AIAL FORUM

ISSUE 107 APRIL 2023

Incorporating two of the 2022 National Lectures on Administrative Law by the Hon Justice Stephen Gageler AC, Justice of the High Court of Australia, and Emeritus Professor Robin Creyke AO

Australian Institute of Administrative Law

AIAL FORUM

ISSUE 107 APRIL 2023

The *AIAL Forum* is published by:

Australian Institute of Administrative Law Incorporated
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This issue of the *AIAL Forum* should be cited as (2023) 107 *AIAL Forum*.

Printed by Instant Colour Press

ISSN 1 322-9869

Printed on Certified Paper

AIAL FORUM

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Recent developments

Anne Thomas

Cost model consultation paper released

The Government, as part of delivering on its commitment to implement the recommendations of the Respect@Work Report, has opened a public consultation process on an appropriate cost model for Commonwealth anti-discrimination proceedings.

The Respect@Work Report 2020 set out the conclusions and 55 recommendations from the *National Inquiry into Sexual Harassment in Australian Workplaces*, carried out by the Australian Human Rights Commission.

In implementing some of the recommendations from the report, the Government last year introduced the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, which requires employers to take proactive steps to prevent sexual harassment in the workplace.

The Government considered the recommendations of the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Bill and listened to stakeholder concerns about the cost provisions that were included in the original version of the Bill and based on a recommendation of the Australian Human Rights Commission.

As a result of these considerations the Government removed the cost provision from the Bill and committed to referring the issue of costs in discrimination proceedings to the Attorney-General's Department for review.

The Attorney-General's Department has released a consultation paper as part of its review into the most appropriate cost model in anti-discrimination proceedings.

The Department will also conduct virtual roundtables with key stakeholders to inform its advice to the Government and ensure that any unintended consequences of cost reforms are properly considered.

<https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/>

<https://ministers.ag.gov.au/media-centre/cost-model-consultation-paper-released-24-02-2023>

How Australia broke its migration system, and what we can do to fix it

The Minister for Home Affairs, the Hon Claire O'Neil, in a speech to the Australian Financial Review Workforce Summit on 22 February 2023, has released a plan for addressing issues with the current migration system.

The Minister stated that structural reform is necessary which is significant in scope and scale, and has set out eight big changes that will drive a new model for migration in Australia. The changes required are to:

- articulate a clear definition of why our migration system exists, and what problems it is to solve, in order to design a program where the structure, rules and administration meet those objectives.
- redesign the fundamental structure of the migration system, and rebalance the temporary and permanent programs. Sensible, good discussion on the long-term management of the migration program as a whole is necessary, including working with State Governments to address infrastructure, services and housing. The push is for more care, time, attention and strategy to getting the right people to Australia when they are needed.
- remove policies which create 'permanently temporary' conditions, requiring clarity where migration is truly temporary and managing this fairly.
- sharpen the focus on skills, both having clear strategic thinking behind the people Australia needs, and where they will come from, as well as a streamlined process that makes this easy. This will involve actively selling Australia to the right people. Part of the goal is to create a system that helps deliver skills to the regions, and to small business — two groups which are struggling to access the current migration system.
- unlock migrant potential, by improving the speed and ease with which migrants' existing skills are recognised when they arrive, and increasing support to translate the skills of secondary applicants and others into the labour market.
- coordinate and integrate the needs of the labour market, training and education system and the migration system, which will require giving Jobs & Skills Australia a formal role in the migration system for the first time.
- design out migrant worker exploitation wherever possible.
- fix the administration of the system and simplify the arcane rules and reduce complexity.

The next steps proposed by Ms O'Neil to prepare a draft architecture for a new migration system which will be released for consultation and discussion in April. The draft architecture will be guided by the report of the Review into the Migration System which was established by Ms O'Neil in September 2022. The Review is due to report to the Minister early this year.

More on the Migration Review can be found at <https://www.homeaffairs.gov.au/reports-and-publications/reviews-and-inquiries/departmental-reviews/migration-system-for-australias-future>

<https://minister.homeaffairs.gov.au/ClareONeil/Pages/how-australia-broke-its-migration-system.aspx>

Government commits to significant metadata reform

The Government has committed to a reform of Australia's metadata retention laws in its response to the bipartisan Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Mandatory Data Retention Regime. The Government's response was released in February 2023.

The mandatory data retention regime is a legislative framework which requires carriers, carriage service providers and internet service providers to retain a defined set of telecommunications data for two years, ensuring that such data remains available for law enforcement and national security investigations.

The PJCIS tabled its report in October 2020, making 22 recommendations for revised practices and legislative reform.

The PJCIS concluded that while the Mandatory Data Retention Regime provides critical assistance to law enforcement and intelligence services, the regime lacks transparency and adequate safeguards.

The PJCIS raised concerns about the absence of clear guidelines for agencies that access and manage metadata under the Mandatory Data Retention Regime, inadequate record-keeping obligations and the fact that the legislation does not require officers who are authorised to access telecommunications data to undertake specific training.

The PJCIS also heard evidence that a large number of non-criminal law enforcement agencies, including local councils, were using other laws to gain access to people's metadata outside of the Mandatory Data Retention Regime. The PJCIS argued that such practices should cease.

The Government accepts most of the PJCIS's recommendations. The implementation of many of these recommendations will require legislative reform.

The Government is committed to ensuring the Mandatory Data Retention Regime continues to support the work of law enforcement and national security agencies while also ensuring that these powers are subject to appropriate safeguards.

The Government will now work to implement the Committee's recommendations as soon as practicable.

The Government's response can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Dataretentionregime/Government_Response>

<https://ministers.ag.gov.au/media-centre/government-commits-significant-metadata-reform-21-02-2023>

Expert Advisory Group to Guide Reform to Australia's System of Administrative Review

The Government has announced the Expert Advisory Group that will guide the landmark reform to Australia's system of federal administrative review.

On 16 December 2022, the Australian Government announced that it would replace the Administrative Appeals Tribunal (AAT) with a new administrative review body. The Expert Advisory Group will provide advice on key policy and legislative issues in relation to this reform.

The Advisory Group will comprise:

- Former High Court Justice, the Hon Patrick Keane AC KC (Chair)
- Ms Rachel Amamoo
- Emeritus Professor Robin Creyke AO
- Professor Anna Cody
- Emeritus Professor Ron McCallum AO
- Former Federal Court Justice, the Hon Alan Robertson SC
- Emeritus Professor Cheryl Saunders AO

Each member is highly qualified and brings a wealth of experience to the Advisory Group, which will guide the delivery of a new, trusted federal administrative review body that serves the interests of the Australian community.

The Hon Patrick Keane AC KC (Chair) is a former High Court Justice; former Chief Justice of the Federal Court; former Justice of the Queensland Supreme Court; and former Solicitor General of Queensland. Mr Keane was admitted to the Queensland Bar in 1977 and in 1988 he was appointed Queen's Counsel. He was appointed a Companion in the General Division of the Order of Australia in 2015.

Ms Rachel Amamoo is a barrister, admitted to the Bar in 2019 and was named in Doyle's Guide as a Leading Administrative and Public Law Barrister, junior counsel, Australia 2022.

Professor Anna Cody is the Chair of the Community Legal Centres Australia Board; Member, Legal Aid Commission NSW Board; Dean, School of Law, Western Sydney University; former Chair, Community Legal Centres NSW Board; former Director, Kingsford Legal Centre; and former Deputy Chair, NSW Legal Assistance Forum.

Emeritus Professor Robin Creyke AO is an Emeritus Professor at the Australian National University; former Member of the Administrative Review Council of Australia; former Integrity Advisor to the Australian Taxation Office; former Senior Member of AAT; Senior Sessional

Member of the ACT Civil and Administrative Tribunal; member of the Administrative Law Committee of the Law Council of Australia and Chair of the National Customs Brokers Licensing Advisory Committee.

Professor Creyke has been writing about tribunals for over thirty years and has also undertaken empirical research into the impact of judicial review cases both within government and also for successful applicants and their lawyers.

Emeritus Professor Ron McCallum AO is an Emeritus Professor at the University of Sydney Law School; former Dean of Sydney Law School; former Member, AAT General and NDIS Division; former Deputy-Chair, Board of Directors of Vision Australia; Senior Australian of the Year (2011); former Chairperson, United Nations Committee on the Rights of Persons with Disabilities; former (and inaugural) president of the Australian Labour Law Association; and former Asian regional vice-president, International Society for Labour and Social Security Law.

Professor McCallum is a highly respected industrial and discrimination lawyer and a prominent human rights advocate. In 1993, he became the first totally blind person appointed to a full professorship at any Australian university when he became Professor in Industrial Law at the University of Sydney.

The Hon Alan Robertson SC is a former justice of the Federal Court of Australia (2011–2020); formerly a Deputy President of the AAT; formerly a Deputy President of the Australian Competition Tribunal; President of Australian Academy of Law; Deputy Chair of the NSW Electoral Commission; and Honorary Professor, College of Law at the Australian National University.

Emeritus Professor Cheryl Saunders AO is the Emeritus Professor at Melbourne Law School and former President of the Administrative Review Council of Australia. Professor Saunders has published widely in the areas of administrative law, constitutional law, constitutional reform, comparative constitutional law, and federation.

Professor Saunders is a President Emeritus of the International Association of Constitutional Law; a former member of the Victorian Judicial Remuneration Tribunal; a former President of the International Association of Centres for Federal Studies; and the founding Director of the Centre for Comparative Constitutional Studies.

<https://ministers.ag.gov.au/media-centre/expert-advisory-group-guide-reform-australias-system-administrative-review-17-02-2023>

Landmark Privacy Act Review report released

The Government has released the report of the Attorney-General's Department's review of the *Privacy Act 1988*, noting that strong privacy laws are essential to Australians' trust and confidence in the digital economy and digital services provided by governments and industry.

The Privacy Act has not kept pace with the changes in the digital world demonstrated by the large-scale data breaches of 2022 which affected millions of Australians, with sensitive personal information being exposed to the risk of identity fraud and scams.

Following those breaches the Government has sought to increase significantly the penalties under the Privacy Act for serious or repeated privacy breaches and give the Australian Information Commissioner improved and new powers.

The Government is now seeking feedback on the 116 proposals in the report before deciding what further steps to take.

Submissions on the report were due on 31 March 2023. Further information can be found at <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>

<https://ministers.ag.gov.au/media-centre/landmark-privacy-act-review-report-released-16-02-2023>

Extension of the Robodebt Royal Commission

The Governor-General, His Excellency General the Honourable David Hurley AC DSC (Retd), has amended the Letters Patent to extend the Royal Commission into the Robodebt Scheme.

Royal Commissioner Catherine Holmes AC SC advised the Government that a short extension was needed and the Government has agreed. The Royal Commission will now deliver its report on 30 June 2023.

The Royal Commission has been examining, among other things:

- the establishment, design and implementation of the Robodebt scheme, who was responsible for it, why they considered it necessary, and any concerns raised regarding legality and fairness,
- the handling of concerns raised about the Robodebt scheme, including adverse decisions made by the Administrative Appeals Tribunal,
- the outcomes of the Robodebt scheme, including the harm to vulnerable individuals and the total financial cost to government, and
- measures needed to prevent similar failures in public administration.

More information on the Robodebt Royal Commission can be accessed at <https://robodebt.royalcommission.gov.au/>

<https://ministers.ag.gov.au/media-centre/extension-robodebt-royal-commission-16-02-2023>

Government Response to Joint Select Committee Family Law Inquiry

On 25 January 2023, the Government released its response to the inquiry conducted by the Joint Select Committee on Australia's Family Law System.

The Committee's inquiry was wide-ranging and covered issues such as additional training, accreditation and monitoring of family law professionals and services, delays, and legal costs in the courts, enforcing court orders, addressing family violence, and the operation of the child support scheme.

The response includes agreement from Government to consider simplifying and clarifying legislation on the resolution of parenting matters and the enforcement of parenting orders.

The Government is progressing work that implements several of the Committee's recommendations. The 2022–23 Budget confirmed $87.9 million over four years to continue to expand the successful Lighthouse Project approach to managing family safety risk in the Courts to 15 Federal Circuit and Family Court of Australia registries, nationwide.

The Government is also considering innovative approaches to support families to resolve post-separation financial matters, and measures to improve standards for critical professions and services, such as family report writers and Children's Contact Services.

The Hon Amanda Rishworth MP, Minister for Social Services, said that changes to the family law system to make it safer and easier to use that would ensure the welfare of victim-survivors of family violence, including children, were paramount.

'It is critical that the family law system protects those at risk of violence — including children and young people — who are victims and survivors of family violence in their own right,' Minister Rishworth said.

'We know that long, complicated and adversarial court proceedings can have negative effects on the health and wellbeing of people who are already in a fragile emotional state dealing with the breakdown of a relationship — including children.'

The response also includes agreement from Government to implement key recommendations to improve the operation of the child support scheme.

The Committee concluded its two-year inquiry on 22 November 2021, when it released the last in a series of reports outlining its recommended improvements to Australia's family law system and child support scheme.

The Government response can be accessed at <https://www.ag.gov.au/families-and-marriage/publications/australian-government-response-inquiry-joint-select-committee-australias-family-law-system>

<https://ministers.ag.gov.au/media-centre/government-response-joint-select-committee-family-law-inquiry-25-01-2023>

Federal judicial commission consultation opens

The Government has released a discussion paper on the establishment of a federal judicial commission.

The Albanese Government gave in-principle support to a federal judicial commission in its response to the Australian Law Reform Commission's (ALRC) report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, which can be found at <https://www.ag.gov.au/legal-system/publications/government-response-australian-law-reform-commission-report-138-without-fear-or-favour-judicial-impartiality-and-law-bias>.

The ALRC found that while problematic conduct by judges is relatively rare, a federal judicial commission would provide a transparent and independent means to address complaints about the conduct of federal judges and reinforce public trust in the judicial system.

The ALRC report does not propose a particular model to adopt. The Government will consult broadly on possible models with a discussion paper providing a starting point to guide the early stages of this reform.

This reform work reflects and builds upon the Government's commitment to integrity, fairness and accountability across all public institutions.

A federal judicial commission will complement the work of the National Anti-Corruption Commission which will commence operation this year.

Feedback on the questions raised in the discussion paper will be critical to inform the Government's consideration of any potential federal judicial commission model.

The discussion paper can be accessed at <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/supporting_documents/discussionpaper.pdf>

<https://ministers.ag.gov.au/media-centre/federal-judicial-commission-consultation-opens-17-01-2023>

Appointment to the Australian Law Reform Commission

The Government has appointed the Hon Justice Mark Moshinsky to serve as acting President of the Australian Law Reform Commission, following his appointment as a part-time member of the advisory body.

The Australian Law Reform Commission plays an important role to ensure our laws remain relevant and fit-for-purpose. It makes recommendations to government including how to simplify the law, adopt new or better ways to administer the law and improve access to justice.

Justice Moshinsky will serve as acting ALRC President while a merit-based recruitment for the role is conducted.

Justice Moshinsky is a judge of the Federal Court of Australia. His appointment coincides with the concluding appointments of the Hon Justice Sarah Derrington AM and the Hon Justice John Middleton AM, who served as President and part-time Commissioner of the ALRC respectively.

We congratulate Justice Moshinsky on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-australian-law-reform-commission-09-01-2023>

Review of Commonwealth secrecy offences

The Government has commenced a comprehensive review of Commonwealth secrecy offences.

In two unanimous bipartisan reports, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the former government conduct a review of all secrecy provisions in Commonwealth legislation. Of particular concern to the PJCIS was whether existing legislation adequately protects public interest journalism.

Secrecy offences play an important role in circumstances where the unauthorised disclosure of Commonwealth information may cause harm to essential public interests, such as national security and the safety of the public. However, multiple reviews have raised concerns about the number, inconsistency, appropriateness, and complexity of Commonwealth secrecy offences.

There are 11 general secrecy offences, 487 specific offences and over 200 non-disclosure duties in Commonwealth legislation. This review of Commonwealth secrecy offences is the first critical step to ensuring that these laws, which are designed to protect essential public interests, remain fit-for-purpose.

In response to a recommendation of the Royal Commission into Defence and Veteran Suicide, the review will specifically consider whether amendments are needed to protect individuals who provide information to Royal Commissions.

The Attorney-General's Department will consult widely across government and civil society, including media organisations and legal experts, to ensure the review responds to information by a broad range of expertise and perspectives.

An interim report was provided to Government on 31 January 2023. The review's final report will be delivered by 30 June 2023.

The terms of reference for the review are available on the Attorney-General's Department website: <https://www.ag.gov.au/crime/publications/terms-reference-review-secrecy-provisions>.

<https://ministers.ag.gov.au/media-centre/review-commonwealth-secrecy-offences-22-12-2022>

Albanese Government to abolish Administrative Appeals Tribunal

On 16 December 2022, the Government announced that it will abolish the Administrative Appeals Tribunal and replace it with an administrative review body that serves the interests of the Australian community.

The Government is committed to restoring trust and confidence in Australia's system of administrative review, beginning with the establishment of a new administrative review body that is user-focused, efficient, accessible, independent, and fair.

The Government will consult with stakeholders on the design of the new body. This work will be led by a taskforce within the Attorney-General's Department and be informed by an Expert Advisory Group led by the Hon Patrick Keane AC KC, a former Justice of the High Court of Australia.

As part of this reform, the Government has committed:

- $63.4 million over two years for an additional 75 members to address the current backlog of cases and reduce wait times while the new body is being set up; and
- $11.7 million over two years for a single, streamlined case management system.

The Government will undertake further work as part of the reform process to ensure the financial sustainability of the new body.

The new body will have a transparent and merit-based selection process for the appointment of non-judicial members. Existing non-judicial members of the AAT will be invited to apply for positions on the new body in accordance with that process.

The Government has developed a set of guidelines for appointments to the AAT prior to its abolition. Appointments for non-judicial members to the new body will be consistent with the principles set out in these guidelines.

Matters currently before the AAT will be unaffected. They will continue to be heard as the reform progresses and will transition to the new review body once it is established.

Current AAT staff will transition to the new body as part of the reform. The Government is committed to working closely with the Public Sector Union and the AAT to ensure that the staff of the AAT are supported throughout this process.

The Hon Justice Susan Kenny AM has been appointed as the Acting President of the AAT. The Government will conduct a transparent and merit-based selection process for the role of President in due course.

<https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>

Appointments to the Federal Court of Australia

The Governor-General, His Excellency the Hon David Hurley AC DSC (Retd), has appointed Justice Catherine Button, Justice Geoffrey Kennett, and Mr Ian Jackman SC as judges of the Federal Court of Australia.

Justice Button has been appointed to the Victorian Registry and commenced on 16 January 2023. Justice Button came to the Bar in 2007 and took silk in 2018. In July 2021, Justice Button was appointed as a Judge of the Supreme Court of Victoria.

Justice Kennett has been appointed to the New South Wales registry and commenced on 19 December 2022. Justice Kennett came to the Bar in 1998 and took silk in 2010. In March 2022 Justice Kennett was appointed as a Judge of the Supreme Court of the Australian Capital Territory.

Mr Jackman has been appointed to the New South Wales Registry and commenced on 6 February 2023. Mr Jackman was admitted as a barrister in the Supreme Court of New South Wales in 1989, and took silk in 2002.

We congratulate Justices Button and Kennett, and Mr Jackman on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-15-12-2022>

Commonwealth Ombudsman's Stored Communications and Telecommunications Data Annual Report

On 7 March 2022, the Attorney-General, the Hon Mark Dreyfus, tabled the Commonwealth Ombudsman's annual report on stored communications and telecommunications data powers under the *Telecommunications (Interception and Access) Act 1979*.

The report is the outcome of 37 inspections across 21 agencies that used powers covertly to access stored communications and all agencies that had access telecommunications data powers between 1 July 2021 and 30 June 2022.

The Ombudsman made 13 recommendations, 145 suggestions and 97 better practice suggestions — a decrease on the number of recommendations and suggestions made in the previous year.

The Ombudsman inspects Commonwealth, state and territory law enforcement and integrity agencies' use of these powers against the requirements of the Act, reporting annually to Parliament.

Stored communications include items existing on a telecommunications carrier's system like emails and text messages. Telecommunications data is the information about a communication, but not the content of the communication itself and may include subscriber information, call charge records and location-based data.

The report identifies areas posing the greatest risk to agencies' compliance with the Act in 2021–22 such as destruction of stored communications, data vetting and quality control frameworks, use and disclosure record-keeping obligations and reporting to the Minister.

The report makes findings about instances of non-compliance in authorisations and warrants as well about the adequacy of risk controls such as agency governance frameworks, systems and training.

The report can be found on the Commonwealth Ombudsman website <https://www.ombudsman.gov.au/__data/assets/pdf_file/0013/115222/Commonwealth-Ombudsman-2020-21-Annual-Report-Stored-Communications-and-telecommunications-data.pdf>

Publication of report to the Attorney-General

On 6 February 2023, the Attorney-General, the Hon Mark Dreyfus, tabled the Commonwealth Ombudsman's report summarising the Ombudsman's oversight of the following covert powers:

- controlled operations
- delayed notification search warrants
- health checks of agencies' preparedness to use new account takeover warrant powers introduced in 2021.

The Commonwealth Ombudsman, Mr Iain Anderson, noted that as each of the above powers are used covertly, '[m]y Office's oversight helps shed light on the use of these powers and supports agencies to continuously strive towards full compliance with legal requirements'.

The Office of the Ombudsman made 13 suggestions and 13 better practice suggestions across these three regimes to the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC).

Controlled operations are covert (undercover) operations carried out to obtain evidence of a serious Commonwealth offence. Controlled operations provide legal protection for authorised participants who engage in conduct that would otherwise be unlawful or lead to civil liability. There was a significant decrease in the number of issues identified per inspection at the ACIC and AFP in 2021–22, in comparison with 2020–21, with both agencies taking action in response to our previous recommendations and suggestions to effect systemic improvements to their governance of the use of controlled operations.

Delayed notification search warrants allow the AFP to conduct a covert search of a premises to investigate certain terrorism offences. They are 'delayed' because the occupier of the premises does not know the search is happening at the time and is only notified later. The Report noted that there were no major instances of non-compliance by the AFP in using these warrants for the first time.

An account takeover warrant allows law enforcement to take control of an online account when investigating a serious offence. Online accounts include, for example, social media accounts, online banking accounts and accounts associated with online forums. The Report concluded that agencies had done well in ensuring their draft policies, procedures and guidance will support the proper use of these new powers.

The report can be found at:

<https://www.ombudsman.gov.au/publications-and-news-pages/news-pages/media-releases/commonwealth-ombudsman/06-february-2023-publication-of-commonwealth-ombudsman-report-to-the-attorney-general-on-agencies-compliance-with-the-crimes-act-1914>

Recent decisions

The limits of jurisdictional error for a sentencing court

Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3

On 15 February 2023, the High Court handed down its decision in *Stanley v Director of Public Prosecutions.* The majority allowed the appeal remitting the matter to the District Court of New South Wales to be heard and determined according to law.

The matter concerned the appellant who, in 2019, in contravention of the *Firearms Act 1996* (NSW) committed offences of knowingly taking part in the supply of a firearm and having in possession for supply a shortened firearm. In October 2020, the appellant pleaded guilty in the Local Court of New South Wales at Dubbo and was granted bail pending sentence. In December 2020, the appellant was sentenced to an aggregate term of imprisonment for three years with a non-parole period of two years. The appellant appealed to the District Court against the severity of the sentence. Before the District Court, the appellant asked the Court, under s 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), to make an intensive correction order (ICO) that would have directed the appellant's sentence of imprisonment be served by way of intensive correction in the community.

In deciding whether to make an ICO, community safety is the paramount consideration as provided for under s 66(1) of the Sentencing Procedure Act, and subsection 66(2) requires that when considering community safety, the Court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.

The District Court dismissed the appeal, without referencing or making any findings in relation to s 66(2) of the Sentencing Procedure Act. Having no appeal rights, the appellant filed a summons in the New South Wales Court of Appeal seeking relief in the nature of certiorari, quashing the decision of the District Court. The majority of the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law, but rather an error of law within the jurisdiction of the District Court, dismissing the summons.

The appellant was granted special leave to appeal to the High Court. The appeal raised two issues: one, whether the failure of the District Court Judge to make the assessment required under s 66(2) in declining to make an ICO was a jurisdictional error of law; and two, whether the District Court Judge failed to make that assessment. Justices Gordon, Edelman, Steward and Gleeson in the majority concluded that the answer to both those questions was 'yes' for the following reasons.

The Supreme Court's jurisdiction to determine proceedings for judicial review of a sentence is limited to review for jurisdictional error of law, as a result of the privative clause in s 176 of the *District Court Act 1973* (NSW). As an inferior court with limited jurisdiction, whether the District Court has made an error of law that is jurisdictional will depend on the proper construction of the relevant statute.

In considering the legislative framework, the majority noted that the power to order, or to decline to order, an ICO under s 7(1) is a discrete function that arises *after* the sentencing court has imposed a sentence of imprisonment. Once the power to make an ICO is enlivened, the sentencing court must address the relevant considerations in the Sentencing Procedure Act, specifically, in this case, s 66 which imposes specific mandatory considerations on the decision maker. That is, s 7 is not an inconsequential subsequent power after the sentencing process is complete, rather it is a sentencing function that is to be exercised in reference to the paramount consideration in s 66 of the Sentencing Procedure Act. Moreover, it is a discretionary power that fundamentally changes the nature of the sentence of imprisonment ([82]).

Noting the decision in *Craig v South Australia* (1995) 184 CLR 163, that a failure by a sentencing court to take into account a relevant consideration in the course of arriving at a sentencing decision will not ordinarily be a jurisdictional error without more, the majority found that even though the consideration in s 66 was not enlivened until after sentencing, this did not mean the court remained within jurisdiction when making the separate decision to order an ICO. The majority held that as a sentencing function, s 7 must be exercised by reference to the considerations in s 66, although a failure to do so would not invalidate the original sentence, as a separate decision to impose a sentence of imprisonment had already been made. Rather, the consequence of a failure to consider the s 66 requirements, is that the discretion to consider whether to grant an ICO under s 7(1) was invalid, and therefore had not been exercised.

Moreover, the majority held that it would be contrary to Parliament's intent essentially to enable a District Court Judge undertaking a rehearing of a sentencing process to be wholly immune from review where a fundamental step in the mandated process for deciding whether to make an ICO is omitted.

The majority concluded that the District Court Judge had failed to undertake the assessment in s 66(2) such that no decision on the ICO issue had been made and this duty remained unperformed.

Chief Justice Kiefel, and Justices Gageler and Jagot each wrote separate dissenting judgments. Each found that there was no jurisdictional error as s 66 of the Sentencing

Procedure Act does not condition the authority of the sentencing court to make or refuse to make an ICO under s 7(1) of the Sentencing Procedure Act. The decision to make or refuse an ICO is required to be informed by other considerations in addition to those in s 66, such that the obligation under s 66(2) does not condition the validity of the sentencing process. This is for two reasons: firstly, the authority of the sentencing court to sentence an offender to a term of imprisonment is not conditioned on the proper exercise of power under s 7(1) to make an ICO; and secondly, non-compliance with s 66(2) does not result in the sentencing court exceeding the limits of its decision-making authority conferred on it by s 7(1).

Justice Gageler reiterated that a restriction on power does not necessarily condition, and thereby limit, the authority to exercise that power, as noted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 373–4. Moreover, the language and structure of s 66 and the essential evaluative nature of the decision it goes towards does not give rise to an inference that any element in s 66 is meant to be a jurisdictional fact.

Justice Jagot also emphasised that s 7(1) was about the manner of service of a sentence of imprisonment and not the imposition of a sentence of imprisonment, and while the way in which a sentence is to be served is important to the individual offender, the Sentencing Procedure Act does not make s 66 a pre-condition to a sentence of imprisonment ([190]). As such, an error as a result of not considering the matters under s 66 is one within jurisdiction.

The requirement of procedural fairness where information derived from torture is considered

Director-General of Security v Plaintiff S111A/2018 [2023] FCAFC 33

The matter concerned an appeal from orders made by a single judge of the Federal Court setting aside two adverse security assessments (ASAs) made on the 23 April 2018 and 27 October 2020, respectively, by the Director-General of Security, concerning the respondent. Both ASAs had concluded that the respondent was directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979*. Specifically, the security risk posed by the respondent arose from an assessment that he had been a member of the Egyptian Islamic Jihad prior to coming to Australia, had held an ideology supportive of politically motivated violence, and was still likely to hold that ideology and to act upon it.

The respondent, an Egyptian citizen, had been in immigration detention since arriving in Australia in May 2012. In June 2015, the respondent applied for a protection visa. In undertaking a security assessment, the Australian Security Intelligence Organisation (ASIO), had obtained information from the AFP that the respondent had been sentenced in absentia in Egypt for terrorism offences. The evidence, however, upon which the respondent had been sentenced had most likely been obtained by torture. Upon making the decision to issue the 2018 ASA, the Director-General informed the Department of Home Affairs of the ASA. The briefing note which accompanied the Director-General's decision detailed aspects of the Egyptian trial provided by the respondent and attributed some weight to the allegations made against the respondent at the trial, describing them as 'merely contributing to a broader intelligence case underlying the security assessment'.

On 13 June 2018, a delegate of the Minister for Home Affairs refused to grant a protection visa to the respondent as a consequence of the 2018 ASA in line with s 36(1B) of the *Migration Act 1958* which provides that not having an ASA is essential to the granting of a protection visa.

On 15 September 2020, ASIO interviewed the respondent and informed him that his ASA was being reviewed. On 27 October 2020, the Director-General approved a decision brief to issue an ASA. The Department of Home Affairs was subsequently informed and once again refused to issue a protection visa in accordance with s 36(1A) of the Migration Act.

In overturning the 2018 ASA, the primary judge found that the decision constituting the security assessment relied upon material that was held by Her Honour to have been discredited as it was likely that it had been obtained by torture and/or prepared by Egyptian authorities. The primary judge also overturned the 2020 ASA on the ground that the respondent had been denied procedural fairness in relation to the future risk that he posed to national security having regard to his current and future circumstances. The information which may have been obtained from torture was not used in the 2020 ASA.

The Government appealed to the Full Court on three grounds. Grounds 1 and 3 were found successful by the Court, while Ground 2 could not be considered as it was an appeal seeking to rectify reasons and not the primary judge's orders.

Under Ground 1, which concerned the validity of the 2018 ASA, the Government contended that while evidence from the Egyptian trial had been referred to, it was neither material nor significant, or relied upon in a 'primary and material way'. This was emphasised by the conclusion of the 2019 report of Mr Robert Cornell, the Independent Reviewer of Adverse Security Assessments on the 2018 ASA, which did not find any reliance on that material met the description of being 'irrational, unreasonable, unfair, or contrary to any ASIO policy or procedure' ([110]). The Full Court found that the primary judge had failed to appreciate the distinction between the prohibition on ASIO itself engaging in torture or in some way endorsing torture by others, and the use of information obtained by others engaging in such conduct, and then it coming into the hands of ASIO, falling short of any such complicity, which is not prohibited by law or policy, but is required to be treated with restraint and caution ([93]). The Court drew out the distinction made by all the Lords in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, which stands as precedent for the common law exclusion from evidence in a curial proceeding of third party torture evidence, between curial and executive use of material that may have been obtained by torture, with a greater latitude allowed for executive use for the purpose of public protection ([17]). Neither did the Court find any denial of procedural fairness in the respondent's proposition that relying upon material that is not credible nor reliable is procedurally unfair noting that ASIO had weighed the evidence from the Egyptian trial with what the respondent had provided and had invited the respondent to comment on four occasions in addition to an interview.

Ground 3 concerned the validity of the 2020 ASA, in which the primary judge had found that ASIO had failed to explore the respondent's current ideology and future risk by failing, in particular, to put to the respondent certain questions identified as necessary by the judge. The Court agreed with the Government that information about the respondent's past beliefs

and conduct was relevant to the assessment of current beliefs and the future. Moreover, the power to issue a security assessment in s 37 of the ASIO Act does not, in and of itself require the assessment to be 'forward looking', an assessment can be made about current or recent events. The Court held that the assessment of a person's likelihood of engaging in, for example, politically motivated violence or other terrorist activity, 'is almost always going to involve a consideration of what that person has said and done in the past, and a view being formed as to whether any stance revealed by history has changed' ([128]). It was thus not unreasonable of ASIO to seek to ascertain what the respondent's position was in the past to assist in ascertaining whether there had been any material change in his position. Moreover, the Court concluded that the respondent had been provided with an ample opportunity to volunteer any further information on these issues. Procedural fairness, in this situation did not require the respondent be asked certain questions by ASIO, particularly where the respondent was given an opportunity to provide any information he wished to be considered, in light of a range of questions that had already been asked about matters concerning his ideology. The respondent had been made aware of the relevant concerns and given a reasonable opportunity to address them. The Court upheld Ground 3.

Under Ground 2, the Government sought to correct a mischaracterisation by the primary judge of the 2020 interview of the respondent. Her Honour had found that the ASIO interviewers had a predetermined view when they commenced the interview, flowing from ASIO views of the respondent's activities some 20 to 30 years ago. As Ground 3 has been upheld, the criticisms of the interviewers had likewise not been upheld. The Court did not find it necessary to decide this aspect. Moreover, it was not appropriate for the Court to consider as it was an appeal to correct reasons rather than an appeal on orders.

The orders of the primary judge setting aside the 2018 ASA and 2020 ASA were set aside and the matter dismissed with costs.

One element of a multifactorial assessment does not lead to illogicality or irrationality of the whole

FSKY v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 2

The case concerned an appeal from a decision of the Federal Court made on 12 May 2022. In that decision, the primary judge dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal made on 30 June 2021. The Tribunal had affirmed a decision of a delegate of the respondent (the Minister) made on 15 October 2020, refusing to grant the appellant a Protection (Class XA, subclass 866) visa (protection visa) pursuant to s 65 of the *Migration Act 1958*. Although the delegate had found the appellant was a person for whom Australia had protection obligations, the Tribunal affirmed the delegate's decision that the appellant had not met the criteria in s 36(1C) of the Act, having concluded the appellant was a danger to the community, due to having been convicted of a 'particularly serious crime'.

The appellant was a Cambodian citizen who was granted a Spouse (Class BC Subclass 100) visa in October 1999, as a dependent applicant in Australia. Between 2001 and 2015 the appellant was convicted of 131 separate offences and crimes and served 10 terms of

imprisonment. On 3 February 2017, the appellant's spouse visa was cancelled based on his 'substantial criminal record' as a result of being imprisoned for a term of 12 months or more in accordance with ss 501(6)(a) and 501(7)(c) of the Migration Act. On 3 April 2018, the appellant lodged an application for a protection visa. This was refused on 4 June 2018. On 15 August 2018, a delegate of the Minister decided not to revoke the appellant's visa cancellation. On 8 November 2018, the Tribunal affirmed the decision of the delegate not to revoke the cancellation and remitted the decision to the Department of Immigration and Boarder Protection. On 15 October 2020, the delegate refused to grant the appellant a protection visa on the basis that he did not meet the criteria in s 36(1C).

The Tribunal, in affirming the delegate's decision, noted that determining whether a person is a 'danger to the community' under s 36(1C), did not require the Tribunal to balance considerations or exercise a discretion. Rather, this was a matter of fact ([18]). The Tribunal adopted a non-exhaustive list of relevant factors to be considered in determining whether a person constitutes a danger to the Australian community. These factors were those that had been identified by Tamberlin DP in *WKCG and Minister for Immigration and Citizenship* [2009] AATA 512 at [26]–[29]. One such consideration was the appellant's risk of recidivism.

The primary judge found that the 'low to moderate' risk of recidivism finding of the Tribunal was only one of several factors that the Tribunal considered as part of the overall assessment of danger, dismissing the application, and upheld the decision of the Tribunal.

The appellant's appeal to the Full Court was made on the grounds that it was not logical or rational for the Tribunal to find that he posed a 'danger' to the Australian community required under s 36(1C)(b) where the Tribunal had found the appellant's risk of recidivism was 'low to moderate'. The decision of the Full Court was handed down 20 January 2023, dismissing the appeal.

The Full Court did not accept that the primary judge had fallen into error in finding the Tribunal had not erred in its determination that the appellant posed a danger to the Australia community. Noting in particular, the requirement in s 36(1C)(b) of the Migration Act involved a multifactorial assessment which included, but was not limited to, the risk of recidivism. The Court found that it was clear from the Tribunal's reasons that it had undertaken the multifactorial assessment it was required to do, and consequently, its reasons were rational and logical. Moreover, the concept of 'danger' in s 36(1C) was reliant on whether the appellant had been convicted of a 'particularly serious crime', not as the appellant contended, the risk of recidivism being 'high'.

In coming to its decision, the Full Court emphasised that the Tribunal's findings had to be understood in the context of the whole of its reasons on the topic of risk of recidivism. Importantly, the low to moderate risk of recidivism finding did not confine or impede the finding of 'danger', as the test of 'danger to the community', as already noted, is multifactorial which involves a complex assessment matrix ([59]). Rather, to isolate the bare probabilities of recidivism as constituting the relevant consideration required by s 36(1C) would constitute error. By way of example, the Court adopted the respondent's analogy, that is, it would be misleading to describe one turn of a gun barrel in a game of Russian roulette as only exposing the participant to 16.66 per cent chance of harm (which may be expressed as a

low to moderate risk in the abstract). One would, however, describe that exposure to being shot in the head as a 'danger' to the person in the firing line. That would be so even if the odds were smaller because while the probability of a bullet emerging from the gun may be low, the consequence of the gun firing a shot to the participant's head is catastrophic ([60]).

The Court upheld the respondent's submission that the decision-maker's task under s 36(1C) did not involve 'moving discs on an abacus', but rather comprises a 'melting pot' in which all factors, by instinctive synthesis are given consideration, as the Tribunal correctly adjudicated.

IBAC, and the extent to which it is to afford natural justice

AB v Independent Broad-Based Anti-Corruption Commission [2022] VSCA 283

Between 2019 and 2021, the Victorian Independent Broad-Based Anti-Corruption Commission (IBAC) conducted an investigation in accordance with its functions. As part of this investigation, AB was summoned to give evidence in a private examination. At the conclusion of the investigation, IBAC prepared a draft special report setting out its findings and recommendation. The draft report contained adverse comments and opinions relating to AB and CD (AB's employer, a non-governmental agency). In accordance with s 162 of the *Independent Broad-based Anti-corruption Act 2011* (IBAC Act), on 6 December 2021, IBAC sent AB a redacted version of the report and requested that he provide his response to it by 20 December 2021.

On 12 December 2021, AB's solicitor wrote to IBAC requesting the transcript of AB's witness examination, the transcripts of examinations of other witnesses and copies of other materials upon which IBAC relied in preparing the draft report. IBAC agreed only to provide a transcript of AB's examination.

On 31 January 2022, AB commenced proceedings in the Trial Division seeking judicial review remedies in relation to the draft report. AB alleged that IBAC had infringed the common law principles of natural justice in the manner in which it prepared the draft report and the natural justice requirement of s 162(3) of the IBAC Act in the manner in which it sought his response to the draft report.

On 7 February 2022, CD was served with the same redacted version of the draft report that had been provided to AB, a response was sought by 21 February 2022. On 11 February, CD was added as a party to AB's proceeding against IBAC seeking the same relief as AB. On 28 September 2022, the judge decided that IBAC had not infringed either the common law principles of natural justice or the natural justice requirements of the IBAC Act.

The applicants filed an application for leave to appeal to the Court of Appeal on a number of grounds. The Court, consisting of President Emerton and Justices of Appeal, Beach and Kyrou, grouped the applicants' grounds and considered them under two categories: category 1, natural justice in the context of s 162(3) of the IBAC Act; and category 2, natural justice in the context of the preparation of the draft report.

Prior to dealing with the above two categories, the Court addressed the issue raised in IBAC's notice of contention, that the primary judge should have found that the reference to 'adverse material' in s 162(3) of the IBAC Act consists only of comments or opinions contained in a draft report that are adverse to the affected person and it is only those opinions or comments to which the affected person is required to be given a reasonable opportunity to respond.

The Court found that the notice of contention should be upheld. As a matter of statutory interpretation, the word 'material' as used in s 162(2), (3) and (4) was a convenient label to refer back to the subject matter which enlivened IBAC's obligations in each subsection ([132]). For s 162(3), that is 'a comment or an opinion about which is adverse to any person' and not the material upon which those comments or opinions are based. Further, the provision in s 166, which is confined to the contents of the draft report, but makes no reference to 'adverse material', points to the conclusion that the natural justice obligation in s 162(3) is itself restricted to the contents of the draft report.

In regard to the first category of grounds, the key issues were what the hearing rule of natural justice required IBAC to do to ensure that it provided the applicants a reasonable opportunity to be heard, and whether the steps that IBAC took were sufficient in all the circumstances.

The Court noted that the requirements of the hearing rule of natural justice are 'flexible and respond to the circumstances of each case', informed by a variety of factors, including the scope and objects of the statute conferring the statutory power being exercised, the nature of that power, the right or interest of a person that may be affected by the exercise of the power and the severity of the consequences to that person resulting from the exercise of the power ([161]).

In this context, IBAC had a reasonable opportunity to provide any other contents of the draft report which disclosed the basis on which IBAC formed the adverse comments and opinions or which provided necessary context for them. The Court held that IBAC had satisfied the requirements in s 162(3) of the Act, with one exception, which consisted of a very vague statement in the draft report that was considered 'impossible for the applicants to respond to'. However, the Court found that this did not mean IBAC had denied the applicants a reasonable opportunity to be heard. As a *draft* report (emphasis added), the applicant could urge IBAC to change it in light of the response they provided. Yet, even if IBAC failed to make the requested changes, s 162(3) of the IBAC Act contains the addition protection of requiring IBAC to set out in its final report each element of the applicant's response. This was considered significant by the Court as such a requirement ensures anyone reading the report can consider not only IBAC's findings but also the applicant's perspective in relation to those findings.

The applicants' second category of grounds contended that the hearing rule of natural justice required IBAC to give them notice of the allegations it was investigating at an earlier stage of the investigation. The Court found that these grounds were not made out, finding neither support in the IBAC Act or legal authority.

The Court noted *Re Pergamon Press Ltd* [1971] 1Ch 388 and *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 as authorities which provides that a public official conducting an investigation may defer approaching a person being investigated until the investigation has advanced sufficiently to enable relevant information to be collected and issues to put to that person have been identified. Likewise, contrary to the applicants' submissions, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 and *Coutts v Close* [2014] FCA 19*,* stipulate that it is usually sufficient for a public official to provide a person who may be affected by an investigation with the substance or gravamen of the matters that are adverse to the person. It is not necessary that all the relevant material supporting the allegations is provided for natural justice to have been afforded. As such, the fact that IBAC did not put to AB all the adverse material in the draft report did not mean that IBAC had not complied with the hearing rule of natural justice.

The Court refused leave for appeal.

Administrative law within the common law tradition

*The Hon Justice Stephen Gageler AC**

The eminent historian of English law Sir John Baker commenced his recently published Hamlyn Lectures, *English Law under Two Elizabeths,* by raising the question whether the common law of 21st century England is the 'same' as the common law of 16th century England. His answer was that it is. His explanation was that:

> The law actually is the same law, if we understand the word 'same' in the way that the present writer is the same John Baker as the boy of that name who was at primary school when the Queen was crowned, even though there is little discernible similarity between the two entities and not one molecule remains of the earlier being. It is quite possible to be the same organically and yet to evolve and to grow, and also (eventually) to decline.[1]

The explanation drew on that branch of philosophical inquiry known as ontology, which is concerned with 'identity' or 'sameness' and, in particular, with the age-old question of how something might be said to remain the same even though some or all of its component parts might be replaced. The question is sometimes illustrated by the ancient example of the 'Ship of Theseus' which, according to Plutarch, had all of its timber planks replaced as they rotted one by one. Sometimes it is illustrated by the example of the 'Philosopher's Axe' which, it is said, has had a number of new handles and a number of new heads.

One contemporary answer to the age-old question is that a thing which can be seen to have changed can yet be seen to have remained the same if time is seen to be a dimension of its existence. A three-dimensional form (be it a ship, an axe or a person) can in that way be seen as a four-dimensional worm stretching through time as well as occupying space at each moment in time. The four-dimensional worm can then be seen to be the one thing in time and space even though it might look like two quite different things were its time dimension to be sliced through and were its three-dimensional form at one moment in its life cycle compared with its three-dimensional form at another moment in its life cycle.

Taking my cue from John Baker the elder, my starting point is to treat the common law which we inherited from England and the common law which we now understand to be the common law of Australia as the same common law. When I refer to the 'common law' I mean to refer, like Baker, to the entire body of judge-made law, including judge-made principles of equity and statutory interpretation.

The nature of judicial law-making means that the common law, considered as a body of judge-made law, lends itself to being understood to maintain an identity through time even more strongly than does a three-dimensional form (such as a ship, an axe or a person). That is because the centrality of the doctrine of precedent to the identity of the common law means that the content of the common law at any moment in time can never be examined

* The Hon Justice Stephen Gageler AC is a Justice of the High Court of Australia. This is a revised version of a lecture given under the auspices of the Australian Institute of Administrative Law in Sydney on 1 June 2022. The author thanks Rebecca Lucas for her research assistance and comments.

1 Sir J Baker, *English Law under Two Elizabeths* (Cambridge University Press, 2021) 2.

by slicing through the time dimension and attempting to take a snapshot of the common law at a moment in time.

Frederick Schauer elucidated how judicial adherence to the common law method of following precedent means that the judicial declaration of the law at a moment in time affects the future as much as it is affected by the past. As he put it:

> An argument from precedent seems at first to look backward. The traditional perspective on precedent, both inside and outside of law, has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.[2]

Judicial adherence to the common law method therefore means that it is impossible to say what the common law is at any moment in time by looking just to that moment. What is necessary in that moment is to look to how the law has been declared by judges in the past and to look to how the law might be declared by judges in the future. Oliver Wendell Holmes captured the essentiality of that time-dimension to the identity of the common law when he famously said that '[i]n order to know what it is, we must know what it has been and what it tends to become'[3] and when he went on provocatively to proclaim that 'by the law' he meant 'nothing more pretentious' than '[t]he prophecies of what the courts will do in fact'.[4]

From that starting point of treating the common law as a body of judge-made law having a single continuing identity through time, I narrow my focus to look to those interconnected parts of the common law which pertain to the judicial review of administrative action and which we now group under the rubric of 'administrative law'. In looking to administrative law, I look beyond the frequently adjusted collection of principles of law which we think of as legal doctrine.

My concentration instead is on 'values'. When I refer to a 'value', I mean an enduring idea or belief about a desirable end or about acceptable means which operates to inform the content and application of legal doctrine. A 'value' in the sense I am using that term is an idea or belief that is of sufficient significance or importance to influence the judicial attitude to the performance of the function of the judicial review of administrative action. A value is not a principle of law but rather an idea or belief that, alone or in combination with other ideas or beliefs, informs the declaration or enforcement of a principle of law.

My ambition in this article is to uncover and describe some of the values which influence the judicial attitude to the performance of the function of the judicial review of administrative action and to locate those values within what I will refer to as 'the common law tradition'. In referring to 'the common law tradition' I mean to refer to those institutional structures of, and normative practices within, courts which adhere to the common law method and that have served to foster those values and to transmit them through time.

2 F Schauer, 'Precedent' (1987) 39 *Stanford Law Review* 571, 572–3.
3 OH Holmes, *The Common Law* (MacMillan, 1881) 5.
4 OH Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 461.

By attempting to locate administrative law values within the common law tradition, I am consciously drawing on the more general relationship between values and tradition explored in the writings of the philosopher Samuel Scheffler.[5] Scheffler has explained:[6]

> Traditions are ... human practices whose organizing purpose is to preserve what is valued beyond the life span of any single individual or generation. They are collaborative, multigenerational enterprises devised by human beings precisely to satisfy the deep human impulse to preserve what is valued. ... [B]y participating in traditions that embody the values to which they are committed, individuals can leverage their own personal efforts to ensure the survival of those values. In addition, they can think of themselves as being, along with their fellow traditionalists, the custodians of values that will eventually be transmitted to future generations. In this sense, participation in a tradition is not only an expression of our natural conservatism about values but also a way of achieving a *value-based* relation to those who come after us. We can think of our successors as people who will share our values, and ourselves as having custodial responsibility for the values that will someday be theirs.

Scheffler's explanation provides an account of how I and other judges I know see our temporal relationship to the common law. We do not see ourselves, in the language of Benjamin Cardozo, as 'knight[s]-errant, roaming at will in pursuit of [our] own ideal of beauty or of goodness'; rather, as Cardozo put it, we 'draw inspiration from consecrated principles' and 'exercise discretion informed by tradition [and] disciplined by system'.[7] We do not see ourselves as having dominion over the common law or any part of it, nor as declaring it merely in and for the present. We see ourselves as present-day custodians of values that have been transmitted to us from earlier generations and that will be transmitted from us to future generations. What we do in the present, we do with a sense of responsibility to the past and for the future.

What are the values of which I speak? And what are institutional structures and normative practices by means of which those values have been transmitted through time to their present custodians?

Administrative law values

The historically transmitted values which influence our contemporary judicial attitude to the judicial review of executive action are not incompatible with those of a modern system of public administration. Yet it would be a mistake to think that they are the same.

The values influencing judicial review of executive action can be contrasted with the 'primary goal' of the administrative law system as identified by the Administrative Review Council in that they are not about 'improving the quality, efficiency and effectiveness of government decision-making generally'.[8] They can be contrasted as well as with the 'overall objective' of the merits review system as also identified by the Administrative Review Council in that they are not about 'ensur[ing] that all administrative decisions of government are correct or preferable'.[9]

5 S Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2010); S Scheffler, *Death & the Afterlife*, ed N Kolodny (Oxford University Press, 2016).
6 Scheffler, *Death & the Afterlife* (n 5) 33 (emphasis in original).
7 B Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 141.
8 Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012) 41 [2.63].
9 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) 16 [2.9].

Because they are embedded in institutional structures and normative practices, and because their transmission has been largely unspoken, however, identifying what those values are is more difficult than identifying what they are not. With notable recent exceptions,[10] judges have rarely attempted to articulate them. That has been left to academics, one of whose strengths has lain in their ability to stand aside from the day-to-day cycle of dispute and adjudication and to point out patterns not always apparent to those whose focus is more immediate.

The earliest and most enduring academic articulation was that of Albert Venn Dicey writing in the late 19th century. His explanation of common law constitutionalism was famously in terms of 'parliamentary supremacy' and the 'rule of law'. Components of the 'rule of law', as he explained it, were that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary [courts]'[11] and that 'the general principles of the constitution … are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[12] Those components combined inexorably to result in his denial of any room within common law constitutionalism for a distinct 'administrative law'.[13] That is a perception to which I will return.

A further articulation of enduring significance was that of Louis Jaffe and Edith Henderson writing in the middle of the 20th century.[14] Expressed in Dicey's terminology, the effect of Jaffe and Henderson's analysis of the development of English administrative law since the 17th century was to combine the conceptions of parliamentary supremacy and the rule of law to explain the judicial review of administrative action in terms of the judiciary declaring and enforcing the limits of administrative power conferred on the executive by the legislature. That basic account of judicial review of administrative action has been especially influential in Australia.[15]

Following on from Jaffe and Henderson, by far the most influential account of judicial review of administrative action to emerge in the second half of the 20th century was that of William Wade and Christopher Forsyth. They explained the concern of a court engaged in the judicial review of administrative action as being about ensuring the 'legality' of the exercise of power. The judicial review of administrative action, on the Wade and Forsyth account, was all about keeping administrators within the legal limits of legally conferred power. The 'very marrow of administrative law' on their account, was to be found in the doctrines by which those limits were ascertained and enforced by the judiciary.[16]

10 R French, 'Administrative Law in Australia: Themes and Values' in M Groves and HP Lee (eds), *Australian Administrative: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15–33; J Allsop, 'Values in Public Law' (2017) 91 *Australian Law Journal* 118.

11 AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed,1959) 193.

12 Ibid 195.

13 Ibid Ch XII.

14 LL Jaffe and EG Henderson 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.

15 S Gageler, 'Whitmore and The Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38 *University of New South Wales Law Journal* 1316.

16 HWR Wade and CF Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 26.

There were some, within the academy but also within the judiciary, who challenged the Wade and Forsyth account by asserting that 'legality' was nothing more than a 'fig-leaf' covering up the embarrassing anatomical reality that the doctrines by which the judiciary ascertained and enforced the legal limits of power were in truth the products of naked value judgments.[17] Without disqualifying the aptness of the metaphor, Forsyth gave the following delicate response: 'Those who consider that the fig-leaf should be stripped away to reveal the awful truth to all the world do not, with respect, appreciate the subtlety of the constitutional order in which myth but not deceit plays an important role and where form and function are often different'. The requirement for courts to conceive of their role as restricted to being arbiters of legality was 'inherent' in the 'constitutional order'. Maintenance of the fig-leaf was a matter of institutional decorum — 'a gentle but necessary discipline'.[18]

Two recent academic works have sought to expose the value judgments hidden by the fig-leaf in respectful and nuanced terms. One of those works, by Joanna Bell, focuses on administrative law in England and Wales.[19] The other, by Paul Daly, takes account as well of administrative law in Australia, Canada, Ireland and New Zealand.[20]

Bell labels Wade and Forsyth's account of judicial review of administrative action as 'monist', given that it sought to account for administrative law as the embodiment of a unitary principle, and notes the more recent emergence within the academy of other competing monist accounts which have sought to account for administrative law as the embodiment of one or other different unitary principles.[21] Critiquing without rejecting those monist accounts, Bell charmingly invokes the metaphor of a rose. Just as it is possible to admire the beauty of a rose and yet scientifically to examine its 'inner structure', she argues, it is possible to admire the elegance of a monist account and yet to appreciate that the account fails 'to supply the whole set of intellectual tools needed to understand administrative law adjudication'.[22] Without detracting from Wade and Forsyth's account, it is therefore possible to recognise the complexity of administrative law and seek to explain the detail of its anatomy. One source of the complexity of administrative law which she identifies is its pursuit of multiple normative goals.

In the culmination of a project on which he has been working for more than a decade,[23] Daly takes up where Bell leaves off. His argument is that the 'core features of the contemporary common law of judicial review of administrative action' can be explained in terms of four values which he derives from decided cases across the multiple jurisdictions he has examined.[24] He argues that those four values are sometimes in harmony and sometimes in tension. He argues that their interplay 'can be understood as having structured the principles that judges apply and the decisions that judges reach' and that their elucidation has 'the

17 See D Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] *Public Law* 543; Lord Woolf 'Droit Public — English Style' [1995] *Public Law* 57, 66.
18 C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 122, 136–7.
19 J Bell, *The Anatomy of Administrative Law* (Bloomsbury Publishing, 2020).
20 P Daly, *Understanding Administrative Law in a Common Law World* (Oxford University Press, 2021).
21 Bell (n 19) 220ff.
22 Ibid 246.
23 See earlier P Daly, 'Administrative Law: A Values-based Approach' in J Bell et al (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing, 2006) 23.
24 Daly (n 20) 14.

potential to be a source of "reasoned justification" for judicial review principles and decisions, guiding the development of administrative law in the future and justifying the contemporary law of judicial review of administrative action'.[25]

The four values in the terms identified by Daly are 'individual self-realisation' (involving the protection of 'individual interests which are important because they contribute to ... individuals' ability to plan their affairs whilst being treated with respect by administrative decision-makers');[26] 'good administration' (involving the avoidance of compromising effective and efficient public administration);[27] 'electoral legitimacy' (involving respect for the roles of elected representatives);[28] and 'decisional autonomy' (involving courts and administrative decision-makers each staying in their own spheres of decisional competence and doing what they do best: courts assessing lawfulness of executive action and administrative decision-makers assessing the merits).[29]

Much in Daly's account resonates with my experience. My perception of the values which inform our contemporary judicial attitude to the judicial review of executive action nonetheless differs from his in several respects. The differences may be attributable partly to my narrower focus on administrative law only in Australia and partly to my experience of judicial review of administrative action as but one limb of an interconnected body of judge-made law. Extending Bell's metaphor to illustrate the same comparison, it may be that the difference between Daly's perception and mine is explicable on the basis that he is attempting to describe the genetic structure of a number of roses grown from a common stock whereas I am attempting to explain the genetic structure of a single rose grown with other flowers in a single garden which it is my current responsibility to tend in my own back yard.

One respect in which I differ from Daly is that I think that we tend within the judiciary in Australia to treat procedural fairness — or as it has traditionally been known 'natural justice' — as intrinsic to the value Daly describes as 'individual self-realisation'. Another is that I think that we tend to treat what he refers to as 'good administration' not as a distinct value so much as the by-product of what he refers to as 'decisional autonomy'. Yet another is that I think we tend to see what he refers to as 'decisional autonomy' not so much in terms of courts doing legality and administrators doing merits but more in terms of courts being mindful of sticking to just doing legality. In that respect, I think we have adhered to the 'gentle but necessary discipline' inherent in Wade and Forsyth's account more consistently than the English and much more than the Canadians.[30]

More than two decades ago, I described the 'merits' of an administrative decision as nothing other than 'the residue of administrative decision-making that in any given case lies beyond any question of legality'.[31] Borrowing language from Ronald Dworkin,[32] I more recently described the area of 'discretion' committed to an administrative decision-maker as

25 Ibid 19 (citations omitted).
26 Ibid 14.
27 Ibid 16.
28 Ibid 17.
29 Ibid 18.
30 S Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151.
31 S Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 280.
32 R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 31.

the 'hole in the legal doughnut'.[33] Thomas Bingham, one of the wisest common law judges of my lifetime, explained in the interim that 'judicial review' is 'an excellent description' of the process by which courts enforce compliance by administrators with the law 'because it emphasizes that the judges are reviewing the lawfulness of administrative action taken by others'. He continued:

> This is an appropriate judicial function, since the law is the judges' stock-in-trade, the field in which they are professionally expert. But they are not independent decision-makers, and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less.[34]

Substituting the expression 'adjudicators of legality' for 'auditors of legality', that explanation well captures the mainstream judicial attitude in Australia. A judge engaged in judicial review of administrative action who imagines that the judicial function is to determine whether the administrative action is 'in accordance with precepts of good administration'[35] is a judge who is perilously unaware of the limits or his or her professional expertise and institutional competence.

Acknowledging the influence of Daly, my own attempt to explain the genetic structure of the judicial review of administrative action in Australia would similarly isolate four values. The first is the autonomy of the individual. The essential idea is that everyone has freedom to do anything not prohibited by law, has rights and interests that are protected by law, and has an entitlement to be heard before power is exercised to diminish that freedom or alter those rights or interests. The second is the subordination of power to law. The essential idea is that nobody has power to diminish the freedom, or to alter the rights or interests of anybody else except as is positively conferred by law. That is so for an officer or authority of the State as it is for everybody else. The third is the subordination of law to democracy. The essential idea is that competing versions of the common good are resolved through the political process. The political resolution is manifested in legislation which, subject to constitutional limitations, has the force of law such that it is binding on everybody including every officer and institution of the State. The fourth is the hegemony of the courts over the declaration of the law. Everybody must abide by the law. Everybody is entitled to form an opinion about the law. But only a court has authority to declare the law.

Those are the four values that I see as fundamental to the judicial review of administrative action in Australia in the sense that they are imperative and omnipresent. To afford them that core status does not rule out other values having borne on the judicial development of administrative law doctrine in the past and continuing to bear on the judicial development of administrative law doctrine in the future. Good faith, impartiality, consistency, rationality, transparency, participation and accountability, as Mark Aronson has noted, can be seen in varying measures to have had some role in shaping modern administrative law doctrine

33 S Gageler, 'Judging the New by the Old in the Judicial Review of Executive Action' (2020) 42 *Sydney Law Review* 469, 472.

34 T Bingham, *The Rule of Law* (Penguin Books, 2010) 61.

35 JNE Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in Bell et al (eds) (n 23) 52.

in Australia.[36] More recently imported ideas, like justification and proportionality, are no longer entirely foreign to our law and are not without some influence in contemporary judicial thinking.

The four core values, as I have couched them, are related to each other in a way that minimises tension between them and contributes to their overall coherence to such an extent that it does no violence to conceive of them as a single composite value. Indeed, what has come home to me in attempting to isolate and explain them is that they are not peculiar to administrative law. They are, I think, at the core of the common law as a whole.

Sir Maurice Byers, a profound legal thinker and the most subtlety persuasive advocate I had the privilege to work with, once said that the law as 'an expression of the whole personality'.[37] As those characteristically beautiful and tantalisingly obscure words have been translated by James Allsop, 'subtlety and complexity' are not 'matters of choice' but 'how life is' and personality as a human attribute 'is: understood nor described by breaking it down into separate component parts (if they be separate at all), though the parts may help one understand the whole'.[38]

It will be recalled that in Archilochus' fable, as appropriated by Isaiah Berlin and in turn by Dworkin, 'the fox knows many things, but the hedgehog knows one big thing'.[39] To the hedgehog, as Dworkin put it, 'value is one big thing'.[40] Where I end up is finding myself in sympathy with Dicey in questioning the existence of a distinct administrative law and more fundamentally in sympathy with Dworkin in thinking unashamedly not as a hedgehog.

Institutional structures and normative practices of the common law tradition

The institutional structures and normative practices through which those core values have been fostered and transmitted do much, I think, to explain their existence and essential coherence.

The standard institutional structures involve the separation of judicial power, the commitment to the judicial power of the unique function of finally resolving disputes about legal rights and duties, and the conferral of that judicial power on an independent judiciary comprised of judges who for the most part have joined the judiciary only after having had long experience as legal practitioners within an independent legal profession. The performance of that function of resolving disputes about legal rights and duties is according to a well-trodden judicial process, intrinsic to which is that the parties in dispute are given an opportunity to be heard and the culmination of which is an adjudication by which the law as ascertained is applied to the facts as found.

36 MI Aronson, 'Public Law Values in the Common Law' in M Elliott and D Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 145.
37 Sir M Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *University of New South Wales Law Journal* 179, 182.
38 J Allsop, 'The Law as an Expression of the Whole Personality' [2017] *Bar News* 25, 25.
39 I Berlin, *The Hedgehog And The Fox: An Essay on Tolstoy's View of History* (Ivan R Dee, 1953); R Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011).
40 Dworkin (n 39) 1.

Judicial review of administrative action occurs within those standard institutional structures. It occurs only in the context of the judicial resolution of a dispute about the legal rights of an individual or about the legal duties of an administrator which is brought before the independent judiciary for adjudication at the suit of the individual against the administrator. It occurs always in accordance with the judicial process.

The normative practices which develop within those institutional structures involve the judiciary attempting always to arrive at the just resolution of the dispute in the individual case through the declaration and enforcement of principles of law that are both seen at the time of adjudication to have been just in the past and appear at the time of adjudication to be just in the present and for the future. For those whose professional lives have involved a repetition of those practices, as Karl Llewellyn put it, '[t]radition grips them, shapes them, limits them, guides them': they develop 'ingrained ways of work or thought' of 'habits of mind'.[41]

The camel

In my metaphorical ramblings, I have moved from a worm to a rose to a fig-leaf to a hedgehog. I will finish with a camel.

When I have spoken about tradition and values in the common law in the past, I have used the metaphor of the camel. I have spoken about a 1,200-year old Tang Dynasty terracotta camel which I bought two decades ago and that sits on a perspex pedestal in my living room. I have explained how the camel is half as old again as the common law. I have explained that I do not see myself as really owning it but rather as having the privilege of looking after it for perhaps another two decades. The camel has been kept safe and handed on through many generations. With goodwill and good management, it will be kept safe and handed on through many generations to come. My job is to keep it safe for the time that I have custody of it.

You cannot meaningfully define a terracotta camel any more than you can meaningfully define Joanna Bell's rose. The most you can do is describe the features that make it meaningful to you, in the belief that others have found those features to have been sufficiently meaningful to have been worth preserving in the past and in the hope that others will find those features to be sufficiently meaningful to be worth preserving into the future.

What I have attempted here is to describe the camel.

41 KN Llewellyn, *The Common Law Tradition — Deciding Appeals* (Little, Brown & Co, 1960) 53.

From sewers to 'super' adjudicators: What next for tribunals?

*Professor Robin Creyke**

The secret of change is to use all of your energy not on fighting the old,
but on building the new. – Socrates[1]

A postscript for tribunals to this principle from that ancient and wise philosopher is that 'rebuilding must follow an assessment of why an institution was created and what it was intended to achieve'.

Tribunals have a long history. Some of the earliest models emerged in England during the 13th century.[2] They were set up to deal with specific issues, like disputes involving railways and coal, drainage and flood defences: *commissions de wallis et fossatis* — the commissions of walls and ditches.

Single issue tribunals also emerged early in Australia. Our earliest tribunals dealt with dust diseases — we only have to remember black lung disease and asbestosis in this land of quarries to understand their genesis. Other early tribunals were taxation boards of review, a national body and in the states and territories the ubiquitous racing tribunals.

The subsequent centuries have seen a variety of models of tribunals and exponential growth of their number. Industrial relations bodies, tribunals that deal with town planning or disputes about tax or mining leases, professional disciplinary boards, and bodies which deal with refusals of licence applications, social welfare benefits and rental and superannuation issues, to name only some. Innovative practices have been spawned and spread. Examples are triaging, case management, concurrent processes for expert witnesses colloquially known as 'hot-tubbing' and wide use of alternative or facilitated methods of dispute resolution (ADR/FDR).

Above all, Australia pioneered tribunals which combined a variety of jurisdictions into a single mega-tribunal — the amalgamation movement. This has produced the Commonwealth's Administrative Appeals Tribunal (AAT), an administrative decisions only review body, and the combined civil and administrative tribunals (CATs) in the states and territories. The CATs review a wide selection of disputes in relation to consumer and commercial decisions, alongside matters between the public and their governments.

The importance of tribunals as a source of redress for individuals is now entrenched in this country. As an indication, the combined jurisdiction tribunals in Australia hear matters authorised by more than 1,300 pieces of legislation. Their combined case load for 2021–2022

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1 The quote is attributed to Socrates but may be a modern summary of his words.

2 'Commissions of Sewers', Wikipedia <https://en.wikipedia.org/wiki/commissions_of_sewers>.

is in excess of 227,000 per annum.[3] The value of this model of adjudication was recognised by the Productivity Commission when it categorised tribunals as one of the 'three major dispute resolution mechanisms' in the civil justice system in Australia.[4]

At the same time, some of the key advantages of tribunals — their objectives to operate in a manner which is informal, speedy, and accessible — are under pressure. There are constitutional shadows over the tribunal landscape, a need to critically examine the architecture of the combined jurisdiction tribunals, developments in technology which have impacted on tribunal operations, and the continuing vexed issue of tribunal appointments.

An exemplar of these developments is the AAT. No apology is needed for any reliance on this tribunal since:

> [t]he basic model [for all of the general jurisdictional tribunals in Australia] has been the Commonwealth model. That is because of its obvious success, its accumulated experience over a quarter of a century and the broad span of its activities.[5]

As a consequence, the objectives of the state and territory tribunals remain close to those of the AAT model.

Constitutional shadows over the tribunal landscape

Burns v Corbett

A weakness in the institutional framework for adjudication in Australia is the failure to define with sufficient precision the distinction between a tribunal and a court. This has opened the way for unwelcome constitutional intrusion. Unless a tribunal can be characterised in constitutional terms as a 'court of a state', the tribunal cannot exercise federal judicial power. The consequence continues to evolve.

That constitutional issue came to the fore in *Burns v Corbett*.[6] In that decision the High Court found that neither of the New South Wales combined tribunals involved — the former Administrative Decisions Tribunal and the later New South Wales Civil and Administrative Tribunal (NCAT) — was 'a court of a state'. Consequently, they could not hear an application between residents of different states, or between a state and a resident of another state. To do so contravened s 75(iv) — the diversity jurisdiction — of the *Constitution*. The practical implication was to prevent any state CAT from hearing reviews in jurisdictions such as discrimination, guardianship and residential tenancy matters in circumstances where the parties were residents of different states. The Queensland Civil and Administrative Tribunal (QCAT) is exempted from this prohibition, as it was created as a 'court of a state'.[7]

3 AAT and the Civil and Administrative Tribunals, *Annual Reports 2020–2021*. This number has reduced over the COVID-19 years.
4 Productivity Commission, *Access to Justice Arrangements* (Report No 74, 2014), Overview, 5.
5 NT Law Reform Committee, *Report on Appeals from Administrative* Decisions (1991, Report No 14) (Horton Review) 22.
6 *Burns v Corbett; Burns v Gaynor* (2018) 265 CLR 304.
7 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.

The decision affected both the civil and the administrative jurisdictions of the CATs. The number of cases potentially affected is not known but typically residential tenancy and guardianship are high-volume areas and given the nature of these jurisdictions a significant proportion of such cases would involve interstate parties.

To state that the decision caused consternation among the CATs is an understatement. The solution generally adopted has been to provide that any such matters must be redirected to a court.[8] That consequence of the decisions means the parties cannot enjoy the benefits of a tribunal adjudication.

Citta Hobart Pty Ltd v Cawthorn

The High Court made an even more concerning decision in its decision in *Citta Hobart Pty Ltd v Cawthorn*[9] (*Citta*). Mr Cawthorn, who needs a wheelchair for mobility, claimed that the Citta company developing Parliament Square in Hobart had discriminated against him under the Tasmanian *Anti-Discrimination Act 1998*. One of the entrances to the square was by stairs only. Citta's relevant defence was that the provisions in the State Act were inconsistent with the Commonwealth's *Disability Discrimination Act 1982* and a standard made under that Act. This was argued to raise a s 109 inconsistency issue and to be inappropriate for decision by the State's Anti-Discrimination Tribunal. The High Court agreed that the Tribunal could not decide the matter.

The Court's decision was that legislation infected by similar issues prevents the five affected state combined tribunals hearing any claim or defence which 'colourably' raises an issue:

- arising under the *Constitution* or involving its interpretation (s 76(i)), or
- arising under any law of the Commonwealth Parliament (s 76(ii)).

Collectively these provisions cover nine types of disputes.[10]

The disturbing possibility for tribunals is the elastic reach of *Citta*. It has two bases: 'colourably' is a low bar; and the reach of this decision extends widely to any claim or defence which touches a constitutional provision or a Commonwealth law. The implications are that, if a party wants to elongate the process or eliminate the possibility of an appeal, there is now an argument that there is a colourable conflict in relation to disputes involving these laws.

The extent of the removal of tribunal jurisdiction will be tested further but is potentially broad as it is not confined to discrete topics.[11] The High Court, alive to the implications for state tribunals, has suggested that the potential reach of the decision could be limited by construing the state law 'so as not to exceed the legislative power of Parliament'. This solution, based on generic provisions in interpretation legislation, is yet to be tested. The concerns remain.

8 For example, *Civil and Administrative Tribunal Act 2013* (NSW) pt 3A; *South Australian Civil and Administrative Tribunal Act 2013* (SA) pt 3A.
9 *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1.
10 *Searle v McGregor* [2022] NSWCA 213 (Kirk JA) (*Searle*).
11 *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226; *Searle*.

The combination of these two decisions has effectively curtailed elements of the jurisdictional reach of most CATs and has resulted in frustrating expectations of some would-be applicants. Other potential dangers from the decision are that governments may be inhibited from bestowing further jurisdictions on tribunals and parties may become reluctant to rely on tribunals for dispute resolution. In other words, these constitutional roadblocks may undermine the important role tribunals play as an accessible and people-friendly dispute resolution option.

Tribunal architecture

The current tribunal streetscape in this country is one sizeable, amalgamated tribunal in each jurisdiction supplemented by a number of free-standing smaller tribunals. The architecture issue has been prompted by two significant reports. The first by Justice Pritchard in 2020 detailed research showing that the civil jurisdiction of the CATs comprises over 90 per cent of their workload;[12] the second was the Senate Committee Inquiry into administrative justice in Australia,[13] the Final Report of which was announced on 30 June 2022, which recommended the 'disassembly' of the AAT.[14] The reports raise some future development issues for Australian tribunals. Specifically, what guides governments when deciding whether to add to a jurisdiction of an amalgamated tribunal? And is the current composition of the amalgamated tribunals appropriate for the model?

Composition: what benchmarks are used by governments when deciding whether to add a tribunal to an amalgamated body or to retain an existing jurisdiction?

The 1971 Kerr Committee report[15] recommended that the Commonwealth establish a single tribunal to decide administrative law disputes on the merits. Building on that report, Bland, in his Final Report in 1973,[16] urged the government to consider why such a tribunal should be created, what members would be required, and what procedures and functioning were intended.[17] These were largely practical questions and by today's standards are relatively unsophisticated. The Kerr Committee report did note that, if government policy had an 'oppressive, discriminatory or otherwise unjust' impact on an individual, the President could be empowered to advise the relevant Minister accordingly. This was recognition that the tribunal could be involved in improvements to government decision-making.[18] Generally, however, the issues raised in these reports are insufficient to answer the questions faced by governments today. They do not address the fundamental questions raised by this topic.

12 Hon Justice J Pritchard 'Australian Civil and Administrative Tribunals: Challenges and Opportunities' (2020) 100 *AIAL Forum* 148 (Pritchard Research).
13 Senate Legal and Constitutional Affairs References Committee, *Performance and Integrity of Australia's Administrative Review System* (Final Report, 30 June 2022) (Senate Committee Inquiry).
14 Ibid.
15 Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (Parliamentary Paper No 144, 1971) (Kerr Committee report).
16 Committee on Administrative Discretions, *Final Report* (Parliamentary Paper No 316, 1973) (Bland Committee Final Report).
17 Ibid [187]–[188].
18 Kerr Committee Report (n 15) [299].

Nor initially did the states do better. Indeed, a discussion paper produced by Victoria in the late 1990s, prior to the establishment of the Victorian Civil and Administrative Tribunal (VCAT), noted 'there are no formal criteria by which to assess the appropriateness of conferring a particular type of jurisdiction on a tribunal'.[19] For that reason, the discussion paper did identify some threshold measures. The bodies to be amalgamated should have low monetary limits, high application rates and less need for formality, and there was a requirement for specialist expertise.[20]

There was, however, no single and accepted set of standards, nor were there attempts to grapple with the issue of what kind of institution tribunals should be and how to differentiate them from courts, a key principle identified in the Kerr Committee report. The absence may have been the reason the President's Review of VCAT by Kevin Bell in 2008 did proffer a more principled approach, at least in relation to whether existing specialist tribunals should be amalgamated into a single body. The Review recommended that to decide whether a proposed new jurisdiction was appropriate government needed to consider the optimal size of an amalgamated body, the attributes of the dispute resolution process and the administrative arrangements.[21]

Subsequent reports preceding tribunal amalgamations in other states added to that list but largely from a pragmatic, not principled, perspective.[22] The advantages of combining tribunals into one institution were said to be cost savings through shared services and fewer members, greater consistency in decisions and standards, faster and simpler hearings, and the increased visibility and accessibility of the amalgamated body.[23] There is almost no discussion about the fundamental characteristics which justify the existence of tribunals including one which is amalgamated.

One report did, however, contain some warnings. They were the need to avoid swamping the smaller tribunals by high-volume tribunals incorporated into the amalgamated body, that the tribunals for inclusion not be disparate in nature, that too large an amalgamated tribunal would lead to the diseconomies of big bureaucracies and prevent cost savings, and that

19 Hon J Wade MP, Attorney-General's Department Vic, *Tribunals in the Department of Justice: A Principled Approach* (Discussion Paper, 1996) (Wade report) 3.

20 Ibid.

21 K Bell 'The Role of VCAT in a Changing World: The President's Review of VCAT' (Speech, Law Institute of Victoria, 4 September 2008) 12.

22 For example, Hon M Barker, *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (2002) (Barker Review) chs 4 and 5; NSW Legislative Council Standing Committee on Law and Justice, *Opportunities to Consolidate Tribunals in NSW* (Report, 2012) 49 (NSW Standing Committee report); Qld: *Independent Expert Panel to Advise on the Implementation of an Amalgamated Civil and Administrative Tribunal in Queensland* (Report, 2008) Attachment 6 (based on standards developed by the Department of Premier and Cabinet in 2000). See also Tasmanian Department of Justice Discussion, *A Single Tribunal for Tasmania* (2015) (*A Single Tribunal for Tasmania)*. Annexure 6: Assessment Criteria, 171–2; New Zealand Ministry of Justice, *Tribunal Guidelines: Choosing the Right Decision-Making Body; Equipping Tribunals to Operate Effectively'* (2019) (NZ Tribunal Guidelines).

23 ACT: ACT Law Reform Advisory Council, *Guardianship Report* (2016); NSW: Report of Department of Communities and Justice, *Statutory Review: Report of the Statutory Review of the Civil and Administrative Tribunal Act 2013* (November, 2021) (NSW Government Statutory Review); Qld: Queensland Government, *Review of the Queensland Civil and Administrative Tribunal Act 2009* (Report, 2018); SA: *Statutory Review: South Australian Civil and Administrative Tribunal [SACAT]* (2017) (Bleby review).

there would always be a need to take account of special circumstances.[24] These warnings referred back to the optimal size of an amalgamated body raised by the Bell review and raised some deeper issues for consideration.

Despite these suggestions, reviews following a period of operation of the combined jurisdiction tribunals focus at most on the statutory objects for the tribunal and whether the amalgamation has cut costs and made tribunal processes more efficient.[25] The reports do not identify minimum benchmarks justifying the creation of the amalgamated body. Nor do they contain data against any such benchmarks of the extent to which any perceived benefits have been achieved. The result is disappointing. Governments appear not to have turned their minds to the potential for the advantages of tribunals to be undermined if care is not taken to avoid identified pitfalls. As de Villiers noted of the amalgamation movement in the Australian states, 'there is no reference to a grand design or a comprehensive explanation as to why the civil and commercial jurisdiction of the courts is being diminished by the transfer of these functions' to tribunals.[26]

Governments need to develop benchmarks — the principled approach advocated by Kevin Bell — based on the experience of the operation of these bodies. Without such guidelines, there is a danger that incorporation of new jurisdictions may substantially impair the justifications for the amalgamation. Amalgamation was designed to achieve timely decisions; encourage alternative forms of decision-making, including mediation; and enhance consistent and high-quality decision-making. These objectives need to be remembered when the structure of tribunals is under consideration. This remains a task for urgent attention.

Are the jurisdictions included in the CATS or the AAT a good fit?

The two reports by Justice Pritchard[27] and the Senate Committee do raise the issue of whether having all the jurisdictions under the combined tribunal umbrellas is a good fit. The concerns expressed mirror the call for criteria. As one commentator put it, in relation to state and territory combined tribunals:

> As a result of the absence of a general philosophical plan or guiding principle as to what jurisdictions should be transferred to super-tribunals, the super-tribunals of the respective States resemble a smorgasbord of jurisdictions with little intra-state consistency.[28]

24 NSW Standing Committee report (n 22) [3.45]–[3.47], [3.53], [4.55]–[4.59].

25 Cth: Hon IDF Callinan AC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Final Report, 2015) (Callinan Review); NSW: NSW Government Statutory Review (n 23) 13; Qld: Queensland Government, *Review of Queensland Civil and Administrative Tribunal Act 2009* (Report, July 2018); SA: Bleby Review (n 23) 90–91; Vic: President's Review of VCAT (n 21); WA: Hon K Baston, WA Parliament Standing Committee on Legislation, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal* (Report 14, 2009) (Baston review).

26 B de Villiers 'Accessibility to the Law — the Contribution of Super-tribunals to Fairness and Simplicity in the Australian Legal Landscape' (2015) 39 *University of Western Australia Law Review* 239, 242.

27 Pritchard Research (n 12); Senate Committee Inquiry (n 13).

28 de Villiers (n 26) 247.

CATs

The structural issues for the CATs have not achieved the same level of public notoriety as occurred in relation to the AAT. Nonetheless, since the warnings about amalgamation were made prior to the establishment of four of the state and territory combined tribunals, it is important to consider whether the information has influenced amalgamations since that time or had an impact on the reviews of the older CATS. That question is raised squarely by the imbalance between the volume of matters in their civil and administrative jurisdictions. Has this created the structural, resourcing, or swamping issues which were foreshadowed?

An empirical study undertaken in 2019 produced mixed responses to the question concerning the suitability of tribunals for inclusion. There was a discernible trend to identify guardianship as an outlier.[29] It was noticeable too that remuneration tribunals, industrial relations and most workers' compensation bodies, some mental health tribunals and, in two States, criminal injuries bodies have been excluded. Tenancies, atypically, are excluded from Western Australia's State Administrative Tribunal (SAT). Although there is some consistency in the exclusions, the justification for not bringing these bodies under the combined tribunal umbrella is limited.

Despite the marked imbalance between the civil and the administrative aspects of their jurisdictions, responses from some of the larger combined tribunals were that 'swamping' had not occurred. This was said to be due to the professionalism of members[30] or that the issues could be managed.[31] There are reasons to be cautious about these responses. It is not just the imbalance in size which is of concern but also the different culture and practices between the two arms. Civil matters were formerly undertaken by courts; initial administrative decisions were made by the executive. These factors import parameters for decisions by the judicial and executive arms of government which are significantly distinct. To an extent, these differences have been retained for most combined tribunals in their legislation. There has been little analysis to date of the impact of this feature of their statutory frameworks.

Common sense and an understanding of human nature suggest there would be a tendency for the tribunal members, staff and those who appear in the civil jurisdiction to adopt a judicial, not an administrative, model of practice. Legal representatives familiar with court processes are likely to operate, even if subconsciously, in court-like mode. The adversarial process employed in party/party disputes compared to the more inquisitorial processes in the administrative jurisdictions add force to the supposition.

There is some support for this view. Research by Justice Pritchard concluded:

> [The addition of the civil jurisdiction had created a] challenge for those CATS with a large civil jurisdiction, and especially one which includes more complex or high-value cases. That challenge lies in combating the resistance of some lawyers to dealing with cases quickly, using streamlined processes. Attempts to impose short time frames at each stage of a proceeding may be met with consent orders by the parties to extend time. Statements of issues, facts and contentions, or summaries of cases, can start to look like pleadings.

29 R Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26(4) *Australian Journal of Administrative Law* 206–232.
30 Ibid.
31 Ibid 206.

That finding also concurs with tribunal members' knowledge of the prevalence of judicial culture. It is significant that the QCAT has a 'by leave' requirement for legal representation before it.[32] There are also statutory limits on legal representation in some jurisdictions within NCAT. The 2021 review of NCAT accepted that legal representation should continue to be limited in the Consumer and Commercial Division since legal representation as of right could 'create a legalistic, formal or adversarial culture'.[33] No such limitation applies in the South Australian Civil and Administrative Tribunal (SACAT), Western Australia's SAT and the ACT's Civil and Administrative Tribunal (ACAT).[34]

The result is an inherent conflict in the combination of the civil with administrative matters, particularly, as Justice Pritchard observed, in high value or precedentially significant matters. As she observed:

> In such cases it is particularly important for CATS to keep steadily in mind their philosophical foundation, and to continue to press the parties to narrow the dispute to what is really in issue, to endeavour to resolve the case by compromise through ADR or FDR and, failing that, to proceed to a hearing as quickly as possible.[35]

That conflict has the potential to threaten foundational features of tribunals in Australia that they provide informal, economical and speedy decisions. This threat needs to be kept under surveillance and carefully managed to avoid such an outcome.

AAT

The issue is raised by the recommendation in the report of the Senate Committee Inquiry that the AAT be disassembled.[36] The justification for the recommendation was not clearly spelled out. 'Disassembly' is a structural term — to take apart. At first sight the term suggested that recommendation meant that some parts of the AAT should be hived off or reconstituted. That assumption was misplaced. The government has now settled the meaning with its announcement that the AAT is to be abolished and the tribunal replaced 'with an administrative review body that serves the interests of the Australian community'.[37]

Justification for this dramatic move is that previous appointments processes had 'fatally compromised the AAT, undermined its independence and eroded the quality and efficiency of its decision-making'.[38] Funding deficits had also hobbled the tribunal. The government has established a comprehensive process of consultation with interested and knowledgeable members of the community to establish 'an accessible, sustainable and trusted federal administrative review system'.[39]

32 *Queensland Civil and Administrative Appeals Tribunal Act 2009* (Qld) s 43.
33 NSW Government Statutory Review (n 23) 17.
34 ACT: *ACT Civil and Administrative Tribunal Act 2008* s 30; SA: *SA Civil and Administrative Tribunal Act 2013* s 56; WA: *State Administrative Tribunal Act 2004* s 39.
35 Pritchard Research (n 12) 158.
36 Senate Committee Inquiry (n 13) rec 3.
37 Hon M Dreyfus KC MP Attorney-General 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 16 December 2022) 1.
38 Ibid.
39 Ibid 2.

An issue which may receive attention in that consultation process is the imbalance in size as between the Migration and Refugee Division of the AAT and its remaining divisions. The issue of swamping may be a real one. Any one division which is more demanding of resources than another must be analysed carefully to ensure that the more demanding elements of the tribunal's operations do not outweigh legitimate needs of others.

The earlier Callinan Review into the AAT suggested there were internal issues about the inclusion of the Migration and Refugee Division of the AAT (MRD).[40] The review noted there was a cultural misfit between the MRD and the remainder of the AAT's jurisdictions, because of its 'very different legislative regimes and practices', exacerbated by it legacy case load and 'deficiency of members'.[41] The recommendations of this report did not suggest the excision of the MRD but did recommend that the procedures code applying to that division should be removed.[42]

The Senate Committee Inquiry also focused on that division in its expression of concerns 'about [MRD's] administrative processes, transparency and productivity':[43]

> The figures are telling. For the period 1 July 2021 to 28 February 2022, the MRD had a total of 56 845 cases on hand, 84 per cent of the Tribunal's total backlog of cases. That had barely reduced from the 86 per cent at the end of the previous financial year. The cases on hand had increased from 16,764 at the end of FY 2016 to 65,374, a more than fourfold increase. As the AAT submission to the Committee observed:
>
> > The percentage of cases finalised within 12 months has declined steadily from 66% in 2016–17 to 29% in 2020–2021. Similarly, the median processing time from lodgement to decision for cases finalised in 2016–17 was 40 weeks; by 2020–2021 the median had more than doubled to 99 weeks. For protection visa cases, the median time for cases finalised in 2020–2021 was 104 weeks.

The statutory requirement for distinct procedures for the MRD[44] has inhibited the intended harmonisation of procedures within the combined tribunal.[45]

These and other differences have been inimical to the development of 'a new common culture' as was intended at amalgamation in 2015.[46] A similar, less extreme carve-out of statutory procedures applies to the Social Services and Child Support Division (SSCSD).[47] The Security Division, for understandable reasons, is also subject to special statutory procedures.[48] These exceptions too need critical examination.

A singular and prized feature of tribunals is their flexibility. But even elastic bands have their limitations. An issue for those tasked with reshaping the national amalgamated tribunal will be what is the level of elasticity which can be tolerated in the revised tribunal if it is to achieve the objectives outlined in the Attorney-General's media statement when disassembly was

40 Callinan Review (n 25).
41 Ibid 1.3.
42 Ibid Measure 22.
43 Senate Committee Inquiry (n 13) [7.13].
44 AAT Act s 24Z.
45 Hon Justice D Kerr *Chev LH*, 'Challenges and Changes' (Speech, South Australian Chapter of the Council of Australasian Tribunals, 26 October 2016) 9.
46 Ibid.
47 AAT Act ss 39(2)(b), 39AA.
48 For example, AAT Act ss 19E, 19F, 27AA, 35A, 38A, 39(2)(a), 39A, 39B, 43AA.

announced. In that context it is as well to remember that it is easy to abolish institutions and undo good work — much harder to fine-tune and tailor them.

Tribunals' internal architecture

A related structural issue is whether the new tribunal should offer expanded access to a form of internal appeal. The AAT's submissions to the Callinan Review advocated second-tier review more generally to alleviate 'the pressures on the court system'.[49] That submission was rejected by the review.[50] Currently, the SSCSD is the only AAT Division in which a second tier of appeal is permitted.[51] That special position was to compensate the jurisdiction for the potential loss on amalgamation of two external tiers of merits review: the first being review by the former Social Security Appeals Tribunal; the second being the AAT.

The majority of combined tribunals have an appeal tier or panel.[52] Their value is that a panel of more experienced and senior members produces decisions which are of higher quality. These decisions provide consistency and guidance to other members of the tribunal and, in turn, improve public administration. They also reduce the workload for courts. For an applicant, an internal appeal is also cheaper and quicker and usually provides full merits review, advantages not possible from court proceedings. Such decisions also reduce the workload of the courts. These features enhance the public's trust in the institution. As the NSW Parliament Standing Committee on Law and Justice put it:

> [L]imiting appeals to only the courts can create a barrier to the availability of appeals for some people due to the cost, delay and formality of court processes. Ensuring access to justice is also about ensuring an accessible appeal mechanism.[53]

These outcomes are consistent with the aspiration in the announcement of the intention to abolish the AAT that the revised body will 'serve the interests of the Australian community', improve the 'quality and efficiency' of the tribunal's decision-making,[54] and increase trust in the institution.[55] They respond to a growing concern with the absence of trust more generally in Australia's public institutions. As Peter Shergold, a wise former leading public servant, put it:

> I am concerned about the declining levels of trust in politicians, in governments to some extent, to a lesser extent in public servants, and declining trust in the authority of churches, business, unions, and the law …[F]or institutions that have traditionally been associated with democracy there is declining trust. … It is clear our institutions need to be revised and reinvigorated and rethought.[56]

49 AAT Submission to Callinan Review (n 25) [103]–[104].
50 Callinan Review (n 25) Measure 13.
51 AAT: *Social Security (Administration) Act 1999* (Cth) ss 179, 182, 183.
52 ACAT Act 2008 (ACT) s 79; NCAT Act 2013 (No 2) (NSW) s 80(2); QCAT Act 2009 (Qld) s 142; SACAT Act 2013 (SA) ss 70, 71.
53 NSW Parliament Standing Committee Report (n 22) xiii.
54 Hon M Dreyfus KC MP Attorney-General 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media release, 16 December 2022) 1.
55 Hon TF Bathurst 'Trust in the Judiciary' (Speech, 2021 Opening of Law Term Address, 3 February 2021).
56 P Shergold 'Promise of "Frank" Look at Our Pandemic Response', *The Australian* (9–10 April 2022) 18.

Technological changes

No consideration of the future of tribunals would be replete without addressing the profound technological changes which have occurred in the last decade — changes accelerated by the pandemic. The digital transformation has been a 'road to Damascus' moment or what psychologists would call a 'reframe'.

The upside of these developments has been an acceleration of changes to the benefit of both applicants and tribunals. What has emerged is a more sophisticated analysis of the advantages provided by technological assistance, and how these possibilities can be used for particular tribunal processes and specific categories of applicants.

The consequence has seen certain kinds of proceedings, such as directions hearings, initiated by electronic means, except in special circumstances, and the discretionary use of electronic proceedings in other kinds of proceedings — for example, alternative dispute processes, if that is fair, resolves the matters quickly and efficiently and can be conducted using such methods. At the same time online processes must take account of the needs of the person, their ability to manage online communication and their strong preferences, particularly if the person is not legally represented.

The following discussion of the changes reflects practices within the AAT but is also apparent in the guidelines, practices or legislative changes of combined tribunals throughout Australia.[57] The collection is a testament to that flexibility which is a hallmark of tribunals.

COVID-related changes

It was assumed at the commencement of 2020 that the pandemic would quickly be brought under control. That assumption proved to be misplaced. Consequently, tribunals introduced fundamental changes to their operation.[58] The most obvious response to the pandemic was the virtual cessation of hearings in person. Online hearings became the norm.[59] Pre-hearing processes were, almost without exception, to be conducted electronically, and documents were to be lodged online.[60] These moves were not without their humorous side. As one commentator observed of hearings by videoconference, these have been notable for the distraction of 'children and family pets apparently seeking "leave to appear"'.[61]

57 ACAT: Practice note 1 of 2022, *Communicating with ACAT;* Practice note 2 of 2022, *How Can I Take Part in ACAT Proceedings — Remotely or In Person;* NCAT: President's Message, 3 May 2022, *Changes to In-person Hearings*; NCAT, *COVID-19: Temporary Arrangements to Lodging Your Application and Documentation*; NCAT Procedural Direction 6 — *Filing of Documents*; NTCAT: Practice Direction No 3 — *Electronic Case Files*; *Modified NTCAT Process for Termination of Tenancy*; NTCAT & MHRT: *COVID-19 Measures*; QCAT: *QCAT COVID-19 Update*, 7 March 2022; SACAT: *All Applications are Lodged Online; Majority of Hearings by Telephone or Video*; SAT: Public Notices 10 June 2022 — *Hearings May Be in person, By Telephone, or Video Conference Depending on the Matter and the Interests of Justice*; TasCAT: *COVID-19 Important Update: Conduct of Hearings at TasCAT*, 15 March 2022; VCAT: *COVID Safety Measures for VCAT Hearings*.

58 AAT Act s 33.

59 For example, AAT General Practice Direction cl 2.4 and Practice Directions for specific divisions; ACAT: NCAT: NTCAT: QCAT: SACAT: SAT: VCAT.

60 For example, AAT General Practice Direction cl 2.2. and documents were to be lodged electronically: cl 2.3.

61 P Woulfe, Chair Federal Litigation and Dispute Resolution Section, Law Council of Australia, 'Welcome to the 2021—2022 (Summer) Edition of Chapter III'.

As a consequence, there was wholesale use of videoconference and teleconference hearings. This was a boon to some. Many applicants said they wanted their matters dealt with and had sufficient confidence in the technology to accept an online hearing.[62] For people with special needs, particularly of those with mobility or psycho-social issues, use of remote hearings improved their access to justice. The applicant can participate more comfortably from their own home or the house of their support person. The flipside of this advantage is that the applicant must have access to the technology and that the person's particular disability does not inhibit their participation.[63]

Members' competence in managing technology has also been enhanced.[64] Overall, this has meant a boost to more efficient operations. The efficiency of tribunal operations has also been improved, with requirements for earlier lodgment of documents and restriction on the size of documents able to be lodged online.[65] Another consequence is that parties are thinking more critically about what evidence they need to submit. As one tribunal observed approvingly:

> improved audio-visual technology has allowed fairer and safer access and enabled expert witnesses, parties and their counsel to appear remotely, reducing costs without compromising fairness or independence.[66]

At the same time, those who are likely to be digitally challenged, whether for geographical or other reasons, must not be left out.[67] For these cohorts, greater efforts must be made to facilitate access. One suggestion is that 'governments fund free digital literacy programs and access to free or low-cost internet or computers for citizens who are disadvantaged to facilitate their participation in virtual hearings'.[68]

There are mixed views about whether there are procedural fairness issues in online hearings. A survey of AustLII-reported cases in the AAT in the first quarter of 2020 revealed only a handful of some thousands of cases where concerns were raised on the ground of absence of fair process.[69] There are alternative views. In-person contact during tribunal processes can increase the possibility of understanding a point of view and can enhance trust and the exchange of sensitive information.[70] As one commentator observed: 'We humans are social animals.'[71] The use of online hearings detracts from these possibilities, particularly for hearings and other processes where sensitive matters such as family or migration issues are likely to be raised. In such matters, the parties are often reluctant to be heard online.

62 Minutes of LCA/AAT Liaison Committee meeting (LCA/AAT Minutes, 20 August 2020), 5.
63 LCA/AAT Minutes, 3.
64 For example, see AAT, *AAT Annual Report, 2020–2021*, p 102.
65 For example, the Tasmanian Workers Rehabilitation and Compensation Tribunal, *Annual Report 2020–2021,* ACAT's website notes, p 15: 'Documents can be lodged by email (so long as it is not more than 40 pages long).'
66 Tasmanian Resource Management and Planning Appeal Tribunal*, Annual Report 2020–2021*, 15.
67 B Howarth 'Govt Must Manage Demographic Divide as Services Go Online' *The Australian* (6 May 2022) 22; A Moses 'Digital Justice Must Not Leave Anyone Behind' *The Australian* (21 January 2022) 21. See also C Denver and A D Selvarajah 'Safeguarding Access to Justice in the Age of the Online Court' (2022) 85 *MLR* 25.
68 A Moses (n 67) 21.
69 The survey was conducted by the author of this article and has not been published.
70 T Fullerton 'West Opening, But Damage is ne' *The Australian* (19 February 2022) 13.
71 Hon Justice Logan 'The Efficient Disposal of Cases after COVID-19' (Speech, Virtual Conference of the Commonwealth Magistrates' and Judges' Association, Logan, 13 September 2021) 5.

Submissions to an inquiry in the United Kingdom earlier this century also advocated oral hearings. The inquiry found that such hearings were arguably more user friendly, better suited to cases that turned on disputed facts or complex issues where it was necessary to test the evidence rigorously, they provided a better opportunity to uncover information not disclosed in written evidence, offered parties the equivalent of their 'day in court', and allowed justice to be seen to be done in a more transparent way.[72]

Post-pandemic

Notwithstanding these developments, the post-pandemic period has seen a return to in-person hearings at tribunals become the default position. As one combined tribunal said of its intention post-COVID:

> We are determined not to simply revert to the pre-COVID-19 way of performing our functions but to build on lessons learned to be more effective and efficient in the interests of the parties and in conformity with our statutory objectives.[73]

At the same time, valuable remnants of the COVID-induced innovations have been retained. Online hearings are more likely for remote locations where that is more efficient or to respond to the particular circumstances of a party. Pre-hearings or other processes conducted electronically are likely to continue. Directions hearing, conferences and some forms of alternative dispute resolution may be accomplished online without disadvantage, provided all parties have access to the technology and are comfortable with its use.

Nonetheless, although the lessons from this period are still being amassed, the preliminary assessments have alerted tribunals to how better to use technological changes while not jeopardising those fundamental tenets of the justice system — namely, that justice requires parties should be seen and heard. The accelerated reliance on use of electronic means of operation is likely to have a continuing impact on tribunal operations.[74] More targeted use is to be expected. However, implications remain for open justice and accessibility. These issues will need to be assessed carefully to ensure tribunal objectives can continue to be realised.

Tribunal appointments

Tribunal appointment is a contentious issue.[75] Australia has seen its share of political cronyism in the appointments process. It is ironical that the generous salary range for members of tribunals, designed to ensure their independence, is being subverted by the salaries making these appointments desirable positions in which to place people with political connections.[76]

72 Sir A Leggatt, *Tribunals for Users: One System, One Service* (London, TSO, 2001) (Leggatt report) [8.16].
73 ACAT, *Annual Review 2020–2021*, 25.
74 R Down 'Legal Body Wants Virtual Access Systems Extended' *The Weekend Australian* (18–19 June 2022) 8.
75 Senate Committee Inquiry (n 13) ch 4 'The selection of AAT members'.
76 For example, AAT members are currently paid between $193,990 to $496,560 pa.

In the 1990s concerns about appointments processes in tribunals led the Administrative Review Council to warn:[77]

> There is overwhelming support for a rational and transparent selection and appointment process, and for the proposition that more broadly-based consultation in that process is likely to assist in ensuring merit-based appointments. Some suggested that otherwise the conclusion would remain open that appointments were being made for reasons other than merit. … The existence of concerns about independence, whether or not correctly based in fact, can itself damage the credibility of individual tribunals and the tribunal system, thereby undermining the function that tribunals were established to perform.

What is dispiriting is that, more than a quarter of a century later, the same recommendations are being made.[78] What can be done? The question is apt given the evidence of public dissatisfaction with cronyism. Failure to follow accepted processes is involved, including political preferment in tribunal membership. The practice is not confined to Australia. It has been acknowledged to be endemic.

What is the position in other countries?

For England, Wales, Scotland and, in some circumstances, the United Kingdom as a whole, there are two protections. Most appointments to positions on major tribunals in England and Wales are made by the Judicial Appointments Commission and, for Scotland, by a Judicial Appointments Board. Appointees must meet statutory qualifications. There is no absolute prohibition on political appointments, but use of the independent commission serves to avoid unbridled practices. As the Leggatt report observed, these processes 'provide an independent filter for the appointments process which will make it harder for political appointments to occur'.[79]

In Canada, the situation is patchy and variable. In Ontario there is a legislative solution.[80] The Act requires as part of the 'member accountability framework' a publicly available description of the functions of members, and a requirement that an applicant has the 'skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal'.[81] In addition, unless trumped by provisions in another Act, selection of tribunal members must be a competitive, merit-based process, based on publicly available statutory criteria relating to experience, knowledge or training in the subject matter and tribunal jurisdiction, as well as decision-making aptitude.[82] An appointment or reappointment to a tribunal must be based on the recommendations of the chair of the tribunal.[83] In other provinces, the matter is left to the legislation for individual tribunals. Canada has experienced similar issues relating to appointments as Australia.[84]

77 Callinan Review (n 25) citing ARC's *Better Decisions* report [4.25], [4.28]
78 Law Council of Australia, *Policy on the Process of Judicial Appointments* (Policy Statement, 2021) 8; Grattan Institute submission to the Senate Committee Inquiry, Submission 12, p 7.
79 Leggatt report (n 72).
80 The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* SO 2009, Ch 33, Sch 5.
81 Ibid cll 7(2), 8.
82 Ibid cl 14(1)–(3), (5).
83 Ibid cl 14.4.
84 H M MacNaughton 'Future Directions for Administrative Tribunals: Canadian Administrative Justice — Where Do We Go From Here?' in R Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 213, 214.

In New Zealand, guidelines recommend members be appointed on their merits, with the tribunal chair being involved in any interview panel. The guidelines indicate minimum qualifications for members should be in legislation and take into account the nature of the tribunal, the requisite practice in or experience with the tribunal's subject matter, whether legal or adjudicative experience or qualification is needed, and whether the person is fit and proper to be appointed.[85] The discretion of the relevant Minister to appoint or recommend appointment is unfettered. At the same time, the guidelines recommend public notification of job descriptions, advertisements for eliciting interest, and the interviews should be conducted by an independent panel.[86]

The French system is possibly the most sophisticated and the most transparent. Under the Code of Administrative Justice there are multiple categories of potential employees who may become members of *Le Tribunal Administratif*. A substantial proportion are recruited from *L'Ecole Nationale*, the National School of Public Administration. Defined proportions may also come from those with military, public or hospital service, academe, the judiciary or by competitive examination. The interesting aspect of the process, however, is that there is a prescribed and limited scope for political appointments. Ministers may appoint to certain positions they control but the terms of these appointees are limited to three years with one renewal. Equally the French President, the Presidents of the National Assembly, and the Senate may each appoint someone, but for one three-year term only. These details are statutory — that is, they are included in the Code.

Australia

In Australia there is a momentum for change. What is called for is a rational and transparent selection and appointment process and more broadly based consultation to assist in ensuring merit-based appointments. The Senate Committee Inquiry recommended that the Attorney-General retain the discretion to make appointments outside those of the independent panel but that the discretion should be limited. The report did not specify how the limits were to be achieved.[87]

The Law Council recommended that, if an appointment was not on the list recommended by an independent panel, the Attorney-General must at least publish an explanation. That solution may, as Leggatt put it, make it harder for political appointments to occur.[88]

The Grattan Institute recommended that, to strengthen the criteria listed by the Administrative Review Council, the Attorney-General should *only* be able to choose candidates assessed as suitable by the independent panel — a panel which would include the Secretary of the

85 NZ Tribunal Guidelines (n 22) 17, 18. See also P McConnell 'The Future of Tribunals in New Zealand' in Creyke (n 84) 194, 197–200.

86 Ibid 200.

87 Senate Committee Inquiry (n 13) rec 2.

88 Law Council of Australia (LCA), *Policy on the Process of Judicial Appointments* (2021) 8 which the Council 'considers should govern the appointment of members and/or presidents in the AAT' (LCA Submission in December 2021 to the Senate Committee Inquiry, *Performance and Integrity of Australia's Administrative Review System*, Recommendation, 9).

Attorney-General's Department and the Public Service Commission or their representatives.[89] An alternative safeguard recommended by the Institute was that, if there were appointments outside the panel's list, an annual report to Parliament on tribunal appointments must be made by a Public Appointments Commissioner, a position to be created.[90]

The Attorney-General heeded some of these suggestions as evidenced in *Guidelines for Appointments to the Administrative Appeals Tribunal (AAT)* (Guidelines) published in December 2022. Vacancies are to be advertised with listing criteria for positions and expressions of interest are to be called for every six months. Independent assessment panels are to be used, the panel comprising the Secretary of the Attorney-General's Department (or delegate), the President of the Tribunal, and another member nominated by the Attorney-General. The Attorney-General 'will use the panel report to recommend [members'] appointments'.[91]

The Guidelines do not prohibit political appointments, but the overall process is more transparent and an improvement. There is enhanced openness and fairness in the appointments' process assuming they continue to be followed.

It is unlikely that the statutory system in France would be adopted in Australia. Nonetheless, assuming a possibility that some political appointments will continue to be made in Australia, it would have been a distinct improvement if some limit on the number of such appointments, akin to those in the French Code, could have been essayed. Such an outcome is possible. The Grattan Institute noted that: 'In the 12 years before the amalgamations, just three per cent of new members had political connections … In the seven years since, 18 per cent of new members had political connections — … 31 per cent since 2017–18.'[92] These figures are contrasted with VCAT in which '0.5 per cent of current appointees have political connections, despite high salaries and a similar appointments process to the AAT'.[93] So even without a statutory inhibition it appears that conservative practices can provide for limitations on political appointments.

If, as the Attorney-General has indicated, and the Productivity Commission has confirmed, tribunals are an important element of the national justice system, the appointments processes deserve to be more transparent and non merit-based appointments should be limited, ideally to the three per cent or less, which was the position for the AAT about a decade ago.

Tribunals face a loss of trust when the issue of political appointments has become a matter of public notoriety. Political appointments are seen as a threat to the independence of members' decision-making, thus eroding confidence in the outcomes of their decisions. That notoriety and the issue of the independence of its members, has again become apparent, notably in relation to appointments to the AAT, although concerns have also been expressed

89 Grattan Institute submission to the Senate Committee Inquiry 'Towards a Better AAT Appointments Process' (2021) 11.
90 Grattan Institute, 'New Politics: A Better Process for Public Appointments' (2022) recs 6, 7.
91 Attorney-General's Department, *Guidelines for Appointments to the Administrative Appeals Tribunal (AAT*) (15 December 2022) 1, 2.
92 Grattan Institute (n 89) 19.
93 Ibid 20.

in relation to appointments to some CATS. It is to be hoped that the heightened attention to this issue will serve to significantly limit resort to political appointments in the future.

Conclusion

Tribunals are the face of justice for the Australian public. As such, tribunals deserve to be maintained and supported in order that they can continue to be accessible, efficient, and perceived to be independent. These features are essential to promote public trust and confidence in tribunal decision-making. There is much of which we can be proud in the history of tribunals in Australia. At the same time there remain challenges for this important segment of our public institutions.

A paper presented at the AIAL national conference in 1997 concluded with the following, as apt today as then:

> [G]overnments weaken the links in the accountability chain at their peril. People only have confidence in a system which is independent and impartial. Moves to reduce the important of … the tribunal system and to lessen the effectiveness of the bodies which investigate citizens' complaints should be resisted because they ae taking away important safeguards and because they a retrograde, short-sighted approach to administrative review. … We forget these lessons at our peril.[94]

94 R Creyke, 'Sunset for the Administrative Law Industry? Reflections on Developments Under a Coalition Government' (1998) 87 *Canberra Bulleting of Public Administration* 39, 53.

Never the twain shall meet? An exploration of the demarcation between the roles of administrative tribunals and the courts where taxpayers have a choice of venue for contesting an assessment decision of a revenue authority

*Reynah Tang AM and Frank O'Loughlin KC**

While tribunals have a long history in the English legal system which Australia inherited, the development of a single tribunal able to review a broad range of governmental decisions was a distinctly Australian innovation, as was the creation of 'super tribunals', with both administrative and civil jurisdictions, at a state and territory level.[1]

It is, of course, well established in Australia that the role of a tribunal, when called on to consider a challenge to a governmental decision, is to engage in merits review: that is, to make the correct or preferable decision having regard to all of the evidence and other material before the tribunal. Generally, a tribunal is not limited to either the same material considered by the original decision-maker when making the decision under review or the rules of evidence in relation to what it can consider. In making a review decision, the tribunal 'steps into the shoes' of the decision-maker and can (within some limits) re-exercise any discretions available to the agency. Among other powers, a tribunal may substitute the decision under review with a new or varied decision or refer the decision back to the decision-maker to be made in accordance with the tribunal's reasons or to be reconsidered based on the additional evidence and other materials available.

By contrast, when courts have been called on to undertake review of administrative decisions which engage matters of discretion and policy, they have traditionally confined themselves to judicial review: that is, determining whether there is error in the manner in which the applicable decision was made and, if so, remitting the matter to the agency to reconsider the decision in accordance with law. Even with legislative reform to address the procedural difficulties associated with the traditional prerogative writs, the problem has always been the potential for a pyrrhic victory for the party seeking review if the agency, upon reconsideration, reaches the same conclusion.

At a Commonwealth level, the High Court has interpreted the *Constitution* to require a strict separation of powers between courts, the Parliament and executive, with the result that federal tribunals cannot exercise judicial powers (for example, to enforce their own decisions) and courts cannot encroach into the areas reserved for the executive (for example, to re-exercise any discretion available to an agency of government). This has served to reinforce the demarcation between courts and tribunals. However, those federal constitutional limits

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1 This article was the subject of an Australian Institute of Administrative Law seminar on 24 November 2022. On 16 December 2022, the Commonwealth Attorney-General announced the proposed creation of a new Administrative Review Body and, on 17 February 2023, announced the composition of the Expert Advisory Group to 'provide advice on key policy and legislative issues' in relation to that new body. The extent of the new body's powers remains to be seen. That the new body is forecasted to perform a merits review function, including in a federal tax dispute setting, suggests it is likely to have functions and powers similar to the AAT. There does not appear to be any significant change proposed, nor is it likely that there could be, to the limitations on what the courts can do in a federal tax dispute setting, as discussed in this article.

do not apply at a state level such that, at least in theory, tribunals can be vested with judicial powers and courts may venture into merits review.

The distinction between the roles and powers of courts and tribunals has particular significance in circumstances where an affected person has the choice between those fora for challenging a governmental decision, as is the case of a taxpayer seeking to contest a tax assessment decision of a revenue authority. A choice of venue for the resolution of tax disputes has long been a feature of tax law. It was first introduced at a federal level in 1921 and subsequently replicated in the tax administration legislation of a number of states. The choice is significant because, if the wrong choice is made, the court or tribunal deciding the matter may lack the power to give the remedy sought.

Despite the commonality as between the federal and state tax administration provisions, divergent interpretations have been taken regarding the nature of an appeal or review to be undertaken by a court where a taxpayer chooses that setting. It appears that the choice of language adopted by a given legislature has the potential to confirm or negate the traditional demarcation between the roles of the courts and tribunals in such cases. Further, even in situations where the legislative demarcation is maintained, the courts have sometimes been tempted to stray into what appears to be merits-like review.

Nevertheless, as intended when tribunals were established as an alternative pathway to the courts for contesting tax decisions, tribunals have certain procedural features that, at least in some cases, make them a more suitable — and, at times, the only practical — setting for a party seeking to contest a tax assessment decision.

Relevant aspects of the history of the 'Australian taxation system' and a brief overview of the structure for its administration

To understand the choice available to taxpayers as to the setting for challenging taxation decisions, as well as the inter-relationship between the regimes at a Commonwealth and state level, it is necessary to have some general appreciation as to:

- the history of the 'Australian taxation system';[2] and
- the general administration of that system at both levels.

A potted history of the Australian taxation system

Before federation, each of Australia's six colonies raised their own taxes, primarily through customs and excise duties,[3] although stamp duty and land taxes were also imposed.

2 Reinhardt and Steel (n 3).

3 S Reinhardt and L Steel, 'A Brief History of Australia's Tax System', Paper presented to the 22nd APEC Finance Ministers' Technical Working Group Meeting in Khanh Hoa, Vietnam, on 15 June 2006: available at <https://treasury.gov.au/publication/economic-roundup-winter-2006/a-brief-history-of-australias-tax-system>.

At federation, 'exclusive power' to impose customs and excise duties was reserved to the Commonwealth,[4] in order 'to secure interstate free trade and [ensure] adequate protection for Australian industry'.[5]

By the time of federation, most of the colonies had also introduced income taxes;[6] however, while the *Constitution* permitted the Commonwealth to impose taxes in addition to customs and excise duties,[7] federal income taxes were not introduced until 1915, when that became necessary to finance Australia's involvement in the First World War.[8] For a period of time, between the two World Wars, the states continued to impose their own income taxes, with the state and federal taxing systems 'kept separate, and administered separately by the different bureaucracies'.[9]

It was not until 1942, when the Commonwealth government introduced the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) — providing for Commonwealth grants to be made to the states provided they ceased to levy their own income taxes — that the states abolished their own income tax regimes.[10] Constitutional challenges to this regime failed.[11]

Over time, the Commonwealth has also introduced a range of other taxes, some of which have overlapped to a greater or lesser extent with state taxes, including:

- in 1910, a federal (flat-rate) land tax, which was in place until 1952;[12] and
- in 1941, a payroll tax 'to finance a national scheme for child endowment', which continued until 1971 when the Commonwealth 'handed over payroll taxes to the states, acknowledging that this tax represented the sole possible growth tax available to the states'.[13]

The most recent substantive tax reform was the introduction, in 2000, of the goods and services tax (GST). Exceptionally, as part of an intergovernmental agreement,[14] the revenue from the GST is collected by the Commonwealth but distributed to the states and territories. That agreement required the states and territories to abolish a range of inefficient taxes, including stamp duty on a considerable range of transactions and instruments. At the time, some commentators, perhaps optimistically, thought this would presage the end of stamp duty, a tax widely viewed as 'highly inefficient';[15] however, the experience has been otherwise. Although it is true that the number of instruments or transactions to which duty applies has

4 *Australian Constitution* s 90.
5 Reinhardt and Steel (n 3) citing P Groenewegen, *Everyone's Guide to Taxation in Australia* (Allen and Unwin, 1985).
6 Ibid.
7 *Australian Constitution* s 51(ii).
8 Reinhardt and Steel (n 3).
9 Ibid.
10 Ibid.
11 *South Australia v Commonwealth* (1942) 65 CLR 373 and *Victoria v Commonwealth* (1957) 99 CLR 575.
12 Reinhardt and Steel (n 3).
13 Ibid citing R Mathews and B Grewal, 'The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating' (Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997).
14 Intergovernmental Agreement on Reform of Commonwealth-State Financial Relations.
15 K Henry et al, 'Australia's Future Tax System — Final Report — Part 1' (Commonwealth of Australia, 2010) [6.2].

reduced, the duty base has been broadened in various ways. For example, in Victoria, the duty base has been expanded to capture changes in economic entitlements to land[16] and (albeit under separate legislation) windfall gains realised from land.[17]

While the tax mix ebbs and flows, income tax remains the most significant tax imposed at a federal level by a considerable margin.[18] At a state and territory level, duty, land tax and payroll tax each remain significant imposts (although the mix varies between the states and territories, with some — particularly, the Australian Capital Territory — taking active steps to replace duty on property transfers with a broader land tax regime).[19]

Brief overview of the administration of the Australian taxation systems

Given the historical context, it is unsurprising that the essential structure for the administration of the Australian taxation system at the federal and state/territory levels is similar in three important ways:

- A designated commissioner is granted the 'general administration' of the taxation regime,[20] as well as a more specific power (or, in some cases, discretion) to assess a person (normally referred to as a 'taxpayer') to tax under the applicable taxing Act(s).[21]
- A taxpayer is given a right to seek internal review of an assessment, by way of an 'objection' process.[22] While not specifically legislated,[23] the internal review is usually undertaken by a different team or officer within the taxation administration office headed by the relevant commissioner.[24]
- There is then some mechanism for external contest of the assessment in the event that a taxpayer remains dissatisfied with the determination of the objection.

The mechanism for external contest is the focus of this article.

16 *Duties Act 2000* (Vic) pt 4B.
17 *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic).
18 59% of all taxes imposed in Australia: OECD, 'Revenue Statistics 2021 — Australia' (2021).
19 For Victoria in 2020/2021, land transfer duty (27.2%), payroll tax (26.2%) and land tax (13.7%) accounted for more than 65% of total taxation revenue: Department of Treasury and Finance, 'State Taxation Revenue' — *Taxation Revenue — Annual* (available at <https://www.dtf.vic.gov.au/state-financial-data-sets/state-taxation-revenue>).
20 For example, at the federal level, see *Income Tax Assessment Act 1936* (Cth) s 8 which confers the power of general administration of income tax on the Commissioner of Taxation, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 63 which confers the power of general administration concerning a range of Victorian taxes on the Commissioner of State Revenue.
21 For example, at the federal level, see *Income Tax Assessment Act 1936* (Cth) s 166, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 8(1).
22 At the federal level, see *Taxation Administration Act 1953* (Cth) Div 3 of Pt IVC, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 96.
23 At various times, calls have been made for the internal review of income tax assessments to be conducted by an independent agency. See, most recently, House of Representatives, Standing Committee on Tax and Revenue, 'Tax Disputes' (Commonwealth of Australia, 2015) [6.68]–[6.77].
24 That is, the Australian Taxation Office in the case of federal income tax, and the State Revenue Office in the case of Victorian taxes.

External contest at the federal level

Background

When income tax was introduced at a Commonwealth level, the *Income Tax Assessment Act 1915* (Cth) provided for external contest of an assessment by way of appeal to the High Court of Australia or to the Supreme, County or District Court of a state.[25]

A bifurcated model was introduced a short time later, when the *Income Tax Assessment Act 1921* (Cth)[26] established a 'Board of Appeal', comprising a chairman and two other members appointed by the Governor-General (each holding office for a term of seven years), as an alternative pathway for the contest of a tax assessment.[27] A taxpayer dissatisfied with the objection decision of the Commissioner of Taxation could request that the Commissioner treat his objection as an appeal and to forward it, as required by the taxpayer, either to the High Court or the Supreme Court of a state (where the objection raises questions of law only), or to the High Court or a Supreme Court or a Board of Appeal (where the objection raises questions of fact).[28]

On hearing an appeal, the powers of a court or the Board were similar; each could 'make such order as it [thought] fit, and [could] either reduce or increase the assessment'.[29]

However, there were also differences. While any decision of a court was expressed to be 'final and conclusive' in all respects,[30] the decision of a board was only final and conclusive 'on questions of fact',[31] and there was a right of appeal to the High Court in its appellate jurisdiction (excluding a decision by the Board on a question of fact).[32]

Further, the legislation establishing the Board of Appeal provided that it should 'not be bound in its consideration of any question by any rules of evidence, but in forming its decision [was to] be guided by good conscience and the facts of the case'.[33]

25 *Income Tax Assessment Act 1915* (Cth) s 37(4).
26 This amended the *Income Tax Assessment Act 1915* (Cth).
27 *Income Tax Assessment Act 1922* (Cth) s 10 (inserting s 36A of the *Income Tax Assessment Act 1915* (Cth)).
28 Ibid s 37(4).
29 Ibid s 38(1).
30 Although, presumably still subject to appeal to a superior court where available, for example, to correct jurisdictional error.
31 *Income Tax Assessment Act 1922* (Cth) s 10 (s 38(2) and (3)).
32 Ibid s 38(8).
33 Ibid s 40(1).

The establishment of the Board of Appeal can be traced to an early recommendation of the Royal Commission on Taxation (Royal Commission), which observed:

> There was perhaps no single subject upon which such unanimity of opinion was manifested by witnesses as upon the necessity for the appointment of a tribunal, other than a Court, to deal with the numerous cases under the Income Tax Act in which taxpayers dissent from the decisions of the Commissioner, but for various reasons are unable or unwilling to assert what they believe to be their rights, in a superior Court.
>
> …
>
> The expense, delay, and risk of proceedings in the superior Courts are said to deter taxpayers (particularly where the amount involved is not large) from seeking a judicial determination of points at issue between themselves and the Taxation Department … It is contended also that, in many cases, no point of law arises, but the issue is one depending upon differing views as to facts. … *[T]he evidence taken by the Commission disclosed a very widespread desire for a tribunal less hampered by technical rules of evidence and procedure than are the ordinary Courts of Law*. There is undoubtedly a general belief that *such a tribunal would be cheaper, more direct, and more speedy in its methods, and would give greater satisfaction* to the taxpayers.[34]

Relevantly, the Royal Commission proposed that the Board of Appeal be given power to deal with appeals in all matters in which the Commissioner's discretionary power is not subject to review [with the exception of purely administrative matters …], and generally with all matters in which taxpayers are dissatisfied with the Commissioner's decision, including those in which there is not a right of appeal to a court under s 37 of the *Income Tax Assessment Act*.[35]

While it is evident that the Royal Commission envisaged the Board of Appeal having a different and broader jurisdiction than the courts, including the power to examine and (if appropriate) re-exercise discretions available to the Commissioner of Taxation, the legislative alignment of the provisions providing for, and the powers to be exercised upon completion of, an appeal (in either setting) was to prove constitutionally fatal.

The Board of Appeal was short-lived. Less than four years after its introduction, the High Court delivered its decision in *British Imperial Oil Company Limited v Federal Commissioner of Taxation*[36] (*British Imperial Oil*), holding that the powers conferred on the Board of Appeal formed part of the judicial power of the Commonwealth. As s 71 of the *Australian Constitution* provided that such power could only be vested in a court, the Board was not validly constituted.

The then Chief Justice (Knox CJ) explained that:

> The power conferred on the Board of determining questions of law, the association of the Board as a tribunal of appeal with the High Court and the Supreme Court of a State, and the provisions for an appeal to the High Court in its appellate jurisdiction … establish that the expressed intention of Parliament was to confer on the Board portion of the judicial power of the Commonwealth, which at any rate includes the power to adjudicate between adverse parties as to legal claims, rights and obligations …[37]

34 Parliament of the Commonwealth of Australia, 'First Report of the Royal Commission on Taxation' (Government Printer for the State of Victoria, 1921) (First RC Report) [141] and [143] (emphasis added).
35 First RC Report [150].
36 (1925) 35 CLR 422.
37 Ibid 432.

Noting that s 72 of the *Constitution* required that the office of a justice of a court be for life, Knox CJ observed that the Board of Appeal (whose members were appointed for seven year terms) was 'not a "Court" in the strict sense' and, as such, 'the Parliament has no power to invest it with functions appertaining to the judicial power of the Commonwealth'.[38]

Isaacs J identified the demarcation between permissible administrative review and impermissible judicial appeal in observing that the powers given to the Board were judicial because the Board's function was 'one of ascertaining and determining whether and how far the rights and duties independently enacted have been accurately declared by the Commissioner, *and not for the purpose of superseding his discretionary judgment to create a constitutive element of liability*'.[39]

From Board of Appeal to Board(s) of Review

The Commonwealth Parliament took the hint from the High Court, re-establishing the Board as 'a Board or Boards of Review'[40] and providing taxpayers with the choice of contesting an assessment by referral to the Board for 'review' or to the High Court or a Supreme Court by way of 'an appeal'.[41] The amendments provided that, for the purposes of undertaking any review, the Board 'shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act', which were 'deemed to be assessments, determinations or decisions of the Commissioner'.[42]

In *Federal Commissioner of Taxation v Munro*,[43] the High Court upheld the constitutional validity of the Board(s) of Review. As Isaacs J explained, by the amending legislation, the Commonwealth Parliament 'drastically altered the Act so as to conform to the law as explained in [*British Imperial Oil*], and created a new Board — a Board of Review — on a totally different basis'.[44] His Honour likened the changes to 'the difference between daylight and dark'.[45]

Isaacs J noted that the problem with the original model was the equivalence which had been created between the Board of Appeal and the High Court (and State Supreme and County Courts), being 'an unmistakable and an inseparable indication' that the Board was to exercise judicial power.[46] Critically:

> Instead of assimilating the Board to the Court, as in the old [provisions], the Board in the new [provisions] is assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it is given 'the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act'.[47]

38 Ibid 433.
39 Ibid 436 (emphasis added).
40 *Income Tax Assessment Act 1925* (Cth) s 9 (amending s 41(1) of the *Income Tax Assessment Act 1915* (Cth)).
41 Ibid s 11 (s 50(4)).
42 Ibid s 10 (s 44(1)).
43 (1926) 38 CLR 153.
44 Ibid 172.
45 Ibid 175.
46 Ibid.
47 Ibid 183.

Higgins J, perhaps somewhat dismissively, referred to the Board of Review as 'a mere piece of administrative machinery',[48] and 'auxiliary' to the Commissioner of Taxation 'in his administrative function'.[49] Observing that the Commissioner 'has to consider the law as well as the facts of each case presented to him', but that this 'does not make him a judicial officer', His Honour suggested that, likewise, if 'Parliament provide[s] the Commissioner with a Board to assist him as to law or facts it does not thereby make him or the Board a judicial officer … or [turn] the Board into a Court'.[50]

In a relatively early decision, *Jolly v Federal Commissioner of Taxation*[51] (*Jolly*), the High Court considered the range of discretions which could be re-exercised by the Board of Review. By majority,[52] the High Court held that the Board of Review's power to conduct a review extended to the 'entire process of assessing additional tax',[53] specifically including the discretion of the Commissioner of Taxation to remit additional tax. In forming this view, the High Court noted that the Board was designed to enable taxpayers to seek the 'reconsideration and re-examination of the process by which [a tax] liability had been imposed upon them, particularly in relation to matters where the Commissioner had a discretion'; concluding that 'arguments of fairness' suggested that this should extend to review of the 'discretionary remission of an amount which may prove a ruinous imposition'.[54]

By 1971, the Commonwealth Taxation Boards of Review[55] were well established, with the Commonwealth Administrative Review Committee (more commonly referred to as the 'Kerr Committee') describing them as 'outstanding examples' of federal administrative tribunals enabling review of administrative decisions on the merits.[56]

Appeal to a court

Taxpayers have, of course, always had the ability or option to seek to contest a Commonwealth tax assessment by way of appeal to a court, initially the High Court or the Supreme or County Courts of a state and, more recently, the Federal Court of Australia.

It was not until 1949, 34 years after the introduction of income tax at a federal level, that the High Court expressed its views on the nature of such an appeal in *Avon Downs Proprietary Limited v Federal Commissioner of Taxation*[57] (*Avon Downs*).

The *Avon Downs* decision concerned an appeal of an assessment involving the application of s 80(5) of the *Income Tax Assessment Act 1936* (Cth).[58] At the time, s 80(5) denied

48 Ibid.
49 Ibid 201.
50 Ibid.
51 (1935) 53 CLR 206.
52 Rich, Dixon, Evatt and McTiernan JJ (Starke J dissenting).
53 (1935) 53 CLR 206, 215 (per Rich and Dixon JJ).
54 Ibid 214.
55 As they had come to be known, and noting that separate Boards had been established around Australia by this time.
56 *Report of the Commonwealth Administrative Review Committee* (Kerr Committee) (Commonwealth Government Printing Office, Canberra, 1971) [18(a)].
57 (1949) 78 CLR 353.
58 *Income Tax Assessment Act 1936* (Cth).

deductions for losses incurred by private companies in previous tax years unless sufficient (at least) 25 per cent continuity of underlying ownership of the company had been maintained. Importantly, the requisite level of continuity of ownership needed to be established 'to the satisfaction' of the Commissioner of Taxation. Dixon J observed that the provision was designed to address the then practice 'of turning to account the existence of losses in unsuccessful private companies' (for example, by selling the shares in the loss company to the owners of another profitable company and then vesting the profitable business in the loss company and using its prior year losses to shelter the profits from tax).[59]

In assessing the taxpayer company, the Commissioner had disallowed the prior year losses claimed on the basis that he was not satisfied the company's underlying ownership had been maintained to the requisite extent in circumstances where there had been a sale of most of the shares in the company just before the end of the tax year.

In its objection, the company contended that the assessment should be overturned because the new shareholders had not in fact been entered on the company's share register before the end of the relevant tax year, such that there was no change in the company's underlying ownership. In disallowing the objection, the Commissioner 'gave no reasons and it [did] not appear what view of the facts he took or whether he took any other view of the law'.[60]

Dixon J noted that, had he been required to form the requisite state of satisfaction, he may have been prepared to reach a different conclusion on the evidence before the Commissioner. He said:[61]

> I myself am prepared to accept the explanation given before me of the purported minute of the supposed meeting of directors of 29th June 1944 and I am prepared to accept the evidence that before the end of the year of income no entry was made in any share register of the company of the names of the transferees pursuant to the transfers of 14th June 1944.
>
> But it is for the commissioner, not me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion that he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on some ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.

Ultimately, however, Dixon J dismissed the appeal and upheld the assessment because he was 'not prepared to find that the Commissioner's refusal to be satisfied upon the issue formulated by s 80(5) [was] due to any such misapprehension, mistake, misconception, unreasonableness or miscarriage of judgment [which] would authorise [the Court] to interfere and set aside [the C,ommissioner's] conclusion'.[62]

59 (1949) 78 CLR 353, 354.
60 Ibid 359.
61 Ibid 360.
62 Ibid 362–3.

At least in a circumstance where a tax assessment involves an opinion or state of satisfaction to be formed on the part of the Commissioner, the *Avon Downs* decision established that the nature of an appeal under the income tax legislation involved 'judicial review' of the assessment made by the Commissioner of Taxation, and the court could (or would) not engage in a consideration as to the merits of the Commissioner's decision.

The choice for a taxpayer to contest an assessment by way of appeal to a court remains to this day,[63] subject to the limitation described by Dixon J in *Avon Downs* where the disputed element of a tax assessment is dependent on the opinion of, or state of satisfaction to be formed by, the Commissioner.

Administrative Appeals Tribunal

In light of the background recounted above, it is hardly surprising that the Kerr Committee:

- formed the view that the courts should 'exercise a supervisory jurisdiction only [in relation to administrative decisions]', which was 'partly for constitutional reasons and partly because [the Committee did] not regard a court as being the most appropriate body to review administrative decisions on the merits';[64] and
- recommended the establishment of an 'Administrative Review Tribunal' to engage in merits review of a broad range of decisions of the federal government and its agencies.

In the latter regard, it is apparent the Kerr Committee had in mind a body with similarities to the Commonwealth Taxation Boards of Review. For example, they envisaged:

- administrative decisions being reviewed by a panel of three, albeit with the chairman being a judge and the other members being an officer of the department concerned and a lay person;[65]
- the rules of evidence would not apply in the new tribunal;[66] and
- the tribunal would be empowered to substitute its own decision for that of the administrator.[67]

63 *Taxation Administration Act 1953* (Cth) s 14ZZ(1)(a)(ii) and Div 5 of Pt IVC.
64 Kerr Committee (n 56) [289].
65 Ibid [292].
66 Ibid [295(g)].
67 Ibid [297(ii)].

The proposed tribunal took form in the shape of the Administrative Appeals Tribunal (AAT), which was established in 1975.[68] Giving life to these concepts, the *Administrative Appeals Tribunal Act 1975* (Cth) has provided from the outset that:

- in undertaking a review, the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision' and, where it sets aside the decision under review, may make another decision 'in substitution for the decision so set aside';[69]
- any decision as varied or substituted 'shall, for all purposes … be deemed to be a decision of [the person that made the decision]';[70]
- any proceeding is to be 'conducted with as little formality and technicality, and with as much expedition, as … a proper consideration of the matters before the Tribunal permit';[71] and
- the AAT is 'not bound by the rules of evidence' and 'may inform itself on any matter in such manner as it thinks appropriate'.[72]

By 1986, the AAT had replaced the specialist Commonwealth Taxation Boards of Review as the tribunal to which taxpayers could apply for external merits review of income tax assessments made by the Commissioner of Taxation.[73]

Parallel proceedings

Although the tax administration legislation envisages a taxpayer making a choice as between an appeal to the court and review by the AAT, there is, in fact, an option to pursue separate (but related) disputes utilising both settings. As noted in *King v Commissioner of Taxation*,[74] taxpayers can (and not uncommonly do) pursue parallel proceedings, involving 'review by the [AAT] of a decision concerning remission of administrative penalties … [and] elect[ing] to have the substantive revenue law controversies determined by an exercise of judicial power by the [Federal] Court'.[75]

68 *Administrative Appeals Tribunal Act 1975* (Cth).
69 Ibid s 43(1).
70 Ibid s 43(6).
71 Ibid s 33(1)(b).
72 Ibid s 33(1)(c).
73 *King v Commissioner of Taxation* [2022] FCA 935 [5]. See, now, *Taxation Administration Act 1953* (Cth) s 14ZZ(1)(a)(i).
74 [2022] FCA 935.
75 Ibid [4].

Similarities and differences in processes

Notwithstanding the structural differences between the court and tribunal settings for disputing objection decisions with which taxpayers are dissatisfied, at the Commonwealth level there are some striking similarities, both substantive and procedural, between the two.

For reviewable objection decisions,[76] the two settings have:

- a common starting point, namely dissatisfaction with an objection decision;[77] and
- practically identical structural constraints, namely in each setting:
    - — the taxpayer is limited to the grounds stated in the relevant objection unless leave is granted to expand those grounds;[78]
    - — the taxpayer bears the burden of proving that the disputed assessment is excessive or incorrect and what the assessment should have been;[79] and
    - — the arbiter can make decisions affirming, setting aside, substituting or varying the decision made by the Commissioner.[80]

However, one important structural feature of the Tribunal's powers, which differs from the Federal Court, is that the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'.[81] This reflects the wider scope of the function of the Tribunal, and its ability to substitute its exercise of a discretion, or its state of satisfaction or its opinion, where the relevant taxing provision[82] has such a feature.

Nevertheless, most taxing provisions are self-executing[83] or, in the terms expressed by Gibbs J (as his Honour was) in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner*

76 All objection decisions other than ineligible income tax remission decisions (decisions concerning remission of additional taxes): *Taxation Administration Act 1953* (Cth) ss 14ZQ and 14ZS.

77 Ibid s 14ZZ(1)(a)(i) for reviews by the AAT and s 14ZZ(1)(a)(ii) for appeals to the Federal Court.

78 Ibid s 14ZZK(a) for the AAT and s 14ZZO(a) for Federal Court appeals.

79 Ibid s 14ZZK(b) for the AAT and s 14ZZO(b) for Federal Court appeals.

80 *Administrative Appeals Tribunal Act* (Cth) s 43 for AAT decisions and *Taxation Administration Act 1953* (Cth) s 14ZZP for Federal Court decisions, the latter power expressed in more expansive terms ' … such order in relation to the decision as it thinks fit, including an order confirming or varying the decision'.

81 *Administrative Appeals Tribunal Act* (Cth) s 43(1).

82 For present purposes, a provision which has an effect on a tax liability outcome, whether by including an amount in assessable income or the calculation of another amount that is included in assessable income, allowing a deduction in calculating taxable income or allowing a tax offset or credit.

83 Many are plainly self-executing, for example, the *Income Tax Assessment Act 1997* (Cth) ss 6-5 and 8-1, while others require some analysis before a conclusion can be reached, for example, *Income Tax Assessment Act 1997* (Cth) s 102-5 which includes net capital gains in assessable income, a task which calls in many and varied provisions in pts 3-1 and 3-1 (and some elsewhere) in determining the amount of any net capital gain, one of which can be s 149-30(2) which, if it is relevant, requires the Commissioner's satisfaction or reasonable assumption as to underlying ownership. If the calculation of net capital gains in a particular case does not have any component that turns on a state of satisfaction, opinion or belief of the Commissioner, then it will be a self-executing taxing provision.

of Taxation[84] (*Kolotex Hosiery*), 'depend upon the existence of a state of facts or of mixed law and fact, [that can be] found by the court to which an appeal is brought'.[85] These provisions have effect where the facts of a taxpayer's circumstances fall within their terms and no element of discretion, opinion or state of satisfaction is called for or required.

Where an element (sometimes called a particular) of an assessment at the source of a taxpayer's dissatisfaction is a self-executing provision, the controversy over that assessment (and objection decision) can be pursued in every respect, namely as to facts and/or as to how the law applies to those facts, in either the Federal Court or the Tribunal. For example:

- a dispute over a general deduction claim under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) can be pursued in either the AAT or the Federal Court. The same tests apply to answer that question in both settings: for example, whether a loss or outgoing has been 'incurred'. That statutory condition calls, amongst other things, for an evaluation of the relevant contract terms[86] and intentions of parties in a legal or jurisprudential manner to determine whether the taxpayer has 'definitively committed' to the liability;[87] and
- a dispute over whether a receipt is ordinary income and taxable under s 6-5 of the *Income Tax Assessment Act 1997* (Cth) can also be pursued in either the Tribunal or the Federal Court. Again, in both places the same tests apply to determine assessability. For example, this requires an examination of whether an amount has 'come home' to the taxpayer beneficially, and free of restriction.[88]

In these situations, the task of the court or the Tribunal is, in the relevant sense, the same — to find what the critical facts are and to apply the law to those facts. Both settings apply the same tests for deductibility or assessability. If it were otherwise, the law applied by the tribunal would not be the same as that applied by the court, and differing outcomes would be available depending on the setting of the dispute.

Further, and notwithstanding the AAT is not a court, it must perform this court-like function in applying the law, and do it without error, because failure to do so will most likely result in the Tribunal having made an error of law and its decision exposed to being overturned on appeal.[89]

84 (1975) 132 CLR 535.

85 Ibid 561.

86 *Coles Myer Finance Ltd v Federal Commissioner of Taxation* (1993) 176 CLR 640, 662–3 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ) and *Federal Commissioner of Taxation v Malouf* [2009] FCAFC 44 [45] (Sundberg, Jessup and Middleton JJ).

87 *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492, 506 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

88 *Arthur Murray (NSW) Pty Ltd v FCT* (1965) 114 CLR 314, 318 (Barwick CJ, Kitto and Taylor JJ).

89 A question of law raised by an AAT decision is the foundation for, and the subject matter of, any appeal from a tribunal decision to the Federal Court, see *Administrative Appeals Tribunal Act 1975* (Cth) s 44. Whether the facts as found fall within the terms of the legislation under review is generally a question of law: see *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (19980 82 ALR 175, 182 (Gummow J), which was referred to with approval in *Haritos v Commissioner of Taxation* [2014] FCA 95 [143] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

Accordingly, the questions in issue in some types of disputes, and the steps involved in their resolution by a court or the AAT, are for all relevant purposes identical.

The processes in both settings also have a number of parallels, namely:

- the parties are obliged to file documents to define the issues in dispute and inform the evidence to be led:
    - in the Federal Court the Commissioner is obliged to file an appeal statement,[90] and practice calls for a responding appeal statement to be filed by the taxpayer;[91] and
    - in the AAT, the convention is that Statements of Facts, Issues and Contentions are filed by each party,[92]
- with these documents informing the same process and serving the same purpose; and
- as a practical matter, evidence is introduced in a similar manner, by affidavit in the court and in the AAT by a witness statement. In both settings, witnesses are usually cross-examined. Where expert evidence is required, both settings generally adopt similar processes (for example, the use of 'hot tub' processes) where it is thought beneficial to do so.

In these circumstances, it is not surprising that, despite the statutory direction for the AAT to be less formal, the processes in many tax disputes are very much court-like and deliberately so. Recently Deputy President McCabe[93] said:

> The Tribunal is part of the executive, to be sure, but — at least in its General and Taxation & Commercial Divisions — the Tribunal operates on a court-like model with a well-understood suite of forensic tools and procedures that are adapted to assist the Tribunal to make findings of fact. Most of those tools are wielded by the parties, much as they would in a court. As Foster J explained in *Eldridge v Commissioner of Taxation* [1990] FCA 369 (at [41]), the Tribunal's 'functions partake far more of the Court than of the office desk'. There are some differences between proceedings in court and those in the Tribunal, to be sure. Section 33(1)(c) of the AAT Act makes clear the rules of evidence are not binding in the Tribunal, and s 43 requires the Tribunal to refer to evidence or other material on which it bases its findings of fact. The differences between the two forums are not always apparent in practice. For example, the rules of evidence are often a reliable guide to the underlying challenge of identifying, testing and evaluating relevant and probative material in a way that is procedurally fair. It follows the Tribunal generally goes about its task in way that is functionally the same as the court.[94]

90 *Federal Court Rules 2011* (Cth) r 33.03(a)(iv).
91 Taxation Practice Note (TAX-1) (available at <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/tax-1>) [3.5].
92 AAT, Practice Direction Review of Taxation and Commercial Decisions [4.4(f)].
93 The Head of the Tax & Commercial and Small Business Tax Divisions of the AAT.
94 *TDWF and Commissioner of Taxation* [2022] AATA 3610 [11].

On the other hand, there are also a number of structural differences between the two settings:

- As already noted, one feature of the AAT's powers is that the tribunal 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision',[95] reflecting a wider scope of the merits review function of the AAT and its ability to substitute its exercise of a discretion, or its state of satisfaction, or its opinion where the relevant taxing provision[96] has such a feature. The tribunal is a more suitable setting for resolution of such matters.

- In a court setting, where facts are in dispute, that is, there is no agreement between the parties as to any facts, or as to critical facts, the facts must be proved by evidence which is admissible in accordance with common law and *Evidence Act 1995* (Cth) rules.[97] In the AAT, findings of fact also need to be made, but while the tribunal has power to take evidence on oath,[98] it is not bound by the rules of evidence, can inform itself as it sees fit and can base its conclusions on evidence and other material.[99]

- The AAT is a no-cost jurisdiction; the winner bears their own costs and the loser does not have to pay the costs of the other side. This is to be contrasted with the Federal Court which is a jurisdiction in which costs normally 'follow the event'. That is, the winner can expect a proportion (rarely the whole) of the costs they incur in the dispute process to be recovered from the unsuccessful party. This can be an important consideration in choice of setting.

- An appeal from a decision of the AAT is confined to a question of law. Notwithstanding the relaxation of the strictness which has historically been associated with the meaning of a question of law,[100] there is still a limitation. By contrast, an appeal from a decision of a single judge of the Federal Court to the Full Court is an appeal *de novo*, so all issues are able to be disputed again.

The decision in *Henry Jones IXL v Commissioner of Taxation*[101] an illustration of the difference. The primary judge concluded that the proceeds received by the taxpayer company on disposition of a royalty stream were to be regarded as a profit on revenue account (and taxable)[102] because the Court found that the revenue stream was acquired with the intention or purpose of selling it to make a profit.[103] That was a finding of fact. On appeal, the Full Federal Court concluded that the revenue stream was not acquired for the purpose

95 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
96 For present purposes, a provision which has an effect on a tax liability outcome, whether by including an amount in assessable income or the calculation of another amount that is included in assessable income, allowing a deduction in calculating taxable income or allowing a tax offset or credit.
97 See *Addy v Commissioner of Taxation* [2019] FCA 1768 [35] (Logan J).
98 *Administrative Appeals Tribunal Act 1975* (Cth) s 40(1)(a).
99 Ibid ss 33(1)(c) and 43(2B).
100 *Haritos v Commissioner of Taxation* [2014] FCA 95 [143] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).
101 [1991] FCA 11 (Sweeney J).
102 The disposition occurred in 1982, prior to the introduction of capital gains tax in 1985.
103 [1991] FCA 11 [63] and [66] (based on the first limb of the principles in *Federal Commissioner of Taxation v Myer Emporium Limited* (1987) 163 CLR 199, 209–10).

of profit-making by sale.[104] Had the first instance decision been a decision in the AAT, the finding of the purpose for which the revenue stream entitlement was acquired would have been a finding of fact, such that an appeal in relation to that finding might not be possible (in the absence of any other error of law).

External review at a state level — Victoria

The early contest provisions

The then Colony of Victoria introduced an income tax in 1895.[105] At that time, an objection to a tax assessment could be lodged by any taxpayer 'feeling aggrieved by reason of any assessment'[106] and, if a taxpayer remained dissatisfied after the Commissioner's determination of the objection, the objection was to be 'transmitted by the Commissioner to be heard and determined by a police magistrate'.[107] Any objection was to be 'heard in public', with the police magistrate having 'full power of hearing and determining the objections as to the amount of the assessments so transmitted',[108] with a right of appeal to the County Court.[109]

Similarly, at that time, a person dissatisfied with an assessment of stamp duty made by the Comptroller of Stamps was entitled to appeal to a court (in that case, the Supreme Court of Victoria).[110]

By contrast, under the *Land Tax Act 1890* (Vic), while there an appeal available in respect of the classification of land, it was to be heard by the Commissioner of Land Tax 'in a summary way', and the orders made by the Commissioner were stated to be 'final'.[111]

While there were differences in the contest mechanisms between the different tax regimes, none provided for external merits review.

The establishment of a merits review tribunal and the choice of settings

In 1972, an 'alternative means' of challenging an assessment or ruling in respect of land tax, stamp duty, payroll tax and certain other imposts was introduced, 'for the first time in Victoria'.[112] This was achieved through the formation of a Victorian Taxation Board of Review

104 [1991] FCA 377 at [48] (Hill J) (and therefore the first limb of the *Myer Emporium* principles was not engaged).
105 *Income Tax Act 1895* (Vic).
106 Ibid s 23(3).
107 Ibid s 24(3).
108 Ibid s 25(b) and (e).
109 Ibid s 26.
110 *Stamps Act 1890* (Vic) s 71(1).
111 *Land Tax Act 1890* (Vic) ss 22 and 25.
112 *Hansard*, Legislative Assembly, 21 March 1972 (Mr Hamer, Chief Secretary), 4288.

(Victorian Board), intended to be 'somewhat similar to that operating for many years in the Commonwealth field of taxation'.[113] Like its federal counterpart, the Victorian Board:

- was to consist of a chairman and two other members, each holding office for a term of up to seven years;[114]
- was empowered to *review* decisions referred to it by the Commissioner of State Revenue,[115] although, interestingly, aspects of the *Evidence Act 1958* (Vic) were applicable;[116] and
- had 'all the powers and functions of the Commissioner', was able to 'confirm, reduce, increase or vary the assessment', and its decisions were 'deemed to be assessments determinations or decisions of the Commissioner'.[117]

Taxpayers were given the choice to request that the Commissioner refer a dispute of a tax assessment to the Victorian Board by way of review, or have their objection treated as an appeal and set down for hearing in the Supreme Court of Victoria.[118] Where the objection was reviewed by the Victorian Board, both the Commissioner and taxpayer had a right to appeal to the Supreme Court on a question of law.[119]

As observed by (then) Deputy President Macnamara in *Baranov v State Revenue Office* (*Baranov*),[120] the 'same structure was adopted when the Victorian Taxation Board of Review was abolished and its jurisdiction incorporated into the new Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1984* and finally when that jurisdiction was given to [the Victorian Civil and Administrative Tribunal] …'.[121]

The nature of a court appeal

Under the current regime, taxpayers dissatisfied with the determination of an objection by the Commissioner of State Revenue are given the choice to request that the matter be referred to the Victorian Civil and Administrative Tribunal (VCAT) for review or treating the objection as an appeal and causing it to be set down for hearing in the Supreme Court.[122]

In *Conte Mechanical and Electrical Services Pty Ltd v CSR*[123] (*Conte*), Pagone J — who had previously been a member of VCAT — explained that this 'option, and the choice made by the taxpayer, is not without important significance'.[124] Noting that s 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that, in its review jurisdiction, VCAT has all of the functions of the decision maker, Pagone J observed that this 'effectively puts

113 Ibid.
114 *Taxation Appeals Act 1972* (Vic) s 3(2), (4).
115 Ibid s 11(1).
116 Ibid s 14.
117 Ibid s 17 (land tax), s 19 (stamp duty) and s 26 (payroll tax).
118 Ibid.
119 Ibid.
120 [2008] VCAT 2652.
121 Ibid [33].
122 *Taxation Administration Act 1997* (Vic) s 106.
123 [2011] VSC 104.
124 Ibid [2].

[VCAT] in the shoes of the Commissioner [of State Revenue] and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner'.[125]

On the other hand, as the court is not given a similar power, Pagone J considered that the court is unable to re-exercise any discretion itself; instead, the 'nature of the proceeding in the Court … requires the taxpayer to demonstrate legal error for the court to set aside the decision of the Commissioner before remitting it back … for re-determination'.[126] Further, any consideration of the determination [of the Commissioner] must generally be upon the materials that were before him'.[127]

While the decision in *Conte* was apparently definitive, Croft J (also a former VCAT member) had occasion to re-consider the nature of an appeal to the Supreme Court in *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue*[128] (*Nationwide Towing*). In that proceeding, a preliminary question arose as to the nature of the appeal, namely whether it involved an appeal by way of hearing *de novo*, judicial review of the decision or some other form of appeal.[129]

Croft J considered that the High Court decision in *Avon Downs* was 'a particularly important authority' given the 'similarity in structure' between the income tax provisions considered by the High Court and the relevant aspects of the *Taxation Administration Act 1997* (Vic).[130] Indeed, he accepted Deputy President Macnamara's observation in *Baranov* that there was a 'clear and direct lineage' from the income tax provisions, through the 'facsimile provisions' introduced in Victorian in 1972, to the present operative provisions in the *Taxation Administration Act 1997* (Vic).[131]

For this reason, Croft J was of the view that, in enacting the appeal provisions in the current legislation, the Parliament 'should be taken to have intended them to have the meaning expounded by Dixon J in *Avon Downs*'.[132] In this regard, he observed the 'dual pathway approach … to enable a taxpayer to review or appeal assessments has been maintained, consistent[ly], in Victoria' over time, as well as between 'different and complementary' statutory provisions.[133] Further, he rejected the Commissioner's contention that the decision in *Conte* could be distinguished based on the nature of the particular decision under review.[134]

In Croft J's view, if an appeal to the Supreme Court involved 'merits review on a *de novo* hearing', this would result in duplication and eliminate the historical choice given to taxpayers, 'without any clear legislative intention being discerned that Parliament intended that outcome'.[135]

125 Ibid.
126 Ibid [3]–[4] (citing *Avon Downs*).
127 Ibid [5].
128 [2018] VSC 262.
129 Ibid [2].
130 Ibid [26].
131 Ibid [30].
132 Ibid.
133 Ibid [45].
134 Ibid [35].
135 Ibid.

Interestingly, His Honour went on to observe that, while VCAT was designed to provide a 'cheap and flexible review', and enable taxpayers to represent themselves, this did not preclude taxpayers from seeking merits review in VCAT by a Supreme Court judge (either the President of VCAT or another judge appointed on an ad hoc basis) as an alternative to a 'more confined appeal' in complex cases.[136] Of course, the nature of any such hearing should not change because a judge who sits as the Tribunal is still required to have regard to s 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), which requires the Tribunal to 'conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of [the Act] and the enabling enactment and a proper consideration of the matters before it permit'.

A choice with some limitations

It has recently been established that, in Victoria, a taxpayer's choice as to setting is a one-off choice. In *Vicinity Funds v Commissioner of State Revenue*,[137] the Court of Appeal of the Supreme Court of Victoria dismissed a taxpayer's appeal of a decision by a trial judge refusing an order in the nature of mandamus to compel the Commissioner to refer a dispute regarding an assessment to VCAT.[138]

The Commissioner had refused to make the referral because the taxpayer had earlier requested that its objection to the relevant assessment be treated as an appeal and set down for hearing in the Supreme Court. The right to make that request was enlivened as a result of the Commissioner's failure to determine the taxpayer's objection within 90 days.[139]

It would appear that the reason the taxpayer was seeking to change the setting is that, in the meantime, the Commissioner had determined the taxpayer's objection and, in doing so, formed the view that the arrangements entered into by the taxpayer amounted to a tax avoidance scheme. As the taxpayer had earlier accepted that appeals to the Supreme Court proceed by way of judicial review,[140] it can be inferred that the taxpayer was concerned about the risk that, even if it were successful in demonstrating error in the Commissioner's decision, the matter might simply be remitted to the Commissioner for reconsideration, who might remain of the same view.

In the event, the Court of Appeal held that, 'once a taxpayer has elected a forum in which to pursue an appeal or review, s 106(1) [of the *Taxation Administration Act 1997* (Vic)],[141] construed by reference to its text, context and purpose, is spent' and, as such, the legislation 'does not permit or require the Commissioner to refer a matter concerning the same objection to a second forum'.[142]

136 Ibid [51] (footnotes omitted).
137 [2022] VSCA 176.
138 The High Court refused the taxpayer special leave to appeal: [2022] HCASL 220.
139 *Taxation Administration Act 1997* (Vic) s 106(1)(b).
140 [2022] VSCA 176 [40].
141 The section which provides taxpayers with the choice as to the setting for resolving a state tax dispute.
142 [2022] VSCA 176 [9].

After observing that the tax administration legislation in New South Wales permits a taxpayer to move a state tax dispute from its Supreme Court to the New South Wales Civil and Administrative Tribunal (NCAT) (or vice versa), the Court of Appeal suggested that, 'had

Parliament intended that a taxpayer could avail themselves of a second choice in relation to the forum for review, it would have made express provision for that second choice … such as is found in … New South Wales'.[143]

While it was unlikely to provide any comfort to the instant taxpayer, the Court of Appeal suggested that, where a taxpayer is concerned about delay in the Commissioner's determination of an objection — but wants to leave open its choice between review and appeal — it would be possible for the taxpayer to seek an order in the nature of mandamus in respect of constructive refusal by the Commissioner to perform his duty (that is, to finalise the determination of the taxpayer's objection).[144]

Before turning to look at the external contest provisions in other states, it is relevant to observe that, while a tribunal can re-exercise most discretions available to the Commissioner in conducting a review, there may also be some limits. In this regard, in *Pitard v Commissioner of State Revenue*,[145] VCAT determined that it did not have the power to re-exercise the discretion, accepted as being reposed in the Commissioner,[146] to determine whether (or not) to issue an assessment in the first place.

The taxpayers were members of the same property development group who had, somewhat unfortunately, triggered the sub-sale provisions in the duties legislation[147] on 35 occasions and were seeking to be relieved from the additional duty payable as a result. In contending that VCAT could re-exercise the Commissioner's discretion to assess[148] (and, hence, to not assess), the taxpayer relied upon the High Court's decision in *Jolly* and Rich and Dixon JJ's description of the word 'decision' as 'being of the widest connotation'.[149] Ultimately, VCAT determined that it did not have the ability to re-exercise the discretion to issue (or not issue) an assessment on the basis that the inclusion of a discretion for the Commissioner to assess (or not) 'should not … be taken to signal a departure from the fundamental scheme of the legislation [which] prevents a challenge to the due making of an assessment once a notice of assessment is produced, with any challenge under Part 10 of the [*Taxation Administration Act 1997* (Vic)] limited to challenging the substantive liability under the assessment'.[150]

The taxpayer companies appealed but went into liquidation (for other reasons) before any appeal could be heard.

143 Ibid [95].
144 Ibid [89].
145 [2019] VCAT 1074.
146 Ibid [30].
147 *Duties Act 2000* (Vic) Pt 4A, Div 3.
148 *Taxation Administration Act 1997* (Vic) s 8 which provides that the Commissioner 'may' issue an assessment. By virtue of s 45 of the *Interpretation of Legislation Act 1984* (Vic), that word 'shall be construed as meaning that the power so conferred may be exercised, or not, at discretion'.
149 (1935) 53 CLR 206, 214–15.
150 [2019] VCAT 1074 [84]–[85].

Similarities and differences between an appeal to the Supreme Court and review by VCAT

As is the case at federal level, there are a number of substantive and procedural similarities between the review of a tax assessment decision by VCAT, and an appeal to the Supreme Court, in that:

- both have a common starting point, that is, a taxpayer dissatisfied with the Commissioner's determination of its objection;[151]
- in each case, the taxpayer must request the Commissioner to initiate a proceeding (by way of referral to VCAT or causing the objection to be set down for hearing in the court) and cannot initiate the proceeding directly;[152]
- except with leave of VCAT or the court, the taxpayer is limited to the grounds of objection and the Commissioner is limited to the grounds on which the objection is disallowed;[153]
- the taxpayer bears the onus of proving its case;[154] and
- the tribunal or the court may, ultimately, 'confirm, reduce, increase or vary the assessment or decision'.[155]

Like the federal tax regime, Victorian tax legislation includes many 'self-executing' provisions. For example, a person who is a foreign resident, as defined by reference to their visa class, must pay foreign purchaser additional duty and there is no discretion for VCAT to relieve a taxpayer from the duty even if they have been misled into believing that they were permanent residents.[156] In such cases:

- the same tests apply, irrespective of the setting;
- the task of the Supreme Court and VCAT is the same — that is, to make findings as to the relevant facts and to apply the law to those facts; and
- to avoid falling into error, VCAT must undertake the task with the same rigour as would be the case if the matter were before the court itself.[157]

There are also similarities in the process in both settings, particularly in terms of the material before the court or VCAT, and evidence being introduced by way of formal statement (an affidavit in the court and witness statement at VCAT).

151 *Taxation Administration Act 1953* (Vic) s 106(1)(a).
152 Ibid s 106. The Commissioner must generally refer the matter to VCAT or set it down for hearing in the Supreme Court within 60 days. It has been held that, as a result of this structure, VCAT cannot extend the 60 day period for a taxpayer to make a request for referral: *Di Dio Nominees Pty Ltd v Commissioner of State Revenue* [2004] VCAT 1352 [65].
153 Ibid s 109.
154 Ibid s 110.
155 Ibid s 111(1) (in the case of VCAT) and 112(1) (in the case of the Supreme Court).
156 *Rudd and Noor v Commissioner of State Revenue* [2022] VCAT 188.
157 It has been observed, albeit outside the state tax context, that even where legislation provides VCAT with the discretion to 'make any order it considers fair', this does not permit 'palm tree justice'; rather, VCAT must accord justice according to law: *Christ Church Grammar School v Bosnich* [2010] VSC 476.

As is the case for the AAT, in its review jurisdiction, VCAT 'has all the functions of the decision-maker',[158] such that it 'stands in the shoes'[159] of the Commissioner of State Revenue and may re-exercise any discretion and reconsider any matter that depends on the opinion or state of satisfaction of the Commissioner.

As the Supreme Court has observed (albeit in a non-tax setting), VCAT's role on review is 'not to sit in appeal from the decision', but rather to review decisions on their merits, 'without any presumption as to the correctness of the decision under review'; and, ultimately, it 'must conduct its own independent assessment and determination of the matters necessary to be addressed'.[160]

Further, as is also the case for the AAT, VCAT is 'not bound by the rules of evidence' (except to the extent that it chooses to adopt them); rather, VCAT 'may inform itself on any matter as it sees fit'.[161]

There are also differences in terms of costs, and the threshold for any appeal from a first instance decision:

- For Victorian state tax disputes, VCAT is a no costs jurisdiction,[162] while the costs of an appeal to the Supreme Court are 'in the discretion of the Court'[163] and, typically, costs will follow the event.
- An appeal is available, from a decision of VCAT, to the trial division of the Court on a question of law, with leave. Such leave may only be granted if the Court is 'satisfied that the appeal has a real prospect of success'.[164] Since 2014, there is no longer an appeal as of right from a decision of a trial judge of the Court: rather, leave is required, but this may be granted if the Court of Appeal 'is satisfied that the appeal has a real prospect of success'.[165] Notably, however, the grant of such leave is not restricted to questions of law.[166]

Accordingly, notwithstanding the substantive and procedural similarities between the review of a tax assessment by VCAT and an appeal to the Supreme Court, it might be going a bit too far to suggest that VCAT can, or should, necessarily go about its task in a way that is 'functionally the same' as the court.

158 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51(1).
159 *Mond v Perkins Architects* [2013] VSC 455 [10]; referenced by VCAT in a state tax context in *Motticant Pty Ltd v Commissioner of State Revenue* [2017] VCAT 1820 [10].
160 Ibid.
161 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b), (c).
162 Ibid sch 1, cl 91(1).
163 *Taxation Administration Act 1997* (Vic) s 112(2).
164 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.
165 *Supreme Court Act 1986* (Vic) s 14C.
166 See, for example, *Jarrold v Registrar of Titles* [2015] VSCA 45 where, on appeal, a new trial was ordered on the basis that the trial judge had made 'erroneous findings of fact'.

External review at a state level — other jurisdictions

The nature of an appeal or review has been considered in some other jurisdictions, with varying approaches taken depending on the precise wording of the tax administration legislation in the jurisdiction.

New South Wales

The New South Wales provisions providing for taxpayer's rights to contest a tax assessment are somewhat different to Victoria. If a taxpayer is dissatisfied with the determination made by the Chief Commissioner of State Revenue regarding the taxpayer's objection, the taxpayer may either:

- apply to NCAT for 'administrative review';[167] or
- apply to the Supreme Court of New South Wales for 'a review' of the decision.[168]

The powers of the Court and NCAT following review are the same. That is, both may 'confirm or revoke the assessment', 'make an assessment or other decision in place of the assessment' or 'remit the matter to the Chief Commissioner for determination in accordance with its finding or decision'.[169]

In its 2011 decision in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue*[170] (*Tasty Chicks*), the High Court accepted that the nature of the review to be undertaken by a judge of the Supreme Court of New South Wales extended to re-exercising the discretion available to the Commissioner to 'de-group' certain members of payroll tax group. The High Court quoted, with apparent approval, the observation of Gzell J at first instance, that:[171]

> The powers in the Taxation Administration Act, s 101 are quite different from the powers of a Court on appeal under the Income Tax Assessment Act. They are specific and include the power to make an assessment or other decision in place of the assessment or decision the subject of the review. And any dichotomy between the powers of the Supreme Court and the powers of the Administrative Decisions Tribunal has been abrogated. The powers on review are the same for Court and Tribunal.

The High Court held that the New South Wales Court of Appeal's reliance on *Avon Downs* for the contrary result (that is, that the taxpayer had to show that the Chief Commissioner's exercise of the discretion was 'vitiated by error') was 'misplaced'.[172] In reaching this conclusion, the High Court noted that the review provisions were amended in 2002 and quoted from the Treasurer's second reading speech which indicated that the legislation was

167 *Taxation Administration Act 1996* (NSW) s 96.
168 Ibid s 97.
169 Ibid s 101.
170 [2011] HCA 411.
171 Ibid [20] (citing *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2009] NSWSC 1007; (2009) 77 ATR 394 [165]).
172 Ibid [19].

being amended to confer 'concurrent jurisdiction' on the Administrative Decisions Tribunal (now NCAT) and the Supreme Court, with the only differences envisaged between the two settings relating to cost, timeliness and flexibility.[173]

In the event, the High Court remitted the matter to the New South Wales Court of Appeal for further hearing. In its decision in *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd*,[174] that Court (differently constituted) observed that the High Court had held that 'the jurisdiction and powers conferred on the Supreme Court on such a review [by the Supreme Court under s 97 of the *Taxation Administration Act 1996* (NSW)] entitled it to address afresh the questions before the Chief Commissioner having regard to the material before it, including questions as to jurisdictional 'satisfaction' and the exercise of discretionary power …'.[175]

Nevertheless, the Court of Appeal found that the Gzell J had 'erred' (in the A*von Downs* sense) in failing to address whether the businesses of certain group entities (including the respondent) were 'carried on substantially independently' of another group entity.[176] The Court of Appeal found that, although the businesses were separately owned and controlled, the businesses of the relevant entities were not carried on substantially independently of that other group entity.[177] It followed that the discretion to de-group the entities did not arise (although if it had, the Court of Appeal was satisfied that Gzell J had provided proper — 'albeit very short' — reasons for its exercise).[178]

Ultimately, the Court of Appeal dismissed the application for review in respect of most of the payroll tax years in question,[179] rendering the High Court outcome something of a pyrrhic victory.

Queensland

On their face, the Queensland provisions regarding the contesting of a tax assessment are closer to the provisions that apply in Victoria than the New South Wales provisions. A taxpayer that is dissatisfied with the Commissioner's decision as to an objection may either 'appeal to the Supreme Court' or 'apply … to QCAT [that is, the Queensland Civil and Administrative Tribunal] for review of the Commissioner's decision'.[180]

However, there are also some important differences.

173 Ibid [21] (referring to New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 October 2000 at 8935).
174 [2012] NSWCA 181.
175 Ibid [2] (Meagher JA). Barrett JA and Sackville AJA concurring with His Honour's reasons (emphasis added).
176 Ibid [58] (Meagher JA).
177 Ibid [60] (Meagher JA).
178 Ibid [63]–[64] (Meagher JA).
179 Ibid, [66] (Meagher, JA). Barrett JA and Sackville AJA agreeing with the orders made.
180 *Taxation Administration Act 2001* (Qld) s 69(2).

In the case of review by the Queensland Civil and Administrative Tribunal (QCAT), the Tribunal must reconsider an assessment based on the 'evidence before the Commissioner when the decision was made', unless it considers it 'necessary in the interests of justice to allow new evidence'.[181]

By contrast, on an appeal to the Supreme Court, if the Court is 'satisfied evidence material to the objection was not before the commissioner', the court *must* '*direct the commissioner* to reconsider the objection having regard to the evidence and any other evidence obtained by the commissioner'.[182] Further, the Supreme Court is ultimately limited to 'allow[ing] the appeal completely or partly or disallow[ing] it'.[183]

In *Wakefield v Commissioner of State Revenue*[184] (*Wakefield*), Bowskill J (as the Chief Justice then was) considered the nature of an appeal under that regime, which had only been the subject of 'passing reference, but not detailed consideration' in a small number of previous cases.[185] Her Honour held that:[186]

> Where, as in this case, the appeal is from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner's state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on the law and facts as they are at the time of the hearing of the appeal. The exercise of the Court's powers in this regard are not dependent upon the demonstration of some legal, factual or discretionary error by the decision-maker.
>
> However, where the decision appealed is one which depended upon the Commissioner being satisfied of a particular fact or matter, the appellant does need to demonstrate an error of principle in the Commissioner reaching, or not reaching, that state of satisfaction, before the Court would intervene. As observed by Wilson J in the *Feez Ruthning* case [*Feez Ruthning v Commissioner of Pay-roll Tax* [2003] 2 Qd R 41 [20]], where that is shown, the next question would be whether the Court can or should re-exercise the discretion, or whether the matter should be sent back to the decision maker. *I would not construe ss 69-70C of the Taxation Administration Act as conferring a power on the Supreme Court to stand in the shoes of the Commissioner, and re-exercise any discretionary power conferred on the Commissioner*. In that respect, *the nature of an appeal to the Supreme Court may be distinguished from the alternative option which is available to a taxpayer, of seeking review of an objection decision by QCAT*. A matter referred for review to QCAT invokes the powers and functions of QCAT under the Queensland Civil and Administrative Tribunal Act, including as that does the power to perform the functions of the decision maker (s 19), *which effectively puts the Tribunal into the shoes of the Commissioner and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner*. But as this is not an issue that arises for determination in this case, given the different nature of the decision the subject of the appeal, it is unnecessary to address this further.

In the latter regard, Bowskill J appears to have distinguished the High Court's decision in *Tasty Chicks* (on the basis that the powers of the court and the tribunal under the New South Wales provisions 'were the same'), while citing the analysis of Pagone J in *Conte*[187] in support of the limitations on the court's role on an appeal.

181 Ibid s 71(3)(a).
182 Ibid s 70B.
183 Ibid ss 70B(4) and 70C.
184 [2019] QSC 85.
185 Ibid [25].
186 Ibid [34]–[35] (emphasis added, footnotes omitted).
187 Ibid footnotes 28 and 29.

South Australia

While South Australia has had a civil and administrative tribunal since 2015, a taxpayer who is dissatisfied with the Minister's determination (via RevenueSA) of an objection to a tax assessment is only entitled to appeal to the Supreme Court of South Australia.[188] As in New South Wales, following appeal, the Supreme Court may 'confirm or revoke the assessment' or 'make an assessment or decision in place of the assessment or decision to which the appeal relates'.

In *Perpetual Corporate Trust Limited v Commissioner of State Revenue*,[189] Auxiliary Justice Bochner considered the nature of an appeal under the South Australian provisions. Relying on *Tasty Chicks*, it was observed that an appellant 'is not required to show error on the part of the decision maker' and that, in undertaking the appeal, the court 'stands in the shoes of the Commissioner'.[190]

When courts blur the boundaries

The traditional demarcation between merits review by tribunals, and appeal before a court, has generally been maintained by the courts in the absence of clear legislative indications to the contrary. From time to time, however, courts approach the boundaries of, or might even be seen to dip their toes into, ponds where the threshold condition, or gateway, to exercising a statutory power and/or making a decision is an opinion, or a state of satisfaction, or a belief of the relevant Commissioner.

Blurring the boundaries at the federal level

An example, at a federal level, of a court approaching, or (on some views) crossing, the boundary, can be seen in the *Kolotex Hosiery* decision in 1975. After that, a series of cases concerning the tax residency of individual taxpayers can be seen as further illustrations of the phenomena, being the decisions in *FCT v Applegate*[191] (*Applegate*), the first instance Federal Court decision in *Addy v FCT*[192] (*Addy*) and the Full Federal Court decision in *Harding v FCT*[193] (*Harding*).

Like *Avon Downs*, the *Kolotex Hosiery* decision concerned the Commissioner's state of satisfaction concerning elements of the carried forward loss rules for companies in s 80A of the *Income Tax Assessment Act 1936* (Cth) which, so far as is relevant, denied a company's entitlements to deductions for carried forward losses unless the Commissioner was satisfied as to a degree of continuity of underlying ownership of the company seeking to claim the loss deduction. The Commissioner's satisfaction as to these matters was a threshold condition

188 *Taxation Administration Act 1996* (SA) s 92.
189 [2022] SASC 7.
190 Ibid [10].
191 (1979) 27 ALR 114.
192 [2019] FCA 1768 (Logan J).
193 *Harding v F C of T* [2019] FCAFC 29 (Logan, Davies and Steward JJ).

before an entitlement to a deduction arose. As Steward J explained in the Full Federal Court decision in *Addy*,[194] the decision in *Kolotex Hosiery* concerned the following:

> [The Commissioner must be] be satisfied that the same requisite persons beneficially owned shares in the taxpayer company both during the year in which the loss was incurred and the year in which the loss was to be used. In *Kolotex* [Hosiery], the Commissioner was not so satisfied. Gibbs J (as his Honour then was) and Stephen J decided that the Commissioner had erred in law in reaching that conclusion. However, their Honours did not remit the matter back to the Commissioner. Rather, based on alternative grounds raised for the first time before the Court by the Commissioner, it was decided, by reference to those grounds, that the Commissioner could not otherwise properly be satisfied about the necessary continuity of ownership. It followed that the Commissioner had been correct to disallow the taxpayer's deduction.

In *Kolotex Hosiery* itself, Gibbs J (as his Honour then was) explained the rationale for the Court determining the matter, rather than remitting it back to the Commissioner, in the following passages:

> If the Commissioner has in fact been satisfied he cannot subsequently refuse a deduction on the ground that he ought not to have been satisfied, unless in the circumstances he is entitled to amend the assessment under s 170 of the [*Income Tax Assessment] Act [1936* (Cth)]. By the same reasoning, however, it cannot be said that if the Commissioner has not in fact been satisfied but ought to have been satisfied he is bound to allow the deduction, although such a case may be one in which the court on appeal will hold that the Commissioner's conclusion should be reviewed. Unless it is sought to review the conclusion of the Commissioner that he is not satisfied, it is not enough to say that he ought to have been satisfied, or that he would have been satisfied if he had not fallen into error. The court on appeal cannot purge the Commissioner's reasoning of its errors and then attribute to him a satisfaction which in fact he lacked. …
>
> In the present case the Commissioner was not in fact satisfied of the matters stated in either s 80A or of those stated in s 80C [of the I*ncome Tax Assessment Act 1936* (Cth)] and the first contention made on behalf of *Kolotex* fails.
>
> The questions that then arise are whether the conclusion of the Commissioner is open to review and, if so, whether it should be held that he should reach the requisite satisfaction. The grounds on which the conclusion by the Commissioner that he is not satisfied may be examined by a court of appeal are those stated in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*; … However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court.
>
> There is no doubt that the decision of the Commissioner was affected by error. It is not contested that he was wrong in thinking that s 80D applied. … On the view that I take of the law and the facts, the Commissioner could not properly have been satisfied of the matters stated in ss 80A and 8OC, whether or not s 80B(5) was applicable ...[195]

194 [2020] FCAFC 135 [311].
195 (1975) 132 CLR 535, 567–8.

Similarly, Stephen J said:

> No doubt, attainment by the Commissioner of a state of satisfaction or his failure to attain that state of mind must, if it is to have any statutory significance, occur before notice of assessment issues to the taxpayer; I would regard as irrelevant to the correctness of the original assessment any state of mind existing after that time. But the present is, in any event, not such a case. Both before and after issue of the notice of assessment the Commissioner has remained unsatisfied. All that has happened is that he has discovered, as time has passed, what he regards as additional and alternative grounds for his failure to be satisfied and the significance of these new grounds is only this: before the court may review the Commissioner's failure to be satisfied it must detect some error of law affecting that conclusion or some other of the grounds for interference referred to by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*. Here such grounds exist, they are provided by the errors affecting the Commissioner's course of reasoning which led him to his conclusion. But having entered upon a review of the Commissioner's conclusion the court must form its own opinion of what should have been the Commissioner's conclusion and must do so unaffected not only by those errors which led the Commissioner to his original conclusion unfavourable to the taxpayer but also unaffected by any other errors or oversights, whether or not favourable to the taxpayer, which may have affected the Commissioner's original conclusion. The court will therefore necessarily have to consider any new grounds urged by the Commissioner as justifying the assessment, not because they may support the Commissioner's already vitiated state of dissatisfaction of mind, but rather because they may assist the court in determining whether either a contrary conclusion should be substituted for the Commissioner's original failure to be satisfied, founded as it was upon reviewable error, the appeal therefore being allowed, or whether, on the contrary, the assessment should stand unaffected and the appeal be dismissed because, once all errors and oversights are rectified, the case is not seen to be one in which the Commissioner should have been satisfied in terms of the Act.[196]

While the court involved itself in consideration of a matter that turned on the Commissioner reaching a state of satisfaction, and the decision can be seen as encouragement for the court to do so, arguably the decision of the court should not be construed as involving the court substituting its satisfaction for the Commissioner's, as the court did not disturb the Commissioner's decision.

The decisions in *Applegate*, *Addy* (at first instance) and *Harding* each concerned the Commissioner's state of satisfaction elements of the definition of 'resident of Australia' in s 6 of the *Income Tax Assessment Act 1936* (Cth) which, so far as is relevant, defines a resident of Australia in the following terms:[197]

> '**resident or resident of Australia**' means:
>
> (a) a person, other than a company, who resides in Australia and includes a person:
>
> (i) whose domicile is in Australia, *unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia*;
>
> (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, *unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia*; …

196 Ibid 567–8.
197 Emphasis added.

The policy underlying paragraphs [(a)(i)] and [(a)(ii)] of that definition is reasonably clear. The definition seeks to identify and distinguish two groups of people so that (subject to relief under any double taxation agreement with the country in which the person is resident) they can be taxed differently, being:

- one group of people, with a sufficient or significant connection with Australia, who will be treated as 'residents' and taxed on their worldwide income; and
- the other group of people, with a lesser connection or potentially no connection with Australia, who will be treated as 'non-residents' and taxed only on their income from Australian sources (for example, earnings for work done in Australia for Australian customers pursuant to contracts made in Australia and the revenue from sales of goods to Australian customers pursuant to contracts made in Australia).

The requirement to be in Australia for more than half the year (commonly referred to as the 183-day test), and the Australian domicile element of the residence test, are both rigid or bright-line tests. Without more, these tests might classify people in inappropriate ways. For example, someone might be trapped in Australia for more than 183 days for medical reasons without ever having intended to be here that long, and without ever having any intention to live here permanently or even indefinitely, and all the while maintaining a usual place of abode abroad. The policy of our system is not to ascribe 'resident' status to that person. The chosen mechanism to allow relief in this setting is the Commissioner's state of satisfaction carve out for those people who are here longer than 183 days in a year and who the Commissioner is satisfied have maintained their usual place of abode outside Australia and have no intention to take up residence in Australia. This carve out allows a degree of flexibility to accommodate particular circumstances and avoids the harshness of a bright-line distinction.

Harding[198] involved the permanent place of abode outside Australia aspect of the definition. Mr Harding was an Australian citizen who was living and working abroad but had not altered his Australian domicile. The Court's discussion focused on what was meant by the concept of a permanent place of abode outside of Australia, and whether Mr Harding had maintained such a permanent place of abode.

Justice Logan commented on the nature of the jurisdiction of the Federal Court conferred by the *Taxation Administration Act 1953* (Cth) to hear and determine appeals concerning taxation objection decisions. Paraphrasing a little, His Honour said:

> When this Court exercises the original jurisdiction conferred on it …. to hear and determine …[a taxation] 'appeal' …., it exercises a jurisdiction which, necessarily, is more extensive than determining on judicial review whether the objection decision is attended with jurisdictional error. The qualification, 'necessarily', flows from the basal constitutional proposition that a right of recourse to an exercise of the judicial power of the Commonwealth so as to contest whether the criteria giving rise to an alleged taxation liability are met is one feature which, at the Federal level, distinguishes a valid law with respect to taxation from an invalid arbitrary exaction:
>
> This feature, necessary for the constitutional validity of a law with respect to taxation is not expressly referred to in *Kolotex Hosiery* …[but] … this feature explains why, [once *Avon Downs* type error has been

198 [2019] FCAFC 29 (Logan, Davies and Steward JJ).

> established] Gibbs J …[concluded] 'it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court'. The court's so doing prevents arbitrary exaction by the Commissioner, who is an officer of the Executive. A like view of the role of the court on a taxation appeal in relation to a satisfaction based liability criterion is evident in the judgment of Stephen J in that case, at 576.[199]

The practical effect of his Honour's approach is that, if the court has power to determine whether the Commissioner ought to have been satisfied, the outcome that follows can be seen to be the court stepping into the shoes of the Commissioner and crafting a conclusion that would flow if the Commissioner had in fact been satisfied. This is very close to, if not the same as, the court assuming a role of being satisfied and crafting an outcome on the basis of that satisfaction.

Justices Davies and Steward took a different approach, with some significance. Again paraphrasing a little, they said:

> Here, in our view, the Commissioner's satisfaction about a taxpayer's place of abode is not just a procedural step but forms part of the criteria for determining residence in subpara (i), which comprises two parts. The first part requires a determination of the domicile of the taxpayer. The second part is an exception or 'carve out' from domicile constituting 'residency'. The carve out is where the 'Commissioner is satisfied' that the taxpayer has a 'permanent place of abode outside Australia'. Unlike the issues of where a person 'resides', where a person is domiciled, and where a person has 'actually been' (subpara (ii) of the definition), the exception in subpara (i) expressly and specifically depends on the state of mind of the Commissioner. It does so, not so as to create an administrative or procedural step to be fulfilled, but to reserve to the Commissioner a function which forms part of the criteria for residence. That function is his sufficient satisfaction about the permanent place of abode of the taxpayer which is the 'fact' that enlivens the exception. For reasons set out below, the statutory history also supports this construction. It follows that the question for the Court below was not whether Mr Harding had in 2011 a permanent place of abode outside of Australia; rather it was whether the Commissioner erred in law in not being satisfied that he did have such a permanent place of abode.
>
> Before us, however, the parties reached an agreement that because the case had proceeded below on a different assumed footing, it should continue on that basis. The Court was content to hear the appeal in that way. As it happens, something similar occurred in …[the *Applegate* decision] …..
>
> Whilst the Court was prepared to accede to the wishes of the parties in this case, that does not detract from our view that the criterion in subpara (i) turns upon the Commissioner's, and not the Court's, state of satisfaction. It also means that the consequences of what was said by [justices] Gibbs and Stephen J … in *Kolotex Hosiery* … concerning the function of the Court in considering whether there was legal error in the formation of the Commissioner's state of satisfaction, need not be addressed.[200]

The agreement to proceed on the basis noted obviated the need for the court to focus on whether the case was a circumstance where the court could finally determine the matter in the event of concluding that there was jurisdictional error, or whether the matter needed to be referred back to the Commissioner. It is open to conclude that the court approached the agreement of the parties as having the effect that the Commissioner would accept that he had the relevant state of satisfaction if the court concluded that, on an approach that did not entail jurisdictional error, he should have been so satisfied.

199 Ibid [3]–[4].
200 Ibid [20]–[22].

The first instance decision in *Addy*,[201] can also be seen to have been at the edge of the court intruding into matters concerning the Commissioner of Taxation's opinion or state of satisfaction. This decision concerned the permanent place of abode aspect of the 183 days in Australia (that is, para [(a)(ii)]) limb of the definition of a resident of Australia. A visitor to Australia who is in the country for 183 or more days in a year is presumed to be a resident of Australia 'unless the Commissioner is satisfied that the person's usual place of abode is outside of Australia', and they have no intention to establish a place of residence here. Ms Addy had been in Australia for more than 183 days. The focus of the Court's discussion was whether Ms Addy had a usual place of abode outside of Australia and did not intend to take up residence here.

When the dispute came before Logan J in the Federal Court, the Commissioner contended that he had not had the opportunity to consider the 183-day test and whether or not to be satisfied that Ms Addy's usual place of abode was not in Australia.[202] That submission was not accepted by Logan J.[203] His Honour observed that the Commissioner had originally deemed Ms Addy to be a non-resident, which suggested that the Commissioner must necessarily have been satisfied that Ms Addy's usual place of abode was outside of Australia and that she did not intend to take up residence in Australia.[204] Further, given that the Commissioner had issued amended assessments which classified Ms Addy as a resident of Australia, his Honour considered that the Commissioner must have re-visited his earlier state of satisfaction.[205] Interestingly, his Honour observed:[206]

> As to paragraph (a)(ii) of the definition in s 6(1) of the 1936 [Assessment] Act, for reasons already given, the Commissioner must or must be taken to have reached and then revisited a conclusion as to the application of that paragraph, including by reference to its satisfaction based 'carve out': Harding, at [20]. It is not necessary in this case to reach any concluded view as to the extent of the Court's jurisdiction on a taxation appeal in relation to satisfaction based provisions affecting a taxation liability, as it was not in *Harding*, although the subject was adverted to in both my and the joint judgement in that case. It is sufficient if one assumes, given that each of the assessments was made prior to the Full Court's judgement in *Harding*, that it is inferentially likely that the Commissioner acted on his hitherto erroneous conception of what constituted a 'place of abode' and that it is open to the Court to reach its own conclusion.
>
> On this basis and on the whole of the evidence in this proceeding, the Commissioner should have been satisfied that, during the 2017 income year, Ms Addy's 'usual place of abode' was in Australia and that she did intend to take up residence here. For reasons already given above, not only had Australia and more particularly the Earlwood house become her usual place of abode during that income year but also that is where she intended to take up residence.
>
> The foundation for the Court to reach such a conclusion, which appears to involve the Court standing in the shoes of the Commissioner, is not expressed in the decision.[207]

201 [2019] FCA 1768 (Logan J).
202 [2019] FCA 1768 [22].
203 Ibid [26].
204 Ibid [29].
205 Ibid.
206 Ibid [61]–[62].
207 In his appeal decision reasons, Derrington J (at [2020] FCAFC 135 [132]) observed that this conclusion 'was … apparently founded upon his Honour's view of the decision in [*Kolotex Hosiery*] …, albeit that decision was not referenced in his Honour's reasons'.

On appeal,[208] the Full Court in *Addy* essentially proceeded on the basis that the Commissioner had not formed the requisite state of satisfaction in making the amended assessment and, as a consequence, the exception to the 183-day rule for residence in Australia was not applicable. Accordingly, the effect was that Ms Addy was a resident because what remained of the (a)(ii) part of the definition of a resident of Australia was self-executing.

Justice Davies concluded that Logan J was mistaken in concluding that the Commissioner must necessarily have addressed the relevant question and not been satisfied that Ms Addy's usual place of abode was outside Australia because the evidence showed that the Commissioner had not in fact turned his mind to that question.[209] Her Honour disposed of this aspect of the case on the basis that Ms Addy had been in Australia for 183 days, and in the absence of the Commissioner forming the requisite state of satisfaction, she satisfied the test of being a resident of Australia. Davies J considered it perfectly permissible for an absence of the Commissioner's satisfaction to be the product of him not turning his mind to the question.[210]

Justice Derrington reached a similar conclusion. Relevantly, His Honour canvassed the circumstances where a court could substitute its own state of satisfaction for those of the Commissioner[211] and generally observed that, on *Avon Downs* principles, a state of satisfaction might be vitiated, but even if the court could vitiate the Commissioner's state of satisfaction, it was not open to it to substitute an opinion for that of the Commissioner.[212]

His Honour also rejected propositions to the effect that the powers of the court, to make orders as are just and to allow remedies to which the parties appear to be entitled (created by s 22 of the *Federal Court of Australia Act 1976* (Cth) in conjunction with the terms of the *Taxation Administration Act 1953* (Cth)), extend to allow the court to substitute its opinions or states of satisfaction for those of the Commissioner.[213]

Justice Steward concluded that the better view of the evidence was that the Commissioner never turned his mind as to whether he should or should not be satisfied as to matters in the residency test,[214] but concluded that the change in the basis of assessment — that is, accepting that Ms Addy was a resident of Australia — led to the proper conclusion that the Commissioner had changed his mind when he subsequently decided that she was a resident, because there was plain evidence that he had at least made that decision.[215]

208 *Commissioner of Taxation v Addy* [2020] FCAFC 135 (Davies, Derrington & Steward JJ).
209 Ibid [23].
210 Ibid [24] and [25].
211 Ibid [134] and following.
212 Ibid [142].
213 Ibid [182], [183] and [186].
214 Ibid [281].
215 Ibid [284].

His Honour concluded that:

- the role of the court was limited to determining whether the Commissioner had lawfully obtained a state of satisfaction, and that is a limited style of review in the *Avon Downs* sense,[216] and later concluded that the role of the court in relation to the residency test was not to substitute its own opinion for the Commissioner's state of satisfaction. That was the Commissioner's function, and not a function for the court to determine on the merits;[217] and
- if the Commissioner has not formed the relevant state of satisfaction, then the self-executing aspects of the residency definition operated in accordance with their terms and, as such, someone who has been in Australia for more than 183 days is a resident of Australia.[218]

His Honour's remarks concerning the impact of the *Kolotex Hosiery* decision bear reproduction in full:

> The taxpayer relied upon [*Kolotex Hosiery*] as authority for the proposition that in a Pt IVC tax appeal a Court, once satisfied of the presence of error in the attainment by the Commissioner of his state of satisfaction, can decide for itself whether or not the Commissioner should on the evidence before the Court be so satisfied. With respect, I do not accept the correctness of that submission for the following two reasons:
>
> (a) First, the form of the relief ordered by Gibbs and Stephen JJ was the product of what the parties wanted the Court to do. …
>
> As such, *Kolotex* [Hosiery] should not be taken as a binding authority for the proposition put forward by the taxpayer. As McHugh J said in the High Court decision of *Coleman v Power* (2004) 220 CLR 1 at 44–45 [79]:
>
> The only power with which this Court is invested is judicial power together with such power as is necessary or incidental to the exercise of judicial power in a particular case. The essence of judicial power is the determination of disputes between parties. If parties do not wish to dispute a particular issue, that is their business. This Court has no business in determining issues upon which the parties agree. It is no answer to that proposition to say that this Court has a duty to lay down the law for Australia. Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue. If the conceded issue is a necessary element of the decision, it creates an issue estoppel that forever binds the parties. But that is all. The case can have no wider ratio decidendi than what was in issue in the case. Its precedent effect is limited to the issues.
>
> (Emphasis added.)
>
> (b) Secondly, and in any event, it should be accepted that Gibbs and Stephen JJ did not remit the matter for reconsideration because in *Kolotex* [Hosiery], as a matter of law, only one conclusion was open to the Commissioner to reach with respect to the beneficial ownership of the taxpayer. This was

216 Ibid [294].
217 Ibid [306].
218 Ibid [314].

explained by Davies J (Senior) in *Ferris v Commissioner of Taxation* (1988) 20 FCR 202, where his Honour rejected a submission that the Court should re-exercise the Commissioner's power under s 109 of the 1936 [Assessment] Act to treat certain payments made to shareholders or directors by a private company as a dividend. Davies J said at 212:

In an appeal of this nature where what is in issue is the exercise of a discretion by the Commissioner, the Court's function is limited to determining whether there was an error such that, in judicial review proceedings before it, this Court would make an order of review with respect to the challenged decision. That issue is to be determined by reference to the material which was or ought to have been taken into account by the Commissioner when the challenged decision was made: see *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 and *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (1975) 132 CLR 535.

(c) Davies J rejected a submission that the Court should set aside the assessment the subject of appeal based on additional evidence adduced by the taxpayer. His Honour said at 216:

Mr Staff submitted that the Court should set aside the assessment without remitting the matter for reconsideration and that on the evidence before the Court it should do so. Mr Staff referred to *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (supra) and *Henry Comber Pty Ltd v Commissioner of Taxation (Cth)* (supra). However, the Court would so act only if it were satisfied that the result contended for was the only one to which a decision maker, properly instructed and not acting unreasonably, could come. It is not for the Court itself to exercise the discretion which is conferred upon the Commissioner. The function of the Court is a function in the nature of judicial review. Unless the Court is satisfied that there is no room for the exercise of the subject discretion, the Court must remit the matter for reconsideration.

I very respectfully agree with and gratefully adopt what Davies J said in *Ferris*.

(d) This is not a case where it can be said that only one conclusion was legally open to the Commissioner in relation to the issue of both the taxpayer's usual place of abode and her intention to take up residence. Whilst the primary judge found that the taxpayer intended to reside in Sydney for more than 12 months, it was also the taxpayer's intention to return to England to study acting. In such circumstances, I do not think that there was only one conclusion that could be legally reached about the taxpayer's intention about residency. Notwithstanding that finding, for my part my strong impression is that the taxpayer's usual place of abode in the 2017 year of income remained Bexleyheath in Kent and that she also had no intention of taking up residence in Australia. The taxpayer was in Australia temporarily on an extended holiday. She only worked to support her holiday. She had no right to stay in Australia permanently. In that respect, I refer to the following observation made by the majority in *Harding* concerning the 183 day test (called the 'third test' in the following) at 329 [39]:

In contrast to the second test, what is described in the Notes as the third test in subpara (ii) is, initially, concerned with a person who is physically present in Australia for most of a given year of income. The exception to it probably applies to a person who is physically present in Australia for the required number of days but who would not be considered to be an Australian because he or she is only a temporary visitor of this country for a period of time. That period might even extend to a term of years.

(e) However, my personal views are not what matter. The authority to determine whether the taxpayer's usual place of abode in the 2017 year of income was in England and to ascertain whether she intended to take up residence in Australia, lay with the Commissioner.

(f) Finally, the taxpayer cited in her written submissions [a number of] authorities in support of the proposition that, based on *Kolotex* [Hosiery], a Court may exercise powers and discretions reposed in the hands of the Commissioner:

….

(g) These cases, in my view, do not clearly support the taxpayer's proposition. Some of them address another issue, namely the relevance of fresh material or evidence in the ascertainment of an error of law. To the extent that some authorities, such as *Russell [v Commissioner of Taxation (Cth)* [2009] FCA 1224] at first instance, may, on one view, appear to favour the broader contention of the taxpayer here, with profound respect I prefer the expression of the law by Davies J in *Ferris*: cf *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 per Gaudron J.[219]

The decision of the Full Federal Court in *Addy* was ultimately overturned by the High Court.[220] However, that was based on a different ground (namely, the operation of the Convention between Australia and United Kingdom for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains).

In a matter where the Commissioner has reached a state of satisfaction and it is necessary to overturn it, any optimism that might be gained from the *Harding* or *Addy* first instance decisions, that a court can substitute its own decision, is illusory. These types of matters need to be pursued in the AAT. This is because the *Avon Downs* principles only go so far: while courts can correct jurisdictional error, it is brave to assume that those principles allow correction by the court itself of non-jurisdictional errors.

Blurring the boundaries at a state level

There are also examples of courts blurring the boundaries at a state level, such as in:

- *Drake Personnel Ltd v Commissioner of State Revenue (Vic)*[221] (*Drake*), where Phillips JA observed that 'the parties have proceeded alike upon the footing that the Court now stands in the shoes of the Commissioner for the purposes of [a provision of the *Payroll Tax Act 1971* (Vic) dependent on the Commissioner's state of satisfaction] and I proceed accordingly'.[222]
- *LIV v Commissioner of State Revenue*[223] (*LIV*), where Digby J suggested that the *Taxation Administration Act 1997* (Vic) did 'not require identification of reviewable error' in relation to provisions of the *Payroll Tax Act 2007* (Vic) depending on the Commissioner's state of satisfaction.[224]

The decision in *Drake* is somewhat equivalent to the decision of Davies and Steward JJ in *Harding* and, as Croft J observed in *Nationwide Towing*, does 'not provide good reason for not following the reasoning of Pagone J in *Conte*'.[225]

219 Ibid [314] (Davies J agreed with these observations: Ibid [26]).
220 *Addy v Commissioner of Taxation* [2021] HCA 34.
221 [2000] VSCA 122; (2000) 2 VR 63.
222 Ibid [21].
223 [2015] VSC 604.
224 Ibid [67].
225 [2018] VSC 262 [58].

Likewise, Croft J observed that, in the *LIV* decision, Digby J 'stressed [his view as to the need to find error] was unnecessary to the decision' and, in any event, concluded that the reasoning in *Conte* was to be preferred.[226]

As such, for similar reasons to those discussed in the federal context above, any hint in those cases that the Supreme Court might be willing in some cases to engage in something akin to merits review must be discounted.

Should the choice of setting for contesting tax assessments be maintained?

In an article published in 2012, Professor Creyke criticised the 'creeping legalism'[227] and the 'judicialised model of tribunal which had eventuated' since the administrative law reforms introduced following the Kerr Committee report; suggesting that tribunals 'need to take up the invitation posed by the High Court in 201[228] to 'identify and to publicise their distinctive nature'.[229]

Arguably, this is even more important where — as is the case for contesting taxation decisions at a federal level and in many states — applicants are given a choice as to setting (and more so in New South Wales where the traditional demarcation in the respective roles of the court and tribunal has been abolished).

In the authors' view, it is appropriate to assess the success or otherwise of tribunals that deal with reviews of tax assessments against the expectations set by the Royal Commission (and notwithstanding the initial setback with respect to the Board of Appeal). In this regard, the Royal Commission envisaged that a tribunal undertaking review of a tax assessment would:

- be able to reconsider the facts, and deal with matters the subject of the relevant commissioner's discretionary powers (that is, engage in merits review);
- not be 'hampered' by technical rules of evidence and procedures;
- be cheaper, more direct and speedy in its methods; and
- ultimately, 'give greater satisfaction to the taxpayers'.

Nature of review

Federally, and in Victoria and Queensland, it can be seen that taxpayers are given a real choice — *not without consequences* — to contest a tax proceeding by way of (merits) review by a tribunal, or appeal (more in the nature of judicial review, at least where a discretion, opinion or state of satisfaction is involved) to the applicable superior court.

226 Ibid [59].
227 Quoting the Hon Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2009).
228 *Minister for Immigrations & Citizenship v SZGUR* [2011] HCA 1.
229 R Creyke, 'Tribunals — "Carving Out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19.

Notwithstanding the occasional blurring,[230] or misconception,[231] it is apparent that lawyers have come to appreciate those differences and recommend an appropriate pathway to their clients depending on the nature of the assessment in question.

Of course, consistent with the views expressed by Bowskill J in *Wakefield*, where the matter involves the application of law to objective conclusions of fact, and the stakes are high enough, it is not surprising that an appeal to a court may be preferred.

However, revenue legislation is replete with express discretions,[232] and the application of such legislation is often dependent on the relevant commissioner's state of satisfaction or opinion as to certain matters, or provides the relevant commissioner with a discretion to ameliorate the effect of a strict application of the law.[233] In these cases, the decision in *Avon Downs* illustrates why the tribunal pathway is likely to be preferred to an appeal to a court, given the ability of the tribunal to 'step into the shoes' of the relevant commissioner and re-exercise any discretions, or form its own views as to relevant considerations. This may be so even if the sums involved are significant.

Of course, this difference will not strictly apply where the roles of the courts and tribunals are aligned, as in New South Wales. Similarly, the relevance of the distinction may be diminished in circumstances where courts have shown themselves willing to blur the boundaries by the manner in which they dispose of an appeal (such as in *Harding* and the first instance decision in *Addy*).

Nevertheless, even in those case, it is debatable whether courts are the most appropriate body to review administrative decisions on the merits. Certainly, the Kerr Committee did not think so. By contrast, making the 'correct or preferable decision' has been the *raison d'etre* of general administrative tribunals since they were first introduced.[234] As such, tribunals may well retain a competitive advantage in this regard.

Evidentiary considerations

Generally, tribunals are not bound by the rules of evidence.[235] Also, they may consider new evidence or material not before the relevant revenue commissioner.[236] (The additional hurdle for the admission of new evidence in Queensland revenue proceedings sits as an exception.)

By contrast, the rules of evidence strictly apply in any court proceeding and, as indicated in *Conte*, the court may be largely limited to considering the evidence that was before the

230 As in *Harding*, as well as *Addy* at first instance.
231 As appears to have been the case initially in *Vicinity Funds*.
232 For example, see *Payroll Tax Act 2007* (Vic) ss 8, 23(4), 79(1), 85 and *Land Tax Act 2005* (Vic) ss 16(3), 16A(1), 55(1), 55A(1), 55A(2) and 55A(2A) (based on the phrase the Commissioner 'may determine'). In the *Income Tax Assessment Act 1936* (Cth), that phrase is used 11 times.
233 For example, *Duties Act 2000* (Vic) s 22(3) (based on the phrase 'Commissioner is satisfied', which is used 65 times in that Act). In the *Income Tax Assessment Act 1936* (Cth), that phrase is used 34 times.
234 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.
235 See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b), *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c) and *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2) (except in exercise of its enforcement jurisdiction or civil penalty proceedings).
236 *Shi Migration Agents Registration Authority* (2008) 235 CLR 286.

relevant commissioner (again, noting the unusual position in Queensland). Indeed, the strict rules of evidence may apply even where, as in New South Wales, a court is engaging in *de novo* review.[237]

Given there is a 'reverse' onus of proof in taxation proceedings — that is, a taxpayer bears the burden of establishing that a different assessment should be made[238] — the evidentiary considerations will often favour bringing the contest of an assessment in a tribunal where there is more latitude for the presiding member to take account of material, even if it is not produced in admissible form.

Cost

In her article, Professor Creyke accepted that tribunals 'are cheaper than courts',[239] but in answer to the question of whether they are 'cost-effective', the answer was more ambiguous (that is, 'it depends').

Unsurprisingly, given the complex nature of much tax legislation, the relevant taxation authority may be entitled to[240] and (in any event) will often seek to be represented by counsel in any proceedings where a tax assessment is being contested.

While taxpayers can (and often do) represent themselves, if they are unrepresented, there may be a serious 'inequality of arms'.[241] To a limited extent, this may be ameliorated in the federal sphere, where there are novel issues in play and 'test case' funding[242] is made available by the Commissioner of Taxation, or in a situation where pro bono representation is available.[243] Of course, in the vast majority of the cases, no such assistance is available and it will be left to individual tribunal members to seek to level the playing field for an unrepresented applicant, to the extent possible (and without becoming or being perceived to have become an advocate for either party).

In those jurisdictions where no costs can be awarded in tax proceedings,[244] this at least reduces the risks for a taxpayer who (unsuccessfully) contests a tax assessment. Even where this is not the case, the award of costs is generally discretionary,[245] rather than automatically following the event as they usually do in the courts.[246]

237 See, for example, *Young v Chief Commissioner of State Revenue* [2020] NSWSC 330 [10]–[11].

238 At a federal level, see *Taxation Administration Act 1953* (Cth) ss 1477 and 14ZZK. For example, at a state level, see *Taxation Administration Act 1997* (Vic) s 110.

239 Creyke (n 229) 29.

240 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62(2).

241 Victorian Law Reform Commission, *'Civil Justice Review: Report'* [2008] VLRC 14, 101. A similar issue has been recognised in New Zealand: Law Commission, *'Tribunal in New Zealand'* [2008] NZLCIP 6 [6.37].

242 Australian Taxation Office, 'Test Case Litigation Program': Available at <https://www.ato.gov.au/tax-professionals/tp/test-case-litigation-program/>.

243 For example, under the Victorian Bar pro bono scheme administered by JusticeConnect: see <https://www.vicbar.com.au/public/community/pro-bono-scheme?>.

244 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, cl 91(1).

245 See, for example, *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

246 In Victoria, the costs of an appeal of a tax assessment to the Supreme Court are 'in the discretion of the Court': *Taxation Administration Act 1997* (Vic) s 112(2). However, costs are often awarded (at least when the taxpayer is successful): see, for example, *Razzy Australia Pty Ltd v Commissioner of State Revenue* [2021] VSC 409.

Of course, if the costs of a successful contest are not recoverable from the relevant commissioner, this may diminish the benefit of the contest if legal representation is required.

Efficiency

In her 2012 article, Professor Creyke observes that tribunals 'have generally been quicker than courts to embrace [ADR or alternative dispute resolution] processes', although the 'significance of this move has not been publicised sufficiently'.[247] She goes on to describe such pre-hearing arrangements as 'the engine rooms of [tribunal] processes for settling disputes'.[248]

ADR is successfully used for tax matters in the AAT, with the vast majority of applications resolved before final hearing.

Compulsory conferences are not available in Victorian state tax proceedings, except with the consent of the Commissioner of State Revenue,[249] which is rare (and, while it may be possible for the tribunal to require mediation,[250] this appears to be rarer still). However, noting that somewhere between 66 per cent and 80 per cent of state tax matters initiated in the Tribunal in 2020/2021 and 2021/2022 and 79.4 per cent of the number of Commonwealth tax cases initiated in the Taxation and Commercial and Small Business Taxation Divisions of the AAT over that period were resolved without a final hearing, it can be inferred that the initiation of a referral to VCAT and the AAT is still an effective mechanism to bring about an efficient resolution of such disputes. This is likely to be the case because, in preparing for a hearing, the parties have an opportunity to exchange evidence and their respective positions, which facilitates them reaching a mutually agreed outcome.

Of course, where ADR processes are not available, or fail to resolve proceedings, then the contest will need to progress to a hearing.

While somewhat impacted by the effects of the pandemic, it is usually the case that a proceeding will progress more quickly in a tribunal than a court. An analysis of Victorian state tax cases decided between 1 July 2020 to 30 June 2022 reveals that the median time for resolution of a dispute before the Supreme Court of Victoria was 83 weeks, whereas the median time for resolution of a review at VCAT was 61 weeks (that is, around half a year less).

Efficiency may be particularly important in tax matters, as the revenue authority will not necessarily be prohibited from enforcing payment pending any review or appeal[251] and, even where the revenue authority does not press payment of the full amount in dispute, the exposure to interest in the event of any delay may be significant (because the rate of interest is set at a market rate).[252]

247 Creyke (n 229) 25.
248 Ibid 26.
249 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, cl 90.
250 Ibid s 88.
251 See, for example, *Taxation Administration Act 1953* (Cth) s 14ZZM and *Taxation Administration Act 1997* (Vic) s 108 (if the Commissioner of State Revenue requires payment of some or all of the tax in dispute, he can apply for an order to this effect from the Supreme Court of Victoria).
252 See, for example, *Taxation Administration Act 1997* (Vic) s 25(1) and *Taxation Administration Act 1953* (Cth) s 8AAD(1).

Satisfaction of taxpayers

While it is not suggested that tribunals are perfect, the authors consider that the 'philosophy of their existence',[253] at least in the tax field, was clearly established by the Royal Commission in 1921 and, by and large, they still fulfil the role for which they were established.

Unfortunately, no direct data is available on whether taxpayers are satisfied with the outcome of review proceedings in the AAT or VCAT or, more to the point, whether their level of satisfaction is greater or lesser than would have been the case if they proceeded by way of appeal to a Court.

However, it is relevant to observe:

- A customer survey conducted by VCAT in 2018 indicated strong 'overall customer satisfaction', that parties were satisfied as to the 'fairness of way in which [their] case was handled' and felt that they received 'equal treatment in hearings' and that the 'member listened to [the] parties before making a decision'.[254] Similarly, the AAT has rated well for 'fairness'.[255]
- As can be seen from the following table (for the 2020/21 financial year), appeal rates of tribunal decisions are relatively low, and the success rate of such appeals even smaller:

Tribunal	Cases finalised	Appeals	Appeal upheld
AAT (Taxation and Commercial)	897	19 (2.1%)	6 (0.7%)
VCAT (All)[256]	34,132	76 (0.2%)	3 (0.0%)

- There are a much smaller number of tax cases decided by the Federal Court (in the case of Commonwealth taxes) or Supreme Court of Victoria (in the case of Victorian taxes). An analysis of published decisions indicates there were only four appeals of Victorian state tax matters which were, at the request of a taxpayer, set down before the Supreme Court and finalised between July 2020 and June 2022, compared with 17 reviews finalised by VCAT over the same period (that is, around four times as many reviews as appeals were initiated and concluded over that period).

Taken collectively, it can be inferred — albeit tentatively — that taxpayers still appreciate the option to pursue review of tax assessments by a tribunal, consistent with the 'unanimity' of views that led to the implementation of the additional pathway in 1921.

253 Creyke (n 229) (referencing J McMillan, 'Merit Review and the AAT A Concept Develops' in J McMillan (ed), *The AAT — Twenty Years Forward* (Canberra, 1998), 33.

254 86% overall customer satisfaction for 2018: VCAT, 'Customer Surveys', available at: <https://www.vcat.vic.gov.au/about-vcat/feedback-and-complaints/customer-surveys>.

255 The AAT also conducts a survey of fairness, which recorded ratings of 76% from parties: AAT, *Annual Report 2020–21*, 34.

256 While these figures include civil cases in high volume lists, the number of appeals of state tax decisions is too small to be statistically significant.

Objective decision-making and good government in merits review tribunals

*Bernard McCabe**

The government has recently announced its intention to replace the Administrative Appeals Tribunal (AAT). It is therefore timely to reflect on the need for a general merits review tribunal in Australia's system of administrative law. While the place of such a tribunal in those arrangements is generally accepted, it is helpful to appreciate its role and the value it brings if the reforms are to realise its promise to the Australian community.

There is much to learn from nearly five decades of experience with the AAT. Most of the learning reinforces the immense value of such a body. There are also cautionary tales. I will not attempt exhaustively to catalogue those lessons in this article. I venture the more serious shortcomings of the AAT are ultimately the product of an identity crisis — a sense of ontological confusion that is summed up in the expression 'quasi-judicial'. That expression refers to the fact the AAT is not a court established under Ch III of the *Constitution* even as it exhibits many of the features and some of the ethos of a court.[1]

An expression like 'quasi-judicial' risks confusing more-or-less court-like processes or means and an obligation to 'act judicially' with ends.[2] Other expressions, like 'independent', 'impartial', 'dispute resolution mechanism'[3] or even 'executive decision-maker' are incomplete explanations of the role and value of a general merits review tribunal. When shorn of context, all the descriptions are potentially misleading.

It is not enough to discuss the constitutional limits that delineate the work of tribunal members from that of judges, or to describe in practical terms what tribunal members do and the way in which they go about their work. The reform process — and the process for selecting the membership of the AAT's successor — should be informed by a richer understanding of the essence of the tribunal member's role and the culture which must be established to support members in achieving their mission. That requires us to go back to first principles.

The AAT has been described as an instrument of 'good government.[4] The expression 'good government' (or 'sound public administration') is uncontroversial, but the concept may be

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1 As Foster J explained in *Eldridge v Commissioner of Taxation* [1990] FCA 369, [41], '[the Tribunal's] functions partake far more of the Court than the office desk'. For a useful reflection on the differences between court and tribunal proceedings, see R Creyke, 'Tribunals — Carving out the Philosophy of Their Existence: The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19.

2 In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; (1979) WL 182733, 7 (*Drake*), Bowen CJ and Deane J referred to 'a superficial trapping of curial decision making' and cautioned: 'The trappings of judicial decision making are not however necessarily indicative of the existence of judicial, as opposed to administrative, power. Bowen CJ and Deane J then observed (at 8): 'Many tribunals whose functions are purely administrative are under an obligation to act judicially, that is to say, with judicial detachment and fairness'. The point was repeated at 11.

3 Downes J and Dr Schaffer explained in *Ego Pharmaceuticals Pty Ltd and Minister for Health and Ageing* [2012] AATA 113, [36], the AAT is not strictly speaking a dispute resolution mechanism at all: it is an executive decision-maker, albeit that its decision-making process is activated as a consequence of disputation.

4 *Sullivan v Department of Transport* (1978) 1 ALD 383, 384 (Smithers J); see also *Drake*, 80 (Smithers J); also *Minister for Immigration and Ethic Affairs* (1979) 2 ALD 634, 638 *(Drake No 2)* (Brennan J).

taken for granted — perhaps because Australians expect and enjoy relatively high standards in government. This paper begins by briefly revisiting some of the seminal discussions of the AAT in search of a coherent understanding of 'good government'. I then turn to the distinct contribution of a general merits review tribunal to the realisation of that vision. That requires consideration of a range of desirable institutional features. It also inevitably involves consideration of the key attributes of a tribunal member.

I argue the key attributes of a tribunal member are best summed up in the word 'objective'. While tribunal members need a range of personal qualities and skills (including, in particular, advocacy skills) and go about their job in well-understood ways, that is all in service of being — insofar as possible — a genuinely *objective* decision-maker who gives faithful and intelligent effect to the letter of the law and — where questions of discretion and public interest arise — the spirit of the law *and* the values and conventions embedded in our wider administrative law system.

Concepts of good government and sound public administration

Downes J (sitting with Deputy President Hack) reflected on the nature of discretionary administrative decision-making in *Rent-to-Own (Aust) Pty Ltd and Australian Securities and Investments Commission*[5] (*Rent-to-Own*). After acknowledging many tribunal decisions did not involve the exercise of discretion, Downes J and DP Hack focused on the correct approach in cases where the AAT was tasked with arriving at the preferable decision. The Tribunal noted surprisingly little had been written about how a tribunal decision-maker should go about that task.[6] The Tribunal then attempted to illuminate the differences between courts and tribunals. It observed:

> [The AAT] arrives at its decisions in a manner familiar in courts, but that is not to say that the matters guiding the decision-making process are the same as those guiding courts. Of course, the Tribunal must correctly determine what the law is and apply it correctly. However, outside this role, the nature and functions of the Tribunal are quite different to the usual functions of a court.[7]

Warming to the task, the Tribunal observed:

> The Tribunal, in its determinations, *must be informed by matters of good administration*. It needs to be conscious that it is, for example, fulfilling for this case, the role of regulator in connection with the licensing of credit providers. The appropriate level of protection of the public is, of course, vital to this activity.[8]

The reference to 'matters of good administration' has an excellent pedigree. In the Full Court's seminal judgment in *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd*, Smithers J said:

> It is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles applicable to judicial review. In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.[9]

5 [2011] AATA 689.
6 Ibid [32]–[33], [48].
7 Ibid [40].
8 Ibid [41] (emphasis added).
9 [1979] FCA 21; (1979) 41 FLR 338, [56].

His Honour explained:

> It is clear that in enacting the [*Administrative Appeals Tribunal Act 1975*], Parliament had in mind to provide for the review by an independent Tribunal of certain administrative decisions by reference to standards of good government …[10]

Smithers J made essentially the same point in *Drake*,[11] when he said the newly-established AAT was conceived as a tool of 'good government'.[12] That is not a description — or a motivating principle — that is applied to the courts precisely because they are *not* 'an instrument of government administration'.[13] Downes J and DP Hack explained in *Rent-to-Own* why the concept might be useful in administrative (including tribunal) decision-making:

> It is important to remember the difference between court adjudication and administrative decision-making. Judges are not often called on to make decisions which require an evaluation of the consequence of a decision in terms of public interest. Their focus is more on questions of lawfulness of conduct. The power of administrative decision-makers, both within government and on review, is often a significant power. In terms it can exceed the powers of courts. The extent of the power implies that it must be exercised with care. Administrative decision-makers at all levels frequently make decisions which affect the operations of government where individuals are affected. Very often the only clearly applicable measure or touchstone is the public interest. …[14]

The Tribunal proceeded to discuss ways in which tribunal members might identify and accommodate the public interest. I will return to that discussion in due course. For now, it is enough to note the way Downes J and DP Hack regarded 'matters of good administration' as a kind of *leit motif* of the AAT that was derived from a profound appreciation of the AAT's unique role compared to courts. It is worth exploring some of the foundational writings in relation to the AAT to enlarge on that discussion.

10 Ibid [55].

11 (1979) 24 ALR 577.

12 Ibid 602; see also *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; (1979) 24 ALR 307, [55] 335 (Smithers J).

13 *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286, [140] (*Shi*) (Kiefel J).

14 [2011] AATA 689, [49]. The point the Tribunal was making about the distinction between curial and administrative decision-making was made (in a slightly different way) by Brennan J in *Drake No 2* where his Honour explained at 643:

> The Tribunal is rightly required to reach its decisions with the same robust independence as that exhibited by the courts, but there is a material difference between the nature of a decision of the Tribunal reviewing the exercise of a discretionary administrative power, and the nature of a curial decision. The judgment of a court turns upon the application of the relevant law to the facts as found; a decision of the Tribunal, reviewing a discretionary decision of an administrative character, takes into account the possible application of an administrative policy.
>
> The policy which guides the exercise of a discretionary administrative power may rightly seek to achieve an objective of public significance, and a balance may have to be struck between the achieving of that objective and the interests of an individual. In this respect, the making of a discretionary administrative decision is to be distinguished from the making of a curial decision. Generally speaking, a discretionary administrative decision creates a right in or imposes a liability on an individual; a curial decision declares and enforces a right or liability antecedently created or imposed. The distinction is too simply stated, but it suffices to show that the adjudication of rights and liabilities by reference to governing principles of law is a different function from the function of deciding what those rights or liabilities should be …

Discussions of the AAT and the concept of merits review conventionally begin with a reference to the report of the Kerr Committee.[15] The committee's report was published in 1971. It recognised there were gaps in the remedies available to Australians wishing to challenge government decisions. That was a serious problem given the executive government was expanding to intrude into more aspects of life and business. In those circumstances, the report explained:

> … it has been universally accepted that judicial review by the courts standing alone, by the prerogative writs, declaration or injunction under the existing law, cannot provide an adequate review for administrative decisions.[16]

The report concluded there was need for an additional mechanism of review that was more accessible and which was able to provide more effective redress that was equal to the powers being exercised. It explained:

> … at a time when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision.[17]

Thus was born the concept of a general merits review tribunal that complemented the courts (in particular, a new Commonwealth superior court that would, amongst other things, exercise supervisory jurisdiction over the tribunal).[18] The Kerr Committee report made clear the new tribunal was intended to do more than secure individual justice. The committee recognised the tension between achieving individual justice and the need for efficiency in administrative decision-making. It concluded it was possible to satisfy both objectives. Indeed, the committee concluded a proper system of merits review could have a profoundly positive impact on the justice, quality *and* efficiency of government decision-making.[19]

The bulk of the Kerr Committee report was devoted to describing the function of our administrative law system, and the ways in which it might be improved, along with a survey of developments in analogous systems overseas. The report included a blueprint for the new general merits review tribunal. The committee said it should be headed by a federal judge and suggested the tribunal's membership should include laypeople with expertise in the subject-matter of administrative decisions.[20] The report also described the proposed tribunal's (essentially court-like) processes in some detail, complete with hearings, the potential for legal representation, the power to summons documents and witnesses, evidence given on oath, cross-examination, and a power to award costs in appropriate cases.[21]

15 Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee*, (Parliamentary Paper No 144, 1971) (Kerr Committee report).
16 Ibid 1 [5].
17 Ibid 3 [11].
18 Ibid 74–5.
19 Ibid 3 [12].
20 Ibid 87–8.
21 Ibid 88–9.

The Kerr Committee report is very much the work of eminent lawyers. In focusing on how the system worked, and how it might work better, it is an intensely practical document. It noted there had not hitherto been a thorough-going discussion of the role and operation of the organs of public administration in this country.[22] Interestingly, while it referred to individual justice, democratic values, and the need for efficiency, it did not otherwise attempt to articulate a comprehensive or unifying theory of good government or sound public administration.

The Kerr Committee report seeded a fruitful period of administrative law reform in the 1970s and 1980s — reforms that included the appointment of the Ombudsman, the establishment of the AAT and the Federal Court of Australia, and the passage of the *Administrative Decisions (Judicial Review) Act 1978* (Cth) and the *Freedom of Information Act 1982* (Cth). More recently, the Information and Privacy Commissioners have been added, and the government has now announced the imminent establishment of a national integrity and anti-corruption commission. Collectively (and individually, as they all have carefully defined roles) these actors operate the framework of laws and norms that are essential to Australia's nomocracy. *Nomocracy* refers to a government that operates within and is constrained by a system of laws and norms. Those laws and norms shape and regulate the exercise of power.

One could argue the *nomocracy* concept does no more than describe a polity that observes the rule of law. But our system of government does not and cannot operate solely with reference to the law or the values popularly associated with the rule of law concept. So much of our system operates according to conventions and norms that are simply assumed. These cultural traits are mostly unnoticed and unquestioned unless they are challenged in the observance. Arguably, one of those enduring values is adherence to a conception of 'good government' or (to borrow the language of Downes J and DP Hack in *Rent-to-Own*) 'good administration'. But again, what does that *mean*?

In a report titled *Better Decisions: Review of Commonwealth Merits Review Tribunals*[23] issued in 1995, the Administrative Review Council (ARC) considered aspects of the evolved administrative law system. It focused on the merits review tribunal system. The report acknowledged the ontological tension in relation to those tribunals, explaining:

> … it is not a simple task to reconcile the place of review tribunals as part of the executive arm of government with their role of providing merits review that is, and is seen to be, independent of the agency whose decision is under review, and that is undertaken according to processes and procedures that are fair and impartial.[24]

22 Ibid 26.

23 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report 39, August 1995) (*Better Decisions* report).

24 Ibid 23 [2.51].

Interestingly, like the Kerr Committee report before it, the ARC did not expound at length on the concept of good government in the 1995 report. But it did address the desirable features of a merits review mechanism. It concluded the objective of such a tribunal was to reach the correct and preferable decision in every case that came before it, and to promote correct and preferable decision-making more generally.[25] It continued:

> This overall objective therefore incorporates elements of fairness, accessibility, timeliness and informality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes.[26]

The report then explained:

> In seeking to meet this overall objective, the Council considers that the merits review system should have several specific objectives. They are:
>
> • providing review applicants with the correct and preferable decision in individual cases;
>
> • improving the quality and consistency of agency decision making — there are two main ways this can be achieved:
>
> — by ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions (referred to in this report as the 'normative effect'); and
>
> — by taking into account review decisions in the development of agency policy and legislation;
>
> • providing a mechanism for merits review that is accessible (cheap, informal and quick), and responsive to the needs of persons using the system; and
>
> • enhancing the openness and accountability of government.[27]

The report emphasised that part of the value of review tribunals lay in their different perspective compared to primary decision-makers. The report noted:

> Review tribunals do not operate under the same day-to-day pressures as agencies. They do not have to deal with the same high volume of primary decisions. They do not carry out a range of other functions which compete for time and resources. Tribunals do have their own budget and resource limits, but they are generally in a position to devote more time to the consideration of individual cases than are agency decision makers.
>
> A review tribunal's principal focus is on the reconsideration of the merits of the particular cases before them, and on the rights or responsibilities of individual applicants as prescribed by law. Tribunals are required to have regard to relevant government policy (and in some cases must apply it),… but the differences described above mean that tribunals are generally in a better position than agency decision makers to fully consider the law and facts in each individual case, and may therefore be less reliant upon policies or guidelines in deciding the appropriate outcome.[28]

Those observations echo more pointed remarks by Sir Anthony Mason. In a seminal paper published in 1989, he explained there were five significant ways in which a primary

25 Ibid 16–17 [2.10]. (Editor: The use of 'or' not 'and' in the expression 'correct and preferable' was endorsed in *Shi*).
26 Ibid 17 [2.10].
27 Ibid 17 [2.11].
28 Ibid 24–5 [2.58]–[2.59].

decision-making process might fall short of the decision-making on a review conducted according to a more 'judicial' model. It is worth quoting that analysis at length:

> First, [the primary decision-making process in the agency] lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not have to give reasons for his decision. Fourthly, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.[29]

At the heart of Sir Anthony's critique lies a concern about perspective and detachment: the challenge of making dispassionate decisions fairly, without regard to essentially irrelevant considerations. Sir Anthony's analysis suggests the value of transparency and a requirement to give reasons serve to expose and limit the tendency towards subjective or idiosyncratic decision-making.

While the landmark ARC *Better Decisions* report did not offer a pithy definition of 'good government' or attempt to articulate a unifying theory of sound public administration, some of the content of that concept is readily inferred from the discussion. In particular, the report emphasises the value of a tribunal lies in its capacity to operate in an environment that is more conducive to considered decision-making. The importance of that insight is reinforced by the observations of Sir Anthony Mason about the desirability of being able to make decisions from a vantage point 'above the fray' using well-adapted processes and personnel. Downes J and Hack DP made substantially the same point in *Rent-to-Own* when they warned of the risk of decision-makers indulging a 'personal or idiosyncratic view…'.[30] To put it another way: the value of a tribunal lies in its potential for greater *objectivity*.

Objectivity in this context refers to a sense of professional detachment from the tribunal member's personal beliefs, feelings or preferences — but also from the pre-occupations of the primary decision-maker and other constituencies. *Objectivity* implies a clear-eyed focus on that which is relevant. The objective decision-maker accepts that what is relevant (and the relative weight to be accorded to relevant factors) is ultimately determined, either expressly or implicitly, by: (a) the legislative regime which authorises the decision-maker to act; and (b) a body of principles or values derived from the wider system. The objective decision-maker strives to give intelligent effect to the authentic will of the Parliament when it passed the statute in question. To that end, objective decision-makers are logical, rational and measured; they make transparently principled decisions based on evidence that is identified according to fair processes. They are fearless in their decision-making without tipping into zealotry that is heedless of outcomes. They are dispassionate, but not bloodless. They are aware of the world around them since that is where the decisions that they make will take effect. They understand the difference between questions of law (where conventional lawyerly skills and experience may assist) and questions of public policy (where a sound education in the liberal arts or specialist disciplines may sometimes be an advantage).

29 A Mason, 'Administrative Review: The Experience of the First Twelve Years' [1989] *Federal Law Review* 3; (1989) 18 *Federal Law Review* 122, 130.

30 [2011] AATA 689 [50].

Importantly, they are also self-aware — if only because complete objectivity and detachment is foreign to the human condition.

Other words that have been used to describe the AAT's role do not so completely capture its essential quality. For example, the word 'independent' is often used to describe such a tribunal, presumably borrowing from the concept of judicial independence. While being objective implies (in this context) acting *independently of* the primary decision-maker in order to avoid what Sir Anthony Mason described as the 'political, ministerial and bureaucratic' influences that might impact on decision-making, members of the general merits review tribunal are not free agents. Such a tribunal remains part of the decision-making continuum, whereas judges exist outside that process and deal in formal concepts of legality rather than more fluid concepts like 'public interest' or 'good government' which inform administrative decision-making.[31] A general merits review tribunal steps into the shoes of the primary decision-maker in the sense it exercises the same powers and is subject to the same formal constraints.[32] Over-use of the word 'independence' is apt to mislead both the tribunal member and the public as to the extent of the tribunal's remit. That presages error and disappointed expectations.

The ARC made this point clearly in the *Better Decisions* report. After acknowledging the more complex relationship that exists between tribunal decision-makers and primary decisions-makers compared to courts, the report argued a measure of independence was required to ensure the tribunal member could operate at arm's length and keep faith with the expectations of the citizenry — but added the desirable level of independence was not necessarily achieved in the same way in which judges were protected.[33]

Other descriptors, like 'impartial' are also in danger of being misunderstood. There is no doubt a general merits review tribunal must be even-handed as between the parties that appear before it — a task that can be challenging when the decision-maker may have vastly more resources at its disposal compared to an applicant who may be self-represented, or who operates under some kind of disadvantage. The recent report of the Australian Law Reform Commission[34] has summarised the law and practice in relation to the dangers of bias. The report offers a timely reminder of how decision-makers that are perceived to be biased can corrode public confidence in the decision-making process and institutions of government. Obvious impartiality is a core feature of an objective decision-maker who is not distracted by bias — because indulging biases would be unfair and potentially discreditable, and because biases introduce extraneous considerations into the decision-making process that distract from the legislation and its purpose. To speak of impartiality in isolation from this wider context may create the impression that the decision-maker is simply calling 'balls and strikes' in the process of quelling a controversy between two contestants, divorced from any considerations of good government or public interest.

The word 'objective' best captures and incorporates the various dimensions of good decision-making. Use of the word in the context of a general merits review tribunal serves

31 *Rent-to-Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689 [49].

32 See, for example, *Shi*, [40] (Kirby J), [96] (Hayne and Heydon JJ), [134] (Kiefel J). See also *Frugtniet and Australian Securities v Investments Commission* [2019] HCA 16, [14] (Kiefel CJ, Keane and Nettle JJ).

33 *Better Decisions* Report (n 23) 71 [4.3]–[4.6].

34 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021).

to emphasise the centrality of the legislation and lawful policy that gives effect to the purpose of that legislation. It is not an exhaustive description of what is required, of course: it almost goes without saying there are many qualities, skills and experiences which are desirable in a tribunal member. (The ARC suggested a list in the *Better Decisions* report.[35]) But objectivity is the hallmark of what the philosopher Michael Oakeshott referred to as a 'civil association'. A civil association is characterised by a commitment to process. Its counterpoint, the 'enterprise association', is characterised by its devotion to achievement of a goal. Given the centrality of its role in public administration, a general merits review tribunal is a quintessential civil association that should not have an agenda in each case that comes before it beyond that which is provided for explicitly or by implication from the legislation (including lawful policy which gives effect to that purpose) — apart, that is, from a concern for promoting good government.

Summary

Neither the Kerr Committee report nor the ARC *Better Decisions* report attempted to articulate a comprehensive understanding of the 'good government' concept. That is surprising at one level: the AAT, as a general merits review tribunal, has long been understood as a tool of government administration which is informed by a concern for 'good government' and 'sound public administration'. Given that pedigree, it would be ideal if there were some sort of canon or course which set out the learning about good government that would assist members to fulfil their mission. The omission of a comprehensive theory from the reports is probably because 'good government' is not a fixed concept which may be reduced to detailed prescriptions capable of universal application. While academic writings in management, political science and political economy (amongst other disciplines) may shed light on the concept, 'good government' — like obscenity — may be more readily recognised in practice than defined in the abstract.[36] One is left to draw inferences about what a commitment to good government requires. One inference I have drawn about the demands of good government is the importance of objectivity in decision-making. Ultimately, the importance of objectivity and other dimensions of good government are best understood by seeing a decision-making process in action.

Objective decision-making in practice

In *RBPK and Innovation and Science Australia,*[37] Thomas J and I described the Tribunal as 'an advocate for good government, a function [the Tribunal] discharges by modelling good decision-making behaviour in individual cases'.[38] I have argued in this paper that objectivity is a necessary feature of that model decision-making process. That understanding was

35 *Better Decisions* report (n 23) 72–3, [4.8]–[4.12].

36 In *Jacobellis v Ohio* 378 US 184 (1964), Potter Stewart J famously observed: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.'

37 *RBPK and Innovation and Science Australia* [2018] AATA 404.

38 Ibid [11] (Thomas J and DP McCabe).

usefully illustrated by a recent decision of the AAT in *WRMF and National Disability Insurance Agency*[39] and the judgment of the Full Federal Court on appeal in *National Disability Insurance Agency v WRMF*.[40]

The application for review in *WRMF* was made by a woman in her 40s who suffered from a range of serious health conditions including multiple sclerosis. She was significantly disabled as a result. One aspect of her disability was an inability to obtain sexual release without assistance. She sought and obtained access to the National Disability Insurance Scheme (NDIS) on account of her various disabilities. The National Disability Insurance Agency (the NDIA) balked when she asked for assistance in the form of a specially trained sex worker. The NDIA refused to fund this. As it explained in a media statement issued around the time of the decision: 'The NDIA does not cover sexual services, sexual therapy or sex workers in a participant's NDIS plan.'[41]

In its decision on review, the AAT delivered an open set of reasons and a more elaborate confidential statement of reasons given the sensitivity of the subject matter. The open reasons referred to the objectives set out in s 3 of the *National Disability Insurance Scheme Act 2013* which include, inter alia:

> (c) support the independence and social and economic participation of people with disability; and
>
> (d) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme; and
>
> (e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;

The AAT also referred to s 4 which sets out general principles guiding actions under the Act, including:

> (1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.
>
> (2) People with disability should be supported to participate in and contribute to social and economic life. …
>
> (11) Reasonable and necessary supports for people with disability should:
>
> (a) support people with disability to pursue their goals and maximise their independence; and
>
> (b) support people with disability to live independently and to be included in the community as fully participating citizens; and
>
> (c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.

39 [2019] AATA 1771 (DP Rayment).
40 [2020] FCAFC 79 (Flick, Mortimer and Banks-Smith JJ).
41 Ibid [29].

Sections 13 and 14 then authorised the NDIA to provide or fund a range of supports. Section 14 refers to providing:

> assistance in the form of funding for persons or entities:
>
> (a) for the purposes of enabling those persons or entities to assist people with disability to:
>
> (i) realise their potential for physical, social, emotional and intellectual development; and
>
> (ii) participate in social and economic life;…

The Tribunal also referred to s 17A, which set out the principles to be applied in dealing with people with disability, and s 24, which set out the disability requirements. Subsections 24(1)(c) and (d) refer to:

> (c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:
>
> (i) communication;
>
> (ii) social interaction;
>
> (iii) learning;
>
> (iv) mobility;
>
> (v) selfcare;
>
> (vi) selfmanagement; and
>
> (d) the impairment or impairments affect the person's capacity for social and economic participation; …

On review, the statutory question was framed as whether a support of that nature was a reasonable and necessary support.[42] That question was derived from s 34(1). That subsection set out a number of considerations including the requirement in s 34(1)(e) to consider whether 'the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide …'.

The word 'supports' — let alone the expression 'reasonable and necessary supports' — is not defined in the Act. So there was a controversial question to be resolved.

The first thing to note about the Tribunal's decision is its obviously purposeful choice of language in the open reasons. While the terms of the application for review and the discussion at the hearing all referred to a sex *worker*, DP Rayment chose to describe the service provider in his reasons for decision as a specially trained sex *therapist*. That characterisation became a point of contention on appeal because the NDIA said they did not know at the time of the hearing that the Tribunal was going to use that description; if they had

42 [2019] AATA 1771 [6].

known, they argued, they might have made submissions. The Full Court concluded there was no substance to that point. It found the Tribunal had obviously elected to describe the support in those terms because those words provided the best and most accurate way of communicating the Tribunal's explanation for what was being decided.[43]

It is worth pausing to reflect on that point. It is undoubtedly true that when a tribunal member writes their reasons for decision, they must think about how those reasons are going to be understood. That is entirely appropriate given (as the Tribunal explained in *RBPK*) tribunal members are themselves engaged in a classic act of advocacy: the Tribunal is contending for an outcome and seeking to persuade others — the parties, but also the wider bureaucracy, the other members of the AAT, the Federal Court on review and the public — that they should all accept the outcome. Like any good advocate, the tribunal member must think on how to pose and present their argument. It is never enough for a tribunal member to produce a technically sound decision. The member must also be an effective advocate who aims to persuade and promote public confidence in the Tribunal's decisions.[44] The Tribunal in *WRMF* was obviously aware of how its decision might be misunderstood or even misrepresented, so it took steps to reduce that risk.

While the language in the Tribunal's decision in *WRMF* reflected a consciousness of the community's expectations and likely reaction, the substance of the decision was firmly anchored in the text of the statute — to the extent that DP Rayment observed at the outset of his reasons that, properly understood, the construction process did not leave much discretion in deciding the access and support questions.[45]

Given the language in the statute, there was no reason why a specially trained sex therapist retained at modest cost was unacceptable. On appeal, the Full Court explained:

> We see no reason why sexual activity and sexual relationships would not be regarded as included within the activities listed in s 24(1)(c) (in particular sub-para (ii)); nor why the way an impairment may affect a person's ability to engage in sexual activity and sexual relationships would not be within the concept of 'social ... participation' in s 24(1)(d). Members of the Australian community can choose to engage in lawful, consensual, sexual activity and sexual relationships; or, they can choose not to. For some people, such activities and relationships will fulfil important human needs; for others they may be less important. That is the case with many kinds of social participation in which individuals engage — sport, music, hobbies, political or religious activities. Nevertheless, they are all part of the spectrum of interaction between individuals within a community. The supports to be provided to a person who qualifies as a participant are intended to accommodate an individual's particular impairments and to assist that particular individual to be a participating member of the Australian community, and to do so on the basis of the values set out in the objects and guiding principles clauses of the Act, as well as the values set out in s 17A of that Act …[46]

The Tribunal pointed out s 35 of the Act authorised the minister and his state counterparts to agree policies that determined what was a reasonable and necessary support. A policy agreed according to this process was binding on the executive. But there had been no

43 [2020] FCAFC 79 [95].
44 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(d).
45 [2019] AATA 1771 [7].
46 [2020] FCAFC 79 [141].

such agreement in relation to the provision of sex therapists or sexual services. In those circumstances, it was not appropriate for the Tribunal to assume the role of the relevant ministers. As DP Rayment explained:

> No political considerations are relevant to be taken into account by the executive, including this Tribunal. Such considerations will be taken into account by representative governments deciding whether or not to make a special rule under s 35(1).[47]

The Full Court confirmed the Tribunal was right to take this approach, saying:

> The Tribunal otherwise correctly distanced itself from decisionmaking based on 'political' considerations. To this might be added 'moral' considerations.[48]

It is clear the Tribunal understood it would be unhelpful and irrelevant for it to focus on the expectations of an uninformed public about the wisdom of the legislation or the lawful and proper outcomes of the legislated process. Yet the likely reaction of the public was anticipated and factored into the way the reasons were expressed.

The point is, with respect, obvious. Tribunal members are not elected politicians. They are certainly not appointed to give effect to their own moral or ideological preferences. Nor are they tribunes of the people or avatars of a noisy section of the populace that supposedly frequents the proverbial 'front pub'. A general merits review tribunal gives effect to what our elected representatives have said through the parliamentary process. Those who would have tribunal members make an independent assessment of community attitudes or expectations when making a decision — assuming such a thing can be done — are (perhaps unwittingly) asking tribunal members to act as politicians and implement an agenda that is conceived outside the democratic process. It ultimately matters not whether such members pursue their own agenda, or that of the government of the day, or that of a vocal section of the public that might be distorted by the media.

The AAT's decision in *WRMF* illustrates how a general merits review tribunal is intended to function. The Tribunal in that case understood its job was to answer questions posed by the legislation *in accordance with that legislation*. To the extent the legislation left choices open, the Tribunal understood it must answer the questions with reference to the purpose evident in the legislation. It did not allow itself to be distracted by extraneous considerations that were beyond its remit. Yet the Tribunal endeavoured to explain its reasons in a way that was intended to inform and persuade the various constituencies.

To be fair, the Tribunal pointed out in its reasons in *WRMF* that a proper construction of the legislation left little room for inference or doubt about the correct outcome. That is not always the case. The complexity of modern governance and the challenge of drafting legislation that accommodates every possible eventuality inevitably leads to discretionary powers and a significant role for administrative policy.

47 [2019] AATA 1771 [7].
48 [2020] FCAFC 79 [157].

The famous *Drake* litigation[49] turned on the extent to which the Tribunal should take into account, or even defer to, administrative policy in the exercise of discretionary powers. The applicant in that litigation had argued the Tribunal should not have regard to the policy promulgated by the relevant minister, much less show any deference to the minister's guidance. Brennan J, in *Drake No 2*, threaded the administrative policy needle with care. His Honour explained lawful policy was desirable in modern government decision-making because it promoted consistency. His Honour noted:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.[50]

Brennan J went on to explain:

> There are powerful considerations in favour of a Minister adopting a guiding policy. It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[51]

His Honour also pointed out administrative policy was typically formulated using the vast resources available to the executive government after a careful balancing of various interests. At its best, administrative policy was the product of careful research, consultation and deliberation which is shaped by a clear-headed view of the public interest. That resource-intensive and time-consuming process can be contrasted with a hearing before a tribunal which may not be as well-suited to making good general policy that is properly informed by the public interest.[52]

It is accepted that a general merits review tribunal like the AAT is not *obliged* to apply administrative policy if that policy does not otherwise have the force of law. The Tribunal is ultimately required to make the correct or preferable decision in each case that comes before it. If the promulgated administrative policy does not tend to the preferable outcome in cases where there is a choice, it may be appropriate for the Tribunal to ignore the policy or qualify its application. In most cases, the administrative policy will suggest a sensible outcome — particularly when one appreciates the effort that typically goes into formulating administrative policy, and the value of consistency. The challenge for the Tribunal lies in those cases where it is argued the outcome suggested by the policy is lawful but decidedly not the preferable outcome.

49 *Drake* and *Drake No 2*.
50 (1979) 2 ALD 636, 639.
51 Ibid 640.
52 Ibid 644.

Objectivity and preference

There is less scope for idiosyncrasy or agendas to operate in tribunal decision-making than people commonly suppose. The answer in a given case is usually obvious when one has proper regard to the text *and purpose* of the legislation under consideration. The purpose might conveniently be set out in an objects clause, or it may be divined from the text or structure of the legislation; it might be described in the secondary materials. In any event, it is discoverable using conventional techniques of statutory interpretation that must be applied and clearly explained in the reasons for decision. But the Full Court in *WRMF* recognised situations might still arise where reasonable people might disagree about the outcome,[53] especially where there is an exercise of discretion or the outcome turns on a 'fact-intensive exercise'.[54] Many of these cases do not involve the exercise of discretion, but still involve the exercise of individual judgment that is shaped by experience. A good example is found in the definition of 'injury' in s 5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The definition includes an exclusion which applies where the injury was 'suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment'. Determining what is *reasonable* is inevitably a value-laden inquiry.

There is no doubt that a careful and transparent reasoning process reduces the risk of idiosyncrasy, especially in cases where there is ultimately a *correct* outcome. But there may remain some scope for individual judgment about what is the *preferable* outcome in cases involving the exercise of discretion which required the decision-maker to form a view about questions of public interest.

Downes J and DP Hack suggested in *Rent-to-Own*[55] that the decision-maker in such a case must resort to community standards or community values as a touchstone in discussions of the public interest.[56] The Tribunal was concerned about members effectively misusing their positions to make subjective or idiosyncratic choices.[57] It is worth unpacking that discussion given the way appeals to 'community expectations' have become more explicit in discussions about the role of a general merits review tribunal.

The Tribunal in *Rent-to-Own* explained expressions like 'community standards or values' have a long pedigree in judicial decision-making,[58] citing Stephen J in *Onus v Alcoa of Australia Ltd*, who observed:

> Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others.[59]

53 [2020] FCAFC 79 [143].
54 Ibid [152].
55 [2011] AATA 689.
56 Ibid [50].
57 Ibid [48], [50].
58 Ibid [51].
59 [1981] HCA 50; (1981) 149 CLR 27, 42.

The Tribunal referred to a range of other leading authorities to similar effect, including the judgment of Brennan J in *Mabo v Queensland (No 2)*[60] and the reasoning of Lord Atkin in *Donoghue v Stephenson*[61] who said the tort of negligence was shaped by a moral code but also 'a general public sentiment of moral wrongdoing for which the offender must pay'. The Tribunal also referred to extra-judicial remarks of Sir Anthony Mason who said: '[When] interpreting statutes and giving them operation, judges will, where appropriate, take into account community standards and values.'[62]

Sir Anthony elaborated on what he meant by 'standards and values' in a later paper[63] which was referred to in the Tribunal's decision in *Rent-to-Own*.[64] Sir Anthony explained:

> It is accepted that a judge must decide a case without regard to the popularity or unpopularity of the decision. On the other hand, when a judge has regard to community values and standards in arriving at a decision, the judge is looking to enduring values and standards, not matters of transient impression which may arise by way of reaction to particular and immediate events.[65]

Sir Anthony's conception of '*enduring* values and standards' [emphasis added] is narrow. As Downes J and DP Hack pointed out in *Rent-to-Own*, it may not be possible to isolate those standards through an evidentiary process — but they are discoverable by inference. The Tribunal explained:

> Relevant community values will not depend on transient or fashionable thinking. They will not be found in the publications of vocal minorities or the fulminations of the media, motivated by short term considerations and the improvement of circulation or ratings. They will not necessarily reflect the views of individual politicians. Community standards will be found in more permanent values. They will be informed in part by legislation of the parliaments, and especially legislation applicable to the decision-making. Formal statements by ministers will be relevant, but not when they are not speaking officially or when their remarks are not carefully considered or do not appear to reflect 'a broad consensus of opinion' (Mason, *Courts and Public Opinion* at 36). Decisions will also be informed by the decision-maker's belief based on experience. Evidence will rarely be of any practical assistance.[66]

In other words, the decision-maker must strive to divine community standards and values *from objective sources,* starting (and in most cases finishing) with the legislative regime in question. That observation is consistent with the goal of promoting objective decision-making as a feature of Australia's nomocracy. But there is a danger in this debate. It lies in the use of language that may not be well-understood, or which may be understood in different ways by different constituencies. The tendency to elide expressions like 'community standards or values' with their more populist-sounding relation 'community expectations' when describing

60 [1992] HCA 23; (1992) 175 CLR 1, 42.
61 [1932] AC 562, 580.
62 Sir A Mason, 'The Courts and Public Opinion' (20 March 2002) (NSW Bar Association Journal *Bar News,* Winter 2002) 30.
63 Sir A Mason 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 33.
64 [2011] AATA 689 [64]–[65].
65 Sir A Mason (n 63) 41, 42.
66 [2011] AATA 689 [65].

the role of a general merits review tribunal can generate false expectations and distract the tribunal itself from its role as an objective decision-maker. As I explained in 2013:

> There is a real risk that executive decision-makers in particular will resort to 'the publications of vocal minorities or the fulminations of the media' as the authentic voice of the community, not least because many in the media lay claim to precisely that role. The subtle distinctions referred to by judges may well be lost on harassed public servants and their media-sensitive masters who are wearily familiar with the claims that they — and increasingly the courts — are 'out of touch'. [67]

After referring to a specific example where a primary decision-maker referred to community expectations as evidenced by incomplete and inaccurate media reports, I warned:

> One is left with the uncomfortable suspicion that the qualifications may be lost in translation. That danger has probably increased as social media has provided a new, unregulated and influential voice for those who may not know the law, or the exigencies of public administration, but who are confident they know what is *right*. Those voices might enjoy outsized influence on the deliberations of executive decision-makers.[68]

This discussion suggests firstly that language matters when describing the role of a general merits review tribunal, if only because language can feed into unrealistic expectations and an unhealthy culture. Tribunal members need to be rigorous and transparent in their objectivity. Secondly, tribunal members must always resist the temptation to put their 'fingers on the scale' when making decisions', either to advance their own preferences or to advance an agenda suggested by somebody else. The lure of exercising power (or a desire to please those who might exercise power with respect to the tribunal member) is insidious and corrosive of objectivity.

Creating a supportive culture that promotes objective decision-making

It *almost* goes without saying that a decision-maker acts improperly if they are influenced by self-interest, personal prejudices, animus or ideological preferences. Let us assume all tribunal members understand so much. Bias of this kind was addressed by the Australian Law Reform Commission in its recent report. The more interesting part of that report for present purposes dealt with the sources of unconscious bias, which is less well-understood.

I do not propose to dwell on the insights into unconscious bias that are contained in the ALRC report. Suffice to say decision-makers are human, and the goal of being truly objective in decision-making is difficult to achieve. The ALRC report makes clear that, at a minimum, individual decision-makers must be self-aware and interrogate their own biases and predispositions. In this connection, it is worth noting the results of a study of federal judges in the United States that was reported in *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*.[69] One of the authors of the book that resulted from the study was Richard Posner, a high-profile appellate judge and prolific academic attached to the University of Chicago. The authors rejected the traditional 'legalist' theory of judicial

67 B McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' [2013] UQLawLJ 7; (2013) 32 *University of Queensland Law Journal* 103, 119.

68 Ibid.

69 L Epstein, WM Landes and RA Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013).

decision-making which assumes judges do not have regard to factors outside the text of the legislation and orthodox norms of judicial decision-making.

The study concluded there was limited evidence of judges — particularly at the trial court level — routinely indulging personal political or (to the extent that is a different thing) ideological preferences in their decision-making. The authors proposed an alternative theory which was a variation on the realist theory of jurisprudence. The realists assume judges do consult a wider range of considerations in their decision-making. The authors' theory is called the 'labour market' theory of judicial behaviour.[70] That theory suggests judges are like other workers in at least this respect: they all respond rationally to their work environment to maximise their own utility as they go about their jobs. Unlike most other workers, judges are not highly motivated by the prospect of increasing their salary. That makes non-monetary features of the work especially important as motivating factors. The authors of the study hypothesise the way in which judges go about their work might be affected by a range of factors including their individual appetites for:[71]

- hard work and leisure;
- publicity and controversy;
- the approval or opprobrium of colleagues (or former colleagues, or their social group); and
- approval or criticism from appellate courts or the academy.

The survey results generally confirmed the thesis. Some results are worth noting for present purposes — particularly those that reflect on tenure. Federal district and appellate judges in the United States enjoy life tenure, and judges of the same rank are all paid the same amount. Security of tenure and competition over remuneration did not factor as motivations for judges included in the survey (except to the extent that some judges took the opportunity for a quiet life). Having said that, the study concluded many judges were conscious of the prospect of being promoted to a higher court.[72]

The study is useful to the extent it draws attention to the arguably uncontroversial proposition that judges and tribunal members are rational human actors who can be expected to be aware of the demands of the environment in which they operate. The missing piece in the study — at least for present purposes — is the extent to which decision-making might be affected by the absence of secure tenure, particularly where there has been a dilution or compromise of a culture that supports independence in judicial workplaces.

The study is worth quoting because of the lessons it holds for the reform process. If one objective of the reforms is to promote a culture of objective decision-making, it is as well to remember that objective decision-makers may not emerge fully-formed from even the most well-meaning appointment processes. More is required to develop and sustain an appropriate culture.

70 Ibid 30ff.
71 Ibid 31–2.
72 Ibid 36.

I do not propose to expound on the various reforms that will shortly be debated as part of the consultation process. For now, it is enough to mention two considerations that should be kept in mind if the culture of objectivity is to be reinforced and entrenched.

First, a culture of objectivity will be enhanced when members experience a sense of *psychological safety*. 'Psychological safety' is a well-understood concept in literature regarding compliance. It refers to institutional and other features of an organisation that induce a sense of confidence in workers that they will be supported when they identity problems or suggest change. In the tribunal context, a sense of psychological safety can buttress the courage members are expected to demonstrate when making decisions. In a practical sense, members who experience psychological safety are better able to 'shut out' concerns for their own position which might otherwise encroach (even if sub-consciously) on their decision-making.

Fostering psychological safety is a tricky process. Members must still be accountable for their performance. Good leadership is essential in getting the balance right, but it will also be necessary to carefully calibrate reappointment processes. Suffice to say members who fear their performance will not be judged objectively on its merits are unlikely to experience psychological safety, and they may be exposed to perverse incentives that are inimical to objective decision-making.

Second, a culture of objectivity also depends on respect for the professional autonomy of members as they go about making decisions. As Sir Anthony Mason explained, the benefit of a general merits review tribunal lay in the potential for a more considered approach than is possible at the primary decision-making stage where decision-makers face bureaucratic, political and resource pressures. While a review body must live within its means and operate coherently, it would be a pity if the conduct of reviews were unduly influenced or restricted by bureaucratic and other concerns. That point was made by Sir Gerard Brennan when he addressed the AAT's 20th anniversary conference. After noting the AAT had developed a large bureaucracy, he warned:

> I hope that the need for this core of personnel and the inevitable closeness of their working relationship with the members, especially the permanent members, is not conducive to a cast of mind that subjects the independence of members to the corporate memory or knowledge or advice of the AAT bureaucracy.[73]

The *Administrative Appeals Tribunal Act 1975* currently attempts to deal with the challenge of balancing the responsibilities of members and staff in two ways. First, s 24A vests overall responsibility for management of the Tribunal's administrative affairs in the President but explicitly allocates responsibility for matters arising under the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999* to the Registrar. As a consequence, the President and the Registrar are effectively required to collaborate in the leadership of the AAT as an organisation. Second, the statute distinguishes between the *business* of the Tribunal, which is *directed* by members who assist the President,[74] and the *administrative affairs* of the Tribunal, which are managed and carried on by public servants.

73 Sir G Brennan, 'The AAT — Twenty Years Forward' (Opening Address, Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996).

74 *Administrative Appeals Tribunal Act 1975* (Cth) s 17K(6).

That distinction also necessitates constructive collaboration between members and staff in the conduct of reviews.

It is certainly possible to conceive of alternative organisational arrangements to those which are currently in place at the AAT, but the challenge remains: whatever arrangements are devised, members require a level of autonomy and a capacity to direct the review process — a process which does not begin and end in the hearing room.

Conclusion

The authors of the *Behavior of Federal Judges* study pointed out that courts (and the military, and other important organisations where differentials in pay were not significant) depended on developing what students of organisational behaviour called a 'high commitment' culture in which the actors came to identify with the mission.[75] The establishment of a high commitment culture assumes the actors have a clear understanding of that mission, and that they possess the skills, experience and aptitude to make sense of what is required of them.

In this paper, I have argued for a more nuanced appreciation of the tribunal member's role at the outset of the reform process. That ultimately requires the articulation of a distinctive jurisprudence of tribunal decision-making which prizes objectivity and incorporates a profound understanding of the Tribunal's role as an advocate for, and instrument of, good government.

75 Epstein, Landes and Posner (n 69) 34–5.

Administrative process, practice and law in a pandemic — how much is enough?

*Caroline Edwards**

When the COVID-19 pandemic emerged in early 2020, the world of Australian public administration was required to adjust very quickly to a whole new operating environment. Ordinary processes were unsuitable for the task because they required behaviour which risked transmission of the virus, because they did not lend themselves to the type of innovation required and because they were simply not fast enough.

By straining, side-stepping or exempting activity from the ordinary processes, dramatic reforms and novel responses were able to be implemented in time to stem spread of the infection and counter the economic impact. This work all happened at enormous and uncharacteristic speed. Many of the usual brakes on action were absent: financial constraints were few, the government and consultative processes which usually accompany new measures were radically truncated or dispensed with all together, and the operation and availability of traditional public law accountability mechanisms was limited.

There will be ongoing debate about the content, manner and timing of the actions which Australian governments took in response to the pandemic. My starting point is that the fundamental role of government and government processes is to protect and promote the wellbeing of the people of Australia. The actions taken in response to the pandemic were designed and intended to this end and did in fact contribute to Australia's success in avoiding the death rate and health system impact seen in other countries — especially in 2020.

During this period, I was a senior executive in the Commonwealth Department of Health — acting as Secretary from February to July 2020 and then as Associate Secretary until mid-2021. In this role I was responsible for developing and implementing Commonwealth health policy and programs in accordance with my obligations as a public servant. I was the senior accountable officer for various health system issues concerning the pandemic, including the emergency measures under the *Biosecurity Act 2015* (Cth), the introduction of telehealth and electronic prescribing, the procurement of huge volumes of medical equipment, and collaborations with the states and territories on funding and practical activity to prepare for an increase in patients. Of course, I was supported on all these issues by a highly skilled and effective team which deserves credit for the successes. The views I express in this article are my own and not those of the department or the Commonwealth.

This paper focuses on actions taken during the first six months of the pandemic at a time when little was known about the virus, no guaranteed or even prospective vaccine had been developed and the widely reported impact on communities around the world, in such places as New York and Madrid, was stark and frightening.

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General challenges to ordinary process

While the case for speed and relaxed processes was clear and the aim widely supported, it is also undeniable that the approach increased the risk that measures would be ineffective,be financially wasteful, unduly impinge on the lives of Australians or have serious unanticipated consequences. There will be significant reflection over the coming period as to the extent to which these additional risks were realised and whether the benefits outweighed those realised risks. More fundamentally, the question remains whether the quality of decision-making was impaired by the increased speed and reduced process and the extent to which the processes which were reduced or avoided are required.

What is ordinary process?

It is important to be clear about what is being referred to as the ordinary processes which were, in large part, altered, expedited or dispensed with in early 2020. For the purposes of this article, 'ordinary processes' include formal processes, conventions and administrative practices in relation to: (a) Cabinet processes and the related processes of ensuring government authority; (b) processes which underpin and lead up to funding appropriations and allocations; (c) primary and subordinate legislative processes; (d) consultation processes within and outside government; (e) procurement rules; (f) administrative procedures; and (g) the pre-existing architecture of the Commonwealth, state and territory relations under the Council of Australian Governments (COAG) umbrella.

In relation to the health measures discussed in this article, many of these processes were dramatically truncated in terms of time and extent, temporarily suspended in the case of procurement rules and fundamentally abandoned and recast in the case of engagement with the states and territories.

Speed

A common element across all aspects was that decisions were made and measures implemented at a much faster pace than was usual. For example, the new Medicare items to support telehealth and COVID testing which were part of the initial health package of measures announced in early March 2020 were commissioned, developed, authorised and announced within a fortnight, processes which would usually take many months and perhaps years.[1] They were introduced without the customary level of financial assessment or comprehensive compliance arrangements. Such speed has natural disadvantages. Truncated, narrow or short consultation and processes mean that relevant views and alternative ideas may not be considered, mistakes may not be picked up and the opportunities to stress test or consider unintended consequences are reduced. There tends not to be the opportunity for external scrutiny. In addition, the relevant officials are tired and harried given the enormous workload and pressure.

1 A large number of health insurance determinations commenced on 13 March 2020 and the following days. See, for example, *Health Insurance (Section 3C General Medical Services — Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Determination 2020*.

However, speed also minimises the chance that new ideas are lost in the bureaucracy or delayed or blocked due by those with vested interests or who are simply conservative. Most of all, it enables urgent measures to be implemented when they are needed. The challenge in an emergency situation, and perhaps in all circumstances, is to balance the risk of things going wrong against the risks of acting too late or not acting at all.

Remote working and record keeping

A further notable unforeseen impact of the pandemic with respect to decision-making and, in particular, record keeping arises from the sudden and widespread transition to remote working. While public administration had been moving to electronic document management over numerous years, paper was still at the centre of many processes in early 2020. One basic example of the challenges was the need to sign and witness important contracts for the purchase of goods and services when the delegate is working from home. A printer and scanner overcome many of the challenges but the good practice of finding a non-family member to act as witness hits a major hurdle in the context of a household isolating and socially distancing from colleagues, neighbours and friends.

In addition, hard copy filing becomes all but impossible whether as the primary or back-up system and adherence to prior systems is difficult as senior staff act without the customary assistance of support staff. Unless an electronic record system is easy to use and senior officers are accustomed to using it themselves, scanning and email become the cumbersome work-around.

Coupled with this challenge in early 2020 was the move from physical face-to-face conversation to various online platforms. Many organisations rapidly implemented video conferencing systems (Webex in the case of the Department of Health) but even the herculean efforts of IT departments required implementation times. Teleconferencing was very frequent and the use of messaging services such as WhatsApp proliferated. Security was a further issue with the need to circulate classified documents much more quickly than had previously been the case. Again, the technical security protocols were not designed, or compatible with the need, to share information widely and quickly in order to provide a base for good decision making.

All these elements incorporated greater risk of mis-filed or lost documents in the paper trail and of security breaches in the sharing of confidential material. Again, the gravity of the potential health and economic outcomes of the pandemic meant that officials were faced with stark choices on which processes could or should be complied with.

The underpinning Biosecurity Act determinations

Declaration and determinations under the Biosecurity Act

Fundamental to the altered landscape was the Biosecurity Declaration (the Declaration) made under the *Biosecurity Act 2015* by the Governor-General on 18 March 2020[2] that declared that a human biosecurity emergency existed. The requirements for such a Declaration were, in summary, that a listed human disease posed a severe and immediate threat, or was causing harm to human health on a nationally significant scale, and the declaration was necessary to control the entry or spread of the disease.[3] This Declaration enlivened in the Minister the power to exercise special powers, in addition to those generally available under the Act.[4] These included providing emergency requirements by determinations — for example, preventing the movement of persons between places[5] — and directions to any person.[6] Before making such requirements or directions, the Minister was required to be satisfied that they were necessary, and the legislation required in summary a proportionality assessment of the measures.[7] Failure to comply was an offence.[8]

It is notable that the administrative processes established to support the making of the Declaration, and its amendment, by the Governor-General were observed in full. This reflected the gravity of the action and the magnitude of the powers assumed by the Minister as a result. The Declaration was published on the Federal Register of Legislation with an explanatory statement. Such declarations are not disallowable by the Parliament,[9] and because of this do not require a human rights statement of compatibility[10] and are not routinely assessed by the Senate Standing Committee for the Scrutiny of Delegated Legislation.[11]

Also notable is the fact that the powers were employed by the Minister on only a few occasions and in relation to limited circumstances. There were, of course, a wide range and large number of other COVID-19 instruments which have been usefully collected by the Senate Standing Committee for the Scrutiny of Delegated Legislation.[12]

2 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020.*
3 *Biosecurity Act 2015* (Cth) s 475.
4 I note that early on some actions were taken under these general powers: see *Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020*.
5 Biosecurity Act s 477.
6 Ibid s 478.
7 Ibid ss 477(4) and 478(3).
8 Ibid s 479.
9 Ibid s 475(2) referring to the *Legislation Act 2003* (Cth) s 42.
10 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1); L Fletcher, 'In These Uncertain Times: (A Lack of) Oversight of the *Biosecurity Act 2015* (Cth)' (2020) 41(2) *Adelaide Law Review* 641, 649–51.
11 Parliament of Australia, 'Role of the Committee', (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Role_of_the_Committee>; Fletcher (n 10) 651.
12 Parliament of Australia, 'Scrutiny of COVID-19 Instruments', (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

Determinations under the Biosecurity Act

There is no doubt that determinations under the Biosecurity Act and the Declaration are capable of making a substantial impact on the usual freedoms of Australians and others. The prohibition on Australians leaving the country and citizens of other countries arriving, which was implemented by a range of mechanisms including under the Biosecurity Act,[13] was a dramatic approach. However, this was arguably a predominant — and perhaps *the* predominant — measure which resulted in the low COVID-19 rates in Australia. Other determinations included the banning of cruise ships[14] and the closing of airport shops;[15] and a prohibition on price gouging for essential items.[16] Arguably, the bar on return of Australian citizens from India for 14 days made on 30 April 2021 represented the high water mark on Commonwealth infringement of usual freedoms.[17] This Determination was challenged in the Federal Court but upheld in the decision of *Newman v Minister for Health and Aged Care*.[18] Mr Newman was an Australian citizen and, although the Court held he had a common law right to return, this could be restricted by clear legislation, which the Act, Declaration and Determination provided. The Court noted that 'the power to restrict movement of persons across borders is a necessary incident of a power to prevent the entry of a human disease into Australia or to prevent the spread of such a disease from Australia to another country'.[19]

Interestingly one of the other arguments of the applicant was that the Minister could only have considered the relevant submission in relation to the Determination for one day, which Justice Thawley did not regard as surprising and he noted that indeed 'it would be hoped that the Minister acted expeditiously in an emergency situation'.[20] Indeed for many of the actions taken during that period, a full day of consideration would have been an unaffordable luxury.

The uses of the Biosecurity Act to make these determinations were not accompanied by a truncation or reduction in process other than in the sense that officials worked through the night to complete them. In this sense, the legislative basis precluded the risk taking discussed above and underscores the importance of non-discretionary requirements to limit arbitrary action. These instruments were also published on the Federal Register of Legislation with their explanatory statements and were similarly not subject to disallowance by the Parliament,[21] or required to be accompanied by a human rights statement of compatibility or routinely

13 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirement) Determination 2020*; *Biosecurity (Exit Requirements) Determination*, made under the Biosecurity Act s 45(2); *Biosecurity (Human Coronavirus with Pandemic Potential) (Preventive Biosecurity Measures — Incoming International Flights) Determination 2021*.

14 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020*; then *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020.*

15 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirement — Retail Outlets at International Airports) Determination 2020*.

16 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020*.

17 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021*.

18 [2021] FCA 517 (Thawley J).

19 Ibid [83].

20 Ibid [58].

21 Biosecurity Act s 475(2) referring to the Legislation Act s 42.

assessed by the Senate Standing Committee for the Scrutiny of Delegated Legislation.[22] They were not required to be accompanied by a human rights statement of compatibility but nonetheless the Minister did give a response to a request by the Parliamentary Joint Committee on Human Rights.[23]

The fact that only a fraction of the potentially available power to restrain individual freedoms and activities was in fact activated can be attributed to the stringent legislative framework around the making of the Declaration and the determinations.

An example of relative restraint is evidenced by the determination to limit entry to remote Aboriginal communities on the basis of the elevated risk to people with high burdens of pre-existing disease and the difficulty in preventing spread in overcrowded conditions.[24] These limits were implemented in the context of close consultation with representatives of communities affected and the relevant states and territories and they were lifted immediately the relevant state or territory had alternative, less intrusive arrangements in place.

In the event, most of the stringent restrictions in place around Australia were effected under the relevant state and territory legislation and not under the Biosecurity Act at all. This was a fact not always well understood as is evidenced by the proceedings of the Senate Standing Committee for the Scrutiny of Delegated Legislation's inquiry into the exemption of delegated legislation from parliamentary oversight hearing on 3 September 2020.

In asking about the appropriateness of the Declaration and determinations under the Biosecurity Act not being disallowable, the then chair of the committee, Senator Ferravanti Wells, prompted the following exchange:

> Chair: … when you look at the consequences of those declarations not just at the Commonwealth level but also at the state level and then at the local level. Understandably, for Australians who have now been impacted at the local level as a consequence of those declarations, that nexus now needs to be explained to them. That's really why we are concerned, particularly in relation to what's happened with COVID.
> …
>
> Ms Edwards: Thanks, Senator; we welcome the scrutiny. I just want to make the point for those listening that many of the restrictions that have been imposed on Australians are under state legislation. Those restrictions that apply under the Biosecurity Act are reasonably limited and are really only to do with international travel, cruise ships and some price-gouging issues. There was the remote communities element, which was done at the request of the states early on, but the vast majority of the restrictions as we know them all over the country are under pre-existing, completely separate state regimes which have no nexus whatsoever to the Biosecurity Act.
>
> Chair: … but as a consequence of what is declared at a federal level, without that federal declaration — correct me if I'm wrong, Ms Edwards — the states could not do what they've done. It's the declaration at the federal level, the Governor-General's declaration, that cascades then to enable the states to do their —
>
> Ms Edwards: The Governor-General's declaration gave a sense that there was a national emergency, but their legislation, completely separate from anything the Commonwealth does, would enable them to do exactly what they've done already. There is no flow-on from us having made that declaration.

22 Parliament of Australia (n 12); Fletcher (n 10) 649–51.
23 Human Rights (Parliamentary Scrutiny) Act s 9(1); Fletcher (n 10) 649–51.
24 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020*.

The context of Australian administrative law and the processes built into the Biosecurity Act itself were influential in limiting recourse to the powers available to the Minister. The potential for litigation was evident as was the scrutiny which would be applied to determinations. Of course, a culture in which individual freedoms are respected and emergency powers are viewed with caution also played a part.

Nonetheless many of the measures taken under the legislative frameworks of the Commonwealth and the states and territories caused hardship and distress to Australians. The restrictions on the ability of people to leave their homes, their area and their state or territory were significant, families were separated, funerals were missed and children missed learning and social opportunities. There is also considerable debate and discussion as to the relative impact of measures on different sectors of the community and the extent to which the negative impact fell disproportionately on already disadvantage communities and people and on women.[25] These implications of the policy decisions taken and the extent to which they were warranted and proportionate will be long debated and the lessons learnt will be incorporated into future planning. To date, no procedural or administrative law issue has successfully been employed to demonstrate a failure in decision making. They were fundamentally in the nature of political assessments, based on health and economic advice, and will be judged on those bases.[26]

Examples of pandemic-related activity where ordinary processes were challenged

Purchase and distribution of the national medical stockpile

Early in 2020, it became apparent that the availability of and supply chain for the purchase of personal protective equipment (PPE) would be an issue. The pre-existing system was for face masks for use in a clinical setting as well as gowns, goggles and other items to be purchased directly by states and territories for public hospitals and private clinics from established suppliers importing the items, primarily from China and primarily from Wuhan province. The supply was generally on an 'as needed' timing basis and limited products were stockpiled, especially given the fact that the usability of products is time limited due to degradation of elastic straps et cetera.

The use of PPE to prevent the spread of pathogens in a clinical setting is a core element of infection control practice. In 2020, there were frequent alarming reports of hospitals overseas facing a deluge of seriously ill COVID-19 patients without adequate supplies of PPE. It was in this context that fears that the Australian supply was inadequate grew.

The National Medical Stockpile is a longstanding facility which had traditionally been focused on preparation for a potential chemical or biological attack or disaster. PPE in the form of masks was held but in relatively small numbers in anticipation of a localised incident. It was not designed, and it did not hold anywhere near the numbers of PPE items which would be required, to support hospital operations and medical practice across the country.

25 See, for example, talk by Samantha Lee of Redfern Legal Centre at AIAL seminar entitled 'Administration in an emergency: Lessons learned from past two years', 15 June 2022.

26 See, for example, *Palmer v Western Australia* [2021] HCA 5; (2021) 272 CLR 505.

It was decided in February 2020 to embark on a procurement process to bolster supplies in order to help meet shortfalls or failures in direct supply and to distribute supplies as needed.

The process involved searching out providers, manufacturers and potential manufacturers of PPE. Supplies of ventilators and new treatments for which there were claims of efficacy for combatting COVID-19 were also sourced. This process was arduous and urgent as the Chinese supply of PPE was interrupted or diverted and countries all over the world scrambled to purchase product and quarantine local production for their own needs. The stockpile was dramatically expanded through contracts for much larger quantities than had ever been procured previously and which were much more rapidly drafted than ever before. Also under stress were the existing systems for storage, inventory and distribution. Bespoke and expensive initiatives to freight the material to Australia in the face of a collapse of supply chain were also implemented.

Decision-making was required also as to the identity of eligible recipients, and the timing and manner of distribution. In the initial period as supply was sourced and began to arrive in country, the quantities in the stockpile were carefully rationed to ensure that supplies were released in order of priority for infection control. At the same time, many groups who had previously not used PPE, or used it only in small quantities, such as police, aged care workers, transport workers and others in essential industries, were clamouring for supply in the face of the pandemic. While the fear was understandable, many of these calls were disproportionate with the risk of infection given the low level of infection in Australia and especially given the limited supplies. Resisting calls for PPE from those whom health experts advised were at lower risk was one of the most challenging tasks for public servants.

The purchasing program was also undertaken in the context of rapidly escalating prices which virtually ruled out a stable objective assessment of value for money in accordance with usual processes and benchmarking. The value for money requirement remained at the forefront of consideration but became less evidence based as the market operated as never before. The propriety of price was judged against the backdrop that doctors, nurses and other health workers might be without PPE and exposed to the virus.

The extent of cost recovery (if any) was also considered especially as many of the recipients were already funded by the Commonwealth for PPE — primarily public hospitals — or were ‘for-profit entities’ for whom purchase of PPE was a business expense.

Overall, the whole process posed extreme difficulties and required complex decision-making in the tightest of time frames.

Much of this process is recorded in the Australian National Audit Office's (ANAO) report *COVID-19 Procurements and Deployments of the National Medical Stockpile* published on Thursday 27 May 2021 whose conclusions included that:

> Procurement processes for the COVID-19 NMS procurements were largely consistent with the proper use and management of public resources. Inconsistent due diligence checks of suppliers impacted on procurement effectiveness and record keeping could have been improved.

And:

> In the absence of risk-based planning and systems that sufficiently considered the likely ways in which the NMS would be needed during a pandemic, Health adapted its processes during the COVID-19 emergency to deploy NMS supplies. Large quantities of PPE were deployed to eligible recipients. Due to a lack of performance measures, targets and data, the effectiveness of COVID-19 NMS deployments cannot be established.

In the event, no reports have been located of hospitals treating patients without PPE and distribution of PPE was made to aged care facilities, GPs, disability services and allied health providers among others. Initially, supplies were limited to locations where an outbreak was actually occurring or highly likely to occur, as wider distribution was limited by supply, but quantities increased as contracts were entered into and delivery into the stockpile realised.

It is well documented, however, that many organisations complained that they had not been provided with PPE or that the provision was too slow or in too small a quantity. Whether the decision-making as to allocation was optimal is unknown and possibly unknowable but the efficacy of the border closures on the spread of the disease meant that this was not tested to a high degree.

There was no suggestion of corruption in the contracting or unacceptable quality standards in the product. The main issue was that obtaining the product was difficult and appropriately managing distribution of limited supply required a hierarchy of priority.

The question which arises in an administrative law context is how should decision-making in these extreme circumstances be judged. The review of the activity is hampered by reduced capacity for record keeping and documentation and the virtually non-existent time available for planning before the need to act.

Stringently proper decision-making is necessary for the rule of law and for good governance and it is also arguable that better record keeping, more careful planning and a wider process of consultation would have yielded a more easily defensible program. However, it might also have led to lost opportunity to close contracts and a delay in the attainment of the supply actually required by Australia's health system facing the pandemic.

To be judged against a standard of ample supply and sufficient time for robust processes and record keeping would be a mismatch with the circumstances in which officials found themselves. In my view an alternative faster approach by which good decision-making can be safeguarded without the red-tape and time frame that has often been the case should be considered. In this regard, the tailored governance and decision-making framework — known as 'live assurance' — created and implemented while the pandemic was at its height will be a model for consideration noting that even this might be too slow in some crisis circumstances.

The question for administrative lawyers is whether the public law system is sufficiently flexible to recognise and facilitate optimal decision-making in circumstances where there is no certainty other than that there is grave risk to the population and where the decision-makers have limited time and resources to draw upon. It is certainly the case that timid decision-makers who are concerned with later analysis of their decisions are at least equally capable of contributing to the realisation of grave consequences. The risk of failing to act must be balanced against the risk of acting with truncated processes.

Other health system measures

A range of other significant policies were implemented during the first half of 2020. Some like telehealth and electronic prescribing were essentially the acceleration of initiatives which were in contemplation and the subject of discussion internal to government and consultation with stakeholders. Telehealth was initially permitted for patients and doctors who were infected with COVID-19 or at particular risk of severe disease, and quickly escalated into a universally available service. Many practitioners delivered telehealth solely or predominantly for periods during the following 24 months and the use of telephones greatly outweighed video consultations. The measure was implemented by the creation of numerous new Medicare rebate items which mirrored existing items other than that the delivery method was by telephone or video rather than face-to-face.[27] The items were initially required to be bulk billed (meaning that the charge was limited to the rebate amount paid by government) but this limit was later removed. A further major change to combat allegations of predatory low value care providers entering the telehealth market was to require that, in most cases, a patient could access telehealth with a practitioner (or practice) only where the patient had received a face-to-face service with that provider within the previous 12 months. This was to combat the potential for low quality telehealth-only services to flood the market and undermine the businesses of existing community-based practices.

Telehealth was immediately popular with practitioners and patients, both as a COVID-19 related measure and for general convenience, and rates of service rose quickly. To give a sense of the take-up, 95.9 million telehealth services were delivered to 16.8 million patients between 13 March 2020 and 12 February 2022, and 91,087 practitioners used telehealth services.[28]

27 See n 2.

28 Australian Digital Health Agency (Digitalhealth), 'Telehealth' (Web Page) <https://www.digitalhealth.gov.au/healthcare-providers/initiatives-and-programs/telehealth>.

Challenges with the rapid implementation of telehealth were significant and remain current including the need to ensure appropriate compliance arrangements, avoid over servicing and maintain quality. The rapid implementation also meant that previous plans to incorporate telehealth into a broader reform of primary health care including to increase continuity of care were largely overtaken.

The implementation of telehealth proceeded as a series of policy changes, and implementation adjustment as issues arose rather than through a global policy development approach in advance. Of course, regardless of the extent and time frame of pre-planning, the reality is that any major reform requires adjustment and monitoring and it is an open question whether the continual improvement would have been avoided by slower implementation.

There is no doubt that the reform was implemented much more quickly than had been expected or had been the case with earlier reforms due to the pandemic imperatives. Whether the speed brought with it disadvantages and unforeseen policy implications of greater impact and longer duration than would otherwise be the case and whether any such negative implications overshadowed the benefits remains to be considered by future review and assessment.

Commonwealth–state collaborative measures

A further area of activity and significant reform related to the areas of collaboration and cooperation between the federal government and the state and territory governments.

A new national partnership implementing a 50:50 share of the health costs of COVID-19 on public health measures (testing and contact tracing in particular) and public hospital costs incurred as a consequence of the COVID-19 case load was agreed in very short order and adjustments to the general cost sharing agreement for public hospitals was also rapidly negotiated.

A truly innovative agreement was also put in place to guarantee the financial position of private hospitals and clinics in the face of pauses imposed on elective surgery and to ensure that nursing staff, hospital and clinic facilities including ICU and equipment, such as ventilators and PPE, could be drawn upon by the public COVID-19 response if needed. The private hospitals and clinics entered into agreements with the relevant state or territory government with the costs of maintaining the arrangements borne by the Commonwealth using the National Partnership on COVID-19 Response Agreement[29] as a mechanism.

The speed at which these arrangements were put in place will be a long-term reminder of how efficient the federation can be. While much media attention and commentary has focused on the significant acrimony that arose from issues such as asynchronous border restrictions, it is important to note the high level of cooperation.

29 Federal Financial Relations, 'National Partnership on COVID-19 Response', <https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2021-04/covid-19_response_vaccine_amendment_schedule.pdf>.

A further characteristic of this period was for the bureaucracy surrounding interactions between the Commonwealth, states and territories to be greatly reduced. The complex processes of the longstanding committee of Health Department CEOs, the Australian Health Ministers Advisory Council (AHMAC), for example, were predominantly dropped and were replaced with frequent, good faith and collaborative teleconferences and intense bilateral telephone contact. To my mind, this approach was more productive, much quicker and fostered lasting trusting relationships and collaborations.

Conclusion

It was an unprecedented time and the potential health disaster facing the nation called for fast, innovative and novel initiatives.

Much of the legal framework served the process well with the Biosecurity Act emergency provisions working as intended and existing programs such as Medicare and National Partnership Agreement infrastructure lending themselves to fast scale-up and adjustment.

However, many processes were too slow, too paper based and too cumbersome to aid the politicians, officials, health practitioners and advisers charged with protecting the population and especially those most vulnerable to severe disease and death.

In addition, the quality of decision-making is yet to be judged but many of the tools usually used to make that assessment were casualties to the speed of action. Record keeping and traditional consultative processes were supplanted by WhatsApp, the exercise of judgement and informal collaborations.

Administrative law practitioners may need to consider how decision-making should be assessed in these circumstances. It is my view that, at its core, public decision-making should be judged by the impact on Australia and Australians. Where, for reasons forced by the circumstances, there are gaps in the process, or gaps in the documentation of that process, observers should have regard to the context and look to outcomes as the measure.

Rationalising mercy? The statutorification of the prerogative of mercy and its amenability to judicial review

*Julian R Murphy**

Over 100 years ago, in the case of *Horwitz v Connor*[1] (*Horwitz*), the High Court purported to say that 'no Court has jurisdiction to review the discretion of the Governor in Council in the exercise [of the prerogative of mercy]'.[2] While that comment has been subsequently explained to be obiter, lower Australian courts have felt constrained to follow it, including as recently as 2020, where it was cited as either persuasive or binding by the Queensland Court of Appeal, the Full Court of the Federal Court and a single judge decision in the Victorian Supreme Court.[3] There are a number of aspects of that case, and its legacy, that warrant particular scrutiny; and this article will come to them in due course. At this juncture what is relevant to note is that the High Court's understanding of the non-reviewability of the prerogative of mercy was rooted in common law conceptions inherited from England.[4] In the last century, however, the English common law has developed considerably, such that at least most prerogative powers are now considered amenable to review, even those engaging considerations of high policy, such as the prerogative power to prorogue Parliament, and certainly those affecting individual interests, such as the prerogative of mercy. So too have there been important developments, including statutory developments, in Australia. Yet *Horwitz* has held firm, and the prerogative of mercy remains — on the current state of the law — unreviewable.

In this article, I tease out two related anomalies in the Australian law on this subject. The first of those relates to what I will call the statutorification of the prerogative of mercy — that is, the development of, and judicial consideration of, a statutory architecture of powers surrounding the prerogative of mercy. I will suggest that, despite the increasingly sophisticated 'modern approach'[5] to statutory interpretation that is now orthodox in Australia, the case law considering these statutory provisions has been impoverished by conclusory statements about the non-reviewability of the *common law* mercy powers and reductive analogies between those and the statutory mercy powers.

The second anomaly this article seeks to expose is the contradistinction by which the Australian law as to the reviewability of the prerogative of mercy has stagnated in 1908 while the common law of England (and other common law countries) has moved on, such that it is now widely accepted that exercise of the prerogative of mercy *is* reviewable, albeit perhaps on a more limited basis, and with a greater sensitivity to executive discretion, than other public law powers. While Australian courts have been made aware of at least some

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1 (1908) 6 CLR 38 (*Horwitz*).

2 Ibid 40.

3 *Holzinger v Attorney-General (Qld)* (2020) 5 QR 314 (*Holzinger*); *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1 (*Ogawa*); *Zhong v Attorney General (Vic)* [2020] VSC 302 (*Zhong*).

4 *Von Einem v Griffin* (1988) 72 SASR 110, 126 (Lander J) (*Von Einem*).

5 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 634–5 (Brennan CJ; Dawson, Toohey and Gummow JJ).

of these authorities they have, for the most part, chosen not to follow them. The rationale for that reluctance has been the idea that judicial review of the prerogative would embroil the courts in consideration of matters of high policy and politics that are the proper, and exclusive, domain of the executive. I want to point to evidence to the contrary, again with reference to the Australian case law considering the statutory adjuncts to the prerogative. In some of these cases courts have either accepted, or assumed, the reviewability of the statutory prerogative powers and have gone on to engage in the exercise of judicial review. The reasoning in those cases shows courts to be perfectly capable of engaging in this task in a way that remains cognisant of the respective spheres of competence of the executive and judiciary.

Before proceeding, it is helpful to advert to the controversy over terminology in this field. Although much of the case law and commentary uses the language of 'prerogative of mercy', it has been noticed that the power typically conceived of by that name is in fact now conferred, at a federal level at least, by s 61 of the *Constitution*. Accordingly, a Full Court of the Federal Court has said that it is 'preferable' to describe the power as 'an exercise of the Constitutional executive power under s 61 of the *Constitution*'.[6] Similar looseness of terminology has infected discussions of the statutory powers, which are sometimes called 'statutory prerogative' powers[7] — something of a contradiction in terms. To cut through this terminological confusion, and to ensure consistency, this article will use the term 'common law mercy powers' to refer to what was historically the prerogative and will use the term 'statutory mercy powers' to refer to the more modern statutory innovations in this area.

The nature and scope of the power(s)

The essence of the common law and statutory mercy powers are that they allow, through various processes, for the conditional or unconditional pardon of a person or an alleviation of their sentence.[8] It has been said that, whenever one is faced with the challenge of ascertaining the scope of a prerogative power, 'the proper approach is a historical one' whereby one asks, 'how was it used in former times and how has it been used in modern times?'[9] For that reason, it is helpful[10] to start with an overview of the common law origins of the prerogative of mercy, its transformation to a constitutional footing in s 61 of the *Constitution*, and its encrustation with various statutory adjuncts. This overview will be necessarily brief, as the focus of this article is on the *reviewability* of the power rather than its content or scope.

6 *Ogawa* (n 3) 15 [64], [68].
7 *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440, 453 [52] (Lander J) (*Eastman*).
8 *R v Milnes and Green* (1983) 33 SASR 211, 216–17 (Cox J). A more extensive survey of the nature and scope of common law and statutory mercy powers can be found in J R Murphy, F Gerry QC, R Tisdale and J Kretzenbacher, 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2021) 46(3) *Monash University Law Review* 252.
9 *Burmah Oil Co v Lord Advocate* [1965] AC 75, 101 (Lord Reid).
10 Cf *Ogawa* (n 3) 15 [67]–[68].

Common law history

The prerogative of mercy can be traced back to Ancient Athens[11] or even earlier, to the Code of Hammurabi (approximately 1754 BCE) or the amnesties of the Han dynasty in China (starting approximately 202 BCE).[12] In the Middle Ages, the pardon power was available for persons who killed in self-defence[13] and, later, was exercised increasingly often in the 18th century in England, by which time half of all death sentences were commuted to transportation.[14] Perhaps as many as one-third of the convicts on the First Fleet were recipients of the prerogative.[15]

In the Australian colonies, such as New South Wales, hundreds of conditional and unconditional pardons were granted each year.[16] In 1872, the Victorian Premier and Attorney-General described the Governor's pardon as 'in every day practice'.[17] On federation, by virtue of s 61 of the *Australian Constitution*,[18] the prerogative was vested in the Governor-General of Australia and in the governors of each state, on advice of the Executive Council.[19]

Statutory adjuncts and encrustations

In the 'age of statutes',[20] the prerogative has not remained immune from statutory attention. These developments have been variously described as 'a statutory accretion to the prerogative power to pardon';[21] 'a statutory adjunct to a prerogative of mercy';[22] 'ancillary to the prerogative power';[23] or a statutorily 'control[led]' exercise of the prerogative power.[24] Their exercise has been said to be 'similar in nature to [the] prerogative discretion'[25] and

11 CD Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328, 1334.
12 D Tait, 'Pardons in Perspective: The Role of Forgiveness in Criminal Justice' (2000) 13(3) *Federal Sentencing Reporter* 134, 134.
13 CH Rolph, *The Queen's Pardon* (Cassell, 1978) 19. See also *R v Secretary for the Home Department; Ex parte Bentley* [1994] QB 349, 357 (Watkins and Neill LJJ and Tuckey J); S Grupp, 'Some Historical Aspects of the Pardon in England' (1963) 7 *American Journal of Legal History* 51, 60.
14 L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1948) vol 1, 151–9, 163–4. See also D Hay, 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh and EP Thompson, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Allen Lane, 1975) 17, 34.
15 GD Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 5.
16 JJ Spigelman, 'The Macquarie Bicentennial: A Reappraisal of the Bigge Reports' (The Annual History Lecture, History Council of New South Wales, 4 September 2009) 12 <https://historycouncilnsw.org.au/wp-content/uploads/2013/01/2009-AHL-Spigelman.pdf>.
17 Sir J Martin, quoted in JM Bennett, 'The Royal Prerogative of Mercy: Putting in the Boots' (2007) 81(1) *Australian Law Journal* 35, 37.
18 See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9 (Isaacs J).
19 *In re an Arbitration Between The Standard Insurance Co Ltd and Macfarlan* [1940] VLR 74, 82 (Gavan Duffy J).
20 *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J). Credit for coining the phrase 'age of statutes' is usually attributed to Guido Calabresi. See G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).
21 *Pepper v Attorney-General (Qld); Re Fritz* [1995] 2 Qd R 580, 589 (Mackenzie J).
22 *Martens v Commonwealth* (2009) 174 FCR 114, 120 [23] (Logan J).
23 *Von Einem* (n 4) 129.
24 *L v South Australia* (2017) 129 SASR 180, 210 [116] (Kourakis CJ).
25 Ibid.

might be described as a statutory 'substitute' or 'alternative' to the prerogative.[26] Broadly speaking, there are two categories of statutory descendants of the common law mercy powers: statutory analogues to the prerogative of mercy; and statutory referral and opinion powers.

Statutory analogues to the prerogative of mercy

In many Australian jurisdictions,[27] the prerogative has been supplemented by analogous statutory powers.[28] These statutory powers range from limited powers to remit monetary penalties and property forfeitures[29] to more robust powers to order the discharge of an offender from a term of imprisonment.[30] In their most powerful iteration, the statutory analogues include a pardon power.[31]

As the legislation often makes clear,[32] statutory analogues to the prerogative are designed to run 'parallel'[33] with the prerogative, without limiting its operation in any way. As long ago as 1949, Dixon J noted that courts construing statutory provisions 'affect[ing]' the 'Prerogative … power to remit sentences' 'should be careful to maintain' the distinct roles of the courts and the Crown in the administration of sentences.[34] There is thus an 'extremely strong' presumption of statutory interpretation that preserves prerogative powers from statutory encroachment absent 'clear and unambiguous provision'.[35]

Notwithstanding this presumption of statutory interpretation, there are jurisdictions where it is arguable that the entire mercy powers are now statutory. In the Northern Territory, the prerogative is reposed in the Administrator of the Northern Territory and derives from ss 31 and 32 of the *Northern Territory (Self-Government) Act 1978* (Cth), whereby the Administrator

26 *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

27 New South Wales, Queensland and South Australia do not appear to have any sort of statutory remissions powers, although some Queensland prisoners may still be eligible for a remission under the repealed statutory remission power. See *Corrective Services Act 2006* (Qld) s 401. Note that state and territory law on remissions applies to federal offenders held in state or territory prisons. See *Crimes Act 1914* (Cth) s 19AA(1). Furthermore, federal offenders sentenced before 1 July 1990 may be eligible for remission under *Commonwealth Prisoners Act 1967* (Cth) s 19 (now repealed).

28 This analysis does not cover statutory powers that are not analogous to the prerogative of mercy but do involve some interference with a sentence — for example, the power to release a prisoner shortly before the completion of their sentence: *Corrective Services Act 2006* (Qld) s 110; *Prisons Act 1981* (WA) s 31.

29 See, for example, *Crimes (Sentence Administration) Act 2005* (ACT) s 313(b), (c); *Sentencing Act 1997* (Tas) s 98; *Sentencing Act 1991* (Vic) s 108; *Sentencing Act 1995* (WA) s 139.

30 *Crimes (Sentence Administration) Act 2005* (ACT) s 313(a); *Sentencing Act 1995* (NT) s 114(2); *Corrective Services Act 2006* (Qld) s 75 (note that while s 75 has been repealed it remains applicable to certain prisoners by virtue of s 401); *Corrections Act 1997* (Tas) ss 86, 87; *Corrections Regulations 2018* (Tas) regs 25, 26; *Corrections Act 1986* (Vic) s 58E; *Corrections Regulations 2019* (Vic) reg 100.

31 See, for example, *Crimes (Sentence Administration) Act 2005* (ACT) s 314.

32 *Crimes (Sentence Administration Act) 2005* (ACT) s 314A; *Corrective Services Act 2006* (Qld) s 346(1); *Sentencing Act 1997* (Tas) s 97; *Corrections Act 1997* (Tas) s 89; *Sentencing Act 1991* (Vic) s 106; *Sentencing Act 1995* (WA) s 317.

33 A Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 13 [1.25].

34 *Flynn v The King* (1949) 79 CLR 1, 7–8 (Dixon J).

35 *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ). See also J Goldring, 'The Impact of Statutes on the Royal Prerogative: Australian Attitudes to the Rule in *Attorney-General v De Keyser's Royal Hotel*' (1974) 48 *Australian Law Journal* 434.

assumed certain prerogative powers of the Crown.[36] Accordingly, it is most accurate to describe the prerogative of mercy in the Northern Territory as 'a statutory prerogative',[37] the statute in question being the Northern Territory (Self-Government) Act. This is the way that the prerogative-style power has been described in the Australian Capital Territory (ACT).[38] Arguably, Queensland has a statutory prerogative as well, in s 36 of the *Constitution of Queensland 2001* (Qld).

Statutory referral and opinion powers

In addition to the statutory analogues to the prerogative discussed above, additional statutory powers operate in conjunction with, or as an 'adjunct'[39] or 'supplement'[40] or 'substitute'[41] or 'alternative'[42] to, the prerogative of mercy.[43] The general effect of these provisions is to create mechanisms for the involvement of state and territory courts in the consideration of mercy petitions in two distinct ways: by a 'reference power' and an 'opinion power'.[44] An example of these related powers, which will be discussed later in this article, is that contained in s 672A of the *Queensland Criminal Code*, which provides:

> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may —
>
> a. refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted;
>
> b. if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly.

36 Earlier in the Northern Territory's history the prerogative of mercy was understood to be only exercisable by the Governor-General of Australia. See Northern Territory, *Parliamentary Debates*, Assembly, 19 September 1978 (Questions without notice). Of course, the Commonwealth itself assumed these powers from the British Crown pursuant to s 61 of the *Australian Constitution*. See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9 (Isaacs J).

37 This description was used in *Eastman* (n 7) 453 [52].

38 Ibid.

39 *Martens v Commonwealth* (2009) 174 FCR 114, 120 [23] (Logan J).

40 M Hinton and D Caruso, 'The Institution of Mercy' in T Gray, M Hinton and D Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519, 520.

41 *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

42 Ibid.

43 For a discussion of the historical origins of these provisions, see C Castles, 'Executive References to a Court of Criminal Appeal' (1960) 34(6) *Australian Law Journal* 163, 163–4.

44 The distinction between 'reference' and 'opinion' powers is gratefully adopted from Hinton and Caruso (n 40) 521. For an early and insightful discussion of the distinction see *R v Gunn (No 1)* (1943) SR (NSW) 23, 25 (Jordan CJ; Davidson J agreeing).

All Australian states and territories, except for the ACT,[45] have some statutory version of the reference power[46] and the opinion power.[47] Persons convicted of federal offences in state courts are also eligible for these procedures, as s 68(2) of the *Judiciary Act 1903* (Cth) applies the state legislation by analogy to federal convictions and thus allows the federal Attorney-General, or other relevant Minister,[48] to refer a matter to a state court or seek an opinion from a state court.[49]

Conclusion

The above analysis has implications for the reviewability of refusals of mercy petitions. This is because a refusal of a petition for mercy may constitute a refusal to exercise the statutory mercy powers *and* a refusal to exercise the common law mercy powers.[50] Against that background, it can now be suggested, some Australian judgments have tended to elide the statutory and non-statutory powers and considerations related to their reviewability.

Reviewability of statutory mercy powers

This article now turns to what I have called the first anomaly in the Australian case law on the reviewability of the prerogative of mercy. That anomaly can be neatly summarised in two propositions. First, nearly all the judgments purporting to pronounce upon the reviewability of the *common law* prerogative of mercy have in fact been primarily concerned with *statutory* powers. Secondly, even insofar as those cases squarely confront the reviewability of the statutory powers, they do so in a way that is at odds with the modern approach to statutory interpretation — that is, with little consideration of text, context and purpose. Instead, they purport to deploy conclusory statements about the non-reviewability of common law mercy powers as applying by necessary analogy.

To substantiate this claimed anomaly I will consider three cases: the early case of *Horwitz* and the recent cases of *Holzinger v Attorney-General (Qld)*[51] (*Holzinger*) in the Queensland Court of Appeal and *Attorney-General (Cth) v Ogawa*[52] (*Ogawa*) in the Full Court of the Federal Court.

45 The ACT has a different 'inquiry' scheme that is not contingent upon the receipt of a petition for mercy. See *Crimes Act 1900* (ACT) pt 20.

46 *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)(a), (b); *Criminal Code* (NT) ss 431(a), 433A; *Criminal Code 1899* (Qld) s 672A(a); *Criminal Procedure Act 1921* (SA) s 173(1)(a), (2); *Criminal Code Act 1924* (Tas) s 419(b); *Criminal Procedure Act 2009* (Vic) s 327(1)(a); *Sentencing Act 1995* (WA) s 140(1)(a).

47 *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)(c); *Criminal Code* (NT) s 431(b); *Criminal Code 1899* (Qld) s 672A(b); *Criminal Procedure Act 1921* (SA) s 173(1)(b); *Criminal Code Act 1924* (Tas) s 419(b); *Criminal Procedure Act 2009* (Vic) s 327(1)(a); *Sentencing Act 1995* (WA) s 140(1)(b).

48 See *Martens v Commonwealth* (2009) 174 FCR 114, 123 [35] (Logan J).

49 Ibid 118–9 [15]–[19] (Logan J); *R v Martens (No 2)* [2011] 1 Qd R 575, 598 [85]–[86], 600 [92], [94] (Chesterman JA; Muir JA agreeing); *Yasmin v Attorney-General (Cth)* (2015) 236 FCR 169, 172–4 [4]–[12] (*Yasmin*); *Jasmin v The Queen* (2017) 51 WAR 505, 529 [96] (Buss P), 549–50 [227]–[228] (Mazza and Mitchell JJA). Cf *R v Martens* [2010] 1 Qd R 564, 567 [14]–[15] (Logan J); *Nudd v Minister for Home Affairs* (2011) 122 ALD 529, 532 [10] (the Court).

50 As to the characterisation of a single refusal as multiple decisions, see *Martens v Commonwealth* (2009) 174 FCR 114, 116–17 [4] (Logan J).

51 *Holzinger* (n 3).

52 *Ogawa* (n 3).

Horwitz v Connor

The foundational case on the reviewability of statutory mercy powers is *Horwitz*.[53] Mr Horwitz had been convicted and sentenced in the Supreme Court of Victoria and was serving a total effective six-year sentence of imprisonment in the Geelong jail. Mr Horwitz had directed the writ of habeas corpus to the Inspector-General of Penal Establishments of Victoria alleging that he was entitled to a remission of his sentence, and thus release from prison, based on his interpretation of regulations establishing the eligibility criteria for sentence remissions. The regulations apparently established certain criteria which, if met, meant that a remission 'shall be lawful'.[54] At the return of the writ in the Full Court of the Supreme Court of Victoria, Mr Horwitz appears to have argued that 'shall' meant 'must',[55] and thus that, having met the criteria, there was a duty on the Governor to remit his sentence. The Full Court of the Supreme Court of Victoria apparently rejected that interpretation of the regulations.[56] On an application for special leave to appeal to the High Court, the Court discussed the wording of the regulations with counsel in argument.[57] Ultimately, it appears that the High Court agreed that the regulations did not confer any *duty* on the Governor to grant a remission but instead conferred a 'power' that was 'discretion[ary]'.[58] The High Court accordingly dismissed the application for special leave, saying:

> The power given to the Governor in Council by sec. 540 of the *Crimes Act 1890* is a discretionary power to make regulations, and further, 'to mitigate or remit the term of punishment accordingly,' that is, in accordance with the regulations. The Governor in Council has power to remit the term of imprisonment of the applicant. He has not done so. The most that might be asked for here would be a mandamus to the Governor in Council to consider the matter. But a mandamus to the Governor in Council will not lie, and no Court has jurisdiction to review the discretion of the Governor in Council in the exercise. The application will be refused.[59]

It can immediately be noted that the one-paragraph judgment says considerably more than was necessary to dismiss the application for special leave. It comments on mandamus even though mandamus was never sought (the Governor was not even a party to the proceedings). It also talks categorically about an inability of any court to review the prerogative of mercy,

53 *Horwitz* (n 1).
54 Ibid 40 (Higgins J, quoting the regulations).
55 That 'shall' can sometimes mean 'must' is explained in *Julius v Lord Bishop of Oxford* [1880] 5 AC 214, which was relied upon by Mr Horwitz in argument. See *Horwitz* (n 1) 39 (argument).
56 The Full Court of the Supreme Court of Victoria's decision of 3 April 1908 is unreported. However, it clearly turned on the proper interpretation of the regulations. See the summary of the decision at *Horwitz* (n 1) 39.
57 Ibid 39 (argument).
58 Ibid 40 (Griffith CJ, for the Court).
59 Ibid.

even though, in truth, the case turned upon a statutorily directed exercise of a remission power. It is thus appropriate to state the following limits on the persuasive authority of that judgment:

- it was a short, ex tempore judgment that does not expose its reasoning;[60]
- it is of no precedential value, being a dismissal of special leave;[61]
- even if it were of precedential value, the comments about the reviewability of the prerogative power, and the unavailability of mandamus to compel consideration of an application for the remission of sentence, were obiter dicta as no such review had been sought;[62]
- even if it were of precedential value, its ratio would be no more than that the particular regulations at issue created a discretion, not a duty (and corresponding entitlement). In this regard, the courts have repeatedly emphasised that questions of statutory interpretation directed to determining the reviewability of a statutory power must be conducted by close analysis of the *particular provision at issue*, and that there is limited utility in referring to interstate provisions;[63]
- finally, the judgment was decided at a time when it was thought that prerogative powers could not be amenable to judicial review,[64] and thus it is hardly surprising that the Court did not stray long to consider whether adjacent statutory powers might be amenable to review.

Holzinger v Attorney-General (Qld)

Over a century after *Horwitz*, the applicant in *Holzinger* applied for judicial review of a decision of the Attorney-General not to refer his case to the Queensland Court of Appeal under s 672A of the *Queensland Criminal Code* reproduced earlier in this article.[65] The proposed grounds of review were a denial of procedural fairness, failure to take into account a relevant consideration, unreasonableness, and no evidence.[66] The Court of Appeal denied that the statutory power was amenable to review.[67] Significant to that holding was the conclusion that the statutory provision at issue was 'a power to commence litigation',[68] not a

60 *Ogawa* (n 3) 16 [73] (the Court).
61 As to the precedential status of refusals of special leave to appeal see *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 133 [112] (Kiefel and Keane JJ); cf G Lindell (ed), *The Mason Papers: Selected Articles and Speeches* (Federation Press, Sydney, 2007) 31–2. As to the lack of precedential value of *Horwitz*, see *Ogawa* (n 3) 16 [73]. Although it should be noted that *Horwitz* was cited with approval in *R v Toohey; Ex parte Northern Land Council* (1985) 151 CLR 170, 261 (Aickin J); *L v South Australia* (n 24) 208 [109] (Kourakis CJ).
62 WMC Gummow, 'Administrative Law and the Criminal Justice System' (2008) 31 *Australian Bar Review* 137, 141 ('No exercise of the prerogative of mercy was involved'). See also *Ogawa* (n 3) 16–7 [73].
63 See, for example, *Yasmin* (n 49) 180 [47] (the Court).
64 *Von Einem* (n 4) 126 (Lander J).
65 *Holzinger* (n 3) (the Court).
66 Ibid 329–31 [37].
67 Ibid 353 [121].
68 Ibid 331 [40].

power of an administrative character,[69] a power that affected rights[70] or a power that required the provision of reasons;[71] and it was one that required the balancing of competing policy objectives.[72]

For present purposes, what is interesting about the reasoning in that case is that it proceeded almost exclusively by analogy with the non-reviewability of the common law prerogative powers. The Court went on to say that 'the exercise of the prerogative of mercy may involve a consideration of matters that are not justiciable because they are only relevant to a pure act of mercy or because they involve policy with respect to public demands or expectations'.[73] Thus, in respect of the Attorney-General's recommendation to the Governor, the Court held this 'cannot rationally be constrained by any statutory or common law criteria'.[74]

These characteristics of the common law prerogative of mercy dominated, and decided, the Court's conclusion that the statutory referral power was not amenable to judicial review, with the Court emphasising the 'linkage' between the referral power and the common law prerogative power.[75] The Court also drew an analogy between the referral power and the power to present an ex officio indictment, which had also previously been held to be non-reviewable as a result of it having 'something of the nature of a prerogative power'.[76]

What is unusual about the decision is that, like *Horwitz*, while it purports to make statements about the scope, purpose and (absence of) limits of a statutory power, it engages in almost no discussion of the text, context and purpose of the statute. The Court was, of course, well aware of the legislative precursors to s 672A from the United Kingdom (UK) and New South Wales, which precursor provisions made clear that the power was conferred for a very particular purpose — namely, to provide an avenue for the executive to refer matters to the courts where those matters were deemed 'too complex' or 'too difficult' to be determined by the executive.[77] The conferral of a power with a clear purpose suggests that, applying the ordinary principles of statutory interpretation, the power might at least be limited by reference to its purpose. However, no such possibility was entertained or explored in *Holzinger*.

The take-away from *Holzinger*, then, is that courts considering the reviewability of statutory adjuncts to the prerogative appear, respectfully, often appear to be overly distracted by historical statements as to the non-reviewability of the prerogative and fail to apply the orthodox principles of the modern approach to statutory interpretation with its focus on 'the statutory text, context and purpose'.[78]

69 Ibid 334 [52].
70 Ibid 334 [52]–[53].
71 Ibid 337 [61].
72 Ibid 337 [62].
73 Ibid 324 [18].
74 Ibid.
75 Ibid 325 [19]. See also 325 [22].
76 *Barton v The Queen* (1980) 147 CLR 75, 110 (Wilson J).
77 Second Reading Speech to the Criminal Appeal Bill 1911 (NSW) in Legislative Assembly of NSW, *Parliamentary Debates*, 5 July 1911, 1294–5, quoted in *Holzinger* (n 3) 328 [34] (the Court).
78 *Comcare v Martin* (2016) 258 CLR 467, 479 [42] (the Court).

This anomalous approach is also evident in the Full Court of the Federal Court's decision in *Ogawa* — a decision also concerning s 672A of the *Queensland Criminal Code* as picked up and applied by the *Judiciary Act 1901* (Cth). In *Ogawa*, in relation to the statutory mercy power, the Court felt compelled to follow *Holzinger* because the Full Court was not convinced that decision was plainly wrong.[79] Accordingly, the Court said that, on the authority of *Holzinger*, a statutory referral power was not reviewable on grounds of procedural unfairness; inflexible application of policy; unreasonableness; failure to take account of a relevant consideration; and no evidence.[80] It is notable that, again, there was little discussion of the text, context and purpose of the statutory referral power; rather, the case was decided on the application of precedent.

Moving then to the common law mercy power, the Full Court observed 'although it is unnecessary to determine the matter, we doubt whether it is correct to state that the exercise of the Constitutional executive power to grant or refuse a pardon to a petitioner is totally immune from judicial review'.[81] The Court continued, 'A recognition of the fact that there may well be some aspects of the decision-making power to grant or refuse mercy which are essentially political or non-justiciable, does not necessarily carry the consequence that any legal error manifest in that decision-making process should remain immune from judicial scrutiny'.[82]

Importantly, however, the Full Court did go on to consider whether the primary judge was incorrect that the Attorney-General's decision not to recommend mercy was vitiated by a material misunderstanding of the statutory test.[83] The Court concluded that any error was not material. The Court explicitly left this open as a potential ground of review of the exercise of the prerogative and also suggested that 'a denial of procedural fairness' would take the matter outside of 'the decision making freedom entrusted to the Attorney-General'.[84]

The tension that one sees in *Ogawa*, then, is that the Court at the same time concluded that the statutory referral power was largely unreviewable while noting, in obiter, that the common law prerogative *would* be amenable to review on certain bases. This, it is suggested, is an example of the tail wagging the dog. The very reason the Queensland Court of Appeal concluded that the statutory referral power was unreviewable was because of its 'linkage' to the common law mercy power,[85] which the Queensland Court of Appeal considered to be clearly unreviewable.[86] The Full Federal Court felt constrained to accept that conclusion, despite, in the next breath, doubting the very foundation of it — that is, suggesting that the common law prerogative *would* be amenable to review.

79 *Ogawa* (n 3) 19 [81] (the Court).
80 Ibid 19 [84].
81 Ibid 16 [73].
82 Ibid 17 [75].
83 Ibid 18 [77]–[79].
84 Ibid 18 [79].
85 *Holzinger* (n 3) 325 [19]. See also 325 [22].
86 Ibid 324 [18].

Conclusion as to the first anomaly

What these three cases reveal is an approach to questions of the reviewability of statutory powers that pays insufficient regard to the text, context and purpose of such powers. Instead, one sees the reductive equation of the statutory powers with the common law prerogative of mercy, combined with conclusory statements as to the prerogative's non-reviewability (and thus the non-reviewability of the statutory powers). This is what I call the first anomaly in the Australian case law on the reviewability of the prerogative of mercy and its related statutory powers. I want to turn now to the second, related, anomaly.

Stagnation of Australian law on reviewability of the common law mercy powers

The second anomaly is the fact that Australian law on the reviewability of the common law prerogative of mercy has stagnated since the 1908 decision of *Horwitz*, while the English common law on which that decision was based has moved on. Indeed, the law in the UK and other common law jurisdictions is now such that the prerogative of mercy is clearly amenable to judicial review. I will first briefly describe the divergent paths of Australian and other common law countries in this regard before turning to why I think the divergence is unjustified, even in light of matters arising from the Australian case law.

The origins of the Australian position

As has been explained, the origins of the Australian orthodoxy that the prerogative of mercy is not amenable to judicial review is the decision in *Horwitz*, where it was said that 'no Court has jurisdiction to review the discretion of the Governor in Council in the exercise [of the prerogative of mercy]'.[87] Although no case law is cited for that proposition, subsequent courts have recognised that it was informed by English common law relating to the non-reviewability of the prerogative powers.[88]

Despite the limits of the decision in *Horwitz* identified earlier in this article, *Horwitz* has been regularly applied for the proposition that the prerogative of mercy is not amenable to judicial review in Australia. That adherence to obiter remarks in a one paragraph, ex tempore judgment is particularly puzzling in light of the considered development of the law in the UK, to which I will now turn.[89]

Developments in United Kingdom (and Privy Council)

Judicial opinions as to the reviewability of the prerogative have developed considerably over the last half-century in the UK. As will be seen in the summary of the authorities below, it was initially thought that the prerogative of mercy was unreviewable, but it is now largely accepted that it may be reviewed in certain circumstances.

87 *Horwitz* (n 1) 40 (Griffith CJ, for the Court).
88 *Von Einem* (n 4) 126 (Lander J).
89 This comparative discussion is conducted while remaining cognisant of the importance of domestic constitutional context. See *Ogawa* (n 3) 16–7 [73] (the Court).

In 1971, in *Hanratty v Lord Butler*[90] (*Hanratty*), it was forcefully said that the prerogative of mercy was 'outside the competence of the courts' and that 'the law will not inquire into the manner in which the prerogative is exercised'.[91] Five years later those views were affirmed in *De Freitas v Benny*[92] (*De Freitas*), where it was said that, under English common law, the prerogative of mercy was 'a matter which lies solely in the discretion of the sovereign'. It was further asserted that '[m]ercy is not the subject of legal rights. It begins where legal rights end'.[93] It was thus determined that the exercise of the prerogative could not be subject to judicial review.

In *Council of Civil Service Unions v Minister for Civil Service*[94] (*CCSU*), although it was acknowledged that prerogative powers may be subject to judicial review, Lord Roskill doubted that the prerogative of mercy was one such power, writing:

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as … the prerogative of mercy … are not, I think, susceptible of judicial review because their very nature and subject matter are such as not to be amenable to the judicial process.[95]

A contrary view was expressed in *R v Secretary of State for the Home Department; Ex parte Bentley*[96] (*Bentley*), where the UK Court of Appeal clarified that the full unconditional pardon was not justiciable but the failure to consider other forms of pardon was an error of process that *was* reviewable.[97] The Court wrote, 'we conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process'. Importantly, the Court of Appeal reached this decision by explicitly distinguishing *Hanratty*, *De Freitas* and *CCSU*.

However, the reviewability of the prerogative was again doubted just a few years later in a Privy Council case from the Bahamas, *Reckley v Minister for Public Safety and Immigration [No 2]*.[98] There it was held that the process of the prerogative of mercy under the Constitution of the Bahamas was not justiciable. It was remarked, '[o]f its very nature the minister's discretion, if exercised in favour of the condemned man, would involve a departure from the law. Such a decision was taken as an act of mercy or of grace'.[99] *Bentley* was distinguished and the Privy Council resoundingly endorsed *De Freitas*. It appeared that the reviewability of the prerogative had finally been settled, in the negative.

90 (1971) 115 SJ 386 (Lord Denning MR).
91 Ibid.
92 [1976] AC 239, 247 (Lord Diplock for the Board of the Privy Council).
93 Ibid.
94 [1985] AC 374 (Lord Roskill).
95 Ibid 418.
96 [1994] QB 349.
97 Ibid 363.
98 [1996] 1 AC 527
99 Ibid 541.

That apparent consensus was exploded shortly thereafter in 2001, in the Privy Council case of *Lewis v Attorney-General of Jamaica*,[100] where the Privy Council concluded that '[t]he procedures followed in the process of considering a man's petition are … open to judicial review'.[101] (That decision was followed by the Caribbean Court of Justice in *Attorney General v Boyce*.)[102]

The following year, 2002, the High Court in England concluded in *R (B) v Secretary of State for the Home Department*[103] that the decision of the Secretary of State on whether to recommend remission of a prisoner's sentence is amenable to review.[104] The Court noted, however, that the justiciability calculus may be different where 'high policy' considerations are involved.[105]

A number of other common law jurisdictions appear to have become more receptive to the reviewability of the common law prerogative, including Canada,[106] New Zealand,[107] South Africa,[108] India,[109] Singapore[110] and Hong Kong.[111] All of this confirms the observations of the Federal Court of Australia that, in Australia as overseas, 'the clear trend of authority is towards some degree of judicial supervision of, at least, the process by which the mercy prerogative is exercised'.[112]

Claims of incompetence, disproven

Against those developments, Australian courts, with a few exceptions,[113] have dug in their heels in insisting on the non-reviewability of the prerogative of mercy (and related statutory powers). Apart from citing *Horwitz* as requiring such a result, the courts have also explained this conclusion as to non-reviewability as being based on the prerogative and related statutory powers involving considerations outside of the court's sphere of competence, and thus as paradigmatically non-justiciable. So, for example, in *Holzinger* the Court said that the power is 'to bestow an act of mercy irrespective of any legal considerations and to rectify a miscarriage of justice of a kind that a court is not equipped to deal with'.[114]

100 [2001] 2 AC 50, 75–80.
101 Ibid 79.
102 [2006] CCJ 3. See also *Attorney-General v Joseph* [2006] CCJ 1 (AJ) [132].
103 [2002] EWHC 587 (Keene LJ).
104 Ibid [22], [55].
105 Ibid [13]–[23].
106 *Thatcher v Attorney-General* [1997] 1 FC 289 (Can); *Black v Chretien* (2001) 54 OR (3d) 215 [55]; *Hinse v Canada* [2015] 2 SCR 621.
107 *XY v Attorney-General* [2016] NZAR 875, 883 [31].
108 *Minister of Justice v Chonco* (2010) 1 SACR 325 (CC) [30]; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4. See also GN Barrie, 'Judicial Review of the Royal Prerogative' (1994) 111 *South African Law Journal* 788; BC Naude, 'The Pardoning Power as a Duty of Justice' (2002) 15 *South African Journal of Criminal Justice* 159.
109 *Epuru Sudhakar v Government of Andhra Pradesh* (Supreme Court of India, 11 October 2006).
110 *Yong Vui Kong v Attorney General* [2011] SGCA 9.
111 *Ch'ng Poh v Chief Executive of Hong Kong Special Administrative Region* [2003] KKLRD 496 [31]–[32].
112 *Yasmin* (n 49) 189–90 [88] (the Court). Two common law countries resisting the trend towards reviewability of the prerogative are Swaziland and Malaysia. See *Nkosi v Attorney-General* [2004] SZHC 79 (June 17, 2004); *Juraimi bin Husin v Lembaga Pengampuanan Negeri Pahang* [2001] 3 MLJ 458.
113 *Yasmin* (n 49) 181–94 [53]–[102] (the Court).
114 *Holzinger* (n 3) 324 [17] (the Court).

However, a close analysis of the case law reveals it to disprove this very proposition. A number of Australian courts, it turns out, have engaged in judicial review of the prerogative and related statutory powers and have shown themselves to be institutionally capable of doing so while remaining sensitive to the broad nature of the decisional freedom that both the prerogative and statutory adjuncts confer on the executive.

There are a number of examples of courts engaging in this task. Usually, the way a court reaches this position is that, rather than determining the difficult question of whether or not the prerogative of mercy is reviewable, the court proceeds on an assumption that it is reviewable but disposes of the applicant's grounds of review on the merits.[115] A recent example of this occurred in Victoria in the 2020 decision of the Victorian Supreme Court in *Zhong v Attorney-General (Vic)*.[116]

In that case, Croucher J assumed without deciding that judicial review was available for a decision not to refer a mercy petition to the Victorian Court of Appeal under s 327(1)(a) of the *Criminal Procedure Act 2009* (Vic).[117] Croucher J considered the grounds of a misunderstanding of the law or unreasonableness[118] and engaged in an extensive consideration of, first, the proper statutory test to be read into the language of the provision;[119] and, secondly, the wide area of decisional freedom that must be acknowledged in the reasonableness inquiry due to 'the exquisitely discretionary nature of the decision'.[120]

A more consequential example is Logan J's decision in *Martens v Commonwealth*[121] (*Martens*). There the applicant sought judicial review of a decision of the Minister charged with administering the Attorney-General's Department challenging the decision not to refer his case to the Queensland Court of Appeal pursuant to s 672A of the *Queensland Criminal Code*. Logan J considered 'a ministerial decision as to whether to engage that statutory adjunct [to the prerogative of mercy] as amenable to judicial review'.[122] Logan J considered, and rejected, a ground alleging that the decision had been made by an officer other than that upon whom the power had been conferred.[123] Logan J considered, and upheld, a ground expressed as a failure to take into account a relevant consideration[124] or, alternatively, a misunderstanding of the statutory test.[125]

While Logan J's decision in *Martens* was criticised by the Queensland Court of Appeal in *Holzinger*, that criticism was on the threshold question of reviewability, not Logan J's subsequent careful examination of the grounds. For present purposes, the important point to take away from *Martens* is its consequences. Logan J's ruling required a reconsideration of the referral power in light of all relevant considerations and in light of the proper statutory test.

115 In addition to those discussed in the text see *Von Einem* (n 4) 138–52 (Lander J); *Eastman* (n 7) 459–63 [81]–[102] (Lander J).
116 [2020] VSC 302 (Croucher J).
117 Ibid [116]–[117].
118 Ibid [123]–[124].
119 Ibid [126]–[142].
120 Ibid [146].
121 (2009) 174 FCR 114 (Logan J).
122 Ibid 120 [23].
123 Ibid 125 [40].
124 Ibid 128 [51], 138 [78].
125 Ibid 135 [66], 138 [78].

When that reconsideration was engaged in, the relevant Minister came to a different conclusion and decided to refer the case to the Queensland Court of Appeal. The Queensland Court of Appeal, in turn, quashed Mr Martens' convictions and set aside his sentence of imprisonment on the basis that the conviction was unreasonable and could not be supported on the evidence.[126]

Martens, then, is an example of a petition for mercy, and the exercise of statutory powers related to it, that only worked as it was intended to work because the petitioner was able to seek judicial review of a decision in that process that was infected by jurisdictional error. It might be thought that this, then, is not an example of courts unjustifiably trespassing into the domain of the executive but instead is a routine example of courts supervising the administration of a statutory scheme to ensure that it operates in the way Parliament intended it to operate.

Conclusion

Keeping to the theme of the conference out of which this article was born — 'Administrative law on the edge' — the most edgy question I had originally tasked myself with answering was that of the reviewability of the prerogative of mercy. Consideration of the case law revealed, however, that the key to the reviewability of the prerogative in fact lay in the case law considering the adjacent statutory powers.[127] Ultimately, if the subject matter rather than the source of a power is what makes it amenable to review[128] then consideration of the prerogative-adjacent statutory powers will provide indications of the reviewability of the prerogative.[129] I have suggested that the case law on the statutory powers, albeit out of keeping with the modern approach to statutory interpretation, has nevertheless identified some outer limits to the prerogative-related powers and has shown those limits capable of being judicially enforced.

126 *R v Martens* [2011] 1 Qd R 575.

127 The interrelated questions of reviewability was acknowledged in *Von Einem* (n 4) (Lander J).

128 *Council of Civil Services Unions v Minister for Civil Service* [1985] AC 374, 407 (Lord Scarman): 'The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.'

129 *Ogawa* (n 3) 20 [86].