12 [34] (Gleeson CJ), 16 [47] (McHugh and Gummow JJ), 38 [121], 45 [140] (Callinan J).
166 Ibid 13–14 [37] (Gleeson CJ).
167 Transcript of Proceedings, *Lam* (n 145) 6 [230] (Mr Walker).
168 *Hossain* (n 1) 137 [41] (Nettle J), 149 [79] (Edelman J).

decision.[169] While the principles regarding materiality in *Hossain* hold precedential value, its factual circumstances are less useful in this regard because they are unique. Overall, the case represents low factual analogical usefulness for future decisions.

SZMTA *and* MZPAC *can be used to establish the similarity between materiality and practical injustice, through counterfactual analysis*

In both *SZMTA* and *MZAPC,* the Minister conceded that there had been a breach of procedural fairness.[170] Consequently, the central issue was whether the breach amounted to a jurisdictional error, a task completed through the lens of materiality. Had the fact of breach been contested, or had the cases been challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'),[171] it is likely that the appellants would still be unsuccessful in obtaining the remedies they desired. This is because the inquiry conducted when establishing a breach of procedural fairness is substantially the same as the materiality inquiry. Since Aala, and before the articulation of materiality, a breach of procedural fairness automatically resulted in a finding of jurisdictional error,[172] and the implied materiality element of practical injustice went to establishing that breach.[173] While the language and emphasis has evolved, the practical test has not. Rather, the implied materiality element is now considered as a further, explicit, element of jurisdictional error. To demonstrate their similarity, it is useful to consider the facts of *MZAPC* in alternative court proceedings. Let us then assume that the Minister had not conceded a breach of procedural fairness and that this issue in dispute would therefore turn on whether the appellant in *MZAPC* has suffered some 'practical injustice'.

In *WZARH*, the majority reiterated the stringent test for 'practical injustice':

> Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure … unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given. [174]

In *MZAPC*, the appellant argued that, because the Tribunal failed to disclose the notification under s 438, he lacked the opportunity to make submissions on the information disclosed in the notification.[175] These facts satisfy the first limb of the fair hearing rule, as the Tribunal failed to allow the appellant to be heard on the content of the notification. The appellant's case would likely fall short on the second limb. The appellant argued that the material that was the subject of the notification, which included a Victoria Police record, went to the Tribunal's assessment of his credibility.[176] However, in the absence of evidence that the Tribunal considered exercising its powers under s 483(3), and in the absence of reference

169 Ibid.
170 *SZMTA* (n 2) 440 [27] (Bell, Gageler and Keane JJ); *MZAPC* (n 3) 594–5 [17] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 624 [134] (Gordon and Steward JJ), 643 [201] (Edelman J).
171 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') s 5(1)(a).
172 *Aala* (n 22) 101 [41] (Gaudron and Gummow JJ).
173 *Stead* (n 100) 147.
174 *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).
175 *MZAPC v Minister for Immigration and Border Protection* [2019] FCA 2024 [30].
176 Ibid [28].

to the notification material in its reasons, the court may infer that the Tribunal did not consider the information when determining the appellant's case.[177] These circumstances are distinguishable from *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[178] ('*VEAL*'), where there was clear evidence that the Tribunal had intellectually engaged with the adverse material,[179] and the content of the information was so prejudicial that it could not realistically be set aside.[180] Further, the Tribunal accepted the credibility of the appellant's claims and instead denied the visa on the basis that the appellant's fears of persecution should he return to India were not well founded.[181] Because the appellant's credibility was not in issue, the content of the notification was not significant to the contentious issues being determined by the Tribunal.[182]

In these factual circumstances, allowing the appellant the opportunity to make submissions about the content of the notification would not increase the possibility of a successful outcome because the contents of the report were of minimal relevance to the ultimate decision.[183] Had the Minister conceded a breach of procedural fairness in a case run under s 5 of the ADJR Act, the court would still have had to determine whether the appellant suffered a practical injustice in order to obtain a remedy under s 16. Here, the materiality element is established as part of the practical injustice test for establishing procedural unfairness. And again, as with the common law, the appellant would have been denied remedies on this basis. On balance, as the denial of procedural fairness did not rise to the level where it deprived the appellant of the possibility of a successful outcome, it is unlikely that the appellant would have been granted the remedies he sought, even in this alternative factual scenario.

Some might argue that semantic differences between the test for a breach of procedural fairness (depriving the *possibility* of a successful outcome)[184] and the threshold for materiality (whether the outcome could have *realistically* been different)[185] mean that the bar to establish procedural fairness is less onerous. Respectfully, I disagree. In the High Court's various judgments on materiality, the use of the term 'realistic' has often been supplemented or replaced by other phrases, such as 'realistic possibility',[186] 'objective possibility',[187] and 'unnegated possibility'.[188] Further, in *MZAPC* the majority referred to the strength of *Stead's* 'analogical force of reasoning', on the basis that 'procedural unfairness can result in

177 *MZAPC* (n 3) 604 [56]–[57] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
178 (2005) 225 CLR 88 ('*VEAL*').
179 Ibid 99 [27].
180 Ibid.
181 *MZAPC* (n 3) 609 [76] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 628 [151] (Gordon and Steward JJ).
182 *VEAL* (n 178) 96 [17].
183 *SZMTA* (n 2) 452 [72] (Bell, Gageler and Keane JJ).
184 *Stead* (n 100) 147; *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).
185 *MZAPC* (n 3) 605 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
186 *SZMTA* (n 2) 445 [48], [49] (Bell, Gageler and Keane JJ); *MZAPC* (n 3) 600 [39]–[40] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
187 *CNY17* (n 140) 95 [47] (Kiefel CJ and Gageler J).
188 *MZAPC* (n 3) 602 [47] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

jurisdictional error'.[189] In *Stead*, the central inquiry was whether 'the denial of natural justice deprived him of the *possibility* of a successful outcome'.[190] The threshold for deprivation is therefore the same in both the 'practical injustice' test and the inquiry under a 'materiality' analysis.

I have just distinguished key materiality and procedural fairness cases, where jurisdictional error was *not* found, from factually clearer breaches of procedural fairness that will amount to a jurisdictional error — that is, there is a very narrow factual area in which these cases sit. In the cases of *SZMTA* and *MZAPC*, materiality merely fulfilled the function of the practical injustice test, given that the breach of procedural fairness was conceded by the government. In cases where a breach of the fair hearing rule is contested, the practical injustice test does most of the legwork. Consequently, there is a higher bar for immateriality. In this context, the substantive inquiry of materiality is almost the same as that for procedural fairness set out in *Stead* — the emphasis has merely shifted from an implied threshold of materiality in establishing the ground of procedural fairness to an explicit materiality inquiry that sits outside the ground of review.

Materiality post-MZAPC

Materiality remains important in the context of the fair hearing rule in circumstances where procedural fairness is conceded, and the courts need to establish whether the breach rises to a jurisdictional error. One might argue that a concession should automatically amount to a jurisdictional error, given the importance of procedural fairness in our administrative regime and the dignitarian and rule of law values that we associate with affording procedural fairness. But this argument is inconsistent with the principles set out in *Lam* and *WZARH*. Both cases acknowledge that a breach of procedural fairness, lacking a practical element, will amount to a merely non-jurisdictional error.[191] The logic behind arguing that a concession will automatically lead to jurisdictional error undermines the 'practical injustice' threshold and asserts that any breach, no matter how insignificant, should amount to a jurisdictional error. While some may see this as a desirable mode of governing administration, it is ahistorical and attempts to hold up procedural fairness as something more than it is.

Under the test for procedural fairness, the applicant must go further than asserting mere breach and demonstrate that they were deprived of the possibility of a successful outcome in consequence. Why, then, should the bar be lower in a s 75(v) context, merely because a Minister has conceded one part of a two-part inquiry? Materiality remains relevant to the fair hearing rule because otherwise the application of that rule would be vulnerable to a concession of even the most minor breach.

In the alternative, it is unclear why the High Court interprets a ministerial concession of a breach to amount to a denial of procedural fairness, generally, and glosses over the practical injustice test in favour of a materiality inquiry. Perhaps materiality represents a broadening of the practical injustice test that applies to all grounds of review, not just procedural fairness. An alternative approach could be to view a breach as satisfying part 1 of the two-part test

189 *MZAPC* (n 3) 601 [45] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
190 *Stead* (n 100) 147.
191 *Lam* (n 145) 13–14 [37] (Gleeson CJ); *WZARH* (n 110) 342–3 [60] (Gageler and Gordon JJ).

in *WZARH* and engage with the (substantially identical) practical injustice test. If, as I have argued, the relevance of materiality is limited to such concessions in the fair hearing rule context, then a stringent materiality analysis could be altogether avoided by deferring to a procedural fairness inquiry in the first instance. In this context, in the context of the fair hearing rule, materiality has no new role to play; its articulation is not a development of law but merely a shift in emphasis and language.

Concluding remarks

It remains uncertain how, exactly, the procedural fairness fair hearing rule and materiality interact, and indeed whether materiality should form a part of a procedural fairness inquiry at all. I have demonstrated that the 'practical justice' threshold and the materiality threshold are substantially identical, by examining what each test demands in the context of recent materiality cases. It appears that the line of reasoning for both thresholds is substantially the same and that, once practical injustice is made out, materiality has little more to add in terms of judicial analysis. This is evident from the counter-factual analysis of *MZAPC*, where the reasoning considered the similar factors and produced the same outcome. It follows that materiality has a lesser role when the central inquiry of judicial review is breach of the fair hearing rule — substantially, the test remains as articulated in *Stead*. However, because of the High Court's disregard for the practical injustice test in cases where a breach has been conceded by the decision-maker, materiality remains relevant to establishing the practical detriment necessary to amount to jurisdictional error. Consequently, materiality cannot be completely disregarded for the fair hearing rule as it has been for the rule against bias. Despite the special place of procedural fairness in judicial review in promoting values of dignity and the rule of law, materiality remains an important filter that functionally serves to realise the principles set out in *Lam*. In both the context of the fair hearing rule and administrative mistakes generally, materiality represents the practical, utilitarian balance between the aforementioned values and 'decision-making [as] a function of the real world'.[192]

192 *Hossain* (n 1) 134 [28] (Kiefel CJ, Gageler and Keane JJ).

The *Human Rights Act 2019* (Qld): three tricky questions for administrative lawyers

*Felicity Nagorcka**

Although perhaps not everyone yet realises it, the commencement of the *Human Rights Act 2019* (Qld) was a watershed for administrative law in Queensland. At least two factors, working together, make that true.

The first factor is that the human rights protected in pt 2 of the Act are very extensive. As in other human rights jurisdictions, the scope of each right is to be 'construed in the broadest possible way' by reference to the right's 'purpose and underlying values'.[1] Accordingly, in their unlimited form, the rights are likely to be much broader in scope than one might expect from a cursory reading of the text of each provision. For example, the right to privacy may encompass a right to work;[2] the right to property might be limited by an increase in taxation[3] or a reduction in social welfare;[4] and the approval of a mining lease may limit the right to life if it results in an increase in carbon emissions.

The breadth of the rights in pt 2 means that human rights are potentially engaged by practically all forms of government decision-making in Queensland, including decision-making in respect of corporations.[5]

The second factor is s 58(1). This provision imposes two distinct obligations on 'public entities':[6]

- The first is 'substantive', as it requires that public entities must act and make decisions that are compatible with human rights.
- The second is 'procedural,' as it requires that when making a decision a public entity must not to fail to give proper consideration to a relevant human right.

Therefore, s 58(1) provides two new potential grounds of judicial review: one focused on outcomes and one focused on process. These grounds can provide an applicant with relief, even where the traditional administrative law grounds do not.

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1 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [130] (Martin J) ('*Owen-D'Arcy*').

2 *ZZ v Secretary, Department of Justice* [2013] VSC 267 (Bell J).

3 *Špaček, s.r.o. v The Czech Republic* (2000) 30 EHRR 1010, 1019 [39]; *Burden v United Kingdom* (2008) 47 EHRR 38, 875 [59]; R (*Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin) [139] (Burnton J).

4 *Stec v United Kingdom* (2005) 41 EHRR SE 18 [54]; *R (RJM) v Secretary of State for Work and Pensions* [2008] 3 WLR 1023, 1032–1035 [23]–[34] (Lord Neuberger).

5 Corporations do not have human rights in Queensland — see *Human Rights Act 1958* (Qld) s 11(2). However, decision-making about corporations frequently affects human beings.

6 *Owen-D'Arcy* (n 1) [125].

Taken together, those two factors — the broad scope of the rights and s 58 — mean that administrative law practitioners in Queensland should, if they do not already, turn their minds to potential human rights arguments in practically every judicial review application and in many other cases besides. However, to those who do, one difficulty which will quickly become apparent is that there are many tricky questions thrown up by the Human Rights Act. In this article I discuss three of those questions:

1. How does a court review a decision for 'compatibility' with human rights?
2. What is the interaction between s 48 and s 58?
3. How does the piggybacking provision in s 59 work?

How does a court review a decision for 'compatibility' with human rights?

The substantive limb of s 58(1) — para (a) of that subsection — provides that it is 'unlawful' for public entities to 'act or make a decision in a way that is not compatible with human rights'.

How does a court review a decision for 'compatibility' with human rights under s 58(1)(a)? Two statutory provisions are critical in answering this question.

Firstly, s 8 defines the phrase 'compatible with human rights'. It provides that an act, decision or statutory provision will be 'compatible with human rights' if the act, decision or provision:

- 'does not limit a human right'; or
- 'limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13'.

Hence, s 8 makes it crystal clear that when a decision does limit human rights (which, given the breadth of the rights, will be often) s 13 will be key.

Second, s 13 is similar in many ways to its Victorian counterpart — s 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'). Section 13 is not drafted in terms which precisely replicate the Victorian equivalent or any of its other predecessors. While in terms of its *drafting* s 13(2) is a creature unique to Queensland, in terms of the concepts laid out in s 13 it is not at all unique to Queensland. The Queensland drafting just sets out, more precisely and comprehensively, each of the steps involved in a structured proportionality analysis.

In the first detailed consideration of s 58 in the Supreme Court of Queensland, *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* ('*Owen-D'Arcy*'), Martin J said that, like s 7 of the Charter, s 13 should be regarded as embodying a 'proportionality test'.[7]

7 Ibid [104].

Since McCloy v New South Wales[8] ('*McCloy*'), a majority of the High Court has accepted structured proportionality as the 'tool of analysis' to be used when determining whether burdens on the implied freedom of political communication are permissible. If you compare [2(B)(3)] of *McCloy*[9] with the text of s 13(2) you will see a striking similarity.

Accordingly, implied freedom cases — and, since *Palmer v Western Australia,*[10] s 92 cases — can be instructive in relation to how proportionality testing works (although, of course, it is necessary to be aware of the difference in context when having regard to those constitutional cases).

Looking at s 13(2), it has these steps:

a. First, consider the *nature of the human right* — its purpose and underlying values. The idea is to keep this in mind from the outset.

b. Then consider the nature of the *purpose of the limitation* — in other words, what is the *reason* this act or decision limits human rights? For example, is it to protect the community from disease; or to protect a particular group from a dangerous person? In the context of the implied freedom of political communication, this stage asks whether the purpose is *legitimate*. In human rights jurisprudence, a measure will fail at this point if its purpose is not consistent with a free and democratic society.

c. Paragraph (c) then asks whether the limit on the human right actually helps to achieve the purpose identified — do the means help to achieve the ends? As the explanatory note to the Human Rights Act explained,[11] para (c) sets out what in proportionality analysis is called 'rational connection', or *suitability.*

d. Paragraph (d) asks whether there are less restrictive ways of achieving the purpose — the explanatory note tells us that this is what is called *necessity* testing.[12] It asks if there is another way to achieve the purpose, but which imposes less of a limit on human rights. If there is then the limit on human rights is not *necessary* to achieve the purpose.

e. Finally, consider paragraphs (e) to (f). As the explanatory note states, '[t]he lastthree factors involve a balancing exercise'.[13] *Balancing* involves 'comparing the importance of the purpose of limiting the right, with the importance of the human right and the extent to which it is limited'.[14] In other words, is the limit on the right disproportionate to the purpose you seek to achieve, even though it has passed suitability and necessity testing? In *Clubb v Edwards* Kiefel CJ and Keane and Bell JJ gave the classic

8 (2015) 257 CLR 178. See, most recently, *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 504 [48], 509–10 [76]–[85] (Kiefel CJ, Keane and Gleeson JJ), 534 [194], 535–6 [199]–[202] (Edelman J); cf 545 [247] (Steward J).
9 (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).
10 (2021) 95 ALJR 229, 242–3 [52] (Kiefel CJ and Keane J), 284 [264] (Edelman J).
11 Explanatory Notes to the Human Rights Bill 2018, page 17.
12 Ibid.
13 Ibid.
14 Ibid pp 17–18.

> example of a law which would fail the balancing stage — a law which allows a person to be shot and killed in order to prevent damage to property.[15] Such a law would have a 'rational connection' to the purpose of preventing damage to property and perhaps would be more effective than any other means of achieving that purpose. Such a law, their Honours said, would fail at the *balancing* stage.

It is true that the chapeau to s 13(2) uses the word 'may': it says 'the following factors may be relevant'. For that reason, it is at least arguable that s 13(2) offers a non-exhaustive grab-bag of factors that might or might not be considered, depending on the particular facts and circumstances.

However, it is also strongly arguable that, despite the word 'may', the task of considering whether a limit on human rights is compatible is a task which requires a structured proportionality analysis.[16] One strong argument in favour of this view is that, given s 13(2) lists the steps in a 'structured proportionality' analysis, the only rational way to apply s 13(2) is to apply each factor, in order. As was hopefully apparent from the above overview of s 13(2), when structured proportionality testing is used, each of the steps builds on the last.

In the constitutional context, the High Court justices who embrace proportionality testing regard each of its steps as logically required in every case, even where, for example, the burden on a constitutionally protected freedom is small. The Commonwealth and various states have, in different cases, submitted that not all of the steps are always necessary. Those submissions have been roundly rejected.[17] The High Court jurisprudence therefore suggests that where structured proportionality is applied to demonstrate that a measure is justified, there are no shortcuts. Each step is logically required and builds on the last. But that also means that, if a measure fails at an earlier step, there is no need to go further because each step builds on the last and an early deficiency cannot be cured in the later stages. Perhaps this is why the chapeau to s 13(2) uses the word 'may'.

The decision in *Owen-D'Arcy* appears to endorse that view as applicable to s 13(2), given that Martin J said the factors in s 13(2) 'should' be addressed when deciding whether a limit on a human right is justified.[18] His Honour went on to do exactly that.

In *Owen-D'Arcy* a claim of unlawfulness under s 58(1) of the Human Rights Act was upheld for the first time in Queensland. As the decision says a number of significant things about s 58, and the justification analysis under s 13, it is useful to briefly outline the facts of the case.

Mr Owen-D'Arcy was convicted in 2010 for the brutal murder of another man and he received a life sentence. While in prison, in the period between 2011 and 2013 he was convicted of a number of other offences, including the attempted murder of a correctional services officer. In January 2013 a maximum security order ('MSO') was made in relation to him. From that point

15 *Clubb v Edwards* (2019) 267 CLR 171, 200–1 [70] (Kiefel CJ, Bell and Keane JJ).

16 For a comprehensive development of this argument, see Kent Blore, 'Proportionality Under the *Human Rights Act 2019* (Qld): When are the Factors in s 13(2) Necessary and Sufficient, and When Are They Not?' (2022) 45 *Melbourne University Law Review* (forthcoming).

17 *Brown v Tasmania* 261 CLR 328, 369 [126] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 199 [62]–[63] (Kiefel CJ, Bell and Keane JJ).

18 *Owen-D'Arcy* (n 1) [244].

a new MSO was made every six months, up to the MSO which Mr Owen-D'Arcy challenged. That MSO was in effect from 18 June 2020 to 16 December 2020. At the time that MSO was made, a No Association Decision was also made. The No Association Decision meant that Mr Owen-D'Arcy was not permitted contact with any other prisoners. The effect of the two decisions was to hold Mr Owen-D'Arcy in what amounted to solitary confinement. At the time of the decisions, he had been so held for approximately seven years.

Mr Owen-D'Arcy brought an application for judicial review against both decisions. The application included a number of traditional judicial review grounds, including failure to accord procedural fairness, irrelevant considerations, and unreasonableness. Onto this, he 'piggybacked' claims under s 58 of the Human Rights Act.

For present purposes, the critical part of the judgment is that Martin J found that the MSO decision was substantively incompatible with human rights and that the decision-maker had failed properly to consider human rights when making the No Association Decision. Accordingly, both decisions were unlawful for failure to comply with s 58.

The reasons of Martin J highlight a number of critical points about the question of 'substantive compatibility' under the Human Rights Act. I want to highlight three of them:

- First, *Owen-D'Arcy* makes clear that '[t]he applicant bears the onus of establishing that the decision imposes a limit on human rights'.[19] In *Owen-D'Arcy* this point about onus had real bite. Mr Owen-D'Arcy had relied upon the right in s 17(b), which is the right not to be treated or punished in a cruel, inhuman or degrading way. Martin J held that '[i]n order for s 17(b) to be engaged, the applicant must demonstrate, at a minimum, that the terms of his confinement are of such a nature that they can manifest in bodily injury or mental suffering'.[20] The evidence did not rise to this level, and accordingly the onus was not satisfied. Hence, Mr Owen-D'Arcy failed to establish that the s 17(b) right was limited.[21]

- Second, if a limit on a human right is established, the decision in *Owen-D'Arcy* makes clear that 'the respondent bears the onus of justifying the limit'.[22] The evidence required to prove that a limit on a human right is justified, having regard to the factors set out in s 13(2), should be 'cogent and persuasive'. [23]

  This requirement, to put on evidence in order to defend the lawfulness of a decision, may come as a surprise to those who are used to defending government decision-making. Further, because the evidence is concerned with substantive compatibility, it need not be evidence that the decision-maker actually considered.

19 Ibid [128].
20 Ibid [190]–[191].
21 Ibid [192].
22 Ibid [129].
23 Ibid [133].

This principle also had real bite in *Owen-D'Arcy.* Mr Owen-D'Arcy also relied on the right in s 30 to humane treatment while deprived of liberty. While it was conceded that this right was limited, Martin J specifically accepted that the applicant's evidence established a limit on this right.[24]

The onus then shifted to the respondent to justify the limitation. Martin J said: 'The respondent must demonstrate that the limitation is justified. The standard of proof is high and requires a degree of probability commensurate with the occasion'.[25] However, the respondent in *Owen-D'Arcy* did not call any evidence.[26] That meant that when Martin J came to analyse each of the steps in s 13(2), he concluded that, although there was a 'rational connection' with the purpose of managing the applicant's risk of violence, the respondent had not shown that the MSO decision was 'necessary'. It was not enough, his Honour said, for the decision-maker to recite her belief in the necessity for the order without providing any basis for that belief; and the experience in other jurisdictions suggested that there were alternatives.

- Third, review for compatibility with human rights is not merits review, but it is a 'high standard of review'.

On this, Martin J adopted what was said in *PJB v Melbourne Health*[27] ('*Patrick's case*') — a decision of Bell J in the Supreme Court of Victoria. A number of points come out of the discussion:

- The jurisdiction of the court remains supervisory, not 'substitutionary' — it is a question of the *lawfulness* of the decision by human rights standards, not a determination on the merits.[28]

- However, human rights review is 'more precise and more sophisticated than the traditional grounds of review'.[29]

- The court is required to assess 'the balance which the decision-maker has struck', not merely whether it is in the range of rational or reasonable decisions.[30] In fact, *Owen-D'Arcy* is a great example of that point because Mr Owen-D'Arcy's traditional unreasonableness ground failed, whereas his human rights ground succeeded.

- Appropriate 'weight and latitude [should be given] to the repository of the power',[31] so as to avoid a 'drift' into merits review. But that does not mean that it needs to be shown that a decision-maker has *manifestly* weighed the considerations in an unreasonable or unjustifiable way.

24 Ibid [239]–[240].
25 Ibid [243].
26 Ibid [175].
27 (2011) 39 VR 373.
28 *Owen-D'Arcy* (n 1) [147].
29 Ibid [149].
30 Ibid.
31 Ibid [146], [149].

How does the piggybacking provision in s 59 work?

Section 59(1) of the Human Rights Act is universally known as the 'piggybacking provision'.

The Victorian equivalent of s 59 has been said to have a 'conditional' and 'supplementary' operation.[32] The same may be said of s 59 itself. It is conditional in that there must be an independent cause of action in relation to the same act or decision.[33] Once the condition is satisfied, the supplementary human rights grounds under s 58 may be relied upon to obtain the relief that would have been granted on the independent ground, even if that independent ground is ultimately unsuccessful.[34] So, for example, the human rights ground could found the grant of an order in the nature of prohibition if the applicant also alleged an independent ground amounting to jurisdictional error. It would not matter if the jurisdictional ground failed; nor would it matter that unlawfulness under s 58(1) is not jurisdictional.[35]

The key debate is around the operation of s 59's condition. In particular, what does it mean to say that a person 'may seek' relief or a remedy 'on the ground that the act or decision was, other than because of s 58, unlawful'?

Prior to his appointment to the Federal Court, Justice Mark Moshinsky, speaking about the Victorian Charter, suggested two approaches to this question: [36]

1. an 'abstract availability' approach, where it would be sufficient if the relief or remedy that the plaintiff seeks is, in principle, available in respect of the particular act or decision, and the plaintiff has the right process, the right court, and is within time to seek the relief or remedy

2. alternatively, the 'factual availability' approach, where the plaintiff would also need to rely on a non-Charter ground in seeking the relief or remedy in the proceeding.

The factual availability approach is curious in that, assuming it is correct, it means that the Parliament has created an Act to protect the human rights of those impacted by government decision-making but simultaneously provided that such persons can only have a remedy where they might have got a remedy on a different ground anyway. As Moshinsky J observed:

> It is difficult to see any reason why the right to seek relief or a remedy should depend on whether there happens to be, on the facts of the particular case, an independent non-Charter basis to seek the relief or remedy. That would seem to produce arbitrary results.[37]

32 *Director of Housing v Sudi* (2011) 33 VR 559, 580 [96] (Maxwell P).
33 *Innes v Electoral Commission of Queensland* (*No 2*) [2020] QSC 293.
34 *Human Rights Act 2019* (Qld) s 59(2).
35 Ibid s 58(6).
36 Mark Moshinsky QC, 'Bringing Legal Proceedings Against Public Authorities for Breach of the Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria Online Journal* 91, 96. See also Justice Mark Moshinsky, 'Charter Remedies' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights: A Decade On* (The Federation Press, 2017) 69, 79–80.
37 Moshinsky 'Bringing Legal Proceedings Against Public Authorities for Breach of the Charter of Human Rights and Responsibilities' (n 36) 91, 96.

Nevertheless, the factual availability approach has support in Queensland.[38] Assuming it is correct, a further question arises: does the factual availability approach mean that all an applicant needs to do to engage s 59 is to include in their application some independent ground of unlawfulness, irrespective of the merits of the independent ground? That seems unlikely. But at the other end of the continuum, s 59(2) tells us that the independent ground does not have to succeed.

How strong does the independent ground of unlawfulness have to be? The answer to that question is not entirely clear. Two suggestions have been made.

The first is that s 59 will not be satisfied where the applicant's reliance on the independent ground of unlawfulness is 'colourable' — that is, pressed solely for the purpose of enlivening jurisdiction to grant relief under s 59 of the Human Rights Act.

This approach draws on jurisprudence from the Federal Court, as to when federal jurisdiction will be attracted.[39] It sets a low bar: it looks not so much to the merits of the argument but to the purpose for which the claim was made. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*,[40] French J (as his Honour then was) said that a claim may be colourable where it is 'a sham reflecting no genuine controversy and therefore establishing no matter in respect of which the Court may exercise jurisdiction'.

A somewhat higher bar was suggested by Pamela Tate SC SG, prior to her appointment to the Victorian Court of Appeal.[41] The suggestion was that the supplementary operation of s 59 will not be enlivened if the ground of independent unlawfulness would not withstand a strike-out application. There is a simplicity and attractiveness to the idea that an applicant cannot 'piggyback' on a ground which has been struck out.

What is the interaction between s 48 and s 58?

Section 48 is the 'interpretative clause'. It provides:

> All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

The interpretive provision (s 48)

Before I consider its interaction with s 58, I want to say a little bit about s 48 itself.

38 *Innes v Electoral Commission of Queensland* (No 2) [2020] QSC 293, [276].

39 See *Kheir v Robertson* [2019] VSC 422, [102] (McDonald J), citing *Burgundy Royale* (1987) 18 FCR 212, 219 (Bowen CJ, Morling and Beaumont JJ) and *Edge Technology Pty Ltd v Lite-On Technology Corporation* (2000)

40 (2000) 104 FCR 564 [88].

41 Pamela Tate SC SG, 'A Practical Introduction to the Charter of Human Rights and Responsibilities' (Speech, Seminar Program of the Victorian Government Solicitor's Office, 29 March 2007) 15 [95(8)].

In Victoria, s 32(1) is the equivalent of s 48(1) in Queensland. In July 2021, the Victorian Court of Appeal unanimously said that '[t]he requirement in s 32(1) of the Charter … requires a court to explore all possible interpretations of the relevant statutory provision and to adopt that interpretation which least interferes with Charter rights'.[42]

I want to make two observations about that statement and its potential application in Queensland.

The first concerns the proposition that the interpretation which 'least interferes' with Charter rights should be adopted.

In *Momcilovic v The Queen*[43] ('*Momcilovic*') there was a question around whether the interpretative task under s 32(1) allowed a court to engage in 'justification', proportionality analysis under s 7(2) (s 7(2) of the Charter being the equivalent of s 13 of the Queensland Human Rights Act). French CJ and Crennan and Kiefel JJ held that s 7(2) 'cannot not inform the interpretive process'.[44] Gummow, Hayne and Bell JJ held that it did.[45] Heydon J held that s 7(2) did inform the interpretative process, but for that reason s 32(1) was invalid.[46] The Victorian courts have not yet expressly resolved whether s 7(2) applies to the interpretive process under s 32(1).[47]

However, that question simply does not arise in Queensland because when s 48 uses the phrase 'compatible with human rights', s 8 tells us what that means. As discussed above, s 8 refers us directly to s 13 and the analysis set out in s 13(2).

In the only substantial decision on s 48 (as yet) in the Queensland Supreme Court, this point appeared to be accepted. In *Australian Institute for Progress v Electoral Commission of Queensland*[48] a question arose concerning the proper construction of provisions in the *Electoral Act 1992* (Qld) which prohibit property developers from making political donations. It was accepted that the statute limited freedom of expression and the right to take part in public life. Applegarth J applied a structured proportionality analysis by reference to each of the paragraphs of s 13(2)[49] and concluded that the limitations on the rights imposed by the statute were justified. His Honour's analysis ended at that point.

Consequently, it may be that, unlike s 32(1) of the Victorian Charter, s 48(1) does not require the adoption of an interpretation which provides the 'best' outcome in terms of human rights, or the 'least interference'. In terms, s 48(1) requires only that the interpretation be

42 *HJ v Independent Broad-based Anti-Corruption Commission* [2021] VSCA 200, [153] ('*HJ*').
43 (2011) 245 CLR 1.
44 Ibid 44 [35] (French CJ), 219 [572] (Crennan and Kiefel JJ).
45 Ibid 92 [168] (Gummow J), 123 [280] (Hayne J), 249–50 [683]–[684] (Bell J).
46 Ibid 175 [439] (Heydon J).
47 *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383–4 [87]–[88] ('*Nigro*').
48 (2020) 4 QR 31.
49 Ibid 73 [121].

'compatible'. Hence, if one interpretation of a provision would not limit a human right, and another interpretation would limit a human right but in a way that is demonstrably justifiable, s 48 has nothing to say. Section 48(1) cannot help you to choose between those competing constructions, because both are 'compatible with human rights'.[50]

My second observation is that the bounds of what is a 'possible interpretation' remain unclear. This issue will arise in Queensland, given that, like s 32(1) of the Charter, s 48 requires the adoption of a compatible interpretation only 'where possible to do so consistent with [the provision's] purpose'.

On this question, the Victorian Court of Appeal has previously said that s 32(1) does not permit a court to 'depart from the *ordinary meaning* of the statutory provision'.[51]

It is not clear what the Court of Appeal meant by 'ordinary meaning'. If it meant 'literal or grammatical meaning' then s 32(1) does considerably less than the principle of legality (to which s 32(1) is frequently compared), and many other principles of statutory construction.[52]

In the seminal statement about the process of statutory construction, in *Project Blue Sky Inc v Australian Broadcasting Authority,* McHugh, Gummow, Kirby and Hayne JJ said:

> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[53]

More recently, in *R v A2*,[54] Kiefel CJ and Keane J said:

It is now accepted that words having an apparently clear ordinary grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.[55]

Context includes relevant principles of construction. It therefore seems unlikely that s 48 could not allow a departure from the literal or grammatical meaning.[56]

There are also statements in Victoria that s 32(1) does not enable a court to 'depart from the intention of Parliament in enacting the statute'[57] or to 'override the Parliament's intention'.[58]

50 The position is different where no construction is compatible, because of s 48(2), which also does not have a Victorian counterpart.
51 *Nigro* (n 47) 383 [85].
52 See further Bruce Chen, 'Revisiting Section 32 of the Victorian Charter: Strained Constructions and Legislative Intention' (2020) 46 *Monash University Law Review* 174, 178.
53 (1998) 194 CLR 355.
54 (2019) 93 ALJR 1106, 1117.
55 Ibid [32].
56 Cf *Fitzgerald v The Queen* [2021] NZSC 131 [61] (Winkelmann CJ).
57 *Slaveski v Smith* (2012) 34 VR 206, 214 [20].
58 *Nigro* (n 47) 382 [82]; see further Chen (n 52) 201.

Subject to some comments made recently by Gageler J,[59] it has in Australia been accepted that parliamentary intention is a 'metaphor'. Hence, in *Lacey v Attorney-General* (Qld) six judges said:

> Ascertainment of legislative intention is asserted as statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[60]

If parliamentary intention is the 'outcome' of the process of statutory construction, how could s 32(1), or s 48(1), sensibly be thought to 'override' that intention? Section 48(1) is a rule provided by the Parliament itself about how its intention is to be ascertained.

On occasion, statements about the limits of what is possible under s 32(1) are directed, it seems, to suggesting that it is impermissible to override the intention of the legislature at the time the statute was enacted.[61] That appears to be another way of saying that s 32(1) does not enable a new interpretation to be given to a statute which predates the Charter (or, in Queensland's case, the Human Rights Act). Yet, requiring existing statutes to be reinterpreted as compatible — where possible — would seem to have been a large part of the parliaments' purpose when enacting s 32(1) or s 48(1). And there is some support for the view that it is possible — for example, in *Momcilovic*, Bell J accepted that '[p]rovisions enacted before the Charter may yield different, human rights compatible, meanings in consequence of s 32(1)'.[62]

Many of the statements about the limits of what is 'possible' under s 32 are probably best seen as emphatic rejections of the 'remedial approach' adopted by the House of Lords in *Ghaidan v Goden-Mendoza*.[63] Famously, that case concerned the construction of a statute which provided that, upon the death of a tenant, a surviving spouse succeed to the tenancy. The statute treated 'a person who was living with the original tenant as his or her wife or husband … as the spouse of the original tenant'. The case was decided in 2004, before same-sex marriage, and the House of Lords considered that the words 'his or her wife or husband' words were plainly limited to heterosexual de facto couples. However, relying on s 3(1) of the *Human Rights Act 1998* (UK), a majority of the House of Lords interpreted the phrase 'as his or her wife or husband' to extend to Mr Godin-Mendoza, who was the surviving long-term same-sex partner of a deceased tenant. Lord Nicholls of Birkenhead, in the majority, acknowledged that because s 3 used the word 'interpretation' it would be natural to focus, initially, on the words. But His Lordship continued:

> But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.[64]

59 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 460–1 [74]–[77].
60 (2011) 242 CLR 573, 592 [43].
61 See the discussion in Chen (n 52) 201 ff.
62 (2011) 245 CLR 1, 250 [684].
63 [2004] 2 AC 557.
64 Ibid 571 [31].

In Australia it is not 'impossible to suppose' that Parliament intended that the operation of the interpretative clauses should 'depend critically upon the particular form of words adopted'. Sections 32(1) and 48(1) might require strained interpretations, but they remain commands about the process of 'interpreting particular text'. As the High Court has recently said, in the process of 'interpretation', 'the text of a statute is important, for it contains the words being construed'.[65] The process of construction begins and ends with the text, considered in context.[66]

In Queensland, text, context and purpose will necessarily limit the bounds of what is 'possible' under the Human Rights Act. But, in that respect, s 48(1) is surely the same as other principles of construction.

Interaction with s 58

A question arises as to how s 48(1) will interact with s 58(1). The same question has been given some consideration in Victoria. The question arises this way:

- The first point is that many discretionary powers will be compatible with human rights across the range of their potential operations because, although they authorise decisions which may limit human rights, they are drafted in terms which 'already [strike] the relevant balance between the right' and the purpose being pursued.[67] One example may be where the statute authorises decisions only to the extent they are 'reasonably necessary for the purpose' of X. Powers of that kind are likely to be 'compatible' and s 48 could not change their meaning.

- However, there will be some broad statutory discretions which, on their face, are *capable* of being exercised in ways which are compatible and ways which are incompatible. Applied to a statutory discretion of that kind, s 48(1) may have a confining effect. Section 48(1) might require such powers to be read down, so as to authorise only decisions which are 'compatible' with human rights.

- An analogy might be drawn with the operation of s 92 of the *Constitution* and the implied freedom of political communication. As the High Court has recently made clear, both s 92 and the implied freedom may require a broadly expressed statutory power to be read down, as a matter of construction, to permit only those exercises of discretion that are within constitutional limits.[68] It seems plausible that s 48(1), as a principle of construction, might sometimes have the same effect, although if reading down were not possible, the result would not be invalidity.[69]

65 *R v A2* (2019) 93 ALJR 1106, 1117 [36] (Kiefel CJ and Keane J). See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

66 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

67 Cf *HJ* (n 42) [182].

68 *Palmer v Western Australia* (2021) 95 ALJR 229, 254 [122] (Gageler J) and authorities there cited. See also *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

69 *RJB v Secretary, Department of Justice* (2008) 21 VR 526, 555 [110]–[113] (Nettle JA).

- If that is right, how does the operation of s 48(1) on broad statutory discretions interact with s 58(1)? In particular, if s 48(1) confines broad statutory discretions, how does that fit with the following features of the 'model' implemented by the Queensland Human Rights Act:

  — The obligation in s 58(1)(a) to make decisions compatibly with human rights is deliberately confined to 'public entities'; not all those vested with statutory powers will be 'public entities'. Hence, s 48(1) might result in a de facto widening of the obligation in s 58(1)(a).

  — A failure to comply with s 58, expressly in Queensland, does not give rise to a jurisdictional error — see s 58(6)(a). This result might be undermined by the application of s 48(1).

  — Section 59, the 'piggybacking provision', deliberately confines the circumstances in which human rights compatibility may be raised as a ground on which to challenge administrative decisions. A claim based on a confined construction of the decision-making power, rather than on s 58(1)(a), might circumvent this requirement.

For reasons of that kind, it has been suggested in Victoria that it would be inconsistent with the structure of the Victorian Charter to apply the interpretative provision to statutory discretions.[70] The point is not settled. In 2013, the Victorian Court of Appeal doubted that the interpretative provision could have the effect of confining statutory discretions. However, in 2015 the Court rejected an argument, put by the Victorian Attorney-General, that the Charter's interpretative provision should not be engaged in construing the discretionary power. However, because the equivalent of s 58 also applied in that case, the decision is not particularly clear.[71]

Conclusion

The questions canvassed in this article are just three of the many difficult questions which will now arise for Queensland administrative lawyers under the Human Rights Act.

70 *Nigro* (n 47) 408–9 [185].

71 *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129, 233–4 [322]–[323] (Tate JA); See also Bruce Chen, 'How Does the Charter Affect Discretions? The Limits of s 38(1) and Beyond' (2018) 25 *Australian Journal of Administrative Law* 28, 40.

Therapeutic jurisprudence in child protection matters

*Gwenn Murray and Glen Cranwell**

Child protection in an important area of public law. Each of the states and territories has enacted legislation providing for the protection of children,[1] and in Queensland the legislative framework is contained in the *Child Protection Act 1999* (Qld) ('CP Act').

The paramount principle for administering the CP Act, set out in s 5, is that 'the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount'.

The general principles set out in s 5B of the CP Act include:

a. a child has a right to be protected from harm or risk of harm

b. a child's family has the primary responsibility for the child's upbringing, protection and development

c. a child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child.

Section 5BA sets out principles for achieving permanency for a child and the need for children to have ongoing, positive, trusting and nurturing relationships and stable living.

For Aboriginal and Torres Strait Islander children, s 5C of the CP Act sets out additional principles for placement, prevention, partnership, participation and connection, including:

> (b) the long-term effect of a decision on the child's identity and connection with the child's family and community must be taken into account.

Decision-making under the CP Act is variously undertaken by the chief executive[2] (or their delegate) of the Childrens Court of Queensland and by the Queensland Civil and Administrative Tribunal ('QCAT'). Our focus in this article is on review proceedings that are brought in QCAT, although many of our observations have broader application.

Our contention is that the guiding principles set out in the CP Act, as well as similar guiding principles in other state and territory child protection legislation, are a natural fit with therapeutic jurisprudence. We consider that therapeutic jurisprudence, which is an interdisciplinary method of applying the law, can positively impact on the social and psychological wellbeing

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1 See *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Children's Protection Act 1993 (SA); Children, Young Persons and their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

2 Director-General, Department of Children, Youth Justice and Multicultural Affairs.

of families and children. When appropriately applied in child protection proceedings, it can help to strengthen parenting and encourage relationships between applicant families and carers and the respondent Department of Children, Youth Justice and Multicultural Affairs (the department).

We note that on the occasions that legal representatives appear in child protection proceedings, or give legal advice to prepare parties for proceedings, they can also have an important role to play and we will address this in conclusion.

What is therapeutic jurisprudence?

The term 'therapeutic jurisprudence' originated in work undertaken by Wexler and Winick in mental health law in the United States in the late 1980s.[3] Simply put, therapeutic jurisprudence is the term used to describe an approach to the law that considers legal processes and procedures as having 'an impact on the physical and psychological wellbeing of the participants'.[4]

Therapeutic jurisprudence is based on the principles of voice, validation, respect and promoting self-determination:[5]

- *Voice* means providing an environment where the participant can tell their story to an attentive judicial officer.
- *Validation* involves the judicial officer acknowledging that he or she has heard the participant, values their contribution and will take their story into account.
- *Respect* is 'the manner in which the judicial officer interacts with the [participant], whether the judicial officer takes time to listen to the participant, the tone of voice and language used and the body language of the judicial officer in interacting with the participant'.[6]
- *Self-determination* is the opposite of paternalism and coercion. Choice promotes motivation, confidence, satisfaction and 'increased opportunities to build skills necessary for successful living'.[7]

3 David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David Wexler and Bruce Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991).

4 Michael King, 'Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172.

5 Michael King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 151.

6 Michael King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 95.

7 Bruce Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1766.

In contrast to more formal adversarial proceedings, judicial officers employing a therapeutic jurisprudence approach should be more active, more collaborative, less formal, more attuned to direct communication with the participants, more attuned to their personal circumstances, and more positive in their interactions with them.[8]

Thus, judicial officers fulfil an essential leadership role, providing guidance to all of the various participants in working towards a common goal[9] — which in child protection matters is the safety, wellbeing and best interests of the child. The judicial officer can act as an example for participants and can model proper ways of interacting by:[10]

- the way the judicial officer interacts with participants;
- demonstrating respect for other participants' views;
- using empathetic communication techniques;
- promoting dialogue;
- facilitating participants in sharing ideas and suggestions for the conduct of a case; and
- using a non-confrontational style in addressing differences between participants.

Therapeutic jurisprudence has been widely used in specialist courts and tribunals — for example, drug courts, domestic violence courts, youth justice courts, mental health courts and tribunals, Indigenous courts and even some civil courts. More recently, there have been calls for the increased adoption of therapeutic jurisprudence principles by mainstream courts and tribunals. In this context, therapeutic jurisprudence has been used by some members of QCAT in the Tribunal's child protection jurisdiction.

While there is a substantial body of scholarship relating to therapeutic jurisprudence, there is a need for more comprehensive judicial and legal education in the theory and practice of therapeutic jurisprudence. We hope to make a modest contribution through this article.

Overview of child protection matters at QCAT

The Childrens Court has the power to make child protection orders under ch 2 pt 4 of the CP Act. The orders that can be made include:

- granting custody of the child to the chief executive (s 61(a)(ii));
- granting short-term guardianship of the child to the chief executive (s 61(e)); and
- granting long-term guardianship of the child to the chief executive (s 61(f)(iii)).

8 Jelena Popovic, 'Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121.
9 King (n 5) 36.
10 Ibid 10.

Where the Childrens Court has granted custody or guardianship of the child to the chief executive, QCAT has jurisdiction to review certain decisions of the chief executive or their delegate. These are set out in s 247 and sch 2 of the CP Act and include:

- a decision in whose care to place the child (s 86(2));
- not informing a child's parents of the person in whose care the child is and where the child is living (s 86(4));
- refusing to allow, restricting or placing conditions on contact between a child and the child's parents or a member of the child's family (s 87(2));
- removing a child from the care of the child's carer (s 89);
- refusing a certificate of approval as a foster carer or kinship carer (ss 136);
- reviewing case plans (ss 51VA and 51VB); and
- directing a parent about the supervision of a child (s 78).

In any particular proceedings before the Tribunal, the parties may include:

- the delegate of the chief executive;
- the child;
- a parent;
- a carer; and
- a person affected by a contact decision under s 87(2), which the Appeals Tribunal in *Department of Child Safety, Youth and Women v PJC and the Public Guardian*[11] considered was limited to the child's mother, father and any members of the child's family.

An application may be brought by the public guardian on a child's behalf pursuant to s 133 of the *Public Guardian Act 2014* (Qld) or by another person on behalf of the child with the President's approval pursuant to s 99P of the CP Act. In addition to being a party to the proceedings, children and young people can also express their views and wishes directly to the Tribunal themselves or through a letter or through the child advocate from the Office of the Public Guardian.

Section 99H of the CP Act provides that, for a hearing, the Tribunal must be constituted by three members, at least one of whom is legally qualified. For a compulsory conference the tribunal must be constituted by at least two members, at least one of whom is legally qualified.

11 [2019] QCATA 109 [90].

Pursuant to s 99H(4), the President of QCAT may choose a member to constitute the Tribunal for child protection proceedings only if the President considers that the member:

a. is committed to the principles mentioned in ss 5A to 5C of the CP Act;

b. has extensive professional knowledge and experience of children; and

c. has demonstrated a knowledge of and has experience in one or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, Indigenous affairs, law, psychology or social work.

Paragraph 10 of QCAT Practice Direction No 6 of 2015: *Process for Administrative Reviews in Child Protection Matters* provides:

> The tribunal panel will include a lawyer and a member with child protection experience. Where the child is Aboriginal or Torres Strait Islander, the tribunal will endeavour to have an Aboriginal or Torres Strait Islander member sit on the review.

We consider the use of a multi-disciplinary panel to be critical in child protection matters and central to the application of therapeutic jurisprudence.

The child protection expert will have knowledge and understanding of the child protection continuum, the effects of trauma and abuse on children, and attachment theory. They will also have knowledge and experience of social characteristics of vulnerable families, such as the prevalence and effects of domestic and family violence, mental health conditions, the effects of drug and alcohol misuse, and inter-generational poverty and abuse.

First Nations members will have knowledge and understanding of the cultural context and issues for the child, as well as for their family and community. Suitably qualified First Nations members could also be child protection experts. Matters relevant to the appointment of QCAT members include 'the need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders', as well as 'the range of knowledge, expertise and experience of members of the tribunal'.[12]

The Tribunal must make decisions in the best interests of the child. This is determined by considering relational, legal, placement and cultural considerations in ensuring stability, safety and permanency. It is essential for the Tribunal to understand the unique needs of the child before it who has experienced trauma and disrupted attachments. This is particularly important when making decisions in stay applications, for example, that could result in the immediate removal or return of a child to a placement.

Applying therapeutic jurisprudence to child protection matters

As noted above, the parties to a proceeding may include child safety officers, the child, the child's parents, other family members, and the child's carers. The importance of the relationship between these parties for the wellbeing of the child cannot be overstated.

12 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 183(6)(b) and (d).

Tribunals are their own ecosystems, and how a member treats the participants can have therapeutic or anti-therapeutic effects. Exchanges within the proceedings can help set the tone for the relationship between the parties moving forward — in following the case plan or any agreement reached in the Tribunal.

As Lens, Katz and Suarez noted, this is particularly true of child safety officer interactions.[13] Negative tribunal interactions, where departmental officers are treated disrespectfully and as less than competent, can undermine the officers' authority and give parents justification to question or challenge the fairness of their requests.

Applicant parents or carers must also be treated with respect, using plain English and ensuring proper understanding of the proceedings.[14] It is not helpful to chastise applicants and point out their parental failing. While it is important that they are held to account for their behaviour and actions, positive interactions acknowledging their efforts and progress will encourage their parenting strengths and their relationships with child safety officers.

Positive tribunal interactions, where departmental officers and applicants are treated as valued and competent, can enhance the relationship between parents and the department and encourage a model of cooperative action towards a shared goal.

Many reviewable decisions are made by the department through 'family-led decision making' practice. This is a practice approach, which is described in the *Child Safety Practice Manual*,[15] is one where families are supported to take the lead in making decisions and in taking action to meet the safety, belonging and wellbeing needs of the child or young person. This approach has been developed from a New Zealand model. This is particularly important for Aboriginal and Torres Strait Islander families, to ensure a focus on creating a culturally safe space and for mapping kinship networks.

The compulsory conference for child protection review applications in QCAT is a facilitative mediation process that encourages the participation of, and gives voice to, families and carers to resolve issues directly with the department during the conference. This is a therapeutic jurisprudence approach to applying the law in the review of decisions.

Sometimes there are other underlying concerns that relate to the decision under review. For example, it may be that a contact decision is under review, but the heart of the concerns for the family are poor communication with the department. They may feel that they have little information about their children, such as school reports and photos, or want to be more involved in their children's lives, such as attending health and medical appointments with them or simply knowing how they are.

From the department's perspective, while child safety officers might be trying to work with parents to build capacity for children to safely return home, such officers could also be receiving constant email and abusive phone calls from disgruntled families. Parents may

13 Vicki Lens, Colleen Katz and Kimberly Suarez, 'Case Workers in Family Court: A Therapeutic Jurisprudence Analysis' (2016) *Children and Youth Services Review* 107.

14 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 29.

15 Queensland Government, *Child Safety Practice Manual* (2022) <https://cspm.csyw.qld.gov.au/>.

not be attending contact when arranged, leaving children disappointed; or drug screens that would demonstrate abstinence and ensure safety for children during contact may not be undertaken.

A better understanding of the position of the applicant and expectations of the respondent can be determined during the compulsory conference.

Often these types of arrangements are captured in agreements made by the parties in the compulsory conference. These conferences are particularly successful in achieving resolutions. Few applications progress to hearing — most are withdrawn at the compulsory conference — which highlights the importance of a therapeutic and facilitative mediation approach.

The process must focus on the ongoing relationship between the child and their family and the ongoing working relationship between the department and the family. If good communication strategies can be developed, with a clear plan about working together, this may increase the quality of both the decisions themselves and the way in which they are made. This is a protective jurisdiction but also a therapeutic jurisdiction.

For applicant parents and carers, they see that the department is held accountable for their decisions and actions at the compulsory conference, feel listened to, and have an opportunity to try to achieve a better outcome.

Parents sometimes express that they consider they are reaching case plan goals — returning clean drug screens, attending parenting courses — but there is no acknowledgement of this or a sense they are any closer to improving contact arrangements or achieving reunification. Tribunal members, by acknowledging the progress of parents and reflecting this back to the department, can have an impact on parents and their working relationship with the department.

In child protection, unlike in other jurisdictions, the applicant and the respondent department need to have an ongoing working relationship for the duration of the child protection order. In some cases it is until the children reach 18 years of age. This relationship must be preserved in the best interests of the children, so that goals such as reunification or greater contact can be achieved.

Implications for legal representatives

The duty of a legal representative to act in their client's interests in a child protection proceeding is no different to any other proceeding. However, whether a legal representative is acting for the child,[16] a parent, a family member, a carer or the chief executive,[17] we contend that the interests of their respective clients will be enhanced by adopting a collaborative approach rather than an adversarial one. It bears repeating that the paramount consideration in a child protection proceeding is the safety, wellbeing and best interests of the child.

16 Children and young people can be directly represented if they are *Gillick* competent to give instructions or represented by a separate representative through a grant of Legal Aid: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

17 The chief executive is represented by a legal officer from Court Services.

Consistent with what we have outlined above, we consider that on the occasions that legal representatives do appear for applicants, they have a role in preparing their client to speak on their own behalf in the proceedings to the greatest extent possible. This maximises the client's involvement in the hearing ('voice'), and their sense of investment in the outcome ('self-determination'). We accept that there may be some issues where it is more desirable for a legal representative to speak on behalf of the client, such as points of legal interpretation or where the applicant is disadvantaged or particularly vulnerable.

Legal representatives also have a role in discussing with their client the views of other parties, insofar as they are known, prior to the proceeding; or to 'reality test' with them the prospects of success in achieving what they are wanting from the department. Being able to acknowledge another party's views ('validation'), even when they disagree with them, can open doors which might lead to favourable outcomes beyond the conference or hearing itself. We consider that legal representatives should also attempt to model a non-confrontational way of expressing disagreement with other parties ('respect'). In this regard, the role of the court services representative as the model litigant to assist the Tribunal and the parties is also critical.

Conclusion

Legal representatives and Tribunal members should not underestimate the effect the Tribunal process, decisions and reasons can have on children and families. They can also have an inherent therapeutic value. We have seen that insight into the vulnerability of families and the trauma of child protection decisions on them, and the words said to them, can have an important impact.

It is critical and good practice to be up-front about the child protection concerns, giving applicants the chance to be accountable and listening to them, while acknowledging their stress and trauma and the progress they have made. It gives them some hope and encourages their parental efforts to improve their situation in the future. Facilitating agreements with clear communication and plans may increase better and participative decision-making in the future.

When best practice is followed, child protection is both a protective and a therapeutic jurisdiction.

Justice for those who wield the sword: the constitutional basis for military discipline in the Australian Defence Force

*Cameron Rentz**

The purpose of this article is critically to examine the three distinct and seemingly incompatible views that have emerged concerning the constitutional basis of courts martial. In a line of cases beginning with *R v Bevan; Ex parte Elias and Gordon*[1] ('*Bevan*'), the High Court found military tribunals exercise judicial power but not 'the judicial power of the Commonwealth' within the meaning of s 71 of the *Constitution*. In *Lane v Morrison*[2] ('*Lane*'), the High Court found that, within the context of a military tribunal, the executive is acting judicially but not exercising judicial power. A third view has emerged lending support to a third view — a so-called 'military exception' to Ch III of the *Constitution*, which suggests that the first two views are irreconcilable within a broader constitutional context. Through an analysis of the historical context in which military discipline has developed, the article argues that the view enunciated in *Lane* should be the preferred interpretation, both pragmatically and on a constitutional basis.

The article argues that military discipline in the Australian Defence Force ('ADF') has always been a function of executive power, albeit exercised in a judicial manner, and that it ought to remain so. In some ways, disciplinary proceedings in the ADF bear many similarities to their criminal counterparts in courts across the country. This is hardly surprising, given the historical context in which military discipline has come into being. The modern concept of military discipline from a common law perspective draws its roots from the necessity of administering justice during the English Civil War, where discipline in the army required an enforcement mechanism but judicial action by civilian authorities was either impractical or inappropriate. The constitutional basis for military discipline can be inferred from ss 51(vi) and 68 of the *Constitution*[3] as a function of military command rather than a judicial power. This unique feature of the military discipline system sets it apart from civil courts that are established under Ch III of the *Constitution*. However, an alternative view has been proposed — the view that military discipline in the ADF should be considered as an exercise of judicial power.[4]

Before proceeding to assess the merits of the competing views, the terms 'military discipline' and 'judicial power' ought to be defined. From this foundation, two distinct approaches to reconciling the constitutional basis for military discipline in the ADF will be explored.

One of these approaches that will clearly emerge — as the most logical and most fundamentally supported by law, history, and necessity — asserts that military discipline is quite simply an application of executive power exercised in a judicial manner. From here, attention will turn to the importance of context and history when it comes to the administration of military discipline,

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1 (1942) 66 CLR 452 ('*Bevan*').

2 (2009) 239 CLR 230; [2009] HCA 29 ('*Lane*').

3 *Australian Constitution.*

4 Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40 *Federal Law Review*.

paying particular attention to military discipline's birth out of necessity. The remainder of the article will briefly consider the interaction between the *Constitution*, the *Defence Act 1903* (Cth) and command of the ADF, before finally turning to the matters of juries, the punishment of imprisonment and the distinction between service and criminal offences. The history, purpose and fundamental tenets of military discipline in the ADF are at odds with those of judicial power. Executive power and the prerogative have clearly envisaged military discipline as something altogether different from, and separate to, judicial power. Nevertheless, this article seeks to provide a meaningful analysis of the issues in question to demonstrate why military discipline should be viewed as a function of executive power.

Military discipline

The term 'military discipline' can encapsulate many facets of fairness, discipline and command in an armed force. For the purposes of this article, it is important not to confuse the term 'military discipline' with the term 'military justice' (which would generally include a much broader range of mechanisms and procedures within the ADF, extending beyond that of military discipline alone). The most important aspects of military discipline are the basis for 'service offences' and the procedures which follow once such charges are laid against a member of the ADF. Administrative arrangements, such as sanctions provided for under the *Military Personnel Policy Manual* or under the *Defence Regulation 2016* (Cth), are not aspects of military discipline for the purposes of this article. At a fundamental level, military discipline is rooted in concepts such as service at the pleasure of the Crown and Crown prerogative. Today the *Defence Force Discipline Act 1982* (Cth) ('DFDA') is the primary piece of legislation which deals with military discipline in the ADF. What has always been at the heart of military discipline is the requirement for extraterritorial application, expeditious application and the requirement for good order and discipline in an armed force. For the purposes of this article, 'military discipline' refers specifically to discipline law as it applies to the ADF, exercised pursuant to the DFDA.

Judicial power

A clear understanding of what is meant by the term 'judicial power' is fundamental to understanding why military discipline is not a judicial function. The use of the term has been further complicated by the terms 'judicial power of the Commonwealth' and 'exercised judicially'. It is fundamental that clarity here is established in order to articulate the reason that military discipline does not fall into the category of judicial power. For the purposes of this article, the term 'judicial power' refers to judicial functions (under the doctrine of separation of powers) carried out pursuant to Ch III of the *Constitution*. The distinction between 'judicial power' and the 'judicial power of the Commonwealth' as espoused by Starke J in *Bevan*[5] appears to have long since slipped into obscurity.[6] Ever since *Lane*,[7] the High Court has held that 'the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III'.[8] As such, in this article there will be no attempt to revisit

5 *Bevan* (n 1) 466–7.
6 Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from non-Criminal Detention' (2021) 36 *Melbourne University Law Review* 91.
7 *Lane* (n 2).
8 Ibid 247−8 (French CJ and Gummow J).

the issue or provide further analysis of that 'supposed distinction'.[9] Suffice to say that judicial power exercised by a Commonwealth entity *is* the judicial power of the Commonwealth for the purposes of the *Constitution*.

What is clear is that judicial power is exercised by a *court*, properly constituted pursuant to Ch III. This, as pointed out by French CJ and Gummow J (citing McHugh JA) in *Lane*, excludes courts such as the Coroner's Court.[10] This is a useful starting point, but it then raises the question: what is a court? This question was dealt with in detail in *Lane*, where the plaintiff argued that the Australian Military Court ('AMC') was a federal court established inconsistently with Ch III. Some of the indicia of such a court are that it is permanent, it is established as a court of record,[11] it can determine criminal guilt,[12] it has the power of contempt of court[13] and its judges enjoy tenure.[14] These factors were fundamental issues which led to the demise of the AMC in *Lane*. Judicial power for the purposes of this article is therefore defined as power exercised by a court 'administering the law of the land'[15] pursuant to the separation of powers, legitimately constituted consistent with Ch III, which is established as a permanent court of record, with the power to determine criminal guilt.

A tribunal acting judicially, then, is not synonymous with judicial power. The mere appearance of acting judicially is done for many reasons which can include fairness, transparency and rigour but does not automatically trigger an assumption that the tribunal is exercising judicial power for constitutional purposes.

The three (two) approaches

Various views attempting to define the constitutional basis for military discipline in the ADF have been offered, and one article[16] identifies three approaches which have emerged over time. The first view is that military tribunals in the ADF exercise judicial power but not the judicial power of the Commonwealth.[17] For reasons already stated above, this approach was effectively dismissed in *Lane* and can be safely discounted from the outset. The second approach is that ADF tribunals do not exercise judicial power at all for the purposes of the *Constitution*; rather, they are an exercise of executive power (the executive power argument). The third approach is that ADF tribunals do exercise judicial power but as an exception to Ch III of the *Constitution*. The latter two approaches will now be analysed, in order to demonstrate why the first of these two should be preferred.

9 *White v Director of Military Prosecutions* [2007] HCA 29, 123 (Kirby J).
10 *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497, 515.
11 *Lane* (n 2) 105−8 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
12 Ibid.
13 These indicia (in addition to others) were outlined by the plaintiff in *Lane* as detailed by K Cochrane in '*Lane v Morrison* [2009] HCA 29' (2010) *AIAL Forum* 61, 70.
14 *Australian Constitution* s 71.
15 *R v Cox; Ex parte Smith* [1945] HCA 18 ('*Cox*') 23 (Dixon J).
16 Crowe and Ratnapala (n 4).
17 Ibid 161, 163.

The executive power argument

From the outset, this approach enjoys legitimacy as a result of the High Court's judgment in *R v Kirby; Ex parte Boilermakers' Society of Australia*[18] ('*Boilermakers*'), in which it was declared that Ch III 'is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … [N]o part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III'.[19] By not claiming to be a court exercising judicial power, the executive power justification of ADF military tribunals is consistent with *Boilermakers*. This view was more recently reinforced by French CJ and Gummow J, who stated that 'the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III'.[20] As a result of the absence of any pretence of masquerading as a court wielding judicial power, the basis for military justice as accepted by the High Court is the defence power. Section 51(vi)[21] allows Parliament the power to legislate regarding 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'. Section 68[22] provides that the Governor-General is the Commander-in-Chief of the naval and military forces of the Commonwealth. Taken together, these sections have long formed the constitutional justification for military discipline in the ADF on the understanding that the '[m]aintenance of an effective defence force can be viewed as a constitutional imperative'.[23] Writing from a US perspective, Maurer states, '[t]he military's function as an organ of government responsible for executing national defense relies on the good order and discipline of its members'[24] and that this fact is 'uncontroversial'.[25] Necessity forms an important aspect of the executive power argument, as was highlighted in *Re Tracey*; *Ex parte Ryan*[26] ('*Tracey*'):

> [T]he defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as a part of the organization of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Ch III and to impose on those administering that code the duty to act judicially.[27]

In *Bevan*, Williams J justified military discipline as a legitimate exercise of executive power outside of judicial power because of its necessity in assisting 'the Governor-General, and Commander-in-Chief of the Naval and Military Forces of the Commonwealth, to control the forces and thereby maintain discipline'.[28] It should not be forgotten that military discipline is fundamentally an exercise and responsibility of command. Kennett highlights that, in *White*

18 (1956) 94 CLR 254 ('*Boilermakers*').
19 Ibid 270.
20 *Lane* (n 2) 48.
21 *Australian Constitution*.
22 Ibid.
23 Geoffrey Kennett, 'The Constitution and Military Justice after *White v Director of Military Prosecutions*' (2008) 38(2) *Federal Law Review* 231.
24 Dan Maurer, 'Are Military Courts Really Just Like Civilian Criminal Courts?' *Lawfare* (Blog Post, 13 July 2018), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts>.
25 Ibid.
26 [1989] HCA 12 ('*Tracey*').
27 Ibid 17 (Mason CJ, Wilson and Dawson JJ).
28 *Bevan* (n 1) 481 (Williams J).

v Director of Military Prosecutions[29] ('*White*'), Callinan J recalled that matters of command (which necessarily includes military discipline) are vested in the executive[30] and that discipline is a function of command that might not be subject to judicial supervision under Ch III of the *Constitution*.[31] This approach to s 68 is consistent with the reasoning provided by Gleeson CJ in *White* in dealing with the defence power:

> history and necessity combine to compel the conclusion, as a matter of construction of the *Constitution*, that the defence power authorises parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth.[32]

As will be further discussed below, the historical development of military discipline and the de jure position held by military discipline at the time the *Constitution* was drafted are both highly influential in the understanding of military discipline as an executive function: 'At the time of federation, legislatively based military justice tribunals were a "well-recognised exception" to the judicial system for determining guilt.'[33] The fact that the exercise of military discipline demands judicial-like procedures in nature is necessitated by the concept of fairness due to an obligation to exercise the power in a 'proper and judicial way'.[34] White helpfully notes that it is not uncommon for many 'strictly administrative bodies' to do this.[35]

In *Lane*, the entire bench was 'inclined to the view that traditional courts martial … did not exercise judicial power at all for constitutional purposes'.[36] The view that military discipline in the ADF is a matter for the executive pursuant to s 51(vi) enjoys wide support in academic[37] and judicial[38] circles.

The exception to the Chapter III argument

Any approach which suggests that the authority of ADF military discipline is judicial in nature must overcome the prohibition laid out in *Boilermakers*, outlined above. This is the first major hurdle, over which it is submitted that the 'exception to Ch III' argument cannot successfully negotiate. The 'exception to Ch III' argument asserts that military discipline is an exercise of judicial power, which is an exception to Ch III of the *Constitution* and therefore an exception to *Boilermakers*. The problem with this approach is that there is little persuasive or authoritative legal basis to support it. There are several issues. First, to adopt it would incur the inference that (since it is judicial power) it must be exercised by a court (which DFDA tribunals are not).

29 *White v Director of Military Prosecutions* [2007] HCA 29 ('*White*').
30 Ibid 240 (Callinan J); also see Kennett (n 23) 247.
31 Ibid 241, 242 (Callinan J) cited by Kennett (n 23) 247.
32 *White* (n 29) 14 (Gleeson CJ).
33 Kennett (n 23) 245−6.
34 *White* (n 29) 240 (Callinan J).
35 M White, 'Military Justice and Chapter III: The Constitutional basis of Courts Martial — Commentary on Article' (Seminar Paper, Australian Association of Constitutional Lawyers Seminar, Sydney, 8 May 2013).
36 Crowe and Ratnapala (n 4) 167.
37 James Stellios, 'Military Justice and the Constitution' in Robin Creyke et al (eds), *Military Law in Australia* (The Federation Press, 2019) 56.
38 *Lane* (n 2); Michael Burnett, 'Does the ADF require a Chapter III Military Court?' (Speech, Federal Circuit Court of Australia, Judge Advocate General's Conference, 28 October 2013) <http://www.federalcircuitcourt.gov.au.wps/wcm/connect/fceweb./reports-and-publications/speeches-conference-papers/2013/paper-Burnet-military-court>.

Second, it is not supported by the relevant history and context in which military discipline has developed and is inconsistent with the legal realities of military discipline at the time when the *Constitution* and the Defence Act were drafted. Third, it would require an exception to the strict separation of powers.[39] Fourth, it would be inconsistent with the recently decided High Court unanimous judgment in *Lane* and invite the possibility that the AMC should have been found to be legitimate.[40]

As a basis for this approach, an argument can be made regarding the availability of imprisonment as a punishment under the DFDA, which is generally a punishment only available pursuant to judicial power. For example, in *Chu Kheng Lim v Minister for Immigration*, *Local Government and Ethnic Affairs*[41] it was held that the involuntary detention of aliens for any other purpose than was strictly necessary to enable assessment of their case or deportation (such as for punitive purposes) would contravene Ch III. It can be argued, therefore, that, since imprisonment under the DFDA is possible, ADF tribunals must be exercising the judicial power of the Commonwealth. Ratnapala and Crowe point to *Al-Kateb v Godwin*[42] — another case involving aliens and deportation — as authority for this argument. However, it is important to note that, first, neither of these cases took place in the context of military discipline — these cases can be distinguished on the basis that the detention of aliens was not exercised pursuant to the defence power; second, the matter of dealing with aliens is not subject to military command pursuant to s 68 of the *Constitution*, whereas military discipline is so subject; and, third, imprisonment under the DFDA is imposed as a punishment in respect of guilt for 'service offences', not criminal offences. These cases, which involve immigration and deportation of aliens, support the proposition that involuntary detention for anything other than legitimate executive functions must rely on judicial power. However, it should be noted that the application of military discipline *is* a legitimate executive function. The relevance of these cases to the question of the constitutional basis for military discipline in the ADF is therefore limited.

This 'exception to Ch III' argument draws on the previously dismissed distinction between 'judicial power' and the 'judicial power of the Commonwealth'. While differing opinions continue to be presented,[43] there is ample support[44] to conclude that the distinction can be discarded and that the only judicial power of the Commonwealth must be executed pursuant to a strict interpretation of Ch III of the *Constitution* and that the distinction should be discarded. Nevertheless, an important passage relied upon to form the basis of this argument is taken from Kirby J in *White*:

> The supposed point of distinction, propounded to permit service tribunals to escape from this characterisation in s 71 of the *Constitution*, is that, whilst they exercise 'judicial powers', it is not 'the judicial power of the Commonwealth under Ch III of the *Constitution*' As a matter of language, logic, constitutional object and policy, this supposed distinction should be rejected. It has never hitherto commanded endorsement of a majority of this Court. It should not do so now.[45]

39 Which was established in *Boilermakers* which permits no flexibility in the separation of powers.

40 Paul Brereton, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial — Commentary' (Seminar Paper, Australian Association of Constitutional Lawyers Seminar, Sydney, 8 May 2013).

41 (1992) 176 CLR 1, 33.

42 (2004) 219 CLR 562.

43 Both Edelman J and Gageler J made some interesting comments pertaining to s 68, Ch III of the *Constitution* and the maintenance of military discipline in *Private R v Cowan* [2020] HCA 31.

44 Gordon (n 6) 91; *Lane* (n 2) 48 (French CJ and Gummow J), 114 (Hayne, Heydon Crennan, Kiefel and Bell JJ); *White* (n 29) 123 (Kirby J).

45 *White* (n 29) 123 (Kirby J).

Ratnapala and Crowe conclude that the power 'exercised by military tribunals is both judicial power and judicial power of the Commonwealth … Kirby J concedes that a limited exception to this rule (*Boilermakers*) is necessary in order to support the historical jurisdiction of courts martial'.[46] This article suggests that a preferable interpretation of Kirby's reasoning above is that the power exercised by military tribunals is neither 'judicial power' nor the 'judicial power of the Commonwealth' and that the distinction should be discarded.

In summary, the 'exception to Ch III' argument demands acceptance of the conclusion that military discipline is an exercise of judicial power, mainly on the basis that the standard of proof required to determine guilt for a service offence is the criminal standard and that the punishment of imprisonment is possible. Ergo, an exception to the separation of powers mandated by *Boilermakers* must be allowed. The 'exception to Ch III' argument may be convenient in a broader constitutional context. It may lead to a point where questions about the judicial-like nature of military discipline proceedings become irrelevant — ergo, if it looks like a court and acts like a court, it must be exercising judicial power. It is also elegant in its simplicity. Notwithstanding these strengths, it does not automatically follow that it would make good law. For the reasons addressed in this section, combined with insufficient regard for the historical context in which military discipline developed, it is asserted that an exception to *Boilermakers* does not allow for the role of command (s 68), does not acknowledge the role of executive power in maintaining good order and discipline in the ADF (s 51(vi)), is inconsistent with the unanimous decision in *Lane*, and is therefore problematic.

Historical background

The historical development of military discipline shows that to consider the exercise of military discipline law as an exercise of judicial power under Ch III is problematic.

The role of command maintaining and enforcing discipline is clearly articulated in the following passage:

> In the long history of warfare it has come to be regarded as a truism that any effective and successful military force must be well disciplined. That discipline is to be *maintained and enforced by commanders* at all levels.[47]

The fact that the ADF is often called upon to deploy outside of Australian sovereign territory necessitates the requirement of a swift and fair system to administer military discipline by the ADF itself. The realities of operational service will often necessitate that military discipline be carried out in a theatre where no Australian court exercising judicial power can sit. For example, during the Second World War the Australian military forces conducted 47,141 courts martial proceedings.[48]

Although *Tracey* was decided some time ago, the historical analysis provided in the case

46 Crowe and Ratnapala (n 4) 175.

47 Richard Tracey, 'The Constitution and Military Justice' (2005) 28(2) *University of New South Wales Law Journal* 426 (emphasis added); Richard Tracey, 'Military Discipline Law' in Robin Creyke et al (eds), *Military Law in Australia* (The Federation Press, 2019) 80.

48 L Mead, 'Not Exactly Heroic But Still Moderately Useful: Army Legal Work During the Second World War 1939–1945' in Bruce Oswald et al (eds), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years* (Big Sky Publishing, 2014) 136.

remains particularly insightful. It is helpful to recall that, when the *Constitution* came into being, the previous law which applied to the military and naval forces of the colonies continued to apply, and this fact was acknowledged by the Defence Act.[49] What is even more relevant is the history behind those previous legislative arrangements. Brennan and Toohey JJ reach further back in history by outlining the basis for military command in its most undiluted form — that which was exercised by a sovereign monarch in person, as and when armies were raised as required. Under such circumstances, it should come as no surprise that the discipline and good order of such forces was purely a matter for the Crown to determine as it saw fit, 'which came to be known as the Articles of War'.[50] As far back as 1792, the difficulty of achieving a balance between maintaining a strong military and a strong parliament (to which the military, particularly the army, was subservient) was recognised:

> The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army … It is one object of that act to provide for the army; but there is a much greater cause … the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army.[51]

The effect of the *Mutiny Act 1689* (Imp) was to acknowledge the Crown's authority to make Articles of War, but those articles were bound by restrictions imposed by the Act.[52] As Brennan and Toohey JJ point out, 'the prerogative authority to make Articles of War was eventually superseded by a statutory power'.[53] The *Army Discipline and Regulation Act 1879* (Imp) attempted to merge many operative aspects of the previous Mutiny Act and Articles of War as they existed from time to time. The *Army Act 1881* (Imp) was merely another step in the direction of covering the field. However, it is important to note that the Crown's ability to proclaim Articles of War was retained, but only insofar as those articles were consistent with the Act.

In 1903 the Defence Act[54] (ss 55 and 56) effectively adopted the *Army Act 1881* (Imp) to provide the basis for maintaining good order and discipline of the forces of the Commonwealth.[55] The significance of this should not be understated. Not only does this fact reliably inform us of the historical background and context in which the application of discipline law was based but it also provides an insight into how s 51(vi) of the *Constitution* should be interpreted. It is abundantly clear from the detailed history of military discipline law provided by their Honours in *Tracey* that the application of military discipline was never considered as based on a notion of judicial power. The head of power was originally the Sovereign as Commander-in-Chief and, later, executive power was exercised through commanders pursuant to legislation (or Articles of War in certain circumstances). As such,

49 *Tracey* (n 26) 18 (Brennan and Toohey JJ). The following legislation existed prior to federation: *Military and Naval Forces Regulation Act 1871* (NSW); *Defences and Discipline Act 1890* (Vic); *The Defence Act 1884* (Qld); *The Defences Act 1895* (SA); *The Defence Forces Act 1894* (WA); *The Defence Act 1895* (Tas), all of which (according to their honours) closely mirrored the development of their counterparts in the United Kingdom.

50 *Tracey* (n 26) 6 (Brennan and Toohey JJ).

51 *Grant v Gould* (1792) 2 HBL 69, 99 (Lord Loughborough), cited by Brennan and Toohey JJ in *Tracey* (n 26) 9.

52 C Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 86.

53 *Tracey* (n 26) (Brennan and Toohey JJ).

54 Act No 20 of 1903 <https://www.legislation.gov.au/Details/C1903A00020>.

55 *Tracey* (n 26) 18 (Brennan and Toohey JJ).

the defence power for raising and maintaining military and naval forces of the Commonwealth was clearly intended to allow for the creation of a system to enforce military discipline which was outside Ch III of the *Constitution*. Such was the accepted norm at federation, and such was clearly the interpretation when the Defence Act was drafted and promulgated (only two years after federation). While debate existed as to what could legitimately be considered a 'service offence', and concern of encroachment on the ordinary criminal law by military law during times of 'peace within the Realm',[56] there does not appear to be any controversy surrounding the assertion that the head of power for military discipline was executive in nature, not judicial.

These arrangements eventually gave way to the DFDA. Since the matter of military discipline was subjected to statute by Parliament, the exercise of those powers pursuant to statute has remained an executive function exercised by command: 'The [DFDA] is a good example of a field in which statute has replaced regulation by prerogative almost completely.'[57] As will be detailed later, this involvement of command in the system remains paramount to the viability of courts martial from a constitutional perspective and to their categorisation as an exercise of executive power rather than judicial power.

Legislation, the *Constitution* and command

The executive power to maintain and enforce military discipline pursuant to s 51(vi) of the *Constitution* is informed by both historical development and the application of s 68 of the *Constitution*. The following sections of the Defence Act,[58] as it applied at federation, clearly demonstrate that s 51(vi) was to be inferred as acknowledging executive power to maintain good order and discipline of the naval and military forces of the Commonwealth and reinforced the role of command in the execution of military discipline:

> 86. The Governor General may —
>
> (a) Convene courts-martial;
>
> (b) Appoint officers to constitute courts-martial; and
>
> (c) Approve, confirm, mitigate or remit the sentence of any court-martial.
>
> 88. Except so far as inconsistent with this Act, the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial in the King's Regular Forces shall apply to courts-martial under this Act in relation to the Military Forces, and the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial in the King's Regular Naval Forces shall apply to courts-martial under this Act in relation to the Naval Forces.

Although these sections no longer appear in the Defence Act as it applies today,[59] there are numerous references to the nature of command and particular provisions which reinforce the continuing prevalence of the 'command' of the ADF. Nothing in the Defence Act amends

56 Ibid 8 (Brennan and Toohey JJ).
57 Moore (n 52) 56; Logan J made a similar observation of the notion of service at the Crown's pleasure in *Millar v Bornholt* [2009] FCA 637 [72].
58 Act No 20 of 1903 <https://www.legislation.gov.au/Details/C1903A00020>.
59 Compilation n 77 of 18 December 2020.

or interferes with the nature of command in the ADF laid out in s 68 of the *Constitution*. It is useful here to take special note of the fact that in 1903 'the Army Act 1881 (Imp) and the *Naval Discipline Act 1866* (Imp) … were given full effect in respect of Australian Forces in wartime'.[60] Starke J commented that:

> the scope of the defence power is extensive … and although the power contained in s 51 (vi) is subject to the *Constitution*, still the words 'naval and military defence of the Commonwealth and control of the forces to execute and maintain the laws of the Commonwealth', coupled with s 69 [sic] and the incidental power (s 51 (xxxix)) indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise, and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative point of view.[61]

Justice Logan made the pithy observation that there is no constitutional basis for the judiciary to command and control the ADF, stating that the judiciary is neither trained nor resourced to carry out that function.[62] He concludes his paper by further reinforcing the history of warfighting and the necessity that military discipline be left alone as an execution of executive power as a function of command '[w]ithin the bounds of constitutional legislative competence: the choice of means [of military discipline] is a matter for the legislature, not the judiciary'.[63] He finishes by inferring that defining military discipline as an exercise of judicial power or 'civilianising' would largely equate to a 'contradiction not just in terms but also in thinking'.[64]

Ultimately, military discipline should be viewed as an exercise of executive power because without input from command throughout the entire process — which informs the context and judgment of the trial of service offences — the offences and any subsequent convictions would risk losing much of their meaning. Military discipline proceedings under the DFDA are meaningless without approval of conviction and punishment by the appropriate level of command. This fact was articulately summed up by Platt J in 1821, who stated:

> The proceedings of the CourtMartial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of a CourtMartial; and, it is equally clear, that the Court could not punish without his order of confirmation.[65]

This insight into the complementary relationship between military discipline proceedings and the role of command in approving those proceedings is as relevant today as it was in 1821.

60 Tracey, 'The Constitution and Military Justice' (n 47) 426–7; also expressed by Jim Waddell, 'From Federation to Armistice: The Earliest Army Legal Officers' in Bruce Oswald et al (eds), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years* (Big Sky Publishing, 2014) 2; and Henry Burmester, 'The Rise, Fall and Proposed Rebirth of the Australian Military Court' (2011) 39 *Federal Law Review* 196.

61 *Bevan* (n 1) 468.

62 John Logan, 'Military Court Systems: Can They Still Be Justified In This Age?' (Conference Paper, Specialist Subjects Session 4B, Commonwealth Magistrates and Judges Association 18th Triennial Conference, Brisbane, 10 September 2018).

63 Ibid.

64 Ibid.

65 *Mills v Martin* 19 Johns 7, 30 (1821), cited in *Lane* (n 2) 85.

Acting judicially

With sound constitutional, legislative, historical, practical and logical basis for the categorisation of military discipline as an exercise of executive power, this article will now address some of the contentious features of military discipline which give it the *appearance* of a judicial function.

A court of record and power of contempt of court

One of the key criticisms of the AMC was that it purported to be a court of record which had the ability to enforce its own decisions and had the power of contempt of court. In *Lane*, French CJ and Gummow J identified a court of record as having the power to 'both make its determinations and enforce them'.[66] They found that the AMC was so constituted, and this was one of the grounds upon which it was subsequently struck down as unconstitutional. They also noted that the AMC 'goes beyond what as a matter of history was encompassed by the administration of military justice by a hierarchical command structure'.[67] It is worth noting that as far as the 'contempt of court' aspect of the argument goes, the original iteration of the Defence Act provided the following:

> 89. Any person who wilfully interrupts or disturbs the proceedings of a court-martial, or uses insulting language towards the court or the members thereof, or who by writing or speech uses words calculated to improperly influence the court or the members thereof or the witnesses before the court, shall be guilty of contempt of court, whether the act committed was committed in the court or outside the court.
>
> 91. Contempt of court shall be punishable as follows: —
>
> (a) On conviction before a court-martial or court of summary jurisdiction by fine not exceeding Twenty pounds or by imprisonment not exceeding two months;
>
> (b) On conviction before the High Court or a Justice thereof or a Supreme Court or a Judge thereof by fine or imprisonment in the discretion of the court.

Therefore, in 1903, when the Defence Act first received royal assent, courts martial did have a power of contempt of court, albeit created by statute. It must be noted that this power granted by the Defence Act was not an inherent power enjoyed by a court of record at common law. The result of this is that the 'contempt of court' argument alone, raised in *Lane*, relies on a clear (and accurate) distinction between the power of contempt of court held by a court of record on one hand and a statutory power similar to contempt of court, such as that provided for under s 53 of the DFDA and s 89 of the current compilation of the Defence Act, on the other.[68] The court of record argument in respect of *Lane* stands, as long as it is accepted that AMC's ability to enforce its own decisions absent of command input alone meant that it was illegitimately exercising judicial power.

66 *Lane* (n 2) 33.
67 Ibid 37.
68 Compilation No 77 of 18 December 2020.

The most fatal aspect of the AMC could perhaps be summed up as the removal of a command review process which implied that the AMC was capable of making and enforcing its own decisions, which has always been such an important aspect of military discipline proceedings.[69] The exercise of military justice in the ADF, both before the AMC and post *Lane*, ensures that command exercises its powers of review with respect to summary and superior tribunals as provided for under the DFDA. As stated by Dixon J, '[t]o ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army, navy or air force. But they do not form part of the judicial system administering the law of the land'.[70]

Imprisonment

It has been argued[71] that military discipline in the ADF should be framed as an exercise of judicial power because the punishment of imprisonment can be imposed in respect of a conviction for some service offences. There are two important issues which this argument overlooks. First is the principle that deprivation of liberty as a punitive measure for criminal guilt can only be imposed pursuant to judicial power. This principle must be applied literally — military discipline proceedings in the ADF do not (and have no power to) determine criminal guilt; rather, they determine guilt of a 'service offence' (which is not brought on indictment). The fact that the standard of proof required to convict is the same as that required in criminal proceedings is irrelevant — that fact alone does not lead to a conclusion that criminal guilt is determined under military discipline proceedings. Secondly, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ have succinctly summed up the justification for a special exemption for military discipline in this regard:

> It is to be borne … that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a service offence … Punishment of a member of the defence force for a service offence, even by deprivation of liberty can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by … service tribunals are amenable to intervention from within the chain of command, the steps taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force.[72]

Therefore, the availability of imprisonment for the purpose of maintaining military discipline should not lead to a conclusion that military discipline in the ADF is an exercise of judicial power. On the contrary: it has long been accepted that the punishment of a member of the ADF for a service offence, including a punishment involving a deprivation of liberty, can be imposed outside the judicial power of the Commonwealth.

Juries and the distinction between crimes and service offences

The right granted by s 80 of the *Constitution* to trial by jury (which is not observed in military discipline proceedings in the ADF) is the final matter to be addressed. However, the explanation as to why this is the case is remarkably simple. The *Constitution* provides that '[t]he trial on *indictment* of any offence against any law of the Commonwealth shall be by

69 Waddell (n 60) 13.
70 *Cox* (n 15) 23 (Dixon J).
71 Crowe and Ratnapala (n 4) 172.
72 *Haskins v Commonwealth* [2011] HCA 28, 21.

jury'.[73] Service offences pursued under the DFDA are not brought on indictment because they do not allege criminal offences. Further, a jury is not required by law for the trial of a service offence because a service offence is not indictable. All that s 80 requires is that the trial on indictment of an offence against a law of the Commonwealth will be by jury.[74] This is possible because the DFDA avoids the application of s 80 of the *Constitution*.[75] Even when a service offence is constituted by substantially the same conduct as a criminal offence, the offences themselves can always be distinguished from each other.

Although *R v Stillman*[76] ('*Stillman*') is a decision of the Supreme Court of Canada which has its own unique constitutional arrangements, there are important similarities between the Canadian Armed Forces and the ADF. Both jurisdictions share a common law background in which military law originated from England. The Canadian *National Defence Act*[77] ('NDA') and the DFDA share numerous similarities, including a provision to charge criminal offences as 'service offences'.[78] Both states have constitutional rights to trial by jury (and exceptions to this right — constructed somewhat differently).[79] The majority in *Stillman* held that the exception to the right of a trial by jury under the Canadian constitution was valid in respect of charges based on service offences.

The decision to deny a right to a jury trial in *Stillman* demonstrates an international perspective that offences charged pursuant to military discipline framework should not be subject to a trial by jury. Military discipline determines guilt in respect of service offences which are not crimes, and service offences are not brought on indictment.

The way forward: further research

The principles set in *Lane* are now firmly established and the AMC is no longer. It may be that a permanent military court of any sort outside of command may be impermissible due to s 68 of the *Constitution*.[80] Although there was further thought to the establishment of a federal court to try serious service offences (in the guise of a 'Military Court of Australia' established under Ch III, as opposed to the unconstitutional AMC) which would be compatible with the decision in *Lane*, that Bill[81] has now lapsed and the current system of military discipline in the ADF appears to the operating satisfactorily. The more recent High Court judgment in *Private R v Cowan*[82] has clear implications pertaining to the jurisdiction of tribunals under the DFDA. It also has consequences for the nature and character of 'service offences' imported by virtue of s 61 of the DFDA. The question of whether a tribunal under the DFDA

73 *Australian Constitution* s 80 (emphasis added).
74 *Kingswell v The Queen* [1985] HCA 72 (Gibbs CJ, Wilson and Dawson JJ).
75 Stellios (n 37) 55.
76 2019 SCC 40.
77 RSC 1985 (Canada).
78 *Defence Force Discipline Act 1982* (Cth) s 61; *National Defence Act* RSC 1985 (Canada) s 130.
79 The right in Canada is explicitly exempt from application to 'offences under military law'. In Australia the right to jury trial exists only for offences brought on 'indictment' — services offences are not brought by way of indictment; rather, they are 'charged'.
80 However, it should be noted that both Edelman J and Gageler J made some interesting comments pertaining to s 68, Ch III, of the *Constitution* and the maintenance of military discipline in *Private R v Cowan* [2020] HCA 31.
81 Military Court of Australia Bill 2012.
82 *Private R v Cowan* [2020] HCA 31.

— during peace time in Australia, where a conviction could rest on the decision of a panel of three out of five ADF officers — is an appropriate forum to determine guilt for allegations which essentially amount to serious criminal offences requires careful analysis. Time will tell whether this issue is considered in the future and what the implications might be for military justice in the ADF and the jurisdiction to try imported 'service offences' which effectively amount to serious criminal offences.

Conclusion

A sound executive and legislative basis, constitutional interpretation, history, the nature of command, 'operational needs'[83] and the High Court judgment in *Lane* combine to lead to the conclusion that military discipline is not an exercise of judicial power which is an exception to Ch III of the *Constitution* but, rather, is executive power exercised in a judicial way. This article has shown that this view is preferable over other approaches for several reasons. First, a historical analysis of the development of military discipline and how military discipline was considered at the time the *Constitution* was drafted clearly shows that it was originally based on Crown prerogative and later defined as an exercise of executive power, eventually administered by way of statute.[84] Second, ss 51(vi) and 68 of the *Constitution* provide a sound constitutional basis to support the argument that military discipline is a function of executive power, through command of the military and naval forces of the Commonwealth. And, third, the administration of military discipline does not exercise, and does not purport to exercise, judicial power. While it may be administered in a judicial manner, that alone does not amount to an exercise of judicial power. The High Court has long recognised that the *Constitution* makes particular allowance for imprisonment for service offences pursuant to military discipline, without triggering a requirement to exercise judicial power. To avoid risking a jurisdictional void in respect of service offences committed outside of Australian territory, and to allow for the expeditious prosecution of alleged service offences, it could hardly have come to an alternative conclusion without grappling with serious practical ramifications. The 'end to be achieved by martial law, consistently with s 51(vi) of the *Constitution*, is the promotion of the efficiency, good order and discipline of the defence forces'[85] and, as such, military discipline is firmly a matter for the executive.

83 Stellios (n 37) 56.
84 Burmester (n 60) 196.
85 *Tracey* (n 26) 13 (Mason CJ, Wilson and Dawson JJ).