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Dr Linda Nix AE

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Professor Robin Creyke AO
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Ms Tara McNeilly
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Australian Institute of Administrative Law Incorporated
ABN 97 054 164 064

PO Box 83, Deakin West ACT 2600
Ph: (02) 6290 1505; Fax: (02) 6290 1580
Email: aial@commercemgt.com.au
www.aial.org.au

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Recent developments

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Appointments to the High Court of Australia

The Government has announced the appointment of Justice Stephen Gageler AC as the 14th Chief Justice of the High Court of Australia. Justice Gageler will commence as Chief Justice on 6 November 2023 upon the retirement of Chief Justice Susan Kiefel AC.

Justice Gageler has served on the High Court since 2012. Prior to this, he was the Commonwealth Solicitor-General.

The Government has also announced the appointment of Justice Robert Beech-Jones to the High Court of Australia. Justice Beech-Jones will fill the vacancy created by the appointment of Justice Gageler as Chief Justice, and will also commence on 6 November 2023.

Justice Beech-Jones has served on the Supreme Court of New South Wales since 2012. In 2021 he was appointed Chief Judge of the Common Law Division of the Supreme Court of New South Wales and a Judge of Appeal.

We congratulate Justice Gageler and Justice Beech-Jones on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-high-court-australia-22-08-2023>

Independent Review of the National Legal Assistance Partnership — consultation open

The Independent Review of the National Legal Assistance Partnership ('NLAP') led by Dr Warren Mundy has released an Issues Paper inviting submissions on future funding arrangements for the legal assistance sector.

Legal assistance is essential to ensure access to justice and equality before the law, especially for vulnerable people facing disadvantage.

The current NLAP is a $2.4 billion agreement between the Commonwealth and state and territory governments to fund vital legal assistance services for the most vulnerable people in Australia.

The NLAP includes funding for services delivered by Legal Aid Commissions, Community Legal Centres, and Aboriginal and Torres Strait Islander Legal Services.

With the current NLAP due to expire in 2025, Dr Mundy was appointed in June 2023 to conduct an independent and transparent review into how future arrangements could better provide access to justice for all who need it.

The Issues Paper summarises current legal assistance funding and invites discussion to inform potential future funding agreements. The Paper highlights the reviewer's particular

focus on the adequacy of legal assistance funding arrangements and access to legal assistance for Aboriginal and Torres Strait Islander peoples.

The review will be completed by early 2024 with its findings informing decisions on future funding arrangements for legal assistance.

The Issues Paper is available on the Review's website at <https://nlapreview.com.au/the-independent-review-of-the-nlap>.

Submissions in response to the Issues Paper close on 27 October 2023.

<https://ministers.ag.gov.au/media-centre/independent-review-national-legal-assistance-partnership-consultation-open-18-08-2023>

Government taking decisive action in response to PwC tax leaks scandal

The Australian Government has announced a package of reforms to prevent tax adviser misconduct.

The PwC scandal exposed severe shortcomings in Australia's regulatory frameworks. By increasing penalties, giving regulators stronger powers to investigate and prosecute perpetrators, and boosting transparency, collaboration and coordination within government, the Government is acting to restore public confidence and help prevent this from happening again.

The package of reforms cover three priority areas:

- strengthening the integrity of the tax system
- increasing the powers of our regulators
- strengthening regulatory arrangements to ensure they are fit for purpose.

Legislation to strengthen the integrity of our tax system and increase the powers of regulators will be introduced this year, with consultation on the reforms beginning shortly.

These reforms build on the work already underway to improve government processes in the wake of the PwC tax leaks scandal, including:

- new legislation to strengthen the Tax Practitioners Board introduced to Parliament earlier this year
- a $30 million funding boost for the Tax Practitioners Board to increase compliance activities in the October 2022–23 Budget

- action to strengthen Commonwealth procurement frameworks by directing PwC to remove any staff involved with the confidentiality breach from contract work until the outcomes of the Switkowski review are known and by enabling departments to terminate contracts with parties that receive adverse findings against them from a legal body.

<https://ministers.ag.gov.au/media-centre/government-taking-decisive-action-response-pwc-tax-leaks-scandal-06-08-2023>

Final Report of the Royal Commission into the Robodebt Scheme

On 7 July 2023, Commissioner Catherine Holmes AC SC, delivered the Final Report of the Robodebt Royal Commission to the Australian Government.

The Royal Commission found that 'Robodebt was a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. In essence, people were traumatised on the off-chance they might owe money. It was a costly failure of public administration, in both human and economic terms' (page xxix, 'Overview of Robodebt').

The Government will now consider the recommendations presented in the final report carefully and provide a full response in due course.

The report can be accessed at <https://robodebt.royalcommission.gov.au/publications/report>.

<https://ministers.ag.gov.au/media-centre/final-report-royal-commission-robodebt-scheme-07-07-2023>

Appointment of Sex Discrimination Commissioner of the Australian Human Rights Commission

The Government has appointed Dr Anna Cody as Sex Discrimination Commissioner of the Australian Human Rights Commission.

In this role Dr Cody will promote and advance the rights of Australians by tackling discrimination on the grounds of sex, sexual orientation, gender identity, intersex status and all other protected attributes in the *Sex Discrimination Act 1984* (Cth).

Dr Cody will also play a critical role in the Commission's delivery of the *Respect@Work: Sexual Harassment National Inquiry Report (2020)*.

Dr Cody's five-year appointment will commence on 4 September 2023.

We congratulate Dr Cody on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-sex-discrimination-commissioner-australian-human-rights-commission-06-07-2023>

Commencement of the National Anti-Corruption Commission

On 1 July 2023, the National Anti-Corruption Commission ('NACC') formally commenced operations. The NACC is established under the *National Anti-Corruption Commission Act 2022* (Cth) ('*NACC Act*').

The NACC:

- investigates serious or systemic corrupt conduct across the Commonwealth public sector by ministers, parliamentarians and their staff, statutory officer holders, employees of all government entities and government contractors;

- operates independent of government, with discretion to commence inquiries on its own initiative or in response to referrals from anyone;

- is overseen by a statutory Parliamentary Joint Committee, empowered to require the Commission to provide information about its work; and an independent Inspector who will investigate corruption issues and complaints about the NACC, and look at how the NACC uses its powers;

- has the power to investigate allegations of serious or systemic corruption that occurred before or after its establishment;

- has the power to hold public hearings in exceptional circumstances and where it is in the public interest to do so;

- is empowered to make findings of fact, including findings of corrupt conduct, and refer findings that could constitute criminal conduct to the Australian Federal Police or the Commonwealth Director of Public Prosecutions; and

- operates with procedural fairness and its findings will be subject to judicial review.

The *NACC Act* also provides strong protections for whistleblowers and exemptions for journalists to protect the identity of sources.

The inaugural Commissioner of the NACC is the Hon Paul Brereton AM RFD SC. Ms Nicole Rose PSM and Dr Ben Gauntlett are the Deputy Commissioners alongside acting Deputy Commissioner Ms Jaala Hinchcliffe (former Integrity Commissioner of the Australian Commission for Law Enforcement and Integrity ('ACLEI')). Mr Phillip Reed has been appointed the Chief Executive Officer of the NACC, and Ms Gail Furness SC has been appointed the Inspector of the NACC.

From 1 July to close of business on Monday 14 August 2023, the NACC received 624 referrals. Approximately 13% of the referrals relate to matters well publicised in the media: see <https://www.nacc.gov.au/news-and-media/update-reports-and-assessment-15-Aug-2023>.

<https://ministers.ag.gov.au/media-centre/commencement-national-anti-corruption-commission-30-06-2023>

President of the Australian Law Reform Commission

The Honourable Justice Mordecai Bromberg has been appointed President of the Australian Law Reform Commission ('ALRC') for a five-year term commencing on 10 July 2023.

Justice Bromberg replaces the Honourable Justice Mark Moshinsky, who has been Acting President of the ALRC and will continue as a part-time Commissioner.

The ALRC plays an important role in ensuring our laws continue to work in the best interest of the Australia people. Its recommendations to government help to simplify the law, promote new or better ways to administer the law, and improve access to justice.

Justice Bromberg has been a judge of the Federal Court of Australia since 2009. In 2005 Justice Bromberg became the founding president of the Australian Institute of Employment Rights and now chairs the Advisory Board of the Centre for Employment and Labour Relations Law at the University of Melbourne.

We congratulate Justice Bromberg on his appointment.

<https://ministers.ag.gov.au/media-centre/president-australian-law-reform-commission-20-06-2023>

Public interest disclosure reform

The *Public Interest Disclosure Amendment (Review) Act 2023* (Cth) passed Parliament and came into effect on 1 July 2023.

Key measures in the legislation include improvements in protections for public sector whistleblowers and witnesses through expanding the immunities and scope of the public interest disclosure scheme to those who 'could make' a disclosure.

The scheme now has a stronger focus on serious integrity wrongdoing, such as fraud and corruption, which makes the scheme easier for agencies to administer.

Additionally, the legislation enhances the oversight of the scheme by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

This Act implements 21 of the 33 recommendations of the 2016 *Review of the Public Interest Disclosure Act* by Mr Philip Moss AM and is also informed by other parliamentary committee reports.

Following passage of the Act, the Australian Government has commenced consultations on a second stage of reforms. This will involve redrafting the *Public Interest Disclosure Act 2013* (Cth) to address the underlying complexity of the scheme and to provide effective and accessible protections to public sector whistleblowers.

More information about the Act and its passage can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6958>.

<https://ministers.ag.gov.au/media-centre/public-interest-disclosure-reform-15-06-2023>

Appointments to the Copyright Tribunal of Australia

The Government has announced three members of the Copyright Tribunal of Australia. Professor Michael Fraser AM, Ms Fiona Phillips and Ms Alida Stanley have been appointed as part time, non-judicial members of the Tribunal, each for three-year terms.

The Copyright Tribunal is an independent specialist body, established under the *Copyright Act 1968* (Cth), that primarily hears disputes about remuneration payable to copyright collecting societies under copyright licencing schemes. Non-judicial members provide specialist expertise to assist the Tribunal in determining disputes.

We congratulate Professor Fraser, Ms Phillips and Ms Stanley on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-copyright-tribunal-australia-08-06-2023>

Appointments to the National Native Title Tribunal

The Government has announced the appointments of Mr Kevin Smith as President, and Ms Katie Stride as Registrar, to the National Native Title Tribunal.

Mr Smith will be the first First Nations person to be appointed as President of the Tribunal. He has over 28 years of professional experience in native title and First Nations law.

Mr Smith has replaced the outgoing President, the Hon John Dowsett AM KC. Mr Smith's five-year appointment commenced on 10 July 2023.

Ms Stride is currently a National Judicial Registrar — Native Title, in the Federal Court. She has replaced outgoing Native Title Registrar, Mrs Christine Fewings. Ms Stride's five-year appointment commenced on 7 August 2023.

We congratulate Mr Smith and Ms Stride on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-national-native-title-tribunal-08-06-2023>

Administrative Appeals Tribunal appointments and reform process

The Australian Government has appointed two new Deputy Presidents and made short-term reappointments of 32 members and two Deputy Presidents to the Administrative Appeals Tribunal ('AAT').

The appointments provide the AAT with continuity, stability and support to ensure its ongoing operation during the reform process, announced in December last year.

Appointments to the AAT

The Hon Justice Lisa Hespe and the Hon Justice Geoffrey Kennett have been appointed as new Deputy Presidents for two-year terms.

Justice Hespe was appointed to the Federal Court of Australia in 2022, preceded by a 27-year career as a lawyer, including five years as a Senior Member of the AAT.

Justice Kennett was also appointed to the Federal Court of Australia in 2022. Prior to that appointment, Justice Kennett had an extensive career in the Australian Public Service, including as Counsel Assisting the Solicitor-General of the Commonwealth, before being called to the NSW Bar in 1998. He was appointed Senior Counsel in 2010.

Justices Hespe and Kennett bring extensive experience and expertise across a range of relevant practice areas and will enhance the AAT's capacity to consider matters within its jurisdiction.

We congratulate Justices Hespe and Kennett on their appointments.

Short-term reappointments to the AAT

Thirty-four reappointments have also been made to the AAT on a short-term basis until 22 December 2023. This includes 32 members and two Deputy Presidents, Ms Jan Redfern PSM and Mr Ian Molloy.

Deputy Presidents

- Ms Jan Redfern PSM
- Mr Ian Molloy

Members

- Mr David Barker
- Mr Michael Biviano
- Mr Peter Booth
- Mr Michael Bradford
- Dr Christhilde Breheny

- Ms Nicole Burns
- Ms Justine Clarke
- Ms Christine Cody
- Mr Damian Creedon
- Mr Brendan Darcy
- Ms Nicola Findson
- Ms Tania Flood
- Ms Margaret Forrest
- Mr Nicholas Gaudion
- Mr Peter Haag
- Ms Linda Holub
- Ms Noelle Hossen
- Ms Penelope Hunter
- Ms Christine Kannis
- Mr Roger Maguire
- Ms Deborah Mitchell
- Mr Peter Newton SC
- Professor Julie Quinlivan
- Ms Tamara Quinn
- Mr Frank Russo
- Ms Roslyn Smidt
- Mr David Thompson
- Mr Ian Thompson

- Mr Dominic Triaca
- Mr Peter Vlahos
- Brigadier Anthony Warner AM LVO (Rtd)
- Mr Paul Windsor

We congratulate the above on their appointments.

Reform process

The Government is continuing work to develop legislation to establish a new federal administrative review body.

The recent consultation process received 120 formal submissions and 287 short-form responses to the public issues paper.

These submissions, together with contributions from stakeholders at events held during the consultation period, will inform the design of the new body, as will the advice from the Expert Advisory Group chaired by former High Court Justice the Honourable Patrick Keane AC KC.

Information about the reform process is available on the Attorney-General's Department website at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

<https://ministers.ag.gov.au/media-centre/administrative-appeals-tribunal-appointments-and-reform-process-02-06-2023>

Justice Emilios Kyrou AO appointed Judge of the Federal Court and President of the Administrative Appeals Tribunal

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has appointed the Hon Justice Emilios Kyrou AO as a Judge of the Federal Court of Australia and as President of the Administrative Appeals Tribunal ('AAT').

On 16 December 2022, the Australian Government announced it would replace the AAT with a new administrative review body. The President will lead the AAT through this important reform and will be the inaugural President of the new administrative review body, once established, for the remainder of the term of the appointment.

The proposed term of appointment is five years.

Justice Kyrou has been selected though a transparent and merit-based process. His Honour has the experience and capacity to lead a trusted federal administrative review body in a fair, efficient, accessible and independent manner.

Justice Kyrou has been a Judge of the Supreme Court of Victoria since 2008 and from 2014 has been a Judge of the Victorian Court of Appeal.

Justice Kyrou is widely recognised for his integrity, legal excellence, independence and intellectual capacity. He is an experienced leader and administrator, and is an expert in administrative law. On Australia Day this year Justice Kyrou was appointed an Officer of the Order of Australia 'for distinguished service to the judiciary and to the law, to professional associations and to the community'.

Justice Kyrou's appointment as a Justice of the Federal Court commenced on 8 June 2023 and his appointment as AAT President commenced on 9 June 2023.

<https://ministers.ag.gov.au/media-centre/president-administrative-appeals-tribunal-24-05-2023>

Kristina Stern SC appointed as a Judge of Appeal of the Supreme Court of NSW

The NSW Attorney General, Mr Michael Daley, has announced the appointment of Dr Kristina Stern SC as Judge of Appeal of the Supreme Court of NSW.

'Dr Stern is widely recognised as a leading public law and commercial silk,' Mr Daley said. 'She is one of the most highly regarded lawyers in her fields and is a fantastic addition to the Supreme Court.'

Prior to moving to Australia Dr Stern was at the London bar for 10 years, before which she lectured in law at Kings College London and completed her PhD at Cambridge University.

Dr Stern has appeared in significant complex commercial and administrative law disputes. She is chair of the NSW Bar Association Inquests and Inquiries Committee and has appeared at numerous inquests and inquiries.

Dr Stern has replaced Justice Paul Brereton who now leads Australia's new National Anti-Corruption Commission.

We congratulate Dr Stern on her appointment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2023/kristina-stern-sc-appointed-as-a-judge-of-appeal-of-the-supreme-.html>

Bolstering Australia's national privacy and FOI regulator

The Australian Government will appoint a standalone Privacy Commissioner to deal with growing threats to data security and the increasing volume and complexity of privacy issues.

Currently, the Australian Information Commissioner, Ms Angelene Falk, holds a dual appointment as the Privacy Commissioner. Ms Falk will remain the Information Commissioner and head of the Office of the Australian Information Commission.

A merit-based selection process to fill the role of the Privacy Commissioner will commence. Ms Falk will continue as the Privacy Commissioner until the process is finalised.

In light of the recent resignation of Mr Leo Hardiman PSM KC as Freedom of Information Commissioner, the Government has appointed Ms Toni Pirani as acting Freedom of Information Commissioner, effective 20 May 2023.

<https://ministers.ag.gov.au/media-centre/bolstering-australias-national-privacy-and-foi-regulator-03-05-2023>

Consultation on major reform of Australia's anti-money laundering and counter-terrorism financing laws

The Australian Government has commenced consultation on reforms to Australia's anti-money laundering and counter-terrorism financing ('AML/CTF') scheme.

The purpose of the AML/CTF regime is to assist businesses to identify risks in the course of providing their services that might go towards assisting money laundering, which funds serious crimes such as terrorism, child abuse and the illicit drug trade.

The existing AML/CTF regime is complex, resulting in inefficiencies for business and government. Lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones (known as 'tranche-two entities') are particularly vulnerable to exploitation by transnational, serious and organised crime groups and terrorists.

The Government has accepted all recommendations of the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy and Efficiency of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (Report, March 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Report>.

The Committee made four recommendations, including that the AML/CTF regime be extended to tranche-two entities.

The Government has released the first of two consultation papers on the proposed reforms. The first consultation paper proposes reforms that will simplify and modernise the operation of the regime. The second consultation paper proposes extending the AML/CTF regime to tranche-two entities.

<https://ministers.ag.gov.au/media-centre/consultation-major-reform-australias-anti-money-laundering-and-counter-terrorism-financing-laws-20-04-2023>

Appointment of Open Government Forum members

The Australian Government has announced the membership of Australia's Open Government Forum.

The Forum will play a crucial role in helping Australia remain a member of the multilateral Open Government Partnership ('OGP') by designing the Third National Action Plan.

The OGP is a multilateral initiative that aims to secure commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.

As an OGP member, Australia is required to produce a national action plan that sets out commitments that the government will deliver within a two- or four-year timeframe. Australia has been a member of the OGP since 2015 and has released two National Action Plans so far.

The Government has engaged with civil society to develop a new Third National Action Plan, which will seek to capture an ambitious plan for open government, transparency and accountability.

Civil society members of the Forum:

- Dr Kate Auty (co-chair)
- Professor Anne Twomey AO
- Ms Anooshe Mushtaq
- Professor Charles Sampford
- Ms Cindy He
- Mr Clancy Moore
- Mr Kyle Redman
- Dr Tania Penovic
- Mr Tim Lo Surdo.

The government co-chair is Simon Newham, Deputy Secretary, Attorney-General's Department. Additional government members will be represented by several other agencies including the Office of the Australian Information Commissioner, the Australian Public Service Commission, the Commonwealth Ombudsman and the Department of Prime Minister and Cabinet.

<https://ministers.ag.gov.au/media-centre/appointment-open-government-forum-members-05-04-2023>

Consultation opens on design of the new federal administrative review body

The Australian Government is asking for public input on the design of a new federal administrative review body.

In December 2022, the Government announced that it would abolish the Administrative Appeals Tribunal and replace it with an administrative review body that is user-focused, efficient, accessible, independent and fair.

The Government has released an issues paper which has been developed in close consultation with the Expert Advisory Group chaired by the Hon Patrick Keane AC KC, a former Justice of the High Court. The paper invites views on a wide range of matters central to the design of the new body, including its structure, membership, powers and procedures.

Further information about the consultation, including links to the issues paper, survey and submission options can be accessed at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

<https://ministers.ag.gov.au/media-centre/consultation-opens-design-new-federal-administrative-review-body-03-04-2023>

Appointment of the Chief Justice of the Federal Court of Australia

The Hon Justice Debra Mortimer has been appointed as the Chief Justice of the Federal Court of Australia.

Justice Mortimer is only the fifth Chief Justice of the Federal Court and the first female Chief Justice appointed since the Court was established in 1976.

Justice Mortimer has served on the Federal Court since 2013. Her Honour's appointment as Chief Justice commenced on 7 April 2023, upon the retirement of the Hon Chief Justice James Allsop AC, who has been Chief Justice since 2013.

We congratulate Justice Mortimer on her appointment and wish Chief Justice Allsop all the best for the future.

<https://ministers.ag.gov.au/media-centre/appointment-chief-justice-federal-court-australia-31-03-2023>

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

On 19 June 2023, the Constitutional Alteration (Aboriginal and Torres Stair Islander Voice) 2023 was passed by the Commonwealth Parliament. The Bill contains the proposed constitutional amendment that will insert in the *Constitution* a new Chapter which recognises Aboriginal and Torres Strait Islander peoples and provides consultation through the Voice.

The passage of the Bill follows months of consultation with First Nations leaders on the Referendum Working Group and legal experts in the Constitutional Experts Group.

The Bill was referred to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum for review. The Committee called for public submissions addressing the provisions of the Bill. The Committee's *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* recommended that the Bill be passed unamended. The report can be found at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report>.

Passage of the Bill through Parliament will enable a referendum to be held in the second half of this year.

More about the Bill and its passage can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019>.

<https://ministers.ag.gov.au/media-centre/constitution-alteration-aboriginal-and-torres-strait-islander-voice-2023-30-03-2023>

Delivering overdue reform of intelligence and criminal justice frameworks

On 29 March 2023, the Attorney-General, the Hon Mark Dreyfus KC MP, introduced into Parliament two bills to deliver reform of Australia's national intelligence community and criminal justice frameworks.

The National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023 (Cth), which passed Parliament and came into effect on 12 August 2023, implements recommendations from the 2019 report of the *Comprehensive Review of the Legal Framework of the National Intelligence Community*, led by Mr Dennis Richardson AC.

The Bill (now Act) will apply proper checks and balances to the authorisation of intrusive powers, provide operational clarity to agencies, lessen the Inspector-General of Intelligence and Security's administrative burden and increase transparency by ensuring appropriate access to information.

The Crimes and Other Legislation Amendment (Omnibus) Bill 2023 (Cth) is currently before the Senate. It updates and clarifies the intended operation of certain provisions in the *Crimes Act 1914* and other Commonwealth legislation. The Bill will strengthen proper administration of government, law enforcement and judicial processes by making necessary technical amendments.

<https://ministers.ag.gov.au/media-centre/delivering-overdue-reform-intelligence-and-criminal-justice-frameworks-29-03-2023>

Review of secrecy provisions

The Australian Government has finalised public consultation as part of its review of Commonwealth secrecy offences.

Secrecy offences play an important role in preventing the unauthorised disclosure of information which can undermine national security and harm the public interest. However, multiple reviews have raised concerns about the number, inconsistency, appropriateness and complexity of Commonwealth secrecy offences.

A comprehensive review of Commonwealth secrecy offences was recommended by the Parliamentary Joint Committee on Intelligence and Security.

As part of the review, the Government launched a six-week public consultation process seeking views on the operation of secrecy provisions, including:

- what principles should govern the framing of general and specific secrecy offences in Commonwealth legislation
- whether any general or specific secrecy offences should be amended or repealed
- what defences should be available for general and specific secrecy offences
- what principles should govern the framing of the public interest journalism defence and should any amendments be considered.

The review's final report is due to Government by 31 August 2023.

The consultation paper can be accessed at <https://consultations.ag.gov.au/crime/review-secrecy-provisions/>.

<https://ministers.ag.gov.au/media-centre/review-secrecy-provisions-consultation-paper-released-27-03-2023>

Review into Australia's Human Rights Framework

The Attorney-General, the Hon Mark Dreyfus KC MP, has asked the Parliamentary Joint Committee on Human Rights to conduct a review of Australia's Human Rights Framework. The Committee has been asked to:

- review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;

- consider developments since 2010 in Australian human rights laws (both at the Commonwealth and state and territory levels) and relevant case law; and

- consider any other relevant matters.

The Human Rights Framework was launched in 2010. Its key focus was ensuring that education and information about human rights is readily available to everyone in the Australian community. This included the establishment of the Joint Committee on Human Rights and the requirement that each Bill be accompanied by a Statement of Compatibility with Australia's international human rights obligations.

The review is an opportunity to consider whether these and other components of the Framework remain fit for purpose, or if improvements can be made.

Submissions to the Committee closed on 1 July 2023.

The Committee's report is due on 31 March 2024.

<https://ministers.ag.gov.au/media-centre/review-australias-human-rights-framework-22-03-2023>

Recent decisions

Apprehended bias in a multi-member court

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15

The appellant is a citizen of Burkina Faso who, in 2013, was convicted of a drug importation offence under the *Criminal Code* (Cth) and was sentenced to a term of imprisonment of 10 years with a non-parole period of 7 years. The appellant appealed his conviction, which was dismissed in November 2014. In 2017, while the appellant was serving his sentence of imprisonment, a delegate of the Minister made the decision to cancel his visa on the basis that he did not pass the 'character test' under s 501 of the *Migration Act 1958* (Cth), by reason of the sentence of imprisonment. In 2019, another delegate of the Minister decided not to revoke that cancellation decision. This decision was affirmed by the Administrative Appeals Tribunal ('AAT') in 2020. The appellant applied for judicial review of the decision by the AAT and was unsuccessful before the primary judge, leading to the appeal before the Federal Court.

The appeal was scheduled to be heard on 17 August 2021 before a Full Court constituted by Justices McKerracher, Griffiths and Bromwich. Before the commencement of the hearing, the associate to Justice Bromwich sent an email to the legal representatives of the parties advising them that Justice Bromwich had appeared for the Crown in the appellant's unsuccessful conviction appeal in 2014. At the commencement of the hearing of the appeal before the Full Court, the appellant applied for Justice Bromwich to recuse himself. Justice McKerracher invited Justice Bromwich to 'deal with the application'. Justice Bromwich

explained that he declined to recuse himself from sitting on the appeal for reasons he then elaborated on and also later set out in his written judgement. Justice McKerracher then invited the appellant to continue, and the hearing resumed. The Full Court handed down its decision on 15 September 2021, unanimously dismissing the appeal.

On appeal before the High Court, the question was whether the circumstances were sufficient to have given rise to apprehended bias on the part of the individual judge, Justice Bromwich. The secondary issue was whether the application for Justice Bromwich to recuse himself was appropriately left by Justices McKerracher and Griffiths to be considered and determined by Justice Bromwich alone, or should have been considered and determined by the Full Court constituted by all three judges.

Chief Justice Kiefel and Justices Gageler, Gordon, Edelman and Jagot (Justices Steward and Gleeson dissenting) found that the situation was such that apprehended bias should have been found, allowing the appeal. The majority upheld and applied the two-step test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 to determine whether a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of the question the judge is required to decide — that is, first, to identify the factor which might lead a judge to resolve the question other than on its legal and factual merits; and second, to articulate the logical connection between the factor and the apprehended deviation from deciding that question on its merits.

Chief Justice Kiefel and Justice Gageler found that the appellant's unsuccessful conviction appeal in 2014 was sufficiently connected to the case before the Full Court to give rise to a reasonable apprehension of bias on the part of a fair-minded lay observer of the possibility that Justice Bromwich had formed and retained an attitude to the appellant incompatible with the degree of neutrality required to resolve issues in a subsequent proceeding to which the appellant was a party. The fact that the conviction led to the cancellation of the appellant's visa so as to be 'causally related to the subject-matter of the appeal concerning the non-revocation of the cancellation decision', reinforced the reasonableness of that apprehension: [55].

Justices Gordon and Jagot both emphasised the 'incompatibility' between Justice Bromwich's role as prosecutor appearing personally in the conviction appeal and his later role as a judge of the Full Court hearing the appellant's migration appeal: [64]. Noting that the second proceeding would never have arisen if not for the Crown's successful defence of the conviction at the conviction appeal ([83]), Justices Gordon and Jagot found that there was a connection between the proceedings, and it was 'generally easy' to establish the second limb of *Ebner*. The observer here would understand that the appellant's appeal to the Full Court was the last check on the power and obligation of the Commonwealth Executive under the *Migration Act* to remove the appellant from Australia as a result of his visa cancellation. Consequently, an apprehension of bias might be made more readily by the fair-minded lay observer where the decision relates to a person's right to be at liberty in Australia: [84].

Justice Edelman found that the connection between the two matters was 'more than a loose one': [166]. There was a causal connection between the conviction and the refusal to revoke the visa cancellation. Noting the seriousness of the offence, his Honour found that the subject of the conviction appeal was one connected step to a process which concluded

in the cancellation of the appellant's visa and the judicial review application and appeal, such that a fair-minded lay observer might have had a reasonable apprehension of bias concerning Justice Bromwich's impartiality.

Justices Steward and Gleeson, in dissent, found that there was no 'logical connection' between the earlier conviction appeal in which Justice Bromwich appeared as prosecutor and the visa appeal to be decided on the merits. Noting that the reasonable lay observer would be aware that the appellant's conviction, while a necessary condition to be satisfied in order for his visa to be cancelled, was not, and was never going to be, a matter for the Full Court. There was no rule of automatic disqualification for apprehended bias on the basis of incompatible roles. Justice Steward further noted that the duty to sit should not be displaced without good cause; 'it cannot be set aside because of merely superficial appearances': [216].

However, regarding the recusal application, which did not need to be decided in light of the finding of apprehended bias, the Court made some comments.

Chief Justice Kiefel and Justice Gageler, in their joint reasons, found that existing authority provides no direct answer as to whether the application for Justice Bromwich to recuse himself was appropriately left for Justice Bromwich alone or should have been considered and determined by the Full Court, with procedures adopted by intermediate courts of appeal within Australia varying between and within those courts themselves. They also noted that internationally, a diversity of approaches is evident, but they provide little guidance. Nonetheless, Chief Justice Kiefel and Justice Gageler noted that when it is recognised that actuality or apprehension of bias is inherently jurisdictional, in that it negates judicial power, 'it becomes apparent that the responsibility for ensuring the absence of bias — whether actual or apprehended — lies with a court as an institution and not merely with a member of that court whose impartiality may be called into question'. The duty of any court 'is to be satisfied of its own jurisdiction': [27].

As such, an objection to a multi-member court as constituted, hearing and determining a matter based on an allegation of bias on the part of one or more of its members, raises a question of jurisdictional fact which that court can and must determine for itself in order to be satisfied of its own jurisdiction: [28]. Moreover, once a Full Court consisting of three or more judges is constituted and seized of the hearing on an appeal, the responsibility for the discharge of judicial power involved in hearing and determining the appeal devolves to those three judges acting institutionally as the Full Court.

Justices Gordon, Edelman, Steward and Jagot, each in separate decisions, found that the preferable, if not proper, course is for the judge in question to be given the initial opportunity to decide for themself whether they will recuse themself. If they do not, and an objection is maintained, or there are matters that the other judges consider may give rise to a potential apprehended bias, such that there is doubt about their jurisdiction, the Full Court as a whole may determine the issue.

Justice Gordon held that there were at least three basic reasons why this was appropriate. First, a recusal application raises both professional and ethical obligations for the individual judge; second, it is not improper for a judge to decline to sit without having affirmatively

concluded that they are disqualified, even if their colleagues ultimately were to conclude that the judge is not disqualified; and third, where the judge in question deliberates on a matter of their own recusal together with the other judges constituting the court, it may appear to lack impartiality and transparency.

Justice Edelman, agreeing with Justice Gordon, noted that it is a matter of 'basic ethics' that requires the judge in question to have the first opportunity, and a continuing ability, to recuse themself: [109]. Moreover, this is consistent with the approach taken in single-judge hearings which permits, and usually requires, the first consideration to be made by the subject judge. The ethical obligations which require any application to be directed to the judge at first instance do not 'evaporate' when the judge moves from sitting alone to sitting as a member of a multi-member court.

Justice Jagot noted that in the context of 'an exercise of judicial power, the judge the subject of the issue of bias (apprehended or actual) should always decide the issue whether the judge is to sit, whether as part of a single or multi-member bench', and that this is a 'well-established convention' that results in part from 'the lack of any apparent source of judicial power by judges exercising co-ordinate jurisdiction to make any such order against the other judge': [314]. Moreover, such an approach provides both the court as an institution and the individual judge with the greatest degree of flexibility to decide what course is in the best interests of the administration of justice in any given case.

The power of the legislature

Government of the Russian Federation v Commonwealth of Australia [2023] HCA 20

On 15 June 2023, the *Home Affairs Act 2023* (Cth) commenced. The purpose of the Act was to terminate, on commencement, the relevant lease and any legal or equitable right, title, interest, trust, restriction, obligation, mortgage, encumbrance, contract, licence or charge, granted or arising under or pursuant to a relevant lease, or in dependence on a relevant lease, over a specified parcel of land adjacent to Parliament House in the Australian Capital

Territory. That parcel of land, prior to the Act coming into force, was held by the Government of the Russian Federation ('GRF').

On 23 June 2023, the GRF filed a summons, a notice of constitutional matter and an interlocutory application in the High Court. In the summons, the substantive relief sought was a declaration of constitutional invalidity of the Act, alleging that the Act is not supported by a head of legislative power and is contrary to s 51(xxxi) of the *Constitution* by reason of an alleged failure to provide for the acquisition of property only on just terms. The interlocutory application sought interim relief pending the determination of the application for declarations as to the invalidity or otherwise of the Act.

Justice Jagot did not find the GRF's case for invalidity of the Act to be a strong one, noting the difficulty in identifying a serious question to be tried in circumstances where the Justice identified several constitutional heads of power which provided, on their face, ample support for the terms of the Act, including *Constitution* s 51(xxix) with respect to 'external affairs", s 51(xxxi) with respect to just acquisition, and s 122. In so far as the GRF relied on the

proposed absence of just terms, the Court found that s 6(1) of the Act, which provided that if there was an acquisition of property then reasonable compensation would be paid, clearly overcame that alleged concern.

The Court also made clear that the biggest problem for the GRF's case was a failure to 'confront the reality of the fundamental change in circumstances', being the legislative action that the Commonwealth had taken through the provisions of the Act to terminate the lease in the clearest possible terms which, similarly, also signalled that there was no proper foundation for the granting of the interlocutory injunction. It not being necessary for the Commonwealth to identify an immediate purpose for which it required the land, it was sufficient that the terms of the Act clearly identified a sovereign interest in being able to determine that the land will not be occupied by the GRF.

The Court dismissed the application.

Application of procedural fairness in light of a security assessment

CCU21 v Minister for Home Affairs [2023] FCAFC 87

On 30 September 2019, the applicant's Class XE Subclass 790 Safe Haven Enterprise Visa was cancelled by the Minister for Home Affairs under s 501(3) of the *Migration Act 1958* (Cth) on the grounds that the Minister reasonably suspected the appellant did not pass the character test. This reasonable suspicion was based on an Adverse Security Assessment ('ASA') by the Australian Security and Intelligence Organisation ('ASIO'), which assessed the applicant to be directly, or indirectly, a risk to security. Section 501(6)(g) of the *Migration Act* provided that a person does not pass the character test if the person has been assessed by ASIO to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* ('*ASIO Act*').

In July 2020, ASIO subsequently issued a Qualified Security Assessment ('QSA'), which concluded the appellant was unlikely to pose an ongoing serious threat to Australia's territorial and border integrity and thus was not a risk to security. The appellant sought to revoke the earlier cancellation decision on the basis that he passed the character test. The then Minister concluded that the appellant failed the character test because he was 'not of good character' under s 501(6)(c) of the *Migration Act*.

The appeal before the Full Court of the Federal Court raised three questions. First, was the initial Minister's decision to cancel the appellant's visa liable to be set aside because the Minister failed to consider the reputational consequences of Australia breaching its non-refoulement obligations under international law? Second, if no, was the decision liable to be set aside because the Minister had failed to consider the risk posed to the Australian community? And third, if no, was the subsequent decision to refuse to revoke the cancellation decision made in breach of the rules of procedural fairness, or in a way that was irrational or unreasonable?

As to the first question, the Full Court held that it was clear the Minister's decision to cancel the visa assessed whether the national interest required its cancellation but did not consider,

as part of that examination, the reputational consequence for Australia were it to breach its non-refoulement obligations under international law.

The appellant submitted that the Minister could not rationally conclude that the cancellation of his visa was in the national interest without turning his mind to the international reputational consequences. The appellant relied on the decisions in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 ('*CWY20*') and *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100 ('*ENT19*') to establish this contention. The Court agreed with the appellant that while both *CWY20* and *ENT19* dealt with different provisions, s 501A(2) of the *Migration Act* and cl 790.227 of the *Migration Regulation 1994*, respectively, the same expression 'national interest' is used in s 501(3) and as such, the reasoning in *CWY20* and *ENT19* should be applied — namely, no reasonable decision-maker could lawfully calculate whether it was in the national interest to consider the visa application without considering the implications for Australia of returning the appellant to his country of nationality in breach of Australia's non-refoulement obligations.

However, the Court was not persuaded that it was irrational or unreasonable for the Minister not to consider the international reputation consequences in assessing the national interest given that the mere fact the appellant held a protection visa, without more, would not, on its face, require such a consideration. The Court noted that in this case, there was no evidence of material before the Minister that indicated a real risk of harm to the appellant, if repatriated, of the kind the international conventions sought to prevent, such as death or torture or cruel, inhumane, or degrading treatment or punishment, as articulated under articles 6 and 7 of the *International Convention of Civil and Political Rights*. As such this aspect of the appeal was dismissed.

The Court then turned to the second question. In the Minister's 2019 decision, he had concluded that the appellant posed a risk to the Australian community 'in light of ASIO's assessment that he is directly or indirectly a risk to security within the meaning of section 4 of the ASIO Act'. The Court found that the ASIO assessment was an 'evident and intelligible basis' for the Minister's conclusion. The significance of the ASA was recognised by Parliament by the mere fact that an ASA in itself was sufficient for the appellant to fail the character test without any further consideration (*Migration Act* s 501(6)(g)). Moreover, the Minister was entitled to assume that the ASA had been lawfully made. Consequently, the Court found that there was nothing irrational or unreasonable in the Minister inferring that that which was a serious risk to border and territorial security was also a serious risk to the community: [58]. Additionally, the Minister was entitled to place great weight on the existence of the ASA, and the fact that he did so did not imply that the Minister was acting under the dictation of ASIO: [60].

As to the third question, the subsequent decision of the Minister not to revoke the earlier cancellation decision was based on the ground that the appellant, having failed the character test in light of the appellant's past and present criminal conduct and general conduct, was not of good character under s 501(6)(c) of the *Migration Act*. The Minister had informed the appellant by letter prior to making the decision that she may have regard to the appellant's people-smuggling activities in 'relation to your past general conduct'. As the letter referred to past 'general conduct' only, the appellant did not make submissions to the Minister about the significance of people smuggling from a criminal perspective.

The Court found that while the powers of the Minister under s 501(6)(c) would have permitted her to consider the criminality of the appellant's conduct as an aspect of his general conduct, the terms of her letter suggested otherwise, such that the appellant was entitled to act accordingly: [66]. The Court further found that the Minister had considered the criminal significance of people smuggling in making her decision, which was, necessarily, a breach of procedural fairness. The Court then considered whether the breach was material such that there was a jurisdictional error. In determining this point, the Court applied the High Court's decision in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17, noting that they could not have regard to the reformulation of the materiality test in the subsequent High Court case *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398, as there was no majority decision on that point.

The *MZAPC* test required an answer as to whether there was a realistic possibility that a different decision could have been made, the onus being on the applicant for judicial review to prove the historical facts from which this conjecture is to be drawn. In this case, the Court found that there was insufficient material before the Minister to conclude that the appellant had committed people-smuggling offences. As such, if procedural fairness had been provided, there was a realistic possibility that the revocation application would have succeeded, establishing jurisdictional error: [101]. Moreover, the Minister could not have rationally or reasonably concluded on the material before her that the appellant had committed any offence.

The Court set aside the Minister's non-revocation decision to be reconsidered according to law.

Materiality requirement where lack of procedural fairness not made out

AML v Longden Super Custodian Pty Ltd [2023] VSCA 118

On 18 December 2017, the respondent and applicant entered into a fixed 12-month residential tenancy agreement, in respect of a property owned by the respondent. On

6 May 2022, the respondent served on the applicant a notice to vacate the property, as the respondent intended to sell it. The applicant did not vacate. On 22 June 2022, the respondent commenced proceedings in the Victorian Civil and Administrative Tribunal ('VCAT'), seeking orders for possession. On 2 September 2022, the Tribunal made orders granting possession of the property to the respondent and requiring the applicant to vacate ('the possession order').

On 12 September 2022, the applicant lodged an appeal in respect of the possession order on grounds that the Tribunal had failed to comply with the principles of procedural fairness by not dealing with his application to adjourn the VCAT hearing. On 31 March 2023, Associate Justice Irving dismissed the appeal on the basis that it had no real prospects of success. On 13 April 2023, the VCAT issued a warrant of possession in respect of the property. On 18 April 2023, the applicant issued a summons seeking an injunction permitting him to remain in the property and an order staying further execution of the warrant of possession pending an appeal from the decision of Associate Justice Irving. On 20 April 2023, Justice Forbes heard the application for the injunction and stay, and subsequently dismissed the

summons and refused the application for an interlocutory injunction and stay, noting that the applicant's prospects of success on the appeal were 'precarious'.

The application to the Court of Appeal from the decision of Justice Forbes raised three grounds, the main one being whether the primary judged erred in concluding that in order to establish a case of error in the decision of Associate Justice Irving, the applicant must demonstrate that, as a consequence of the breach of procedural fairness by the VCAT, he was deprived of a realistic possibility of achieving a different outcome before the Tribunal.

The applicant submitted that based on the decision of the High Court in *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 ('*Nathanson*'), he was, in fact, not required to demonstrate that the denial of procedural fairness by the VCAT had deprived him of a realistic possibility of a different outcome before the Tribunal.

The Court distinguished the principle in *Nathanson*, finding that that case had to be understood in its context, which involved the operation of the principle of materiality in a case in which a breach of procedural fairness had been established. The Court applied the decision in *Minister for Immigration and Border Protection v SZMTA* (2018) 264 CLR 421, 445, noting that 'it is well established that where there has been a breach of procedural fairness, it must be demonstrated that the breach was material', such that if the applicant had been accorded procedural fairness, there is a 'realistic possibility' that the decision of the VCAT could have been different: [42]. As such, in this case the applicant was required to demonstrate that the lack of procedural fairness operated to deny him an opportunity to give evidence or make arguments to the Tribunal.

In the present matter, the applicant had been presented an opportunity to appear before the VCAT or arrange a representative to appear on his behalf; however, given the substantial business of the Tribunal, the Tribunal had nonetheless proceeded to hear and determine the application of the respondent for possession in the applicant's absence on 2 September 2022. The applicant, moreover, had a right to seek review of the orders made on 2 September 2022, pursuant to s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), a right which the applicant was aware but did not avail himself of. The existence of this statutory right to have a rehearing of the matter before the VCAT, in the Court's view, further undermined the applicant's assertion that he had been denied procedural fairness in that proceeding. Moreover, Associate Justice Irving had afforded the applicant repeated opportunities to demonstrate how, had he attended the VCAT hearing, he might have advanced an argument or presented evidence that might have affected the outcome of that proceedings, none of which the applicant took advantage of. As such, the Court held that Justice Forbes had correctly identified and applied the applicable test, dismissing the appeal.

Administrative process, practice and law in a pandemic — how much is enough?

*Frances Adamson AC**

For 34 years now the Institute has championed the study and greater understanding of administrative law.

I suspect, with the greatest of respect, that this is not a topic that might immediately excite the passions of the average person one might stop on Rundle Mall. But ask them instead whether they have an interest in government actions, decisions, processes and accountability; in social security, taxation, the regulation of health, education and media providers; or in the environment and development, privacy, fairness and human rights, and it is almost certain, I think, that every passerby will have both an opinion and a personal example.

The Institute, and you its members, are to be warmly commended for elevating and deepening the study of the body of law which affects so profoundly the functioning of our society, from the operation of the local council to the most complex aspects of constitutional law.

Your conference theme, of 'Building Trust and Confidence', is also timely, though I wonder, if the convenors were to sit down today to settle on a theme, whether they might not prefer '*re*building trust and confidence'. I venture that there have been few times in the recent past when the need for building public trust and confidence in our institutions has been so pronounced, or the challenge so complex.

While there have always been those who doubt and challenge the integrity of our public processes and institutions, it is undeniable that the COVID pandemic has given fertile ground to views such as those held by the sovereign citizens movement. While these may be marginal views in the grand scheme of things, I think their prominence and growth are nonetheless indicative of a stress in the fabric of our social discourse and our social compacts. And it is perhaps commonplace, but nonetheless true, to note also that social media, and the narrow casting of news through curated feeds, means that opinions are more often reinforced and normalised than challenged and subjected to the rigour of debate.

While the role of Governor may not be well understood by the public at large, it is apparent from many of the people I meet and the letters I receive that the office is seen as a repository of trust in public life, and that there is a thirst for integrity and trust. This is something to be encouraged and welcomed, and I view the maintenance and strengthening of that perception as a key part of my role.

A reductionist view might hold that the essential role of the Governor is purely constitutional, but experience has shown me that it is the interplay between what we call the three Cs — the constitutional, the ceremonial and the community roles — that gives strength to the office and, I am also of the view, to our democracy.

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* Her Excellency the Hon Frances Adamson AC is the Governor of South Australia. This article is an edited version of her opening address to the Australian Institute of Administrative Law 2023 National Conference in Adelaide on 27 July 2023.

Within proper bounds, I want the role of Governor to be seen as integral to the public life of the State and to strengthen the sense of transparency and probity in public institutional life. To this end I meet regularly with the Premier and have met individually with every Member of both Houses of the State Parliament and Members of the House of Representatives and Senators representing South Australia.

My regional visits program will enable me to engage, during my five-year term, at local government level across the State's 69 local council areas. The weekly convocation of Executive Council is of course the most regular manifestation of the constitutional authority of the role. Whilst preserving the confidentiality of those meetings, I can nonetheless say that I do view them as an opportunity to exercise Bagehot's prescriptions.[1]

At the other end of the scale of confidentiality, it is a matter of State pride that the passage of the South Australian *First Nations Voice Act 2023* was conducted, including the Executive Council, in public on the steps of the Parliament House, just up the road. Content aside, all my engagements are on the public record so that the people of South Australia can have visibility of what their Governor is up to.

At a more personal level, my husband Rod and I want to make Government House and grounds a place for *all* South Australians. We were encouraged that 60,000 members of the public visited as part of the Illuminate Festival, still running in other parts of the city.

Somewhat unfortunately, the perception of trust in my office can also lead people to ask me to do things I cannot, but I believe these occasional misapprehensions are more than offset by the benefits of imparting visibility and leadership to the role. In this audience I do not need to defend the centrality of the role, at least in its conceptual sense, to law and governance, insofar as the Crown is the *fons et origo* [source and origin] of state power.

Over the centuries there has been an inverse correlation between the decline in the personal power of the sovereign and the necessary growth of administrative and constitutional law to regulate the exercise of that power by the body politic. Administrative law's gain has been the sovereign's loss, although not the Crown's.

Most direct powers have long been exercised by the executive, but that is not to say there are not powers still left to Governors, and I should here acknowledge the virtual presence at the conference of Professor Anne Twomey, whose *Veiled Sceptre*[2] has become required reading for Governors. Some powers have disappeared more recently, and I have to say that the demise of the arbitral function of the University Visitor, once held by my office, is not something I have had cause to repine.

One power I might mention briefly because it is called upon with some regularity, although exercised infrequently, is that of pardon. I mention it here not least because of the tension between decision-making power and transparency, which is a theme of your conference.

1 [Editor: Walter Bagehot famously attributed three rights to the sovereign — to be consulted, to encourage and to warn.]

2 Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018).

I can speak about it, to some degree at least, because of an article that appeared in *The Australian* of 19 September last year entitled 'Tell us why: pardon refused for "innocent" killer John Bailey'.[3]

The matter can be summarised by two quotes from that article. The first: 'A petition seeking a posthumous pardon for a man hanged for a triple murder in the late 1950s has been rejected without explanation by South Australian Governor Frances Adamson.' And the second quotes the petitioner as saying 'in the interests of transparency, the South Australian governor needed to release the reasons for the rejection'.

I am unfortunately unable to tell you how this tale ends, not because of confidentiality but because insofar as it raised a significant policy issue — the disclosure of reasons for the rejection of requests for pardon — it was referred to the AttorneyGeneral and remains active.

The Solicitor-General had asked me to reflect on my transition from senior public federal servant to State Governor and whether, and if so how, my perspectives differed, in the context of the themes of this conference. Unsurprisingly, there are some significant differences between being Governor and being the head of a large — 6,000 staff — department of state with direct administrative responsibilities and attendant challenges.

My colleagues heading domestic departments would have more harrowing tales to tell in terms of engagement with administrative law in its various guises, but the Department of Foreign Affairs and Trade was by no means immune.

As a metric, in 2021–22, the most recent year for which data is available, 9 claims were commenced in the Administrative Appeals Tribunal and 377 freedom of information requests finalised. The department also managed a range of legal matters before courts and tribunals, including some high-profile cases with which you would be familiar from the media. But also perhaps unsurprisingly, there is an important similarity in the perspective to be gained from both positions.

In both, for all the challenges and for all the failings that might occur, I saw and see, almost without exception, dedicated public servants, officials, legislators, legal practitioners, animated by sound principles, genuinely striving to pursue the public interest, to follow due process, to maximise fairness and transparency and to deliver good outcomes. In both, I saw and see that they do so in policy, administrative and legal environments with robust mechanisms of scrutiny and accountability.

As I say, this system is not perfect, but it is open to continuing evolution, as we can see with, for example, the remaking of the Administrative Appeals Tribunal or the recent creation of a National Anti-Corruption Commission.

3 'Tell us why: pardon refused for "innocent" killer John Bailey', *The Australian* (online, 19 September 2022) <https://www.theaustralian.com.au/nation/tell-us-why-pardon-refused-for-innocent-killer-john-bailey/news-story/5e78645cb01e64808667a2cec2a7d437>.

It is also a system that has just had administered to it a very serious critique in the report of the Holmes Royal Commission into the Robodebt Scheme.[4] I will not comment on the substance of the report, only note that it is a report that will require the most sober consideration. Without, in light of the report, being glib, I nonetheless believe that the path of public administration still tends to the better, and your work over the past 34 years and into the future, is an important contributor to its continuing improvement.

I note the call for papers for this conference spoke of the opportunity to discuss contemporary issues, of which there is clearly a plethora; to share practical experiences, which I am sure you will do enthusiastically; and to consider future developments. It is on this last that I encourage you to focus your attention. The success of the trust-building project may well depend on it.

4 *Royal Commission into the Robodebt Scheme* (Report, July 2023).

Convention or law — which builds trust?

*Anne Twomey**

In New Zealand, constitutionality is based upon convention, whereas in Australia it is based upon entrenched constitutional provisions which override ordinary legislation. Which is more capable of building trust — convention or law? While law gives greater certainty, convention can sometimes be more effective in ensuring fidelity to fundamental constitutional principles. This article compares the positions of New Zealand and the States of Victoria and New South Wales in relation to the same issue: the entrenchment of the contentious policy of prohibiting the privatisation of water utilities. It considers the effectiveness of convention and law and which was better placed to build public trust in governmental processes.

The question of whether something is 'constitutional' means different things in Australia, on the one hand, and in New Zealand and the United Kingdom, on the other. The essential difference is the significance of convention.

In Australia, because of the federal system and the entrenched *Constitution*, the question of whether something is constitutionally valid is a *legal* question that is determined by the courts based upon laws enacted in accordance with the *Constitution*. Validity will turn on matters such as whether there is a head of power to support a law, or a breach of an express or implied constitutional limitation on power. The effect is that in Australia, it is the *Constitution* that rules, rather than Parliament.

In the United Kingdom and New Zealand, in contrast, there is no legally binding written constitution. While there are laws that give effect to their constitutions, in the broadest sense, these laws can be altered by the enactment of an ordinary Act of Parliament, and there is no capacity for the courts to strike down a law as invalid, except possibly if it is not a law because it did not follow the correct manner and form to be validly enacted. In both countries Parliament is sovereign and the role of the courts is limited. The question of whether something is 'constitutional' in New Zealand and the United Kingdom means whether it complies with constitutional conventions.[1]

In short, whether something is 'constitutional' in Australia is a question of law, enforced by a court, whereas whether something is 'constitutional' in New Zealand or the United Kingdom is a matter of convention, which is enforced politically. So which is more capable of building trust — law or convention?

On the one hand, the advantage of law is that it can be enforced by an independent third party — a court. It also has the benefit of greater certainty, because it is for the most part set down in text. Conventions, however, are more uncertain, because they are often not codified in writing and the existence and scope of a convention is often disputed. The Whitlam dismissal is a classic case of various conventions that have been hotly disputed for almost 50 years. As they are not enforced by courts, there is no ultimate source of authority

* Professor Emerita, University of Sydney. This article is an edited version of the paper delivered at the Australian Institute of Administrative Law 2023 National Conference.

1 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154, 158 [16] (Richardson P, Henry and Blanchard JJ).

to determine a dispute about constitutionality one way or another. This means that disputes about conventions can drag on until all the combatants have died and no one remembers what the issue was anymore.

On the other hand, conventions are more closely tied to principles and can, if the conventions stick, be effective in building trust in a way that a law may not be. If constitutionality is determined by strict formal compliance with a law, this can sometimes be achieved while ignoring the fundamental principle that underpins its provisions. This is known as complying with the letter of the law, rather than its spirit. Convention tends to cleave towards the spirit of the constitution, while compliance with law can be formalistic and exploitative when politicians seek to achieve political advantage in a way that offends constitutional principle without breaking any law.

A recent analogy concerns corruption and the misuse of public money in the allocation of grants. Politicians will commonly assert that they are not corrupt because they have not done anything illegal — yet corruption extends well beyond what is formally unlawful. Even assuming that politicians were complying strictly with the law (and often they were not), their conduct corrodes public trust once it departs from the conventions of good government, including the expenditure of public money for public purposes and in response to public need, rather than electoral advantage.

In this article, however, I will draw on two near identical examples of an issue of constitutionality — the entrenchment of a contentious policy of prohibiting the privatisation of water services in New Zealand and in Victoria (with a cameo appearance from New South Wales). The outcome in each case was different and tells us something about convention, law and whether convention can turn into law.

New Zealand

In New Zealand, there is no higher law that permits the entrenchment of constitutional provisions. The *Colonial Laws Validity Act 1865* (UK) was repealed with respect to New Zealand in 1947[2] as were all other forms of entrenchment.[3] New Zealand abolished its previously entrenched Legislative Council shortly afterwards.

However, in 1956 the New Zealand Parliament enacted a provision in its *Electoral Act 1956* which entrenched six key provisions on matters including the term of the House of Representatives, electoral redistributions and the minimum voting age. In New Zealand these are described as 'reserved' provisions. They were passed with bipartisan, indeed unanimous, support and were regarded as fundamental constitutional provisions that were beyond politics and should therefore be protected from partisan change. The entrenching provision provided that any law that altered or repealed these reserved provisions had to pass by a 75% special majority in the House of Representatives or a majority of voters in a referendum.[4]

2 *Statute of Westminster Adoption Act 1947* (NZ).
3 *New Zealand Constitution (Amendment) Act 1947* (UK).
4 See, formerly, *Electoral Act 1956* (NZ) s 189, now *Electoral Act 1993* (NZ) s 268 and *Constitution Act 1986* (NZ) s 17(2).

It was recognised at the time that legal entrenchment was not possible due to the principle of parliamentary sovereignty and the absence of any higher authority to support entrenchment. The Attorney-General observed during the passage of the Bill:

> I should make it perfectly clear that the effect of these reserved sections is not in their legal force to bind future Parliaments but in their moral force as representing the unanimous view of Parliament.
>
> Under our Constitution Parliament cannot bind successive Parliaments, and each successive Parliament may amend any law passed by a previous Parliament.[5]

For this reason, it was decided that there was no point in the double entrenchment of the provision, as this would not be legally effective. Instead reliance was placed on the 'superior moral sanctity' of the provisions, rather than their legal effectiveness.[6] The Attorney-General observed that the provisions would 'only really be entrenched if they become universally accepted as rules which commend themselves to the sense of fairness of the people as a whole'.[7]

It was this universal acceptance and moral sanctity which led to the acceptance of a constitutional convention which supported the effectiveness of the entrenchment. Philip Joseph described the safeguard of entrenchment as 'moral and conventional only, not legal'.[8] In practice, no alterations were made to these purportedly entrenched provisions without following the specified manner and form. Any attempt to act otherwise was rejected on a procedural basis by the presiding officer and therefore failed to pass.[9]

By 1986, the Royal Commission on the Electoral System felt able to conclude that double entrenchment of fundamental electoral provisions was not essential because of the 'well-established convention' that supported entrenchment.[10] In 1993, when a new *Electoral Act* was enacted and the entrenched provisions were re-enacted — again without double-entrenchment — the Attorney-General noted that in theory it would be possible to repeal the entrenching provision by a simple majority, but in reality it was not an option as it would expose the House 'to allegations of political abuse and to allegations of having breached constitutional conventions'.[11] Such action would, in his view, 'be legally and constitutionally improper'.[12]

Convention crystallising into law

One of the great legal debates about convention is whether a convention can ever crystallise into a legal obligation. By its very definition, a convention is not a law. It is not legally binding

5 New Zealand, *Parliamentary Debates*, vol 310, 26 October 1956, 2839 (Mr Marshall, Attorney-General).
6 K J Scott, *The New Zealand Constitution* (Clarendon Press, 1962) 8.
7 New Zealand, *Parliamentary Debates*, vol 310, 26 October 1956, 2839 (Mr Marshall, Attorney-General).
8 Philip A Joseph, *Joseph on Constitutional and Administrative La*w (Thomson Reuters, 5th ed, 2021) 624.
9 New Zealand, *Parliamentary Debates*, Vol 399, 15 July 1975, 3057.
10 New Zealand, *Towards a Better Democracy — Report of the Royal Commission on the Electoral System* (Report, December 1986), [9.188].
11 New Zealand, *Parliamentary Debates*, vol 537, 3 August 1993, 17140–1 (Paul East, Attorney-General). To the same effect, see Mary Harris and David Wilson (eds), *McGee, Parliamentary Practice in New Zealand* (Oratia, 4th ed, 2017) 10.
12 New Zealand, *Parliamentary Debates*, vol 537, 3 August 1993, 17142. To this effect, see also Dean Knight, Submission to the Standing Orders Committee, 5 February 2023, 7.

on actors, although actors nonetheless treat a convention as morally or politically binding upon them.

In this example, however, two conventions are in play. The first is that political actors will comply with the manner and form constraints, even though they are not legally enforceable. The second is that the courts will not interfere with the intra-mural proceedings of the Parliament,[13] and will therefore not enforce requirements for votes by special majorities.

What is most interesting about this New Zealand example is the gradual shift in understanding of these two conventions and how they interact. The initial view was the one taken in 1956 — that entrenchment had moral and political force, but no legal force at all and no court would intervene to give it effect.

The intermediate view was that the procedure set out in the entrenching clause imposed a legal obligation on the House of Representatives. But this legal obligation was not enforceable in the courts. It was instead a duty of imperfect obligation because the House has exclusive cognisance of its own internal procedures. It was therefore a matter for enforcement within Parliament, through Standing Orders and the exercise of authority by the presiding officer.[14] For example, in the first edition of McGee's *Parliamentary Practice in New Zealand*, it was contended that 'it is solely for the House' to apply the entrenchment requirements in the *Electoral Act* 'to its own proceedings and that the courts would not and could not control the manner in which the House did this'.[15]

In 1995 the House of Representatives bolstered its Standing Orders on manner and form to confront the 'moral objection to a bare majority of the House imposing on a future House the need for a super-majority (for example a 75 per cent majority) in order to legislate'.[16] It therefore required the same special majority be used to entrench a provision as would later be required to amend or repeal it.[17] The use of a high special majority, such as 75%, also had the effect of preventing the entrenchment of contentious party policies, as they would not attract the necessary level of support for entrenchment.

The third and most recent view, which draws on dicta in a number of cases, is that the courts might now enforce manner and form constraints. The argument is that while courts in New Zealand 'do not have a power to consider the validity of properly enacted laws',[18] they may be able to determine whether a statute has not been 'properly enacted'.

For example, in *Westco Lagan Ltd v Attorney-General*[19] in 2001, a New Zealand High Court judge observed that he had no doubt that the Court had 'jurisdiction to determine whether

13 *Westco Lagan Ltd v Attorney-General* [2001] NZLR 40, 63 [98] (McGechan J); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332; *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418, 426–7 (Lord Cooke of Thorndon).

14 Harris and Wilson (eds) (n 11) 10.

15 David McGee, *Parliamentary Practice in New Zealand* (NZ Government Printer, 1985) 433.

16 Joseph (n 8) 641.

17 New Zealand, House of Representatives, Standing Order 266(1). See further Harris and Wilson (eds) (n 11) 446.

18 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323, 330 (Robertson J); *Pickin v British Railways Board* [1974] AC 765, 798 (Lord Simon of Glaisdale).

19 [2001] NZLR 40.

there has been compliance with any mandatory "manner and form" requirements imposed by statute law for the enactment of legislation by Parliament'.[20] He contended that 'manner and form' is confined to procedural legal processes, not the content of legislation and therefore does not involve the Court intruding into 'an area in which the Court is not equipped to operate.[21] But he prefaced these remarks by the observation that he was 'pressed for time' and could not address all the issues raised.[22] He did not examine any particular entrenched provisions, or whether there had been any intention for them to be legally entrenched, or the consequences of the failure to doubly entrench them. Nor was his observation on the legal enforceability of entrenchment relevant to the outcome of the case. It therefore has no precedential authority.

When the issue arose in *Ngaronoa v Attorney-General*[23] in 2019, the New Zealand Solicitor-General conceded on behalf of the Crown 'that if Parliament amends or repeals an entrenched provision without observing the prescribed manner and form, the Act is not validly passed'.[24] The Supreme Court did not have to decide the point. The majority, however, observed that it seemed 'the pendulum has swung in favour of enforceability', but that it 'would prefer that issue to be resolved after argument on the point'.[25]

The issue has not been resolved by a court because the House of Representatives has meticulously complied with the manner and form constraints. The strength of the convention that supports compliance has therefore averted any legal judgment as to whether the convention has transformed into a legally enforceable requirement and whether the convention of non-interference is qualified in relation to manner and form.

Nonetheless, the prevalent academic view in New Zealand seems to be that entrenchment is now legally enforceable in New Zealand. Palmer and Knight, in a 2022 book, reached the following conclusion:

> It is now expected that the courts will enforce 'manner and form' provisions, that is, enhanced procedural requirements beyond the standard obligations that a bill be passed, by a simple majority, through the various stages of the House. The orthodox understanding of legislative supremacy would not contemplate such a restriction; doing so would amount to an impermissible attempt by one parliament to bind its successors and would undermine its perpetual sovereignty. But this form of procedural entrenchment is no longer regarded as legally objectionable.[26]

Philip Joseph has taken a more nuanced position. He has argued that while a court might enforce a doubly entrenched manner and form requirement, he doubted whether single entrenchment would be sufficient, particularly when there was no original intent that the

20 Ibid 61 [91] (McGechan J).
21 Ibid 61–2 [91]–[92].
22 Ibid 61 [90].
23 [2019] 1 NZLR 289.
24 Ibid 294 (summary of argument).
25 Ibid 312 [70] (William Young, Glazebook, O'Regan and Ellen France JJ). Cf *Taylor v Attorney-General* [2015] NZAR 705 [68] and n 32, where Ellis J of the New Zealand High Court observed that it was not disputed that non-compliance with the manner and form in s 268 of the *Electoral Act 1993* (NZ) would invalidate a law and that it is 'trite that compliance with manner and form requirements is a condition of valid law-making'.
26 Matthew Palmer and Dean Knight, *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, 2022) 132. See also Knight, Submission to the Standing Orders Committee (n 12) 4.

entrenchment be legally enforceable.[27] He also thought that in determining the legal enforceability of a manner and form requirement, the courts should 'ensure that Parliament's entrenchment has a constitutional rationale, is directed at the integrity of democratic process and not substantive legislative policy, and does not offend the distinction between "manner and form" and "substance" '.[28]

The Three Waters Bill

In November 2022, however, the focus switched from the legal enforceability of manner and form requirements back to the convention that gives political and moral effect to them. On 22 November, a Greens MP, Eugenie Sage, moved an amendment to a Water Bill to entrench continuing public ownership and control of water services in New Zealand. The Labor Government supported the amendment, while two Opposition parties opposed it.

Because the entrenching amendment did not command 75% support of Members and the Standing Orders require symmetry in the special majority for both enactment and future repeal, the measure was entrenched with a lower special majority of 60%, requiring a future special majority of 60% or a majority in a referendum for its alteration or repeal.

Sage did not seem to consider that the entrenchment of water ownership and control would be legally enforceable. She observed during debate:

> Even though Parliament can't bind future parliaments, it is that moral power that an entrenchment provision has — that it's a strong signal in this bill, that it represents the will of New Zealanders.[29]

In this case, however, it was a partisan policy which did not have the unanimous support of the Parliament as had all the previously entrenched provisions.

There was an immediate reaction by public law academics and lawyers who objected to this purported entrenchment. The public law academics, in an open letter,[30] pointed out that only core provisions that were fundamental to the system of representative democracy and had unanimous bipartisan support had been entrenched in the past. They considered that a politically contentious provision aimed at preventing future privatisation did not meet this 'constitutional threshold'. They urged the Government 'to think about the dangerous precedent that this legislative action may set', which would extend 'the use of entrenchment from a limited range of matters that are fundamental to our constitutional system to a matter of contested social policy'.[31]

27 Joseph (n 8) 637, 639–40. Note the discussion that distinguishes the New Zealand position from that in the United Kingdom in *R (Jackson) v Attorney-General (UK)* [2006] 1 AC 262.

28 Joseph (n 8) 658.

29 New Zealand, *Parliamentary Debates,* 22 November 2022, vol 764, 13956 (Eugenie Sage).

30 Dean Knight et al, Open Letter, *Twitter* (28 November 2022), <https://twitter.com/drdeanknight/status/1596950491002712064>.

31 Ibid; see also Michael Neilson, 'Three Waters: Lawyers' constitutional concerns over entrenched privatisation provision — "dangerous precedent" ', *New Zealand Herald* (online, 28 November 2022) <https://www.nzherald.co.nz/nz/politics/three-waters-lawyers-constitutional-concerns-over-entrenched-privatisation-provision-dangerous-precedent/UYRHQD7WSBAFREIT2X6G5QHHEI/>.

The New Zealand Law Society also issued a statement asserting that the entrenchment clause 'breaches a well-established convention observed by successive Parliaments' under which 'entrenchment provisions are reserved for significant constitutional matters outside the scope of general policy debate'.[32] The statement described the entrenchment clause as 'undemocratic: it proposes to bind the hands of future governments on a contestable policy position'.[33]

Interestingly, the strength of the convention and the public response was such that the Government backed down. The Bill was recommitted to the committee stage and the entrenchment provision was removed. The Labor Attorney-General, David Parker, stated that the Government agreed that the 'entrenchment of the anti-privatisation clause is an inappropriate use of the entrenchment tool' and that a 'serious constitutional mistake' would have occurred if the entrenchment provision were not removed.[34] He gave two reasons why the scope of those matters that were entrenched had to remain narrow.

The first was 'democracy' — that the people were entitled to throw out the Government at an election and elect a new Parliament that would change the law. This meant that the new Parliament should not be stuck with the policy of the previous government that has been tossed out.[35]

The second reason was the uncertainty about the legal effectiveness of entrenchment. Parker noted that Parliament had upheld the convention about entrenchment for 50 years or so and had not abused it. But if a politically contentious matter were purportedly entrenched, then a subsequent government would likely seek to remove the entrenching provision by an ordinary majority, resulting in the matter being determined by the courts. He did not want the courts to intervene either way in relation to the convention and concluded with the hope that 'we maintain the strength of [the] convention by not undermining it'.[36]

So in New Zealand, the convention of complying with manner and form restrictions was maintained, and the question of whether they had transformed into an enforceable law was again avoided. This meant the courts did not have to address whether to qualify the convention of non-interference in the internal workings of Parliament. Trust was both relied upon and built, without reliance on law and courts.

Victoria

The contrast with Victoria is particularly notable. As in all Australian states, entrenchment was originally supported by s 5 of the *Colonial Laws Validity Act 1865*, which was replaced in substantially the same terms by s 6 of the *Australia Act 1986* (Cth and UK) ('*Australia Acts*'). The New Zealand constitutional threshold is in part replicated by the narrow terms of s 6 of the *Australia Acts*, which confine the obligation of compliance with manner and form to laws respecting the 'constitution, powers or procedure' of the Parliament.

32 New Zealand Law Society, 'NZLS Statement on the Water Services Entities Bill', 2 December 2022, <https:/www.lawsociety.org.nz/news/law-society-statements/nzls-statement-on-the-water-services-entities-bill/>.
33 Ibid.
34 New Zealand, *Parliamentary Debates*, 6 December 2022, vol 764, 14334.
35 Ibid.
36 Ibid 14335.

But here we see the division between law and convention. The convention was effective in New Zealand because it gave effect to fundamental constitutional principles. In contrast the law, in s 6 of the *Australia Acts*, has been treated as no more than a series of words which can be manipulated and interpreted to achieve a political end.

Until 2003, entrenchment in Victoria's *Constitution Act 1975* (Vic) was limited and confined to absolute majorities. However, a Constitutional Commission recommended that large swathes of the constitution be entrenched either by a referendum requirement or a special majority of three-fifths, but without any consideration of the legal basis for such entrenchment, let alone fundamental constitutional principles.[37] When the Opposition queried the legality of this degree of entrenchment, noting that many of the provisions — such as the independence of the DPP and access to information — did not seem to fall within the 'constitution, powers or procedures' of the Parliament,[38] the Victorian Attorney-General made vague assertions that the 'weight of legal opinion absolutely supports the existence of an entrenchment power', without explaining how.[39] It appears that reliance was placed upon the 'inherent power' of the Parliament 'to reorganise itself by requiring referendums, or indeed special majorities for other matters'.[40]

This was before the High Court's judgment in *Attorney-General (WA) v Marquet* ('*Marquet*'),[41] which left the application of any such alternative form of entrenchment most doubtful.[42] It is now likely that the only source of valid entrenchment at the state level in Australia is s 6 of the *Australia Acts*, as according to the High Court, s 6 leaves 'no room for the operation of some other principle, at the very least in the field in which s 6 operates'.[43]

The Victorian Government continued, however, to entrench laws, moving further away from constitutional matters into partisan policy issues. Later in 2003 it purportedly entrenched Part VII of the Constitution to prevent the future privatisation of water services in Victoria.[44] In 2021, the same approach was taken in purportedly entrenching an anti-fracking policy in the *Constitution Act 1975*.[45] During the last election campaign in Victoria, the Andrews Government promised to entrench in the *Constitution Act 1975* provisions to prevent the privatisation of a re-formed State Electricity Commission. These are precisely the types of entrenchment that in New Zealand were regarded as contrary to convention and 'unconstitutional' in the broad sense of the word.

37 Constitution Commission Victoria, *A House for our Future: A Report* (Report, Department of Premier and Cabinet, Melbourne, 2002) 70. See further Carolyn Evans, 'Entrenching constitutional reform in Victoria' (2003) 14 *Public Law Review* 133, 133.

38 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2003, 267 (Mr Doyle), 278 (Mr McIntosh); Legislative Council, 25 March 2003, 439 (Mr Davis).

39 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2003, 296 (Mr Hulls).

40 Victoria, *Parliamentary Debates*, Legislative Council, 27 March 2003, 585 (Ms Broad) and 26 March 2003, 551 (Mr Scheffer). See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 202.

41 (2003) 217 CLR 545 ('*Marquet*').

42 Ibid 571 [70], 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J); Carney (n 40) 202–3.

43 *Marquet* (n 41) 574 [80].

44 *Constitution (Water Authorities) Act 2003* (Vic).

45 *Constitution Amendment (Fracking Ban) Act 2021* (Vic).

When questioned in Parliament about the constitutional validity of the anti-fracking provisions, the Victorian Attorney-General did not attempt to rely on the previous argument that there was an alternative power of entrenchment. Instead, she tried to shoe-horn it into s 6 of the *Australia Acts* by arguing that every law that seeks to amend or repeal an entrenched provision is a law respecting the 'powers or procedure' of Parliament, and therefore absolutely anything can be effectively entrenched. This argument is contrary to the intent of s 6 of the *Australia Acts*, which was clearly directed at a limited category of entrenchment respecting certain fundamental matters concerning the Parliament. When the *Australia Acts* were being negotiated, there were different views amongst the states about what the scope of entrenchment should be. Some preferred no capacity to entrench while others wanted to be able to entrench anything. The compromise position was to maintain the limited category of entrenchment permitted by s 5 of the *Colonial Laws Validity Act 1865* — that is, 'constitution, powers or procedure' of the Parliament.[46]

Moreover, the reference to the 'constitution' of Parliament would be rendered otiose, as would all the cases[47] which addressed its meaning, if the words 'powers or procedure' were interpreted as applying to any law at all that seeks to amend or repeal a purportedly entrenched law. While the issue was raised before the High Court in *Marquet*, the majority declined to determine it, as the law in question fell within the scope of 'constitution'.[48]

Justice Kirby, however, rejected the argument that 'powers or procedure' extends to any law. He pointed out: 'Were it otherwise, every time an attempt was made to impose a particular procedure upon a State legislature, by the incorporation of a "manner and form" provision in a purported entrenchment, this would have achieved a self-fulfilling outcome.'[49] He concluded — rightly in my view — that one must characterise a law by reference to its entirety,[50] or, as Dawson J observed in another case, by reference to its 'subject-matter',[51] rather than its procedural effect.

Justice Kirby was also concerned that if a state Parliament could entrench anything, rather than the very limited class of matters concerning Parliament, it could have a serious impact upon the 'democratic accountability that underpins all Australia's constitutional arrangements'.[52]

It seems that the fundamental democratic principles which inform the convention in New Zealand, and support the building of trust in the system of government, do not appear to be given the same regard in Victoria, where the words of s 6 of the *Australia Acts* are interpreted to serve a party political end of preventing contentious policy matters being

46 Anne Twomey, *The Australia Acts 1986 — Australia's Statutes of Independence* (Federation Press, 2010) 238–9 and 241, referring to records of the Special Committee of Solicitors-General.

47 See, eg, *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457, 468, 470 (Barton J); *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 418 (Rich J); *Attorney-General (NSW) v Trethowan* [1932] AC 526, 540 (Lord Sankey LC); *Clydesdale v Hughes* (1934) 51 CLR 518, 528 (Rich, Dixon and McTiernan JJ); *Western Australia v Wilsmore* (1982) 149 CLR 79, 102 (Wilson J).

48 *Marquet* (n 41) [74] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

49 Ibid [199] (Kirby J).

50 Ibid.

51 *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 459 (Dawson J).

52 *Marquet* (n 41) [200] (Kirby J).

dealt with differently by a future government. The convention seems to have deeper roots in principle in New Zealand than the law does in Victoria.

One of the arguments used in Victoria when the constitutionality of its 2003 entrenchment was being disputed was that non-parliamentary matters had previously been entrenched, including in other states. This is the pernicious 'precedent' argument, which was feared in New Zealand and runs rampant in Australia. Any government lawyer will be able to tell tales of how difficult it is to combat unconstitutional proposals when the complaint is raised that another state has done it, so why cannot we?

New South Wales

This takes us to New South Wales. Before the last State election, the Labor Opposition promised to amend the *Constitution Act 1902* (NSW) ('NSW Constitution') to protect Sydney Water and Hunter Water from being privatised in the future. Having won the election, this was one of the first priorities of the new Government. What could the poor government lawyers do to fight off the claims that this politically partisan policy be entrenched in the NSW Constitution, especially in the face of the Victorian precedent?

They must have done something quite special, because when the Bill was introduced to Parliament, it did not entrench anything. Instead, the *Constitution Amendment (Sydney Water and Hunter Water) Act 2023* (NSW) merely provided that privatisation could not occur 'unless authorised by an Act of Parliament'. It was just a legislative limit on executive power. No attempt at entrenchment was involved.

Premier Chris Minns, in giving the second reading speech, noted that it was 'extremely unusual' to insert a matter of policy of this kind in the NSW Constitution, and that a constitution normally deals with the operation and power of the legislature, the role of the Governor and other democratic matters. He observed that it was not something that the Government took lightly or that it intended to make a habit of. He referred to the Victorian precedent, and concluded that while the Government wanted to make it harder for any future government to privatise water corporations, 'it does not want to try to pre-empt the decisions of future parliaments on a policy matter'.[53]

The purpose of inserting this measure in the NSW Constitution, as opposed to any other Act, was therefore unclear. The Opposition Leader, Mark Speakman, noted that any claim that water assets were better protected in the NSW Constitution than in any other Act of Parliament was untrue. He criticised the use of the NSW Constitution 'as a political plaything'.[54] But at least no attempt was made to entrench a partisan policy and bind both a future Parliament and the people who elected it.

53 New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 May 2023, 17 (Chris Minns, Premier).
54 Ibid, 23 May 2023, 19 (Mark Speakman).

Conclusion

Where conventions are deeply rooted in constitutional principle, they can be very effective and build trust in the community about acceptable standards of conduct. In such cases, conventions can be more effective than laws. One of the reasons we have laws is due to a lack of trust that people will comply with conventional standards of conduct. And one of the

consequences is that people will often seek to manipulate the words of laws to achieve their desired aim with little or no regard to the fundamental principles that underlie the law.

We also need to be aware of the rise of authoritarian politicians for whom convention is nothing but a minor impediment to be swept aside to achieve political aims. The Brexit prorogation controversy in the United Kingdom and the Morrison secret ministry scandal in Australia show us how disregard for convention can fuel public distrust in government. It also indicates that judicial intervention may be warranted to help restore public trust. Finding the right balance between convention and law is an ongoing challenge.

The interaction of policy and law in environmental governance

*Brian J Preston**

This article considers the role of policy in environmental law. Environmental law depends on policy in ways and to an extent greater than other areas of public law. To understand what is environmental law thus necessitates examining the role that policy plays in framing, fleshing out and fulfilling environmental law.

At the outset, I need to explain what I mean when I am referring to policy in this article. I use the word 'policy' to refer to both statutory and non-statutory policies.[1]

By statutory policies, I am simply referring to policies that are made pursuant to a statute. The statute may impose a duty on some agency or official to make a policy but more commonly the statute reposes a power to make a policy. The statute will usually specify both the process that needs to be followed in making the policy and the objective or outcome that needs to be achieved by the policy. Many statutory policies are forms of delegated or subordinate legislation. In this context, I will discuss statutory instruments, such as environmental planning instruments ('EPIs'), which are made pursuant to New South Wales planning legislation. These are a form of delegated legislation. I will refer to various strategic plans that are made pursuant to the planning legislation but are not themselves delegated legislation. I will also refer to guidelines and strategies for biodiversity assessment, which are a form of statutory policy made pursuant to express statutory powers but are not a form of delegated legislation. Excluded from my discussion of statutory policies, however, are regulations, which are a more traditional form of delegated legislation. Hence, I do not include the regulations made under planning legislation as statutory policies.

Non-statutory policies, as the name suggests, are not made pursuant to a statute and hence are not statutory instruments or delegated legislation. Nevertheless, non-statutory policies are made in the shadow of statutes. They may guide or structure the exercise of discretionary powers under a statute. They may aid more generally the agency or official in the administration, implementation and enforcement of a statute.

I will discuss this distinction between statutory and non-statutory policies by examining the sources, legal constraints and legal effects of policies. In the first part, I will develop the distinction I am drawing between statutory and non-statutory policies by identifying the sources of these different policies. I will provide an illustration of statutory policies and non-statutory policies in planning or environmental law. In the second part, I will explore the legal constraints of policies. The legal constraints of statutory policies differ from those of non-

* The Hon Justice Brian J Preston FRSN SC is the Chief Judge of the Land and Environment Court of New South Wales. This article is an edited version of Justice Preston's presentation delivered at the 2022 AIAL National Administrative Law Conference on 21 July 2022.

1 The way I classify policy for the purposes of this article is not necessarily the way that policy is understood in other jurisdictions. See, eg, Laurence Etherington, ' "Mandatory guidance" for dealing with contaminated land: paradox or pragmatism' (2002) 23 *Statute Law Review* 203, for a discussion of 'statutory guidance' issued under pt IIA of the *Environmental Protection Act 1990* (UK). See also Gillian Metzger and Kevin Stack, 'Internal administrative law' (2017) 115(8) *Michigan Law Review* 1239, for a discussion of US 'internal administrative law', which is 'the processes, guidelines, and policy issuances that an administrative agency adopts to structure the actions of its own officials' (at 1248).

statutory policies, although there is some overlap. I will identify some of the ways in which these legal constraints have been exposed in judicial review of policies. In the third part, I will examine the legal effects of policy, both statutory policies and non-statutory policies. I will spend more time on the legal effects of non-statutory policies as these are less known and discussed than the legal effects of statutory policies.

The picture I will draw of the role of policy in environmental law and governance will be, for reasons of time, a sketch rather than a detailed painting. But sketches have their uses — they can distil complex phenomena to their essence. That is what I hope to achieve.

Sources of policy

Source of statutory policies

Environmental legislation commonly requires the development and application of policies to aid the administration, implementation and enforcement of legislation. Planning law is the best-known example.

The typical structure of planning law involves primary legislation and tiered delegated legislation. Consider the NSW planning legislation. The primary legislation is the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*'). Pursuant to the regulation-making power in the *EPA Act*,[2] the *Environmental Planning and Assessment Regulation 2021* (NSW) ('*EPA Regulation*') has been made. This is delegated legislation.

The primary legislation of the *EPA Act* empowers the making of EPIs, another form of delegated legislation, in order to implement the legislative objects and scheme of the *EPA Act*. Under the *EPA Act*, there are two types of EPIs, State environmental planning policies ('SEPPs')[3] and local environmental plans ('LEPs').[4] As their names suggest, SEPPs are intended to set broad policies for the whole State, while LEPs are intended to set more detailed policies for a local government area. This does not always occur in practice, with SEPPs being used from time to time to effect changes to planning policy at a local level, including authorising certain development or types of development to be carried out on particular land.

In turn, another type of delegated legislation, development control plans ('DCPs'), facilitate implementation of EPIs. The principal purpose of a DCP is to provide guidance to persons carrying out development and to the consent authority for such development on three matters:

> (a) giving effect to the aims of any environmental planning instrument that applies to the development,
>
> (b) facilitating development that is permissible under any such instrument,
>
> (c) achieving the objectives of land zones under any such instrument.[5]

2 *Environmental Planning and Assessment Act 1979* (NSW) s 10.13 ('*EPA Act*').
3 Ibid s 3.29.
4 Ibid s 3.31.
5 Ibid s 3.42(1).

There is, therefore, a tiering of delegated legislation from the *EPA Regulation* to EPIs to DCPs.

But there is more. The primary legislation of the *EPA Act* and the various delegated legislation made under it require or empower the preparation of other policies or incorporate by reference other policies.

One example concerns strategic planning. There are various statutory requirements to prepare regional strategic plans,[6] district strategic plans[7] and local strategic planning statements.[8] There is a nesting of these strategies and statements, such that a local strategic planning statement needs to be consistent with a district strategic plan,[9] which needs to be consistent with a regional strategic plan,[10] which in turn needs to be consistent with other strategic plans.[11] In preparing regional strategic plans, regard must also be had to policies made under other legislation and for other purposes, including:

> (b) any other strategic plan that applies to the region,
>
> (c) any 20-year State infrastructure strategy, 5-year infrastructure plan and sectoral State infrastructure strategy statement under Part 4 of the *Infrastructure NSW Act 2011*.[12]

These regional and district strategic plans and local strategic planning statements are not EPIs themselves, and they are not delegated legislation, but they do inform the EPIs that can be made, as a planning proposal for an EPI needs to give effect to such strategic plans.[13]

Another example of planning legislation empowering the preparation of policies concerns biodiversity assessment. The *EPA Act* applies the statutory process of biodiversity assessment in pt 7 of the *Biodiversity Conservation Act 2016* (NSW) ('*BCA*') and pt 7A of the *Fisheries Management Act 1994* (NSW) ('*FMA*').[14] Those parts of those statutes provide a test for determining whether a development or activity is likely significantly to affect threatened species or ecological communities, or their habitats.[15] These provisions empower the making of guidelines to be used in applying the test.[16] Section 7.3(2) of the *BCA*, for example, provides:

> The Minister may, by order published in the Gazette with the concurrence of the Minister for Planning, issue guidelines relating to the determination of whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats. Any such guidelines may include consideration of the implementation of strategies under the Biodiversity Conservation Program.

This provision gives statutory force to any guidelines issued by the Minister. The provision also gives statutory force to any strategies under the Biodiversity Conservation Program by

6 Ibid ss 3.3, 3.5.
7 Ibid ss 3.4, 3.6.
8 Ibid s 3.9.
9 Ibid ss 3.8(3), 3.9(2)(b).
10 Ibid ss 3.4(3)(b), 3.8.
11 Ibid s 3.3(3)(b).
12 Ibid s 3.3(3).
13 Ibid ss 3.8(2)–(4), 3.33.
14 Ibid s 1.7.
15 See *Biodiversity Conservation Act 2016* (NSW) ss 7.2, 7.3 ('*BCA*'); *Fisheries Management Act 1994* (NSW) s 220ZZ ('*FMA*').
16 *BCA* (n 15) s 7.3(2); *FMA* (n 15) s 220ZZA.

the guidelines requiring such strategies to be considered in applying the test. The Biodiversity Conservation Program has its own statutory source in the *BCA*.[17]

Although these guidelines and strategies have a statutory source, they are not delegated legislation. Nevertheless, their statutory source makes them a form of statutory policy.

This discussion of statutory policies under planning law will suffice to illustrate the types of policies that have a statutory source. I turn now to policies that do not have a statutory source.

Non-statutory policies

There are first of all high-level, government policies. In the environmental context, a high-level environmental policy 'refers to a course of action adopted to secure, or that tends to secure, a state of affairs in relation to environmental matters, that is perceived to be desirable'.[18] High-level environmental policies can have a statutory source, such as the planning and infrastructure policies and the Biodiversity Conservation Program to which I have earlier referred, but otherwise they are prepared by relevant government departments or agencies in the exercise of general executive power to set the direction of administration and governance in their particular fields.

An example concerns climate change. There is no specific climate legislation at the federal level, or in most states including New South Wales, to direct the climate action to be taken by governments. Policies fill the gap. In New South Wales, the Office of Environment and Heritage prepared a 'NSW Climate Change Policy Framework' in 2016 and the Department of Planning, Industry and Environment, prepared a 'Net Zero Plan Stage 1: 2020–2030' in 2020. These policies adopt the target of achieving net-zero emissions by 2050 and set out a plan of how to do so.

Such policies are the object of this particular field of administration but do not structure or guide how decisions are to be made.[19] This is the role that lower-level, more detailed policies play. They structure or guide the exercise of statutory powers under planning or environmental legislation.

It has long been recognised that there are benefits in Ministers or government departments or agencies adopting policies to guide the exercise of discretionary statutory powers. Justice Brennan's statement in *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* ('*Drake (No 2)*') is a locus classicus:

> 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.

17 *EPA Act* (n 2) s 4.35.

18 Elizabeth Fisher, Bettina Lang and Eloise Scotford, *Environmental Law: Texts, Cases and Materials* (Oxford University Press, 2nd ed, 2019) 244.

19 As to this distinction in non-statutory policies, see Alan Robertson, 'Supervising the legal boundaries of executive powers' (2021) 50 *Australian Bar Review* 12 at 54–5.

> 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.[20]

Similar statements are to be found in *Minister for Immigration and Ethnic Affairs v Gray*,[21] *Plaintiff M64/2015 v Minister for Immigration and Border Protection*[22] and *Belmorgan Property Development Pty Ltd v GPT Re Ltd*.[23]

Legal constraints of policy

There are legal constraints on making both statutory and non-statutory policies. These legal constraints relate to the authority to make the policy, the process of making the policy and the outcome of the policy. The legal constraints differ depending on the source of the policy, whether statutory or non-statutory.

Legal constraints of statutory policies

Both the process and the result of making a statutory policy are legally constrained. At the outset, a legal constraint is that a statutory policy must actually be made if there is a statutory duty to do so. Such statutory duties to develop policies might be rare — mostly there is a power but not a duty to make a policy — but such duties do occur. An example is the duty in s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) ('*POEA Act*'). The Environment Protection Authority ('EPA') is required to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'.

The content of and compliance with this statutory duty were in issue in *Bushfire Survivors for Climate Action Inc v Environment Protection Authority*.[24] The climate group contended, and I found, that this statutory duty obliged the EPA to develop environmental quality objectives, guidelines and policies to ensure protection of the environment from climate change.[25] In construing the duty in s 9(1)(a) of the *POEA Act*, I noted that the legislature has used general language. This revealed a legislative intention that the language in the statutory provision should be regarded as ambulatory, capable of picking up changes in the subject matter as they occur from time to time.[26] I continued:

> Having regard to its general and ambulatory language, s 9(1)(a) of the POEA Act should be construed as 'always speaking', allowing the duty to embrace changes in the threats to the environment in New South Wales. The threats to the environment, against which environmental quality objectives, guidelines and policies need to be developed to protect the environment, will change over time and place and in magnitude and impact. The environmental quality objectives, guidelines and policies to ensure environment protection will need to change in response to the threats to the environment that prevail and are pressing at the time.

20 (1979) 2 ALD 634, 640 ('*Drake (No 2)*').
21 (1994) 50 FCR 189, 206.
22 (2015) 258 CLR 173 [54].
23 (2007) 153 LGERA 450 [71].
24 (2021) 250 LGERA 1.
25 Ibid [16], [69].
26 Ibid [64], [65].

> For instance, the pollutants of yesteryear, with their concomitant threats to the environment and risks to human health, may no longer be the pollutants of today, which pose different threats to the environment and different risks to human health. The environmental quality objectives, guidelines and policies that s 9(1)(a) would have required be developed to ensure environment protection from the pollutants of yesteryear may not be the environmental quality objectives, guidelines and policies that s 9(1)(a) now requires to be developed to ensure environment protection from the pollutants of today.
>
> What is required to perform the duty in s 9(1)(a), therefore, will evolve over time and place in response to the changes in the threats to the environment. This may make it difficult to describe definitively what the duty requires at any particular time or place, because it requires identification of the current threats to the environment. Nevertheless, it should always be possible to identify the current threats that are of greater magnitude and greater impact. This means that, at a minimum, the duty under s 9(1)(a) will require the development of environmental quality objectives, guidelines and policies to ensure the protection of the environment from threats of greater magnitude and greater impact.
>
> On the evidence, at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected. Indeed, this has been recognised by the EPA. One of the instruments on which the EPA relied was its Regulatory Strategy 2021–24, which identified climate change as one of the challenges facing the environment in New South Wales and the EPA. In these circumstances, the duty in s 9(1)(a) to develop environmental quality objectives, guidelines and policies to ensure environment protection requires the development of such instruments to ensure environment protection from climate change.[27]

I found that the statutory duty on the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change was unperformed and issued an order, in the nature of mandamus, compelling performance.[28]

If a statutory policy is to be made, it must be made in accordance with the statutory process for making a policy. This process may be laid down in the subject statute, such as the planning or environmental legislation, or in a general administrative procedure statute. The statutory process might involve consultation about the draft policy[29] or public notification and exhibition of the draft policy[30] and consideration of any resultant submissions before making the policy. The procedures might involve consideration of specified matters before making the policy or require that the policy achieves some specified outcome.

More generally, a legal constraint is that the statutory policy must be authorised by and consistent with the primary or delegated legislation under which the policy is made. I will give three illustrations of statutory policies that were found not to be authorised by or to be inconsistent with a statute, one in the United States, another in Ireland and a third in the United Kingdom.

27 Ibid [66]–[69].
28 Ibid [142], [148], [149].
29 As to complying with statutory requirements for consultation in the making of an EPI, see *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306, 335–8.
30 As to complying with statutory requirements for public exhibition of an EPI, see *Smith v Wyong Shire Council* (2003) 132 LGERA 148.

US Environmental Protection Agency's Clean Power Plan rule

An illustration of a statutory rule not being authorised by a statute is in the recent decision of the US Supreme Court in *West Virginia v Environmental Protection Agency*.[31] The Environmental Protection Agency ('US EPA') had promulgated the Clean Power Plan rule, a type of delegated legislation made under the hybrid rulemaking procedures in the *Clean Air Act 1963* (US).[32] The Clean Power Plan sought to reduce carbon dioxide emissions from existing coal-fired and natural gas-fired power plants in three ways. First, existing power plants could undertake to burn coal more cleanly. This was a source-specific, efficiency-improving measure. The second and third ways were quite different, as both involved what the US EPA called 'generation shifting' at the grid level. The aim was to shift electricity production from higher-emitting to lower-emitting producers. The second way was to effect a shift in generation from existing coal-fired power plants, which would produce less power, to gas-fired power plants, which would produce more power. This would reduce sector-wide carbon dioxide emissions because gas plants produce less carbon dioxide per unit of electricity generated than coal plants. The third way was to effect a shift in generation from both coal and gas power plants to renewable energy sources, mostly wind and solar.[33]

The US EPA cited s 111 of the *Clean Air Act* as providing authorisation to make the Clean Power Plan rule. Under that section the EPA can determine the emissions limit with which sources of pollutants (carbon dioxide emissions being a pollutant) will have to comply. The EPA observes that limit by determining the 'best system of emission reduction … that has been adequately demonstrated' for the kind of existing source. The limit reflects the amount of pollution reduction achievable through the application of that system.

At issue was whether s 111(d) of the *Clean Air Act* authorised the generation shifting approach in the Clean Power Plan to reduce emissions from existing coal-fired power plants. The majority (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ), with a concurring opinion of Gorsuch J in which Alito J joined, held that the Clean Power Plan lacked clear congressional authorisation in the *Clean Air Act* to achieve such generation shifting at the grid level. The minority (Kagan J with whom Breyer and Sotomayor JJ agreed) dissented, finding that the Clean Power Plan was authorised by s 111 of the *Clean Air Act*.

The majority announced and applied the 'major questions doctrine'. This doctrine goes further than normal statutory interpretation to determine whether a policy or rule made by an agency is authorised by the statute. In the majority's opinion,

> there are 'extraordinary cases' that call for a different approach — cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.[34]

31 597 US __ (2022) ('*West Virginia v EPA*').

32 Section 307(d) of the *Clean Air Act*, 42 USC § 7607(d). Hybrid rulemaking requires procedures that are more formal than the informal "notice-and-comment" rulemaking under the *Administrative Procedures Act 1946* (US) (APA), but are less formal than the on-the-record, formal hearing provisions of the APA.

33 *West Virginia v EPA* (n 31) 7–8 (Opinion of the Court).

34 Ibid 17.

In such cases, courts ' "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism" '.[35] To convince the court otherwise, the agency must point to 'clear congressional authorisation' for the power it claims.[36]

The rationale for the major questions doctrine is that Congress is to be presumed to intend to make major policy decisions itself, not leave those decisions to agencies.[37] Judge Gorsuch, in his concurring opinion, suggested that the purpose of the major questions doctrine is 'to ensure that the government does "not inadvertently cross constitutional lines" ',[38] including the separation of powers. He stated:

> The major questions doctrine seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests … The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond' those the people's representatives actually conferred on them. As the Court aptly summarizes it today, the doctrine addresses 'a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.'[39]

The majority held that the generation shifting approach in the Clean Power Plan represented such a transformative expansion of the US EPA's regulatory authority that there is every reason to hesitate before concluding that Congress meant to confer on the EPA the authority it claimed under s 111(d) of the *Clean Air Act*.[40] Chief Judge Roberts, delivering the Opinion of the Court, concluded:

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.' … But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.[41]

The minority disputed the legitimacy and application of the 'major questions doctrine' as a rule of statutory interpretation.[42] The question of whether the Clean Power Plan is authorised by the *Clean Air Act* is to be determined by 'normal text-in-context statutory interpretation'.[43] Applying this normal rule of statutory interpretation, the Clean Power Plan is authorised by s 111 of the *Clean Air Act*.[44] The generation shifting enabled by the Clean Power Plan is the 'best system of emission reduction', being the most effective and efficient way to reduce power plants' carbon dioxide emissions.[45]

35 Ibid 19.
36 Ibid.
37 Ibid.
38 Ibid 8 (Gorsuch J, concurring).
39 Ibid 9.
40 Ibid 20 (Opinion of the Court).
41 Ibid 31.
42 Ibid 15 (Kagan J, dissenting).
43 Ibid.
44 Ibid 5–9, 19, 20–2, 32.
45 Ibid 4–5.

Judge Kagan observed that the history of regulation shows that

> Congress makes broad delegations in part so that agencies can 'adapt their rules and policies to the demands of changing circumstances.' … To keep faith with that congressional choice, courts must give agencies 'ample latitude' to revisit, rethink, and revise their regulatory approaches.[46]

Judge Kagan found that this was what Congress had done with the *Clean Air Act*. The enacting Congress had told the US EPA, in s 111 of the *Clean Air Act*, to pick the 'best system of emissions reduction', recognising that the 'best system' would change over time. Congress wanted and instructed the EPA 'to keep up'. The EPA followed those statutory directions when it issued the Clean Power Plan.[47] The generation shifting approach was the best system of emissions reduction and accorded with the enacting of Congress's choice.[48]

Irish Government's National Mitigation Plan

An illustration of a statutory policy being inconsistent with the statute under which it was made is in the Irish case of *Friends of the Irish Environment v Ireland*.[49] The *Climate Action and Low Carbon Development Act 2015* (Ireland) required the Irish Government to prepare a National Mitigation Plan to reduce Ireland's greenhouse gas emissions. The Irish Government had prepared the National Mitigation Plan 2017 to facilitate Ireland's transition to a low-carbon economy by 2050. The plaintiff environmental non-governmental organisation challenged the Plan. The Supreme Court of Ireland held that the Plan was unlawful, as its terms fell 'well short of the level of specificity required to … comply with the provisions of the 2015 Act'.[50] The Court found that the Act required 'a sufficient level of specificity in the measures identified … so that a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options'.[51] The Court held that 'a compliant plan must be sufficiently specific as to policy over the whole period to 2050'.[52] As a reasonable reader of the Plan would not understand how Ireland will achieve its 2050 goals,[53] the Court quashed the Plan on the grounds that it failed to comply with its statutory mandate.[54]

UK ministerial decisions relating to the Net Zero Strategy

An illustration of a statutory policy not being made in accordance with statutory requirements is *R (Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy*.[55] Friends of the Earth, ClientEarth, the Good Law Project and environmental campaigner Joanna Wheatley ('the claimants') brought separate judicial review proceedings which were heard together by the England and Wales High Court. The claimants challenged decisions of

46 Ibid 26–7.
47 Ibid 27.
48 Ibid; see also 30–1.
49 [2020] IESC 49.
50 Ibid [9.3].
51 Ibid [9.2].
52 Ibid.
53 Ibid [6.46].
54 Ibid [6.48].
55 [2022] EWHC 1841 (Admin).

the Secretary of State for Business, Energy and Industrial Strategy made under the *Climate Change Act 2008* (UK) ('*CCA*') in relation to the Net Zero Strategy ('NZS').

The claimants contended that the Secretary failed to comply with the requirements in ss 13 and 14 of the *CCA* in relation to the NZS. Section 13 of the *CCA* imposes a duty on the Secretary to 'prepare such proposals and policies' as he considers will enable the carbon budgets under the *CCA* to be met. Section 14 of the *CCA* requires the Secretary to lay before Parliament a report setting out proposals and policies for meeting the current and future 'budgetary period' up to and including the carbon budget that has just been set. The NZS purported to state the proposals and policies required under s 13 and was laid before Parliament in October 2021 as the report required by s 14.

The claimants put forward a number of grounds of challenge concerning ss 13 and 14 in relation to the NZS. The High Court rejected some of the points raised by the claimants under these grounds of challenge and accepted others. During the course of proceedings, it was revealed that the proposals and policies in the NZS were expected to achieve only 95 per cent of the emissions reductions required to meet the UK's most recent sixth carbon budget ('CB6').[56] The High Court rejected the claimants' argument that under s 13 of the *CCA* the Secretary had to be satisfied that the proposals and policies in the NZS would enable at least 100 per cent of the reductions in emissions required by CB6 to be achieved.[57] The Secretary accordingly did not make any legal error by proceeding on the basis that the proposals and policies were expected to achieve only 95 per cent of the emissions reductions required by CB6.

The High Court found in favour of the claimants on other aspects of the grounds of challenge concerning ss 13 and 14. In particular, the High Court held that the Secretary did not discharge his duty under s 13 of the *CCA* as, due to insufficiencies in the ministerial briefing materials, he was unable to take into account and decide for himself how much weight to give to his department's approach to overcoming the 5 per cent shortfall in achieving the CB6 targets, or to the contributions which individual proposals and policies were expected to make in reducing emissions.[58] Similarly, the High Court held that the Secretary did not satisfy the requirements of s 14 because the NZS did not assess the contributions expected to be made by individual proposals and policies to emissions reductions, and also because it did not reveal that the analysis put before the Secretary left a shortfall against the CB6 targets or how that shortfall was expected to be met.[59] In reaching this conclusion, the High Court noted that a report under s 14 was required to allow Parliament and the public to understand and assess the adequacy of the UK Government's policy proposals.[60]

The High Court accordingly ordered the Secretary to lay a revised report before Parliament by no later than 31 March 2023.[61] The High Court also refused the Secretary's application for

56 Ibid [139].
57 Ibid [177], [193].
58 Ibid [194]–[222].
59 Ibid [223]–[260].
60 Ibid [245], [247].
61 *R (Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy* (England and Wales High Court, Holgate J, CO/126/2022, CO/163/2022, CO/199/2022, 18 July 2022) Order 6.

permission to appeal on the basis that there was no real prospect of success and no other compelling reason for the appeal to be heard.[62]

Legal constraints of non-statutory policies

By their nature, non-statutory policies are not made pursuant to an express power in the statute. Nevertheless, depending on the nature and purpose of the non-statutory policy, it may need to be consistent with a statute.

Lower-level policies that are adopted to structure or guide the exercise of a discretionary statutory power must be consistent with the relevant statute.[63] Such a policy cannot countermand or frustrate the effective operation of the statute reposing the power or promote an outcome which contradicts the objects of the statute.[64] As the Full Federal Court said in *Minister for Home Affairs v G*:

> It is established that an executive policy relating to the exercise of a statutory discretion must be consistent with the relevant statute in the sense that: it must allow the decision-maker to take into account relevant considerations; it must not require the decision-maker to take into account irrelevant considerations; and it must not serve a purpose foreign to the purpose for which the discretionary power was created: see *Drake (No 2)* at 640 per Brennan J; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [24] per Gleeson CJ; *Cummeragunga* [*Pty Ltd (in liq) v Aboriginal and Torres Strait Islander Commission* (2004) 139 FCR 73] at [159] per Jacobson J.
>
> An executive policy will also be inconsistent with the relevant statute if it seeks to preclude consideration of relevant arguments running counter to the policy that might reasonably be advanced in particular cases: *Drake (No 2)* at 640. Thus, an executive policy relating to the exercise of a statutory discretion must leave the decision-maker 'free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the [decision-maker] will make in the circumstances of a given case': *Drake (No 2)* at 641.[65]

Green v Daniels[66] is an illustration of a policy (an instruction in that case) as to how a statutory power was to be exercised. The *Social Services Act 1947* (Cth) provided that a person was eligible for an unemployment benefit if the person was unemployed, was capable of undertaking work and had taken reasonable steps to obtain such work. The head of the department that administered the *Social Services Act* at the time developed a policy that a school-leaver could not qualify for an unemployment benefit until after the start of the next school year. Tasmanian school-leaver Karen Green prematurely lodged her unemployment claim form. The policy was applied automatically by the social security office and Green was told that she could not receive an unemployment benefit until the commencement of the next

62 Ibid Order 12 and [9]–[16] of Holgate J's reasons.

63 In *ARJ17 v Minister for Immigration and Border Protection* (2018) 257 FCR 1, the Full Federal Court held that a blanket policy adopted by the Secretary of the Department of Home Affairs to prohibit mobile phones in immigration detention centres was invalid as it was 'inconsistent with the discretionary powers conferred under s 252 of the *Migration Act*': at [133].

64 *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, 3924–5; Robertson (n 19) 62.

65 *Minister for Home Affairs v G* (2019) 266 FCR 569 [58]–[59].

66 (1977) 13 ALR 1.

school year. The High Court of Australia declared the refusal of the benefit invalid as the policy was inconsistent with the legislation. The Court noted:

> No general discretion is conferred upon [the decision-maker]; instead specific criteria are laid down by the Act and all that is left for him to do is to decide whether or not he attains a state of satisfaction that the circumstances exist to which each of these criteria refer. He must, no doubt, for the benefit of his delegates and in the interests of good and consistent administration, provide guidelines indicating what he regards as justifying such a state of satisfaction. But if, in the course of doing this, he issues instructions as to what will give rise to the requisite state of satisfaction on the part of his delegates and these are inconsistent with a proper observance of the statutory criteria he acts unlawfully; should his delegates then observe those instructions, their conclusions concerning an applicant's compliance with the criteria will be vitiated.[67]

The manner in which a decision-maker considers and applies a non-statutory policy in exercising statutory powers may also be amenable to judicial review in the ways I articulate below when discussing the legal effects of non-statutory policies. These impose legal constraints on the application of non-statutory policies. An unannounced departure from a published policy may amount to a denial of procedural fairness.[68] A decision-maker may misconstrue or misapply the policy such that what is applied is not the policy but something else.[69] The manner or outcome of consideration of a non-statutory policy might cause the resultant decision to be legally unreasonable either in the *Wednesbury* sense[70] or the *Li* sense.[71] The decision-maker's application of the policy may infringe the non-fettering rule or the non-abdication rule.[72] A policy adopted to guide the exercise of a statutory discretionary power cannot lawfully preclude consideration of the merits of individual cases.[73]

The decision-maker's manner of application of a non-statutory policy may also lead to some other breach of law. I will give two examples, one in Pakistan and the other in the Netherlands.

In *Leghari v Pakistan*,[74] the Pakistan Government had adopted national policies for adaptation to climate change, the National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy (2014–2030), which identified actions the Government should take to adapt to the consequences of climate change, such as drought. These were high-level, government policies. However, the Pakistan Government had not implemented these policies. The petitioner, whose family of farmers were suffering from the prolonged drought, brought proceedings in the Lahore High Court claiming that the Government's inaction in implementing the policies to address the consequences of climate change offended his fundamental rights (the right to life, including the right to a healthy and clean environment, the right to human dignity, the right to property and the right to information), which are to be read with the constitutional principles of democracy, equality

67 Ibid 9 (Stephen J).
68 Robertson (n 19) 61.
69 *Jabbour v Secretary, Department of Home Affairs* (2019) 269 FCR 438 [89] ('*Jabbour*'). See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 [61] ('*Davis*').
70 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*').
71 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*').
72 Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Australia, 6th ed, 2022) 706 [12.2.6].
73 See, eg, *British Oxygen Co v Board of Trade* [1971] AC 610, 616, 625, 631; *Green v Daniels* (n 66) 9; *Government Employees' Health Fund Ltd v Private Health Insurance Administration* [2001] FCA 322.
74 Lahore High Court, WP No 25501/2015, 4 September 2015.

and social, economic and political justice, and the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intra-generational equity and the public trust doctrine.

The Lahore High Court upheld the petitioner's claim that the Government's inaction in implementing the Policy and the Framework offended his fundamental human rights. By way of remedy, the Court ordered the establishment of a Climate Change Commission to implement the Policy and the Framework effectively.[75]

The second example is the *Urgenda* litigation in the Netherlands.[76] The Dutch Government had an executive policy to reduce greenhouse gas emissions in the Netherlands. The policy was not adopted pursuant to any statute nor intended to guide the exercise of any particular statutory power. It was a high-level, government policy. The environmental non-governmental organisation Urgenda Foundation claimed that the Dutch Government's policy and action in implementing that policy were insufficiently ambitious in reducing greenhouse gas emissions in the Netherlands. This led to two breaches of law, the Dutch Government's duty of care under the Dutch *Civil Code* and the Dutch Government's obligations under the *European Convention on Human Rights* ('*ECHR*').

In 2015, The Hague District Court found that 'due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring', the Netherlands has a duty of care to take climate mitigation measures.[77] The Court held that the Netherland's climate policy was unlawful as it set insufficient emissions reductions targets in breach of this duty of care. However, the Court did not find the climate policy unlawful for having breached the *ECHR* as it considered that 'Urgenda Itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR'.[78]

In 2018, The Hague Court of Appeal upheld the District Court's decision that the Netherlands breached its duty of care by 'failing to pursue a more ambitious reduction' of greenhouse gas emissions in its climate policy.[79] The Court disagreed with the District Court's disposition of the *ECHR* claim, finding that art 2 (the right to life) and art 8 (the right to home and private life) of the *ECHR* impose a positive obligation on the Netherlands to protect its citizens from 'all activities, public and non-public, which could endanger the rights protected in these articles'.[80] The Court held that 'it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life … It follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.'[81] In reaching this conclusion,

75 Ibid [8].
76 *Urgenda Foundation v Netherlands* (ECLI:NL:RBDHA:2015:7145) ('*Urgenda I*'); *Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA:2018:2610) ('*Urgenda II*'); *Netherlands v Urgenda Foundation* (ECLI:NL:HR:2019:2007) ('*Urgenda III*').
77 *Urgenda I* (n 76) [4.83].
78 Ibid [4.45].
79 *Urgenda II* (n 76) [76].
80 Ibid [43].
81 Ibid [45].

the Court rejected the Netherland's argument that 'the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices'.[82]

In 2019, the Supreme Court of the Netherlands upheld the Court of Appeal's decision that the Netherland's climate policy failed to meet arts 2 and 8 of the *ECHR*. According to the Supreme Court, courts are able to determine whether the policy measures taken by a state are 'reasonable', 'suitable', 'consistent' and taken in 'good time'.[83] The Court found that the Netherland's climate policy, 'whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this',[84] and accordingly that the Court of Appeal was correct in confirming the District Court's order that the Netherlands must limit greenhouse gas emissions to 25 per cent below 1990 levels by 2020.[85]

Legal effects of policy

Legal effects of statutory policies

The legal effects of policies will differ depending on the source of the policies, whether statutory or non-statutory. For those statutory policies that are a form of delegated legislation, their legal effect is derived from the primary legislation under which they are made and the particular terms of the statutory policies themselves. For those statutory policies that are not a form of delegated legislation, their legal effect will depend on their particular terms. There can be, therefore, no generalisations as to the legal effects of statutory policies; it all depends on the source, nature and context of the policies.

This is evident with the statutory policies made under the NSW planning legislation. Different types of EPIs will have different legal effects, depending not only on their place in the planning hierarchy, a SEPP or a LEP, but also on their content. Both types of EPI will have different legal effects to DCPs, as the latter is to provide more detailed guidance in the implementation of the former. And the legal effects of other strategies, policies and programs made under or incorporated by the planning legislation will be different again to the legal effects of SEPPs, LEPs and DCPs, in part because the former are not delegated legislation while the latter are.

One legal effect that may be common to different statutory policies, however, is that they may be a relevant matter to be considered. The statutes may require an administrative decision-maker to take the policies into consideration when exercising certain statutory powers. For example, under the NSW planning legislation, a consent authority is required in determining a development application to take into consideration the provisions of any EPI or DCP that applies to the land to which the development application relates.[86]

82 Ibid [67].
83 *Urgenda III* (n 76) [5.3.3].
84 Ibid [8.3.4].
85 Ibid [8.3.5].
86 *EPA Act* (n 2) s 4.15(1).

Legal effects of non-statutory policies

Although non-statutory policies are not made pursuant to a statute, they are made in the shadow of the statute and derive their legal effect from the statute as well as from the common law. The exercise of a statutory power may require or permit the consideration of some matter. A non-statutory policy may be a relevant matter or a permissible matter to be considered. The exercise of a statutory power may require the according of procedural fairness to certain persons. This might involve consideration of a non-statutory policy.

Failure to consider the non-statutory policy might lead to a denial of procedural fairness. The manner of consideration of a non-statutory policy might be legally unreasonable. I will consider these potential legal effects.

The first legal effect of a non-statutory policy may be as a matter to be considered in decision-making under planning or environmental legislation. A policy can be a relevant matter, in the sense of being a matter that the decision-maker is bound to consider in the exercise of a statutory power,[87] or a permissible matter, in the sense of being a matter that the decision-maker is permitted to, but not bound to, consider in the exercise of a statutory power. Whether a policy is a relevant matter or a permissible matter to consider is a question of statutory interpretation of the statute reposing the power.

Non-statutory policy as a relevant matter for consideration

I will start with relevant matters. The statute may either directly or indirectly require a non-statutory policy to be considered by a decision-maker in the exercise of a statutory power. I will refer to three common formulations of statutory provisions requiring consideration of relevant matters. The first and most direct formulation is where the statute requires consideration of a specified policy. I have earlier given examples of provisions in the *EPA Act* and the *BCA* that require consideration of specified policies.

A second formulation is where the statute requires consideration of policies that fall within a specified class of policies. The question is whether a particular policy falls within the specified class of policies that the decision-maker is required by the statutory provision to consider. I will give three examples of statutory provisions with this formulation. The first two examples concern statutory provisions requiring consideration of climate policies, one in New South Wales and the other in the United Kingdom. The third example concerns a statutory provision specifying the matters a planning certificate is required to disclose, including whether or not land is affected by a policy that restricts the development of the land because of certain risks.

Starting with the climate policies, the NSW example concerns *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* ('*Mining SEPP*').[88] Clause 14(2) of the *Mining SEPP* provides:

> Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

87 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40.
88 The policy is now part of *State Environmental Planning Policy (Resources and Energy) 2021 (NSW)*.

The clause thereby specifies a relevant matter that the consent authority is required to consider, but does so using a description of a class of documents. The consent authority must consider any document falling within the class of documents described in cl 14(2).

In *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc*,[89] the question arose as to whether specified policies fell within the class of documents described in cl 14(2) of 'any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions'. One such policy was contended to be the NSW Climate Change Policy Framework. The administrative decision-maker, the Independent Planning Commission, had taken this document into consideration in deciding to refuse development consent to a new open-cut coal mine. The aggrieved proponent sought to judicially review the decision to refuse consent on numerous grounds, one of which was that the NSW Climate Change Policy Framework did not fall within this class of documents. That claim was rejected by both the Land and Environment Court and the Court of Appeal.

In the Court of Appeal, Basten and Payne JJA held that the language in which the class of documents was described

> did not restrict the scope of the policies, programs or guidelines to those which would be directly relevant to [considering] an assessment of greenhouse gas emissions. There is no reason to impose a restrictive gloss on that language. The very generality of this language supports the conclusion that it was for the consent authority to determine what documents fell within it.[90]

I too held that the class of documents described in cl 14(2) is wide. Each of the words and phrases making up the description of the class of documents is wide, including 'applicable',[91] 'State or national policies, programs or guidelines',[92] and 'concerning greenhouse gas emissions'.[93] The context is also important. The consent authority is to have regard to documents falling within the class of documents when considering 'an assessment of the greenhouse gas emissions (including downstream emissions) of the development'. Greenhouse gas emissions from a coal mine can be direct (Scope 1 emissions) or indirect (Scope 2 upstream emissions or Scope 3 downstream emissions). An assessment of both direct and indirect emissions will be wide, enlarging the class of State or national policies, programs or guidelines concerning greenhouse gas emissions that could potentially be applicable.[94] The consideration required by cl 14(2) is part of a broader consideration required by s 4.15(1) of the *EPA Act* of the impact of the development on the environment. The applicable State or national policies, programs or guidelines concerning greenhouse gas emissions are documents to which regard must be had in considering the assessment of the greenhouse gas emissions of the development.[95]

89 (2020) 247 LGERA 130 (Land and Environment Court) and (2021) 250 LGERA 39 (NSW Court of Appeal) ('*KEPCO NSWCA*').
90 *KEPCO NSWCA* (n 89) [65].
91 Ibid [174] (Preston CJ of LEC).
92 Ibid [175], [177].
93 Ibid [176].
94 Ibid [179].
95 Ibid [180].

The upshot is that the consent authority has a discretion to decide whether a particular document answers the statutory description in cl 14(2) of being an applicable State or national policy, program or guideline concerning greenhouse gas emissions.[96] But even if a document falls outside the statutory description, so that the consent authority is not bound to consider the document, it is still permissible for the consent authority to consider the document. Falling outside the statutory description does not cause the document to become a prohibited consideration.[97]

The UK example concerns s 5(8) of the *Planning Act 2008* (UK). This provision requires that the reasons the Secretary of State for Transport gives in designating a National Policy Statement 'include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change'. The UK Government had designated an Airport National Policy Statement ('ANPS') under the *Planning Act*, which directed a third runway be built at Heathrow Airport. The reasons accompanying the ANPS endorsed the Airports Commission's view in 2015 that the Heathrow expansion would be consistent with climate change targets then in force. However, subsequent to the Airports Commission's report in 2015, the UK had signed and ratified the Paris Agreement, committing the UK to more ambitious emissions reductions targets. Various ministerial statements had also committed the Government to achieving net zero emissions by 2050.

A number of environmental non-governmental organisations brought judicial review proceedings (collectively, the '*Heathrow Case*') challenging the ANPS, arguing, amongst other grounds, that the Secretary had failed to comply with the statutory obligation to take account of Government policy on climate change under s 5(8) of the *Planning Act*. The plaintiffs contended that the UK Government's commitments under the Paris Agreement and the Ministerial statements of intention to achieve net zero emissions by 2050 fell within the statutory description of 'Government policy relating to the mitigation of, and adaptation to, climate change'. At first instance, the Divisional Court held that the Government's commitments and ministerial statements did not;[98] on appeal, the Court of Appeal held that they did;[99] and on further appeal, the Supreme Court held that they did not amount to Government policy.[100] The difference in approach to construction of this statutory description of Government policy between the Divisional Court, the Court of Appeal and the Supreme Court is revealing.

The Divisional Court held that 'Government policy in respect of climate change targets was and is essentially that set out in' the *Climate Change Act 2008* (UK),[101] and not the Paris Agreement or any future change in policy to implement the Paris Agreement or take into account 'the Paris Agreement limits or the evolving knowledge and analysis of climate change that resulted in that Agreement'.[102]

96 Ibid [65] (Basten and Payne JJA), [181] (Preston CJ of LEC).
97 Ibid [67] (Basten and Payne JJA).
98 *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 [612] ('*Heathrow DC*').
99 *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 [228] ('*Heathrow CA*').
100 *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2021] PTSR 190 [112] ('*Heathrow SC*').
101 *Heathrow DC* (n 98) [612].
102 Ibid [619].

The Court of Appeal held that

> the words 'Government policy' are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase 'Government policy' to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation.[103]

The Court of Appeal held that 'the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS'.[104]

This was followed first by the UK's ratification of the Paris Agreement in 2016 and second by the 'firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers'.[105]

The Supreme Court overturned the Court of Appeal's decision, holding that when the Secretary of State for Transport designated the ANPS, 'there was no established policy beyond that already encapsulated' in the *Climate Change Act 2008*.[106] 'The Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development.'[107] As a consequence, none of the Paris Agreement itself, the Government's 'policy commitment' to the Paris Agreement target, or the Ministers' statements concerning the development of policy, amounted to 'Government policy' under s 5(8) of the *Planning Act*.[108]

According to the Supreme Court, 'Government policy' in s 5(8) refers to 'carefully formulated written statements of policy' which have been 'cleared by the relevant departments on a government-wide basis'.[109] The Supreme Court gave as examples policy set out in a National Policy Statement or in statements of national planning policy (such as the National Planning Policy Framework) or in government papers such as the Aviation Policy Framework.[110]

In the Supreme Court's view, 'the epitome of "Government policy" is a formal written statement of established policy'.[111] In exceptional circumstances, the phrase 'Government policy' might extend beyond such written statements of established policy, but there need to be 'clear limits on what statements count as "Government policy", in order to render them readily identifiable as such'.[112] The Supreme Court was of the view that

> the criteria for a 'policy' to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute 'policy' for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification.[113]

103 *Heathrow CA* (n 99) [224].
104 Ibid [228].
105 Ibid.
106 *Heathrow SC* (n 100) [111].
107 Ibid.
108 Ibid [112].
109 Ibid [105].
110 Ibid.
111 Ibid [106].
112 Ibid.
113 Ibid.

The statements by the Ministers did not meet this standard and did not constitute statements of 'Government policy' for the purposes of s 5(8).[114] Further, the Court found that the mere ratification of an international treaty, such as the Paris Agreement, which had not been incorporated into domestic law, did not fall within the meaning of 'Government policy' in s 5(8).[115]

The *Heathrow Case* is significant in at least two ways. First, it shows that the meaning of climate policy has been variously understood.[116] Second, it is a reminder of the 'evident reluctance of the courts to interfere in matters of politics',[117] and 'reinforces the judicial aversion to being seen to interfere with political decisions involving the difficult balance between economic/social factors and the climate emergency'.[118] For these courts, there is an elision between policies and politics. That is unwarranted. The subject matter of policies might well overlap with matters of politics but that does not cause policies to be political.

Bell and Fisher, in the abstract of their case note on the Supreme Court's decision, suggest that

> the Supreme Court could have engaged more explicitly with the legal issues that arise from climate change legislation for administrative law adjudication. For courts to adjudicate well in such circumstances they need to be prepared to develop administrative law doctrine, particularly in light of the issues of integrating climate change into public decision-making and of scientific/policy uncertainty which lie in the background of climate change legislation.[119]

Bell and Fisher continue:

> This lack of detailed engagement with the importance of integration is especially problematic given both the wording and legislative history of section 5(8). Regarding wording, section 5(8), refers to 'Government policy' with a capital 'g'. Arguably, the legislation is referring to the 'policy' of the current HM Government and thus warrants a more dynamic definition. Likewise, the section concerns policies 'relating to the mitigation of, and adaptation to, climate change' — policies that are recognised to be evolving and involve the UK government operating as part of international and transnational regimes. It is not so much that the UK government is transposing international obligations (which raises fears of breaching a commitment to dualism), but that UK government policy on climate change is a product of participation in international and transnational discourse — discourse that is designed to be multi-level. The UK government is not a policy island where it comes to climate change.[120]

I turn to consider my third example of policies that are required to be disclosed in a planning certificate. The *EPA Act* requires a local council, on application being made by a person to it, to 'issue a planning certificate specifying such matters relating to the land to which the certificate

114 Ibid [106], [107].
115 Ibid at [108].
116 Joanna Bell and Elizabeth Fisher, 'The "Heathrow" case: polycentricity, legislation, and the standard of review' (2020) 83 *Modern Law Review* 1072 at 1077.
117 Joanne Hawkins, 'A lesson in un-creativity: (*R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52' (2021) 23(4) *Environmental Law Review* 344, 348.
118 Ibid 346.
119 Joanna Bell and Elizabeth Fisher, 'The Heathrow case in the Supreme Court: climate change legislation and administrative adjudication' (2023) 86 *Modern Law Review* 226, 226; see also 227.
120 Ibid 233–4.

relates as may be prescribed'.[121] The Regulation prescribes certain matters to be specified in a planning certificate.[122] These are the matters set out in a schedule to the Regulation.[123]

In *Della Franca v Lorenzato*,[124] a question arose as to whether a resolution of the local council fell within the description of a prescribed matter to be specified in a planning certificate. At the time, one of the prescribed matters was whether the land was affected by a policy adopted by the council that restricted the development of the land because of the likelihood of a variety of risks, including flooding.[125]

The relevant local council had passed a resolution in 2002 that the council negotiate with the owner of a house the creation of an easement over an existing stormwater pipeline in its current location beneath the house; if an easement could not be agreed with the owner, the council compulsorily acquire an easement over the existing pipeline; and any future development of the property should include the establishment of an easement for drainage purposes in a new location adjacent to the side boundary instead of over the existing pipeline under the house (the '2002 Resolution').

The council issued a planning certificate to a purchaser of the house that there was no adopted policy that restricted the land because of the likelihood of flooding. The house was subsequently flooded. The purchaser sued the council for negligent misstatement that the land was unaffected by a policy restricting development because of flooding. The question was whether the 2002 Resolution answered the description in the prescribed matter of being a policy that restricted the development of the land because of the likelihood of flooding.

The NSW Court of Appeal, overruling the trial judge's finding, held that the 2002 Resolution was not a policy within the description of the prescribed matter. Justice of Appeal Macfarlan, with whom Basten JA agreed on this point, held that the reference to 'policy' in the prescribed matter 'was not concerned with a site-specific decision, or even decisions related to a number of sites, made by council but rather with the relationship of particular land to general floodplain levels'.[126] Even if the 2002 Resolution could constitute a 'policy', it was not one of the character described in the prescribed matter of being one that restricted the development of the land because of flooding. The 2002 Resolution concerned the acquisition of an easement, whether by agreement or by compulsory acquisition, but did not itself restrict development because of the likelihood of flooding.[127]

Justice of Appeal Brereton similarly held that the 2002 Resolution was not a policy: 'a "policy" is a statement of guidelines, principles, or criteria of general application, in accordance with which decisions on specific cases will be made'.[128] The 2002 Resolution 'was not a policy, because it was not a generic statement of guidelines, principles, or criteria but a specific

121 Formerly s 149, now s 10.7 of the *EPA Act* (n 2).
122 Formerly cl 279 of the *Environmental Planning and Assessment Regulation 2000* (NSW) ('*2000 EPA Regulation*'), now cl 290 of the *Environmental Planning and Assessment Regulation 2021* (NSW) ('*2021 EPA Regulation*').
123 Formerly sch 4 of the *2000 EPA Regulation* (n 122), now sch 2 of the *2021 EPA Regulation* (n 122).
124 (2021) 250 LGERA 136 ('*Della Franca*').
125 Formerly *2000 EPA Regulation* (n 122) sch 4 cll 7, 7A; now *2021 EPA Regulation* (n 122) sch 2 cll 9, 10.
126 *Della Franca* (n 124) [83] (Macfarlan JA).
127 Ibid [84], [88].
128 Ibid [139] (Brereton JA).

decision in respect of the subject property'.[129] Justice Brereton also held that the 2002 Resolution did not of itself restrict development at all, but to the extent that the resolution did restrict development, it did not do so because of the likelihood of flooding.[130] The 2002 Resolution did not, therefore, answer the description of a policy specified in the prescribed matter.

The third formulation of a statutory provision requiring consideration of a relevant matter is where the provision requires consideration of a generic matter, within which a particular policy might fall. The question is whether the particular policy falls within the generic matter the decision-maker is required to consider. An example of such a statutory provision is in the planning legislation in New South Wales. Under s 4.15(1)(e) of the *EPA Act*, a consent authority is required, in determining a development application, to take into consideration 'the public interest'. The courts have held that the public interest is wide enough to include the various principles of ecologically sustainable development ('ESD'), including the precautionary principle, the principle of intergenerational equity, the principle of the conservation of biological diversity and ecological integrity, and the principle concerning improved valuation, pricing and incentive mechanisms, including the polluter pays principle.[131]

Consideration of the principles of ESD permits consideration of policy documents concerning ESD, such as the *Intergovernmental Agreement on the Environment*. That agreement was made in 1992 between the Commonwealth, the states, including New South Wales, the territories and the Australian Local Government Association. Section 3.1 of the agreement records that "[t]he parties agree that the development and implementation of environmental policy and programs by all levels of Government should be guided by the following considerations and principles'. Section 3.5 sets out the principles, noting that '[t]he principles set out below should inform policy making and program implementation'. The principles set out are the principles of ESD including the precautionary principle, intergenerational equity, conservation of biological diversity and ecological consideration, and improved valuation, pricing and incentive mechanisms.

In *BGP Properties Pty Ltd v Lake Macquarie City Council*, McClellan CJ noted that under the agreement, the principles of ESD should inform environmental decision-making[132] and held that the agreement 'reflects the policy which should be applied unless there are cogent reasons to depart from it', citing *Drake (No 2)*.[133]

In turn, the principles of ESD, particularly the precautionary principle and the principle of intergenerational equity, have been held to require consideration of the impact of a development on climate change and the impact of climate change on a development.[134] Consideration of the impact of a development on climate change may be assisted by having

129 Ibid.
130 Ibid [140], [141].
131 *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237 [113]; *Telstra Corp Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 [121]–[124]; *Minister for Planning v Walker* (2008) 161 LGERA 423 [42], [43], [56].
132 (2004) 138 LGERA 237 [94].
133 Ibid [92].
134 See *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 [498] and the cases therein cited.

regard to policy documents concerning climate change, such as the NSW Climate Change Policy Framework.[135]

I have given three formulations of statutory provisions that may make a non-statutory policy a relevant matter to be considered in the exercise of statutory powers. There are, of course, other statutory provisions that may preclude an implication that a policy is a relevant matter to be considered. In *Jacob v Save Beeliar Wetlands (Inc)*, the Western Australian Court of Appeal found that

> [t]he express provisions of the EPA Act [*Environmental Protection Act 1986* (WA)] leave no room for an implication that the Policies, or any of them, are mandatory relevant considerations in the [WA Environmental Protection Authority's] assessment of, and recommendations relating to, the Roe 8 extension proposal under s 44 of the EPA Act.[136]

Policy as a permissible matter for consideration

I turn now to consider permissible matters. If a non-statutory policy is a permissible matter, in the sense of being one the decision-maker may consider but is not bound to consider, a mere failure to consider the permissible matter cannot spell invalidity of the decision. However, if the decision-maker does consider a non-statutory policy that it is not bound to consider, and such consideration miscarries in some way, the resultant decision may be amenable to be judicially reviewed for error of law on at least three potential bases.

The first basis may be where the decision-maker publicly states that the statutory power will be exercised in accordance with the policy. An unannounced departure from the published policy might amount to a denial of procedural fairness.[137]

A second basis may be where the decision-maker, although not bound to apply a policy, 'purports to apply it as a proper basis for disposing of the case in hand or misconstrues or misunderstands it, so that what is applied is not the policy but something else'.[138]

A third basis may be on the ground of legal unreasonableness. The manner in which the decision-maker applied the policy or the outcome to which the decision-maker arrived by applying the policy may be legally unreasonable, either in the traditional *Wednesbury* unreasonableness sense or in the *Li* sense.[139] In scrutinising decision-making applying a non-statutory policy for legal unreasonableness, the court's review is informed by the non-statutory policy as well as by the decision-maker's reasoning process applying the policy.[140]

In these three ways, a non-statutory policy that is a permissible matter to be considered can be seen to have legal effect.

135 Ibid [440].
136 (2016) 50 WAR 313 [54].
137 Robertson (n 19) 61.
138 *Jabbour* (n 69) [89]; see also *Davis* (n 69) [61].
139 See *Wednesbury* (n 70) and *Li* (n 71).
140 *Jabbour* (n 69) [102]; see also *Davis* (n 69) [61].

Conclusion

I have outlined the sources of policy, the legal constraints of policy, and the legal effects of policy. I hope the sketch I have drawn reveals the important role that policy plays in the administration of environmental law. It is a role that is only going to become greater. Environmental problems are becoming more uncertain, complex and polycentric. Environmental law alone cannot adapt quickly enough to address these ever-evolving environmental problems. Environmental policy can assist. Policies can be made and remade quicker and more flexibly than laws can be made and remade. Policies can provide much needed detail to flesh out skeletal statutory provisions. Together, environmental law and environmental policy are better equipped to address the pressing environmental problems of today and tomorrow.

Climate change litigation and administrative law — lessons for Australian practitioners?

*Stephen Keim**

Social conflict, in any society that prides itself on the rule of law, will eventually be expressed in litigation. Most recently, conflict over the most appropriate way for society to manage the Covid-19 pandemic resulted in a plethora of litigation.[1] The resort to litigation is not surprising. People engaged in conflict wish to assert rights which, if vindicated by the law, will advantage them, maybe even bring them complete triumph, in the conflict. The more severe the conflict, the more likely that parties will resort to litigation. Or something worse even than litigation.

The music industry,[2] major sport,[3] the exploitation of new technology[4] and even pandemics[5] spawn social conflicts which, from time to time, express themselves through litigation. It is not at all surprising that a conflict over threats to the long-term health of the planet, which may be existential for human culture, would produce a significant amount of litigation.

The increase in climate change litigation also may be explained by the existence of this deepening social conflict. A 2020 United Nations Environmental Program report ('*2020 Status Review*')[6] explains that the current levels of both climate ambition and climate action of governments around the world are inadequate to meet the climate change challenge. As a result, individuals, communities, business entities, NGOs, sub-national governments and others have brought cases seeking to compel enforcement of existing laws to address climate change, to extend those laws, and to define the relationship between fundamental rights and the negative impacts of climate change.[7]

In 2017, the corresponding report identified 884 cases brought in 24 countries of which 654 cases were in the United States and 230 were in other countries. The *2020 Status Review* found that the number of cases had nearly doubled. As at 1 July 2020, there were 1,550 climate change cases filed in 38 countries (plus the courts of the European Union). Of these, 1,200 were filed in the United States and over 350 cases were filed in the rest of the world.[8] The increase in the numbers of countries experiencing such litigation from 24 to 38 is significant in itself.

The Australian cases which get a mention in the *2020 Status Review* include: *Ralph Lauren 57 v Byron Shire Council*;[9] *Waratah Coal Pty Ltd v Youth Verdict Ltd*;[10] *Pridel Investments Pty*

* Stephen Keim SC practises as counsel from Higgins Chambers in Brisbane and Republic Chambers in Hobart.

1 See, eg, *Palmer v Western Australia* (2021) 272 CLR 505.

2 *Williams v Gaye*, 895 F 3d 1106 (9th Cir, 2018).

3 *News Ltd v Australian Rugby League Ltd (No 2)* (1996) 64 FCR 410.

4 *A & M Records Inc v Napster Inc*, 239 F 3d 1004 (2001).

5 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219.

6 United Nations Environmental Program and Sabin Center for Climate Law, *Global Climate Litigation Report: 2020 Status Review*, 2020 ('*2020 Status Review*').

7 Ibid 4.

8 Ibid 4.

9 [2016] NSWSC 169; see *2020 Status Review* (n 6) 23.

10 [2020] QLC 33 (but now see *Waratah Coal Pty Ltd v Youth Verdict (No 6)* [2022] QLC 21); see *2020 Status Review* (n 6) 16.

Ltd v Coffs Harbour City Council;[11] *McVeigh v Retail Employees Superannuation Pty Ltd*;[12] *Abrahams v Commonwealth Bank of Australia*;[13] the petition of 14 Torres Strait Islanders to the Human Rights Committee alleging violations stemming from Australia's inaction on climate change ('*Daniel Billy v Australia*');[14] *Gray v Minister for Planning (NSW)*;[15] *Xstrata Coal Queensland Pty Ltd v Friends of the Earth*;[16] A*ustralian Conservation Foundation v Latrobe City Council*;[17] *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd*;[18] *Gloucester Resources Ltd v Minister for Planning (NSW)*;[19] and *Dual Gas Pty Ltd v Environmental Protection Authority (Vic)*.[20]

This list does not include the more recent decision in *Minister for the Environment v Sharma*[21] in which the Full Court of the Federal Court overturned a decision of Bromberg J[22] finding that the Minister in exercising her powers under the relevant Act on development applications had a duty to take reasonable care to avoid causing personal injury or death to Australian children arising from the emission of carbon dioxide into the Earth's atmosphere. Also handed down since the *2020 Status Review* was published is the decision of the Human Rights Committee in *Daniel Billy v Australia*[23] in which the Committee held that, through failure to take adequate measures to combat climate change and its effects, Australia was in breach of its obligations under articles 17 and 27 of the *International Covenant on Civil and Political Rights*[24] to protect, respectively, the petitioners' home, private life and family[25] and their rights to enjoy their minority culture as Torres Strait Islanders.[26]

Not every piece of climate change litigation necessarily falls within the realms of administrative law. A pure action for damages against a large oil company for property damage and financial loss suffered as a result of extreme weather events caused by climate change, based on the defendant company's contributions over time to rising carbon levels in the atmosphere, would fail to make the cut for what is usually understood to be administrative law.[27]

11 [2017] NSWLEC 1042; see *2020 Status Review* (n 6) 25.
12 Order of Perram J, Federal Court of Australia, NSD 1333/2018, order dated 14 March 2019; order dated 10 June 2020; see *2020 Status Review* (n 6) 27.
13 Federal Court of Australia, VID 879/2017 (case withdrawn); see *2020 Status Review* (n 6) 27.
14 Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (23 September 2022) ('*Daniel Billy v Australia*'); see *2020 Status Review* (n 6) 14.
15 (2006) 152 LGERA 258; see *2020 Status Review* (n 6) 41 n 35.
16 [2012] QLC 13; see *2020 Status Review* (n 6) 41 n 35.
17 (2004) 140 LGERA 100; see *2020 Status Review* (n 6) 41 n 36.
18 (1994) 86 LGERA 143; see *2020 Status Review* (n 6) 41 n 36.
19 [2019] NSWLEC 7; see *2020 Status Review* (n 6) 20.
20 [2012] VCAT 308; see *2020 Status Review* (n 6) 44.
21 (2022) 291 FCR 311 (FCAFC).
22 *Sharma v Minister for the Environment* [2021] FCA 560
23 *Daniel Billy v Australia* (n 14).
24 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
25 *Daniel Billy v Australia* (n 14) 14 [8.12].
26 Ibid 16 [8.14].
27 Peter Nygh and Peter Butt in their *Australian Legal Dictionary* (Butterworths, 1997) define 'administrative law' as the legal principles governing the relationship between the government and the governed. The exercise of power by administrators, including the state (the Crown), ministers, departmental officers, tribunals, boards, and commissions based on legal authority. The source of that legal authority may be statute or the common law, which includes prerogative. The Australian Institute of Administrative Law states that administrative law is principally the law of government actions, decisions, processes and accountability. It includes the basic constitutional arrangements for government, and the basic legal checks on government, in particular, by

A major part of the litigation considered in *2020 Status Review* is directed at government actions or inaction and, almost by definition, may be classified as drawing upon administrative law. Suits directed at government activity or inactivity need to identify rights in the plaintiff which are being threatened or abrogated by the government defendant. Depending on the constitutional arrangements in the particular jurisdiction, those rights may be found in the constitution; derived from common law; found in existing statutes and subordinate legislation; or found in international law and treaty obligations. Whatever the source of rights relied upon, one object of climate change litigation aimed at government defendants is to stimulate new thinking about established categories of rights. The litigation seeks to reconceive and redirect such rights and to apply them to the detrimental consequences of climate change.

The *2020 Status Review* categorises the cases identified in the survey as falling within five categories. One category involves cases alleging consumer and investor fraud through failure by companies to clearly disclose information about climate change and associated risks. A second category involves actions making claims arising out of extreme weather events alleging failure to plan for or manage such events in a proper way. Cases in the third category, which arise as existing cases are determined finally, raise questions of implementation of whatever relief has been granted. A fourth category involves cases addressing the law and science of attributing responsibility of private actors for contributing to the worldwide problem of climate change and cases arguing for greater action by governments to mitigate those contributions. The final category involves actions taken to international adjudicatory bodies notwithstanding that such bodies may lack an ability to enforce their findings.[28]

Any such taxonomy is likely to involve a degree of arbitrariness. The themes and structure of litigation, even addressing a particular area and source of social conflict, are likely both to vary in many ways and to display (often unexpected) similarities. Indeed, this is evident from the *2020 Status Review*'s more detailed consideration as cases pop up in more than one category.

A tangent: challenges for lawyers

The existential nature of the threat posed by climate change raises questions about the role of lawyers. The actions of green-washing fossil fuel producers raise the age-old question of lay friends and relatives — how could you act for a rapist or a murderer? — in more acute forms.

The Law Council of Australia's policy statement on climate change[29] considered the role of lawyers in the face of an existential threat, and observed that climate change litigation, globally and domestically, is raising novel causes of action across multiple areas such as environment and planning, administrative law, corporations law including directors' duties and, inter alia, human rights law, with varying degrees of success and with implications

parliaments, courts and tribunals, ombudsmen and other bodies. Administrative law is particularly relevant to the areas of migration, social security, taxation, industry regulation (for example, of health, education and media providers), environmental and development regulation, and professional regulation (for example, of doctors, lawyers and sportspeople), and concerns the inquiries and operations of local, state, territory and Commonwealth governments, and their privacy, freedom of information, fairness and human rights obligations: 'About AIAL', *Australian Institute of Administration Law* (Web Page) <https://aial.org.au/about/>.

28 *2020 Status Review* (n 6) 4.

29 Law Council of Australia, *Climate Change Policy* (Policy statement, 27 November 2021).

for Australian laws.[30] The policy statement suggested that Australian lawyers need to be alive to the unfolding legal implications of climate change and its consequences as these are adjudicated or settled over time.[31] It also warned that access to justice issues will be particularly relevant in the climate change context;[32] that climate change will create a need for climate-related legal knowledge and skills;[33] and that questions may arise about how lawyers should comply with their ethical obligations under professional conduct rules and common law principles in the context of climate change.[34]

It is, perhaps, a mild statement which leaves some fertile land to be explored in future years.

Context and purpose of climate change litigation

The lived experience of climate change is that people are being adversely affected already, or are facing being adversely affected in the future, by extreme weather events, rising ocean levels, loss of land, loss of usability of land, and many other impacts of a changing climate.[35]

An additional context and cause of climate change litigation is the almost universal inadequacy of governmental responses to mitigate the ongoing contributions of atmospheric gases that cause climate change, or to make the necessary societal and infrastructure changes to adapt to such climate change as cannot be avoided by mitigation.[36] That inadequacy of response is dumbfounding to many and, on one analysis, has persisted for over 44 years. It was on 23 June 1988, on a sweltering June day in Washington DC, that James Hansen, Columbia professor and NASA scientist, told a Senate Committee that he was 99 per cent sure that carbon pollution was already warming the earth, causing droughts and heatwaves. Lawmakers, said Hansen, must 'stop waffling' and deal with the problem.[37]

The objectives of climate change litigation and the sorts of remedies pursued comprehend the enforcement of such laws as have been enacted requiring mitigation and adaption actions by governments and others; the integration of climate action into the regulatory requirements of existing laws including environmental, energy and natural resources laws; the creation of new legal responses seeking to ensure mitigation and adaption activity; the recognition of harm suffered from, or threatened by, climate change as a breach of the protections and rights that currently exist or the creation and development of new protections and rights that provide compensation and other remedies for such harms; and the denunciatory satisfaction of making governments and private actors accountable for the actions and omissions that have caused or contributed to the adverse effects of climate on individuals and societies.[38]

30 Ibid 8 [34].
31 Ibid [35].
32 Ibid 8–9 [36]–[37].
33 Ibid [38].
34 Ibid 9 [39].
35 The *2020 Status Review* (n 6) lists the following: widespread warming; melting glaciers; vanishing snow cover; diminishing sea ice; rising sea levels; acidifying oceans; displacement of peoples; flooding; wildfires; and heat waves; and, paradoxically, freezing temperatures from winter storms: 9.
36 Ibid 4.
37 David J Craig, 'Hansen to Congress: Time is running out to save environment', *Columbia Magazine* (Summer 2008) <https://magazine.columbia.edu/article/hansen-congress-time-running-out-save-environment>.
38 *2020 Status Review* (n 6) 4.

Sources of rights

Both statute law (including constitutions) and judge-made law, of necessity, need to be adapted to changing circumstances, including changing social conditions. Anyone familiar with the workings of a written constitution knows, without thinking, that the words of variously old documents have to be made to work in quite different social circumstances to those in which the document was written and enacted into fundamental law.[39]

Judge-made law also has to adapt to the changing needs of society and the different forms of social conflict that come with changing times.[40]

Incremental development of the law is not enough in rapidly changing times and, for this reason, law reform bodies and parliaments are charged with developing often radically different laws to meet rapidly changing social circumstances.

Since the context of climate change litigation is the failure of parliaments and governments to do sufficient, the crafting of climate change litigation is, often, an attempt to speed up the process of adapting existing legal principles and the rights and remedies for which they provide to answer the unmet needs of those whose lives are being, or threatened with being, torn apart by climate change. Climate change litigation is directed to constructing new legal ideas from what has previously existed to deal with dramatically changed circumstances. At the same time, climate change litigation — even when, on a simple analysis, it is unsuccessful — is a clarion call to governments to stop their inaction and a statement to the public that governments can do more and that, we, the citizens, should demand more of our governments.

Three cases: three jurisdictions

This section discusses three cases from three quite different jurisdictions. Arguably, they are the three most famous climate change cases. As it turns out, each case sought to found its source of rights in the national constitution for that jurisdiction.

Each case displays an attempt to adapt existing concepts to do new work.

The cases had differing results. Ultimately, they display varying judicial responses to the challenge of serious threats to the continued existence of a viable planet and differing attitudes to the role of law and judges in circumstances where the other arms of government are unwilling or unable to respond to a burgeoning crisis.

Case 1: Urgenda Foundation v Netherlands

In *Urgenda Foundation v Netherlands* (‘*Urgenda*’),[41] the plaintiff, Urgenda (a running together of ‘urgent’ and ‘agenda’), had sought a court order directing the State of the Netherlands

39 *Singh v Commonwealth* (2004) 222 CLR 322, 334–5 [16]–[18] (Gleeson CJ).

40 *Dietrich v The Queen* (1992) 104 ALR 385, 402–3 (Brennan J).

41 Supreme Court of the Netherlands, 19/00135 (20 December 2019) (‘*Urgenda*’). Citations are to the English translation of the judgment available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>.

to reduce the emissions of greenhouse gases originating from Dutch soil by at least 25% compared to 1990 levels. In 2015, the District Court allowed Urgenda's claim by ordering the State to reduce its emissions by at least 25 per cent compared to 1990. In 2018, the Court of Appeal confirmed the District Court's decision. A further appeal by cassation[42] went to the Supreme Court of the Netherlands and judgment was handed down on 20 December 2019.[43]

The Court of Appeal had held that there was a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. The Court of Appeal also held that it was 'clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced'.[44] The Netherlands Government did not dispute these factual findings.[45]

The *Constitution of the Kingdom of the Netherlands 2008* ('*Dutch Constitution*')[46] automatically incorporates treaty obligations undertaken by the Dutch government into domestic law. This is achieved by article 94 of the *Dutch Constitution* which provides that the courts must disapply legislation if required by the binding provisions of treaties to which the nation is a party.[47] Further, because the Netherlands is bound by the *European Convention on Human Rights* ('*ECHR*'),[48] the Dutch courts are obliged, under articles 93 and 94 of the *Dutch Constitution*[49] to apply the *ECHR*'s provisions as interpreted by the European Court of Human Rights ('ECtHR').[50]

The Supreme Court's decision dismissing the government's appeal relied on the protections contained in articles 2 and 8 of the *ECHR*.

Article 1 provides that the contracting parties to the *ECHR* must secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the *ECHR*.[51] The Court held that *ECHR* protection is owed by the State to the residents of the Netherlands.[52]

42 A court of cassation does not re-examine the facts in a case but hears appeal only by reference to possible errors in application of the law. See 'Court of cassation', *Wikipedia* (30 July 2023) <https://en.wikipedia.org/wiki/Court_of_cassation>.

43 *Urgenda* (n 41) 2.

44 Ibid 19 [4.7].

45 Ibid [4.8].

46 *Constitution of the Kingdom of the Netherlands 2008* ('*Dutch Constitution*'); an English translation is available at <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

47 Ibid 35 [8.2.4].

48 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953) ('*European Convention on Human Rights*' or '*ECHR*').

49 *Dutch Constitution* (n 46) art 93 provides that provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they are published; and art 94 provides that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions of international institutions that are binding on all persons.

50 *Urgenda* (n 41) 40 [8.3.3].

51 Section 1 of the *ECHR* (n 48) is headed 'Rights and Freedoms' and contains arts 2–18.

52 *Urgenda* (n 41)19 [5.2.1].

Article 2 of the *ECHR* protects the right to life.[53] The Supreme Court held that, according to established case law of the ECtHR, article 2 also encompasses a state's obligation to take positive steps to safeguard the lives of those within its jurisdiction. The Court observed, citing applications of the article in circumstances of hazardous industrial activities and natural disaster, that states are obliged to take appropriate steps if there is a real and an immediate threat to persons and the state is aware of the risk. The Court eschewed any view that imminence meant that the risk must materialise in a short period of time. Rather, the requirement for the obligation to arise is that the risk in question is directly threatening the persons in question.[54]

Article 8 of the *ECHR* protects the right to respect for private and family life.[55] The Court observed that article 8 also has effect in respect of environmental issues. ECtHR case law establishes that article 8 will apply where the materialisation of environmental hazards may have direct consequences for a person's private life even if a person's health is not in jeopardy. Article 8 encompasses a positive obligation to take appropriate measures to protect individuals against serious damage to their environment. The obligation exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.[56]

The Supreme Court also observed that the obligation exists even if the materialisation of the danger is uncertain pursuant to the precautionary principle, which is also recognised in the case law on the *ECHR*.[57]

Under the *ECHR*, there is an onus on the State to produce evidence that its policy responses to a danger are appropriate in all the circumstances.[58]

The Court referred to article 13 of the *ECHR* as relevant to applying articles 2 and 8. Article 13 provides a right to an effective remedy in the case of breaches of rights under the *ECHR*. The Court observed that, pursuant to article 13, a national court must offer effective legal protection from violations of the rights and freedoms ensuing from the *ECHR*.[59]

The Supreme Court found itself facing a question arising from the worldwide nature of climate change and the causes of climate change. What was the obligation of the Netherlands in circumstances where other countries and their industrial complexes were continuing to emit greenhouse gases that would threaten the lives and the private and family life of the residents of the Netherlands? The answer was that the Netherlands Government had to do its part.[60] In coming to its conclusion on this point, the Court drew upon the content of the *United Nations*

53 'Everyone's right to life will be protected by law …': *ECHR* (n 48) art 2(1).
54 *Urgenda* (n 41) 19–20 [5.2.2].
55 'Everyone has the right to respect for his private and family life, his home and his correspondence.': *ECHR* (n 48) art 8(1).
56 *Urgenda* (n 41) 20 [5.2.3].
57 Ibid 20 [5.3.2].
58 Ibid 21 [5.3.2].
59 Ibid 22 [5.5.1]–[5.5.3].
60 Ibid 23 [5.6.3]–[5.7.1]. The basis for this conclusion is developed at some length, drawing on a number of different principles from international law at [5.7.2]–[5.8].

Framework Convention on Climate Change ('*UNFCCC*');[61] recommendations in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change; and resolutions of various Conferences of the Parties under the *UNFCCC* to find a high degree of consensus that developed countries (annex I countries) needed to reduce their emissions by 25–40 per cent from 1990 levels by 2020.[62]

As a result, the Supreme Court ruled that, for the Dutch government to be taking appropriate measures in accord with its article 2 and 8 obligations, adhering to a target of reducing the Netherlands emissions by 25 per cent by 2020 was an absolute minimum.[63] The order of the District Court remained in place.

In *Urgenda*, the cause of action was based on the obligations of a human rights treaty to which the Netherlands had been a party since 3 September 1953. For that reason, *Urgenda* is instructive as to the benefits of seeing the impacts of climate change through the prism of the rights protected by human rights instruments. Unlike the situation in Australia, the *Dutch Constitution* has provision which make the binding provisions of treaties to which the country is a party enforceable through the Dutch legal system. In Australia, treaty provisions do not become part of Australian domestic law unless and until the Parliament enacts them through legislation. The passing of Human Rights Acts in states and territories in Australia does give legal force to specified human rights found in a number of international human rights treaties subject to Parliament's power to legislate otherwise. This creates a potential to draw on arguments of the kind relied upon in *Urgenda*.[64]

Early in 2022, one of the lawyers who acted for Urgenda, Dennis van Berkel, was asked about the influence of the *Urgenda* case and the final decision of the Supreme Court. Van Berkel said that, during the litigation, the Netherlands Government appeared to believe that the case would be unsuccessful and the District Court decision would be overturned at some stage. So, it was not until the Supreme Court confirmed the rulings of the lower courts that the Government seemed to treat the matter with urgency. In early 2020, the Government announced cutbacks in coal generation, and a caretaker government, in power from March 2021, introduced a further package of measures. Urgenda, however, felt that the responses were insufficient and was considering further legal action.[65]

An incoming coalition government that took office on 10 January 2022 has changed the approach to climate change mitigation and has reserved 35 billion euros for climate-related measures.[66]

61 *United Nations Framework Convention on Climate Change*, opened for signature 3 June 1992 (entered into force 21 March 1994).
62 *Urgenda* (n 41) 27–30 [7.1]–[7.2.11].
63 Ibid 33 [7.5.1].
64 See, eg, *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33.
65 Isabella Kaminski, '*Urgenda* two years on: what impact has the landmark climate lawsuit had?', *CarbonCopy* (8 June 2022) <https://carboncopy.info/urgenda-two-years-on-what-impact-has-the-landmark-climate-lawsuit-had/>.
66 Ibid.

Case 2: Leghari v Pakistan

In *Leghari v Pakistan* ('*Leghari*'),[67] on 4 September 2015, Judge Syed Mansoor Ali Shah of the Lahore High Court handed down an eight-page judgment in which he issued orders directed to a number of government ministries, departments and authorities of the Federation of Pakistan and the State of Punjab requiring them to take a number of very specific steps to implement an existing *Framework for Implementation of Climate Change Policy* ('*Framework*'), including the establishment of a Climate Change Commission to start to achieve tangible progress on the ground in achieving mitigation of, and adaptation measures against, climate change.[68]

Ashgar Leghari, the petitioner, was an agriculturist and a citizen of Pakistan who approached the Court through a public interest litigation process to challenge the inaction, delay and lack of seriousness of the Pakistan Government and the Government of Punjab in addressing the challenges and to meet the vulnerabilities associated with climate change.[69]

Mr Leghari argued that climate change is a serious threat to the water, food and energy security of Pakistan, which offends the fundamental right to life under article 9[70] of the *Constitution of the Islamic Republic of Pakistan 1973* ('*Pakistan Constitution*').[71] The *Pakistan Constitution* also has a chapter (pt 2 ch 1 arts 8–28) dedicated to the protection of fundamental rights.

The Court held that climate change is a defining challenge of our time and has led to dramatic changes in our planet's climate system.[72] The effects of climate change, including heavy floods and droughts, constitute, on a legal and constitutional plane, a clarion call for the protection of fundamental rights of citizens, especially the vulnerable and weak segments of society who are unable to approach the court.[73]

The Court also held that fundamental rights, like the right to life, which includes the right to a clean and healthy environment, and right to human dignity (art 14)[74] read with the constitutional principles[75] of democracy, equality, social, economic and political justice, include within their ambit the international environmental principles of sustainable development, the

67 *Leghari v Pakistan* (Lahore High Court, Case no 25501/2015 (25 January 2018)) ('*Leghari*'). This final judgment (delivered after a sustained period of supervision by the Court of actions taken by government agencies and office holders) reproduced the orders, reasoning and findings by the Court on earlier occasions, and is available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180125_2015-W.P.-No.-25501201_judgment.pdf>.

68 Order of Shah J in *Leghari v Pakistan* (Lahore High Court, Case no 25501/2015 (4 September 2015)), cited in *Leghari* (n 67) 11 [13].

69 *Leghari* (n 67) 2 [1].

70 *Constitution of the Islamic Republic of Pakistan 1973* ('*Pakistan Constitution*') art 9: 'No person shall be deprived of life or liberty except in accordance with law.'

71 *Leghari* (n 67) 2.

72 Ibid 10 [11].

73 Ibid.

74 *Pakistan Constitution* (n 70) art 14(1): 'The dignity of man and, subject to law, the privacy of home, shall be inviolable.'

75 Ibid ch 2 arts 29–40 provide for 'Principles of Policy' which each organ of government is required to advance. However, these are not the constitutional principles referred to by the Supreme Court, which appear more fundamental.

precautionary principle, environmental impact assessment, inter-generational equity and the public trust doctrine.[76]

The Court also held that there was a need to move from environmental justice to climate change justice. It held that the fundamental rights of right to life, right to human dignity, right to property[77] and right to information,[78] read with the constitutional values of political, economic and social justice, provide the judicial toolkit to address and monitor the Government's response to climate change. And, so, the Court went on to make its orders against the collected government departments to do things.

Ten days, later, on 14 September 2015, Judge Shah had the parties, including a long list of representatives of government departments and agencies, back before him and issued a fresh set of reasons and made orders.[79] Judge Shah stated that he had heard from the representatives of the ministries and the respective provincial departments and it was quite clear to him that no material exercise had been done on the ground to implement the *Framework*.[80]

Then, Judge Shah proceeded to appoint the Climate Change Commission, composed of a chairperson and a series of influential public servants.[81] The Commission's objectives or terms of reference were the effective implementation of the National Climate Change Policy ('NCC Policy') and the *Framework*.[82] Powers were bestowed upon the Commission, including the power 'to co-opt any person/expert, at any stage' and the power to seek the assistance of any federal or provincial departments and ministries.[83] The creation of the Commission and the bestowing of powers was done pursuant to Order 26 of the Pakistan *Code of Civil Procedure 1908*, which makes provision for the appointment of commissions, principally to examine witnesses or to conduct local examinations and to report.

It appears that what Judge Shah did was to create a commission of inquiry which would continually report to him in order to shame the government and the public service of each of Pakistan and Punjab Province into implementing the climate change policy documents which, he found, were essentially being ignored.

By 25 January 2018, two years and five months after Judge Shah's initial ruling, the case had seen 27 hearings, including the two already discussed on 4 and 14 September 2015, and Judge Shah had become Chief Justice of the Lahore High Court.

76 *Leghari* (n 67) 10 [12].
77 *Pakistan Constitution* (n 70) art 23: 'Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.'
78 Ibid art 19A: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.
79 *Leghari* ((n 67) 11–13 [13].
80 Ibid 11 [13].
81 Ibid 11–13 [13].
82 Ibid 12 [13].
83 Ibid.

Chief Justice Shah attached to his reasons delivered on 25 January 2018[84] an epigraph from Achim Steiner, the Executive Director of the United Nations Environment Program, which stated: 'Climate change is one of the greatest threats to human rights of our generation, posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world'.[85]

The Chief Justice described the Court's handling of the matter before it as a 'rolling review' or a 'continuing mandamus' and also considered it a writ of *kalikasan*.[86] He also described the Court as proceeding 'in an inquisitorial manner by summoning … for assistance' a large number of federal and provincial government agencies.[87]

The Chief Justice observed that the NCC Policy and the *Framework* focused on adaptation to climate measures[88] but observed that, although Pakistan's contribution to global greenhouse gas emissions was very small, both documents gave 'due importance to mitigation efforts' in various sectors, highlighting Pakistan's 'role as a responsible member of the global community'.[89]

The Chief Justice recalled the forming of the Commission by its order dated 14 September 2015.[90] The Chief Justice referred to the Commission's supplemental report dated 24 February 2017 and its recommendations to government to develop and implement plans for climate change adaptation, especially to develop a National Water Policy.[91]

The Chief Justice also drew upon a report of the Commission dated 24 January 2018. This report indicated that progress had been made on 144, or about 60%, of the priority actions in the *Framework*, but that progress was 'uneven', and much remained to be done, including allocating further resources.[92]

The Chairman of the Commission had told the Court that, in his opinion, the Commission had achieved its goals; the Pakistan *Climate Change Act 2017* had been promulgated; the Pakistan Climate Change Authority had been created by the Act; and that, in order to move forward, the Court should direct the government to give effect to the Act and implement the *Framework*. The Chief Justice agreed with these observations.[93]

The Chief Justice went on to note that commissions constituted by the courts had played multiple roles in Pakistan, especially in addressing environmental concerns.[94]

84 *Leghari* (n 67) 2.
85 Ibid 2.
86 Ibid 3 [4]. A writ of *kalikasan* is a term used in the Philippines to mean 'a legal remedy designed for the protection of one's constitutional right to a healthy environment': ibid n 2.
87 Ibid 3 [4]
88 The challenges of finding and implementing adequate adaptation measures were highlighted by the 2022 floods in Pakistan which killed over a thousand people and inundated a third of the country: Paola Rosa-Aquino, 'Deadly floods in Pakistan highlight a troubling problem', *Yahoo! Insider* (1 September 2022) <https://www.yahoo.com/video/deadly-floods-pakistan-highlight-troubling-180433377.html>.
89 *Leghari* (n 67) 7 [7].
90 Ibid 11 [13].
91 Ibid 14 [16].
92 Ibid 16 [18].
93 Ibid 21 [19].
94 Ibid.

Chief Justice Shah referred to earlier cases and observed that Pakistan's environmental jurisprudence has woven Pakistan's constitutional values and fundamental rights with international environmental principles.[95] The Chief Justice compared the differing approaches of adaptation and mitigation, and stated that, while mitigation can still be achieved with environmental justice, adaptation can only be achieved with climate justice where the courts help build adaptive capacity and climate resilience by engaging with multiple stakeholders.[96]

The Court formally dissolved the Commission[97] but went on to create a Standing Committee on Climate Change to act as a link between the judiciary and the executive, and to render assistance to government agencies to make sure that the work of implementing the *Climate Change Act* proceeded.[98]

The Chief Justice ordered that, although the proceedings stood concluded, he did not dispose of the petition but consigned it to the record so that the Standing Committee could approach the Court for appropriate orders to enforce the fundamental rights of the people in the context of climate change, if and when required.[99]

A 2019 article in the *King's Law Journal*[100] argues that Shah CJ's directive judicial approach is likely to raise the hackles of many British-educated lawyers as seeing the judge 'wading deep into policy decisions'.[101] The authors, Barritt and Sediti, argue that this is a mischaracterisation of the case and that what the Court did was to act in a supervisory capacity to ensure that a previously ignored, enacted law is applied and fundamental rights are observed. This is simply playing the balancing role that we expect courts to play in constitutional arrangements, particularly, where there is constitutional protection of fundamental rights.[102]

Barritt and Sediti also argue that *Leghari* was being drawn upon by people framing climate change litigation in the Philippines and India. They conclude by saying that

> *Leghari* is undoubtedly a lodestar in the growing tide of climate change lawsuits across the globe. … [I]t sets the standard for the kind of judgment climate litigation activist[s] are hoping for. It is also a sadly rare example of a case from the Global South attracting scholarly attention in the Global North.[103]

Syed Mansour Ali Shah was appointed a Justice of the Supreme Court of Pakistan on 7 February 2018. Based on seniority in the composition of the Court, he will become Chief Justice of Pakistan on 5 August 2025.[104]

95 Ibid 22 [20].
96 Ibid 23 [22].
97 Ibid 25 [24].
98 Ibid 25 [25].
99 Ibid 26 [27].
100 Emily Barritt and Boitumelo Sediti, 'The symbolic value of *Leghari v Federation of Pakistan*: climate change adjudication in the Global South' (2019) 20(2) *King's Law Journal* 203.
101 Ibid 205.
102 Ibid.
103 Ibid 210.
104 Supreme Court of Pakistan, 'Mr Justice Syed Mansoor Ali Shah', *Honorable Judge Details* (Web Page) <https://www.supremecourt.gov.pk/judges/honorable-judge-details/?judgeName=Mr.%20Justice%20Syed%20Mansoor%20Ali%20Shah>.

Case 3: Juliana v United States

In *Juliana v United States* ('*Juliana*')[105] the US Court of Appeals for the Ninth Circuit, in a judgment filed on 17 January 2020, upheld an appeal by the United States and various officers of the US Government from the judgment of Judge Ann Aiken presiding as the US District Court for the State of Oregon. By allowing the appeal by a 2–1 majority, the Ninth Circuit granted summary judgment dismissing the action by the plaintiffs. A petition by the plaintiffs

that the appeal be reheard by all the judges of the Ninth Circuit was denied by an order filed on 10 February 2021.[106]

The majority in *Juliana* consisted of Murguia and Hurwitz JJ. Judge Hurwitz wrote the judgment on behalf of the majority. Judge Staton delivered a dissenting judgment.[107]

The plaintiffs were 21 young citizens of the United States, an environmental organisation, and a self-styled 'representative of future generations'.[108] A glance through the list of plaintiffs[109] reveals that the representative of future generations was not just any such representative but the same Professor James Hansen who, 44 years ago, had told the world that he was 99 per cent sure that climate change was already happening and that the waffling should stop.[110]

The named defendants were the President, the United States and a number of federal agencies, referred to in the judgment, and here, collectively as 'the government'.[111]

The conduct complained of was continuing to permit, authorise and subsidise fossil fuel use despite long being aware of its risks, thereby causing climate change–related injuries to the plaintiffs. These included psychological harm, damage to recreational interests, exacerbated medical conditions, and damage to property.[112] The said harms were asserted to be breaches of the plaintiffs' substantive rights[113] under the Due Process clause of the Fifth Amendment;[114] the plaintiffs' rights under the Fifth Amendment to equal protection of the law; the plaintiffs' rights under the Ninth Amendment;[115] and the public trust doctrine.[116]

The remedies sought were declaratory relief and an injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]'.[117]

105 947 F 3d 1159 (9th Cir, 2020) ('*Juliana*').
106 Order of the Full Court in *Juliana* (n 105) (10 February 2021).
107 *Juliana* (n 105) 3.
108 Ibid 11 (Hurwitz J).
109 Ibid 2.
110 Craig (n 37).
111 *Juliana* (n 105) 11–12 (Hurwitz J).
112 Ibid 12.
113 Ibid.
114 'No person … shall be deprived of life, liberty or property without due process of law …'.
115 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'
116 See 'The doctrine of public trust', *Lawyers & Jurists* (Web Page) <https://www.lawyersnjurists.com/article/doctrine-of-public-trust/>.
117 *Juliana* (n 105) 12 (Hurwitz J).

The procedural history of *Juliana* is complex.

Judge Aiken, in the District Court, had originally dismissed a motion for dismissal.[118] Her Honour concluded that the plaintiffs had standing to sue; had raised justiciable questions; and had stated a claim for infringement of a Fifth Amendment due process right to a climate system capable of sustaining life. Judge Aiken also held that the plaintiffs had stated a viable 'danger creation' due process claim arising from the government's failure to regulate third-party emissions. The third basis of finding justiciability was that the plaintiffs had stated a public trust claim grounded in the Fifth and Ninth Amendments.[119]

The government sought a writ of mandamus from the Ninth Circuit seeking an order that the District Court dismiss, primarily on the basis that being forced to discovery was onerous on the government; the application was dismissed by a court composed of Thomas CJ, Berzon and Friedland JJ on 3 July 2018.[120] The government then brought an application for a stay of proceedings to the Supreme Court.[121] The application was denied on 30 July 2018 but the Court observed that the breadth of the plaintiffs' claims was striking.[122]

The defendants, after delivering their defence, then brought an application for summary judgment and judgment on the pleadings in the District Court, which was again heard by Aiken J. On 15 October 2018, Aiken J granted summary judgment on the plaintiffs' Ninth Amendment claim, removed the President as a defendant, and dismissed the equal protection claim in part. But her Honour otherwise dismissed the applications for summary judgment and judgment on the pleadings, finding that the plaintiffs had standing to sue, and that sufficient evidence had been presented to survive summary judgment, and rejecting an argument that the plaintiffs could only pursue their claims pursuant to the *Administrative Procedure Act* ('*APA*').[123]

It was from this judgment that the appeal was heard in the Ninth Circuit.

The Court of Appeals rejected the government's argument that the *APA* precluded the plaintiffs from bringing their claims otherwise than under the Act.[124] The Court observed that the plaintiffs' claims did not involve a claim that any individual agency exceeded its statutory authorisation or that any action, taken alone, was arbitrary or capricious. Rather, the plaintiffs argued that the totality of various government actions contributed to deprivation of the plaintiffs' constitutionally protected rights. Because the *APA* only allows challenges to discrete agency decisions, the plaintiffs could not effectively pursue their constitutional claims under the statute.[125] The Court observed that, because denying any judicial forum for a colourable constitutional claim presents a serious constitutional question, it was necessary for the statute to evince a clear intent to deny such forum and the *APA* displayed no such intent.[126]

118 *Juliana v United States*, 217 F Supp 1224 (2016).
119 *Juliana* (n 105) 12–13 (Hurwitz J).
120 Ibid 13; *In re United States*, 884 F 3d 830, 837–38 (9th Cir, 2018).
121 The defendants also brought a second mandamus application to the Ninth Circuit which was also dismissed.
122 *Juliana* (n 105) 13 (Hurwitz J); *United States v US District Court for District of Oregon*, 139 S Ct 1 (2018).
123 *Juliana* (n 105) 13; *Juliana v United States*, 339 F Supp 1062 (D Or, 2018).
124 5 USC §§ 551–559.
125 *Juliana* (n 105) 16 (Hurwitz J).
126 Ibid 17.

The Court considered the defendants' argument that the plaintiffs did not have article III standing to pursue their constitutional claims. It observed that, to have standing under article III of the *United States Constitution*, 'a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision'.[127] The plaintiffs succeeded on the issues of concrete injury and causation but failed on the issue of redressability.

The Court observed that at least some plaintiffs claimed concrete and particularised injuries. By way of example, one plaintiff claimed that she was forced to leave her home because of water scarcity leading to separation from her family on the Navajo Reservation. Another plaintiff had to evacuate his home multiple times because of flooding. These injuries were not regarded by the Court as merely conjectural or hypothetical. It was important that climate change was affecting at least some of the plaintiffs now rather than at some time in the future.[128]

The government's argument that climate change was affecting everybody was held not to go to this aspect of standing. The Court held that it did not matter how many people were affected provided the harm is concrete and personal. In concluding that the District Court was correct to find the presence of a concrete and particularised injury, the Court also observed that standing is satisfied if one of a number of plaintiffs has standing. That is, at least one plaintiff must have standing for all of the relief sought.[129]

On the causation element of standing, the Court of Appeals held that causation can be established even if there are multiple links in the chain as long as the chain is not hypothetical or tenuous. In finding that the causal chain was sufficiently established, the Court observed that the plaintiffs' alleged injuries were caused by carbon emissions from fossil fuel production, extraction and transportation. The United States accounted for over 25 per cent of worldwide emissions from 1850 to 2012 and, at the time of the suit, accounted for 15 per cent. The Court also observed that the plaintiffs' evidence showed that federal subsidies and leases have increased those emissions.[130]

In rejecting the government's argument that the causal chain was too attenuated because it depends, in part, on the independent actions of third parties, the Court drew the distinction between a failure to regulate five oil refineries where the refineries had a 'scientifically indiscernible impact' on climate change,[131] and the host of federal policies, from subsidies to drilling permits, spanning over 50 years and direct actions by the government relied on by the plaintiffs. The Court held that there was at least a genuine dispute as to whether those policies were a substantial factor in causing the plaintiffs' injuries.[132]

Turning to the third element of standing, redressability by an Article III court, the Court of Appeals pointed out that the plaintiffs' claim was that the government's actions had deprived the plaintiffs of a substantive constitutional right to a climate system capable of sustaining human life, as opposed to a claim that a particular act or regulation had been breached or a

127 Ibid 18.
128 Ibid 18–19.
129 Ibid 19.
130 Ibid 19–20.
131 *Washington Environmental Council v Bellon*, 732 F 3d 1131, 1141–6 (9th Cir, 2013).
132 *Juliana* (n 105) 20 (Hurwitz J).

claim that a procedural right had been denied. The relief claimed was a remedial declaration and injunctive relief.[133]

For the question of redressability, the Court was prepared to assume that the substantive constitutional right to a climate system capable of sustaining human life existed.[134]

The Court held that, to establish redressability, the plaintiffs must show two things, namely, 'that the relief they seek is (1) substantially likely to redress their injuries; and (2) within the district court's power to award'. The Court observed that redress 'need not be guaranteed' but 'must be more than "merely speculative" '.[135]

The Court held that the declaration sought, that the government was violating the *United States Constitution*, was 'not substantially likely to mitigate the plaintiffs' asserted concrete injuries' because a declaration, although psychologically beneficial, 'is unlikely by itself to remediate [the plaintiffs'] alleged injuries absent further court action'.[136]

In considering the injunction sought for redressability purposes, the Court stated that the plaintiffs sought to enjoin the executive from exercising discretionary authority expressly granted by Congress and, indeed, to enjoin Congress from exercising power expressly granted by the *United States Constitution* over public lands,[137] namely, that 'Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States'.[138]

The Court then drew a distinction between what appears to be a concession in oral argument that the plaintiffs sought only to challenge affirmative actions by the government (such as the grant of a lease or a drilling permit) and the plaintiffs' expert evidence which showed that just stopping the promotion of fossil fuels was insufficient and no less than a fundamental transformation of the world's energy systems was needed.[139] The Court rejected the argument that the requested relief would likely slow or reduce emissions so as to ameliorate the plaintiffs' injuries to some extent. This position was reached by distinguishing a precedent, *Massachusetts v Environmental Protection Agency*,[140] that had indicated that an improvement on the status quo would be enough to satisfy redressability.[141] The Court expressed scepticism that the first prong of redressability (that the relief sought was substantially likely to redress the plaintiffs' injuries) would be satisfied, but it did not rest its decision on that prong.[142]

Rather, the Court based its whole decision on the plaintiffs' inability to satisfy the second prong of redressability, namely, that the relief sought was within an Article III court's power to grant. The Court accepted that it would be a good thing if an effective plan was developed and implemented to avert the dangers caused by climate change, but concluded that such a plan

133 Ibid 21.
134 Ibid.
135 Ibid.
136 Ibid 22.
137 Ibid.
138 *United States Constitution* art IV § 3 cl 2.
139 *Juliana* (n 105) 23 (Hurwitz J).
140 549 US 497, 517 (2007).
141 *Juliana* (n 105) 24 (Hurwitz J).
142 Ibid 25.

would be too complex and would require legislative actions by Congress and a plethora of discretionary decision-making that would be impossible for a court to supervise or enforce.[143]

The Court relied, in coming to this conclusion, on a US Supreme Court authority in a partisan gerrymandering case, *Rucho v Common Cause* ('*Rucho*'),[144] in which it was held that gerrymandering claims presented political questions beyond the reach of Article III courts. The court in *Rucho* did not deny that extreme partisan gerrymandering can violate the *United States Constitution* but concluded that there was no limited and precise standard discernible in the *Constitution* for redressing the asserted violation.[145] The Court of Appeals in *Juliana* said that *Rucho* reaffirmed that redressability questions implicate the separation of powers, and that, because 'it is axiomatic that "the Constitution contemplates that democracy is the appropriate process for change" …, some questions — even those existential in nature — are the province of the political branches'.[146] The Court in *Juliana* said that the court in *Rucho* found that a proposed mathematical standard was 'too difficult for the judiciary to manage' and that it was impossible, in the case before it, to reach a different conclusion.[147]

And so the plaintiffs lost. The appeal was upheld. And the action was struck out.[148]

One might have thought that that was the end of *Juliana*. The case continues to attract amicus briefs including from members of Congress and state attorneys-general. On 9 March 2021, the plaintiffs filed a motion back in the District Court to amend their petition to claim an adjusted remedy that would accord with the ruling of the Ninth District. Four days later, Aiken J ordered a settlement conference between the lawyers for the parties. That settlement conference came to an end without agreement on 1 November 2021. In the meantime, the motion to amend was argued on 25 June 2021. The parties are still awaiting a ruling from Aiken J.[149]

In an article published on 10 March 2021, the *Harvard Law Review* reviewed the decision of the Ninth Circuit in *Juliana*.[150] The article suggests that the decision 'subtly but significantly narrows the remedial capacity of courts adjudicating large-scale "structural reform" cases'.[151] These are cases where 'courts require schools, firms, and other social institutions to change their behavior in order to make amends for past lawbreaking, most notably racial discrimination'.[152] The article indicates that '*Juliana*'s focus on "limited and precise" legal standards could conceivably disrupt longstanding judicial practice in large-scale structural reform cases' where litigation is 'often long on judicial "flexibility" and short on specific doctrinal rules'.[153] The article also criticised *Juliana*'s reliance on *Rucho*, saying that *Rucho* was concerned with rules governing primary conduct and not about limits to remedies which can be granted by an Article III court: 'By collapsing this distinction between flexible

143 Ibid 25–30.
144 139 S Ct 2482, 2508 (2019) ('*Rucho*').
145 Ibid 2500, 2506–7, cited in *Juliana* (n 105) 27.
146 *Juliana* (n 105) 28, quoting *MS v Brown*, 902 F 3d 1076, 1087 (9th Cir, 2018) (quoting *Obergefell v Hodges*, 135 S Ct 2584, 2605 (2015)).
147 *Juliana* (n 105) 28.
148 Ibid 32.
149 *Youth v Gov, 'Juliana v United States'* (Web Page, 2023) <https://www.youthvgov.org/our-case>.
150 Recent case, '*Juliana v United States'* (2021) 134(5) *Harvard Law Review* 1929.
151 Ibid 1929.
152 Ibid 1933.
153 Ibid 1935.

rights-recognition and flexible remedy-implementation, *Juliana* thus narrows the remedial powers of Article III courts.'[154]

Conclusion

For Australian lawyers, one thing that jumps out from the three cases is that the source of rights, in each case, was the national constitution — although in *Urgenda*, the *Dutch Constitution* did so procedurally by constituting the Netherlands' treaty obligation as not just part of domestic law but as part of the fundamental law of the country.

The cases nonetheless have lessons for Australian lawyers in that they do involve the adaption of particular formulations of rights to new situations. In *Urgenda*, the right to life and the right to respect for private and family life in the *ECHR* were given operation far beyond the world of police shootings and generally phrased search warrants so as to guarantee a healthy and viable environment.

Urgenda is also notable for the way in which it dealt with the obligation of individual countries, especially historically smaller economies, to contribute to mitigation of worldwide levels of emissions. There is an argument raised at the political level in Australia that Australia need not mitigate its emissions because, even if Australia reduced its emissions to zero, this would make no difference to the destructive path of history towards an overcooked world. The Netherlands courts took the unremarkable view that there was an obligation to do the right thing and carry one's proper share of the load. In *Leghari*, the court made the same point: even though Pakistan's contribution to world emissions was historically low and that adaptation was the primary task, it was still important for Pakistan to address its emissions and work to reduce them.

In *Leghari*, the court was prepared to take fundamental rights in the *Pakistan Constitution*, like the right to life and the right to human dignity, and to adapt them to guarantee a right to a clean and healthy environment. But the court was prepared to go further and apply these rights in the context of the constitutional principles of democracy, equality, and social, economic and political justice, and to derive from these latter the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter-generational equity and the public trust doctrine — all of which have been treated in many jurisdictions as 'soft' international environmental law.

Although presently unsuccessful, *Juliana* showed a similar ability to apply a 230-year-old Fifth Amendment and its due process clause to the existential issues raised by climate change. The US Supreme Court has turned its attention to due process rights. Albeit in the context of the Fourteenth Amendment, in *Dobbs v Jackson Women's Health Organization*,[155] the opinion of the Court[156] discussed substantive due process rights and stated that the due process clause has been held to guarantee some rights that are not mentioned in the *United States Constitution* but that any such right must be 'deeply rooted' in the nation's history and tradition, and implicit in the concept of 'ordered liberty'.[157] The Court held that a right to abortion does not satisfy that test. Whether a substantive constitutional right to a climate system capable of sustaining

154 Ibid.

155 No 19-1392, 597 US ___ (24 June 2022) ('*Dobbs*').

156 Delivered by Alito J and joined by Thomas, Gorsuch, Kavanaugh and Barrett JJ.

157 *Dobbs* (n 155) slip op, citing *Washington v Glucksberg*, 521 US 702, 721 (1997); see also 1 (Thomas J); 2 (Kavanaugh J).

human life — as the Ninth Circuit in *Juliana* was prepared to assume existed, without deciding the question — will be held to satisfy the test is a question for a subsequent day.

Juliana is also important for those elements which were found, at least for judgment on the pleadings purposes, to be satisfied. American authorities on standing have been influential in Australian courts going right back to *Australian Conservation Foundation Inc v Commonwealth*.[158] The finding that being affected by extreme weather events attributable to climate change is capable of amounting to concrete and particularised injury may have importance in future Australian cases.

Also important is the finding that causation is capable of being satisfied by a nation's contribution to greenhouse emissions over a substantial period of time. While this is still a tough standard to meet, especially if the contribution in question has to be as substantial as that of the United States, but, nonetheless, the distinction between a country's output and that of a single oil well or coalmine might also prove important in Australia.

That which emerges most clearly from a comparison of the three cases is the matter of judicial philosophy. The judges of the Netherlands, at different levels of the judicial hierarchy, saw no difficulty in making orders that the nation's government do something to combat the existential threat of climate change. The government has since acted in a bona fide way to comply with the order of the courts.

In *Leghari*, Shah CJ was prepared to be very proactive to get the government at national and provincial level to implement what was an already articulated and adopted, albeit ignored, plan. The number of hearing days and Shah CJ's judgments make it clear that the court was prepared to, and did, supervise the progress being made over a substantial period. One also gains the impression that politicians and officials were not only cooperative but generally welcomed the court's leadership on such an important issue to the country's future.

In *Juliana*, the Ninth Circuit Court of Appeals was quite frank. Despite accepting that the country was going to hell in a handbasket, the Court was unwilling to find that it had any power to assist. Although not definitive in the ruling, the Court's finicky approach to the effectiveness of a declaration was unconvincing. If the judicial remedy has to solve the whole problem by its orders before it can act, what is the use of it? Surely an order that improves things is better than no order at all.

The definitive basis of the ruling — that Article III courts have no power to make orders which require supervision in complex situations and that courts cannot make orders unless there are limited and precise standards discernible in the *Constitution* — raises questions about the role and use of courts in a world of existential crisis. At what point will courts be prepared to intervene? At some point, the danger from climate change will be so clear and present that failures by governments to act to save their citizens will approach the level of crimes against humanity. Nero was condemned by history for fiddling while Rome burned. At a more domestic level, a fire chief who failed to order their staff to the rescue when the danger from fire was evident would be found to have breached common law and statutory duties.

At some point, one would think, the law must grant a remedy to the victims of existential threats against failure to act by their governments. The problems with delayed remedies for existential threats, of course, is that no one will be around to file the writ.

158 (1980) 146 CLR 493.

Jurisdictional error: history and some recent cases

*Philip Walker**

The impact of the decision in *Hossain v Minister for Immigration and Border Protection* ('*Hossain*')[1] and subsequent decisions on jurisdictional error indicates that statutes are ordinarily to be interpreted as incorporating a threshold of 'materiality' before a decision is denied legal effect. That condition will not be regarded as being met where the decision could not have been different if the error had not been made. Only bias and unreasonableness grounds do not have to meet this materiality requirement.

This article considers some cases relating to jurisdictional error and materiality which have occurred since. Regrettably, in my view (and the view of some High Court judges[2]), neither concept has become more coherent or easy to apply.

Jurisdictional error

'Jurisdiction' is the authority to decide. The source of a court or tribunal's power must be found within the grant provided to it by the empowering statute. Jurisdictional error or acting outside jurisdiction means that a court or tribunal decision lacked authority and is invalid.[3] Since the 13th century, the common law courts have confined inferior courts within the limits of their jurisdiction by the writ of prohibition.

The conventional view is that by confining inferior bodies within the limits of their jurisdiction, courts are *implementing* the will of Parliament. Parliament has imposed a jurisdictional limit and the courts are enforcing it.[4]

That objective is comparatively easy to achieve if jurisdictional error is confined to exceeding those matters expressly identified in the statute and those matters ancillary to them. A power to review certain kinds of planning decision, for example, may still give rise to questions of statutory construction but the answers to these questions are pursued by recognisable principles with a view to determining the true meaning of the words of grant of authority in the statute. Parliamentary intention is fulfilled by orthodox rules of construction.

Privative clauses and avoidance of invalidity

It is equally an exercise of parliamentary sovereignty to determine whether a factual or legal error results in a decision being invalid.[5] Parliament can permit errors to be made while still acting within jurisdiction so that, despite the errors, the decision will still have legal effect.

* Philip Walker SC is a barrister practising at the private bar in Canberra from Blackburn Chambers. He is a member of the ACT Judicial Council and a Lieutenant-Commander in the Royal Australian Navy Reserve.

1 (2018) 264 CLR 123 ('*Hossain*').

2 See, eg, the comments of Edelman J in *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, 765 [23] ('*Nathanson*').

3 *Hossain* (n 1) 132–3 [23]–[24]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 520 [29] ('*MZAPC*').

4 See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 195 (Lord Pearce) ('*Anisminic*').

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

A sentence to a term of imprisonment, for example, may contain errors but it is normally the case that it remains valid until altered on appeal. If that were not the case and it was void, those detaining the applicant would be liable for false imprisonment.

Tension arises when parliaments attempt to exclude review by the courts for legal error by wide privative clauses. Is a legal error one within jurisdiction which might be made without invalidating the ultimate decision or does it constitute a decision made outside the jurisdiction granted to the decision-maker? If it is the latter, does the resulting decision lack authority and is it invalid?

A privative clause will typically not protect a decision made in excess of jurisdiction because, absent power, there was no 'decision' to protect at all. The UK Parliament, being sovereign, can protect a decision even from jurisdictional error if it uses very clear words. For constitutional reasons, Australian parliaments cannot. Thus, privative clauses can only be of limited operation.

In the face of a privative clause, *Anisminic Ltd v Foreign Compensation Commission* ('*Anisminic*')[6] moved the line between jurisdictional error and non-jurisdictional error of law by substantially enlarging the scope of the former. A similar move occurred in *Craig v South Australia* ('*Craig*'),[7] which held that a tribunal acts outside its jurisdiction if it:

(a) identifies a wrong issue;

(b) asks itself a wrong question;

(c) ignores relevant material;

(d) relies on irrelevant material; or

(e) at least in some circumstances, makes an erroneous finding or reaches a mistaken conclusion, affecting the tribunal's exercise or purported exercise of power.

Australian courts must maintain a distinction between jurisdictional and non-jurisdictional error for constitutional reasons. Despite this, the occasions on which jurisdictional error will be found are many. The distinction between jurisdictional error and error of law within jurisdiction is and always has been extremely difficult to draw. In *Anisminic*, Lord Reid said that the absence of power means that any purported decision is a 'nullity'[8] so the consequences of jurisdictional error are potentially profound.

Regrettably, the wide grounds of jurisdictional error set out in *Anisminic* and *Craig* frequently rely on implications drawn from statute. Those implications range from those which are tolerably clear to those which seem to owe their existence more to divination if not indeed predisposition.[9] In all events this comes at great cost to the certainty of the law even if it does, to some, confer a sense of intellectual rectitude.

6 *Anisminic* (n 4).
7 (1995) 184 CLR 163, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
8 *Anisminic* (n 4) 171B–C. See also *Hossain* (n 1) 133 [24].
9 For a recent decision where the NSW Court of Appeal held 4:1 that a decision not to impose an 'intensive correction order' was not jurisdictional and the High Court held 4:3 that it was, see *Stanley v DPP (NSW)* (2023) 97 ALJR 107. In the view of many judges, this decision had the potential, if jurisdictional, to invalidate the entire sentence under which the defendant had been imprisoned.

Nonetheless, for the most part, the determination of whether a decision was made within authority has been an exercise in statutory construction. That remained so even with the extended forms of jurisdictional error which arose after *Anisminic* and *Craig.* Some cases might depend upon factual findings to determine whether jurisdictional limits have been exceeded. Was a procedure followed, for example?

One area where facts were critical to jurisdiction was a statutory requirement to find a 'jurisdictional fact'. In these cases, jurisdiction depended upon the existence of a particular fact. Here, it was open for a court to determine whether the required fact actually existed so as to enliven the jurisdiction of a lower court or tribunal.[10]

While jurisdictional fact cases turn on factual findings, the findings which are required are identified in the statute and are comparatively confined. What is more, the content of the factual finding which must be made is very similar in each case. Did the event occur in a geographic area? Is the value of the subject matter under a certain sum? Was there a breach of a rule warranting regulatory intervention? Questions such as these have their origins in the statute and direct attention to the same issues in each case.

If jurisdictional error is established, relief normally follows. Relief might be denied in exercise of a discretion in the case of futility but whether a decision would be set aside for want of jurisdiction is not dependent on the finding of facts relating to the consequence of the error itself.

Materiality

The facts which have to be found by the imposition of a requirement of 'materiality', and how they are to be found, are quite different. They are not set out specifically in the statute. The facts are individual to each case with no guidance beyond what may be gleaned from the general concept of materiality. The materiality conclusion is not even determined by existing facts but on speculation about hypothetical, counterfactual outcomes.

The High Court said in *MZAPC v Minister for Immigration and Border Protection* ('*MZAPC*')[11] that materiality turns on 'reasonable conjecture' that the decision, which was in fact made in an individual case, could have been different.[12] Thus, the facts required to be found to determine whether a jurisdictional error renders a decision invalid, could be widely different. The High Court has also placed the onus clearly on an applicant to prove that the decision made could have been different, absent the error.

It is first appropriate to consider the doctrinal basis for this outcome. 'Materiality' requires facts to be found before relief is granted for jurisdictional error. This requirement was not so

10 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
11 *MZAPC* (n 3).
12 Ibid 524 [38].

much of the outcome of the *construction of a particular statute* as it was of a *construction imposed by the Court on all statutes*. In *Hossain* Kiefel CJ, Gageler and Keane JJ stated that materiality was a common-law principle of statutory construction:

> Ordinarily, a statute which impliedly requires that a condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.[13]

In *MZAPC* Kiefel CJ, Gageler, Keane and Gleeson JJ stated that the limits of decision-making authority were 'informed by evolving common-law principles of statutory interpretation'.[14] Their Honours went on to say that in *Hossain*, Kiefel CJ, Gageler and Keane JJ enunciated a 'common law' principle of statutory interpretation that a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition. 'The statute is instead "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".'[15]

A party claiming authority to decide normally must show the existence of that authority. It would only be in the rare case where a citizen is relying on an exception to a general grant of jurisdiction that a citizen would have to show that jurisdiction did not exist.

Despite this, the High Court has said that the applicant bears the onus of proof to establish materiality.[16] Some judges have said that the materiality requirement is contrary to principle and have shown that it is difficult to apply in practice.[17]

In *Minister for Immigration and Border Protection v SZMTA* ('*SZMTA*'),[18] Nettle and Gordon JJ in dissent said that a person was entitled to expect a decision to be made in accordance with the statute and not be subject to an additional requirement to show materiality.

In *Nathanson v Minister for Home Affairs*,[19] Gordon J again in dissent said that there were some cases where the error is so egregious that the '"quality or severity of the error", as a matter of logic and common sense, necessarily gives rise to the conclusion that it does not matter whether the "decision could realistically have been different had [the] error not occurred".'[20]

It is difficult to pass over these views as merely those of dissentients. The origin of review for jurisdictional error was that it was implementing the will of Parliament. It was, in effect, 'thus far and no further'.[21] It is against this background that it should be remembered that Parliament did not legislate to require 'materiality' in statutes as a ground of jurisdictional

13 *Hossain* (n 1) 134 [29].
14 *MZAPC* (n 3) 521 [30].
15 Ibid 521 [31], quoting *Hossain* (n 1) 134 [29].
16 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [46]–[47] ('*SZMTA*').
17 Ibid 458–60 [90]–[95] (Nettle and Gordon JJ); *Nathanson* (n 2) 757 [84]–[85] (Gordon J), 759–60 [93]–[98] and 76–5 [121]–[127] (Edelman J).
18 *SZMTA* (n 16) 458–60 [90]–[95].
19 *Nathanson* (n 2).
20 Ibid 755 [76]–[78], 758 [86].
21 *SZMTA* (n 16) 445 [46]–[47].

error. The majorities in *Hossain* and *MZAPC* imposed it as an additional requirement upon the limits already set in all statutes. By doing so, the High Court altered those limits, in practical outcome if not in express form.

The expressed will of Parliament has become: 'thus far but an indeterminate amount further if the applicant is unable to prove materiality'. Thus, jurisdiction is determined by factual findings relating to consequence. It really does require a very special lens to see a clear parliamentary intent lying behind such a result.

Onus of proof, evidence and materiality

There has been considerable uncertainty about what, if any, evidence is required to demonstrate whether a decision could have been different. In *SZMTA* the High Court said that the issue was 'an ordinary question of fact' which can be determined 'from inferences drawn from evidence adduced on the application' and that this could be assisted by 'by reference to what can be expected to occur in the course of the regular administration of the Act'.[22] The object of this exercise is to determine whether on a counterfactual analysis the decision 'could' have been different as a matter of reasonable conjecture.[23] Materiality was to be proved by inferences from admissible evidence.[24]

Does this contemplate parties leading evidence to establish and rebut a counterfactual? If the resolution of the question is 'an ordinary question of fact', it does.

It certainly permits debate about whether evidence, which was obtained in breach of natural justice, was *considered* by a decision-maker. In *MZAPC* the High Court upheld a decision on the basis that the impugned evidence was not taken into account.

However, in *Nathanson*, the Court held that in a breach of procedural fairness case, 'reasonable conjecture' does not require an applicant to demonstrate how they would have taken advantage of the ability to present their case. It was not necessary to demonstrate the nature of the additional evidence or submissions which would be put to the tribunal. It was to be assumed that a party would do so and achieve a favourable outcome. Considering these statements it was unsurprising that Gageler J said that establishing the threshold of materiality is not onerous.[25]

Justice Edelman has been a critic of materiality. In *Nathanson* he said that the presentation of evidence to demonstrate materiality was exactly what *MZAPC* had required to be done. He stated that the evidence required in a natural justice case to prove the counterfactual was 'almost nothing',[26] and that it was sufficient to make a 'quadruple might' submission by speculating that

> but for the denial of procedural fairness there *might* have been things that he or his wife *might* have said at the hearing that *might* have assisted his case in a manner that *might* have led to a different result.[27]

22 *SZMTA* (n 16) 445 [46]–[47].
23 *MZAPC* (n 3) 524 [38].
24 Ibid 529 [52].
25 *Nathanson* (n 2) 750 [46]–[47], 752 [55].
26 Ibid 759 [93].
27 Ibid (emphasis in original); see also 761 [105].

Criticism of materiality test

A criticism of materiality is that it brings the court very close to making merits judgments. *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*Nahi*')[28] is an example of that. In that case, the applicant filed affidavits about the effect that the cancellation of his visa would have on the welfare of his children. The Full Court of the Federal Court determined the case on other grounds. It nevertheless entertained this evidence and made quite extensive factual findings about the effects of the cancellation of the applicant's visa and his deportation on the welfare of the applicant's children to answer the materiality question.[29]

If the court is not to engage in the merits of a decision it must limit itself to forecasting what decision the decision-maker might have made. In a case about the natural justice hearing rule, either materiality has meaning or it does not. That would seem to necessitate some indication of what the evidence was to be led to assess whether it would have made a difference. If not, Edelman J's view that what has to be proved is 'almost nothing' must surely be right. If that is not so, how is an applicant to be denied the right to show that further evidence or submissions might have made a difference?

If it is open for an applicant to call evidence (even if it is not necessary) about what evidence the applicant would have led or about what submission the applicant would have made, it must surely be that the respondent is able to lead evidence to say that neither would have made any difference. This would be so if materiality was 'an ordinary question of fact'.

This is what happened in *Star Training Academy Pty Ltd v Commissioner of Police (NSW)*.[30] The applicant led evidence of what it would have done had the respondent accorded it procedural fairness. The decision-maker was called. Under cross-examination she admitted that she might have changed her decision if there had been other evidence but that she could not say because she did not see it.

The case was a very strong case for the applicant. The procedural unfairness was obvious. Justice N Adams found for the applicant. In doing so, her Honour expressed her reservations about evidence being led in the manner that it had but acknowledged that the decisions of the High Court suggested that it could be done. Her Honour particularly expressed her reservations about the outcome of a case about jurisdictional error possibly turning on questions of credit.[31]

These matters emphasise the significant disadvantage applicants will face carrying the onus of proof. Typically, respondent departments have exclusive knowledge of why a decision was made. They also have the best knowledge of what happens 'in the course of the regular administration of the Act'.[32] Applicants are at a significant disadvantage proving that the decision could have changed.

28 [2022] FCAFC 29.
29 See also *Healey v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 188.
30 [2023] NSWSC 153.
31 See ibid [186]–[201].
32 *SZMTA* (n 16) 445 [47].

It should also be noted that there are cases where private bodies are authorised to make decisions with legal consequences. Adjudicators who act under the *Building Industry (Security of Payments) Acts* are also subject to review for jurisdictional error.[33]

Justification for materiality test

The imposition of a 'materiality' test to determine jurisdictional error may have occurred in an attempt to rein in the width of jurisdictional error as a result of decisions like *Craig*. It can be said that in a case like *Hossain*, the doctrine has its attractions. In that case, the applicant was refused a visa because he applied outside a time limit and because he failed a public interest test as he owed a debt to the Commonwealth and had made no arrangements to pay it. The time limit question was conceded to be wrongly decided. This error did not materially affect the result because the applicant was clearly indebted to the Commonwealth and failed on the public interest ground.

In *Hossain* it was always open to refuse the visa on the public interest ground. One wonders whether in that case it was necessary to impose a materiality test for all cases when it could have been decided by holding that the decision could have been properly refused on the public interest ground. In all events, not all factual scenarios are as clear as *Hossain*.

It is perhaps the frequency with which jurisdictional error can be found and decisions invalidated that lies behind the statement of Kiefel CJ, Gageler and Keane JJ in *Hossain* when rationalising materiality that decision-making 'is a function of the real world'.[34] Later in *SZMTA* Bell, Gageler and Keane JJ spoke of breaches of the rules of procedural fairness needing to give rise to 'practical injustice' to constitute jurisdictional error.[35]

Conclusion on materiality test

If practicality and reality are the aim of 'materiality', it is questionable whether it is achieving its goal, particularly for the parties who must run jurisdictional error cases. It seems to have made predicting an outcome and running a case more difficult. It solves none of the complexities which existed before it was introduced and only adds another layer of complexity to them.

33 *Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2)* [2023] NSWSC 345.
34 *Hossain* (n 1) 134 [28].
35 *SZMTA* (n 16) 443 [38].

Getting what you want from administrative law

Ellen Rock and Greg Weeks†*

The objectives of the administrative law system frequently do not match the objectives of those who use it. While judicial review's purpose is to define and police the legal boundaries of public law,[1] the control of public power is not necessarily (and, we would submit, rarely) the ultimate goal a judicial review applicant has in mind. An applicant will seldom be aggrieved by the unfairness of a decision-making process which has ultimately gone their way and, to the extent that public law remedies do produce a tangible positive result for a particular applicant, this is generally no more than an unsought side-effect of the machinery of administrative law. The limits of administrative power interest administrative lawyers; by contrast, most people are interested only in outcomes. Applicants aggrieved by the exercise of public power might frequently be disappointed to find that their desired outcomes do not match administrative law's objectives.

In this article, we ask what applicants seek from administrative law and identify three objectives — transparency, redress and reform — which judicial review is often not well-adapted to deliver. The influence of judicial review on administrative law scholarship is inverse to its contribution to resolving administrative law disputes. At best, it is merely 'one of a number of mechanisms for establishing transparency and accountability of government action'.[2] Judicial review cases are important, but are easily outweighed every year by the number of disputes resolved through other mechanisms, such as tribunals, ombudsmen, freedom of information ('FOI') requests, commissions of inquiry and ex gratia compensation schemes. This broader machinery offers a fundamental contribution to the capacity of administrative law to meet applicants' objectives. However, that contribution is sometimes forgotten for the reason that it is less easy to observe than the results of judicial review proceedings. It is commonly the case that even administrative law scholars and practitioners do not know what happens to successful applicants *after* their win in court.[3]

A successful judicial review applicant generally wants more than the chance to go through an administrative process again 'according to law', but that is the best result that most judicial review applicants can hope for. Even assuming the final outcome does go their way, we know that the world continues to turn while flawed decisions are overturned and made afresh; it is possible that a successful judicial review applicant might suffer significant and irremediable loss that nullifies their personal objectives while still meeting the public-facing objective of 'control'. A classic example is a person successfully challenging the invalid cancellation of their business licence with effect only after their business has been forced to close.[4] The limits and functions of Australia's administrative law mechanisms are well-understood, and

* Senior Lecturer, University of Technology Sydney, Faculty of Law.
† Professor, Australian National University, College of Law. We thank Robin Creyke, Matthew Groves, Carol Harlow and Stephen Thomson for their feedback on this article in draft. The usual disclaimer applies.

1 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J) ('*Quin*').
2 John Basten, 'The courts and the executive: a judicial view' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts* (Federation Press, 2019) 44, 45.
3 See Robin Creyke and John McMillan, 'Judicial review outcomes: an empirical study' (2004) 11 *Australian Journal of Administrative Law* 82.
4 See Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) 339.

do not need restating. This article assesses the operation and suitability of administrative law from the viewpoint of what applicants truly seek, demonstrating how the system works as a whole and where gaps remain.

Strategic objectives

An applicant who is aggrieved by an administrative decision can turn to the machinery of administrative law in order to address that grievance. As any legal adviser will explain, however, even a decision made unlawfully does not necessarily open the door to a legal remedy that will satisfy an applicant's wants or needs. In part, this reflects the inherently procedural character of judicial review, which casts a long shadow over the attempt to catalogue the values that underpin administrative law. In addition to legality, those values include openness, fairness, participation, accountability, consistency, rationality, accessibility, impartiality, integrity, honesty and dignity.[5] The values included in this list go beyond legality, but still place an undeniable emphasis on procedure at the expense of substance.[6]

The Australian system of judicial review is dominated by a conception of the separation of powers under which the *substance* of administrative justice is beyond the reach of judicial power. To the extent that a judicial review court's decision 'avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error'.[7] Emblematic of this position is Australia's rejection of substantive relief in public law, either as a response to promissory estoppel[8] or as a remedy for the disappointment of a legitimate expectation.[9] Judicial review can 'cure' unlawful decision-making by requiring that decisions be made (and re-made) according to law, but it is never a mechanism for applicants to obtain the thing that they want or expect. The crux of the problem explored in this article is that applicants frequently have objectives that go beyond the procedural focus of judicial review. An applicant might not be satisfied merely to be the instrument for 'enforcing … the law which determines the limits and governs the exercise of the repository's power'[10] when their objective is the 'cure' that courts emphatically place beyond the constitutional remit of judicial review.[11]

5 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, Thomson Reuters, 2022) [1.20]; Michael Taggart, 'The province of administrative law determined' in Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1, 3; Robert S French, 'Administrative law in Australia: themes and values' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 23.

6 See Carol Harlow and Richard Rawlings, 'Proceduralism and automation: challenges to the values of administrative law', in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law* (Oxford University Press, 2020) ch 14, 279; and Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 4th ed, 2021) ch 2.

7 *Quin* (n 1) 35–6 (Brennan J).

8 See *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 219–22 (Gummow J); *Quin* (n 1) 17–19 (Mason CJ); cf *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835.

9 A detailed discussion appears in Matthew Groves, 'Legitimate expectations in Australia: overtaken by formalism and pragmatism' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 319. This doctrine has been emphatically rejected by the High Court on separation of powers grounds: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 12–13 [34] (Gleeson CJ), 22–7 [68]–[80], 35–7 [111]–[119] (Hayne J), 48 [148] (Callinan J).

10 *Quin* (n 1) 35–6 (Brennan J).

11 As we describe in under 'Redress' below, merits review serves an important complementary function which curtails that limitation.

In order to assess the functional capacity of administrative law to satisfy an applicant's strategic objectives, the starting point must be to identify them. This article explores three:

(a) **Transparency:** Many applicants who access administrative law are interested in achieving transparency, which may take a number of forms. In some cases, an applicant may desire transparency in respect of an obscure process, seeking notice or an opportunity of participation. In other cases, an applicant may seek an explanation of reasoning and, in yet others, they may want access to new or concealed information about government operations. These forms of transparency may in some cases serve a function in their own right, in the sense of achieving individual or public awareness. In other cases, transparency might be a means to another end, such as providing a footing for the pursuit of further administrative law objectives, including redress.

(b) **Redress:** Perhaps the most common desire of administrative law applicants is to achieve redress, which we define in two different ways. First, it might include obtaining a different decision to alter the negative impacts of the one that has been made. For example, an applicant might seek the reinstatement of their cancelled licence or the grant of an entitlement that has been denied to them. Second, a demand for redress may refer to the repair of consequential harm arising from an unlawful decision, such as compensation for invalid detention or for financial harm suffered following the invalid cancellation of a licence.

(c) **Systemic reform:** Perhaps less commonly, administrative law applicants may seek to correct underlying structural flaws which have enabled maladministration to take place. There are numerous examples of cases in which an individual challenge has produced broader legal consequences, though the individual applicant may have been concerned only with the resolution of their own grievance.[12] In some cases, however, an applicant's choice to bring proceedings may be in part (or even primarily) influenced by a desire for systemic reform, particularly for public interest and advocacy groups.[13] This may constitute applying direct pressure for immediate change, or take an indirect route, using administrative law tools to build momentum towards future reform.

These of course are not the only reasons that an applicant might seek to challenge an administrative decision. An applicant may have other goals in mind, such as stalling an undesired event[14] or having an outlet to vent their anger. There are procedures in place which limit the spurious or malicious use of administrative law mechanisms, including costs

12 Applicants in cases that have broad consequences for the law generally are usually seeking only an outcome tailored to their own circumstances; see, eg, *Kioa v West* (1985) 159 CLR 550; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

13 See the examples explored under 'Reform' below.

14 Consider two examples from opposite ends of the administrative law system. First, it has been suggested that tobacco companies used freedom of information requests to 'distract, delay and intimidate the government' in the context of reforms to tobacco marketing: Andrew D Mitchell and Tania Voon, 'Someone to watch over me: the use of FOI requests by the tobacco industry' (2014) 22(1) *Australian Journal of Administrative Law* 18, 42. Second, it is accepted that asylum seekers have no incentive to hurry the process which may see them returned to their country of origin; see, eg, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 506 [118] (Kirby J).

implications,[15] the discretion to decline relief[16] and exclusion from pursuing further actions.[17] However, an applicant can validly use administrative law proceedings for tactical reasons, such as to bolster an applicant's commercial position by reference to a competitor.[18] The above list is therefore not a comprehensive explanation of all possible reasons an applicant may access the mechanisms of administrative law. However, it provides a basis to explore some of the most important and common objectives of administrative law applicants, and serves to highlight the contribution that administrative law makes to those objectives.

Transparency

A desire for transparency often underpins challenges to administrative decisions. This has been explained on the basis that individuals who do not get what they expected from the government are less aggrieved if they understand why that outcome was reached. In many situations, transparency may be of value in its own right because 'democracy rests upon government transparency and accountability'.[19] However, transparency is also a means to an end, in the sense that it provides a footing for further steps to be taken in the pursuit of administrative justice, including redress.[20] In the sections below, we consider various aspects of transparency that applicants commonly seek.

Explanation

Access to a statement of reasons has long been recognised as critical to the meaningful capacity to challenge administrative decisions.[21] In addition to revealing the presence of reviewable errors, an improved understanding of the basis for government decision-making can be justified on dignitarian grounds as well as on the basis that it results in better-quality decision-making.[22] Reasons can lead to increased public confidence in administrative processes by fostering 'the values of transparency and accountability that permeate

15 For example, solicitors can be subjected to punitive costs orders for acting in a matter without reasonable prospects of success: *Legal Profession Uniform Law Application Act 2014* (NSW) s 62, sch 2.

16 For example, a court can refuse to award relief in judicial review proceedings to an applicant who has acted in bad faith (Aronson, Groves and Weeks (n 5) ch 12) and the Ombudsman can decline to investigate where a complaint is 'frivolous or vexatious or was not made in good faith': *Ombudsman Act 1976* (Cth) s 6(1)(b)(i) ('*Ombudsman Act*').

17 For example, an applicant who is deemed to be vexatious may be denied the ability to commence future legal claims (*Vexatious Proceedings Act 2008* (NSW)) or to pursue freedom of information requests (*Freedom of Information Act 1982* (Cth) ss 89K–89M ('*FOI Act*')).

18 In judicial review proceedings, the courts have sometimes allowed competitors to establish standing to challenge decisions made for the benefit of a commercial competitor: *Argos Pty Ltd v Corbell* (2014) 254 CLR 394.

19 Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 6th ed, 2022) 1049. See further Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) 40–1.

20 See the justifications for the obligation to provide reasons in Aronson, Groves and Weeks (n 5) [11.10]–[11.20].

21 JR Kerr et al, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971) pp 78–9 [266].

22 See Janina Boughey, 'The culture of justification in administrative law: rationales and consequences' (2021) 54 *University of British Columbia Law Review* 403, 417–18. See further *Osmond v Public Service Board* [1984] 3 NSWLR 447, 463 (Kirby P).

administrative law',[23] which can be described as a means of 'getting things right' (rather than only 'putting things right').[24] The lack of any right to reasons at common law[25] is in part made up for by the fact that a decision unsupported by reasons is more open to attack on the basis that it is unreasonable,[26] but in greater part by the range of entitlements provided for by statute.[27] The combined interaction of the common law approach and statutory entitlements has seen an 'increased culture of officials providing reasons even when not obliged to do so'.[28] An individual seeking an explanation from government takes the benefit of this culture in addition to these specific entitlements.

Courts and tribunals are not the only pathway towards the provision of reasons. The Commonwealth Ombudsman has an explicit power to report that an agency should have provided reasons in respect of a decision,[29] which may then be forthcoming in the context or aftermath of an ombudsman investigation. The Ombudsman's investigative powers to compel the production of written or oral information from witnesses[30] may also reveal the basis on which a decision was made (though this will not always be shared with the applicant). That same outcome may also arise through the operation of other investigatory mechanisms discussed in more detail in the following section. What all of this tells us, in a more practical sense, is that where an applicant seeks transparency in the form of an explanation or justification for government decision-making, there will often be a mechanism which directly or indirectly supports that goal. It is true that there will be cases that fall between the cracks of the legislative schemes that support the provision of reasons, but an applicant aggrieved by an administrative decision will often have access to a mechanism that can compel the government to explain itself.

Information

The second form of transparency that an applicant may have in mind is uncovering information, whether in the form of government documents or more general evidence about what has occurred in a matter of maladministration. Merits and judicial review processes offer some measure of support to this objective. Once an applicant has commenced a claim before a tribunal[31] or court[32] in respect of an administrative decision, the processes of each

23 Creyke et al (n 19) 1103.

24 Harlow and Rawlings, *Law and Administration* (n 6) 549.

25 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 669–70 (Gibbs CJ).

26 See, eg, *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353; *Klein v Domus Pty Ltd* (1963) 109 CLR 467; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. These cases can be traced back to the decision of the House of Lords in *Sharp v Wakefield* [1891] AC 173.

27 For an overview, see Creyke et al (n 19) 1107–8. The most important of these at the Commonwealth level are s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*'). See also *Uniform Civil Procedure Rules 2005* (NSW) r 59.9; *Acts Interpretation Act 1901* (Cth) s 25D. Many obligations are individualised to particular decision-making contexts: eg, *Corporations Act 2001* (Cth) s 915G.

28 Aronson, Groves and Weeks (n 5) [11.90]. The reasons provided may allow error to be inferred that would not have been obvious in the absence of a statement of reasons: *L&B Linings Pty Ltd v WorkCover Authority (NSW)* [2012] NSWCA 15, [57] (Basten JA).

29 *Ombudsman Act* (n 16) s 15(2)(e).

30 Ibid s 9.

31 A decision-maker was obliged, after an application for review was made, to lodge with the AAT the reasons for the decision and 'every other document … relevant to the review of the decision': *AAT Act* (n 27) s 37.

32 Compulsory procedures may be used to compel the production of relevant documents, although this right is generally more curtailed in public law cases: *Uniform Civil Procedure Rules 2005* (NSW) r 59.7(4).

institution provide a degree of transparency through the production of evidence relevant to the case. However, the most obvious mechanism for an applicant seeking access to documents is FOI legislation. The Commonwealth *Freedom of Information Act 1982* (‘*FOI Act*’) provides that ‘every person has a legally enforceable right to obtain access’ to government documents (broadly defined) held by Commonwealth government departments and agencies.[33] That ‘remarkable reform’[34] has at times struggled to fulfil this aspiration, in part due to frequent legislative and executive tinkering with the rules and practice of open government. In its current form, an agency can refuse to release documents that are conclusively exempt[35] or, alternatively, ‘conditionally exempt’[36] where release would be contrary to the public interest.[37] The agency bears the onus of justifying any refusal of access and cannot take a person’s reasons for seeking access into account in determining whether to release a document.[38] In practice, this means that an agency cannot refuse access on the basis that an applicant intends to use a document in legal proceedings as an alternative to discovery.[39] FOI applications have featured heavily in high-profile litigation against government,[40] demonstrating their utility as a supporting mechanism in pursuit of accountability as well as transparency.

However, the process of seeking information and then testing the legality of any refusal is time-consuming. For example, one applicant who was refused access to their health records in July 2018 waited nearly two years for the Information Commissioner to determine that the agency should have granted access.[41] Such delays are not uncommon,[42] as the Information Commissioner is well aware. After a lengthy period of vacancy following the Commonwealth Government’s attempt to abolish the Office of the Australian Information Commissioner in 2015,[43] the most recent Commissioner resigned in May 2023, citing ‘lengthy delays to information requests and his lack of power to fix a system that currently has people waiting up to five years for an appeal decision’.[44] The beneficial outcomes promised by the *FOI Act* are apt to lose their value where applicants are made to wait so long for the information they request.

33 *FOI Act* (n 17) s 11.

34 John McMillan, ‘Transparent government — are we travelling well?’ (2021) 28 *Australian Journal of Administrative Law* 259, 259.

35 The *FOI Act* (n 17) conclusively exempts documents, for example, because they are subject to legal professional privilege (s 42), or because their release would impact national security (s 33) or disclose trade secrets (s 47).

36 For example, because a document’s release would impact Commonwealth–State relations (ibid s 47B), the economy (s 47J) or personal privacy (s 47F).

37 Ibid s 11A(5). The ‘public interest’ is determined by reference to the factors in s 11B.

38 Ibid s 11(2). An applicant’s motives may be relevant in limited cases, such as where an applicant seeks access to third-party personal information for a valid private purpose rather than with a view to dissemination: see, eg, *‘FG’ and National Archives of Australia* [2015] AICmr 26 (13 April 2015), [38].

39 See, eg, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 98 FCR 311.

40 See, eg, *JT International SA v Commonwealth* (2012) 250 CLR 1.

41 *‘SO’ and Services Australia (Freedom of Information)* [2020] AICmr 25.

42 A former senator has taken legal action against the Australian Information Commissioner over delays of more than three years in ruling on FOI applications: James Massola, ‘FOI Commissioner quits after less than a year in the job’, *Sydney Morning Herald* (online, 6 March 2023) <https://www.smh.com.au/politics/federal/foi-commissioner-quits-after-less-than-a-year-in-the-job-20230306-p5cptq.html>.

43 See Greg Weeks, ‘Attacks on integrity offices: a separation of powers riddle’ in Weeks and Groves (eds) (n 2) 25, 38. The previous FOI Commissioner had resigned in December 2014 and his functions were exercised by John McMillan as Australian Information Commissioner.

44 Massola (n 42).

Beyond FOI requests, many other mechanisms can perform investigative functions, not only to facilitate documentary transparency but also to uncover new information. One of the most important of these is the office of the Commonwealth Ombudsman. The jurisdiction of the Ombudsman extends beyond the legality of government action to capture action that is 'unreasonable, unjust, oppressive or improperly discriminatory'[45] or 'otherwise, in all the circumstances, wrong'.[46] To support this role, the Ombudsman enjoys a broad range of investigative powers, including to require the production of documents and written statements,[47] to require witnesses to attend and answer questions,[48] and to enter premises.[49] This investigatory role is formidable; there are few legitimate bases on which a person or agency may refuse to comply with an Ombudsman's investigatory request.[50] Other bodies with a standing remit to investigate government operations include anti-corruption commissions, which are empowered to investigate 'corrupt conduct' in various jurisdictions;[51] the Auditor-General, who can audit 'performance' in the public sector;[52] and Parliament, which has the power to call for information and documents from the government.[53] Investigatory bodies can also be set up specifically to inquire into an instance of government wrongdoing, including the establishment of royal commissions and parliamentary committee inquiries. Most of these various investigatory bodies enjoy coercive powers,[54] and there are numerous examples of high-profile investigations which have brought to light documents and evidence revealing government wrongdoing.[55]

For an aggrieved individual, the ability to engage with these types of investigatory bodies depends on the applicable rules governing their operation. For example, it is possible for an individual to play a direct role in kickstarting the relevant process by seeking merits or

45 *Ombudsman Act* (n 16) s 15(1)(a)(iii).

46 Ibid s 15(1)(a)(v). See Greg Weeks, 'Maladministration: the particular jurisdiction of the ombudsman' in Matthew Groves and Anita Stuhmcke (eds), *Ombudsmen in the Modern State* (Hart Publishing, 2022) 21, 24–5.

47 *Ombudsman Act* (n 16) s 9(1).

48 Ibid ss 9(2) and 13.

49 Ibid s 14.

50 For example, the privilege against self-incrimination and legal professional privilege do not apply, though information so obtained cannot later be used in evidence: ibid s 9(4). Non-compliance is punishable as an offence: s 36.

51 See, eg, *Independent Commission Against Corruption Act 1988* (NSW) ss 7–9 ('*ICAC Act*'); *National Anti-Corruption Commission Act 2022* (Cth) s 8 ('*NACC Act*').

52 *Auditor-General Act 1997* (Cth) ss 17–18.

53 See, eg, House of Representatives, *House of Representatives Practice,* DR Elder and PE Fowler (eds) (Parliament of Australia, 7th ed, 2018) 625.

54 For anti-corruption commissions see, eg, *ICAC Act* (n 51) ss 21–23; *NACC Act* (n 51) pt 7. Royal commissions have no coercive power at common law (*Clough v Leahy* (1904) 2 CLR 139, 153 (Griffith CJ)) but statutory authority is conferred by the *Royal Commissions Act 1902* (Cth). For the Auditor-General see *Auditor-General Act 1997* (Cth) pt 5. Parliamentary committee powers are backed by the force of orders of contempt, subject to a range of limitations including public interest immunity claims: see, eg, House of Representatives (n 53) 625.

55 Examples include the various investigations by the NSW Independent Commission Against Corruption ('ICAC') into former Minister Eddie Obeid; the 2022–23 Commonwealth Royal Commission into the Robodebt Scheme; the 2013 Commonwealth Royal Commission into the Home Insulation Program; the 2018 Victorian Royal Commission into Management of Police Informants, which investigated the use of a criminal barrister as a police informant; the Auditor-General's investigation and report into 'Sports Rorts' (Auditor-General, 'Award of Funding under the Community Sport Infrastructure Program' (Performance Audit, 15 January 2020); the investigation into the 'children overboard' scandal: Senate Select Committee on a Certain Maritime Incident, 'A Certain Maritime Incident' (October 2002).

judicial review of an administrative decision, or by making a complaint to the Ombudsman or to an anti-corruption commission.[56] Access to other bodies is less direct, with no formal provision being made for individual referrals. However, this does not mean that they are of no potential benefit to an individual. For example, while an individual cannot directly utilise parliamentary procedures to gain access to government documents, an individual may approach their local member to do so on their behalf. Taking a grievance to the media may also prompt a broader investigation, as has been the case in many high-profile instances of government maladministration.[57] An aggrieved individual may also have opportunities to play an active role in providing evidence or support to the investigator once an investigation is underway (eg, making a submission to a royal commission, or appearing as a witness at a parliamentary inquiry).

In short, the extent to which an individual will have access to documents and evidence uncovered by an investigatory body varies greatly according to the body in question. For some administrative law mechanisms, an individual has a leading role in the process that facilitates direct access to relevant documents and information (eg, an applicant will obtain direct access to material produced within the conduct of tribunal or court proceedings or pursuant to an FOI request). In contrast, for many other mechanisms, an individual who kickstarts or participates in an investigation will not be in much better position than any other member of the general public. That is the case for the Ombudsman, for example: an individual has no right of access to information obtained during the course of an Ombudsman investigation undertaken on their behalf because, as a general rule, investigations are undertaken in private[58] and information uncovered during an investigation is not publicly released. That position is even clearer in respect of broader systemic investigations — unless information is provided on a voluntary basis, an aggrieved individual is not entitled to greater information about anti-corruption, royal commission or parliamentary inquiries than other members of the public. These investigations are discussed in the following section.

Publicity

A final element of transparency is the extent to which the machinery of administrative law facilitates publicity of government operations. As noted in the foregoing section, some mechanisms provide an aggrieved individual with access to information as a by-product of their involvement with the relevant mechanism (eg, through making an FOI request). Otherwise, an individual must rely on the more general capacity of the relevant mechanism to facilitate publicity, which may arise both through the public nature of the investigative process, or through the publication of reports. For judicial processes, the default position is that hearings are to be held in public, because justice must not only be done, but be

56 See, eg, *Ombudsman Act* (n 16) s 7; *ICAC Act* (n 51) s 10; *NACC Act* (n 51) s 32.

57 For example, revelations of mistreatment of children held in youth detention systems in the Northern Territory in an investigative report ('Australia's Shame', *Four Corners,* 25 July 2016, <https://www.abc.net.au/news/2016-07-25/australias-shame-promo/7649462>) were subsequently the subject of the *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017).

58 *Ombudsman Act* (n 16) s 8(2).

seen to be done.[59] Other than in the most exceptional circumstances,[60] court and tribunal proceedings take place in public, allowing the public and the media to hear evidence and submissions that may provide insight into government decisions and conduct.[61] To similar effect, many royal commission hearings and parliamentary inquiries take place in public, with witness statements being recorded for posterity in publicly accessible transcripts.[62] However, not all investigatory mechanisms operate in the public eye. As noted above, investigations by the Ombudsman never occur in public[63] and, for some mechanisms, public hearings are discretionary. The comparative powers of the NSW Independent Commission Against Corruption ('ICAC') and the Commonwealth National Anti-Corruption Commission ('NACC') are a good example; the ICAC has the power to conduct a public inquiry if satisfied it is in the public interest,[64] whereas the NACC must hold hearings in private unless 'exceptional circumstances' justify publicity.[65] Private investigations clearly limit the extent to which an individual (and the public more generally) may be made aware of any information that is uncovered.

Concerns regarding limitations in the transparency of investigations may be allayed where a final report is published that reveals relevant evidence and findings of government maladministration. Again, for courts and tribunals, the publication of reasons is routine, and will often detail findings of fact underlying the dispute before determining the merits and/or the legal validity of government action.[66] The value of this transparency is illustrated in part by exceptions to the rule. For example, first-level social security decisions in the Administrative Appeals Tribunal ('AAT') are not published, which meant that important decisions regarding the legality of the Robodebt scheme were effectively suppressed. Similarly, many participants in the National Disability Insurance Scheme have been disadvantaged by the inability to access information about the AAT's approach to cases in which reasons have not been published or were settled before a final decision had been made.[67] For other mechanisms, publicity is generated through the publication of reports.

59 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259. See Rock, *Measuring Accountability* (n 19) 143–4, 168–9.

60 For example, where publication of proceedings would prejudice the fairness of a trial: *Scott v Scott* [1913] AC 417; or where confidential information is in issue before the AAT: *AAT Act* (n 27) s 35.

61 In some cases, public interest may extend to live broadcasting of proceedings: see, eg, *Matthews v SPI Electricity Pty Ltd* (2013) 39 VR 287; *Kamasaee v Commonwealth (No 9) (Live streaming ruling)* [2017] VSC 171.

62 See, eg, Parliament of Australia, *Select Committee for an inquiry into a certain maritime incident: Public hearings and transcripts* (Website) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/hearings/index>.

63 *Ombudsman Act* (n 16) s 8(2).

64 *ICAC Act* (n 51) s 31.

65 *NACC Act* (n 51) s 73.

66 Reasons for judicial decisions are generally seen to be a 'necessary incident of the judicial process': *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA); or 'an inherent aspect of the exercise of judicial power': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329 [22] (Steward J).

67 Public Interest Advocacy Centre, Submission 33 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Inquiry into General Issues Around the Implementation and Performance of the NDIS* (13 July 2020).

Ombudsmen,[68] anti-corruption commissions,[69] royal commissions,[70] Auditors-General[71] and other parliamentary mechanisms publish reports on their findings, and there are numerous examples of such reports which expose maladministration.[72] The reach of these reporting powers is dependent on both the applicable legal framework and the practical approach taken by the body in question. For example, the NACC will be required to prepare a report in respect of all investigations, but to publish only where the Commissioner is satisfied that it is in the public interest to do so.[73] Further, the Ombudsman exercises the power to report in only a small minority of cases.[74] These mechanisms can make a significant contribution to publicising maladministration in the right circumstances, although they are not a clear pathway towards transparency in every case.

Redress

While transparency is a starting point in the pursuit of administrative justice, an applicant's strategic objectives will frequently take the form of a demand for redress. Given the breadth of executive power and the extent to which individuals must interact with bureaucratic regimes, it is of little surprise that maladministration is capable of generating significant economic and non-economic harm. Errors in the cancellation or grant of visas, licences, approvals, permits and so on have the capacity to cause significant hardship to the individuals who rely on them. The pursuit of redress might include both alteration of the impugned decision, and repair of consequential harm that the individual may have suffered while the unlawful decision was in place.

Altering outcomes

Many applicants aggrieved by an unlawful exercise of power are concerned with redress in the form of a different decision. The Nepalese refugee in *Minister for Immigration and Citizenship v SZGUR*[75] was not merely interested in testing the legality of the decision to refuse him a protection visa, but with obtaining permission to remain in Australia; the children in the *Sharma* litigation[76] were not merely seeking to ensure that the Minister for the Environment took their welfare into account, but with halting the approval of a new coal mine; and in *Green v Daniels*[77] Ms Green was less concerned with the Department's inflexible application of policy than with obtaining an unemployment benefit over the period of her summer

68 *Ombudsman Act* (n 16) s 15.
69 See, eg, *NACC Act* (n 51) ss 149, 156.
70 Subject to limitations, eg, *Royal Commissions Act 1902* (Cth) s 6OJ.
71 *Auditor-General Act 1997* (Cth) s 18(2).
72 A celebrated example is the inquiry into the 'children overboard' affair: Senate Select Committee on a Certain Maritime Incident, 'A Certain Maritime Incident' (October 2002).
73 *NACC Act* (n 51) ss 149, 156.
74 For example, in 2015 the Ombudsman investigated approximately 2,300 complaints and published only four reports in respect of those investigations: Rock, *Measuring Accountability* (n 19) 201.
75 (2011) 241 CLR 594 ('*SZGUR*').
76 In *Sharma v Minister for Environment* (2021) 391 ALR 1 (FCA), Bromberg J indicated that the relevant statute treated the safety of the children as a mandatory consideration: at 96 [404]. The claim was framed in negligence rather than judicial review, and was overturned on appeal: *Minister for Environment v Sharma* (2022) 291 FCR 311 (FCAFC).
77 (1977) 13 ALR 1.

vacation. A successful judicial review challenge does not necessarily lay the foundation for any of those substantive outcomes. The Nepalese refugee successfully challenged the legality of two consecutive visa refusal decisions before the High Court allowed the fatal refusal decision to stand;[78] the Minister for the Environment ultimately approved the mine expansion after taking into account the welfare of the children;[79] and Ms Green's welfare payment was refused even without the blind application of the unfavourable government policy.[80] Many judicial review applicants may well obtain the outcome they really wanted when a matter is reconsidered according to law;[81] the Kioa family, for instance, were able to remain in Australia following the determination of their celebrated procedural fairness case.[82] However, as the above examples attest, that is by no means certain and a great many judicial review victories may be Pyrrhic. To the extent that judicial review remedies set the stage for a favourable second exercise of administrative discretion on the merits, this is legally a matter of coincidence rather than a reflection of those merits.[83]

The fundamental truth that Australian judicial review doctrine is unconcerned with the practical benefits it might produce rarely requires further explanation. However, consider the positions of two applicants who are each aggrieved because, say, the decision-maker has irrelevantly taken into account each applicant's criminal history when making an adverse decision. The first applicant holds a current licence which the decision-maker has purported to cancel, while the second applicant sought to obtain a licence but has been refused. The operation of a writ of certiorari will produce entirely inconsistent practical results for each of these two applicants; the former will see their licence restored, but the latter will be left with nothing (apart from the possibility of re-applying). Remedies which compel the exercise of power are likewise of limited benefit to an applicant seeking to alter the outcome of an adverse decision. A writ of mandamus requires a decision-maker to re-exercise their power legally rather than to reach a specific outcome or to compel the exercise of discretion in a particular way.[84] Replacing an unlawful decision-making process with a lawful one will not always lead to a different result; as for Ms Green, the same adverse decision might be reached having validly exercised the relevant power. It follows that what the second applicant in the example above has 'won' through a successful judicial review application is the *chance* of a better outcome. Judicial review's remedies are not designed to achieve

78 A delegate of the Minister initially refused the visa application in 2005. The Refugee Review Tribunal's first decision to affirm that refusal was quashed by the Federal Court in 2006. A differently constituted Tribunal made a second decision to affirm the refusal, which was again quashed by the Federal Court in 2007. The third and final decision to affirm, made by a differently constituted Tribunal in 2008, was found valid by the High Court: *SZGUR* (n 75).

79 See Sussan Ley, 'Statement of reasons for approval under the *Environment Protection and Biodiversity Conservation Act 1999*' (EPBC No 2016/7649, 16 September 2021) [163].

80 See 'Statement by Senator Don Grimes' (27 May 1977). As we note at page 102 below, this negative outcome was later ameliorated through the operation of an ex gratia payment. See Robin Creyke, '*Green v Daniels*' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 309.

81 See Creyke and McMillan (n 3).

82 *Kioa v West* (n 12).

83 As a matter of both law and practice the government does not generally ignore tribunal decisions: see page 99 and nn 92 and 93 below.

84 The circumstances in which mandamus will lie to compel the only legal way to perform a duty are very limited: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; *SAS Trustee Corporation v Woollard* (2014) 86 NSWLR 367, 391 [108] (Basten JA). See Aronson, Groves and Weeks (n 5) [16.90], [16.110].

anything other than procedural redress, in which sense they are a time-consuming and expensive way for an applicant to win 'nothing more than judicial confirmation that they remain in the game and have not yet lost'.[85]

Merits review in tribunals is a much clearer means by which individuals can seek redress in the form of an altered outcome.[86] The regular injunctions against courts curing administrative injustice make more sense once account is taken of the existence of tribunals, and it is no coincidence that the seminal description of the legality–merits distinction in *Attorney General (NSW) v Quin* ('*Quin*') was written by Brennan J, who had been the inaugural President of the AAT and understood well how the various parts of the puzzle fit together.[87] The unspoken part[88] of his judgment in *Quin* is that a tribunal can do what is forbidden to courts and 'form its own judgment of what is the correct or preferable decision in the circumstances of the particular case as revealed in the material before [it]'.[89] The element of 'preferability' offers an applicant scope to seek redress in the form of a varied or substitute outcome[90] reached on the best and most current information.[91] Unlike a judicial review victory, which may only be temporary, a win on the merits is enduring; there are defined limits to the government's ability to 're-exercise' a power (or re-make an unfavourable decision) following determination by a merits review tribunal.[92] Additionally, convention and good practice mean that public administrators almost always comply with tribunal decisions.[93]

In practice, the percentage of cases in which the AAT disagrees with the decision under review varies according to subject area. In the most recently published statistics,[94] for example, the AAT found that the original decision was not 'correct or preferable' in only 10 % of refugee cases, in contrast to 75% of cases involving the National Disability Insurance Scheme. The overall statistic across practice areas reflects that the AAT found the original government

85 Boughey, Rock and Weeks (n 4) 7.

86 The most important of these bodies at the Commonwealth level is the Administrative Appeals Tribunal ('AAT'). On 16 December 2022, the Commonwealth Government announced that it would abolish the AAT and replace it with a new body. See M Groves and G Weeks, 'Tribunal justice and politics in Australia: the rise and fall of the Administrative Appeals Tribunal' (2023) 97 *Australian Law Journal* 278. An applicant may alternatively seek to alter a decision through internal review on the merits by a different decision-maker within the original agency. This may be provided for legislatively (see, eg, *Social Security (Administration) Act 1999* (Cth) pt 4) but need not have a statutory basis.

87 *Quin* (n 1) 35–6 (Brennan J).

88 See FG Brennan, 'The anatomy of an administrative decision' (1980) 9 *Sydney Law Review* 1.

89 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636. See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 [140].

90 *AAT Act* (n 27) s 43(1). The AAT could also affirm the decision on review or set it aside and remit the matter to the original decision-maker.

91 Subject to any contrary statutory indication; see, eg, *Freeman v Department of Social Security* (1988) 15 ALD 671.

92 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 [50]. This result was driven by the terms on which the tribunal's powers were conferred, which may differ as between legislative regimes.

93 Exceptions to this rule are most unusual, although they do sometimes occur; see, eg, the refusal of a Minister to give effect to an order of the AAT: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2020) 171 ALD 608; discussed in M Groves and G Weeks, 'Ministerial adherence to the law' (2020) 27 *Australian Journal of Administrative Law* 187; Aronson, Groves and Weeks (n 5) [12.60].

94 Administrative Appeals Tribunal, 'AAT caseload report for the period 1 July 2022 to 31 May 2023' (Whole of Tribunal Caseload Report, August 2023) <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2022-23.pdf>.

decision was not 'correct or preferable' in 35% of cases. While those statistics include cases that were remitted for reconsideration by the original government decision-maker in addition to those actually varied or remade by the tribunal, these statistics are telling of the capacity for merits review tribunals to alter the outcome of a decision for the benefit of an individual.

Other mechanisms within and beyond administrative law may also serve that goal. The Commonwealth Ombudsman, for example, is able to recommend that an authority should reconsider, vary or cancel a decision following an investigation.[95] Thus, the Ombudsman may urge an agency to grant a licence that has been refused, to confer a benefit that has been denied, or to cancel or reduce a debt that has been raised. The Ombudsman can also make more elastic recommendations to work around strictures that have produced an initially unfavourable decision, for example by recommending that an agency waive or flexibly apply criteria to accommodate an applicant's situation.[96] While unenforceable, agencies are generally inclined to comply with such recommendations:[97] between 2019 and 2021, government agencies accepted 73 of 77 recommendations made by the Ombudsman, with 92% of those having been at least partially implemented at the time of reporting.[98] Many of those recommendations are addressed at more general policy reform in addition to matters of individual grievance, but these statistics reveal that the Ombudsman has clear capacity to agitate for the revision of a government decision. Further opportunities to push for the alteration of an unfavourable decision exist outside the traditionally conceived 'fourth (or integrity) branch'.[99] For example, an individual may press for the alteration of a decision through political channels, such as by complaining to a local Member of Parliament, or calling for attention on the back of media publicity.[100] To summarise, an applicant who seeks a different outcome (as opposed to the nullification of a decision) may find assistance in various places in the broader system of administrative law and beyond.

Repair of harm

Not all harm can be addressed by setting aside or altering an unfavourable administrative decision.[101] To name but a few examples, an individual may be imprisoned pursuant to an invalid administrative order,[102] or be prevented from operating their otherwise profitable

95 *Ombudsman Act* (n 16) s 15(2).

96 For example, the Ombudsman might recommend the use of 'exceptional circumstances' provisions to waive requirements that make an applicant ineligible for a benefit: Commonwealth Ombudsman, *Making Things Right: Department of Education and Training, Compensation for Errors Made by Contracted Service Providers* (Report No 1, March 2015) 9.

97 See Rock, *Measuring Accountability* (n 19) 201–2.

98 Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (Report No 4, October 2022) 2.

99 See, eg, Robin Creyke, 'An "integrity" branch' (2012) 70 *AIAL Forum* 33; James J Spigelman, 'The integrity branch of government' (2004) 78 *Australian Law Journal* 724.

100 There are many examples of success stories arising from these tools in the context of adverse decisions made by the National Disability Insurance Agency; see, eg, Michael Atkin, 'Bill Shorten intervenes in NDIS case after agency refuses to fund modifications for grandmother with a disability', *ABC News* (online 19 August 2022) <https://www.abc.net.au/news/2022-08-19/bill-shorten-intervenes-to-end-ndia-funding-dispute/101346254>.

101 See, eg, the hypothetical example in Boughey, Rock and Weeks (n 4) 339.

102 *Ruddock v Taylor* (2005) 222 CLR 612.

business if their licence is cancelled,[103] or have their commercial activities restricted.[104] In such cases, even if a decision is ultimately remade in the applicant's favour, that revised outcome cannot 'unring' some bells; the individual will still have been imprisoned, lost money or seen their business destroyed. What such applicants often want is repair of that consequential harm, and common law judicial review remedies are not fit for that purpose;[105] 'the mere invalidation of an administrative decision does not provide a cause of action or a basis for an award of damages'.[106] The shortfalls in public law's capacity to provide a remedy for harm suffered as a consequence of invalid government decision-making is an area that has attracted commentators over many decades.[107]

At its broadest, a public law damages remedy would provide compensation for losses arising as a result of government action taken in excess of power. In Australia, at least, there have been no serious indications that such a remedy should be developed. At one stage, a tortious remedy was developed to compensate 'a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another',[108] but it met with little favour from either academics[109] or judges.[110] Establishing the invalidity of an administrative decision does not entitle an applicant to a compensatory remedy, but there may nonetheless be strategic benefit in seeking judicial review if it provides a pathway towards other forms of relief. No tort targets invalidity per se, but in some cases establishing invalidity may be an essential component of liability (eg, misfeasance in public office) or may exclude the availability of a defence (eg, the intentional torts of false imprisonment and battery).[111] An applicant looking to repair harm may find that establishing invalidity is a first step towards their goal of obtaining compensation, either as a precursor to a claim in tort,[112] or in the form of a collateral attack.[113]

103 *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1.

104 *Northern Territory v Mengel* (1995) 185 CLR 307 ('*Mengel*'); *Jain v Trent Strategic Health Authority* [2009] AC 853.

105 An exception which demonstrates the general truth of this contention is that applicants who have only suffered damage to their reputation may want or need no more than a declaration that that damage was inflicted contrary to law; see, eg, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

106 *Chan v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 29, 41. The courts have likewise refused to interpret the statutory power to make an order 'to do justice between the parties' under the *ADJR Act* (n 27) to allow for the making of a compensation order: *Park v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 787, 789–90.

107 The sources are collected in Ellen Rock and Greg Weeks, 'Monetary awards for public law wrongs: Australia's resistant legal landscape' (2018) 41(4) *UNSW Law Journal* 1159.

108 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156. In this context, 'unlawful' meant forbidden by law rather than merely invalid in the public law sense: *Mengel* (n 104) 336.

109 See GP Barton, 'Damages in administrative law' in *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 123, 131.

110 *Kitano v Commonwealth* (1974) 129 CLR 151, 174–5; *Dunlop v Woollahra Municipal Council* [1982] AC 158, 170–1; *Lonrho Ltd v Shell Petroleum Co Ltd* [No 2] [1982] AC 173. It was finally terminated by the High Court in *Mengel* (n 104).

111 See our taxonomy in Rock and Weeks (n 107) 1161–7.

112 For example, Mr Taylor established the invalidity of the administrative decision that gave rise to his imprisonment in judicial review proceedings (*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391) before seeking damages in a false imprisonment claim (*Ruddock v Taylor* (n 102)). Mr Taylor ultimately failed in that latter claim on a statutory construction point.

113 See Ellen Rock, 'Resolving conflicts at the interface of public and private law' (2020) 94 *Australian Law Journal* 381, 384–6.

Given the difficulty and expense of pursuing public and private law claims before the courts, in many cases it may be more realistic to seek repair of harm arising from government decision-making through alternative means. As discussed above, ombudsmen have significant influence to recommend that a government body take action that may be of direct or indirect benefit to an individual, including by recommending the alteration of a decision to one in the individual's favour. Not all harm can be corrected in that way, of course, and the ombudsmen's powers extend to recommending an agency take action to address such consequential harm. For example, on the back of the failed 'Robodebt' scheme, the government had undertaken to refund payments that had been unlawfully levied based on a flawed calculation method. For those individuals who had unsuccessfully challenged their debt before the AAT, Services Australia refused to provide refunds on the basis that it could not alter the effect of the Tribunal's decisions. Following an investigation, the Commonwealth Ombudsman recommended that Services Australia take steps to issue those refunds as soon as possible,[114] and almost all refunds were then processed in the following eight-month period.[115]

With or without a recommendation by the Ombudsman, the government can provide redress to parties who are unable to establish legal liability via ex gratia schemes that provide for the payment of compensation and waiver of debts.[116] Benefits provided under such schemes respond to a moral rather than a legal duty owed by the government in its dealings.[117] Given that maladministration can occur (and cause loss) in the absence of judicially reviewable legal error, there is significant benefit to providing a form of compensation which is not based on the existence of a legal right.[118] In fact, many such schemes are expressly a 'last resort' for those who suffer harm, being inapplicable where there are alternative means to address loss (including legal proceedings).[119] An individual can approach the government directly to request redress through ex gratia compensation schemes, but the Ombudsman may bring greater clout by recommending that the government take remedial action based on findings made during the course of an investigation. Leveraging such compensation schemes plays directly to the strengths of the ombudsman institution, which can *recommend* compensation to remedy maladministration even though it cannot *order* such a remedy. Where an individual suffers harm not remedied by the correction of an unlawful process, the alteration of an unfavourable decision, or the application of private law, ex gratia redress mechanisms perform an important gap-filling function. That important function is evident in the events which unfolded in the wake of the second, and this time lawful, refusal of Ms Green's unemployment entitlement;[120] Ms Green was one of a group of school-leavers to whom the then Prime Minister recommended that an ex gratia payment be made following a

114 Commonwealth Ombudsman, 'Services Australia's Income Compliance Program' (Report No 2, April 2021), recommendation 4.

115 Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (n 98) [1.269].

116 See the detailed discussion of these schemes in Boughey, Rock and Weeks (n 4) ch 10.

117 See ibid 289; Sarah Lim, Nathalie Ng and Greg Weeks, 'Government schemes for extra-judicial compensation: an assessment' (2020) 100 *AIAL Forum* 79, 79.

118 An Australian executive scheme provides compensation specifically to remedy 'defective administration'; see Boughey, Rock and Weeks (n 4) 298–302.

119 See, eg, Department of Finance (Cth), 'Scheme for compensation for detriment caused by defective administration' (Resource Management Guide No 409, November 2018) [19]; Department of Finance (Cth), 'Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013' (Resource Management Guide No 401, April 2018) [5]–[6].

120 See n 80.

recommendation by the Ombudsman.[121] The discretionary nature of ex gratia compensation in this sense cuts both ways; without specified grounds of entitlement it is difficult to access, but that lack of rigidity allows it to travel beyond the strictures of the law.

Reform

Successful challenges to government action are capable of promoting improvements and reform. A finding of unlawfulness might end an unlawful practice, or increase the chance of changes in policy or legislation, or serve an educative function for government officials responsible for making future decisions.[122] The full extent of the consequent change may be unconnected to the purpose for which an applicant sought review of a decision.[123] However, not all administrative law applicants are solely concerned with the resolution of their own individual grievance. Some have a dual purpose in mind, seeking a result that travels beyond the boundaries of their own case,[124] and for some applicants, the choice to bring proceedings is chiefly motivated by the pursuit of a broader agenda, of which the instant case is only a component part. Public interest groups exist across a number of areas, notably including groups concerned with environmental and climate change concerns, human rights, racial discrimination and inequality. There are several ways in which the machinery of administrative law can be used to advance these types of reform-oriented objectives.

Strategic and public interest litigation has long been utilised for the purpose of furthering agendas such as these.[125] The United States has a lengthy history of recognising judicial adjudication of legal claims as a valid forum to push for social and political change[126] and the English legal system saw a similar rise in campaigning groups in the early 1990s.[127] There is little doubt that many individuals and groups in common law countries look to legal claims as a means of furthering a political agenda beyond the instant dispute. While various types of legal claims can further these purposes,[128] public law judicial and merits review claims

121 See Creyke, '*Green v Daniels*' (n 80).

122 See Creyke and McMillan (n 3).

123 See, eg, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, in which the High Court issued declaratory relief that ended the practice of detaining asylum seekers on Christmas Island, although the applicants' purpose was only to challenge procedural unfairness in their own cases.

124 *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 is an example of a case involving mixed motives, with residents seeking to challenge a mine approval for a range of reasons, including concern for their own living conditions and property values, alongside concerns for the natural environment.

125 For a fuller analysis of these issues, see, eg, Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992); Carol Harlow, 'Public law and popular justice' (2002) 65 *Modern Law Review* 1; Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38(4) *Civil Justice Quarterly* 407; Scott Calnan, 'Class actions and human rights litigation in Australia: realising the potential' (2022) 37 *Law In Context* 117.

126 See, eg, *Brown v Board of Education*, 347 US 483 (1954), in which the National Association for the Advancement of Colored People commenced a series of claims of constitutional violations against education authorities with the long-term objective of achieving desegregation. For an overview of this litigation and its aftermath see JT Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford University Press, 2001).

127 Harlow and Rawlings, *Pressure Through Law* (n 125). Note however the disquiet about those developments expressed in Harlow, 'Public law and popular justice' (n 125) 2.

128 A prominent example is the use of claims in tort or equity for strategic purposes. These have been used by representative groups to challenge the unlawful or unreasonable use of powers in the context of detention by police and immigration officials (eg, *Konneh v New South Wales* [2013] NSWSC 1423; *Jenkings v Northern*

have featured in ongoing campaigns on issues such as protection of the environment,[129] climate change,[130] animal rights,[131] the protection of asylum seekers,[132] and, more recently, pushback against restrictions and mandates in the context of the COVID-19 pandemic.[133] One of the biggest legal barriers to exploiting judicial review for these types of purposes is standing rules. An aggrieved individual will not be prevented from seeking review simply because they have an eye to reform in addition to their own grievance, but interest and community groups occupy shakier ground. Australian courts will entertain judicial review claims commenced by such groups where they can establish more than a 'mere intellectual or emotional concern',[134] but there is no suggestion of either judicial or legislative willingness to move towards a regime of 'open standing'. Unless a campaign group can demonstrate an acceptable connection to the matter in hand, its functions will be limited to supporting individuals who do have standing, or to intervening in a matter in some other capacity.[135]

Those who seek to use judicial review and other legal mechanisms in these kinds of contexts may have different strategies in mind.[136] In many cases, an applicant may seek an immediate alteration of the legal status quo, which may then be of benefit as a binding precedent in future cases. Irrespective of the success of the instant claim, an applicant may have broader strategic objectives in mind, such as seeking to generate publicity and public awareness, to document existing problems and limitations in the law, to promote accountability by requiring the government to publicly recognise the impact of its policies, or to stimulate public or political dialogue. The use of legal challenges to build 'momentum' on other objectives, including systemic reform, does not necessarily depend on success in the case at hand.[137] In one celebrated example, an Australian citizen being held without charge by the USA sought to compel the respondent Attorney-General to obtain his release.[138] The legal merits

Territory [2017] FCA 1263; *Kamasaee v Commonwealth* [2017] VSC 537; *DBE17 v Commonwealth* (2018) 265 FCR 600); in the context of environmental matters (eg, *Minister for Environment v Sharma* (n 76)); and in the unlawful levying of taxes or debts (eg, *Prygodicz v Commonwealth* [2020] FCA 1516).

129 See examples in Andrew Macintosh, Heather Roberts and Amy Constable 'An empirical evaluation of environmental citizen suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39(1) *Sydney Law Review* 85.

130 For example, there is a long history of claims premised on the argument that a decision-maker has not taken into account climate change implications: *Greenpeace Australia Ltd v Redbank Power Pty Ltd* (1994) 86 LGERA 143; *Environment Centre Northern Territory v Minister for Resources and Water* [2021] FCA 1635. For discussion see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the next generation of climate change litigation in Australia' (2017) 41 *Melbourne University Law Review* 793.

131 See, eg, *Animals' Angels eV v Secretary, Department of Agriculture* (2014) 228 FCR 35.

132 See, eg, *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 (representative proceedings challenging the refusal to afford an oral hearing to a class of refugees); *ARJ17 v Minister for Immigration and Border Protection* (2017) 250 FCR 446 (representative proceedings challenging the validity of a government policy restricting access to mobile phones); *Ruddock v Vadarlis* (2001) 110 FCR 491 (claim brought by a refugee interest group seeking the release of 433 asylum seekers).

133 See, eg, *Loielo v Giles* (2020) 63 VR 1.

134 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512–13.

135 For example, as a friend of the court: see, eg, *Levy v Victoria* (1997) 189 CLR 579, 604–5 (Brennan CJ).

136 For an overview see Ramsden and Gledhill (n 125) 414–16.

137 Ibid 415.

138 *Hicks v Ruddock* (2007) 156 FCR 574.

of that application were not strong and were never destined to survive the application of the Act of State doctrine. The applicant's victory in court was limited to the dismissal of the government's strike-out application. However, the decision increased pressure on the government to seek his release, which was the applicant's primary objective. The fact that he was repatriated soon afterwards demonstrates the success of pursuing that objective as he did.[139]

The use of the courts as tools of reform is not universally supported. Carol Harlow has noted the potential risks arising from increasing resort to judicial processes for such purposes:

> If we allow the campaigning style of politics to invade the legal process, we may end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy.[140]

Irrespective of what we think of the *desirability* of reform-driven litigation, we note that there are also clear limits to its *utility*. The courts' function is to resolve the dispute before it and — putting to one side concerns about judicial advocacy — it will not generally be appropriate (or permitted) for applicants to argue their case by reference to broader social implications. Judicial review proceedings are a very blunt tool for identifying systemic problems, far less resolving them. Like obtaining a beneficial outcome on the merits, such an outcome will only ever be coincidental. By comparison, there are other administrative law mechanisms that are specifically suited to that broader task.

One of the more important mechanisms for this purpose is the office of the Commonwealth Ombudsman. While originally envisaged to play the more granular role of handling individual complaints, the office has come to take a broader view[141] which extends to 'tackl[ing] the systemic issues within an agency which led to the complaints in the first place'.[142] This function is supported by the Ombudsman's ability to commence 'own motion' investigations[143] and its extremely broad powers to recommend things to the government.[144] While the secrecy of Ombudsman investigations and the office's lack of coercive powers are potential limits to the goals of transparency and redress, these features of the office are incredibly important from a reform perspective. Many have observed that the constructive approach employed by the Ombudsman is more likely to produce a co-operative response from government than an adversarial one.[145] The numerous examples of work undertaken by the Ombudsman which have focused on systemic issues with a view to improvement and reform include issues in

139 See Aronson, Groves and Weeks (n 5) [17.100].

140 Harlow, 'Public law and popular justice' (n 125) 2.

141 Harlow and Rawlings, *Law and Administration* (n 6) 561; Stephen Thomson, 'The enforceability of ombudsman remedies and competition with judicial review' in Groves and Stuhmcke (eds) (n 46) 41, 41.

142 R Glenn, 'Keynote address' (Speech delivered at the Tax Institute 2014 Tasmanian State Convention, Launceston, 16–17 October 2014).

143 *Ombudsman Act* (n 16) s 5(1)(b). We have highlighted above a range of the Ombudsman's investigatory powers which provide considerable latitude to uncover systemic issues.

144 Ibid s 15(2)(d) and (f). The Ombudsman may also include in a report any other recommendation 'he or she thinks fit to make': s 15(3)(b).

145 See, eg, Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 238–42; Harlow and Rawlings, *Law and Administration* (n 6) 555; Rock, *Measuring Accountability* (n 19) 201–2.

relation to the Robodebt debacle,[146] the detention of asylum seekers on Christmas Island,[147] and the deportation of Australian citizens and long-term residents.[148]

A range of other mechanisms within the broader administrative justice system share the task of investigating and recommending reform of the systems of government. For example, integrity commissions often have reform-oriented functions to reduce corruption through education strategies and recommending updates to laws, practices and procedures,[149] and information commissioners may investigate and make recommendations regarding the implementation of FOI regimes.[150] Perhaps the archetypal reform mechanism is a royal commission. These inquiry bodies provide a politically convenient vehicle for change, because their high profile is offset by the fact that the government is not inevitably bound to implement final recommendations. In the context of inquiries into government maladministration, commissioners have made important recommendations for improving systems relevant to preventing and reducing Aboriginal deaths in custody,[151] the ways in which government departments roll out projects and programs,[152] government preparedness and responses to natural disasters,[153] and government debt collection in the aftermath of the Robodebt affair.[154]

While broadly effective, there are clear limits to the capacity of these reform-oriented mechanisms to achieve meaningful change. First, their ability to effectively perform their functions frequently depends on government commitment to funding and resources.[155] There are numerous examples of these types of mechanisms being undercut by inadequate funding,[156] and many members of these bodies have expressed dissatisfaction with being forced to curtail their investigative functions in light of decreased resources.[157] There are also examples of resourcing decisions which have had the effect of entirely disabling mechanisms that would otherwise have contributed to reform-oriented objectives in the

146 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System: A Report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery* (Report, April 2017).

147 Commonwealth Ombudsman, *Christmas Island Immigration Detention Facilities: Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island October 2008 to September 2010* (Report, February 2011).

148 Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter: Report under the Ombudsman Act 1976* (Report, September 2005); Commonwealth Ombudsman, *Department of Immigration and Multicultural Affairs: Administration of s 501 of the* Migration Act 1958 *as it Applies to Long-Term Residents* (Report, February 2006).

149 See, eg, *ICAC Act* (n 51) s 13(1)(e)–(j).

150 *FOI Act* (n 17) ss 69, 88; *Government Information (Information Commissioner) Act 2009* (NSW) pt 3.

151 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991).

152 *Report of the Royal Commission into the Home Insulation Program* (Final Report, 2014) 299–319.

153 *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010).

154 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023).

155 See, eg, Brogan Elliot, 'The hidden influences that limit governmental independence: controlling the Ombudsman's apparent independence' (2013) 21 *Australian Journal of Administrative Law* 27.

156 See Weeks, 'Attacks on integrity offices' (n 43) 38. A recent example is the threatened reduction of the Auditor-General's budget in the aftermath of the 'Sports Rorts' investigation: Paul Karp, 'Coalition accused of trying to avoid scrutiny after audit office budget cut', *The Guardian* (online, 8 October 2020) <https://www.theguardian.com/australia-news/2020/oct/08/coalition-accused-of-trying-to-avoid-scrutiny-after-audit-office-budget-cut>.

157 See, eg, comments in Independent Commission Against Corruption (NSW) ('NSW ICAC'), *Annual Report: 2016–17* (Report, October 2017) 25. In relation to the Commonwealth Ombudsman, see, eg, Elliot (n 155) 27.

administrative law space.[158] Second, the extent to which these types of mechanisms can achieve meaningful reform is dependent on the willingness of government to embrace and commit to recommendations that are made. There are examples of positive outcomes following reform-oriented recommendations made by these mechanisms.[159] However, in many cases, the government may directly or indirectly avoid taking steps to accept or implement recommendations made by integrity bodies. The reception of royal commission reports is a clear example of these limitations.[160] Governments often avoid a comprehensive response to royal commission recommendations by making small pre-emptive changes to avoid criticism, charging a task force with implementation without giving it the powers or resources needed to succeed, or challenging the validity of the report itself.[161] Without the backing of political commitment, administrative law mechanisms may contribute to transparency and publicity objectives[162] but may take much longer to build momentum towards meaningful reform.

From the perspective of an aggrieved individual, again there are clear differences in terms of the accessibility of these various pathways towards reform. Some can be directly driven by an applicant, either acting alone or in concert with others (eg, individual or group public interest litigation). For other mechanisms, an individual's role is less defined. An individual may be able to prompt action by making a report or complaint to relevant bodies.[163] However where an inquiry is targeted at systemic issues, aggrieved individuals are not generally offered a 'seat at the table' in the context of these reform activities beyond providing evidence or information about the issue of concern.

Conclusion

The imperatives that may motivate an applicant to engage with the administrative law system go beyond patrolling the boundaries that constrain the lawful exercise of government power, and will often extend to the pursuit of transparency, redress and, in some cases, reform. As we have demonstrated, there are a number of different directions from which an applicant might be inclined to pursue these objectives, and the best fit for particular objectives will vary from case to case. In some cases, a single mechanism might provide everything an applicant requires; for example, a person whose licence has been invalidly cancelled may achieve both

158 See, eg, the defunding of the Administrative Review Council ('ARC'): Australian Government, *Budget Measures: 2015–16* (Budget Paper No 2, 2015) 65. The ARC was established under the *AAT Act* (n 27) pt V, which was not repealed to give effect to the ARC's functional abolition. See the criticism of that approach in Ian David Francis Callinan QC AC, *Statutory Review of the Tribunals Amalgamation Act 2015* (Law Council of Australia, 2018) 25 [109]–[112].

159 For example, the NSW Parliamentary Code of Conduct was expanded to specifically cover improper influence of Members of Parliament based on recommendations made by the NSW ICAC: NSW ICAC, *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources* (October 2013) 42–3; NSW Legislative Assembly, 'Code of Conduct for Members' (adopted 5 March 2020); NSW Legislative Council, 'Members' Code of Conduct' (adopted 24 March 2020). As to policy reform undertaken in response to recommendations by the Commonwealth Ombudsman, see Commonwealth Ombudsman, 'Did they do what they said they would? Volume 2' (n 98).

160 See, eg, Patrick Dodson, '25 years on from the Royal Commission into Aboriginal Deaths in Custody recommendations' (2016) 8 *Indigenous Law Bulletin* 24.

161 S Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis, 2006) 148. See also Boughey, Rock and Weeks (n 4) 282–3.

162 See discussion under 'Transparency' above.

163 See, eg, *Ombudsman Act* (n 16) s 7; *ICAC Act* (n 51) s 10; *FOI Act* (n 17) s 70.

transparency and redress through proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in which they may obtain reasons, have their grievance aired and validated in a public forum, and be restored to their previous position when the decision is set aside. Other applicants may face more complexity within the administrative law system because of the nature of their case, the scope of their objectives, or simply because in some cases strategy and objectives may evolve over time or as further information is revealed. For these more complex cases, it may be necessary to turn to a range of different mechanisms to pursue various aspects of an applicant's goals. Regular consideration of the ways that various elements of Australia's administrative law system contribute to giving applicants the outcomes they seek is essential, if only as a means to identifying where gaps remain.

Amongst the arguments we have drawn throughout this article, we highlight two points in conclusion. First, when considering the means by which an applicant might achieve their objectives, it is often necessary to look beyond the primary or stated function of a particular administrative law mechanism. For instance, the acknowledged purpose of judicial review is to patrol the legal boundaries of public power; its jurisdictional criteria, grounds of review and remedies are all adapted to that purpose. However, from a strategic perspective, judicial review can, and does, do a number of other things. In certain cases judicial review remedies may alter the negative practical impact of an invalid decision, such as by reinstating an entitlement, or may serve as an essential foundation for a claim of relief through another legal mechanism, such as liability in tort. Judicial review may also contribute to transparency despite the absence of a common law right to reasons; the prospect of a decision being found to lack legal justification may encourage a decision-maker to justify their decision with reasons,[164] which may be further tested during the airing of the dispute in the open court forum. Finally, by establishing precedents and fostering publicity, judicial review proceedings may build momentum towards reform in matters of public concern. We do not suggest that these transparency, redress and reform functions form part of the core rationale for judicial review. However, from a strategic perspective, an applicant may well consider these secondary functions to be relevant to their choice to bring proceedings. This same consideration applies to the other mechanisms we have discussed.

Our second key argument is that, when it comes to strategic objectives, we must observe the adage that administrative law operates as a system rather than as a collection of independent mechanisms. Adopting that perspective highlights the comparative practical differences between mechanisms, including how accessible they are in terms of standing, cost, efficiency, flexibility and so on.[165] More importantly, this allows applicants to appreciate the various connections and pathways between the mechanisms of administrative law.[166] For example documents obtained pursuant to FOI regimes may be used to bolster an applicant's position in merits and judicial review proceedings; ombudsmen may utilise their recommendatory powers to facilitate an applicant's access to redress in the form of ex gratia compensation; establishing illegality in judicial review proceedings may be a first step towards redress via other legal mechanisms; and a complaint to an ombudsman about an individual grievance might prompt a royal commission inquiry that leads to systemic reform. Being alive to these differences and connections between mechanisms allows an applicant to make conscious choices about which is the most appropriate strategic pathway to take in pursuit of what they really seek from administrative law.

164 See cases cited at n 26 above.
165 See Rock, *Measuring Accountability* (n 19) ch 9.
166 For further discussion of this concept, see ibid ch 10.

Miller in Australia — just imagination or the inevitable?

*Dane Luo**

Every three years, the Australian people go to the polls. Armed with a 'democracy sausage', they choose their federal representatives. For the next few years, those representatives go to Canberra. They vote on motions. They write Bills. They ask questions to keep the government accountable. Importantly, they speak for their constituents. The people's elected representatives — all 227 in the House of Representatives and Senate combined — are at the core of the constitutional system of representative and responsible government.

But the executive has a little-known power lurking around. It is the power to 'prorogue' the Parliament.[1] This is a not a word used in common parlance or generally defined in a dictionary. But it has some significant consequences. It gives the Prime Minister the power to suspend Parliament's work. At the stroke of the Governor-General's pen, the people's representatives must stop their work. The votes cannot happen. The Bills cannot be introduced. The committees cannot sit. And the parliamentary chambers are deserted. Put simply, the people's representatives are locked out of their jobs. But down the road, the Ministers are free to exercise their powers without parliamentary accountability. This all happens until the Prime Minister decides to recall the Parliament. (Fortunately, the *Constitution* mandates that Parliament must sit again within 12 months — but, still, 12 months is a very long time.) But the worst part is — if prorogation persists for a long time, the Australian people effectively lose their voice in Parliament. Because when Ministers trigger a prorogation, Parliament cannot stand in the way of having its powers suspended.

But what about the courts? Can they stop the executive wielding this medieval power to frustrate Parliament's constitutional functions? In *R (Miller) v Prime Minister* [2020] AC 373 ('*Miller*'),[2] the Supreme Court of the United Kingdom ('UKSC') held that a prorogation is unlawful if it has the effect of frustrating the constitutional functions of the UK Parliament without reasonable justification. In light of the recent academic discussion of judicial review of non-statutory executive power,[3] it begs the question: can there be judicial review of an executive act to prorogue the Commonwealth Parliament?

This article argues an affirmative answer. This is because the ability of Parliament to perform its constitutional functions is essential to the constitutionally prescribed system of representative and responsible government. Thus, there is a constitutional implication that limits the scope of the power to prorogue the Commonwealth Parliament. This article also addresses issues relating to the jurisdiction of the courts, available remedies and standing.

* Dane Luo BComm (Hons I) LLB (Hons I) (USyd), Associate to Justice Hammerschlag, Chief Judge in Equity at the Supreme Court of New South Wales. This is an edited version of the article which was the winner of the AIAL National Administrative Law Essay Prize for 2023.

1 *Constitution* s 5.

2 [2020] AC 373, 407 [50] (Lady Hale PSC and Lord Reed DPSC for the Court) ('*Miller*').

3 See, eg, Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020).

Prorogation and *Miller*

Nature of prorogation

Prorogation is an executive act which affects the operation of Parliament.[4] It is a power exercised by the Governor-General, on the advice of the Prime Minister.[5] Traditionally, a parliamentary term was divided into sessions, which were usually annual.[6] A session was ended by prorogation, permitting a new session to commence at a later date with a Throne Speech setting out the government's agenda.[7] During the period that Parliament is prorogued, the Houses cannot meet. This means they cannot pass legislation, debate government policy or question ministers. Unless authorised by statute, parliamentary committees may not meet and take evidence.[8] Prorogation also has the effect of 'wiping clean the parliamentary slate' — it vacates all pending proceedings, including Bills that have not completed their passage, questions on notice, orders to produce documents and sessional orders.[9] At the next session, the lapsed items can be reintroduced as if their earlier progress had never happened[10] unless the Standing Orders or legislation permits them to be restored to the stage they were at before the prorogation.[11]

A prorogation is different to a dissolution of the House of Representatives. A dissolution brings a term of Parliament to an end and is followed by a general election.[12] A dissolution thus precipitates democratic accountability whilst a prorogation does not. A prorogation is also distinguishable from an adjournment of a House within a session. An adjournment

4 Bruce M Hicks, 'The Westminster approach to prorogation, dissolution and fixed date elections' (2012) 35(2) *Canadian Parliamentary Review* 20.

5 Whether prorogation is a reserve power has been the subject of debate: see Anne Twomey, 'Prorogation: can it ever be regarded as a reserve power?' (2016) 27 *Public Law Review* 144, 150; Letter from Senator George Brandis QC, Attorney-General, to Sir Peter Cosgrove, Governor-General, 21 March 2016, and attached paper 'The practice and precedents of recall of Parliament following prorogation' <https://www.gg.gov.au/sites/default/files/2019-06/documents_relating_to_prorogation_of_the_parliament_21_march_2016.pdf>.

6 See Legislative Assembly Procedures and Privileges Committee, Parliament of Western Australia, *Changes to Prorogation and Extended Sessions* (Report No 4, 2003) 2 <https://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/024D0345DACEB23548257831003E95DE/$file/Changestoprorogationandextendedsession.pdf>; Clerk of the Parliament, *Queensland Parliamentary Procedures Handbook* (Parliament of Queensland, August 2020) 13.

7 Sir David Natzler et al (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 25th ed, 2019) 163–4 [8.2]. See *Western Australia v Commonwealth* (1975) 134 CLR 201, 290 (Murphy J) ('*WA v Commonwealth*').

8 *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, 122 (Hungerford J). Whether committees can sit without statutory authorisation is the subject of controversy in Australia: see Teresa McMichael, 'Prorogation and principle: the Gentrader Inquiry, government accountability and the shutdown of Parliament' (2012) 27(1) *Australasian Parliamentary Review* 196.

9 *WA v Commonwealth* (n 7) 254 (Stephen J); see also 238–9 (Gibbs J). See also *A-G (WA) v Marquet* (2003) 217 CLR 545, 575–6 [85] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Marquet*').

10 John Hatsell, *Precedents of Proceedings in the House of Commons* (Luke Hansard and Sons, 1818) vol 2, 335–6.

11 *WA v Commonwealth* (n 7) 238–9 (Gibbs J). See, eg, Commonwealth, House of Representatives, Standing Order No 174; *Constitution Act 1934* (SA) s 57(1).

12 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 462. See *WA v Commonwealth* (n 7) 253 (Stephen J).

is effected by a motion passed by the House, not foisted upon it by the government.[13] Importantly, a degree of ministerial accountability is maintained during an adjournment because parliamentary committees continue sitting as usual, written questions may be asked on the Notice Paper and the House can recall itself if a sufficient number of Members desire.[14]

Miller

The UKSC's *Miller* decision is the first decision to find that judicial review of a prorogation is available.

Following a referendum that supported the UK leaving the European Union ('EU') in 2016, the UK Government invoked art 50 of the *Treaty on European Union* to commence the process of leaving the EU.[15] This began a two-year process for the UK Government and European Council to negotiate a withdrawal agreement that contained the terms of the UK's exit.[16] If no agreement was reached by 'exit day' (a 'no-deal Brexit'), the UK would automatically cease to be a member of the EU, with significant consequences for tariffs, trade and the Irish border.[17]

The UK Parliament asserted oversight by requiring that any withdrawal agreement must be approved by the House of Commons, noted by the House of Lords and an Act passed to implement the agreement.[18] The House of Commons rejected, on three occasions, a withdrawal agreement concluded on November 2018 and demanded changes to the agreement. The Johnson Government believed that the European Council would agree to changes to the withdrawal agreement only if there was a genuine risk of a no-deal Brexit. To show it was serious, the Government began preparing for a no-deal Brexit. However, a majority of the Commons did not support that plan.[19]

On 27 August 2019, the Prime Minister advised the Queen to prorogue Parliament from 9 September to 14 October 2019. This was an unusually long prorogation that lasted for 34 of the 52 days leading up to exit day. The prorogation had the effect of reducing the number of sitting days to only four.[20]

13 See *WA v Commonwealth* (n 7) 253 (Stephen J); Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 13.

14 See, eg, Commonwealth, Senate, Standing Order No 55.

15 *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) art 50; *European Union (Notification of Withdrawal) Act 2017* (UK). See also *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 159–60 [121]–[124] (Lord Neuberger PSC, Baroness Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge JJSC).

16 *Treaty on European Union* (n 15) art 50.

17 'Brexit: What would no deal mean?', *BBC News* (online, 13 December 2020) <https://www.bbc.com/news/uk-politics-48511379>.

18 *European Union (Withdrawal) Act 2018* (UK) s 13.

19 See Heather Stewart and Kate Proctor, 'MPs put brakes on Boris Johnson's Brexit deal with rebel amendment', *The Guardian* (online, 20 October 2019) <https://www.theguardian.com/politics/2019/oct/19/mps-put-brakes-on-boris-johnsons-brexit-deal-with-rebel-letwin-amendment>.

20 Anne Twomey, 'Brexit, the prerogative, the courts and article 9 of the Bill of Rights' (Legal Studies Research Paper Series No 19/79, University of Sydney Law School, February 2020) 4 <https://dx.doi.org/10.2139/ssrn.3503178>.

The UKSC held that the limits of the prerogative power to prorogue is determined by the common law, which must be compatible with fundamental principles of the UK constitution[21] — relevantly, parliamentary sovereignty and parliamentary accountability. First, the principle of parliamentary sovereignty is that laws enacted by the Crown-in-Parliament are the supreme form of law.[22] In practice, this principle would be undermined if the executive had an unlimited prorogation power that prevented Parliament from legislating for as long as the executive pleased.[23] Second, parliamentary accountability describes the principle that Ministers are accountable to Parliament through mechanisms such as answering questions, appearing before committees and scrutiny of delegated legislation.[24] If Parliament is prorogued for a long period, there is a risk that 'responsible government may be replaced by unaccountable government: the antithesis of the democratic model'.[25]

Balancing these two fundamental principles with the fact that Parliament does not remain permanently in session and that it is undoubtedly lawful to prorogue Parliament,[26] the UKSC expressed the following test:

> [A] decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[27]

Applying this test to the facts, the first issue was whether the Prime Minister's advice had the effect of frustrating or preventing Parliament from carrying out its constitutional functions. The Court emphatically answered 'of course it did'.[28] The prorogation was unusually long and prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks leading up to exit day. The circumstances were 'quite exceptional' because a fundamental constitutional change was due to take place and Parliament may have considered that scrutiny of government activity was more important.[29] Even if Parliament went into recess for the normal conference season, Members of Parliament would still be able to hold the government to account, but prorogation prevented that from happening.

The Court held it was impossible, on the evidence presented, to conclude that 'there was any reason — let alone a good reason — to advise Her Majesty to prorogue Parliament for five weeks'.[30] The Court considered the evidence of former Prime Minister Sir John Major that a Queen's Speech typically required four to six days of preparation.[31] The British

21 *Miller* (n 2) 404 [38] (Lady Hale PSC and Lord Reed DPSC for the Court).
22 Ibid 404–5 [41], citing *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *A-G v De Keyser's Royal Hotel* [1920] AC 508; *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513.
23 *Miller* (n 2) 405 [42] (Lady Hale PSC and Lord Reed DPSC for the Court).
24 Ibid 406 [46].
25 Ibid 406 [48].
26 Ibid 405 [45].
27 Ibid 407 [50].
28 Ibid 408 [56].
29 Ibid 407–8 [55]–[56].
30 Ibid 410 [61]. Cf Wala Al-Daraji, 'Miller 2: A political decision or a saviour of the UK constitution?' (2020) 12(3) *Amsterdam Law Forum* 1, 6.
31 *Miller* (n 2) 409 [59].

Government's evidence failed to explain why a prorogation of five weeks was needed in the circumstances. It also failed to consider what parliamentary time would be needed to approve any new withdrawal agreement, the impact of prorogation on scrutinising delegated legislation or the competing merits of going to recess and prorogation.[32]

The Court issued a declaration that the advice to the Queen was unlawful[33] and was outside the powers of the Prime Minister to give it. As Her Majesty's Order-in-Council was founded on unlawful advice, it was also unlawful. The actual prorogation was also unlawful, as if the Lords Commissioners 'walked into Parliament with a blank piece of paper'.[34] After concluding that the prorogation was not a proceeding of Parliament, and thus was not affected by parliamentary privilege,[35] the Court declared that Parliament had not been prorogued.[36]

Is a prorogation justiciable?

In *Council of Civil Service Unions v Minister for the Civil Service* ('*CCSU*'),[37] the House of Lords held that an exercise of the prerogative power to prevent public service staff at intelligence headquarters from belonging to a trade union was not immune from judicial review simply on account of the power's non-statutory source.[38] Their Lordships emphasised that it was the subject-matter of the power exercised and its nature, rather than merely its source, that rendered the power justiciable or non-justiciable. Although the High Court has not endorsed the principle that legal source alone should determine justiciability, there is obiter that aligns with *CCSU*,[39] and the principle has been well recognised in intermediate appellate courts.[40]

In *L v South Australia* it was suggested that the power to prorogue may be 'immune from judicial review'.[41] However, that case also recognised that the prerogative powers of the Crown 'exist only in so far as they are recognised by the common law' and that 'an excess of prerogative authority can be set aside by the Courts according to their proper common law limits'.[42] This reflects the dichotomy between jurisdictional and non-jurisdictional errors.[43] Jurisdictional error, which involves determining whether the exercise of power is outside

32 Ibid 409 [60].
33 Ibid 410 [62].
34 Ibid 412 [69].
35 *Bill of Rights 1689,* 1 Wm & M sess 2, c 2, art 9.
36 *Miller* (n 2) 412 [70].
37 [1985] 1 AC 374.
38 Ibid 407 (Lord Scarman), 409–10 (Lord Diplock), 417 (Lord Roskill).
39 See, eg, *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 65 [69] (McHugh, Gummow and Hayne JJ).
40 See, eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449; *Victoria v Master Builders Association (Vic)* [1995] 2 VR 121.
41 *L v South Australia* (2017) 129 SASR 180, 208 [109]–[112] (Kourakis CJ, Parker J agreeing at 236 [198], Doyle J agreeing at 236 [199]).
42 Ibid 207 [107].
43 See Justice Jayne Jagot, 'In defence of jurisdictional error' (Speech, 10th Appellate Judges Conference, Australian Judicial Institute of Administration, 21–22 April 2022) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-jagot/jagot-j-20220422>.

the limits of what is conferred, is always justiciable.[44] Thus, determining whether a limit on the power to prorogue has been breached is not, and never has been, beyond the reach of courts.[45]

The case for a *Miller*-like limit in Australia

Once it is accepted that the limits of the prorogation power are justiciable, the question becomes: are there any limits and, if so, what are those limits? This requires consideration of the constitutional text.

Method of interpretation

Section 5 of the *Constitution* provides that the Governor-General 'may … from time to time, by Proclamation or otherwise, prorogue the Parliament'. The phrase 'from time to time' displaces the common law doctrine that 'a power conferred by statute was exhausted by its first exercise'[46] but does not alter the limits of the power spelt out in the *Constitution*.[47] A court would thus turn to interpreting the word 'prorogue' to determine the limits of the power. It would likely begin by considering the meaning of that term at Federation.[48] The word 'prorogation' means putting off to another day.[49] In the Convention Debates, the power was understood to refer to the prerogative power of the British Crown to prorogue the UK Parliament.[50] As with all prerogative powers, the existence and extent of the prorogation power is determined by the common law.[51] This is unsurprising because the *Constitution* was framed in the language of the common law and should be read in that light.[52] At the same time, *Western Australia v Commonwealth*[53] and *Attorney-General (WA) v Marquet*[54] indicate

44 *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 597 [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [162] (Hayne J) ('*Aala*'); Geoffrey Airo-Farulla, 'Rationality and judicial review of administrative action' (2000) 24 *Melbourne University Law Review* 543, 551.

45 See also Jackson A Myers, 'Transatlantic perspectives on the political question doctrine' (2020) 106(4) *Virginia Law Review 1007*, 1021–5.

46 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, 445 [45] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

47 Ibid 445 [45] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

48 See *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

49 Denis O'Brien, 'Federal elections — the strange case of the two proclamations' (1993) 4(2) *Public Law Review* 81, 82.

50 *Official Report of the National Australasian Convention Debates*, Adelaide, 30 March 1897, 279–80, 908–9 (George Reid).

51 Anne Twomey, '*Miller* and the prerogative' in Mark Elliot, Jack Williams and Alison L Young (eds), *The UK Constitution after* Miller*: Brexit and Beyond* (Hart Publishing, 2018) 69, 73. In relation to the prerogative generally, see *Case of Proclamations* (n 22) 1354 (Coke LJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 223 [75], 226 [86] (Gummow, Hayne, Heydon and Crennan JJ).

52 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 99 [138] (Gageler J) ('*Plaintiff M68/2015*'); *Cheatle v The Queen* (1993) 177 CLR 541, 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

53 *WA v Commonwealth* (n 7).

54 *Marquet* (n 9).

that the term 'prorogue' must be interpreted in a manner consistent with the *Constitution* as a whole,[55] including its underlying principles and implications.[56]

Constitutional implication

The High Court has held that the constitutionally prescribed system of representative and responsible government gives rise to implications concerning political communication and voting rights.[57] It is submitted that, for the same reasons, the *Constitution* gives rise to a constitutional implication that limits the prorogation power to ensure that Parliament can fulfil its constitutional functions of legislating and holding the government to account.

The system of representative and responsible government establishes a chain of accountability[58] — the executive is 'chosen by, … answerable to, and may be removed by' the Parliament,[59] and Parliament is accountable to the people through the requirement that members of both Houses must be 'directly chosen by the people' in periodic elections.[60] As Parliament is at the centre of this chain, the system of representative and responsible government requires not just the mere existence of an elected Parliament, but the ongoing ability of Parliament to perform certain constitutional functions.

The first function is to exercise legislative power, which is conferred by s 1 of the *Constitution*.[61] It may be argued that the executive could govern through its prerogative or nationhood powers or by delegated legislation. However, the grant of prerogative and delegated legislative powers to the executive is fundamentally premised on ongoing parliamentary supervision. This is evident in Professor Dicey's description of the prerogative power as the 'residue … which at any given time is legally left in the hands of the Crown'[62] — a reference to only those historical powers that have not been 'taken away by legislation or fallen into desuetude'.[63] Where the Parliament has delegated its power to the executive,[64] supervision of subordinate legislation is maintained primarily by instruments being tabled and disallowable.[65] In other cases, parliamentary oversight is maintained by the capacity of Parliament to legislate to override any unacceptable statutory instrument.[66] Thus, the system

55 See *WA v Commonwealth* (n 7) 223–4 (Barwick CJ), 239 (Gibbs J), 255 (Stephen J), 266 (Mason J), 278 (Jacobs J), 291 (Murphy J); *Marquet* (n 9) 575–6 [85] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 585–6 [118] (Kirby J).

56 *A-G (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469, 611–2 (Higgins J), cited approvingly in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 332 (Dixon J).

57 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 (Gummow, Kirby and Crennan JJ) ('*Roach*').

58 Benjamin B Saunders, 'Responsible government, statutory authorities and the *Australian Constitution*' (2020) 48(1) *Federal Law Review* 4, 4–5.

59 David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2004) xvii.

60 *Constitution* ss 7, 24. See also *Lange* (n 57) 557–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), citing *Constitution* ss 1, 7, 8, 13, 24, 25, 28, 30.

61 See *Constitution* ss 51, 52.

62 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1961) 424.

63 Sir Frederick Pollock, 'Editorial note' in V St Clair Mackenzie, 'The royal prerogative in war-time' (1918) 34(2) *Law Quarterly Review* 152, 159.

64 See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

65 *Legislation Act 2003* (Cth) ss 38, 42.

66 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Exemption of Delegated Legislation from Parliamentary Oversight Final Report* (Report, 16 March 2021) 19 [3.1].

of representative and responsible government is postulated on Parliament being able to sit so that it can legislate with respect to matters within Parliament's legislative competence, including matters incidental to the exercise of executive power.[67]

The second function of Parliament is to hold the executive accountable. The House of Representatives can 'make or unmake' the government because Ministers may only govern if they have the confidence of the House.[68] Moreover, both Houses have unique powers that make them 'the only [forum] to test or expose ministerial administrative competence or fitness to hold office'.[69] This includes ordering the production of papers, questioning Ministers, carrying motions of censure, and punishing for contempt of a House's orders and rules.[70] In turn, convention requires that Ministers must explain their actions to Parliament, keep Parliament abreast of developments, face Parliament to answer questions and, if required, resign their ministerial office.[71] Thus, the Parliament's accountability functions are also premised on the Houses and committees being able to sit.

It is clear from the structure of the *Constitution* that both of these functions are uniquely conferred on the Parliament. Section 64 of the *Constitution*, which requires that a Minister must be a Member of Parliament,[72] facilitates ministerial accountability by ensuring that Ministers are subject to the direction and control of the Houses and are answerable to Parliament for all executive acts.[73] The constitutional system ensures that governmental powers 'belong to, and are derived from … the people of the Commonwealth'.[74] According to this principle, the people are 'sovereign'[75] and have 'the ultimate power of governmental control'.[76]

Therefore, the very essence of representative and responsible government rests on the Parliament being able to fulfil its constitutional functions of supervising the executive and legislating where it is necessary to curtail executive power.[77] But Parliament's ability to

67 *Constitution* s 51(xxxix); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 441 (Dawson, Toohey and Gaudron JJ); *Davis v Commonwealth* (1988) 166 CLR 79, 95 (Mason CJ, Deane and Gaudron JJ), 111–12 (Brennan J), 119 (Toohey J); *Brown v West* (1990) 169 CLR 195, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

68 See Peter W Hogg, 'Prorogation and the power of the Governor-General' (2010) 27 *National Journal of Constitutional Law* 193, 198; Elaine Thompson, 'The 'Washminster' mutation' (1980) 15(2) *Politics* 32, 33–4.

69 Billy M Snedden, 'Ministers in Parliament — a Speaker's eye view' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond, 1980) 76.

70 Janina Boughey and Greg Weeks, 'Government accountability as a constitutional value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 108.

71 See Judy Maddigan, 'Ministerial responsibility: reality or myth?' (2011) 26(1) *Australian Parliamentary Review* 158, 158; Luke Raffin, 'Individual ministerial responsibility during the Howard years: 1996–2007' (2008) 54(2) *Australian Journal of Politics and History* 225.

72 See also *Constitution* s 44(iv).

73 Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 5; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 464 [220] (Gummow and Hayne JJ).

74 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70, 72 (Deane and Toohey JJ) ('*Nationwide News*'); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ); *Lange* (n 57) 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

75 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ) ('*ACTV*').

76 *Nationwide News v Wills* (1992) 177 CLR 1, 71 (Deane and Toohey JJ) ('*Nationwide News*'). See also Paul Finn, 'A sovereign people, a public trust' in Paul Finn (ed), *Essays on Law and Government* (Lawbook, 1995) vol 1, ch 1.

77 Cf Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) ch 9.

exercise its constitutional functions can be seriously impeded if the executive could abuse an unlimited prorogation power. The High Court has sometimes found it helpful to postulate extreme cases.[78] An extreme prorogation could involve Ministers effectively removing themselves from parliamentary scrutiny and suspending Parliament's constitutional powers until a time the Ministers choose (subject to the limit in s 6 of the *Constitution* that there shall be a session of Parliament at least once a year, and the need to secure the passage of annual supply). In contrast, an extended adjournment by the Houses does not pose the same threat because each House retains the power to recall itself from adjournment at any time and parliamentary committees can continue to hold the executive accountable during an adjournment.[79]

The High Court has recognised a distinction between textual and structural implications from the *Constitution*.[80] As the implied constitutional limitation on the power to prorogue is a predominantly structural implication, it 'must be logically or practically necessary for the preservation of the integrity of that structure'.[81] The implied freedom of political communication is considered necessary to prevent the substantial impairment of 'the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions'.[82] In the same way, it is submitted that the ability of the Houses to sit is 'an "essential", "necessary", "indispensable", "presupposed" or "inherent" element of representative democracy'.[83] The ability of Parliament to carry out its constitutional functions of legislating and holding the executive accountable is an 'indispensable incident',[84] at the 'central conception'[85] and 'essential to the maintenance'[86] of the system of representative and responsible government. Thus, there is a constitutional implication that Parliament's ability to reasonably fulfil its functions of legislating and holding the executive to account is not frustrated.

78 Jack Maxwell, 'Extreme examples in Constitutional Law', *AUSPUBLAW* (Blog Post, 5 February 2020) <https://auspublaw.org/blog/2020/02/extreme-examples-in-constitutional-law/>. See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51, 110–11 (McHugh J).

79 Commonwealth, House of Representatives, Standing Order No 30(c); Commonwealth, Senate, Standing Order No 55(2). See also Commonwealth, *Parliamentary Debates*, Senate, 17 March 2016, 2731–3 (Penny Wong and George Brandis).

80 *Zurich Insurance Co Ltd v Koper* [2023] HCA 25 [26] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) ('*Zurich*'), citing *ACTV* (n 75) 135 (Mason CJ).

81 *ACTV* (n 75) 135 (Mason CJ), quoted in *Zurich* (n 80) [26] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). In *Zurich*, Gordon, Edelman and Steward JJ sharply disagreed with an approach of categorising constitutional implications as either 'textual' or 'structural': [42]–[43]. Their Honours believe that implications need to be 'securely based' on both text and structure: [43]–[45]. It is unclear which approach Beech-Jones J would favour. His Honour's past judgments show that attention is paid to text and structure but do not otherwise shed much light on his approach to drawing constitutional implications: see *Kassam v Hazzard* (2021) 362 FLR 113, 184 [276] (NSWSC). Even if the approach of the minority in *Zurich* is ultimately taken, the implied constitutional limitation on the right to prorogue could nonetheless be found in the same way as the text and structure of the *Constitution* gives rise to the implied freedom of political communication.

82 *Nationwide News* (n 76) 51 (Brennan J).

83 Jeremy Kirk, 'Constitutional implications from representative democracy' (1995) 23(1) *Federal Law Review* 37, 40, 44. See also *Burns v Corbett* (2018) 265 CLR 304, 355 [94], 356 [96] (Gageler J), 383 [175], 388–9 [188] (Gordon J), 392–3 [205] (Edelman J).

84 See *Lange* (n 57) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

85 *Roach* (n 57) 198 [80] (Gummow, Kirby and Crennan JJ).

86 *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ).

On one view, the constitutional implication operates as a direct limitation on the exercise of the prorogation power under s 5 in the same way that the implied freedom of political communication is a limit on legislative and executive power.[87] On another view, if the term 'prorogue' in s 5 is given its common law meaning,[88] the common law must be interpreted in a manner consistent with the *Constitution*, including implications derived from it.[89] On either view, the power to prorogue is subject to a constitutional limit and a purported prorogation which exceeds that limit is a justiciable matter that can be susceptible to judicial review.

Judicial review of a prorogation

Jurisdiction and the proper defendant

A challenge to a purported prorogation could be brought in the original jurisdiction of the High Court to deal with a matter 'arising under or involving the interpretation of the Constitution'.[90] The High Court recognised jurisdictional error as an entrenched minimum in its original jurisdiction to issue 'constitutional writs' of mandamus or prohibition, or an injunction, against officers of the Commonwealth.[91] This jurisdiction is shared with the Federal Court.[92]

Since *FAI Insurances Ltd v Winneke*,[93] the fact that the power to prorogue is conferred on the Governor-General is not decisive in precluding judicial review or prerogative relief against decisions taken on advice of Ministers. Indeed, the High Court has, on at least three occasions,[94] reviewed executive actions pursuant to or for the purpose of the exercise of a statutory discretion conferred on a Vice-Regal Officer. Whilst it has been regarded as 'settled' that prerogative relief is unavailable against a Vice-Regal Officer,[95] it has been accepted that a remedy can be sought against the Attorney-General[96] or the Minister responsible for tendering the advice to the Vice-Regal Officer.[97] In the case of a prorogation, this would

87 *Lange* (n 57) 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

88 *Brewery Employees' Union* (n 52) 531 (O'Connor J). See also *Plaintiff M68/2015* (n 52) 99 [138] (Gageler J); *Cheatle* (n 52) 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 141–2 (Brennan J).

89 *Lange* (n 57) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Kathleen Foley, 'The Australian Constitution's influence on the common law' (2003) 31 *Federal Law Review* 131, 131 n 4. See also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 269–70; Adrienne Stone, 'Rights, personal rights and freedoms' (2001) 25 *Melbourne University Law Review* 374, 406.

90 *Constitution* s 76(i); *Judiciary Act 1903* (Cth) s 30(a).

91 *Constitution* s 75(v); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

92 *Judiciary Act 1903* (Cth) s 39B(1).

93 (1982) 151 CLR 342 ('*Winneke*'). See Mark Leeming, 'Judicial review of vice-regal decisions: *South Australia v O'Shea*, its precursors and its progeny' (2015) 36 *Adelaide Law Review* 1, 11.

94 *Winneke* (n 93); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 ('*R v Toohey*'); *South Australia v O'Shea* (1987) 163 CLR 378.

95 *R v Governor (SA)* (1907) 4 CLR 1497, 1512 (Barton J) (mandamus). See *Horwitz v Connor* (1908) 6 CLR 38 (mandamus); *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222, 241 (Barwick CJ) (certiorari) ('*Banks*'); *R v Toohey* (n 94) 186 (Gibbs CJ); *Winneke* (n 93) 386 (Aickin J) (mandamus).

96 *Winneke* (n 93) 351 (Gibbs CJ), 372 (Mason J), 404 (Wilson J), 419–20 (Brennan J).

97 Ibid 387 (Aickin J); *Stewart v Ronalds* (2009) 76 NSWLR 99, 113 [47] (Allsop P). For example, the writ of mandamus was made to the Aboriginal Land Commissioner for the impugned regulation made by the Administrator: *R v Toohey* (n 94).

be the Prime Minister. It is not necessary for the Governor-General to be a party, even in relation to claims that a proclamation is invalid.[98]

Available remedies

Prerogative writs

A party seeking to invalidate a proclamation purporting to prorogue Parliament may seek that the instrument be quashed by a writ of certiorari. That is what occurred in *Miller* when the UKSC quashed the Order-in-Council because it was founded on unlawful advice.[99] It is unclear whether an Australian court would do the same. Historically, it was said that an Order-in-Council or proclamation cannot be quashed on certiorari[100] because there would be an incongruity in the monarch quashing their own act.[101] This justification has largely been eroded by High Court decisions that express its separation from the Crown and the need to modify English assumptions of Crown immunity because of the Court's original jurisdiction under ss 75(iii) and (v).[102] Nevertheless, Australian courts continue to 'avoid' the use of certiorari for Orders-in-Council and proclamations because they are not necessary when declaratory relief is available.[103] Therefore, it is unlikely that certiorari would be available if a declaration that the proclamation proroguing Parliament is invalid would suffice to address the issue.

Declaratory relief

In *Miller*, the UKSC made two declarations: first, that the Prime Minister's advice was unlawful; and second, that Parliament had not been prorogued.[104] However, Australian courts have stated that the conclusion that certiorari does not lie generally requires the further conclusion that no declaration should be made.[105] Thus, attention must be directed to why an Australian court, confronted with a purported prorogation exceeding the limits of a power, should make declaratory relief.

98 *Cormack v Cope* (1974) 131 CLR 432, 449 (Barwick CJ) ('*Cormack*').
99 *Miller* (n 2) 412 [69].
100 *Riverina Transport Pty Ltd v State of Victoria* (1937) 57 CLR 327, 342–3 (Latham CJ); *Ex parte McWilliam* (1947) 47 SR (NSW) 401, 405–6.
101 *R v Powell* (1841) 1 QB 352, 361 (Lord Denman CJ), cited with approval in *M v Home Office* [1994] 1 AC 377, 415 (Lord Woolf). But see *R (Page) v Lord President of the Privy Council* [1993] AC 682 where the House of Lords accepted that certiorari could lie against the Queen as visitor to a university.
102 See *Aala* (n 44).
103 See, eg, *Certain Children v Minister for Families and Children* (2016) 51 VR 473, 552 [300]–[301] (Garde J); *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 606 [579] (Dixon J).
104 *Miller* (n 2) 410 [62], 412 [70] (Lady Hale PSC and Lord Reed DPSC for the Court).
105 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [101] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Plaintiff M61/2010E*').

First, the formal requirements for making a declaration would likely be met.[106] The relief is directed to determining a legal controversy[107] and a declaratory order will have foreseeable and practical consequences in determining whether Parliament is prorogued.[108] Even after a purported prorogation has concluded, it is arguable that a declaration can still have consequences for informing whether the parliamentary slate has been wiped.

Second, equity acts on the footing of the inadequacy and technicalities of the prerogative remedies to 'vindicate the public interest in the maintenance of due administration'.[109] Thus, the inability to issue prerogative writs to the Governor-General 'does not deny that the proceedings of the [Vice-Regal Officer] in Council in performance of a statutory function may be void and in an appropriate case be so declared'.[110] Indeed, declarations as to the invalidity of a proclamation are commonly sought and made in Australia.[111]

Third, there is considerable public interest in the observance of the limits of a power and the importance in upholding fundamental constitutional principles.[112] When purely declaratory relief is sought, ordinary principles of judicial review remain applicable and a court would still need to consider whether the decision or advice to prorogue Parliament is attended by jurisdictional error.[113] Thus, notwithstanding the unavailability of certiorari, a court may be able to issue a declaration that reflects the final outcome of the case with certainty and precision.[114] This can include declaring that the advice to prorogue was unlawful and the prorogation proclamation is invalid, and that both are void and of no effect. Consistent with the principle that a decision that involves jurisdictional error is no decision at all,[115] a court would also be able to declare, like the Court did in *Miller*,[116] that Parliament has not been prorogued.

106 See *Plaintiff M68/2015* (n 52) 66 [23] (French CJ, Kiefel and Nettle JJ), 76 [64] (Bell J), 90 [112] (Gageler J), 123 [235] (Keane J), 152 [350] (Gordon J).

107 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355–6 [46]–[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

108 Cf *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69 (Mason J, Jacobs J agreeing at 69, Murphy J agreeing at 69), 71 (Aickin J) (High Court). See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 391 [233] (Kiefel and Keane JJ).

109 *Bateman's Bay Local Aboriginal Land Council v Australian Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 257 [25] (Gaudron, Gummow and Kirby JJ) ('*Bateman's Bay*'), cited in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 144 [19] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also Sir Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 *Law Quarterly Review* 238.

110 *Banks* (n 95) 241–2 (Barwick CJ), cited in *R v Toohey* (n 94) 224–5 (Mason J), 261 (Aickin J). For declaratory relief in the public law context generally, see *Bateman's Bay* (n 109) 257–8 [24]–[27] (Gaudron, Gummow and Kirby JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 551 [104] (Gaudron J).

111 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (declaring that certain proclamations were invalid to the extent they effected acquisitions other than on just terms); *Read v South Australia* (1987) 49 SASR 174 (declaring that a proclamation is invalid); *Cormack* (n 98) (seeking declaration that the Governor-General's proclamation is invalid, void and of no effect).

112 See *Plaintiff M61/2010E* (n 105) 359–60 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

113 *Buttrose v A-G (NSW)* (2015) 324 ALR 562, 566 [15]–[16] (Beazley P and Leeming JA).

114 *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308, 333 [89] (Besanko and Gordon JJ, Moore J agreeing at 322 [35]).

115 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–6 [51]–[53] (Gaudron and Gummow JJ). Cf *Calvin v Carr* [1980] AC 574, 589–90 (Lord Wilberforce for the Court) (Privy Council).

116 *Miller* (n 2) 410 [62], 412 [70] (Lady Hale PSC and Lord Reed DPSC for the Court).

Statutory orders

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') does not apply to a 'decision by the Governor-General',[117] which appears to exclude prorogation. There was previously conflicting Federal Court authority as to whether a Minister's advice to the Executive Council can be distinguished from the Council and Governor-General so as to enable review.[118] However, since *Australian Broadcasting Tribunal v Bond*, only 'final and operative' decisions and procedural conduct can be reviewed under the *ADJR Act*.[119] As the Prime Minister's advice to the Governor-General to prorogue Parliament is neither final nor operative, and amounts to conduct that is substantive, not procedural, in character,[120] it is unlikely to be reviewable under the *ADJR Act*.

Standing

To obtain declaratory relief, a plaintiff must have a 'real', 'special' or 'sufficient' interest in raising the questions to which the declaration would go.[121] An interest is material if the person is likely to gain some advantage or suffer some disadvantage[122] greater than that of the public at large.[123] The rule is flexible and will depend on the nature and subject-matter.[124] First, there is a public interest in the observance by the executive of the limitations of its power,[125] particularly as they relate to the control of Parliament. Thus, the test for standing should be construed as an 'enabling, not restrictive, procedural stipulation'.[126] Second, in the context where it is 'somewhat visionary' to rely on the Attorney-General's fiat,[127] courts must be mindful to not create what in practice would be an 'unbridled discretion'[128] or 'islands of power immune from supervision and restraint'.[129]

117 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies'). See Matthew Groves, 'Should we follow the gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 751.

118 Two decisions regard the advice as a decision in its own right: *Steiner v A-G (Cth)* (1983) 52 ALR 148; *A-G (NT) v Minister for Aboriginal Affairs* (1987) 16 FCR 267. Two decisions regard the advice as part of the Governor-General's decision: *Thongchua v A-G (Cth)* (1986) 11 FCR 187; *Squires v A-G (Cth)* (1986) 12 FCR 84.

119 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337, 341–2 (Mason CJ).

120 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 68 n 311.

121 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437–8 (Gibbs J); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 399 ALR 214, 224 [32]–[33] (Kiefel CJ, Keane and Gordon JJ) ('*Hobart International*'); *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558–9 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ) ('*SDA v Minister*').

122 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J) ('*ACF v Commonwealth*'), cited in *Hobart International* (n 121) 233 [65] (Gageler and Gleeson JJ).

123 *Kuczborski v Queensland* (2014) 254 CLR 51, 106–7 [175]–[178] (Crennan, Kiefel, Gageler and Keane JJ), 131 [278] (Bell J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J).

124 *SDA v Minister* (n 121) 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) 626 [19-175].

125 *Bateman's Bay* (n 109) 267 [50] (Gaudron, Gummow and Kirby JJ).

126 Ibid.

127 Ibid 262 [38]. This is particularly so if the Attorney-General is the defendant: see *Winneke* (n 93).

128 *Wotton v Queensland* (2012) 246 CLR 1, 10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

129 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Parliamentarians

Two Justices in *Combet v Commonwealth*[130] recognised that a member of Parliament had standing to challenge expenditure because their status is recognised in the *Constitution*[131] and they have a 'particular interest in ensuring obedience by the Executive Government to the requirements prescribed by the *Constitution* and the laws'.[132] In the context of a prorogation, the interest of parliamentarians is greater than that of the general public because parliamentarians would suffer a disadvantage from the inference of a prorogation with their constitutional functions and privileges to participate in decisions of Parliament and scrutiny of the executive. Thus, it is likely that parliamentarians have a sufficient material interest to challenge a purported prorogation.

Electors, advocacy groups and political parties

The standing of electors, advocacy groups and political parties is, however, less clear and will largely depend on the circumstances of their challenge. On one view, it is unlikely that such persons would gain some advantage or suffer some disadvantage greater than the general public from a prorogation. A mere intellectual or emotional concern is not sufficient to establish standing.[133] On another view, the trajectory of the courts has been to liberalise standing requirements.[134] Justice Kirby held that there is an 'additional interest' in members of the public ensuring compliance of the executive with the law.[135] Given the significance of Houses being representative of 'the people'[136] and the effect of a prorogation is to stop the functioning of the Houses, courts may be willing to grant standing to a wider range of people.

Conclusion

A former Clerk of the Senate, James Odgers, said in 1991 that 'if the practice of prorogation … is to continue, let its interference with the work of Parliament be minimal and not more than the Houses of Parliament may determine'.[137] Odgers was concerned with the possibility that the executive could abuse the power to frustrate the important accountability functions of the Senate. His remarks were nearly two decades before *Miller* at a time when administrative law was not as well-developed and it seemed that there were only political constraints on the prorogation power.

130 (2005) 224 CLR 494 ('*Combet*').
131 *Constitution* ss 24, 26, 27, 29–39, 41.
132 *Combet* (n 130) 556–7 [97] (McHugh J), 620 [308] (Kirby J). But see *Perrett v A-G (Cth)* (2015) 232 FCR 467, 485 [38]–[39] (Dowsett J); *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (1996) 70 FCR 212, 226 (Drummond J).
133 *ACF v Commonwealth* (n 122) 530 (Gibbs J), 539 (Stephen J), 548 (Mason J).
134 Matthew Groves, 'The evolution and reform of standing in Australian administrative law' (2016) 44 *Federal Law Review* 167; Henry Kha, 'Faith in the courts: the aggrieved faithful seeking standing in Australia' (2014) 26(1) *Bond Law Review* 148.
135 *Combet* (n 130) 620 [306] (Kirby J). See also *Walton v Scottish Ministers* [2013] PTSR 51, 76 [94] (Lord Reed JSC, Lord Carnwath JSC agreeing at 77 [102], Lord Kerr and Lord Dyson JJSC agreeing at 90 [157]).
136 *Constitution* ss 7, 24.
137 James Odgers, *Odgers' Australian Senate Practice* (Royal Australian Institute of Public Administration, 6th ed, 1991) 974.

This article has argued that there may also be legal checks and balances. It is submitted that there is a *Miller*-like limit on the prorogation power in the *Constitution* that is justiciable in the High Court or the Federal Court. The Prime Minister would exceed their powers if they purported to prorogue the Parliament in a manner that conflicted with the constitutional implication that Parliament's ability to reasonably fulfil its functions of legislating and holding the executive to account is not frustrated. It is argued that parliamentarians, particularly members of the Opposition or the crossbench, would likely be able to obtain declaratory relief where a purported prorogation exceeds those constitutional limits. Thus, it is argued that the combination of legal and political checks and balances can ensure that gross misuses can be thwarted but prorogation for legitimate purposes remains unaffected.[138]

138 Thomas G Fleming and Petra Schleiter, 'Prorogation: comparative context and scope for reform' (2021) 74(4) *Parliamentary Affairs* 964, 974–5. See generally Peter Aucoin, Mark D Jarvis and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Emond Montgomery Publications, 2011).

She will not be alright — the need for greater protection of integrity institutions

*Alice Tilleard**

> '[T]he ongoing health and effectiveness of the integrity branch should not be taken for granted.'[1]

On Christmas Eve in 2019 the former Deputy Prime Minister expressed, in an infamous Twitter video, that he was 'sick of the government being in [his] life'.[2] Getting the government out of one's life is not particularly viable in our modern administrative state where laws, regulations and administrative processes govern much of our lives. Re-ascending to second in command of the Australian Government is not a viable option for most Australians aggrieved of government action. Australians most vulnerable to suffering from government actions (due to their reliance on them for their livelihoods) are often those without financial, political, and social power. Thus, it is vital that Australians have accessible means of recourse which provide them with effective remedies, limit the occurrence of grievances and provide government accountability — broadly, 'administrative justice'.

Providing remedies and government accountability are no longer solely (or even primarily) administered by the judicial branch. This article first considers this context, exploring the profound change that has occurred from the original separation of powers before then defining the 'integrity branch'. The next two parts explain the insufficiency of the judiciary in providing adequate remedies and government accountability in modern Australia and how integrity institutions are fulfilling this role, and express concerns arising from the current position of integrity institutions. The article builds on the previous parts by arguing that justifications for judicial independence are analogously applicable (to an extent) to integrity institutions. The final part considers how this protection could be ensured, exploring first the constitutional enshrinement of a fourth branch of government and then ensured funding for integrity institutions, and also addresses concerns about granting greater protections.

The article concludes that the current separation of powers does not accurately reflect how an accountable government is (at least somewhat) achieved and remedies are granted to those aggrieved in Australia's modern administrative state. Instead, integrity institutions have a vital role in affording accessible remedies and creating accountability, and so require greater protection, analogous to judicial independence.

* Alice Tilleard is the Associate to a Judge of the Federal Court. This paper was written while the author was studying at the Australian National University and presented at the 2022 AIAL National Administrative Law Conference.

1 Alexander Jonathan Brown, 'The integrity branch: a "system", an "industry", or a sensible emerging fourth arm of government?' in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 325 ('The integrity branch').

2 Barnaby Joyce, *Twitter* (24 December 2019) <https://twitter.com/Barnaby_Joyce/status/1209372444726743046>.

Context

Changes to the separation of powers and government accountability

The separation of powers doctrine underpinning Australia's system of government holds that the legislature creates the laws, the executive implements them, and the judiciary interprets and applies them, ensuring that the other two branches exercise their power within the law. According to Sir Gerard Brennan, judicial independence 'exists to serve and protect not the governors but the governed', and it is 'of such public importance' because 'a free society exists only so long as it is governed by the rule of law … administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought'.[3] Thus, it appears that the judiciary is the body which holds the government to account by ensuring its actions are within the law and providing those it wrongs with effective recourse. And until the 1970s it seems this was largely correct: 'we relied principally on the courts, buttressed by the doctrine of the separation of powers, to be the independent scrutiny forum that was accessible to individuals'.[4]

However, this no longer accurately reflects reality. As McMillan has stated: 'The task of resolving people's disputes with government, and in the process holding the executive government to account, is now extensively discharged by independent bodies other than courts.'[5] McMillan and Carnell have described this as a '*profound*' change to the nature of government, despite what has become our familiarity with 'this model of independent review'.[6] Justice Brennan, writing about Dicey's system of representative and responsible government, stated that 'the courts were to be independent of the other branches of government … [and] there is no doubt but that responsible government was the form of government intended by the framers of the Constitution'.[7] However, he acknowledged that responsible government had been 'turned on its head by the political dependence of the majority of members of the Parliament on the Executive Government'.[8]

Thus there have been changes in how the government is held to account: the judiciary is no longer the primary institution and the executive now has great power over the Parliament (likely resulting in reduced parliamentary scrutiny of the government). These changes affect the non-judicial independent (to varying degrees) bodies that now primarily perform the function of holding governments accountable and assisting those aggrieved, called here the 'integrity institutions'.

3 Gerard Brennan, 'Judicial independence' (Speech, Australian Judicial Conference, Australian National University, 2 November 1996).
4 John McMillan, 'Commonwealth oversight arrangements — re-thinking the separation of powers' (2014) 29(1) *Australasian Parliamentary Review* 32, 32 ('Commonwealth oversight arrangements').
5 Ibid 34.
6 John McMillan and Ian Carnell, 'Administrative law evolution: independent complaint and review agencies' (2010) 59 *Admin Review* 42, 43.
7 Gerard Brennan, 'Courts, democracy and the law' (1991) 65(2) *Australian Law Journal* 32, 33–4.
8 Ibid 34–5.

What are 'integrity institutions'?

The Western Australian Integrity Coordinating Group[9] defines integrity as 'earning and sustaining public trust by serving the public interest; using powers responsibly; acting with honesty and transparency; and preventing and addressing improper conduct'.[10] The scope within these institutions is even broader than this. As Field[11] has noted, 'honest but simply inadequate administrative practice … are not matters that necessarily lack integrity' yet he acknowledged they 'may require investigation and remedy'.[12] Institutions such as ombudsmen and Auditors-General deal with these issues and can be properly conceptualised as part of an integrity branch even if they 'sometimes deal with matters not properly cast as lacking in integrity'.[13] This article views integrity institutions' role broadly, namely to ensure effective recourse for individuals who are aggrieved by government action (whether due to corruption, irresponsible administration or a simple misunderstanding) and to be involved in institutional development to improve decision-making — stopping such issues arising, as the best and most accessible remedy is to not require one at all. Such institutions include:

> Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissions, public service standards commissioners, and inspectors-general of taxation, security intelligence and military discipline.[14]

Further, as Brown highlighted, these institutions ensure government powers are exercised

> for the purposes of which they were conferred, and in the manner expected of them, consistent with both legal and wider precepts of integrity and accountability which are increasingly recognised as fundamental to good governance in modern liberal democracies.[15]

This expectancy of wider considerations of integrity forming good governance emphasises the importance of integrity institutions' role in ensuring our modern democracy. More is expected than strict legality.

9 The Western Australian Integrity Coordinating Group is an informal collaboration of the state's Corruption and Crime Commission, Public Sector Commissioner, Auditor General, Ombudsman and Information Commissioner.

10 Chris Field, 'The fourth branch of government: the evolution of integrity agencies and enhanced government accountability' (2013) 72 *AIAL Forum* 24, 25.

11 Chris Field is currently the Western Australian Ombudsman and President of the International Ombudsman Institute.

12 See, eg, Field (n 10) 25.

13 Ibid.

14 Greg Weeks, 'Attacks on integrity offices: a separation of powers riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25 ('Attacks on integrity offices').

15 Brown, 'The integrity branch' (n 1) 302.

Insufficiency of judicial review and fulfilling by integrity institutions

Judicial processes do not provide adequate assistance for those aggrieved

Most processes of holding the government to account occur outside of the judiciary.[16] It is an entirely uncontroversial statement that judicial review of government action does not provide effective recourse for most people. The remedies issued rarely 'fix' the problem, instead ordering a decision to be remade forcing someone back through government processes. The extensive time and costs involved also place judicial review outside the realistic reach of most people aggrieved by government action. There are 'continuing increases in the cost of legal services and continuing comparative lack of legal aid support for administrative matters'.[17] The failure of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to simplify judicial review has caused it to become largely irrelevant, rather than providing a more accessible route for judicial review. Additionally, with the proliferation of outsourcing of government services and the seemingly restrictive definition of 'officer of the Commonwealth' under s 75(v) of the *Constitution*, it is likely judicial review will become more inadequate in providing remedies and accountability.

The courts undoubtedly sit as an important and constitutionally enshrined backstop to enforce the rule of law. The entrenchment of review of government officials under s 75(v) has been heralded as guaranteeing the rule of law in Australia as it ensures the right to a hearing is not stymied by arbitrary decisions.[18] But practically the rule of law, effective remedies and government accountability are generated through other means — the integrity institutions. Judicial review is a 'remedial process of last resort'.[19]

The courts have themselves admitted that it is not their role to ensure administrative justice or 'good governance'. Justice Brennan's seminal statement in *Attorney-General (NSW) v Quin* declared:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law … If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.[20]

Thus, as administrative justice has become expected as part of good governance, there is clearly a gap left by the judiciary.[21] Further, as Brennan also stated, the 'adversary system [is not] ideally suited to the doing of administrative justice'.[22] Due to the prevalence of government involvement in people's lives, it is vital that some institution has this purpose of securing administrative justice. It is clearly not the courts.

16 McMillan, 'Commonwealth oversight arrangements' (n 4) 34.
17 Alexander Jonathan Brown, 'Putting administrative law back into integrity and putting the integrity back into administrative law' (2007) 53 *AIAL Forum* 32, 47 ('Integrity and administrative law').
18 See, eg, former High Court Justice Mary Gaudron quoted in Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 387.
19 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) 7.
20 (1990) 170 CLR 1, 35–6 ('*Quin*').
21 See, eg, Brown, 'The integrity branch' (n 1) 302.
22 *Quin* (n 20) 37.

This is particularly so considering that Australian courts have refused to venture into considerations of 'fairness' or merits, unlike courts in other countries. For example, the courts in the United Kingdom consider abuse of power,[23] which was rejected by the High Court of Australia.[24] And Canada has held it unreasonable for a Minister to change their decision in some circumstances as their power has already been spent.[25] Australia remains reluctant to hold government to account in this way. This narrow approach may be appropriate due to the existence of tribunals and other integrity institutions; however, it emphasises that there is a large area of administrative justice which Australian courts refuse to touch but which greatly impacts people's lives.

Integrity institutions — the providers of administrative justice

Beyond the reluctance of the courts to extend their scope, integrity institutions are also providing something new. There are now not just the three governmental powers to make, execute and adjudicate disputes but also a fourth — the 'power to ensure integrity in the manner that laws are made, executed and adjudicated upon'.[26] Considering the expansiveness of the modern administrative state, 'citizens have come to expect more of government, and perhaps place greater reliance on government and in turn, integrity agencies'.[27] The courts are not meeting this expectation. There is a gap and the filling of it is desirable to ensure governments act with integrity and not just within the law.

What is clear is that '[a]dministrative justice is the work of many hands' and emphasising the role of the judiciary fails to acknowledge that 'modern administration which is characterised by openness and fair process is substantially the work of the other branches of government'.[28] For example, the ombudsmen alone play a very significant role, handling just under 38,000 complaints during the 2019/20 reporting year.[29] And they have a great level of influence 'simply because ombudsmen are well respected and have significant moral authority'.[30] A case study into the Commonwealth Ombudsman's involvement in immigration cases highlighted the 'need for bodies to watch over administrative decision-makers' and 'reinforce[d] the importance of such oversight bodies in improving the systemic defects and recommending change to minimise recurrence of such events'.[31]

The Chief Justice of Victoria claimed that

> when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads … when a State or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.[32]

23 See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
25 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 (CanLII).
26 Brown, 'The integrity branch' (n 1) 320.
27 Field (n 10) 26.
28 Sian Elias, 'National lecture on administrative law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 5.
29 Commonwealth Ombudsman, *Annual Report 2019–20* (Report, October 2020) pt 7 (Appendices).
30 Weeks, 'Attacks on integrity offices' (n 14) 33.
31 Anita Stuhmcke and Anne Tran, 'The Commonwealth Ombudsman: an integrity branch of government?' (2007) 32(4) *Alternative Law Journal* 233, 236.
32 McMillan, 'Commonwealth oversight arrangements' (n 4) 36.

This exaggerates the role of the judiciary in people's lives. Although the judiciary can play this independent role, it seems that in most of these situations — apart from being in custody — many people would likely not even go to a lawyer.[33] 'The more likely scenario is that an aggrieved person will seek assistance from a website or a complaint handling unit or Ombudsman.'[34] 'There is a tendency in some quarters to go further and assume either that the judiciary alone plays that role or that no other agency can be as effective in doing so'.[35] For example, 'If the courts do not control these excesses, nobody will.'[36] Yet integrity institutions in fact play a major if not predominant role in ensuring remedies for those aggrieved. These judicial statements also highlight how judges tend to emphasise the importance of the judiciary. While they have great experience, they also have a vested interest in the continued elevation of the judicial branch and do not interact with the majority of people aggrieved. Similarly, those who have dedicated their professional lives to integrity agencies also have 'skin in the game'. The views in this area almost exclusively come from these two groups, which both appear skewed according to profession. Being conscious of this I argue that an independent judiciary acts as a vital backstop to ensure remedies and the rule of law, whilst integrity institutions provide most practical assistance to those aggrieved of government decisions through accessible remedies and ensuring administrative accountability.

Concerns regarding the integrity branch's position

Prima facie there is something odd about integrity institutions being nested within the executive, the body it is primarily trying to hold accountable. There are a wide range of bodies which fall under the executive branch, from which integrity institutions maintain degrees of independence. Thus it may just be a 'technical, constitutional truth' to say they are part of the executive.[37] However, there is still a precariousness to the current placement of the integrity branch: integrity institutions are created and funded by the Parliament (which as noted is largely controlled by the executive), thus the executive branch's attitude to an integrity body impacts its security.

It is important to note the success of many integrity institutions. Government bodies take the work of agencies seriously and accept many of their recommendations.[38] As such, it is likely that older institutions which have become entrenched in government processes and even taken a place in the public consciousness (such as the Commonwealth Ombudsman, the Australian National Audit Office and the Administrative Appeals Tribunal ('AAT')) could not be quietly defunded or disbanded. Weeks asserts that '[t]he significance of the Ombudsman, in terms of the rule of law, is that after more than 40 years, to abolish it would cause an outcry'.[39] However, there is still concern that these bodies may be restrained from reaching their full accountability capacity. Moreover, newer bodies that are not viewed as vital are more at risk. Yet, new institutions or at least new powers for existing institutions are likely necessary in the evolving modern world where government continues to play a large role in people's lives and uses new technologies such as automated decision-making.

33 Ibid.
34 Ibid.
35 John McMillan, 'Re-thinking the separation of powers' (2010) 38(3) *Federal Law Review* 423.
36 *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, 322 (Thomas J).
37 Weeks, 'Attacks on integrity offices' (n 14) 25.
38 See, eg, Field (n 10) 29.
39 Weeks, 'Attacks on integrity offices' (n 14) 43.

The downfall of the Administrative Review Council ('ARC') and the temporary defunding of the Office of the Australian Information Commissioner ('OAIC') provide reasons to feel uneasy about the security of other integrity institutions. The then government considered that 'their functions could easily be replicated elsewhere'.[40] The role of the ARC was moved to the Attorney General's Department ('AGD'), which led to the 'curious' (and concerning) result that 'public servants (in the AGD) would have the role of overseeing the AAT, whose purpose and role is to review the decisions of public servants'.[41] This outcome raises concerns that the executive may further bring integrity institutions within its remit rather than ensuring their independence so they can effectively perform their functions.

In 2007 (before the defunding of the ARC and the OAIC), following the National Integrity System Assessment, it was concluded that we were 'travelling a road of gradual curtailment of the effective legal capacity of citizens to challenge government actions that affect them personally or conflict with valid conceptions of the public interest'.[42] The government was attacking integrity institutions as a 'grievance industry' rather than seeing them as a vital aspect of ensuring remedies and improving administration.[43] Another indicator of government disregard for integrity institutions is its response to former High Court Justice Ian Callinan's 2018 review of the amalgamation of the AAT[44] which was not tabled in Parliament until eight months after it was completed. As of late 2022, the Australian Government was *still* yet to formally respond to the report.[45] Further, in a politically sensitive area like migration, the Government has denied any statutory judicial review and the AAT cannot review migration decisions made personally by a Minister.[46] Although these positions have policy justifications, it is apparent that in politically controversial areas governments are willing to remove review mechanisms and thus the ability for those aggrieved to access remedies. The promise of a federal anti-corruption commission was not acted upon for more than a full term of government.[47] All of these instances illustrate a lack of desire for creating and maintaining integrity institutions, and a lack of appreciation of the vital role they play in ensuring administrative justice in Australia's modern administrative state.

Thus, despite much of integrity institutions' work being taken seriously, there is well-founded concern that they are not protected from a government that is ambivalent about or hostile to their role. Considering integrity institutions' expansive role in ensuring effective remedies and accountability, this is concerning and results in a need for greater protection.

40 Ibid 42.

41 Ian Callinan, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Statutory Review, 23 July 2019) 20.

42 Brown, 'Integrity and administrative law' (n 17) 48.

43 Ibid.

44 Callinan (n 41).

45 Department of Parliamentary Services (Cth), 'Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021', *Bills Digest* (Digest No 12 of 2021–22, 19 August 2021) 5–6.

46 'Migration and refugee: can we help?', *Administrative Appeals Tribunal* (Web Page) <https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/can-we-help>.

47 Christopher Knaus, ' "Massive policy failure": retired judges blast Morrison's broken promise on federal ICAC', *The Guardian* (online, 15 April 2022) <https://www.theguardian.com/australia-news/2022/apr/15/massive-policy-failure-retired-judges-blast-morrisons-broken-promise-on-federal-icac>.

Greater protection justifiable as analogous to judicial independence

This greater protection can be justified analogously to judicial independence, due to the role integrity institutions now play. Former High Court Justice Mary Gaudron described 'the Court as being the chief dispute mechanism of society — the glue that keep society together and enables society to work harmoniously'.[48] However, while the courts are still the chief dispute mechanisms, this article argues that the 'glue' holding society together is now better attributed to our integrity institutions due to their ease of access, prevalence of decisions and ability to run their own investigations. They 'perform a major role in reviewing and scrutinising government decision-making, cementing public law values in government processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved'.[49] Thus, integrity institutions are now performing a function — broadly, of providing 'administrative justice' — which means their protection can be justified via analogy to the judiciary (although not to the same extent).

Additionally to the discussion above regarding the inaccessibility of judicial remedies, courts are becoming even more costly as a result of increasing fees for court filing, reflecting 'a clear government policy to discourage people from using conventional and formal legal processes to resolve disputes'.[50] Indeed, '[g]overnment has strongly promoted alternative dispute resolution', requiring parties to 'have taken genuine steps to resolve the matter before commencing litigation'.[51] This points towards both the courts being less accessible to people and the government relying on other processes, making it appropriate for the justification of integrity institutions' protection to be made via analogy with the judiciary. If integrity institutions are not better protected there is the distinct possibility that Australians will be left without readily accessible courts and that integrity institutions can be removed by the government of the day (which is in substance the executive considering that responsible government has been 'turned on its head' due to the executive's control of Parliament, as mentioned above).[52] This is deeply concerning.

Three is not plenty — protection is justifiable

Some advocates for protection of integrity institutions have proposed creating a fourth branch of government to place and protect these institutions.[53] Justice Gageler wrote a paper entitled 'Three is plenty' which argued that a fourth branch is not needed. However, his arguments can be examined to illustrate that the administrative justice supplied by integrity institutions justifies their protection analogously to the judiciary.

Gageler makes clear that 'the separateness of the judicial power of the Commonwealth' has become justified by the need for it 'to determine controversies between the Commonwealth and an individual about the legality of Commonwealth administrative action'.[54] Referring to

48 Burton (n 18) 254.
49 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
50 Ibid.
51 Ibid 34–5.
52 Brennan, 'Courts, democracy and the law' (n 7) 34–5.
53 See, eg, McMillan, 'Re-thinking the separation of powers' (n 35).
54 Stephen Gageler, 'Three is plenty' in Weeks and Groves (eds) (n 14) 12, 21.

Montesquieu and Blackstone, he states that 'the separation of the judicial function came to be identified as serving liberty, and liberty itself came to be recognised as a constitutional objective'.[55] This I entirely agree with. However, the idea should be extended in the light of the modern administrative state and how disputes between government and individuals are actually resolved. The vast majority of people do not have ready access to the courts and alternative institutions such as ombudsmen are much more likely to be able to assist an individual in resolving their dispute and ensuring the government is acting legally not only in that matter but through broader checks of government policies, ensuring liberty. Further, as mentioned, people now expect more than just legality: the integrity institutions ensure good governance.[56] Thus the protection of integrity institutions can now be justified as serving liberty by ensuring access to remedies and good governance, ensuring the constitutional objective of which Gageler speaks.

Gageler also notes that '[f]our members of the High Court in 2000 adopted' the description of the Australian constitutional setting, that 'there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures'.[57] Considering the volume of complaints and comparative accessibility of the integrity institutions, there is now a *profound reliance* on them. The courts remain the ultimate guardian, but integrity institutions provide remedies for individuals and seek to fix maladministration, meaning government powers are kept within their restraints more readily, without requiring extensive litigation. Gageler does not question the ability for the Parliament to 'create agencies with oversight of the exercise of executive functions which are answerable directly to the Parliament'.[58] However, what he is missing is that the creation of these bodies does not ensure their ability to provide oversight effectively. What Parliament creates it can dissolve or defund. Given the prevalence of the practical assistance that integrity institutions provide, and their importance in ensuring good governance, they now are correctly characterised as serving liberty and as guardians limiting government power. This makes them analogous to the judiciary and by Gageler's own argument, justifiable of protection.

Integrity institutions are not the judiciary

As noted above, the analogy to the judiciary only extends so far, and it is important to note that the integrity institutions do not replace the courts. The judiciary acts as the vital backstop ensuring the rule of law, but greater protection for institutions that provide remedies and stymie maladministration before the court stage are essential. Profound change in government accountability has occurred. [59] Thus integrity institutions' protection is now justifiable on a similar basis as the judiciary, namely that those adjudicating the law and providing remedies should be independent from those who make and execute the laws. However, as courts continue to exist, integrity institutions' independence may not need to be as complete as the judiciary's. Yet, as these institutions provide remedies for those aggrieved by government action, axiomatically their work may often go against the political interests of the government

55 Ibid.
56 See, eg, Brown, 'The integrity branch' (n 1) 302.
57 Gageler (n 54) 22.
58 Ibid 18.
59 McMillan and Carnell (n 6) 43.

of the day. They therefore do require independence, since it is 'clearly the independence of integrity agencies from those institutions whose integrity they are charged with maintaining which represents their most important feature'.[60]

Is greater protection necessary?

The judiciary's constitutionally ensured existence is vital. However, it does not mean there is not a need for greater protection for integrity institutions as their defunding would restrict people's access to remedies and stymie government accountability. Integrity institutions ensure assistance is accessible, without the protracted time and costs of litigation; this is vital for ensuring administrative justice. As discussed, some institutions like the ombudsmen have become part of what is expected of the government; however, this does not mean that integrity institutions do not require greater protection. Public or political pressure seems insufficient as a protection — owing to both the institutions' importance in securing administrative justice and the public's lack of understanding of administrative law and how these institutions function. Although a similarly small amount of people can perform lifesaving heart surgery as understand administrative law, the removal of such services from Medicare would gain much greater political outcry than the disestablishment of an integrity institution, despite the reliance people unknowingly place on it for ensuring administrative justice. Thus, integrity institutions, while performing a key role beyond the courts, remain at the whim of the government of the day and are afforded little political protection. Their current statutory existence is not a good enough guarantee considering the vital role they play in ensuring administrative justice.

The role integrity agencies play in providing remedies and administrative justice means that integrity agencies should be owed protection analogously to why the judiciary is protected, as impartial administering of those who seek remedies is necessary for a free society.[61] This is now largely ensured by integrity agencies.

Ensuring greater protection

Accepting that 'profound' change has occurred from the original separation of powers and its envisagement of holding the government to account,[62] it is clear that integrity institutions now perform vital functions for our democracy. But there is a question as to how these functions should be protected. Whilst the separation of powers is no longer reflective of how our government functions, this article argues that what is vital is that their existence and functioning is ensured, more so than a coherent theoretical arrangement, as would be achieved through constitutional separation of powers.

Integrity institutions do in part fulfil the original role of the judiciary. The AAT, for example, 'in reality … inhabits an uncomfortable limbo somewhere between the judicial and executive branches'.[63] However, they could not be moved out of the executive and into the judicial

60 Brown, 'The integrity branch' (n 1) 320.
61 Brennan, 'Judicial independence' (n 3).
62 McMillan and Carnell (n 6) 43.
63 Peter Cane, 'Understanding administrative adjudication' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 273, 293.

branch. '*Boilermakers'* is now a very stable constitutional doctrine and one on which the stability of Australia's separation of powers is directly based.'[64] Thus as integrity institutions are not exercising judicial power (and converting them to Chapter III courts that could exercise such power would impede their unique ability to provide administrative justice), there is no scope for them to be brought within the protection of the judicial branch. However, as they provide the vast majority of remedial assistance for people affected by government decisions, they need to be afforded some greater protection.

Fourth branch

As mentioned above, one proposal for ensuring greater protection is that the integrity institutions should form a new, fourth branch of government.[65] Creating a fourth branch allows theoretical coherence in that these institutions are exercising a power different to the other three branches, namely 'to ensure integrity in the manner that laws are made, executed and adjudicated upon'.[66] And it is plainly more coherent and desirable that such bodies are not embedded within a branch on which it is exercising this power. It would also likely ensure integrity institutions greater independence and protection from government interference. Further, as McMillan has made clear, and this article has highlighted, 'fundamental changes have occurred in government and society [in that] courts no longer stand alone in checking and curbing government power', which 'require[s] us to update our constitutional thinking'.[67] Thus, as Brown stated, analysing integrity institutions' 'nature and legal position … provides some justification for considering that clearer constitutional recognition of their shared function and independence may be advantageous'.[68] Creating a fourth branch acknowledges this change and grants integrity institutions desirable (and arguably justifiable, through judicial analogy) independence to perform these functions. As McMillan has clarified, in response to critiques of a fourth branch, that the objective is not 'to accord a special constitutional stature … nor to suggest that they are transposable with courts'.[69] A fourth branch requires a change in our separation of powers and constitutional reform (notoriously difficult in Australia); however, it would acknowledge the profound change that has occurred and ensure greater protection of integrity institutions due to their role.

Former Chief Justice Martin of the Supreme Court of Western Australia, in arguing not to create a fourth branch, acknowledged that

> integrity agencies have an important role to play in contemporary Australia. However, they are and must remain firmly within the executive branch of government, subject to the scrutiny of Parliament, and to laws passed by the Parliament and enforced by the courts.[70]

64 Boughey, Rock and Weeks (n 19) 170, referring to *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
65 See, eg, McMillan, 'Re-thinking the separation of powers' (n 35).
66 Brown, 'The integrity branch' (n 1) 320.
67 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
68 Brown, 'The integrity branch' (n 1) 325.
69 Ibid.
70 Chief Justice Wayne Martin, 'Forewarned and four-armed — administrative law values and the fourth arm of government' (Whitmore Lecture, Sydney, 1 August 2013) 40.

Ensuring accountability of these bodies is vital (concerns are discussed below). Such a branch would still be within the remit of the courts; it would not make sense for them to be able to operate outside the rule of law. McMillan makes clear a fourth branch is not about according 'a special constitutional … immunity'.[71] Thus it seems Martin's concern about lack of court enforcement is misplaced. However, the accountability produced by parliamentary oversight is valuable, particularly by committees which are not controlled by the government (such as Senate references committees). The types of bodies that would be included in the integrity branch and their relationships to their parliaments would vary (eg, the Victorian Ombudsman is a parliamentary officer in the state constitution while other bodies are creatures of statute with varying degrees of independence).[72] The inclusion of parliamentary oversight is in tension with giving these bodies greater independence especially where the executive has such control over the Parliament. Martin's insistence that '[t]hey must apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values',[73] can be addressed. The protection offered by a fourth branch does not exclude the institutions applying specific standards and operating for specific purposes. There is scope for some aspects to be regulated by statute while an institution's existence and purposes are constitutionally enshrined. The extent of parliamentary oversight of a fourth branch is unclear but would logically be reduced due to their greater independence. This highlights the benefits of ensured funding (discussed below) as it allows bodies to have clear statutory purposes which can be interpreted by the courts and still allow greater parliamentary oversight as they remain within the executive branch (with greater protection).

Thus, McMillan is likely correct that 'we need a new constitutional theory to explain the more complex dispute resolution and accountability framework that has evolved'.[74] What is vital to ensuring people have access to effective remedies is the ensured funding of integrity institutions. The following sections consider if this can occur in a way that requires less of a restructuring of our system and thus is more plausibly possible.

Ensured funding

This article does not regard the creation of a fourth branch as critically as Justice Gummow, who stated he saw 'little utility and some occasion for confusion'.[75] Undoubtedly there would be greater theoretical coherence and protection afforded by a fourth branch. However, ensured funding appears to allow adequate recognition of the profound change that has occurred while requiring smaller changes to our current system, compared to the rethinking of our separation of powers. It also allows parliamentary oversight (as above) and eases concerns about complete independence of very powerful bodies (as below), balancing the need for independence and representative government. Ensured funding would involve integrity institutions with clear statutory purposes being protected by guaranteed funding (adjusted appropriately with changes in consumer price index ('CPI') and workload) such

71 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
72 Brown, 'The integrity branch' (n 1) 310–11.
73 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
74 Ibid.
75 William Gummow, 'The 2012 National Lecture on Administrative Law: a fourth branch of government?' (2012) 70 *AIAL Forum* 19, 19.

that they could not be defunded or abolished without a super majority of Parliament — more than the executive and government of the day is likely to control. This strikes the appropriate balance between respecting representative government and acknowledging the executive's great control over the Parliament and the interests in protecting integrity institutions so they can fearlessly investigate, and provide remedies against, the government. Although the placement of these institutions would remain conceptually odd — those holding executive to account remain within it — the underlying concern is alleviated as they could not be diminished by the executive alone.

Unfortunately, how this could precisely be achieved is unclear. Implementing a manner and form provision (such as seen at a state level) appears attractive. This would bind the powers of the Parliament such that defunding or dissolution of integrity agencies could only occur with the support of a special majority of Parliament. However, it appears that the 'Commonwealth Parliament cannot enact "manner and form" legislation requiring laws to be passed by specified majorities in Parliament'.[76] There is little authority in relation to' whether the Commonwealth can 'entrench certain legislation which it wishes to protect from hasty amendment or repeal but it would seem that unless the legislation is incorporated into the *Constitution* pursuant to the amendment procedure in s 128, no entrenchment is possible'.[77] Thus it appears only a referendum and constitutional reform can ensure greater protection from repeal than a majority vote in each chamber. Alternatively, the Commonwealth Parliament has the power to establish an 'alternative legislature for the enactment of legislation on subjects within Commonwealth legislative power'.[78] This could be used to create a special chamber whose approval is required for changes to an integrity institution's functions and funding. However, this is likely even more controversial and impractical than creating constitutional reform, considering the media and political fury that occurred following an Indigenous Voice to Parliament being (incorrectly) characterised as a 'third chamber'.[79]

The inability of the Commonwealth to pass a manner and form provision on legislation presents a problem for ensuring funding. A Senate not controlled by the government would likely afford greater protection to these institutions, but this cannot be guaranteed and in fact it is likely that it is when the government has control of the Senate that the government accountability and administrative justice provided by integrity institutions will be needed most. Public announcements and bipartisan support of funding promises for extended periods (with appropriate CPI and workload adjustments) may provide slightly greater protection, but this remains at the mercy of political tides and administrative law does not appear to be a vote swinger. However, if it offers slightly greater protection, it may allow institutions to become part of the public consciousness in how our government is held accountable and people are provided remedies. It seems that some institutions, such as the ombudsmen or the NSW Independent Commission Against Corruption ('ICAC'), could not be abolished without creating public outcry and political cost. However, the strength of such outcry and its ability to protect, particularly the gradual curtailment of, integrity institutions remains unclear.

76 George Winterton, 'Can the Commonwealth Parliament enact "manner and form" legislation?' (1980) 11 *Federal Law Review* 167, 201.

77 Gerard Carney, 'An overview of manner and form in Australia' (1989) 5 *QUT Law Review* 69, 95.

78 Winterton (n 76) 201.

79 See, eg, Amy Remeikis, 'Peter Dutton rules out Voice to Parliament, labelling it a "third chamber"', *The Guardian* (online, 12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/peter-dutton-rules-out-voice-to-parliament-labelling-it-a-third-chamber>.

Ensured funding would allow for minimal changes and for parliamentary oversight to continue for such institutions. However, it seems that it is infeasible under our current arrangements. Thus, constitutional recognition of key integrity institutions, an enshrinement of a fourth branch, is likely necessary to ensure the continued existence of such agencies.

Concerns arising from greater protection

Providing greater protection for integrity institutions raises the concern of 'who guards the guardians'.[80] Once we have created them 'we must take steps to keep them under control'.[81] Justice Gummow in a speech on the possibility of a fourth branch was concerned about placing bodies which 'oversee good governance and investigate corruption and malpractice … in islands of power where they are immune from supervision and restraint by the judicial branch of government'.[82] It is not envisaged that integrity institutions would be placed on any such islands of power. Rather, there are two main models of integrity theory: fourth branch theory and national integrity system ('NIS') theory.[83] As the name suggests, fourth branch theory considers integrity institutions as a separate branch of government, while NIS theory considers horizontal and vertical accountability. Both theories assert that the other branches, particularly the judiciary,[84] would perform 'an essential integrity task by ensuring mutual accountability *within* the integrity system [that] will hold watchdogs accountable'.[85] It has been concluded that 'extra-judicial involvement in the performance of integrity functions is, on balance, an acceptable element of modern government'.[86] And as Gageler notes, '[t]he availability of judicial review can provide a level of assurance that a non-judicial accountability body will confine itself within the scope of the statutory functions it is authorised to perform'.[87]

However, it is not enough to say the courts will oversee integrity institutions. Howe and Haigh make clear that the nature of 'watchdogs' (anti-corruption bodies) affects the effectiveness of 'traditional mechanisms for holding watchdogs to account, in particular the effectiveness of judicial review'.[88] These mechanism notably include their 'extraordinary coercive powers',[89] the confidential nature of their operations, the restricted availability of obtaining certain judicial remedies according to the nature of the decision, their inability 'to initiate review of decisions … [and] the lack of regular external review'.[90] It is important to note that not all integrity institutions have such coercive powers as watchdogs; thus for many integrity institutions judicial review will likely be adequate, but the case of watchdogs does point to the need for parliamentary oversight (eg, through committees that can instigate reviews of their work). Judicial review still has an important role in securing administrative justice as it

80 Field (n 10) 30.
81 Bruce Ackerman, 'The new separation of powers' (2000) 113(3) *Harvard Law Review* 633, 694.
82 Gummow (n 75) 24.
83 Sarah Withnall Howe and Yvonne Haigh, 'Anti-corruption watchdog accountability: the limitations of judicial review's ability to guard the guardians' (2016) 75(3) *Australian Journal of Public Administration* 305, 306.
84 Ibid 307.
85 Joseph Wenta, 'The integrity branch of government and the separation of judicial power' (2012) 70 *AIAL Forum* 42, 44.
86 Ibid 43.
87 Gageler (n 54) 24.
88 Howe and Haigh (n 83) 307.
89 *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [4].
90 Howe and Haigh (n 83) 313.

allows independent scrutiny and serves as 'a constant reminder for observance of legality rationality and fairness'.[91] This fine balance between independence and oversight ideally points towards ensured funding; however, due to the near impossibility of ensuring funding, constitutionalising these bodies as a fourth branch is likely necessary.

So … what should be done?

Considering the impracticality of ensured funding and the importance of integrity institutions, the constitutional protection offered by a fourth branch is desirable. Also there appears to be scope for the Parliament to retain some oversight of such bodies through committees or processes such as Senate estimates (even the judiciary's independence allows judges to be appointed by the executive and High Court staff to appear before Senate estimates committees). The extent to which this oversight would be possible while having constitutional protection is beyond the scope of this article. Thus, this article recommends that a fourth branch of government is the desirable mode to ensure effective protection of integrity institutions, justifiable by their function in providing administrative justice analogous to the judiciary and necessary due to the vital role they play.

This conclusion is bolstered by changes in late 2021 to the South Australian ICAC, illustrating the ability for Parliament to remove important integrity institutions. The South Australian Parliament legislated that the 'ICAC will no longer be able to investigate misconduct or maladministration'; no Member in either House or of any party voted against the Bill; and the ICAC Commissioner, Ms Vanstone, described the proceedings as 'extraordinary' and that she was 'really worried' that the 'jurisdiction to investigate corruption has been decimated'.[92] This strengthens the argument for greater protection of integrity institutions and specifically the constitutional enshrinement of key oversight and corruption functions, as bipartisan support for the removal of such functions is not only possible but occurring.

Conclusion

There are legitimate debates about what integrity institutions should exist and the extent of their functions and powers. This article has not sought to resolve these issues. Instead, it has contended that the institutions which are the main supply of effective remedies to those aggrieved of government decisions and which seek to remedy government maladministration — supplying administrative justice — need to be afforded protection from government defunding or abolishment. It was argued that, in Australia's modern administrative state, the judiciary is inadequate for ensuring administrative justice (and in fact does not purport to do so), and that instead this function is supplied by integrity institutions. Concerns as to the current position of, and attitudes towards, the integrity institutions were explored to show a need for their greater protection; and this was justified as their role is analogous to judicial independence. Finally, mechanisms to ensure greater protection were considered,

91 Robin Creyke et al, *Control of Government Action: Text Cases and Commentary* (Lexis Nexis Butterworths, 5th ed, 2019) 40.

92 Michael Clements, ' "Extraordinary" Bill to reduce powers of SA's Anti-Corruption Commissioner passes Parliament', *ABC News* (online, 23 September 2021) <https://www.abc.net.au/news/2021-09-23/sa-icac-bill-passes-parliament/100487668>.

leading to a conclusion that, due to the expansiveness of government power in Australia, the executive's control of the legislature, and Parliament's inability to entrench an integrity body via a manner and form provision, the creation of a fourth branch of government, although difficult to implement, is likely required.

When so much of people's lives are affected by the government, the institutions that seek to secure the government's integrity and ensure effective and accessible remedies for those aggrieved needs to be protected. The bodies that do this are now predominantly our integrity institutions. The current position does not afford them enough protection. Thus, a fourth branch of government is recommended as it is in the best interests of ensuring administrative justice for all Australians … whether we are sick of the government being in our lives or not.

Collateral attack in the criminal jurisdiction: the lack of a unifying theory

*Chris Bleby**

The focus of this article is the apparent absence of any unifying theory of when collateral attack will be permitted in the criminal jurisdiction.

In the 1971 case of *Hinton Demolitions Pty Ltd v Lower (No 2)* ('*Hinton (No 2)*'),[1] Bray CJ of the Supreme Court of South Australia wrote, of the question whether a collateral challenge could be brought in a criminal prosecution:

> I desire, however, to express myself with considerable caution because it seems to me, with respect, that the authorities are in such a state of flux and confusion that it is hardly likely that this Court will be able to construct an enduring causeway through the flood. The task of imposing order on this chaos must, I think, be reserved for the High Court, the Privy Council and the House of Lords. It seems to me that it is hardly possible to disentangle any general principle which will not be opposed to some decision which is binding on us or would be if it stood alone.[2]

In that case, the Registrar of Motor Vehicles had determined and certified the load capacity of a truck. The registered owner was charged with various offences of failing to deliver to the Commissioner of Highways an accurate record of journeys on public roads and failing to pay the charges in respect of those journeys. The owner challenged the validity of the certificate. One head of challenge was that the Registrar had not afforded natural justice to the owner before certifying the load capacity of the vehicle, and that there was therefore no valid determination of that capacity.

I mention this case at the outset because it represents an early, Australian engagement with the difficulty of articulating any sort of unifying principle. I then move forward to another South Australian case, the 2006 case of *Jacobs v Onesteel Manufacturing Pty Ltd* ('*Jacobs v Onesteel*').[3]

This was a civil case, which considered whether a party could challenge collaterally the validity of certain costs rules in the South Australian Workers Compensation Tribunal. Justice Besanko's judgment in that case provides a careful analysis of the development of the strands of doctrine in the English and Australian cases. In doing so, he remarked:

> At all events, the formulation of a general principle (if there is to be one) as to when the validity of government action, whether it be legislative or administrative in character, may be challenged collaterally must be reserved for the High Court.[4]

The distinction between challenges to delegated or subordinate legislation on the one hand, and administrative acts on the other, was crucial to Besanko J's analysis of whether collateral attack would be permitted. Justice Besanko considered the attack to be permissible in that

* Judge of the South Australian Court of Appeal. This article is an edited version of his Honour's paper presented at the Australian Institute of Administrative Law 2023 National Conference in Adelaide on 27–28 July 2023.

1 (1971) 1 SASR 512 ('*Hinton (No 2)*').
2 Ibid 520–1.
3 (2006) 93 SASR 468 ('*Jacobs v Onesteel*').
4 Ibid [96].

case. This was a challenge to the validity of a Rule of Court, being delegated or subordinate legislation. Justice Besanko drew on a long line of authority that when the challenge was on the narrow ground of ultra vires, a person prosecuted for breach of a by-law or regulation can invoke, as a defence, the invalidity of the provision grounding the charge.[5]

This case post-dated *Ousley v The Queen* ('*Ousley*'),[6] which concerned a challenge to an administrative act, the issuing of a warrant under the *Listening Devices Act 1969* (Vic). Notwithstanding the effect of *Ousley* in limiting the grounds of challenge, Besanko J considered that there was nothing in *Ousley* that suggested that a challenge to delegated legislation on a narrow, ultra vires ground, should not be permitted.[7]

So we might start any search for a theoretical framework with the distinction between challenges to legislative and administrative acts. This distinction only goes so far either way. Subordinate legislation is, of course, capable of being challenged on process grounds as well as simple ultra vires grounds.[8]

When it comes to collateral challenges to administrative acts in criminal prosecutions, the search for a unifying theory might start with the 1959 case of *Director of Public Prosecutions (Vic) v Head* ('*DPP v Head*').[9] The defendant was charged with having carnal knowledge of a woman under care or treatment in an institution. The woman to whom the charge related had been ordered into the care of an institution as a 'moral defective'. The offence provision said nothing about whether the offence was conditional on the validity of the order placing the woman in care. At trial, however, the Attorney-General conceded that medical certificates on which the order was made contained no evidence that the woman was a 'moral defective', and that the order could be challenged on an application for certiorari or a writ of habeas corpus. The Victorian Court of Criminal Appeal quashed the conviction.

The House of Lords upheld this decision. The majority held that proof of detention in an institution established a prima facie case that the woman was a 'defective' lawfully in care, but this could be rebutted if the defendant could show that the detention was unlawful. Here, the unlawfulness was conceded.

Lord Denning dissented, although ultimately would not have restored the conviction. He considered that the original order was only voidable, not void. Something would have to be done to void it, such as an application for certiorari by the woman.

Lord Denning's dissent appears to have been the source of the distinction between void and voidable administrative acts that was then endorsed by the Privy Council in 1967, in *Durayappah v Fernando*.[10] It was a distinction ultimately abandoned in England in 1998 in *Boddington v British Transport Police* ('*Boddington*').[11] In Australia, it was in 2002 that a majority of the High Court expressed this to be an unhelpful distinction, in *Minister for*

5 Ibid [83].
6 (1997) 192 CLR 69 ('*Ousley*').
7 *Jacobs v Onesteel* (n 3) [88].
8 See *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206 (currently on appeal to the High Court).
9 [1959] AC 83 (HL).
10 [1967] 2 AC 337 (PC).
11 [1998] 2 AC 143 (HL) ('*Boddington*').

Immigration and Multicultural Affairs v Bhardwaj.[12] Twenty years later, it is an orthodoxy that such a distinction 'overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made'.[13]

In the context of collateral attacks, the distinction developed in England along its own lines.[14] In 1983, the House of Lords in *O'Reilly v Mackman*[15] developed a doctrine described as 'procedural exclusivity'. This required challenges to validity to be brought via an application for judicial review, thereby preserving the procedural and discretionary protections to the government p arty that attached to those procedures. It was intended as a device to prevent abuses of process. It did not last and was finally disapproved of in *Boddington*.

Before this though, in the 1993 case of *Bugg v Director of Public Prosecutions (UK)*,[16] Woolf LJ in the Court of Appeal proposed limiting collateral challenges in criminal proceedings to those of substantive, rather than procedural, invalidity. In drawing this distinction, Woolf LJ suggested that only the narrower or easier grounds of review would be within the cognitive competence of magistrates or judges not in the Divisional Court, that the body whose decision is challenged will not always be a party to the collateral challenge, and that successful collateral challenges do not actually quash the decision. He also thought that those accused of criminal offences should not be able to outflank the discretionary hurdles in the way of applicants for judicial review.

The House of Lords expressed strong doubts about this reasoning in the 1998 decision of *R v Wicks* ('*Wicks*'),[17] a case ultimately decided on statutory interpretation grounds, and then disapproved of the reasoning the same year in *Boddington*. Just by way of example, in *Boddington*, Lord Steyn picked up on a criticism made by Lord Hoffmann in *Wicks*, that procedural issues can be quite simple and substantive issues extremely complex. In any event, the distinction can be difficult to draw. More fundamentally, however, it was unsatisfactory that a posited boundary between substantive and procedural invalidity could represent the difference between committing a criminal offence and not committing a criminal offence. The rule of law, Lord Steyn held, required a clear distinction between what is lawful and what is unlawful.[18]

So this was the course of development in England. Back in 1971 South Australia, the void/voidable distinction held sway. Chief Justice Bray in *Hinton (No 2)* considered himself bound by the endorsement of that distinction in *Durayappah v Fernando*, not that he particularly liked it. He said:

> But it seems to me that, if the analogy, dangerous though it is, with the distinction between acts which are nullities and acts which are merely voidable in other branches of the law is logically applied, it must follow that even the party affected can only assert the invalidity of a voidable act of the type in question in proceedings appropriate for the purpose and not whenever the question arises incidentally. The prerogative writs would, of course, be appropriate for the purpose; so would an action for a declaration against the authority concerned …[19]

12 (2002) 209 CLR 597 at [45]–[46] (Gaudron and Gummow JJ), [66] (McHugh J), [144]ff (Hayne J).
13 Ibid [46] (Gaudron and Gummow JJ).
14 See, generally, Mark Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237.
15 [1983] 2 AC 237.
16 [1993] QB 473 (CA).
17 [1998] AC 92.
18 *Boddington* (n 11) 171.
19 *Hinton (No 2*) (n 1) 522 (Bray CJ).

In an action for prerogative relief or a declaration, both the aggrieved party and the relevant authority would be parties to the proceedings. In any event, Bray CJ concluded that once the law made a distinction between nullities and acts which were merely voidable, it must follow that that invalidity on the basis of being a nullity could be asserted by anyone in any proceeding where the invalidity is relevant. A challenge to an act on the basis it is voidable, on the other hand, could only be made in the appropriate proceedings by the appropriate party. His Honour acknowledged that this was contrary to *DPP v Head* but considered it to be the inevitable consequence of *Durayappah v Fernando* which, as a Privy Council decision, bound him in priority to a decision of the House of Lords.[20] The asserted denial of natural justice was, he considered, a complaint of voidability, not voidness.

In *Hinton (No 2)* Wells J took a narrower view of the principles, in a comprehensive view of the authorities. I cannot do his judgment justice here, but I would just note his key conclusion:

> Except for those cases where what is claimed to be an administrative act has not even the colour of lawful authority, or where an authority or public official, who is a party to a civil action, pleads, and relies on his own administrative act, an allegedly unlawful administrative act cannot be collaterally impeached in any cause of matter, civil or criminal, unless an Act of Parliament or a valid regulation unequivocally authorises such impeachment. The only correct way of attacking an allegedly unlawful administrative act is by means of a separate proceeding appropriate for the purpose.[21]

Ousley is of course the current, enduring authority on the subject of collateral challenges to administrative acts. *Ousley* supports the existence of a presumption of amenability to collateral attack of administrative acts. The High Court in *Attorney-General (Cth) v Breckler*[22] confirmed this. However, the effect of the majority position in *Ousley* was to restrict challenges to warrants on the basis of invalidity on the face of the warrants.

This position has been criticised, such as in that there would seem to be no reason of principle for a challenge not to be available on the basis of irrationality or unreasonableness in issuing a warrant, that is, for jurisdictional error not on the face of the record. Then, as Aronson, Groves and Weeks have observed,

> [f]orcing accused persons to challenge their warrants in separate proceedings imposes an unwarranted costs burden, fragments the criminal process and sometimes proves impossible in terms of legal aid or available evidence.[23]

By way of comparison, the House of Lords in *Boddington* exhorted the desirability of legislative reform to allow the transfer of such challenges to the Divisional Court, but observed that the requirement of leave and the discretionary nature of judicial review would have to be addressed where what is at stake is conviction of a criminal offence.

In any event, *Ousley* was decided a year before *Boddington* and, more broadly, well before the theoretical distinction between void and voidable administrative acts was determined in Australia to be unhelpful. The criticisms of *Ousley* suggest that it is not the product of any sort

20 Ibid 523.
21 Ibid 549 (Well J).
22 (1999) 197 CLR 83 [36].
23 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) [13.280].

of unifying theory. In any event, as Aronson, Grove and Weeks note, in the Commonwealth sphere, legislative amendments have now mostly removed the possibility of collateral challenges once a prosecution is underway.

Returning to *Jacobs v Onesteel*, Besanko J observed it was for the High Court to find a unifying principle, if there was one to be found. In the meantime, and having regard to the academic literature[24] as well as the authorities, he identified the following factors as relevant to whether collateral challenge will be permitted in a particular case:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing, delay and other discretionary considerations?
4. Is there a statutory provision that bears in one way or another on the question of whether a collateral challenge should be permitted?
5. Is the issue raised by the collateral challenge clearly answered by authority?
6. Are there any other cases which raise the same issue?
7. (Possibly) Is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?[25]

In the 2016 case of *Police v Stacy*,[26] which was a criminal matter concerning the alleged breach of a broad barring order by a member of an outlaw motorcycle gang, Parker J drew on these factors when considering whether a collateral challenge to the barring orders was permitted. He concluded that it did not go beyond *Ousley* to permit a challenge to the barring order on the basis that it had been issued contrary to the Act or was defective on its face. He also considered that it may be the case that a collateral challenged based on *Wednesbury*/*Li* unreasonableness could be made.[27] However, he echoed Besanko J's observation that the High Court had not determined whether a collateral challenge could be brought where it was necessary to adduce substantial evidence.

Ultimately, the quest for a unifying theory might be better described, in light of the modern jurisprudence of jurisdictional error, as a quest for a unifying judicial policy. We do not at present have that. The current approach, which at best looks to indicative factors, effectively requires an evaluative task. There are some hard edges to this, most notably on account of *Ousley*. To the extent that those edges are referable back to distinctions in administrative law that are no longer accepted or regarded as helpful, review seems to be necessary. It is also necessary to be clear-eyed about the factors that appear to still be accepted as relevant.

24 M Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237; Enid Campbell, 'Collateral challenge to the validity of government action' (1998) 24 *Monash University Law Review* 272.
25 *Jacobs v Onesteel* (n 3) [93].
26 (2016) 125 SASR 50.
27 Ibid [99]–[100].

For example, to what extent should the discretionary considerations on judicial review, such as delay, be able to stand in the way of a challenge on which guilt of a criminal offence may depend?

Perhaps the best that can be done for now is to recognise, as Besanko J did, that in some cases there are good reasons to allow a collateral challenge and in other cases there are good reasons to deny it.[28] But if the question is not addressed in context by the relevant statute, imputed restrictions on the availability of challenge in the criminal context would seem to require further principled consideration.

28 *Jacobs v Onesteel* (n 3) [93].

Collateral attack in criminal cases

*Mark Weinberg AO**

My approach to this topic is greatly influenced by my own experience, in my days at the Bar, in both seeking to review administrative decisions in the context of criminal trials, and in resisting such review. I will refer at various points to the notion of 'fragmentation' of the criminal justice system, a practice that was rife throughout the latter part of the 20th century.

A criminal trial is unique and, in its own way, fundamentally distinct from a civil trial. At one time there were members of the Bar who could switch regularly from civil to criminal work, and vice versa. No longer is that the case. This is an age of specialisation. The particular skills required of a criminal barrister are very different from those expected of those who practise regularly in the civil law, whether engaged in commercial litigation, common law, or public law.

The fragmentation of federal criminal law practice

The Federal Court was created as a purely civil court. It was never anticipated that it would undertake criminal trials. The judges appointed to that court tended to be drawn from the ranks of commercial and public lawyers, as well as industrial lawyers, and almost never from the ranks of the criminal Bar.

In the latter part of the 1980s, things began to change. The judges of the Court found themselves confronted with novel applications for judicial review, or for injunctive relief, arising out of federal criminal proceedings being conducted in state courts, as they had to be.

In the early days of the Commonwealth, there was little federal criminal law to speak of. From about the 1970s all that changed. Since then, there has been an enormous expansion in the scope of Commonwealth criminal law.

When I was the Commonwealth Director of Public Prosecutions, in the latter part of the 1980s, the overwhelming bulk of the work undertaken by my office consisted of drug cases, and fraud upon the Commonwealth. The position today is very different. The enactment of the Commonwealth *Criminal Code*[1] in 1995 has led to a vast expansion of Commonwealth criminal law, many of the new offences being of a novel, and extraordinarily complex, character.

The same can be said of Commonwealth criminal procedure. The *Crimes Act 1914* (Cth), which originally contained just a handful of provisions, has now grown into something quite different, and vast in scope.

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* Mark Weinberg AO FAAL KC is a former Judge of the Victorian Court of Appeal of the Supreme Court of Victoria and of the Federal Court of Australia. This article is an edited version of his paper presented at the Australian Institute of Administrative Law 2023 National Conference in Adelaide on 27–28 July 2023.

1 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

These days, defending a Commonwealth criminal trial requires a great deal more than merely addressing a jury, 'Rumpole style', about the 'golden thread'. A defence barrister who today engages in this type of work must be a blend of jury advocate and skilled legal technician. In a sense, those who practise in complex areas of state or federal criminal law must today have a knowledge of related disciplines, including in particular public law.

There developed in the 1980s a practice on the part of the defence Bar of challenging investigative and prosecutorial decisions, though not by raising these points within criminal trials, but rather by forays into the state and federal superior courts. This strategy, at the very least, achieved delay, and was successful, at least for a time.

For example, challenges were mounted to:

- the decision to lay charges;[2]
- the validity of any search warrant, surveillance device warrant, or telephonic interception warrant, complaining of formal invalidity, or perhaps invalidity on the face of the warrant;[3]
- the validity of any such warrant based upon an alleged failure to make full disclosure of material that might possibly tell against the grant of the warrant; [4]
- the validity of any search conducted pursuant to a search warrant, having regard to the manner of its execution;
- the decision to commit for trial;[5]
- numerous other administrative decisions taken en route to the ultimate criminal trial itself, including by way of challenge to Constitutional validity.[6]

If the charges in question were federal in nature, the first port of call was generally to the Federal Court, whether by way of judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or perhaps s 39B of the *Judiciary Act 1903*, where injunctive relief was sought.

If the proceedings concerned purely state offences, the application for review would be made to the state Supreme Court, utilising analogous provisions within the state regime. In Victoria, for example, this generally meant the *Administrative Law Act 1978* (Vic), or proceedings for judicial review under the *Supreme Court Rules* at the time.

Some Federal Court judges seemed to welcome the diversion from their steady diet of Federal Court work. There were frequently, in complex federal criminal law proceedings, challenges mounted to the various investigatory and prosecutorial decisions taken along the

2 *Jarrett, Elliott & Camm v Seymour* (1993) 46 FCR 521.
3 *Beneficial Finance Corporation v Commissioner, Australian Federal Police* (1991) 31 FCR 523; *Grollo v Palmer* (1995) 184 CLR 348 ('*Grollo*'); *Ousley v The Queen* (1997) 192 CLR 69 ('*Ousley*').
4 *Karina Fisheries Pty Ltd v Mitson* (1990) 26 FCR 473; overruled by the Full Court of the Federal Court in *Lego Australia Pty Ltd v Paraggio* (1994) 53 FCR 542.
5 *Yates v Wilson* (1989) 168 CLR 338.
6 *Grollo* (n 3).

path to an eventual criminal trial. These proceedings often resulted in great delay, and what was, in truth, 'fragmentation' of the criminal justice system.

In one case that I can vividly recall, a challenge was mounted to the validity of a search warrant which had been executed upon the premises of a well-resourced client. The case was heard in the Federal Court. The judge reserved his decision. It took almost two years for a short judgment dismissing the application to be delivered. However, by the time that judgment was delivered, the period that had elapsed from the commission of the alleged offence was such that it was determined that prosecution was no longer viable.

In complex cases, involving well-resourced defendants, challenges of various kinds to committal proceedings became almost *de rigueur*. Irrespective of whether they won or lost, this was a considerable benefit to those suspected of having committed offences. Generally, delay tends to work in favour of the accused, and rarely of the prosecution.

All this overuse of the civil courts to supervise criminal proceedings eventually came to an end. Both the *Administrative Decisions (Judicial Review) Act* and the *Judiciary Act* were amended to restrict the availability of judicial review, and its various analogues in the original jurisdiction of the superior courts, in criminal matters.

These amendments to the legislation may well have been influenced by the High Court's decision in *Yates v Wilson*[7] to put an end to what was happening. In what is probably the shortest judgment ever published in the *Commonwealth Law Reports*, Mason CJ, Toohey and Gaudron JJ, in refusing special leave to appeal, arising out of a decision to commit for trial, stated:

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and as well inhibit this Court from granting special leave to appeal.[8]

Yates v Wilson had an immediate impact. It acted as a deterrent to the Federal Court's willingness to entertain applications for judicial review against all administrative decisions made in the course of criminal proceedings. The notion of 'fragmentation' of the criminal justice system was thereafter regarded as a somewhat pejorative expression. That notion came to be constantly invoked in response to administrative law challenges of various kinds arising in relation to criminal law proceedings.

This was all to the good, in terms of avoiding delay and 'fragmentation' in the truest sense. Yet this line of jurisprudence posed its own difficulties. It left open the question, under what circumstances should a trial judge (or magistrate) conducting criminal proceedings consider arguments as to the validity of an administrative step as part of the overall conduct of a criminal trial?

7 (1989) 168 CLR 338.
8 Ibid 339.

Ousley v The Queen

The High Court had an opportunity to resolve this issue in *Ousley v The Queen* ('*Ousley*').[9] That case left many unanswered questions. Even now, and with the benefit of much additional case law, a number of those questions remain unresolved. Put simply, the members of the High Court in the majority held that the issue of a warrant of the type that featured in that case was an administrative, and not judicial, act. The High Court had resolved that issue several years earlier in *Love v Attorney-General (NSW)*,[10] as well as in *Grollo v Palmer*.[11] In *Ousley* Toohey J, along with Gaudron J and Gummow J, in separate judgments, all accepted that collateral review was available, in relation to a challenge to the validity of a warrant. They held that the trial judge in the County Court had erred in concluding that he could not engage in such review having regard to the fact that the warrants in question had been issued by Supreme Court judges.

Nonetheless, their Honours severely limited the grounds upon which such collateral review could proceed. According to Toohey J, the warrant would have to be said to have been invalid 'on its face'. No challenge based upon evidential insufficiency would be accepted. Justice Gaudron agreed, at least to that extent. So too did Gummow J, who insisted that the trial judge, while engaged in collateral review, could only determine whether the warrant had been 'regularly granted', and could not consider any broader attack based, for example, on evidential insufficiency.

Justice Toohey went on to observe that, in his view, the warrants in *Ousley* were valid. Justice Gaudron disagreed. She concluded that the warrants were invalid, but held that the appeal should, in any event, be dismissed. Justice Gummow agreed that the trial judge had erred in refusing to enter upon the matter, but concluded that this was insufficient, in the circumstances, to give rise to a miscarriage of justice.

Justice McHugh accepted that the trial judge could, and should, have considered the collateral attack upon the warrants. However, unlike the other members of the Court in the majority, he held that a collateral challenge to a warrant 'cannot be confined to defects appearing on the face of the warrant'.[12] According to his Honour, collateral attack extended to establishing 'jurisdictional error', going beyond error on the face of the warrant. However, as with the other members of the majority, McHugh J said that insufficiency of evidence would not normally ground an attack upon validity.

Of particular interest in McHugh J's judgment was his Honour's consideration of the merits of allowing collateral review in the course of criminal proceedings. Justice McHugh noted that 'efficient administration of the criminal law would be better served if trial judges lacked the power to determine collateral attacks on the validity of warrants'.[13]

Consider also the dissenting judgment of Kirby J, who acknowledged that controversy existed about the extent to which a trial judge may permit a collateral attack on the validity of

9 (1997) 192 CLR 69 ('*Ousley*').
10 (1990) 169 CLR 307.
11 *Grollo* (n 3).
12 *Ousley* (n 9) 102 (McHugh J).
13 Ibid 104.

a warrant in the course of a trial. He noted the reluctance of lower court judges to entertain challenges to the validity of warrants issued by Supreme Court judges, and other practical reasons (such as delay) for discouraging such attacks in the course of a trial. In other words, his Honour was concerned about the dangers of 'fragmentation' through collateral attack but, presumably, only because too readily permitting such challenges to be mounted might, for example, encourage interlocutory appeals to be brought. This would also bring about unnecessary delay, but through a process of a different form of fragmentation.

On balance, Kirby J concluded that collateral attacks were the lesser evil, in terms of avoiding fragmentation. He said that 'in respect of legal challenges based upon suggested defects appearing on the face of the warrant, the trial judge appears competent to make the necessary ruling whatever place he holds in the judicial scheme of things'.[14] Justice Kirby, in dissent, found that the appeal should be allowed, as the appellant had lost the chance to exercise the right to have a judicial determination of the admissibility of the evidence obtained from the illegal use of the listening device.

It is apparent that *Ousley* is a difficult judgment, with no clear ratio. In that regard, it is singularly unhelpful.

Director of Housing (Vic) v Sudi

I had to grapple with some of the implications of *Ousley* in my judgment in *Director of Housing (Vic) v Sudi* ('*Sudi*').[15] The case concerned a decision on the part of the Director of Housing to evict a tenant from public housing. The Director applied to the Victorian Civil and Administrative Tribunal ('VCAT') for a possession order of the premises under s 344(1) of the *Residential Tenancies Act 1997* (Vic). In answer to that application, the occupier of the premises — who was the son of a Somalian refugee who had earlier been granted occupation — claimed that the Director had failed to comply with s 38(1) of the Victorian *Charter of Human Rights and Responsibilities 2006* ('*Charter*') by failing to have regard to some of the various rights spelt out therein.

Justice Bell, who was the President of the Tribunal, dismissed the Director's application for possession by reason of his alleged failure to comply with the requirements of s 38(1) of the *Charter*. In doing so, his Honour effectively engaged in collateral review of the Director's decision, since the actual issue before VCAT was simply whether the occupant, who was in arrears of rent, should for that reason be evicted.

Each member of the Court of Appeal in *Sudi* favoured allowing the appeal, but not quite for the same reasons.

Chief Justice Warren concluded that, as a matter of construction, the *Residential Tenancies Act 1997* (Vic) and the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) evinced an intention to deny VCAT the power to collaterally review the validity of the Director's purported administrative decision. Her Honour determined that the Director's decision to institute the application for possession could only be set aside by a court of competent jurisdiction, which

14 Ibid 148.
15 (2011) 33 VR 559 ('*Sudi*').

VCAT manifestly was not. In other words, she decided that VCAT did not have power to undertake collateral review.[16]

President Maxwell held that it was improbable, in the extreme, that the Parliament intended VCAT to have power to examine, in its original jurisdiction, the legal validity of a decision such as that by the Director to institute proceedings for recovery of possession.

My judgment went perhaps a little further, and explained why, in my view, collateral attack which, theoretically, might otherwise be thought to be available, should not be accepted in the context of *Charter* issues.

In coming to that conclusion, I examined the nature and powers of VCAT, and its composition. I held that issues under the *Charter* were inherently unsuitable for determination by a body such as VCAT. That was particularly so given that VCAT could be constituted by lay members. It was largely on that basis that I determined that the appeal should be allowed.

In other words, in applying *Ousley*, I accepted that at least in the context of the decision under challenge in *Sudi*, collateral review might be appropriate, at least theoretically, in some circumstances. However, it could not be justified in the context of a complex human rights challenge, necessarily involving consideration of a significant body of difficult international human rights jurisprudence.

For what it is worth, having just recently re-read my judgment in *Sudi*, I would not now change my analysis.

The scope of jurisdictional error

The recent decision of the High Court in *Stanley v Director of Public Prosecutions (NSW)* ('*Stanley*'),[17] where a majority held that the failure by a District Court judge to make the assessment required under the *Crimes (Sentencing Procedure) Act 1999* (NSW) gave rise to jurisdictional error, purported to do no more than apply the law as stated in *Craig v South Australia*[18] and *Kirk v Industrial Court (NSW)*.[19]

In my respectful opinion, the actual decision of the majority is difficult to reconcile with the traditional understanding of the limits of jurisdictional error, as laid down in *Craig* and *Kirk*. The error made by the District Court judge seems to me to be a classic error of law within jurisdiction, notwithstanding the specific approval given, by the majority in *Stanley* to both those cases. If I am right, *Stanley* may not yet be the last word on the scope of jurisdictional error. Self-evidently this poses the question, in accordance with *Ousley*, whether, and in what circumstances collateral attack can be mounted upon an administrative decision said to be vitiated by error of that kind.

16 Cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 where it was suggested that although an administrative tribunal may not have the power to quash a purported administrative action vitiated by jurisdictional error, it could simply treat the decision as having no legal effect. In that regard, *Ousley* (n 9), which concerned the power of a court to engage in collateral review, was distinguished.

17 (2023) 97 ALJR 107 ('*Stanley*').

18 (1995) 184 CLR 163.

19 (2012) 239 CLR 531.

Conclusion

The present state of the law regarding the availability in the course of criminal proceedings of collateral attack upon administrative decisions, is both uncertain and unsatisfactory.

Even worse, from my point of view, is the law relating to interlocutory appeals in criminal proceedings. I have long harboured doubts as to the wisdom of permitting such appeals, particularly in the largely unrestricted form in which they can be brought in a state such as Victoria.[20]

Such appeals often achieve little, other than protracted delay. They result in a form of 'fragmentation' which, while different in many respects from judicial review, outside the realm of collateral attack, result in similar unsatisfactory consequences.

In short, the criminal justice stream should be left largely untouched by civil courts. When a trial begins, it should generally be permitted to continue to verdict. The criminal law is sufficiently complex and difficult without the intrusion of public law concepts into the mix. Trial judges should be trusted to control proceedings and to ensure that, as far as possible, the case once begun continues until the jury has spoken. I understand, of course, that there are many judges and others who might take a different view. Such is life.

20 See my Foreword to Greg Taylor, *Interlocutory Criminal Appeals in Australia* (Lawbook, 2016).