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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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Independent Review of the National Legal Assistance Partnership

The Australian Government has received the report of the Independent Review of the National Legal Assistance Partnership (NLAP) from Dr Warren Mundy.

The 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 agreement expires in 2025. The NLAP funds legal aid commissions, community legal centres, and Aboriginal and Torres Strait Islander legal services.

Dr Mundy was asked to consider how future arrangements could better provide access to justice for all who need it.

Commonwealth, state and territory governments will now carefully consider Dr Mundy's report.

More about the NLAP can be found on the website of the Commonwealth Attorney-General's Department at <https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>.

<https://ministers.ag.gov.au/media-centre/independent-review-national-legal-assistance-partnership-06-03-2024>

Appointment of the Aboriginal and Torres Strait Islander Social Justice Commissioner

The Australian Government has announced the appointment of Ms Katie Kiss as the next Aboriginal and Torres Strait Islander Social Justice Commissioner.

The Commissioner leads the Australian Human Rights Commission's work relating to the human rights of Aboriginal and Torres Strait Islander people. This includes undertaking research and education projects to promote respect for, and the enjoyment and exercise of human rights by, Aboriginal and Torres Strait Islander people.

Ms Kiss's five-year appointment commenced on 3 April 2024, filling the vacancy caused by the conclusion of Ms June Oscar AO's appointment.

Ms Kiss has extensive experience in public policy and human rights, including work promoting and protecting the rights of Aboriginal and Torres Strait Islander peoples, for a wide variety of government and non-government organisations.

We congratulate Ms Kiss on her appointment.

For information about the work of the Commissioner, as well as the Australian Human Rights Commission, see <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice>.

<https://ministers.ag.gov.au/media-centre/appointment-aboriginal-and-torres-strait-islander-social-justice-commissioner-05-03-2024>

Review of Australia's credit reporting framework

The Australian Government has commenced an independent review of Australia's credit reporting framework.

Australia's credit reporting system plays an important role in assessing eligibility and suitability for credit and in reducing the risk of financial harm to consumers, as well as protecting the privacy of individuals' personal and sensitive credit information.

The review will consider the overall efficiency of Australia's credit reporting framework, including whether current legislative arrangements in the *Privacy Act 1988* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) enable effective lending of credit while ensuring personal information is adequately protected. This is the first substantial review of Australia's credit reporting framework since 2008.

The terms of reference for the review are available from the Commonwealth Attorney-General's Department at <https://www.ag.gov.au/rights-and-protections/privacy/review-australias-credit-reporting-framework>.

A public consultation period will occur in the coming months, with a final report to be handed to government by 1 October 2024.

Ms Heidi Richards has been appointed as the independent reviewer. Ms Richards has 30 years' experience leading policy and regulatory forums. In addition to her role as a senior executive at the Australian Prudential Regulation Authority, Ms Richards worked at the Reserve Bank of Australia, the United States Federal Reserve Board and the United States Treasury. Ms Richards has worked across both government and private business to develop deep expertise in the financial sector.

We congratulate Ms Richards on her appointment.

<https://ministers.ag.gov.au/media-centre/review-australias-credit-reporting framework -27-02-2024>

Fair Work Amendment Bill 2024

On 15 February 2024, the Australian Government introduced into Parliament the Fair Work Amendment Bill 2024 (Cth). This Bill proposes to amend the *Fair Work Act 2009* (Cth) to provide that a person is not exposed to a criminal penalty under s 675(1) of the Act

for contravening an order made by the Fair Work Commission (FWC) under pt 2-9 div 6, which deals with the employee right to disconnect as contained in the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth).

The introduction of this new Bill will ensure that the treatment of orders made by the FWC under the new "right to disconnect" jurisdiction is consistent with the treatment of FWC orders under the "stop bullying" and "stop sexual harassment" jurisdictions in the *Fair Work Act*.

The Bill is now before the Senate. Further information on the Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7155>.

Appointments to the Federal Court of Australia

The Australian Government has announced the appointments of Ms Penelope Neskovcin KC and Mr Craig Dowling SC as Judges of the Federal Court of Australia. Ms Neskovcin and Mr Dowling have been appointed to the Victorian registry and commenced on 8 February 2024 and 9 February 2024, respectively.

Ms Neskovcin was admitted to practice as a Solicitor of the Supreme Court of Tasmania in 1994, and in 1995 was admitted to practice as a Solicitor of the Supreme Court of Victoria. She was called to the Bar in 2002 and took Silk in 2016.

Mr Dowling was admitted to practice as a Solicitor of the Supreme Court of Victoria in 1991. He was called to the Bar in 1999 and appointed Senior Counsel in 2017.

We congratulate Ms Neskovcin and Mr Dowling on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-07-02-2024>

Appointment of the Age Discrimination Commissioner

The Australian Government has announced the appointment of Mr Robert Fitzgerald AM as the next Age Discrimination Commissioner.

Mr Fitzgerald is the current Ageing and Disability Commissioner in New South Wales. He also served as a Commissioner on the Royal Commission into Institutional Responses to Child Sexual Abuse and as President of the Australian Council of Social Service.

The Age Discrimination Commissioner leads the Commission's work addressing barriers to equality and participation caused by age discrimination and protecting older Australians from discrimination on the basis of age in employment, education, accommodation and the provision of goods and services.

Mr Fitzgerald's five-year appointment commenced on 2 April 2024, filling the vacancy resulting from the conclusion of the Hon Dr Kay Patterson AO's appointment.

We congratulate Mr Fitzgerald on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-age-discrimination-commissioner-06-02-2024>

Appointment of the Race Discrimination Commissioner

The Australian Government has announced the appointment of Mr Giridharan Sivaraman as the next Race Discrimination Commissioner.

Mr Sivaraman is Chair of the Board of Multicultural Australia and a member of the Multicultural Queensland Advisory Council and a Principal at Maurice Blackburn Lawyers.

The Race Discrimination Commissioner is responsible for combating all forms of racial discrimination, and promoting understanding, tolerance and harmony across all sectors of Australian society.

Mr Sivaraman's five-year appointment commenced on 4 March 2024, filling the vacancy resulting from the conclusion of Mr Chin Tan's appointment.

We congratulate Mr Sivaraman on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-race-discrimination-commissioner-05-02-2024>

New Commonwealth Fraud and Corruption Control Framework

The Australian Government has released the new Commonwealth Fraud and Corruption Control Framework, which comes into effect on 1 July 2024.

The previous framework was established in 2014 under the *Public Governance, Performance and Accountability Act 2013* (Cth). The Government commenced work to update that framework following the establishment of the National Anti-Corruption Commission in July 2023.

The amended framework now contains provisions to mitigate corruption risk and will require all accountable authorities of corporate and non-corporate Commonwealth entities to take steps to prevent, detect and respond to corruption and fraud against their entities.

The new measures, which build on existing counter-fraud obligations, will complement the work of the National Anti-Corruption Commission and the Commonwealth Fraud Prevention Centre in preventing fraud and corruption in the Commonwealth public sector.

<https://ministers.ag.gov.au/media-centre/new-commonwealth-fraud-and-corruption-control-framework-01-02-2024>

Joint statement by US Attorney-General Merrick B Garland and Commonwealth Attorney-General Mark Dreyfus

On 31 January 2024, the *Agreement on Access to Electronic Data for the Purpose of Countering Serious Crimes* between the United States and Australia came into effect.

The Agreement will allow US and Australian authorities to obtain more timely access to electronic data held by service providers in the partner nation. Obtaining this information will help US and Australian agencies to prevent, detect, investigate and prosecute serious crime, and to safeguard Australia's national security.

The Agreement provides safeguards and protections that reflect the commitment of both countries to human rights, civil liberties and the rule of law. These include stringent privacy and oversight protections to ensure any data collected meets the Agreement's robust requirements.

Signed by the US Government and the Australian Government on 15 December 2021, the Agreement is supported by each party's domestic legislative frameworks: the *Clarifying Lawful Overseas Use of Data (CLOUD) Act* (US) and the *Telecommunications (Interception and Access) Act 1979 (Cth)* sch 1.

The full text of the Agreement can be found on the website of the US Department of Justice, Criminal Division, at <https://www.justice.gov/criminal/criminal-oia/cloud-act-agreement-between-governments-us-and-australia>.

<https://ministers.ag.gov.au/media-centre/joint-statement-us-attorney-general-merrick-b-garland-and-australia-attorney-general-mark-dreyfus-31-01-2024>

National Anti-Corruption Commission appointment

Ms Kylie Kilgour has been appointed as the Deputy Commissioner of the National Anti-Corruption Commission (NACC). Ms Kilgour becomes the NACC's third substantive Deputy Commissioner.

The Parliamentary Joint Committee on the National Anti-Corruption Commission has provided its approval for this appointment, as required by the *National Anti-Corruption Commission Act 2022* (Cth).

Ms Kilgour will replace the former Integrity Commissioner, Ms Jaala Hinchcliffe, who has been acting Deputy Commissioner since the NACC commenced operations on 1 July 2023.

Ms Kilgour is currently a Deputy Commissioner in Victoria's Independent Broad-based Anti-corruption Commission. She was previously the Chief Executive Officer of Victoria's Royal Commission into Management of Police Informants and has experience leading sensitive investigations.

Ms Kilgour's proposed term of appointment as Deputy Commissioner will be for five years, commencing on 12 February 2024.

<https://ministers.ag.gov.au/media-centre/national-anti-corruption-commission-appointment-24-01-2024>

Australian Law Reform Commission to inquire into justice responses to sexual violence

The Australian Government has asked the Australian Law Reform Commission (ALRC) to undertake an inquiry into justice responses to sexual violence.

The Honourable Marcia Neave AO and Judge Liesl Kudelka of the District Court of South Australia have been appointed as part-time Commissioners to lead this inquiry.

The inquiry's terms of reference ask the ALRC to have regard to:

- laws and frameworks about evidence, court procedures/processes and jury directions;
- laws about consent;
- policies, practices, decision-making, and oversight and accountability mechanisms for police and prosecutors;
- training and professional development for judges, police and legal practitioners to enable trauma-informed and culturally safe justice responses;
- support and services available to people who have experienced sexual violence, from the period prior to reporting to the period after the conclusion of formal justice system processes; and
- alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes and specialist court approaches.

The Government has established a sexual violence lived-experience expert advisory group (EAG) to ensure the real-life experience of victims and survivors are front and centre in the ALRC inquiry. The EAG will work closely with the ALRC to inform its inquiry and will advise the Government on implementing its recommendations.

The ALRC inquiry and the EAG are critical steps towards improving access to justice for victims and survivors of sexual violence, which is key to the National Plan to End Violence against Women and Children 2022–2032.

The ALRC is due to report by 22 January 2025.

More about the ALRC and the inquiry can be accessed via the ALRC website at <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.

We congratulate Ms Neave and Judge Kudelka on their appointments.

<https://ministers.ag.gov.au/media-centre/australian-law-reform-commission-inquire-justice-responses-sexual-violence-23-01-2024>

Appointment to the Australian Criminal Intelligence Commission and Australian Institute of Criminology

The Australian Government has appointed former Ms Heather Cook as the Chief Executive Officer of the Australian Criminal Intelligence Commission (ACIC) and Director of the Australian Institute of Criminology (AIC).

The ACIC is Australia's national criminal intelligence agency, with specialist investigative capabilities under the *Australian Crime Commission Act 2002* (Cth). The AIC is Australia's national research and knowledge centre on crime and justice.

Ms Cook's five-year appointment to both roles commenced on 15 January 2024.

Ms Cook has over 33 years' experience as an intelligence professional, most recently as Deputy Director General of the Australian Security Intelligence Organisation. She is currently a Member of the Distinguished Advisor Panel at the National Security College, Australian National University.

We congratulate Ms Cook on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-australian-criminal-intelligence-commission-and-australian-institute-criminology-18-12-2023>

Appointments and short-term re-appointments to the Administrative Appeals Tribunal

The Australian Government has appointed a new Judicial Deputy President and made 22 new Member appointments to the Administrative Appeals Tribunal (AAT). The Government has also made 63 short-term Member re-appointments to the AAT.

Justice Ian Jackman SC has been appointed as Deputy President of the AAT for a period of two years. His Honour's appointment will transition to the Administrative Review Tribunal (ART) upon the commencement of that new body for the remainder of his term. Justice Jackman was appointed as a Judge of the Federal Court on 15 December 2022.

The 22 new Members of the AAT have been appointed for two-year terms. This includes the appointment of 10 new members to boost the capacity of the AAT to deal with its significant protection visa and other migration-related caseloads.

The Government has also made 63 re-appointments to the AAT on a short-term basis until 30 June 2024. This includes 59 Member-level positions, two Senior Members and two Deputy Presidents, Ms Jan Redfern PSM and Mr Ian Molloy.

Consistent with the requirements for short-term re-appointments to the AAT, views were sought from the President of the AAT about the suitability of Members for short-term re-appointment (having regard to the ongoing operational needs of the AAT). These re-appointments ensure the stable and ongoing operation of the AAT during the period of transition to the ART.

The Administrative Review Tribunal Bill 2023 (Cth), which establishes the ART as a replacement for the AAT, remains before Parliament. Details about the Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7117>

We congratulate everyone on their appointments and re-appointments.

<https://ministers.ag.gov.au/media-centre/appointments-and-short-term-re-appointments-administrative-appeals-tribunal-18-12-2023>

Appointment of AUSTRAC Chief Executive Officer

The Australian Government has announced the appointment of Mr Brendan Thomas as the next Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC).

AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit. It plays a key role in the detection and prevention of serious crime and terrorism both in Australia and overseas.

Mr Thomas's five-year full-time appointment commenced on 29 January 2024. He fills the vacancy resulting from the appointment of Ms Nicole Rose PSM as a Deputy Commissioner of the National Anti-Corruption Commission.

Mr Thomas has been a Deputy Secretary at the NSW Department of Communities and Justice since November 2021, with responsibility for implementing major changes to reduce the over-representation of the Indigenous population in the New South Wales criminal and child protection systems.

We congratulate Mr Thomas on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-austrac-chief-executive-officer-15-12-2023>

Release of Australia's third Open Government National Action Plan

On 15 December 2023, the Australian Government released Australia's third Open Government National Action Plan.

The plan extends from 2024 to 2025 and commits the Government to delivering eight important initiatives to improve public participation and engagement in government, strengthen integrity in government and the corporate sector, and enhance Australia's democratic processes.

The commitments in this plan aim to:

- create transparency in the use of automated decision-making and responsible use of artificial intelligence;
- improve public participation of youth in government;
- further strengthen integrity within the Commonwealth public sector;
- build a pathway towards a beneficial ownership register;
- increase accountability and transparency in procurements and grants;
- improve protections for public sector whistleblowers;
- strengthen transparency in political donations and political advertising; and
- improve media literacy in vulnerable communities to address mis- and disinformation.

These commitments have been co-designed by government and civil society through Australia's Open Government Forum and benefited from two rounds of public consultation. Forum members will monitor the implementation of the commitments.

Further information on the Open Government Partnership and Australia's third National Action Plan is available from the Commonwealth Attorney-General's Department website at <https://www.ag.gov.au/integrity/australias-open-government-partnership/australias-third-national-action-plan>.

<https://ministers.ag.gov.au/media-centre/release-australias-third-open-government-national-action-plan-15-12-2023>

Respect@Work — a better standard for all Australian workplaces

In 2022 the Australian Government passed the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (*Respect at Work Act*), which established a new positive duty for employers and businesses requiring them to take proactive and meaningful action to prevent sexual harassment and other unlawful behaviour in the workplace and in connection with work.

The positive duty enacts a key recommendation of the 2020 *Respect@Work: Sexual Harassment National Inquiry Report* and aims to prevent sexual harassment from occurring, rather than reacting after unlawful conduct occurs. This shifts the responsibility away from individual employees enforcing their right to a safe and inclusive workplace, to employers to ensure the workplace is safe and inclusive for all employees.

The Australian Human Rights Commission (AHRC) now has regulatory powers to inquire into organisations and businesses that may not be compliant with the positive duty. These powers commenced on 12 December 2023. The AHRC's primary focus will be to support employers to comply with the positive duty. The aim is to achieve meaningful cultural change to create safer, inclusive, and more respectful workplaces.

The AHRC has resources to assist employers with the changes, which can be found on its website at <https://humanrights.gov.au/our-work/sex-discrimination/projects/positive-duty-under-sex-discrimination-act>. Where necessary, the AHRC also has a suite of compliance tools which will require employers to comply with the positive duty, including the ability to issue compliance notices and accept enforceable undertakings.

<https://ministers.ag.gov.au/media-centre/respectwork-better-standard-all-australian-workplaces-12-12-2023>

Establishing Australia's first Anti-Slavery Commissioner

On 30 November 2023 the Commonwealth Attorney-General, Mark Dreyfus, introduced the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023.

The Bill amends the *Modern Slavery Act 2018* (Cth) to establish the core functions of the Anti-Slavery Commissioner, including engaging and supporting victims and survivors of modern slavery and supporting business to address risks of modern slavery practices in their operations and supply chains.

The Commissioner's role and functions will complement the work undertaken across government, business and civil society to prevent and respond to modern slavery.

The Commissioner will play a key role in helping to shape implementation of future modern slavery reforms, including those which may arise from the recent statutory review of the *Modern Slavery Act 2018*, which the Australian Government is currently considering.

The Government has committed $8 million over four years to support the Commissioner's establishment and operations.

Modern slavery encompasses a range of serious exploitative practices, such as trafficking in persons, deceptive recruiting, debt bondage, forced labour and forced marriage.

Details about the Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7122>.

<https://ministers.ag.gov.au/media-centre/establishing-australias-first-anti-slavery-commissioner-30-11-2023>

Appointment of the Disability Discrimination Commissioner

The Australian Government has appointed Ms Rosemary Kayess as the Disability Discrimination Commissioner.

The Disability Discrimination Commissioner protects the rights of people with disability in Australia and promotes the United Nations *Convention on the Rights of Persons with Disabilities*.

Ms Kayess's five-year full-time appointment commenced on 29 January 2024, filling the vacancy resulting from the appointment of the former Commissioner, Dr Ben Gauntlett, to the National Anti-Corruption Commission.

Ms Kayess is an accomplished human rights lawyer, academic and practitioner with an expert understanding of Australian anti-discrimination law and international human rights frameworks. She has extensive practical legal experience advising on disability discrimination law, including utilising the disability discrimination complaints mechanism of the Australian Human Rights Commission.

We congratulate Ms Kayess on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-disability-discrimination-commissioner-28-11-2023>

Appointment of Ombudsman for South Australia

The South Australian Government has appointed Ms Emily Strickland to the office of Ombudsman for South Australia. Ms Strickland commenced as Ombudsman in January 2024, replacing Mr Wayne Lines who has retired. She will be South Australia's seventh Ombudsman.

Ms Strickland has extensive experience in public law, including over six years as Deputy Ombudsman at Ombudsman SA and a period as Acting Equal Opportunity Commissioner. Most recently, she has been Director of the Screening Unit at the Department for Human Services (SA).

We congratulate Ms Strickland on her appointment.

<https://www.ombudsman.sa.gov.au/publications/news/appointment-of-ms-emily-strickland-as-ombudsman-for-south-australia>

Commonwealth Ombudsman reports

Defence handling of unacceptable behaviour complaints

On 12 December 2023 the Commonwealth Ombudsman released its investigation report, *Defending Fairness: Does Defence handle unacceptable behaviour complaints effectively?*, into its own-motion inquiry that examined how the policies and procedures evaluated in its previous report (*Defence's Policies for Receiving and Responding to Reports of Abuse* (August 2019)) work in practice in the Australian Defence Force (Navy, Army and Air Force) and the Department of Defence (collectively, "Defence").

As part of the inquiry, the Ombudsman:

- visited seven Defence establishments across the three services;
- conducted 33 interviews and roundtable discussions with Defence personnel;
- surveyed people who had experienced unacceptable behaviour; and
- reviewed Defence's policies and procedures for managing complaints of unacceptable behaviour and reviewed complaint records.

In the 2022–23 financial year, Defence received 1,165 complaints of unacceptable behaviour.

The Ombudsman found that Defence's complaint handling framework is not always working effectively for complainants or for commanders and managers, who all expressed frustrations with the current framework.

In particular, the Ombudsman made the following findings:

- There is no simple way to access information about how to make a complaint about unacceptable behaviour outside of Defence's internal network.
- The lack of an option to make complaints outside the chain of command, and anonymously, is likely preventing some complaints from being made.
- Inconsistent record-keeping requirements mean that the story of a complaint cannot be understood from a single system, preventing meaningful oversight.
- There is a lack of inbuilt mechanisms to ensure people are being treated fairly, with their complaints handled appropriately and consistently.
- It is not easy to obtain and use data on complaints to understand risks and patterns and to drive continuous improvement.
- A lack of training on complaint handling and complex policies and procedures risks unfair and inconsistent complaint processes and outcomes.

While the Ombudsman made several specific recommendations, its key recommendation is the establishment of a specialised, centralised trained complaints unit with quality assurance at its core, operating across all three services and the Department of Defence, enabling Defence to assure itself that the policies and procedures in place are being applied consistently and to facilitate continuous improvement.

Defence accepted all nine recommendations in the report and advised that scoping work on implementing the recommendations, including timeframes, is expected to be completed in the first quarter of 2024.

The Ombudsman will continue to discuss anticipated timeframes for implementation of the recommendations with Defence and return to assess the action taken.

The report can be accessed on the Commonwealth Ombudsman's website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0016/302191/Defending-Fairness-Does-Defence-handle-unacceptable-behaviour-complaints-effectively.pdf>.

Services Australia and Department of Social Services response to addressing impacts of unlawful income apportionment

On 4 December 2023 the Commonwealth Ombudsman released its investigation report, *Accountability in Action: Identifying, Owning and Fixing Errors*, into the response of Services Australia and the Department of Social Services (DSS) to addressing the impacts of unlawful income apportionment.

In February 2023 Services Australia and the DSS (the agencies) told the Ombudsman there was an issue with how Services Australia had been apportioning income to calculate social security payment rates before 7 December 2020, when the law changed. The Ombudsman decided to conduct two investigations into income apportionment.

On 2 August 2023 the Ombudsman published a statement on the lawfulness of the agencies' approach to income apportionment. This investigation looked at the agencies' administration of income apportionment decisions, communication with customers, and handling of complaints, internal reviews and Administrative Appeal Tribunal appeals.

In the course of its investigation, the Ombudsman found:

- Services Australia (and its predecessor Department of Human Services (DHS)) had unlawfully apportioned income between at least 2003 and December 2020.

- The agencies have known about this issue since October 2020.

- The agencies are still unable to advise how many people were affected or the extent to which payment rates were affected — that is, how much payments went up or down because of unlawful calculations.

- The agencies are settling a final legal position about how to calculate employment income lawfully, before they recommence assessing cases.

- Whilst this occurs, Services Australia has paused approximately 20,000 debt reviews and requests for explanations of debts, and identified approximately 87,000 other files that may become debts.

- The agencies did not act promptly to address this issue — in the three years they have known about this issue, the Ombudsman expected more action to have been taken to address it.

- Specifically, the agencies have not taken appropriate steps to:
  - assess the potential impact unlawful income apportionment had on payment rates between 2003 and 2020;
  - develop a remediation strategy for affected customers;
  - develop systems to manage paused debt reviews consistently and appropriately;
  - develop a communication plan and products to explain the issue appropriately to affected customers; or
  - ensure they are capturing and reporting on complaints about income apportionment decisions and communications.

The Ombudsman made three recommendations aimed at strengthening the agencies' responses to historic unlawful decisions, including developing remediation strategies and ensuring paused debts are managed fairly and consistently. Another five recommendations were aimed at improving the agencies' communication with customers, procedural guidance for staff and approaches to complaint handling.

Services Australia and the DSS accepted all eight recommendations. The Ombudsman will continue to monitor the agencies' actions to address historic unlawful income apportionment decisions and the implementation of its recommendations.

The report can be accessed on the Commonwealth Ombudsman's website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0019/302059/FINAL-Income-Apportionment-OMI2-Report.pdf>.

Recent decisions

Use of extrinsic material in statutory interpretation

Harvey v Minister for Primary Industry and Resources (NT) [2024] HCA 1

The McArthur River Project is a mining enterprise in the Northern Territory, carried on by the third respondent, Mt Isa Mines Ltd. The McArthur River Project involves the mining of zinc-lead-silver ore; the processing, treatment and concentration of this ore; and its storage and transportation for sale. The ore is transported to the Bing Bong loading facility located on

the Gulf of Carpentaria before being loaded onto a bulk carrier for transshipment to larger ocean-going vessels. The Bing Bong loading facility is located at a shallow part of the Gulf which requires regular dredging. The dredged sediment is pumped onshore to a dredge spoil emplacement area (DSEA), which is of limited capacity.

In 2013 Mt Isa Mines applied for a new mineral lease (ML 29881) under the *Mineral Titles Act 2010* (NT) to enable it to construct a new DSEA on a pastoral lease it owns near the Bing Bong loading facility.

The first and second appellants, Mr Harvey and Mr Simon, are native title holders in respect of the land comprising the pastoral lease. The appellants brought proceedings seeking to prevent the first respondent, the Northern Territory Minister for Primary Industry and Resources, from granting ML 29881 to the third respondent under the *Mineral Titles Act* without first complying with s 24MD(6B) of the *Native Title Act 1993* (Cth). Section 24MD(6B) provides the appellants with a statutory right of notification, objection and consultation in relation to any proposed grant that creates the right to mine for the sole purpose of the construction of an infrastructure facility associated with mining.

The appellants sought relief in the form of declarations to the effect that the proposed grant of ML 29881 is invalid and orders restraining the Minister from granting the application.

The primary judge, Justice Reeves of the Federal Court, had concluded that the Minister was authorised by s 40(1)(b)(ii) of the *Mineral Titles Act* to grant ML 29881 and that s 24MD(6B) of the *Native Title Act* did not apply to the proposed grant as the new DSEA was not an "infrastructure facility" as defined in s 253 of that Act. The appellants appealed from the primary judge's determination that the proposed grant of ML 29881 is not a future act to which s 24MD(6B) of the *Native Title Act* applies.

The Full Court of the Federal Court of Australia dismissed the appeal, finding that the third respondent's contention that the grant of ML 29881 would not be the creation or variation of a right to mine was correct, namely the activities undertaken at the DSEA would be too "remote" from mining, and that the proposed DSEA was not an "infrastructure facility" for the purposes of s 24MD(6B), with the consequence that s 24MD(6B) and the procedures contained therein were inapplicable to the grant of ML 29881.

The appeal before the High Court required it to determine what constitutes a "right to mine" and what amounts to an "infrastructure facility" as defined by s 253 of the *Native Title Act*, for the purpose of determining whether s 24MD(6B) and, consequently, the procedures set out in that provision, applied.

In their joint judgment, Gageler CJ, Gordon, Steward and Gleeson JJ (Edelman J agreeing) held that the appeal should be allowed, finding that the appellants are entitled to freeholder rights under s 24MD(6A) as well as the procedural rights under s 24MD(6B) of the *Native Title Act*. The proposed grant of ML 29881 constitutes "the creation … of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining": *Harvey* [6].

The High Court found that the creation of a right to mine is generally a future act which results in an application of the right to negotiate procedures under pt 2 div 3 subdiv P of the *Native Title Act* (which includes s 24MD). The future act is invalid when those procedures are not followed. There is a carve-out from the negotiation procedures for the creation of the right to mine "for the sole purpose of the construction of an infrastructure facility … associated with mining": *Native Title Act* s 26(1)(c)(i). Where that carve-out is applicable, as in this case, the negotiation, objection and consultation procedures in s 24MD(6B)(c)–(g) must be followed.

The High Court first considered the term "right to mine". Contrary to the reasoning of the Full Federal Court, the plurality found that a "right to mine" was not a reference to a specific authority or permission that a mining lease might convey, for example, one of the rights listed in s 40(1) of the *Mineral Titles Act*. Rather, the expression "right to mine" should be construed as a composite term to denote all those mining tenements which are capable of being issued under state and territory laws. The *Native Title Act* uses such a phrase because it is sufficiently descriptive of all the various types of mining tenements that can be created under state and territory laws and of the many different names by which such tenements are identified: *Harvey* [66]. This conclusion was seen as bolstered by the phrase "whereby the grant of a mining lease or otherwise", which follows the term "right to mine" in s 26 of the *Native Title Act*. It would be otherwise anomalous, in the context of the *Native Title Act*, to fail to embrace all the various activities that are essential to a mining project and that are authorised by state and territory legislation.

In considering the term "infrastructure facility", the plurality noted that the definition under s 253 of the *Native Title Act* contained the word "includes", which in this context signified that what follows was not intended to be an exhaustive expression of meaning and that the words "infrastructure facility" must also bear their ordinary meaning. This was not considered to be altered by the addition of the words "any of the following": *Harvey* [77]. The plurality also reasoned that it made more sense that Parliament would want to use an open-ended definition allowing inclusion of all the various types of infrastructure associated with mining that might be needed, now and in the future. This interpretation was also considered supported by the Explanatory Memorandum and the Supplementary Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth), which made clear that the listed matters in the definition of "infrastructure facility" were not intended to be exhaustive.

Accordingly, the High Court found that ML 29881 is a future act that is the creation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining for the purpose of s 24MD(6B) of the *Native Title Act*.

Justice Edelman agreed with the orders made by the plurality. However, his Honour noted that interpreting the definition of "infrastructure facility" under the *Native Title Act* was an example of where the words of the definition and the context of the Act gave apparently strong indications of intention to be attributed to Parliament, while an apparently clear expression of an intention to the contrary could also be attributed to Parliament from the context arising from the extrinsic materials. Justice Edelman accepted that there could only be one manifested parliamentary intention. As the extrinsic material in this case was "so clear and specific on this point", it must reshape the understanding of what might otherwise be seen as strong indications of a contrary intention to be attributed to Parliament from the

statutory text and context within the Act: *Harvey* [92]. As such, the definition of "infrastructure facility", for the reasons held by the plurality, was not exhaustive.

Justice Edelman also noted that the modern approach to statutory interpretation, as set out in *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384, is that extrinsic materials should be considered as part of the context that is "considered in the first instance, not merely at some later stage when ambiguity might be thought to arise": *CIC Insurance* 408. Section 15AB of the *Acts Interpretation Act 1901* (Cth) contains various gateways to the consideration of information in extrinsic material. However, as Edelman J noted, the extent to which these gateways will restrict resort to such information might often depend only upon the extent of judicial imagination, because s 15AB has no minimum threshold for ambiguity and, without full context, there is almost always potential for some patent or latent ambiguity: *Harvey* [113]. Moreover, an expansive approach to the extrinsic materials, which s 15AB permits, is still consistent with the nature of that provision as generally facilitative, designed to expand resort to information: ibid [114].

Regarding the weight to be given to extrinsic materials, s 15AB of the *Acts Interpretation Act* "requires that some extrinsic information or knowledge, such as that which is based on reasonable expectations of social norms or fundamental common law principles, generally be given greater weight than other information derived from extrinsic materials": ibid [115]. To this end, the central role of Ministers and their departments in drafting explanatory memoranda and second reading speeches (unlike other extrinsic materials) invites the inference that these materials are more reflective of government intent: ibid [116].

Damages for injury versus damages for unlawful discrimination

Comcare v Friend [2024] FCAFC 4

The respondent was an employee of the Australian Federal Police (AFP), until her employment was terminated in 2019 on the ground of invalidity. In March 2014 the respondent lodged with Comcare a claim for compensation for psychological injury to which her employment significantly contributed, pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*SRC Act*). Comcare accepted the claim and the respondent received compensation in the form of medical expenses and weekly payments on the ground of incapacity, for a total sum of $677,363.84.

In August 2018 the respondent lodged a complaint with the Australian Human Rights Commission (AHRC complaint) alleging discrimination on the grounds of disability and of her sex, and that she had been sexually harassed in the period from March 2013 until early 2014 while at work.

In September 2020 the respondent and the Commonwealth, representing the AFP, entered into a deed of release under which the AFP agreed to pay the respondent the sum of $1,250,000 in settlement of the AHRC complaint. In February 2021 Comcare gave notice of its intention to recover from the respondent the sum of $677,363.84, providing that this was in accordance with the recovery provision of s 48 of the *SRC Act*. The respondent disputed that the monies payable to her under the deed of release gave rise to an entitlement by

Comcare to recover the statutory compensation. The respondent was successful before the primary judge in *Friend v Comcare* [2021] FCA 837.

The issue on appeal to the Full Court of the Federal Court was whether the primary judge was correct in declaring that no part of the sum of $1,250,000 paid pursuant to the deed of release in settlement of the AHRC complaint constituted "damages or a recovery of damages", within the meaning of s 48 of the *SRC Act*, such that Comcare could recover the statutory compensation.

The Full Court upheld the primary judge's decision and dismissed the appeal. The reasons for the decision of the Full Court were set out by Wheelahan J. Notably, the Full Court held that in accordance with the primary judge's conclusion, an order for damages, or an agreement to pay damages, on account of unlawful discrimination is outside the scope of s 48 of the *SRC Act*.

In reaching this conclusion, the Full Court first considered the application of s 44 of the *SRC Act*, the effect of which is to deny the existence of a cause of action against a Commonwealth party in respect of an injury sustained by an employee in the course of their employment for which the Commonwealth would, but for that provision, be liable for damages. The Court found that in applying the decision of Marshall J in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCA 439, the reasoning of which both parties in this case accepted, damages paid as a consequence of a complaint to the AHRC alleging unlawful discrimination are, as a matter of statutory interpretation, outside s 44 of the *SRC Act*. A complaint to the AHRC, or any proceedings that follow that complaint, is not "an action or other proceeding for damages" for the purposes of s 44 because it is not an action for damages of the type contemplated by the provision, that is, a common law action for damages. This was also seen to be demonstrated by the context of pt IV of the *SRC Act,* in which ss 44 and 48 also sit, particularly by ss 46, 47 and 50, which refer to "common law claims": *Comcare* [77].

Turning to s 48, the Full Court determined that "coherence requires" the reference to "damages" in this provision to mirror damages of a type which the other provisions of pt IV of the *SRC Act*, including ss 46, 47, and 50, are concerned with, namely damages recoverable in common law actions for damages. The Court explained: "The recovery of damages in respect of an injury to an employee is a recovery of damages where the injury is the subject-matter of the cause of action because damages is the gist of the common law cause of action in negligence. A complaint to the AHRC alleging unlawful discrimination is different. Its foundation is not the injury but the unlawful discrimination.": *Comcare* [79], citing *Gardiner v Laing O'Rourke Australia Construction Pty Ltd* (2020) 102 NSWLR 599, [40]. Thus, the damages in the instant case are to be characterised as being in respect of the unlawful discrimination because that is the substance of the claim: *Comcare* [79]. Consequently, the recovery of payment made in compensation of a discrimination or sexual harassment complaint under the *Australian Human Rights Commission Act 1986* (Cth), or in satisfaction of an order of payment of damages under that Act, is outside the terms of s 48 of the *SRC Act*: ibid [89].

Although not required to consider this issue, the Full Court also noted that because the basis on which damages may be awarded for unlawful discrimination are statutory, there is no reason to think that the assessment of damages should not, in an appropriate case, take account of payments of no-fault statutory compensation (such as under the *SRC Act*), if the compensation is not repayable: ibid [80]–[85].

Basics of statutory interpretation

Aurizon Operations Ltd v Australian Rail Tram and Bus Industry Union NSW Branch [2024] NSWCA 24

The applicant, Aurizon Operations Ltd (Aurizon), is an accredited rail transport operator under the *Rail Safety National Law* (NSW) (*National Law*). On 29 September 2021 Aurizon applied to the second respondent, the Office of the National Rail Safety Regulator (the Regulator), to vary its railway operations accreditation to add "crew cars" to its new freight service to transport mineral sands from the east coast of Australia to the west coast. Aurizon intended to use the crew cars to give its crew breaks between the Broken Hill to Port Augusta section of its route from Newcastle to Kwinana via Broken Hill, rather than have the crew stay at a depot or hotel over this section.

On 11 February 2022 the Regulator's delegate granted the variation sought. The delegate found that Aurizon had fulfilled the applicable consultation requirements, in accordance with s 99(3) of the *National Law*, by consulting with prospective train drivers who were to operate Aurizon's new national rail route.

Section 99(3)(a) of the *National Law* imposes consultation obligations on a rail transport operation where it proposes to vary its accreditation and that variation involves variations to its safety management system. Consultation is required with those persons "likely to be affected by the safety management system or its review or variation".

As the proposed crew were to be obtained through a labour hire arrangement and none would be members of the first respondent, the NSW branch of the Australian Rail Tram and Bus Industry Union (the Union), Aurizon did not consult with the Union. The delegate was satisfied that Aurizon had consulted with the relevant people and that Aurizon was not required to consult with the Union because none of the proposed crew members was a Union member and so it did not "represent" any of those persons.

By summons filed on 10 May 2022, the Union challenged the validity of the variation. On 11 May 2023 Walton J, the primary judge, set aside the variation on a basis which did not correspond with any of the grounds or submissions that had been put by the parties. Notably, the primary judge found that the Regulator's delegate was in error in construing the nature and extent of the consultation requirements under s 99(3)(a) of the *National Law* and was thus in error in finding that Aurizon had complied with these requirements.

Aurizon appealed and the Regulator cross-appealed the primary judge's order setting aside the variation, both contending that none of the grounds in the summons was made out and that the primary judge ought to have so found.

Aurizon raised several grounds of appeal, the principal ground being that the primary judge erred in construing the consultation requirements under s 99(3)(a) of the *National Law*. The primary judge held that s 99(3)(a) required Aurizon to consult with *all* persons who carry out its railway operations or who work on or at its premises or with its rolling stock, irrespective of whether they were actually "likely to be affected by the safety management system or its review or variation".

The NSW Court of Appeal (Adamson JA; Mitchelmore AJA and Griffiths AJA agreeing) found that the primary judge's interpretation was erroneous. In striving to give meaning to every word of the relevant provision (as per *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71]), the Court found that the primary judge's interpretation disregarded the opening words of s 99(3)(a)(i) ("persons likely to be affected by the safety management system"), which meant that, on the primary judge's interpretation, the same result could be achieved if those words were removed. Moreover, the words "likely to be affected" were found to invite a factual inquiry; coupled with a reading of the *National Law* as a whole, s 99(3)(a)(i) could not be considered a deeming provision: *Aurizon Operations* [53]–[55] (Adamson JA). As such, "persons likely to be affected" must belong to at least one of the three categories listed in the provision (persons who carry out those railway operations, or who work on or at the operator's railway premises, or who work with the operator's rolling stock), which required a "probabilistic inquiry to ascertain what persons are 'likely to be affected' ": ibid [58].

Additionally, the use of the disjunctive "or" between the categories, rather than "and", was an indication to the Court of Appeal that this was consistent with s 99(3)(a) requiring a factual inquiry to identify which persons in each of the three categories (if any) are likely to be affected. Justice Adamson noted earlier precedent in which the court had stated that only in narrow circumstances ought a court read "and" as "or" and "or" as "and", namely, where there is an obvious mistake, or where a list of items is joined by "and" and the list is plainly a list of alternatives: ibid [60], citing *Vanmeld Pty Ltd v Fairfield City Council* (2000) 106 LGERA 454 at [22]–[23]. However, neither of these circumstances was seen to arise in s 99(3)(a).

In considering the context and purpose of the provision, Adamson JA noted that there are sometimes difficulties in construing legislation by reference to its objects and purposes, and stated that it is "not for a court to construe a statute in a way which furthers its objects to the greatest extent possible, since this may not have been the legislative intention": *Aurizon Operations* [63].

In conclusion, the Court of Appeal found that the Regulator's delegate's construction of s 99(3)(a) of the *National Law* was correct, and the only persons who needed to be consulted were those persons who belonged to any one or more of the three categories in that section and whom the delegate was satisfied were likely to be affected by the variation. The Court made orders allowing the appeal and cross-appeal.

Human rights and trust in the time of COVID-19 — lockdowns, prison conditions and vaccine mandates

*Kent Blore and Felicity Nagorcka**

On the eve of the COVID-19 pandemic, Queensland joined the Australian Capital Territory and Victoria in enacting human rights legislation. The response to the pandemic required incursions on fundamental rights and freedoms which tested the human rights frameworks in each of these jurisdictions. Under that framework, whenever an act, decision or statutory provision limits a human right, generally that limit must be justified according to a test of proportionality. In this way, the legislation aims to embed a "culture of justification". This article follows how this culture of justification played out in the ACT, Victoria and Queensland for lockdowns, vaccine mandates and the heightened risks of transmission in a prison setting. It explores what these examples reveal about how human rights legislation interacts with trust in government institutions, and seeks to answer the following question: does a human rights framework help to build trust in government or might it, conversely, encourage scepticism about government decision-making?

A culture of justification and trust in government

The *Human Rights Act 2019* (Qld) commenced on 1 January 2020. By the end of that month, the World Health Organization had declared a public health emergency of international concern in relation to the spread of SARS-CoV-2, the virus that causes COVID-19. On 11 March 2020, the World Health Organization declared a global pandemic.

What was the new human rights paradigm Queensland walked into on the eve of the pandemic? Following the lead of the United Kingdom,[1] the ACT[2] and Victoria,[3] Queensland adopted a "dialogue model".[4] Under the dialogue model, each of the three branches of government is given a role to play in protecting and promoting human rights, creating a "dialogue" between them about how best to achieve that goal. However, at the end of the day, Parliament has the final say.[5]

The dialogue model has the following key features. In Parliament, Members who propose new legislation must table a statement of compatibility, which sets out whether the legislation would be "compatible with human rights".[6] As to the executive, "public entities" or "public authorities" must act and make decisions in a way that is "compatible with human rights" (sometimes called the "substantive limb"), as well as give proper consideration to human rights whenever they make a decision (the "procedural limb").[7] The courts review compliance

* Felicity Nagorcka is Crown Counsel and Kent Blore is Deputy Crown Counsel at Crown Law, Queensland. This article is based on a paper delivered at the AIAL National Administrative Law Conference, Adelaide, 27–28 July 2023. The views expressed in this article are the authors' own and not necessarily those of Crown Law or the Queensland Government.

1 *Human Rights Act 1998* (UK).
2 *Human Rights Act 2004* (ACT) (*HRA* (ACT)).
3 *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter* (Vic)).
4 *Human Rights Act 2019* (Qld) (*HRA* (Qld)).
5 George Williams, "The distinctive features of Australia's human rights charters" in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 22, 23.
6 *HRA* (ACT) (n 2) s 37; *HRA* (Qld) (n 4) s 38; *Charter* (Vic) (n 3) s 28.
7 *HRA* (ACT) (n 2) s 40B(1); *HRA* (Qld) (n 4) s 58(1)(a)–(b); *Charter* (Vic) (n 3) s 38(1).

with the human rights obligations. In Victoria and Queensland, the courts can review the compliance of public entities with their human rights obligations if the complainant has an independent cause of action on which to "piggyback" the human rights claim.[8] In the ACT, there is a standalone cause of action.[9] The courts must also interpret legislation, if possible, in a way that is "compatible with human rights".[10] If the Supreme Court or Court of Appeal is unable to interpret legislation compatibly with human rights, the Court may issue a declaration of incompatibility.[11] The declaration does not invalidate the legislation, but enlivens a procedure that sends the matter back to Parliament for reconsideration. Finally, in Queensland, as an alternative to litigation, the Queensland Human Rights Commission can attempt to conciliate complaints that public entities failed to comply with their human rights obligations.[12] A similar mechanism is shortly to commence in the ACT, permitting complaints to made to the ACT Human Rights Commission.[13]

The common thread running through these obligations is the concept of "compatibility with human rights".[14] A measure will be compatible with human rights if it does not limit any human rights or it limits a human right but the limit is justified.[15] In each jurisdiction, the general limitation clause provides that a limit on human rights will be justified if the limit is "under law" and "proportionate".[16] The requirement of legality recognises that in a society that respects the rule of law, limits on human rights must have "lawful authority" or a "legal foundation".[17] The test of proportionality set out in the general limitation clauses aligns with the structured proportionality test applied in human rights jurisprudence around the world.[18] According to that test, a limit on human rights will be justified if it meets four requirements:

- the measure must have a proper purpose or legitimate aim;[19]

- the measure must be rationally connected to that purpose, meaning that it actually helps to achieve that purpose;[20]

8 *HRA* (Qld) (n 4) s 59; *Charter* (Vic) (n 3) s 39.
9 *HRA* (ACT) (n 2) s 40C.
10 *HRA* (ACT) (n 2) s 30; *HRA* (Qld) (n 4) s 48; *Charter* (Vic) (n 3) s 32. Note in the ACT and Victoria, there is ongoing doubt about the link between the interpretative clause and the general limitation clause. In *Momcilovic v The Queen* (2011) 245 CLR 1, three justices held there was no link between ss 7(2) and 32 of the Victorian *Charter*: at 44 [35] (French CJ), 219–20 [574]–[575] (Crennan and Kiefel JJ). Four justices held there was such a link: at 92 [168] (Gummow J, Hayne J agreeing at 123 [280]), 170 [427] (Heydon J), 249–50 [683]–[684] (Bell J). However, Heydon J was in dissent as to the validity of s 32(1).
11 *HRA* (ACT) (n 2) s 32(2); *HRA* (Qld) (n 4) s 53(2); *Charter* (Vic) (n 3) s 36(2).
12 *HRA* (Qld) (n 4) pt 4.
13 See *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT).
14 See, eg, *HRA* (Qld) (n 4) ss 38(2), 48(1)–(2), 53(2), 58(1)(a), (5)(b).
15 This is the definition of "compatible with human rights" in *HRA* (Qld) (n 4) s 8. The ACT and Victorian Acts do not have an express definition of the term.
16 *HRA* (ACT) (n 2) s 28; *HRA* (Qld) (n 4) s 13; *Charter* (n 3) s 7(2).
17 *DPP (Vic) v Kaba* (2014) 44 VR 526, 647 [468] (Bell J). See also *Borrowdale v Director-General of Health* [2020] 2 NZLR 864, 908 [197]–[200], 912 [225], 915 [240], 925–6 [291] (Thomas, Venning and Ellis JJ).
18 Kent Blore, "Proportionality under the *Human Rights Act 2019* (Qld): when are the factors in s 13(2) necessary and sufficient, and when are they not?" (2022) 45(2) *Melbourne University Law Review* 419; Pamela Tate, "Judicial review and rights review" (2023) 30 *Australian Journal of Administrative Law* 30, 45–7.
19 *HRA* (ACT) (n 2) s 28(2)(b); *HRA* (Qld) (n 4) s 13(2)(b); *Charter* (Vic) (n 3) s 7(2)(b).
20 *HRA* (ACT) (n 2) s 28(2)(d); *HRA* (Qld) (n 4) s 13(2)(c); *Charter* (Vic) (n 3) s 7(2)(d).

- the measure must be necessary, meaning the purpose cannot be achieved in some other way that has a lesser impact on human rights;[21] and

- the measure must strike a fair balance between its purpose and the impact on human rights.[22]

In combination, these provisions mean that whenever an act, decision or statutory provision in the ACT, Victoria or Queensland limits a human right, subject to certain exceptions that limit must now be justified using the test of proportionality. In this way, the human rights Acts introduce a "culture of justification".[23]

The pandemic raised human rights problems in very stark terms, requiring life to be balanced against liberty. As the Queensland Human Rights Commissioner said, "I can envisage no greater test of new human rights legislation than a global pandemic which necessitated a swift and far-reaching response from all levels of government to protect our community."[24]

The next three parts of this article look at the ways in which the human rights frameworks were tested when, respectively, chief health officers imposed lockdowns, prison authorities grappled with the heightened risks of COVID-19 transmission in prisons, and government agencies introduced vaccine mandates.

The fifth and sixth parts of the article then seek to explore what the pandemic experience tells us about how (or, indeed, whether) a cultural of justification helps to builds trust in government. The question is timely in light of new parliamentary inquiries into the potential for a Human Rights Act at the federal level and in South Australia.[25]

The Organisation for Economic Co-operation and Development (OECD) Framework on Drivers of Trust in Public Institutions identifies five main drivers of trust: responsiveness, reliability, openness, integrity and fairness.[26] On the one hand, it seems that, intuitively, a culture of justification should promote these values. By creating transparency of reasoning, and treating people as deserving of an explanation, a culture of justification ought to promote openness and integrity. Further, by improving the quality of decision-making and by requiring

21 *HRA* (ACT) (n 2) s 28(2)(e); *HRA* (Qld) (n 4) s 13(2)(d); *Charter* (Vic) (n 3) s 7(2)(e).

22 *HRA* (ACT) (n 2) s 28(2)(b)–(c); *HRA* (Qld) (n 4) s 13(2)(e)–(g); *Charter* (Vic) (n 3) s 7(2)(b)–(c).

23 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (Yvette D'Ath, Attorney-General); Explanatory Notes, Human Rights Bill 2018 (Qld) 5–6.

24 Queensland Human Rights Commission, *Putting People First: The First Annual Report on the Operation of Queensland's Human Rights Act 2019–20* (2020) 5.

25 "Inquiry into Australia's Human Rights Framework", *Parliament of Australia* (Web page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>; "Submissions open: Inquiry into the potential for a Human Rights Act for South Australia", *Parliament of South Australia* (Web page, 8 December 2023) <https://www.parliament.sa.gov.au/en/News/2023/12/08/01/17/SUBMIInquiry-into-the-potential-for-a-Human-Rights-Act-for-South-Australia>. See also the recent calls for a Human Rights Act at the federal level: Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022); *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023) vol 4.

26 Organisation for Economic Co-operation and Development (OECD), *Building Trust to Reinforce Democracy: Summary Brief Presenting the Main Findings from the OECD Trust Survey* (2021) <https://www.oecd.org/governance/trust-in-government/oecd-trust-survey-main-findings-en.pdf>.

that unnecessary limits on human rights not be imposed, a culture of justification should also promote fairness.

On the other hand, does a culture of justification have a downside for those seeking to build trust in government? Might opening up government action to human rights scrutiny have the practical result of lending an undeserved legitimacy to criticisms based in conspiracy theories and misinformation? Might claims that the legal culture respects human rights actually serve to diminish trust in government, if citizens are (whether rightly or not) sceptical about those claims?

Without any empirical analysis, we have necessarily approached these questions in an abstract and speculative way. But the questions are important. Building trust is critical to the protection and promotion of human rights, just as it is critical to good government more generally. As the pandemic has shown, often human rights can only be safeguarded by government intervention, and the success of government intervention may depend on whether people have confidence in their governments.

Lockdowns

The right to life is protected in each of the human rights Acts in the ACT, Victoria and Queensland,[27] second only — in order, at least — to the right to equality.[28] The right to life is widely recognised to be "the supreme right" as it is "the prerequisite for the enjoyment of all other human rights".[29] The right not only imposes a negative obligation on the state not to deprive life arbitrarily, but also a positive obligation to take steps to protect life.[30] According to the United Nations Human Rights Committee, the right to life may require the state to "take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity", including "the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria".[31] Very soon into the pandemic, it became apparent that the state had to take drastic steps to protect the right to life, including severe curtailments of other rights we normally take for granted, such as freedom of movement.[32] Some human rights experts have suggested that a failure to implement lockdowns would have amounted to a breach of the state's positive obligations to protect life.[33] Sarah Joseph, for example, has pointed to Sweden's "hands off" approach in the early stages of the pandemic as a probable breach of the right to life.[34]

27 *HRA* (ACT) (n 2) s 9; *HRA* (Qld) (n 4) s 16; *Charter* (Vic) (n 3) s 9.
28 *HRA* (ACT) (n 2) s 8; *HRA* (Qld) (n 4) s 15; *Charter* (Vic) (n 3) s 8.
29 UN Human Rights Committee, *General Comment No 36 — Article 6: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [2]; *Waratah Coal Pty Ltd v Youth Verdict Ltd [No 6]* [2022] QLC 21, [1487] (Kingham P); *Loielo v Giles* (2020) 63 VR 1, 65 [240] (Ginnane J).
30 Explanatory Notes, Human Rights Bill 2018 (Qld) 19.
31 UN Human Rights Committee, *General Comment No 36 — Article 6: Right to Life* (n 29) 6 [26].
32 *HRA* (ACT) (n 2) s 13; *HRA* (Qld) (n 4) s 19; *Charter* (Vic) (n 3) s 12.
33 UN Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, 128th sess, UN Doc CCPR/C/128/2 (30 April 2020, adopted 24 April 2020) 1 [2]; Sarah Joseph, "International human rights law and the response to the COVID-19 pandemic" (2020) 11 *Journal of International Humanitarian Legal Studies* 249, 254.
34 Joseph (n 33) 254.

Legislative response to the pandemic — amendments to permit lockdowns

Australian legislatures moved quickly to give public authorities the powers they needed to address the risks posed by COVID-19. For example, although Queensland had pre-existing legislation for the management of public health emergencies, those provisions were quickly recognised to be inadequate. Only one week after COVID-19 was declared a global pandemic, on 18 March 2020 the Queensland Parliament introduced and passed amendments giving the chief health officer a power to issue public health directions, which was wide enough to include lockdowns and border closures.[35] The amendment Bill was accompanied by a statement of compatibility, assessing whether the amendments would be compatible with human rights. It frankly acknowledged that the new powers of the chief health officer had the potential to limit an extensive array of rights — and especially freedom of movement — but it reasoned that those limits were justified by the need to address the risks posed by COVID-19, including the real risk of the public health infrastructure being overwhelmed.[36] The Bill was declared urgent, bypassing referral to a portfolio committee to consider the Bill's compatibility with human rights under s 39 of the *Human Rights Act 2019* (Qld).[37] In fact, the amendments were progressed so quickly there was not even enough time to print off hard copies of the Bill.[38] But in the circumstances, parliamentarians could hardly be criticised for moving with haste. Even if the portfolio committee did not have the chance to grapple with the human rights impact, the statement of compatibility indicates that, at the very least, the Minister for Health (assisted no doubt by public servants within his department) did grapple with that question.

The chief health officer began exercising these new powers to restrict gatherings the very next day, on 19 March 2020.[39] The first lockdown direction in Queensland — requiring people to stay at home — came a little over a week later on 29 March 2020.[40] For the next few years, there was a constant flux of new directions as the circumstances changed and as we learned more about COVID-19. Some commentators noted that the proliferation of new rules, which were not always easy to locate, posed rule of law issues: "knowing what the law is at a given point in time and how it will be implemented has become a daily challenge".[41]

The difficulty in identifying the law at any point in time posed its own human rights challenge. Limits on human rights can only be justified if they are "under law", and that requirement means that the basic requirements of the rule of law must have been met.[42] "The rule of law

35 *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld) s 36.

36 Human Rights Statement of Compatibility, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld) 8–11, 16–23.

37 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2020, 683–4 (Steven Miles, Minister for Health).

38 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 2020, 680 (Speaker).

39 *Mass Gatherings Direction* (Qld); *Non-essential Indoor Gatherings Direction* (Qld) (both issued 19 March 2020 and superseded on 21 March 2020).

40 *Home Confinement Direction* (Qld) (issued 29 March 2020 and superseded on 2 April 2020).

41 Katie Miller, "Finding law in a time of emergency: COVID-19" (2020) *27 Australian Journal of Administrative Law* 66, 68. See also Peta Stephenson and Jonathan Crowe, "Queensland public health laws and COVID-19: a challenge to the rule of law?", *Australian Public Law* (Blog post, 21 August 2020) <https://www.auspublaw.org/blog/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law>.

42 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271 [49]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 46 [174] (Bell J); *PJB v Melbourne Health* (2011) 39 VR 373, 396 [91] (Bell J) (*Patrick's Case*).

requires that the law is accessible and, so far as possible, intelligible, clear and predictable."[43] Laws that are inaccessible, unintelligible, unclear and unpredictable are not laws at all and cannot be the vehicle for imposing justified limits on human rights. Very quickly governments addressed these issues by setting up dedicated websites where public health directions could be located, though some jurisdictions did better than others.[44]

The human rights challenge to lockdowns in Loielo v Giles

The public health directions with the widest and deepest impacts on human rights were lockdown directions, and more than anywhere else in Australia, Melbourne endured particularly lengthy and severe lockdowns. Unsurprisingly then, Victoria was the locus of court challenges to lockdowns.[45] The prime example is the case of *Loielo v Giles*.[46] In June 2020 Melbourne went back into lockdown to deal with a second wave of COVID-19. The lockdown later became more onerous with the introduction of a night-time curfew.[47] At a press conference on the morning of 13 September 2020, the Victorian Premier, Steve Bracks, and the Chief Health Officer of Victoria, Brett Sutton, announced that the curfew would continue.[48] Later that evening, the actual decision-maker, Deputy Public Health Commander Michelle Giles, made the decision to continue a curfew between the hours of 9:00 pm and 5:00 am.[49] Associate Professor Giles was a senior medical adviser in the Victorian Department of Health and Human Services, who was authorised by Mr Sutton to make the decision only two days before it was to be made.[50]

The curfew had a deep impact on restaurant owners like Michelle Loielo.[51] The day after the curfew came into effect, she commenced judicial review proceedings, claiming Associate Professor Giles had acted at the behest of others, and that her decision was unreasonable, illogical or irrational.[52] Ms Loielo "piggybacked" onto her judicial review grounds a claim that Associate Professor Giles had failed to give proper consideration to human rights and that her decision was not substantively compatible with human rights.[53] The parties moved mountains to get the matter on for hearing only 15 days after the decision was made, but on the first day of the hearing, 28 September 2020, the curfew was revoked on the basis that the conditions of the pandemic had changed and a curfew was no longer proportionate.[54]

Even though the curfew had been lifted, Ginnane J in the Supreme Court of Victoria found that Ms Loielo's standing was not thereby removed,[55] and that there was still utility in

43 *Borrowdale* (n 17) 925 [291] (Thomas, Venning and Ellis JJ).
44 Miller (n 41) 68.
45 See also the unsuccessful constitutional challenge in *Gerner v Victoria* (2020) 270 CLR 412, 429 [35] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) where the High Court rejected an argument that the *Constitution* impliedly protects freedom of intrastate movement.
46 *Loielo v Giles* (n 29).
47 Ibid 15 [34] (Ginnane J).
48 Ibid 7 [8], 22 [55], 49 [168].
49 Ibid 22 [57]–[58], 29 [84].
50 Ibid 7 [7], 20–1 [51]–[53], 41 [132].
51 Ibid 6 [4], 11 [26].
52 Ibid 6 [5].
53 Ibid 6 [5].
54 Ibid 6 [3], 23–4 [62]–[63].
55 Ibid 44–5 [144], [146].

considering whether the curfew had been lawful. In particular, if she could make out a breach of human rights, a declaration that the curfew had breached human rights "would not readily [be] regard[ed]" as "having no foreseeable consequence".[56] Ms Loielo won the battle of standing but not the war.[57]

The Court held that the Premier's announcement that the curfew would continue, while certainly "awkward", did not reveal that Associate Professor Giles had failed to make an independent decision.[58] To the contrary, Giles gave detailed evidence that she had made an independent decision and explained her reasoning.[59] Her decision was also not unreasonable, illogical or irrational; it was within the range of reasonable decisions that could have been made.[60] As to human rights, while the curfew limited the freedom of movement[61] of Ms Loielo and about five million other people, that limit was justified as proportionate to the purpose of protecting public health.[62] Further, the evidence from Associate Professor Giles showed she gave real consideration to the human rights impacts of her decision.[63] She felt the "heavy responsibility" for considering the impacts of her decision and described it as "one of the most important tasks" she had ever been asked to undertake.[64]

Three aspects of Loielo v Giles *going to trust in government*

Three features of *Loielo v Giles* are interesting when considering the implications of the decision for trust in government.

First, everyone in *Loielo v Giles* assumed that the accountability mechanisms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian *Charter*) applied, even though it was plainly arguable that they did not. The parties proceeded on the basis that Associate Professor Giles was subject to the human rights obligations of "public authorities": that is, to consider human rights and to act or make a decision which is substantively compatible with human rights.[65] However, the decision of the Full Court of the Federal Court of Australia in *Kerrison v Melbourne City Council*[66] suggests that assumption may have been wrong.

In *Kerrison*, the Full Court found that the making of subordinate instruments by a local council did not involve an "act" for the purposes of the substantive limb of the Victorian *Charter*.[67] The underlying logic appears to be that each of the operative provisions of the *Charter* is directed only to one of the three branches of government, and the operation of each is

56 Ibid 70–1 [267].
57 The issue about standing to challenge revoked COVID-19 measures arose for many litigants, given how quickly the measures changed, and it also arose in other human rights jurisdictions. For a summary of the Canadian cases on standing going both ways, see *Gateway Bible Baptist Church v Manitoba*, 2023 MBCA 56, [23]–[34] (Cameron JA).
58 *Loielo v Giles* (n 29) 49 [170] (Ginnane J).
59 Ibid 10 [19], 49 [172].
60 Ibid 10 [20], 52 [186], 55 [199]–[200], 56 [203].
61 *Charter* (Vic) (n 3) s 12. See also *HRA* (ACT) (n 2) s 13; *HRA* (Qld) (n 4) s 19.
62 *Loielo v Giles* (n 29) 10–11 [21], 68 [254] (Ginnane J).
63 Ibid 10–11 [21], 70 [262].
64 Ibid 34 [105], 70 [261].
65 Ibid 57 [208] (Ginnane J).
66 (2014) 228 FCR 87.
67 Ibid 91 [6], 129–30 [182], 133 [199] (Flick, Jagot and Mortimer JJ).

exclusive of the others. The human rights obligations of public authorities are directed to the executive branch, but subordinate instruments are legislative in nature.

Kerrison has been criticised as leaving a lacuna in human rights protections.[68] There are detailed operative provisions about statements of compatibility for primary legislation[69] and human rights certificates for subordinate legislation,[70] but there is no equivalent obligation for the next rung down: subordinate instruments. Hence, if the human rights obligations of public authorities do not apply, then arguably subordinate instruments slip into an "Alsatia" where human rights protections do not apply. However, it is arguable that those criticisms fail to recognise that operative provisions directed to the legislative branch will apply, including the obligation to interpret statutory provisions, if possible, in a way that is compatible with human rights.[71] And if a compatible interpretation is not possible, subordinate instruments are liable to be declared incompatible by the Supreme Court.[72]

Like council bylaws, public health directions are subordinate instruments. They are legislative in nature and can (and did) affect millions of people across the State.[73] Nonetheless, they are still one rung down from subordinate legislation, meaning they did not need to be tabled in Parliament or accompanied by a human rights certificate. If *Kerrison* is right, then Associate Professor Giles did not need to consider human rights or make sure the public health direction was compatible with human rights. In a footnote in *Loielo v Giles*, Ginnane J recorded that he raised the question of whether the authority of *Kerrison* might be relevant, but the parties did not take him up on it.[74] It is not clear why the parties declined to address the elephant in the room. It might have seemed unpalatable if the public health directions somehow avoided some of the key accountability mechanisms in the *Charter*. In any event, Associate Professor Giles did consider human rights and was always prepared to justify her decision to issue the lockdown direction. But *Kerrison* returned later in the pandemic in the context of vaccine mandates.[75]

The second thing to note is that Ginnane J stressed the importance of acting lawfully and respecting human rights during a crisis: "Even in an emergency, Victoria is a society of laws and any executive decrees must be made in accordance with law."[76] That is all the more important "[w]hen basic human rights such as freedom of movement are being restricted".[77] Moreover, "[h]uman rights are of importance even in urgent or emergency situations" because "if governments and executives can disregard them, they are not rights of any real

68 See, eg, Michael Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) 193–4.
69 *HRA* (ACT) (n 2) s 37; *HRA* (Qld) (n 4) s 38; *Charter* (Vic) (n 3) s 28.
70 *HRA* (ACT) (n 2) s 37; *HRA* (Qld) (n 4) s 41; *Subordinate Legislation Act 1994* (Vic) ss 12A, 21.
71 *HRA* (ACT) (n 2) s 30; *HRA* (Qld) (n 4) s 48; *Charter* (Vic) (n 3) s 32.
72 *HRA* (ACT) (n 2) s 32(2); *HRA* (Qld) (n 4) s 53(2); *Charter* (Vic) (n 3) s 36(2).
73 *Hunt v Gerrard, Chief Health Officer (Qld)* (2022) 13 QR 1, [83]–[87] (Flanagan JA, Morrison JA agreeing at [1]).
74 *Loielo v Giles* (n 29) 57 [208] n 68 (Ginnane J).
75 *Harding v Sutton* [2021] VSC 741, [160] (Richards J). The Federal Court also awarded summary judgment on the basis that *Kerrison* (n 66) made a human rights challenge to pandemic orders untenable in *Wilson v Victoria* [2023] FCA 111, [104]–[108] (Hespe J).
76 *Loielo v Giles* (n 29) 9 [15] (Ginnane J).
77 Ibid 7–8 [10].

value".[78] The value of human rights is not just "protecting individuals"; thinking about human rights also "assists in thoughtful decision-making".[79]

The precautionary principle has been criticised as undermining "thoughtful decision-making"[80] but it loomed large in the case.[81] The precautionary principle is the principle that "a lack of scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk".[82] As Associate Professor Giles put it, "sometimes during a pandemic, there is an absence of scientific evidence because there have not been years of accumulated experience and information", but decisions still "have to be made with the information available".[83] When it came to the curfew, there was some evidence that the full suite of lockdown measures up until that point had been effective in reducing the transmission of COVID-19 — daily case numbers were going down — but Associate Professor Giles accepted there was "no evidence" that that result could be attributed to the curfew in particular.[84] In the proportionality test, this would ordinarily be fatal at the rational connection stage — there was no evidence that the limits on human rights actually helped to achieve their purpose.[85] But Ginnane J reasoned there was "equally no evidence" that lifting the curfew "would have continued to achieve the purpose of reducing new case[s] at the same rate".[86] The curious thing about that observation is that the onus of justifying the limit on human rights is on the person seeking to justify it, and by reference to evidence that is "cogent and persuasive".[87] Associate Professor Giles had to adduce evidence showing that the curfew would be effective. Ms Loielo did not have to adduce evidence to show why lifting the curfew would not be effective. Nonetheless, there is obvious wisdom in taking a precautionary approach to deal with a pandemic, even if it interacts with proportionality reasoning in interesting ways. And the reality is that Associate Professor Giles was not, in fact, making her decision without any evidential foundation at all. The package of lockdown measures — including curfews — had been shown to be effective in reducing case numbers. She "made a judgment based on her experience as an infectious diseases physician with added experience of COVID-19 cases".[88] Ultimately, Ginnane J held that Associate Professor Giles was "entitled to have regard to the precautionary principle".[89] Indeed, it "would have been surprising"[90] if she had done other than adopt "a public health perspective using a precautionary approach".[91]

78 Ibid 10 [17].
79 Ibid 66 [245].
80 Katie Webber, "The precautionary principle and judicial decision making in the COVID-19 pandemic" (2022) 29 *Australian Journal of Administrative Law* 43.
81 As it did in other litigation concerning public health responses to COVID-19: see, eg, *Palmer v Western Australia* (2021) 272 CLR 505.
82 *Loielo v Giles* (n 29) 52 [184] (Ginnane J).
83 Ibid 35 [111].
84 Ibid 31 [91], 67 [250].
85 *HRA* (ACT) (n 2) s 28(2)(d); *HRA* (Qld) (n 4) s 13(2)(c); *Charter* (Vic) (n 3) s 7(2)(d).
86 *Loielo v Giles* (n 29) 67 [251] (Ginnane J); see also 52 [186].
87 *R v Oakes* [1986] 1 SCR 103, 138 [68] (Dickson CJ); *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [147] (Warren CJ); *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 293 [109] (Martin J). See also *Loielo v Giles* (n 29) 66 [246] (Ginnane J).
88 *Loielo v Giles* (n 29) 67 [250] (Ginnane J).
89 Ibid 52 [186].
90 Ibid 70 [262].
91 Ibid.

Third, Ginnane J recorded his doubts that Associate Professor Giles should be the one making decisions as grave as whether to impose a curfew on greater Melbourne.[92] He pointed out that an "authorised officer" is not accountable to Parliament; they may be a relatively junior public servant, and yet they have the power to close all of Victoria and confine all Victorians to their homes.[93] He also pointed out that the primary consideration of an authorised officer was to protect public health, whereas a Minister is better placed to weigh up that goal against the impact on "the economic or social life of the State".[94] He said: "Parliament may wish to reconsider who should exercise these emergency powers and whether their exercise should be required to take into account matters such as the social and economic consequences of their exercise."[95]

New Zealand compared

Loielo v Giles can be contrasted with the New Zealand case of *Borrowdale v Director-General of Health*.[96] In that case, the New Zealand High Court held that the lockdown in the early stages of New Zealand's response to the COVID-19 pandemic was not in fact "prescribed by law".[97] For the first nine days of the lockdown, the New Zealand Prime Minister and other public officials told people that they were required to stay at home and that enforcement action would be taken against those who failed to comply. The problem was that the public health order did not actually require that until it was amended nine days in. Because limits on human rights can only be justified if they are authorised by law, the result was that the impacts of those directions on freedom of movement, assembly, association and religion were automatically unjustified.[98] Questions of proportionality did not arise. The Court was at pains to acknowledge that the government was doing the best it could and that the actions of government needed to "be seen in the context of the rapidly developing public health emergency the nation was facing".[99] Nonetheless, while "the state of crisis during those first nine days goes some way to explaining what happened, it is equally so that in times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance".[100] In *Loielo v Giles*, Ginnane J was alive to the decision in *Borrowdale* and the importance of acting with lawful authority even in a crisis.[101] The difference was that Associate Professor Giles had acted lawfully.

Legislation revisited

Over the course of the pandemic, borders reopened and lockdowns petered out. In 2021 and 2022, the Parliaments in Victoria and Queensland revisited the powers of their respective chief health officers in light of the experience of the pandemic up to that point.

92 Ibid 9 [13].
93 Ibid 40–41 [131].
94 Ibid 9 [13].
95 Ibid 41 [133].
96 *Borrowdale* (n 17).
97 Ibid 912 [225], 915 [240] (Thomas, Venning and Ellis JJ).
98 Ibid 908 [197]–[200], 925–6 [291]. Borrowdale appealed other aspects of the judgment, though the New Zealand government did not cross-appeal the ruling in respect of the first nine days: *Borrowdale v Director-General of Health* [2022] 2 NZLR 356, 363 [11] (Collins J for the Court of Appeal).
99 *Borrowdale* (n 17) 925 [290] (Thomas, Venning and Ellis JJ).
100 Ibid 925–6 [291].
101 *Loielo v Giles* (n 29) 8 [10], 10 [18], 70 [266] (Ginnane J).

In 2021 the Victorian Parliament appeared to take on board Ginnane J's comments about the need to reconsider who should exercise the emergency powers — it might even be said that the courts and the Parliament engaged in a "dialogue". The amendments replaced public health directions with "pandemic orders" to be issued by the Minister of Health.[102] Within seven days of issuing the order, the Minister is required to publish their justification for limiting human rights,[103] and then table it in Parliament within four sitting days.[104]

Similarly, in 2022, the Queensland Parliament overhauled the regime for public health directions for COVID-19. Until the provisions expired on 31 October 2023, the chief health officer was required to publish a "justification statement" on the Queensland Health website within five days of making a public health direction, setting out why the limits imposed on human rights were justified.[105] The justification statement also had to be tabled in Parliament within 21 days.[106]

According to the statement of compatibility for the amendments in Victoria, the changes were designed to "provide transparency about why any limits on rights are needed and how they are demonstrably justified, and [to] ensure that these matters are thoroughly considered before a pandemic order is made".[107] It also neatly solved any accountability deficit that might have arisen from *Kerrison*. After two years of the pandemic, Victoria and Queensland opted for more transparency, not less.[108]

Prison conditions during the pandemic

The balance between the right to life and other human rights was especially acute in a prison context. In its general comment on the right to life, the United Nations Human Rights Committee has pointed out that when states deprive people of their liberty, they "assume the responsibility to care for their lives and bodily integrity" and accordingly bear "a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty".[109] Prisoners are particularly vulnerable to COVID-19. They are a disadvantaged cohort of people with typically poorer health than the general community and they are housed

102 *Public Health and Wellbeing Act 2008* (Vic) s 165AI, inserted by *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) s 12.

103 *Public Health and Wellbeing Act 2008* (Vic) s 165AP(2)(c), (d), inserted by *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) s 12.

104 *Public Health and Wellbeing Act 200*8 (Vic) s 165AQ, inserted by *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) s 12.

105 *Public Health Act 2006* (Qld) ss 142C, 142H, inserted by *Public Health and Other Legislation (COVID-19 Management) Amendment Act 2022* (Qld) s 9.

106 *Public Health Act 2006* (Qld) s 142L(4), inserted by *Public Health and Other Legislation (COVID-19 Management) Amendment Act 2022* (Qld) s 9.

107 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2021, 4229 (Martin Foley, Minister for Health).

108 The Victorian Amendment Bill as initially drafted drew considerable criticism. Much of the criticism was intemperate, but some was well-considered. For an example of considered criticism see Gabrielle Appleby et al, "Victoria's controversial pandemic Bill: 6 ways for the government to show it is serious about scrutiny", *The Conversation* (15 November 2021) <https://theconversation.com/victorias-controversial-pandemic-bill-6-ways-for-the-government-to-show-it-is-serious-about-scrutiny-171600>. The Bill was amended before being passed.

109 UN Human Rights Committee, *General Comment No 36 — Article 6: Right to Life* (n 29) 5 [25], quoted in *Rowson v Secretary, Department of Justice (Vic)* (2020) 60 VR 410, 426 [78] (Ginnane J).

in closed environments where transmissible diseases can spread quickly.[110] For that reason, the right to life required prison authorities to take positive steps to address the risks posed by COVID-19. Early in the pandemic, in May 2020, the World Health Organization and a number of international human rights bodies issued a joint statement drawing attention to the "heightened vulnerability of prisoners and other people deprived of liberty to the COVID-19 pandemic" and urging prison authorities to put in place preventative measures.[111]

However, the steps taken by prison authorities to address those risks also had the potential to limit other human rights, such as the right to humane treatment when deprived of liberty. By virtue of their status as a person deprived of their liberty, prisoners are inherently vulnerable to the exercise of power by the state.[112] Every aspect of their lives is controlled. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*[113] — also known as the *Nelson Mandela Rules* — set out minimum standards to ensure that prisoners are treated with humanity and respect, including access to fresh air and limits on solitary confinement.[114] Prison authorities were faced with the seemingly impossible task of having to reduce the health risks of COVID-19 at all costs except, somehow, the cost of maintaining these minimum human rights standards.

Legislatures worked swiftly to give prison authorities the powers they needed to prevent the spread of COVID-19 into prisons. For example, in the ACT, amendments were introduced and passed on the same day (2 April 2020), giving the director-general of the Justice and Community Safety Directorate the power to make emergency declarations under the *Corrections Management Act 2007* (ACT) specifically for COVID-19.[115] In Victoria, both Houses of Parliament managed to pass amendments on the same day (23 April 2020) introducing a new pt 10B into the *Corrections Act 1986* (Vic). The amendments gave to the governor of each prison, as well as to the secretary of the Department of Justice and Community Safety, new powers to restrict the movement and placement of prisoners.[116] Each of these Bills was accompanied by a statement of compatibility assessing whether the amendments would be compatible with human rights.[117] Again, given each Bill was passed

110 *Rowson* (n 109) 412 [10], 416 [30], 417 [33] (Ginnane J); *Rowson v Secretary, Department of Justice [No 2]* [2022] VSC 382, [19] (Ginnane J) (*Rowson [No 2]*).

111 "UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings", *World Health Organization* (Statement, 13 May 2020) <https://www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>.

112 *Castles v Secretary, Department of Justice (Vic)* (2010) 28 VR 141, 167 [100] (Emerton J).

113 *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) (*Nelson Mandela Rules*).

114 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 307 [174], 323 [238]–[239] (Martin J); *Davidson v Director-General, Justice and Community Safety Directorate (ACT)* (2021) 18 ACTLR 1, 44 [211]–[213] (Loukas-Karlsson J).

115 *COVID-19 Emergency Response Act 2020* (ACT) sch 1, pt 1.2 (as enacted).

116 *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 26.

117 The statement of compatibility in Victoria acknowledged that the powers had the potential to limit a wide range of rights, but reasoned that those limits were justified by the need to address the risks posed by COVID-19: Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 2020, 1178, 1180–83 (Daniel Andrews, Premier). In the ACT, the statement of compatibility did not identify any limit on human rights arising from the new powers to be given to prison authorities. That potential human rights impact appears to have been lost among the more obvious human rights impacts of other amendments introduced in the same Bill. See Explanatory Statement and Human Rights Compatibility Statement, COVID-19 Emergency Response Bill 2020 (ACT) 14.

the same day it was introduced, the processes for scrutinising Bills for compatibility with human rights were necessarily truncated.

With these new powers and other powers, prison authorities began implementing measures to reduce the risks of COVID-19 in a prison setting. These measures included restricting access to visitors, introducing 14-day quarantine periods for new prisoners and, to minimise mixing among the prison population, reducing the hours prisoners could leave their cells.

Attempts to be released from prison

It did not take long for human rights questions to spill over into the courts. At first, prisoners commenced proceedings to allege that prison authorities were required to do more to protect their right to life. The prime example is the Victorian case of *Rowson v Secretary, Department of Justice (Vic)*.[118] Mark Rowson was a prisoner at Port Phillip Prison and was suffering from a number of health conditions, including heart disease and asthma.[119] In April 2020 he commenced an action in negligence, claiming that prison authorities had a duty of care to take reasonable steps to ensure he did not suffer serious injury or death from COVID-19.[120] He then "piggybacked" a human rights claim that a failure to release him from prison would breach his human rights, particularly his right to life.[121] He applied for an interlocutory injunction releasing him from prison pending the outcome of his trial. Both sides called experts who said that the risks to prisoners would be high if an outbreak occurred in the prison.[122] As Mr Rowson's barrister put it, prisoners would be "sitting ducks".[123] While prison authorities had taken a number of protective measures to address the risks posed by COVID-19, Mr Rowson suggested there were gaps between what the policies anticipated should occur and what was actually happening on the ground. Prisoners were not social distancing, touch points were not being cleaned, and his access to flowing water for washing his hands was restricted.[124] The prison authorities had also not conducted a risk assessment.

Without making any findings of fact, Ginnane J accepted there was enough evidence to make out a prima facie case that prison authorities had breached their duty of care to Mr Rowson, exposing him to risk of significant injury.[125] Further, Mr Rowson had made out a strong case for an injunction to restrain the prison authorities from acting unlawfully under s 38(1) of the Victorian *Charter*.[126] Justice Ginnane said that the Supreme Court's inherent jurisdiction "to preserve the subject matter of litigation" meant that, in an extreme case, he would have power to order that a prisoner be released from prison. However, this was not that case.[127] The balance of convenience weighed in favour of Mr Rowson continuing to serve his term of imprisonment in prison, taking into account the steps taken by prison authorities to manage

118 *Rowson* (n 109).
119 Ibid 411 [2] (Ginnane J).
120 Ibid 423 [65].
121 Ibid 426 [77], [80]. For a similar attempt in Canada to invoke human rights in support of release from prison, see *Latham v Canada*, 2020 FC 670, [4] (Pamel J).
122 *Rowson* (n 109) 416 [30], 417 [33], 419 [44] (Ginnane J).
123 Ibid 423 [63].
124 Ibid 414–5 [18]–[19].
125 Ibid 429 [98].
126 Ibid 424–5 [73].
127 Ibid 412 [8]–[9], 428 [93].

the risks of COVID-19 and that, at that stage, no prisoner or prison employee had contracted the virus. However, Ginnane J did order the prison authorities to carry out a risk assessment and implement any recommendations of the risk assessment.[128]

Applications for bail and habeas corpus

At around the same time, in the case of *Re JMT*,[129] the Supreme Court of Queensland considered the relevance of COVID-19 to an application for bail for a person accused of murder ("JMT"). Justice Davis accepted that the measures taken by prison authorities to reduce the risks of COVID-19 could potentially make life in prison more difficult. The impact of the pandemic on court proceedings could also mean that a defendant would need to wait in a prison for a trial for longer than normal. However, while those considerations were weighty, if the accused presented an unacceptable risk of flight, reoffending or interfering with witnesses, then COVID-19 would not make those risks acceptable.[130]

His Honour noted that the impact of COVID-19 on prison conditions might have limited relevance given that the care and control of remandees is a matter for prison authorities, not the courts. In that connection, although no party raised the *Human Rights Act 2019* (Qld), Davis J noted that the Act "primarily casts obligations upon the executive and the parliament and only impacts the exercise of judicial power in limited ways".[131] At that time, there was little appreciation in Queensland that courts have an obligation under s 5(2)(a) of the *Human Rights Act 2019* to apply at least some human rights directly, even when exercising judicial power.[132] In Victoria, when deciding bail applications, the courts have applied human rights directly via the equivalent provision in s 6(2)(b) of the *Charter*.[133] Arguably courts should consider the right to life and other human rights when deciding whether to remand a defendant in a prison during a pandemic. Another human right of obvious potential relevance is the right to be brought to trial without unreasonable delay and to be released if that is not possible.[134] That right was repeatedly raised and considered in bail applications in Victoria throughout the COVID-19 era.[135] In any event, Davis J took into account the likely delay COVID-19 would cause, found that JMT did not present an unacceptable risk and, accordingly, granted him bail.[136]

128 Ibid 429 [102].
129 [2020] QSC 72.
130 Ibid [50], [64]–[66] (Davis J).
131 Ibid [68], citing *Kracke* (n 42) 68 [282] (Bell J) and *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 625, 633–4 [32] (Bell J).
132 One notable exception is a decision of the Court of Disputed Returns in the context of a human rights challenge to a local government election conducted at the start of the pandemic: *Innes v Electoral Commission of Queensland [No 2]* (2020) 5 QR 623, 671 [222]–[224], 672–3 [229]–[230] (Ryan J). For more recent cases, see *Wood v The King* [2022] QSC 216, [74]–[75] (Davis J); *A-G (Qld) v Grant [No 2]* (2022) 12 QR 357, 389–94 [110]–[135], 395–6 [141]–[145], 399 [164] (Applegarth J). Cf the passing reference to *HRA* (Qld) (n 4) s 5(2)(a) in *Beale v Chief Health Officer* [2022] QCA 188, [49] (Morrison JA, Bond JA and Flanagan J agreeing).
133 *DPP (Vic) v SE* [2017] VSC 13, [21] (Bell J); *Re HL* [2016] VSC 750, [68]–[72] (Elliott J); *Re HL [No 2]* [2017] VSC 1, [134] (Elliott J).
134 *HRA* (Qld) (n 4) s 29(5)(b) and (c); *Charter* (Vic) (n 3) s 21(5).
135 *Raffoul v Smith* [2020] VSC 848, [90]–[91] (Croucher J); *Re IH* [2020] VSC 32, [47(g)] (Tinney J); *Re Shea* [2021] VSC 207, [59] (Incerti J); *Taylor v DPP (Vic)* [2020] VSCA 142, [17] (Priest, T Forrest and Weinberg JJA). Cf *Re James* [2020] VSC 602, [42] (Tinney J).
136 *Re JMT* (n 129), [84]–[86] (Davis J). See also *R v Hancock [No 2]* [2022] ACTSC 193, [5], [27], [34], [69],

A few months later, the question of bail arose again in the Queensland Court of Appeal case of *Baggaley v Director of Public Prosecutions (Cth)*.[137] Dru Baggaley faced serious charges of drug importation. Justice Flanagan had denied Mr Baggaley's application for bail on the basis he presented an unacceptable risk that he would fail to appear at this trial, notwithstanding that the pause on jury trials during the pandemic would mean he would spend longer in prison awaiting trial and notwithstanding that lockdowns would reduce his risk of flight in the event he were granted bail.[138] Mr Baggaley appealed against Flanagan J's decision as a self-represented litigant. On the appeal, he raised the impact on his liberty under s 29 of the *Human Rights Act 2019* (Qld). Section 29 contains a number of discrete human rights related to liberty. By arguing that his continued detention would be unlawful and arbitrary, it appears that Mr Baggaley's submissions focused on the right not to be subject to arbitrary detention in s 29(2). However, he also referred expressly to the distinct right in s 29(5)(b), which provides that a person who is arrested or detained on a criminal charge has the right to be brought to trial without unreasonable delay, as well as the right in s 29(5)(c), which provides that a person must be released if that is not possible.[139]

The Court of Appeal accepted the relevance of delay outside of the context of human rights. Speaking for the Court, Fraser JA recognised that "[l]engthy delay before trial is a material consideration favouring a grant of bail, but it is not necessarily a decisive consideration".[140] Curiously, however, the Court did not fold into that analysis the right to be brought to trial without unreasonable delay, as the courts had done in Victoria.[141] Instead, the Court avoided human rights altogether on the basis that Mr Baggaley had not brought an application under s 29(7) of the *Human Rights Act*.[142]

Human rights complaints about quarantine in prison

The broader context of the pandemic was also changing. By the time the Queensland Court of Appeal heard *Baggaley*, the Supreme Court was beginning to list jury trials again in its return to normal.[143] As the pandemic progressed, the focus of prisoners also shifted. They went from wanting prison authorities to do more to keep them safe, to wanting prison authorities to do less. One area of contention was the conditions endured by prisoners during their quarantine period. Prison authorities in each jurisdiction introduced a 14-day quarantine period for new prisoners to ensure that COVID-19 was not introduced into the general prison population. In practice, this meant prisoners were being held in solitary confinement in isolation cells for 14 days. Reportedly, many prisoners did not have access to fresh air or

in which Refshauge AJ declined to grant bail after taking into account the accused's right to liberty and the impact of COVID-19 on prison conditions.

137 [2020] QCA 179.

138 Ibid [2]–[3], [22] (Fraser JA, McMurdo JA agreeing at [36], Mullins JA agreeing at [37]).

139 Ibid [28].

140 Ibid [14].

141 Cf also *Khokhlov v Cyprus* (2023) 77 EHRR 26, 742–3 [95]–[101] (where the European Court of Human Rights found that lengthy delays in extradition proceedings during the COVID-19 pandemic meant that continuing detention became unjustified).

142 *Baggaley* (n 137) [29] (Fraser JA). Section 29(7) of the *HRA* (Qld) (n 4) sets out a right to habeas corpus. It has since been recognised that s 29(7), like all human rights, is not a cause of action: *Wood v The King* (n 132) (Davis J).

143 *Baggaley* (n 137) [29] (Fraser JA).

exercise, and some faced difficulties contacting family members and legal representatives.[144] Solitary confinement is dealt with by the *Nelson Mandela Rules*, which provide that solitary confinement should only be used when necessary and not at all for periods longer than 15 consecutive days.[145] The reason is that a lack of meaningful interaction with other human beings for that period of time has been shown to cause permanent psychological harm.[146]

In *C v Queensland Corrective Services*, a vulnerable Aboriginal woman ("C") with a range of mental health conditions was forced to reset her 14-day quarantine period after receiving medical treatment partway through her initial quarantine period.[147] In a complaint to the Queensland Human Rights Commission, C alleged the prolonged solitary confinement exacerbated her mental illness and breached a number of her human rights, most notably her right to be treated humanely as a person deprived of her liberty. The Human Rights Commissioner has a complaints-handling function aimed at achieving a practical resolution as an alternative to litigation.[148] Through the conciliation process, Queensland Corrective Services was called upon to justify its quarantine policy. The agency said that its quarantine policy was proportionate to the legitimate aim of protecting the right to life of prisoners and prison staff.[149] Queensland Corrective Services updated its quarantine policy when the health advice later changed to allow prisoners to attend medical appointments without resetting their 14-day quarantine period.[150]

Because C was not satisfied with that explanation and the matter could not be conciliated, the Human Rights Commissioner went on to issue a report.[151] In his report, the Commissioner acknowledged that the pandemic had created a unique challenge for Queensland Corrective Services, requiring it to engage in a "complex balancing" of the rights of individual prisoners such as C against the rights of other prisoners and prison staff.[152] The Commissioner accepted that isolation for up to 14 days represented a proportionate limit on C's human rights.[153] However, the Commissioner "suggest[ed]" that isolation for more than 14 days could no longer be justified in light of "all that is known about controlling the spread of COVID-19 now".[154] Accordingly, the Commissioner recommended Queensland Corrective Services

144 Helen Blaber, Tamara Walsh and Lucy Cornwell, "Prisoner isolation and COVID-19 in Queensland" (2021) 8(2) *Griffith Journal of Law and Human Dignity* 52, 56–60. See also Helen Blaber and Tamara Walsh, "Imposed isolation plagues Queensland prisons during pandemic" (2020) *Proctor* (online, 11 December 2020) <https://www.qlsproctor.com.au/2020/12/imposed-isolation-plagues-queensland-prisons-during-pandemic/>.

145 *Nelson Mandela Rules* (n 113) rule 44.

146 *Canadian Civil Liberties Association v Canada (Attorney General)* (2019) 144 OR (3d) 641, 659–61 [72]–[77] (Benotto JA for the Court). For this reason, in Canada solitary confinement for 15 days or more amounts to cruel, inhuman or degrading treatment: ibid 645 [4]–[5], 658 [68], 668 [119], 669 [126], 673 [150] (Benotto JA for the Court); *Francis v Ontario* (2021) 154 OR (3d) 498, [34] (Doherty and Nordheimer JJA, Harvison Young JA agreeing).

147 Queensland Human Rights Commission, *Prisoner Isolation — Unresolved Complaint under Section 88 Human Rights Act 2019* (2 February 2021) [20] ("*C v Queensland Corrective Services*").

148 *HRA* (Qld) (n 4) pt 4. At the time, the scheme for complaints to the Queensland Human Rights Commission was unique to Queensland. A similar scheme was introduced in the ACT in 2023.

149 *C v Queensland Corrective Services* (n 147) [77]–[84].

150 Ibid [40]–[43].

151 *HRA* (Qld) (n 4) ss 88–90.

152 *C v Queensland Corrective Services* (n 147) [35]–[36].

153 Ibid [85].

154 Ibid [87]–[88].

amend its quarantine policy to make the 14-day cap for isolation more explicit. He also recommended the policy be amended to remove caveats for core minimum requirements, such as access to health care, fresh air and exercise.[155] Of course, the recommendations were not legally binding, so it was up to Queensland Corrective Services whether to accept and implement them.

Attempts to reduce length of imprisonment

Prisoners in Victoria began applying for reductions in their head sentence and non-parole period, to take account of the harsh conditions of their detention during COVID-19 lockdowns. Under s 58E of the *Corrections Act 1986* (Vic), the Secretary of the Department of Justice and Community Safety had a discretion to reduce the length of a prisoner's sentence or non-parole period on account of their good behaviour while suffering disruption or deprivation during an emergency in prison such as a COVID-19 lockdown. In 2021 the Secretary decided to reduce Keith Dudley's head sentence by 35 days to take account of various disruptions related to COVID-19 measures, but declined to grant any further reductions on the basis that the overall disruption or deprivation Mr Dudley experienced in prison had not been significant in the context of the pandemic. Mr Dudley sought judicial review of the Secretary's decision. In *Dudley v Secretary, Department of Justice and Community Safety (Vic)*, Cavanough J dismissed the application, finding that the assessment of the extent of disruptions or deprivations were matters for the Secretary, rather than jurisdictional facts for the Court to review.[156]

However, in construing s 58E of the *Corrections Act*, Cavanough J raised the interpretative clause in the Victorian *Charter*. This was because the Secretary submitted that s 58E only conferred a power on the Secretary to reduce sentences and non-parole periods, with no attendant duty to consider an application to exercise that power. Although his Honour did not need to decide the point, Cavanough J noted that s 58E needed to be construed in accordance with s 32(1) of the *Charter*. Section 32(1) requires that, where a provision has more than one possible meaning that is consistent with its purpose, the meaning to be preferred is the one that is most compatible with human rights. Arguably, s 58E would engage the right to liberty and the right to humane treatment when deprived of liberty. Further, it is arguable that construing s 58E as conferring both a power and a duty would "best accord" with those rights.[157] However, his Honour left that possibility floating, given that he did not need to decide the point to dispose of the matter and given that no party had raised the *Charter*.

Two years down the track, Ginnane J returned to Mr Rowson's negligence claim. By 2022, the context was radically different. Vaccines for COVID-19 had been developed, less virulent strains of the virus had become dominant, and the world had largely returned to normal. Justice Ginnane dismissed the negligence claim on the basis that Mr Rowson's release from prison was not the only way prison authorities could protect his health. They could

155 Ibid [104].

156 *Dudley v Secretary, Department of Justice and Community Safety (Vic)* (2021) 66 VR 403, 413–4 [15], 419–24 [34]–[48] (Cavanough J).

157 Ibid 438–9 [87], citing *Kheir v Secretary, Department of Justice and Regulation (Vic)* [2019] VSC 76, [21] (Richards J).

also discharge their duty of care by taking preventative measures within the prison, such as increased cleaning, social distancing and quarantine measures.[158] For similar reasons, the prison authorities had not breached Mr Rowson's human rights.[159]

Interestingly, over the course of the pandemic, both prisoners and prison authorities invoked the "precautionary principle". From a public health perspective, the precautionary principle recognises that decision-makers may need to err on the side of caution and take more drastic steps to mitigate the risks of a pandemic before confirmatory evidence becomes available.[160] In *Rowson*, Mr Rowson submitted that the court should adopt a precautionary approach in recognition of the weight to be given to human life: "As long as there was a small but identifiable risk of significant harm, it was more appropriate to take action than not."[161] That submission did not convince Ginnane J to order his release. Later, in *C v Queensland Corrective Services*, the prison authorities explained that the reason they had not adopted a less restrictive alternative — such as a policy of not resetting the 14-day quarantine period — was that they had to adopt a precautionary approach in the context of a pandemic. Until more information was available, prison authorities needed to err on the side of caution.[162]

Vaccine mandates

As the pandemic progressed, the suite of measures available to address COVID-19 also progressed. Towards the end of 2020, the first vaccines were developed. The vaccine rollout in Australia started in February 2021 and picked up speed by the end of that year. At some point attention turned from encouraging voluntary vaccination to vaccine mandates. To ensure the safety of their workers and customers, employers in the public and private sectors began introducing vaccine mandates as a condition of employment. For example, Qantas Airways and the Queensland Police Service both made the move in September 2021.[163] Then vaccination requirements began featuring in public health directions. For example, in Queensland the chief health officer issued a public health direction on 10 November 2021, making vaccination a condition of entry for healthcare workers to enter their workplace.[164] On 11 December 2021, this direction was expanded to capture teachers, corrective services officers, airport staff and others.[165] That measure was accompanied by a general direction to all members of the public, setting vaccination as a condition of entry for various places such as cafes, restaurants, cinemas, theme parks, cultural festivals, galleries and museums.[166]

158 *Rowson [No 2]* (n 110) [16], [21] (Ginnane J).
159 Ibid [22].
160 *C v Queensland Corrective Services* (n 147) [80]–[83], citing *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, [467] (Burrage J) (a Canadian case about the human rights compatibility of border closures during the pandemic) and *Palmer v Western Australia [No 4]* [2020] FCA 1221, [79] (Rangiah J) (a case about the proportionality of border closures in Australia during the pandemic).
161 *Rowson* (n 109) 423 [63] (Ginnane J).
162 *C v Queensland Corrective Services* (n 147) [80]–[83].
163 *Motion v Qantas Airways Ltd* [2022] FCA 25, [9] (Downes J); *Brasell-Dellow v Queensland Police Service* [2021] QIRC 356, [114] (Davis P, O'Connor VP and Merrell DP).
164 *Workers in a Healthcare Setting (COVID-19 Vaccination Requirements) Direction* (Qld) (made 10 November 2021, superseded 16 December 2021).
165 *COVID-19 Vaccination Requirements for Workers in a High-Risk Setting Direction* (Qld) (made 11 December 2021, superseded 4 February 2022).
166 *Public Health and Social Measures Linked to Vaccination Status Direction* (Qld) (made 7 December 2021, effective from 17 December 2021, superseded on 24 December 2021).

Vaccine mandates opened up a whole new dimension of human rights issues. There are a number of human rights that are concerned with bodily integrity and the autonomy to make decisions about one's own body.[167] For example, the European Court of Human Rights has held that setting vaccination requirements limits the right to privacy, an aspect of which is physical and mental integrity.[168] That Court has held that the right to privacy is limited where a person is held down and vaccinated against their will,[169] and also where there are repercussions for failing to be vaccinated, such as being prevented from going to school.[170] The ACT, Victoria and Queensland also protect the right to privacy,[171] including the bodily integrity aspect of privacy.[172] But these Australian rights to privacy are worded differently from their European counterpart, which might make a difference.[173] Theirs is a right to private life whereas ours is a right not to have one's privacy unlawfully or arbitrarily interfered with.

The New Zealand courts have also recognised that COVID-19 vaccine mandates limit the "right to refuse to undergo any medical treatment".[174] Although the mandates do not involve forced vaccinations against people's will, New Zealand courts have held that the right is still limited where employees are "faced with the choice of either being vaccinated or having their employment terminated".[175] Again, the ACT, Victoria and Queensland protect a similar right not to be subjected to medical treatment without full, free and informed consent.[176] Again, there are differences in wording that might make a difference to its scope.[177] The New Zealand right omits the Australian emphasis on the treatment being "without consent".

Vaccine mandate cases

In Victoria there was an early human rights challenge to vaccine mandates in the case of *Harding v Sutton*.[178] That case concerned the vaccination requirements for teachers, healthcare workers and construction workers, set out in public health directions issued by the Chief Health Officer, Professor Brett Sutton. The first round of litigation involved an application for a stay brought by the plaintiffs who did not want to be vaccinated. Justice

167 See, eg, the rights listed in the context of electroconvulsive therapy in *PBU v Mental Health Tribunal* (2018) 56 VR 141, 174 [110] (Bell J).

168 *Pretty v United Kingdom* (2002) 35 EHRR 1, 35–6 [61] ("It covers the physical and psychological integrity of a person").

169 *Solomakhin v Ukraine* [2012] ECHR 451, [33].

170 *Vavřička v Czech Republic* (European Court of Human Rights, Grand Chamber, Applications nos. 47621/13 and 5 others, 8 April 2021) [258]–[264].

171 *HRA* (ACT) (n 2) s 12; *HRA* (Qld) (n 4) s 25; *Charter* (Vic) (n 3) s 13.

172 See, eg, Explanatory Notes, Human Rights Bill 2018 (Qld) 22; *Castles* (n 112) 162 [77] (Emerton J); *BZN v Chief Executive, Department of Children, Youth Justice and Multicultural Affairs (Qld)* [2023] QSC 266, [231], [244] (Crowley J).

173 See *ZZ v Secretary, Department of Justice (Vic)* [2013] VSC 267, [93] (Bell J).

174 *New Zealand Bill of Rights Act 1990* (NZ) s 11.

175 *GF v Minister of COVID-19 Response* [2022] 2 NZLR 1, 15 [72] (Churchman J). See also *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2022] 2 NZLR 26, 37–8 [29]–[30] (Cooke J); *Four Midwives v Minister for COVID-19 Response* [2022] 2 NZLR 65, 79 [38] (Palmer J); *Yardley v Minister for Workplace Relations and Safety* (2022) 19 NZELR 125, 137–8 [46] (Cooke J).

176 *HRA* (ACT) (n 2) s 10(c); *HRA* (Qld) (n 4) s 17(c); *Charter* (Vic) (n 3) s 10(c).

177 For example, *HRA* (Qld) (n 4) s 17(c) was found not to be engaged by a COVID-19 vaccine mandate: *Edwards v Queensland Health* [2022] QIRC 91, [42] (Power IC).

178 [2021] VSC 741.

Richards found that the plaintiffs had shown a serious question to be tried.[179] In relation to human rights, her Honour said:

> [I]t is clear from the plaintiffs' affidavits that most if not all of them feel that the effect of the Vaccination Directions is to coerce them to consent to being vaccinated in order to be able to continue earning a living and keep their jobs, in circumstances where they would not otherwise consent to the treatment. On that basis I consider there to be an arguable case that the right in s 10(c) of the Charter is limited by the Vaccination Directions. Justice Beech-Jones' rejection of a similar argument in *Kassam* was based on the common law concerning consent to a trespass to the person. It is arguable that the concept of consent at common law is narrower than the "full, free and informed consent" to medical treatment that is contemplated by s 10(c) of the Charter.[180]

However, that was only to say that the question was arguable for the purposes of the stay application. In any event, Richards J went on to find that the balance of convenience did not favour a stay of the vaccination requirements.

This time, unlike in *Loielo v Giles*, the Chief Health Officer also raised the authority of *Kerrison v Melbourne City Council*. He argued that the public health directions were subordinate instruments, and on the authority of *Kerrison* public authorities are not required to act compatibly with human rights when making subordinate instruments. In *Harding v Sutton* Richards J declined to rule on the *Kerrison* point as a separate question, noting that the plaintiffs and the intervenors might want to argue that *Kerrison* was wrongly decided and should not be followed.[181] In the end, the case did not proceed to trial. It quietly went away when the mandates went away.

By contrast, there has been a flurry of decisions handed down by the Queensland Industrial Relations Commission (QIRC), all upholding vaccine mandates. Early on, in October 2021, the full bench of the QIRC upheld the vaccination direction for police in *Brasell-Dellow v Queensland Police Service*.[182] Although the decision did not address human rights, it set the trend for the many human rights cases that followed.[183] Sometimes the Commissioners have found that particular human rights are not engaged,[184] other times the Commissioners have jumped to the justification analysis.[185] In all cases, the QIRC has found that vaccine mandates are compatible with human rights.

179 Ibid [158]–[159] (Richards J)
180 Ibid [161], referring to *Kassam v Hazzard* (2021) 393 ALR 664.
181 *Harding v Sutton* (n 178) [210](d) (Richards J).
182 *Brasell-Dellow* (n 163).
183 See, eg, *Bloxham v Queensland Police Service* [2022] QIRC 37, [47] (McLennan IC); *Colebourne v Queensland Police Service* [2022] QIRC 018, [84]–[85] (Merrell DP); *Slykerman v Queensland Health* [2022] QIRC 39, [32], [43] (Dwyer IC); *Clarke v Queensland Police Service* [2022] QIRC 70, [40] (Power IC); *Graffunder v Queensland Health* [2022] QIRC 76, [98] (McLennan IC); *Casson v Queensland Police Service* [2022] QIRC 113, [34]–[36] (Dwyer IC); *Mocnik v Queensland Health* [2023] QIRC 58, [54]–[76] (O'Connor VP); *Mackenzie v Queensland Health* [2023] QIRC 121, [58] (David P, O'Connor VP and Dwyer IC).
184 See, eg, *Edwards* (n 177) [42] (Power IC).
185 See, eg *Mocnik* (n 183) [54]–[76] (O'Connor VP).

New Zealand compared

That can be contrasted with the track record in New Zealand. In the first wave of vaccination cases, the New Zealand High Court routinely found that the vaccination requirements limited human rights, but that the limit was justified in the circumstances. The Court invoked the precautionary principle, noting "[t]here is no need for proof on a scientific basis".[186] It was enough that vaccination was likely to contribute to preventing the spread of COVID-19 "even if the evidence on the effect on transmissibility [wa]s [still at that stage] uncertain".[187] However, in line with the precautionary principle, as more information became available, the courts applied a higher standard of scrutiny in the next wave of cases.

In *Yardley v Minister for Workplace Relations and Safety*,[188] the New Zealand High Court found that a vaccination direction requiring two doses (and no booster doses) was not compatible with human rights. The reason was that more evidence had become available about the waning effectiveness of vaccines. At least, the evidence in that case showed that requiring only two doses of the vaccine did not "materially advance" the direction's purpose of "ensur[ing] the continuity of the public services, and … promot[ing] public confidence in those services, rather than … stop[ping] the spread of COVID-19".[189] Justice Cooke found that, in the circumstances, the vaccine mandate did not help to achieve its purpose, and there was no rational connection between the means and the ends. The limits on human rights therefore failed a proportionality analysis.

How protecting human rights can build trust

Lockdowns, vaccinations and prison conditions brought into play almost all of the operative provisions in the human rights statutes in the ACT, Queensland and Victoria. When introducing Bills with sweeping new powers to deal with COVID-19, Ministers set out their justifications for the deep limits on human rights in statements of compatibility. Chief health officers and other members of the executive gave detailed consideration to the human rights impacts of their decisions. The courts then reviewed that consideration of human rights in challenges to lockdown directions and vaccine mandates. And in Queensland, the Human Rights Commission conciliated complaints about human rights breaches during the COVID-19 era, including complaints about prison conditions.

In Victoria and Queensland (but not the ACT), the human rights legislation expressly recognises that the legislature has the power to avoid needing to justify limits on human rights by enacting an override declaration.[190] Override declarations are described as reserved for exceptional circumstances such as a "public emergency which threatens the life of the nation"[191] or "an exceptional crisis situation constituting a threat to public safety, health or

186 *Four Aviation Security Service Employees* (n 175) 57 [110] (Cooke J).
187 Ibid.
188 *Yardley* (n 175).
189 Ibid 152 [105] (Cooke J).
190 *HRA* (Qld) (n 4) s 43; *Charter* (Vic) (n 3) s 31.
191 *International Covenant on Civil and Political Rights*, art 4 (regarding derogations, which is the equivalent of override declarations at the international level).

order".[192] On any view, the COVID-19 pandemic was an exceptional crisis situation.[193] That Victoria and Queensland did not enact override declarations throughout the pandemic[194] suggests a commitment to the culture of justification. As the Supreme Court of Victoria once said, long before the pandemic, "[t]he existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights".[195] Ultimately, all three branches of government in the ACT, Victoria and Queensland engaged with the question of whether the public health measures were justified, and at a level of detail that is unique in human rights jurisdictions. Did that widespread engagement with justification help to build trust in government?

There is very little research on the link between trust and human rights. There is some evidence that Queenslanders trust that human rights legislation will lead to better outcomes. In research conducted by Sarah Joseph and others, 18 months after the commencement of the Queensland *Human Rights Act*, a majority of respondents "felt that the Act would make a difference in protecting human rights" (though a significant number of those who felt that way had only heard of the Act through the survey).[196] Nonetheless, at a very broad level, the existence of human rights legislation may lead people to believe government will be more likely to respect human rights. At a more specific level, even without empirical research, there are reasons to believe human rights frameworks can help to build trust in government. This part explores three reasons: people are more likely to trust a government that is in the habit of justifying its actions; better decision-making that survives a proportionality analysis is also more likely to be trusted; and mechanisms to review compliance with human rights obligations can reinforce that trust.

A culture of justification builds trust

Human rights legislation is designed to inaugurate a culture of justification, which may in turn help to engender greater trust in government. A culture of justification is one "in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions".[197] It can be contrasted with a culture of paternalism,[198] in which the government expects to be trusted because it "knows best", and in which it expects to escape scrutiny because it is owed deference. When Associate Professor Giles issued lockdown directions, she did not expect to be immune from

192 *HRA* (Qld) (n 4) s 43(4).

193 See *R v Ali [No 3]* (2020) 15 ACTLR 161, 171 [49] (Murrell CJ); Martin Scheinin, "COVID-19 Symposium: To derogate nor not to derogate?" *Opinio Juris* (6 April 2020) <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

194 Cf *Strengthening Community Safety Act 2023* (Qld); *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (Qld) (after the public health emergency ended, Queensland enacted its first override declarations in relation to youth justice reforms). Cf *Corrections Amendment (Parole Reform) Act 2023* (Vic) (after the public health emergency ended, Victoria enacted further override declarations in relation to parole eligibility).

195 *Certain Children v Minister for Children and Families* (2016) 51 VR 473, 508 [188] (Garde J), quoted in *Loielo v Giles* (n 29) 10 [17] (Ginnane J).

196 Sarah Joseph, Susan Harris Rimmer and Chris Lane, "What did Queenslanders think of human rights in 2021? An attitudinal survey" (2022) 41(3) *University of Queensland Law Journa*l 363, 413.

197 Etienne Mureinik, "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31, 32.

198 *Patrick's Case* (n 42) 448–9 [333] (Bell J).

having to justify her decision. She felt the "heavy responsibility" of her decision, carefully considered whether it would be compatible with human rights, and made her decision prepared to justify it.[199]

More fundamentally, a culture of justification treats people with the dignity of rational beings who deserve to have things explained to them. People are not merely objects for protection, but subjects with autonomy and dignity.[200] So, for example, in *C v Queensland Corrective Services*, someone with as little political capital as a female Aboriginal prisoner was worthy of Queensland Corrective Services taking the time to explain why it had had a policy of requiring prisoners to reset their 14-day quarantine period. In this way, the culture of justification feeds into an open society in which citizens are worthy of receiving an explanation. As Peri Blind has pointed out, "establishing trust requires an open society where citizens are able to debate and question government policies, and can have a sense of making a difference in decision-making processes".[201]

Objectively better decision-making builds trust

A culture of justification might also engender greater trust because it leads to better decisions. As Ginnane J said in *Loielo v Giles*, "consideration of human rights assists in thoughtful decision-making".[202] That is because the proportionality test is designed to weed out poor decisions. Decisions that do not actually help to achieve the policy objective are ruled out.[203] Decisions that limit human rights unnecessarily are ruled out.[204] And decisions that pursue the policy objective at too high a cost to human rights are ruled out.[205] All the elements of the proportionality test "reinforce good policy work".[206] As a senior public servants in Canada reported, the adoption of the *Canadian Charter of Rights and Freedoms*[207] there "enhanced the rationality of the policy-development process".[208]

Ultimately, however, the justification of a limit on human rights is only as good as the justification analysis that is carried out. One issue that arose over the course of the pandemic was that public entities and courts often relied on the "precautionary principle" when justifying limits on human rights. As discussed above, the precautionary principle adopts the attitude of "better safe than sorry" and recognises that public authorities should not need to wait for scientific certainty before responding to a serious risk of harm. For example, in *C v Queensland Corrective Services*, the prison authorities applied a policy of resetting the 14-day quarantine period when there was an interruption, even though the scientific jury was

199 *Loielo v Giles* (n 29) 34 [105], 48 [164], 69–70 [260]–[261] (Ginnane J).
200 *Patrick's Case* (n 42) 448 [333] (Bell J), citing *Nicholson v Knaggs* [2009] VSC 64, [13] (Vickery J).
201 Peri K Blind, "Building trust in government in the twenty-first century: review of literature and emerging issues", 7th Global Forum on Reinventing Government Building Trust in Government 26–29 June 2007, Vienna, Austria, 12.
202 *Loielo v Giles* (n 29) 66 [245] (Ginnane J).
203 *HRA* (ACT) (n 2) s 28(2)(d); *HRA* (Qld) (n 4) s 13(2)(c); *Charter* (Vic) (n 3) s 7(2)(d).
204 *HRA* (ACT) (n 2) s 28(2)(e); *HRA* (Qld) (n 4) s 13(2)(d); *Charter* (Vic) (n 3) s 7(2)(e).
205 *HRA* (ACT) (n 2) s 28(2)(b), (c); *HRA* (Qld) (n 4) s 13(2)(e), (f), (g); *Charter* (Vic) (n 3) s 7(2)(b), (c).
206 Kent Blore and Brenna Booth-Marxson, "Breathing life into the *Human Rights Act 2019* (Qld): the ethical duties of public servants and lawyers acting for government" (2022) 41(1) *University of Queensland Law Journal* 1, 15.
207 *Canada Act 1982* (UK) c 11, sch B pt 1.
208 Mary Dawson, "The impact of the *Charter* on the public policy process and the Department of Justice" (1992) 30(3) *Osgoode Hall Law Journal* 595, 603.

still out on whether that was required. In *Loielo v Giles*, even though there was a question as to whether curfews would assist in achieving the public health purpose, "Ginnane J deferred … to the precautionary principle in concluding that the curfew was a demonstrably justified limit on freedom of movement".[209]

While the precautionary principle certainly has its place in a pandemic, critics have pointed out that the precautionary principle can distort the justification analysis. The uncertainty of the risks posed by COVID-19 can lead to an aversion to any risk. Once that point is reached, "nuanced questions of balancing begin to recede and become replaced with a zero-risk orientation".[210] The need to avert the risk, on one side of scales, always outweighs the impact on human rights, on the other side. That was one of the criticisms made of Associate Professor Giles; her focus on "protect[ing] public health" crowded out consideration of "the social and economic effects" of the curfew.[211] Indeed, Ginnane J noted: "There is an issue of whether a health expert, such as the defendant, is able to properly balance the social and economic consequences of a decision primarily based on health considerations."[212]

Where the precautionary principle is invoked, it is important that decisions are revisited when the science becomes clearer. That is what happened in *C v Queensland Corrective Services* and *Loielo v Giles*. The prison authorities updated their quarantine policy not to require a reset of the 14-day quarantine period when the health advice was updated, and the lockdown direction was revoked on the first day of the hearing in *Loielo v Giles* because it was no longer considered to be a proportionate response in light of the change in conditions since it was first imposed.[213] Greater trust may also be engendered by a willingness to revisit decisions and come to different conclusions once new information comes to light.

Review mechanisms build trust

Mechanisms to review compliance with human rights obligations may also reinforce trust. When Parliament gets the justification analysis wrong, the courts can issue a declaration of incompatibility (although, admittedly, in Australia they rarely do).[214] When public entities fail to give proper consideration to human rights or when they get the justification analysis wrong, the courts can step in to correct the error. Not only that, but the degree of scrutiny applied by the courts is higher than for traditional judicial review.

As to the procedural limb, the "adjective 'proper' means that the standard of consideration must be higher than that generally applicable at common law to taking [sic: take] into account relevant considerations".[215] That can mean that decision-makers need to get into the witness box to explain how they considered human rights, just as Associate Professor Giles did.[216]

209 Webber (n 80) 47.
210 Fiona McDonald, "Precaution in preventative justice: unpacking the logic and assumptions of the expanding universe of post-sentence detention and control" (Speech, Australian Association of Constitutional Law Seminar, 21 June 2023).
211 *Loielo v Giles* (n 29) 53 [190] (Ginnane J).
212 Ibid 69 [258].
213 Ibid 6 [3], 23–4 [62]–[63].
214 See Bruce Chen, "The quiet demise of declarations of inconsistency under the *Victorian Charter*" (2021) 44(3) *Melbourne University Law Review* 928.
215 *Thompson v Minogue* (2021) 67 VR 301, 325 [91] (Kyrou, McLeish and Niall JJA).
216 Tate (n 18) 44–5.

Not only are the courts reviewing whether the public entity decision-maker turned their mind to whether the decision would be compatible with human rights, under the substantive limb the courts are required to determine for themselves whether the decision was *actually* compatible with human rights.[217] For that reason, as Ginnane J said in *Loielo v Giles*, the court's task "is closer to merits review than is usual in judicial review" and "involves a greater intensity of review than is traditionally undertaken by a court in judicial review proceedings".[218] To make an objective assessment as to whether the limits on human rights are justified, the court may need to receive evidence, even expert evidence or evidence that was not before the decision-maker when they made the decision.[219] And the decision-maker cannot control how that evidence will play out. That governments would willingly expose themselves to that level of scrutiny should inspire trust.

How protecting human rights can foment scepticism

Nevertheless, the culture of justification also has the potential to give rise to greater scepticism of government. Some studies overseas have found a correlation between levels of familiarity with rights discourse and levels of scepticism towards state institutions and agents.[220] This part explores three potential avenues for scepticism. First, simply asking whether a measure is justified may suggest there is reasonable doubt about the answer. Second, "pseudolaw" arguments can co-opt human rights to create mistrust in government. And, third, like whitewashing or greenwashing, "human rights–washing" can breed cynicism if people perceive that the actions of government authorities do not match their rhetoric.

Asking the question can raise unwarranted doubt about the answer

The human rights framework opens up questions about the legal legitimacy of government action, where previously the room for doubt about the legality of government action was much more limited. For example, previously, a judicial review proceeding would not have descended to the level of detail of asking whether the evidence showed that vaccines are effective in reducing the transmission and severity of disease. At most, the question would have been whether the imposition of a vaccine mandate was unreasonable in the *Li* sense.[221] The very asking of the question about the evidence for vaccine effectiveness may give rise to an assumption that there is a real controversy, even if there is none, and that a number of answers to that question may be open.

217 For Marcus Teo, this makes the culture of justification a kind of "epistemic independence". The idea of epistemic independence is that, when coming to conclusions, there is intrinsic value in thinking for oneself: Marcus Teo, "Proportionality as epistemic independence" [2022] (April) *Public Law Review* 245, 252. It is not to the point that the original decision-maker thought for themselves (the focus of traditional judicial review): "proportionality's justificatory standard requires courts to reach independent beliefs that the challenged decision is suitable, necessary, and fairly balanced, before holding it valid": ibid 253.

218 *Loielo v Giles* (n 29) 65 [242] (Ginnane J); see also at 67 [248]. Cf *Thompson v Minogue* (n 215) 327 [99] (Kyrou, McLeish and Niall JJA) ("In a sense, the Court's task is neither judicial review nor merits review, but the determination of a question of mixed law and fact. The distinction between judicial review and merits review in this context is therefore not necessarily helpful"). See also Tate (n 18) 41.

219 *Thompson v Minogue* (n 215) 327 [99] (Kyrou, McLeish and Niall JJA); *Harding v Sutton [No 2]* [2021] VSC 789, [40] (Richards J).

220 James Ron and David Crow, "Who trusts local human rights organizations? Evidence from three world regions" (2015) 37(1) *Regions Human Rights Quarterly* 188.

221 *Minister of Immigration v Li* (2013) 249 CLR 332.

However, this fear of sowing unnecessary doubt rests on the idea that citizens are more likely to trust a government that has no difficulty in defending the legality of its decisions. Seeing the issue in that way requires a paternalistic approach: why worry citizens unnecessarily when the government knows what is best anyway? That approach also runs counter to some of the key drivers of trust identified by the OECD, especially openness.[222]

Pseudo human rights and mistrust

A culture of justification also assumes that people can be convinced of cogent arguments about why they should accept incursions on their human rights for the greater good. People may not always be so rational, especially during a pandemic, when "fear, anxiety and paranoia can become prevalent within the community".[223] And, given that the balancing of human rights against other societal objectives involves a value judgement,[224] people can always disagree about whether the limits on human rights are justified. In *C v Queensland Corrective Services*, the government agency revealed the full reasoning process that led it to conclude that the limits on C's right to be treated humanely was justified. That did not convince C that the agency had in fact acted compatibly with her human rights.

The COVID-19 pandemic also showed how human rights can intersect with "pseudolaw" to create greater scepticism in government. The phenomenon of pseudolaw has been on the rise for some time.[225] Pseudolaw refers to "a collection of legal-sounding but false rules that purport to be law" and is often associated with the sovereign citizen movement.[226] Litigants with a genuine sense of grievance increasingly turn to pseudolegal arguments as a shortcut to the conclusion that their grievance is vindicated. Often they genuinely believe that their pseudolegal arguments represent the "true" position and that mainstream legal approaches are illegitimate for some reason. There are deep causes of the pseudolaw phenomenon, including increasing alienation, misinformation and inequality of access to legal supports. Anecdotally, the social upheaval of the COVID-19 pandemic exacerbated those trends, leading to a rise in pseudolegal arguments during the pandemic.[227] One recurring example was the idea that vaccination against COVID-19 amounted to "medical or scientific experimentation" because the Therapeutic Goods Administration had only provisionally approved vaccines available in Australia.[228] The claim that provisional approval somehow amounted to experimentation — akin to the atrocities committed in Nazi concentration camps — was disproved over and over again.[229]

222 OECD (n 26).

223 Ian Freckelton, "Legal issues: COVID-19 denialism, vaccine scepticism and the regulation of health practitioners" (2021) 28(3) *Journal of Law and Medicine* 613, 613.

224 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [89] (French CJ, Kiefel, Bell and Keane JJ).

225 *R v Sweet* [2021] QDC 216, [3] (Cash QC DCJ); *Deputy Commissioner of Taxation v Casley* [2017] WASC 161, [15] (Le Miere J); *Meads v Meads* (2012) ABQB 571, [40] (Rooke ACJ).

226 Donald Netolitzky, "A rebellion of furious paper: pseudolaw as a revolutionary system" (Paper delivered to the Centre d'expertise et de formation sur les intégrismes religieux et la radicalisation (CEFIR) symposium "Sovereign Citizens in Canada", Montreal, 3 May 2018).

227 Stephen Young, Harry Hobbs and Joe McIntyre, "The growth of pseudolaw and sovereign citizens in Aotearoa New Zealand courts" (2023) *New Zealand Law Journal* 6, 6.

228 See, eg, *Clarke v Queensland Police Service* (n 183) [24] (Power IC).

229 *GF v Minister of COVID-19 Response* (n 175) 12 [47] (Churchman J) ("It is therefore not possible to categorise the use of a vaccine which has been through the process of assessment and granted provisional approval as being the equivalent of 'medical experimentation' "); *Four Aviation Security Service Employees* (n 175) 38–9 [32]–[36] (Cooke J); *Kassam v Hazzard* (n 180) 680 [56] (Beech-Jones CJ at CL); *Stevens v Epworth Foundation* [2022] FWC 593, [25] (Colman DP).

Human rights can have a particular allure for people deploying pseudolegal arguments. As Heydon J once said, "[t]he odour of human rights sanctity is sweet and addictive".[230] Human rights are steeped in a philosophy that treats people as inherently worthy of dignity and autonomy, which can be distorted to suit the logic of sovereign citizens. Moreover, litigants have often had their lives interfered with in some way, and this fuels their sense of grievance. Given the breadth of human rights,[231] that interference can often be articulated in human rights terms. For example, people who did not want to receive a vaccination faced very real consequences for their choice not to be vaccinated. They faced the possibility of losing their jobs,[232] and even being preventing from socialising at places like cafes and restaurants.[233] Those impacts certainly engaged human rights. But anti-vaxers jumped to the right not to be "subjected to medical or scientific experimentation",[234] tantamount to torture,[235] and that snowballed into arguments about a breach of the Nuremberg Code, a document that provided ethical guidance for human experiments in the wake of World War II.[236]

Read in isolation, the human rights set out in the human rights legislation may appear to non-lawyers to be absolute, providing litigants with the shortcut they are looking for to conclude that their grievance is vindicated. Of course, this is only half the picture. Pseudo human rights arguments ignore the second half of the analysis as to whether the limit on human rights is proportionate and justified. And they ignore the "collective responsibility" that is inherent in the philosophy underlying human rights, that all people are of equal value and entitled to be treated equally.[237] That is why human rights come with responsibilities.[238] As the European Court of Human Rights pointed out, while we have rights to bodily integrity, sometimes we need to exercise that right by vaccinating ourselves in order to protect other vulnerable people.[239]

However, it would be wrong to assume that any self-represented litigant who raises human rights is misguided.[240] If the litigant has been affected by a government decision, there are good chances their human rights have been limited. However well-intentioned, decision-makers in government entities do not always turn their minds to the human rights impacts of their decisions, and the impact of those decisions on human rights are not always justified. It would be wrong to dismiss the human rights arguments raised by Mr Baggaley on the basis

230 *Momcilovic* (n 10) 183 [453] (Heydon J).
231 "[R]ights should be construed in the broadest possible way": *Re Application under the Major Crimes (Investigative Powers) Act 2004* (n 87) 434 [80] (Warren CJ).
232 See, eg, *COVID-19 Vaccination Requirements for Workers in a High-Risk Setting Direction* (Qld) (made 11 December 2021, superseded 4 February 2022).
233 See, eg, *Public Health and Social Measures Linked to Vaccination Status Direction* (Qld) (made 7 December 2021, effective from 17 December 2021, superseded on 24 December 2021).
234 *HRA* (ACT) (n 2) s 10(c); *HRA* (Qld) (n 4) s 17(c); *Charter* (Vic) (n 3) s 10(c).
235 William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (NP Engel, 3rd ed, 2019) 213 [68].
236 Holly Seale, Ben Harris-Roxas and Bridget Haire, "COVID vaccines don't violate the Nuremberg Code. Here's how to convince the doubters", *The Conversation* (17 November 2021) <https://theconversation.com/covid-vaccines-dont-violate-the-nuremberg-code-heres-how-to-convince-the-doubters-171217>.
237 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3186 (Yvette D'Ath, Attorney-General).
238 See, eg, *HRA* (Qld) (n 4) preamble cl 4.
239 *Vavřička* (n 170) [2] (Judge Lemmens) (concurring on this point and dissenting on other points).
240 "[T]he sovereign citizen argument is a different beast and should not be confused with the proper application of existing human rights law": Ella Scoles, "The sovereign citizen dilemma", *Proctor* (online, 16 September 2021) <https://www.qlsproctor.com.au/2021/09/the-sovereign-citizen-dilemma/>.

that he was self-represented. Given that COVID-19 had put a halt to jury trials, Mr Baggaley was not a misguided "sovereign citizen" to point to the human right to be released from detention on remand where a trial within a reasonable period of time is not possible.

The attempts of self-represented litigants to grapple with human rights can be contrasted with the silence of legal representatives on some occasions. In *Re JMT* Davis J tentatively raised the relevance of human rights to bail in the absence of any submissions from the legal representatives. Likewise, in *Dudley* the legal representatives were silent on human rights, even though the proper construction of a statutory provision was in contest and even though the Victorian Parliament has mandated that legislation be interpreted, wherever possible, in a way that is compatible with human rights. Presumably the forensic choice not to raise human rights reflects a perception that those arguments would not assist the client.

Ultimately, pseudo human rights law has the potential to undermine trust in government in two ways. First, the use of human rights in this way might undermine the perception of human rights legislation as a legitimate and useful legal tool. A proliferation of spurious arguments (relative to other areas of the law) could lead to a broader tendency to discount human rights arguments, especially those made by litigants in person, even where those arguments are reasonable. Sovereign citizen–style arguments can make it feel like all human rights issues are trivial. Second, the ultimate failure of the arguments may simply reinforce the sovereign citizen's distrust in government and the system.

Human rights–washing and mistrust

Arguably, the greatest risk of cynicism may arise from a half-hearted attempt to embed a culture of justification. People's trust may be undermined if they perceive that government entities merely give lip service to human rights or if there are no consequences for government entities when they fail to properly grapple with the human rights at stake. Like whitewashing or greenwashing, "human rights–washing" can breed mistrust in the very framework that is supposed to enhance trust.

We are unaware of examples of "human rights–washing" during the pandemic, but the potential for it reinforces the importance of the role of the legal profession to raise human rights when appropriate: "lawyers have possibly the most critical role to play in breathing life into the *Human Rights Act*, by developing our human rights jurisprudence; … the quality of human rights is only as strong as the profession that is willing to stand up for them".[241] In human rights jurisdictions like the ACT, Victoria and Queensland, taking human rights seriously is about taking the law seriously. The risk that human rights protections will come to be seen as hollow also reinforces the importance of the role of the court reviewing compliance with human rights obligations. Without judicial oversight, the human rights Acts are unlikely to achieve their intended "normative effect on the conduct of public authorities".[242]

241 Chief Justice Helen Bowskill, "10 things I … (am going to love) about you … as new counsel" (Speech, Bar Practice Course Final Address, 5 October 2023) 4.

242 *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 203 [235] (Tate JA); *Thompson v Minogue* (n 215) 326 [91] (Kyrou, McLeish and Niall JJA).

Conclusion: protection of human rights depends on trust in government

We cannot know for certain what, if any, impact the human rights framework in Queensland (and the ACT and Victoria) has had on helping to slow the rates of declining trust in government institutions being experienced across all advanced industrialised democracies. However, it is plausible that, by embedding a culture of justification, a human rights framework may help to build greater trust in government institutions. People are more likely to trust decisions when they are treated as rational beings deserving of an explanation. Better decision-making that survives a proportionality analysis is also more likely to be trusted. Conversely, there are also risks that a human rights framework can engineer greater scepticism. Proportionality review opens up questions for scrutiny that were never in doubt previously, and human rights can be coopted by pseudolaw arguments to create more conspiracy theorists. The real risk may be the cynicism that comes from human rights–washing, when the human rights framework is implemented poorly and comes to be seen as an empty gesture. Then again, some scepticism is always healthy.

Trust and human rights may also have a symbiotic relationship. Trust can help governments to put in place measures designed to protect and promote human rights, such as those put in place over the last three years to address the COVID-19 pandemic. We know that the state had a positive obligation to respect the right to life by imposing lockdowns. But lockdowns would not have been effective if people did not trust the government enough to comply. In the wake of the *Loielo v Giles* decision, Rosalind Croucher observed that the case showed how "being open to scrutiny and the accountability of decisions, based on objective evidence", not only "aids in maintaining public trust" but also aids "ensuring compliance with emergency restrictions".[243] Research during the COVID-19 pandemic revealed that levels of trust in government correlated with levels of compliance with public health measures.[244] The former UN Secretary-General, Ban Ki-moon, once pointed out that "[b]uilding trust in Government is at the core of the world's quest for peace and well-being".[245] The reason is that the ability of governments to protect and promote basic human rights "depends on whether or not people have confidence in their governments".[246] Just as human rights legislation can help build trust in government, human rights can only be protected and promoted if there is trust in government.

243 Rosalind Croucher, "Lockdowns, curfews and human rights — unscrambling hyperbole" (2021) 28 *Australian Journal of Administrative Law* 137, 147.

244 D Goldstein and J Wiedemann, "Who do you trust? The consequences of political and social trust for public responsiveness to COVID-19 orders" (2022) 20(2) *Perspectives on Politics* 412; Anton Pak, Emma McBryde and Oyelola A Adegboye, "Does high public trust amplify compliance with stringent COVID-19 government health guidelines? A multi-country analysis using data from 102,627 individuals" (2021) 14 *Risk Management and Health Care Policy* 293; C Clark et al, "Predictors of COVID-19 voluntary compliance behaviors: an international investigation" (2020) 2 *Global Transitions* 76. Cf Kristina Murphy et al, "Why people comply with COVID-19 social distancing restrictions: self-interest or duty?" (2020) 53(4) *Australian & New Zealand Journal of Criminology* 477, 489–90 (who found that other factors were more important, such as a sense of duty to the authorities, regardless of trust in the authorities).

245 UN Secretary-General, "Public administration and development", UN Doc A/62/283 (21 August 2007) 9 [27].

246 G Shabbir Cheema, "Building trust in government: an introduction" in G Shabbir Cheema and Vesselin Popovski (eds), *Building Trust in Government: Innovations in Governance Reform in Asia* (United Nations University Press, 2010) 1, 1.

Where there's a will there's a lawyer — the Archibald Prize, the Dobell case and subsequent litigation

*Graeme Neate AM**

Paper delivered at the Australian Academy of Law, 17 May 2023[1]

The Archibald Prize for painting portraits has been awarded almost every year for 102 years. Often, particularly in recent decades, the competition has attracted controversy. Indeed, the competition is almost notorious for being controversial. According to a former director of the Art Gallery of New South Wales, Edwin Capon, the prize "galvanises public opinion and interests and attracts inevitable controversy across the country, like no other event". He also wrote:

> The Archibald is far more than an art award. It is the most improbable circus which, like so many imponderables, succeeds mightily against the odds. The prize money is substantial and the publicity can assist winning artists' careers, yet the competition has been described in unflattering terms.

After the finalists for the 2023 Archibald Prize were announced, the art critic for *The Australian* newspaper was moved to quote from TS Eliot's *The Wasteland*, "April is the cruellest month". He continued:

> For the critic, the cruelty of April lies in the obligatory carnival of the Archibald Prize, in which all the usual standards we take for granted during the rest of the year are turned upside down in a kind of grotesque *danse macabre* of the end of painting. The carnivalesque vortex is so strong that even criticism is carried along in the intoxication. The most searing excoriation simply becomes part of the burlesque entertainment, like a court jester mocking the king with impunity. Ultimately, we all become complicit in the media circus, playing our various roles as breathless spruiker or as sardonic hecklers.

More pithily, perhaps, the late John Olsen, who won the prize and was sometimes a critic of other winning entries, periodically described the prize as "a chook raffle".

Amid the hoopla that surrounds the award of the prize, some of the awards have been subjected to disputes that have resulted in litigation. Judges of the Equity Division of the Supreme Court of New South Wales have been asked to decide orthodox legal questions,

* This article was delivered, by video link, by Graeme Neate on 17 May 2023 for the Australian Academy of Law. He died on 17 June 2023. His willingness to deliver the paper, despite his ill-health, is an indication of his commitment to the law, particularly public law, and his strong ethic of responsibility. This article is included in the *AIAL Forum* as a memorial to those qualities.
Graeme's public law work commenced in the Australian Public Service. He subsequently became an adviser to the Queensland Government on the Aboriginal Land Bill and the Torres Islander Land Bill, a foray into what would be a signal element of his professional life. That focus on Aboriginal development led to his long-standing period as the highly respected Registrar and later President of the National Native Title Tribunal. Subsequently he became a Commissioner in the Queensland Industrial Relations Commission, before he moved to Canberra as the President of the ACT Civil and Administrative Tribunal, a role he maintained until his death. He was appointed a Member (AM) of the Order of Australia in the 2015 Queen's Birthday Honours, for his significant service to the law as a leading contributor to Indigenous land rights, and to legal education. In his spare time, he was a notable painter of landscapes and his long-standing interest in art is reflected in this paper. He is missed by many.

1 The President of the Australian Academy of Law, Mr Alan Robertson SC, kindly gave access to the audio recording of the presentation and permission to publish the paper. The article is an edited version of the transcript. As such, the original sources for all the quotations in the article were not available for inclusion or verification, except in a few limited instances. Any mistakes in wording or attribution of quotations are likely a result of the audio quality and transcription process. Headings were added at the editing stage.

such as whether the bequest establishing the actual prize is a charitable trust. The judges have also been asked to answer questions such as: What is a portrait? Can a caricature also be a portrait? Is a painting done from a photograph of the subject a portrait? Can a picture that is a drawing also be a painting?

This article surveys the ways in which those questions have come before the court and how judges have answered them, while overtly attempting to avoid expressing a view about the artistic merit of the subject pictures. The article also describes some of the characters involved in the cases, the artists, their subjects, and their counsel, and the toll such litigation has taken on some of them. The story is told chronologically, in part because, to some extent, subsequent judgments referred to those that went before. Interesting as it may be, this is also a cautionary tale. As the Honourable Michael Kirby has opined, "Art and law but rarely intersect. It is probably best to keep it that way."

The origins of the Archibald Prize

The story begins in 1916. John Feltham Archibald was born near Geelong in 1856, and was educated locally. He became a journalist. He was described as being someone who, as a hopeful young journalist, had ambition ahead of his skills, and an eccentric ego. He loved the bohemian society of writers and artists. As a young man he changed his baptismal name to Jules Francois and described himself as the son of a French Jewish mother. His marriage certificate later noted that he was born in France, rather than Geelong. In 1880 he and John Haynes started *The Bulletin* magazine, a weekly publication which addressed issues of nationhood, culture and identity. His long interest in art led Archibald to employ the best young artists of the day as illustrators of *The Bulletin*.

In 1915 Archibald was made a trustee of the Art Gallery of New South Wales; in 1916 he made a will. He died on 10 September 1919. His estate was considerable, amounting to nearly £90,000. Part of it would pay for the Archibald Fountain in Hyde Park in Sydney. About half the estate went to the Australian Journalists Association Benevolent Fund "for the relief of distressed Australian journalists". Clause 10(a) of Archibald's will provided that five of the fifty equal shares in his estate were to be held on trust to pay the income to the Art Gallery of New South Wales Trust. To quote just one extract:

> The purpose was to provide an annual prize to be styled the Archibald Prize for the best portrait, preferentially of some man or woman distinguished in Art, Letters, Science or Politics, painted by any artist resident in Australasia during the 12 months preceding the date fixed by the trustees for sending in the pictures.

In 1921, the first year when the Archibald Prize was awarded, the prize amounted to £400. Early winners of the Archibald Prize were traditional, representative portraits. William Beckworth McInnes won the inaugural prize. He went on to win again in the second, third, fourth and sixth years, and twice more in the following decade. There was even then occasional controversy. For example, in 1938, when 28-year-old Nora Heysen was the first woman to win the Archibald Prize against 143 other portraits, Mary Edwards, a competing artist, wrote a letter to Heysen, stating, "if you had any moral conscience, you would refuse to accept the prize for a bad painting". Heysen described Edwards as "enemy number one" and "mad" when she publicly opposed the award of the prize to Heysen.

Another artist, Max Meldrum, who was not pleased to lose to a young woman, informed the press: “If I were a woman, I would certainly prefer raising a family to a career in art. To expect them to do some things as well as men is sheer lunacy. A great artist needs all the manly qualities, courage and endurance.”

The 1943 Archibald Prize and the Dobell case

The controversy

In 1943 the artists whose works were exhibited included Joshua Smith, with his portrait *Dame Mary Gilmore*; and William Dobell, with three portraits: the *Billy Boy*, a manual worker at an airbase (now in the collection of the War Memorial), *Mr Brian Penton* (the editor of *The Daily Telegraph*), and *Portrait of an Artist*, a portrait of Joshua Smith. The competition was narrowed to two finalists: Joshua Smith’s portrait of Dame Mary Gilmore and Dobell’s portrait of Joshua Smith. The trustees voted by majority to award the prize to Dobell. There was apparently some uncertainty about the size of the majority vote. The trustee records show seven to three. Yet it was later revealed that one of the trustees, who was recorded as voting for the winning portrait, had mistakenly thought that his vote was for Smith. That would have made the vote six to four. There was even a rumour circulating that in fact, it was five: five. Whatever the numbers, Dobell was announced the winner on the 21st of January 1944.

The award to Dobell’s painting was not greeted with universal acclaim. There was much debate in the press, including assertions that the picture was a caricature. Conservative artists, editorialists and members of the public united against it. Mary Edwards, a fellow competitor and the artist who had criticised the award to Nora Heysen, became a vocal critic of what she saw as a caricature. She publicly advised that “not a child or an expectant mother should be allowed in the Art Gallery at present”. Yet a world record was claimed for that year’s attendance, with 153,000 people visiting the exhibition before it closed in March 1944.

The debate within the artistic community was about issues such as whether the winning painting was a caricature or a fantasy, rather than a portrait as required by Archibald’s will. On 26 January 1944, a group of six artists met in the studio of Mary Edwards to consider the possibility of protesting. Edwards referred to the trustees’ decision as “an artistic Pearl Harbour” (this was at the height of World War II).

Two days later, 80 supportive Melbourne artists met to establish a fighting fund to protest the award. A committee of six artists, including Mary Edwards and Joseph Wollensky, was formed. A letter was hand delivered to the trustees asking them to reconsider their decision. Edwards claimed that the section of the art world that she purported to represent had no quarrel with Dobell or his painting. Their concern was that the trustees had not held to the terms of Archibald’s will, because the painting was a caricature, not a portrait. On legal advice, Perpetual Trustees, as holder of the Archibald bequest, decided not to advance the amount of the prize while the dispute was unfolding. The public defence of their claim also gathered momentum. Senior politicians, including Robert Menzies, participated in the public debate.

Eventually, some of the artists who disputed the award to Dobell decided to take the matter to court. They approached the New South Wales Attorney General to support their questioning of the administration of the trust. The Attorney General consented but made it clear that the State would be a nominal plaintiff only. The informants or relators, as they were legally designated, would bear full responsibility for costs, and were required to lodge a bond of £500 to cover the costs in the event the case was lost.

Soon after the announcement of the formal filing of papers, the Contemporary Art Society in Melbourne began a defence fund to support Dobell and raised £500 by the middle of May.

The hearing

The case was heard by Mr Justice Roper over four days in October 1944. The participants were many. First was the artist Dobell. He had been born in 1899 and was an emerging artist in the 1920s. He won a travelling scholarship to England in 1929 and returned to Australia in 1939, just before the outbreak of World War II. His portraits, often of friends, gained approval, including for his entries in the 1940, 1941 and the 1942 Archibald Prize. He attracted commissions, including portraits of prominent people.

Second was the subject of the portrait in the case, Joshua Smith, an artist who admired Dobell's work. He was six years younger than Dobell and the two of them met in 1939, shortly before they joined the Civil Construction Corps as camouflage painters, disguising aircraft hangars as chook sheds, and painting air strips with rows of cabbages. Both men were from humble beginnings, loners with intense artistic integrity. According to Joshua Smith in an interview in 1990:

> There was an instant rapport, a close friendship between Dobell and myself. We shared a tent with two other men for a year and enjoyed a great wartime camaraderie. None of us went in for deep philosophical discussions. We weren't intellectuals, but we talked a lot, and Dobell and I often sketched each other to keep our hands in.

Smith lived in an outer Sydney suburb with his elderly parents, to whom he was devoted. He often visited Dobell in his Kings Cross flat where people in the artistic community also congregated. Dame Mary Gilmore also lived in Kings Cross and Smith would go to her flat, where she sat for his portrait.

The plaintiffs in this case were artists Mary Edwards and Joseph Wollensky. Wollensky's portraits were also entered in the 1943 competition.

The barristers engaged for the case were impressive. The Attorney General and artists' relators engaged Garfield Barwick KC and Frank Louat. The trustees of the art gallery were represented by Frank Kitto KC and Alan Kerrigan, and Dobell was represented by Frank Dwyer KC and Alfred Conybeare. More than 40 years later, in other litigation concerning the Archibald Prize, Justice Powell noted that counsel for the Attorney General and defendant trustees were "even then of no mean stature".

The public was also involved. The hearing of the case attracted numerous observers. World War II continued, and the case provided entertainment for Sydneysiders who queued to

attend each day of the hearing. The courtroom was crowded with people, including celebrities and society figures. The press reported who was there each day and the reaction of the public gallery to some of the evidence and to exchanges between counsel and witnesses.

In the hearing itself, Barwick's opening was to the effect that when the trustees of the art gallery decided to pay Dobell the prize money, they were guilty of breaching the trust: his painting was not an attempt to create a likeness of Joshua Smith. Rather, its purpose was to depict him in a distorted and caricatured form.

The purpose of the lawsuit was to gain an injunction to prevent the trustees from paying the proceeds of the prize money to Dobell and for re-adjudication of the prize. The painting of Joshua Smith, marked Exhibit D, was brought to the front of the courtroom and placed on an easel where it could be displayed each day of the case. It was transported back to the gallery each evening by court attendants.

The case was seen by others in artistic and personal terms. One witness for the plaintiffs, John Young, who had founded the Macquarie galleries in Sydney in 1925 and had been an Acting Director of the Art Gallery of New South Wales, expressed the view under cross examination: "I doubt very much whether a matter of art can be settled in a lawsuit."

The evidence given at the hearing ranged across topics such as: what are the features that define something as a portrait, relying on numerous art books showing portraits painted over many years; whether caricatures were in a different artistic category from portraits; whether the subject painting was a caricature or fantasy rather than a portrait; and whether the painting was a modern work or an academic work.

Evidence was given by three witnesses called by Barwick. James McDonald, an art critic and former Director of the Art Gallery of New South Wales and of the National Gallery Victoria, was a vociferous critic of Dobell's portrait, which he described as "a pictorial defamation of character". He had not seen the painting until the week before the case began when he was accompanied by Barwick and Louat to the art gallery as part of the preparation for the case. His original criticism had been based on a black-and-white photograph. There was John Henry Young, who had founded the Macquarie galleries and was also critical of the portrait, which he described as a fantasy and a biological absurdity, and there was Dr Vivian Bengerfield, a medical doctor, discussed below.

Two witnesses were called by Kitto: Frank Medworth, Acting Director of the Art Gallery of New South Wales and an art lecturer, and Richard James, whose career had been built in London in contemporary design, and who had come to Australia to work in the advertising industry.

Counsel for Dobell called as witnesses: Linden Dadswell, a well-known sculptor, who had worked in Britain and in Europe before returning to Australia; Paul Haefliger, the art critic for *The Sydney Morning Herald*; and diverse students and artists who also taught at a Sydney technical college, as well as Dobell himself. Some witnesses proffered their own definitions of what constitutes a portrait and what is not a portrait, including what distinguished Dobell's portrait from a caricature, and gave assessments of whether the winning picture was a portrait according to their individual definitions.

As those definitions were formulated in the witness box, they provided fertile areas for cross-examination by opposing counsel. Barwick was particularly robust in his approach to the case on behalf of the plaintiff artists and the Attorney General. He sought to discredit the description of the painting as a portrait by pointing out exaggerated features. He cross-examined Dobell extensively about this. When Dobell stated that he had achieved 90% of the physical appearance of Joshua Smith, Barwick responded by asking questions about individual features of the portrait to demonstrate the extent of the exaggeration. Barwick broke down each of the features and asked Dobell if they conformed individually to the 90% proposition. Dobell responded to a question about the length of Joshua Smith's neck as follows: "That I will admit is elongated. However, you are taking the whole thing bit by bit, and I'm taking it as a picture. I might as well criticise the conduct of your case by the angle of your wig, as for you to take individual things like that."

Before giving his evidence, Dobell was nervous. Apparently, he smoked almost a packet of cigarettes during the lunch break before he was called as a witness. While he was being cross-examined, his counsel asked the judge for Dobell to be treated with respect. But the judge and some observers saw Dobell rise to the occasion and have robust exchanges with Barwick. At one stage Barwick suggested to Dobell that he had entered this painting in the prize as a jest. Dobell denied it: "I don't paint in jest." Barwick also asked Dobell about his eyesight, which the artist assured counsel was extremely good. Over the strong objection of both Kitto and Dwyer, Barwick called Dr Vivian Bengerfield, a medical practitioner with experience as a medical officer in the army, who had dealt with numerous dead bodies during World War I.

> Barwick: "Have you seen Mr Smith?"
>
> Bengerfield: "Someone has pointed him out to me, but I'm not sure whether that is he or not."

Barwick asked Joshua Smith to stand which he did, looking embarrassed and awkward.

> Barwick: "What I want to know is this — what state of Mr Smith's physical existence — his body — does that picture represent, leaving aside proportion?"
>
> Bengerfield: "I would say that it represents the body of a man who had died in that position and had remained in that position for a period of months and had dried up."

One observer was reported as saying this was greeted with bursts of laughter, which was quickly quelled by court attendants.

> Barwick: "As far as the neck is concerned, have you considered the distance or proportion from the shoulders to the ears?"
>
> Bengerfield: "Yes, the normal neck has seven cervical vertebrae in it. And I think to have that, I should think there would have to be at least ten to get that length of neck."

During cross-examination by Kitto, Dr Bengerfield continued to express his opinion about Joshua Smith's physical appearance — his eyes which lacked physical expression, the set of his mouth, his apparent lack of subcutaneous tissue and his generally shrunken appearance, all pointed to the fact that Dobell's representation of Smith was that of a corpse. Remember,

Joshua Smith was present in court. He heard the evidence and others could compare his appearance with the painting.

In cross-examination, Dwyer asked only one question he thought pertinent to the evidence of the doctor.

> Dwyer: "Do you know anything about art?"
>
> Bengerfield: "No."

In final submissions Barwick and Kitto focused on the key legal issues in the case. Dwyer, for Dobell, spoke critically of the action being brought. He said, "The initiation of these proceedings is at once a disgrace to Australian sportsmanship—", when Barwick objected and Justice Roper said, "That does not help your legal argument very much." But Dwyer finished his sentence: "—a blot forever on the record of Australian art." Dwyer had begun by calling the action "childish litigation conceived in jealousy and born in spite". And he continued: "I resent this action by Miss Edwards and Mr Wollensky, and I will say so publicly." Justice Roper replied:

> That may be so, but it does not help me solve the problem or the problems which I have to solve. Does it affect the result in this matter? Is this case brought out of spite, or out of high-minded ideas of maintaining standards of Australian art?

Dwyer said he appreciated that the case would be decided on matters of law. He pointed out that the court had been asked to find the picture was not a portrait at all, and asked why such a finding should be substituted for the verdict of the trustees. He submitted that matters appertaining to art are essentially matters of artistic opinion, and that throughout the history of art, there have been instances of men being subjected to contemporary criticism of the most stringent and most trenchant kind. Having referred to testimony of Dobell and what he sought to achieve, Dwyer added:

> In this case, it is admitted that the painting was painted by an accomplished artist, that it was painted from life with serious intention, and all witnesses see some resemblance and some depiction of the character of Joshua Smith. When it is compared with Smith, the result is a matter for your Honor. But I submit the existence of likeness is too manifest to need development. Exaggerations are there but they are not proved to be frivolous or purposeless. Even the untrained observer can see the resemblance to Smith.

The judgment

Justice Roper reserved his decision on the 26th of October 1944. And on the 8th of November that year, read his reasons for judgment.[2]

His Honour noted that in the proceedings brought by the trustees, it was alleged that the trustees were guilty of a breach of trust in determining to pay certain money, subject to the trust, to Dobell. The informant and relators sought an injunction to prevent the payment of the money, alleging a breach of trust, and a declaration that the determination of the trustees was unauthorised by the trust and hence void. In particular, it was alleged that the picture painted by Dobell is not a portrait but a caricature of Joshua Smith, bearing a certain

2 *Attorney General v Trustees of National Art Gallery of NSW* (1944) 62 WN (NSW) 212.

degree of resemblance to him, but having the characteristic features of his appearance highly distorted and exaggerated.

Justice Roper also noted that almost all the evidence in the case was directed to showing the meaning which should be attributed to the word "portrait", as used in Archibald's will, and the application of that meaning to the picture in question. Before dealing with that evidence, he considered the construction of the will, for the purpose of ascertaining the duties and responsibilities of the trustees, and quite what meaning may be attributed to the word "portrait". His Honour said:

> It is obvious that the awarding of the prize will normally involve the exercise of great delicacy of judgment. And it is to be expected that the opinion of the trustees themselves will not normally be unanimous, and that that of the majority will not normally be received with unanimous accord by the whole body of artists and laymen who view the competing pictures with the idea of forming an opinion as to their relevant artistic merit as portraits.

His Honour continued:

> The question of which, among a group of portraits painted by competent artists, is the best will also always be answered according to the individual tastes and propensities of the observer to whom it is directed. On such a question, it would, I think, be safer to expect differences of opinion than to expect unanimity even among persons well qualified by training and experience to give a weighty opinion.

As a matter of construction of the will, the ultimate right of choice was given to the trustees. And as a matter of law where the matter of execution of a trust depends upon the formulation by the trustees of an opinion or the exercise of a judgement, His Honour said the court would not interfere with its execution unless it was shown that no bona fide opinion was formed, nor bona fide judgement exercised. His Honour thought that Archibald had submitted to the trustees for decision whether a particular picture is a portrait, and the same principles of law applied. So, their decision that a particular picture is qualified to enter the competition, as being a portrait, is only open to attack upon the grounds that it is not a bona fide decision. And the onus of establishing the want of bona fides is upon the party alleging it. There was no allegation in this case that the trustees' decision about whom to award the prize was a fraudulent decision. Consequently, His Honour thought that the court should only interfere in the administration of the prize if it was satisfied that, as a matter of objective fact and not of mere opinion, the picture is not a portrait. He concluded that the suit failed.

Justice Roper thought it was not necessary to interpret the word "portrait" to determine the case. In his opinion, the evidence was overwhelming that at least there was a proper basis for forming an intelligent opinion that the picture in question is a portrait. However, he went on to consider the matters to which most of the evidence and arguments were directed, namely, the interpretation of the word "portrait" and its application to the picture in question. In His Honour's opinion, on the evidence, there had been no change in the meaning of the word "portrait" from the time it was used in the will made in 1916 to the present day (1944). Having heard the evidence of eight people highly qualified to express an opinion on the meaning of the word as the artist understood it, he was satisfied that the word did not have a technical meaning different from its meaning as an ordinary English word in current use among laymen. Even if he had found the portrait had such a technical meaning, it had not been shown that Archibald was a member of the class which used the word in a technical

sense. The word as an ordinary word of the English language and its meaning had to be ascertained accordingly.

From the context in which it was used, it was clear to Justice Roper that Archibald was referring only to a particular type of portrait, namely one of a human being painted by an artist. With the assistance of a dictionary and many other works to which he had been referred, Justice Roper thought that the word "portrait" as used in the will

> means a pictorial representation of a person painted by an artist. This definition connotes that some degree of likeness is essential and for the purpose of achieving it, the inclusion of the face of the subject is desirable, and perhaps also essential.

This article refers to those words again below. His Honour went on to observe that the picture was characterised by some startling exaggeration and distortion, clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. But Justice Roper wrote: "It bears, nevertheless, a strong degree of likeness to the subject, and is, I think, undoubtedly, a pictorial representation of him." His Honour found as a fact that the painting was a portrait within the meaning of the word in the will and consequently the trustees did not err in admitting it to the competition. Whether the work of art or a portrait was good or bad, or whether the limits of good taste imposed by the relationship of artist and sitter had been exceeded, were questions which His Honour was not called upon to decide. And he stated: "As the expression of my opinion upon them would serve no useful purpose, I refrain from expressing them."

His Honour then dismissed the suit and ordered the relators to pay the costs of the defendants.

But that was not the end of the proceedings. After judgment was delivered, Louat, appearing on Barwick's behalf, stated: "Miss Edwards feels that some people believe she is activated by personal bias. She has no personal motivation for bringing this action. Her only aim was to keep the cause of art lofty and undefiled."

The aftermath

It appeared also that the judgment was not the end of the matter because it was revealed that Edwards and Wollensky were not prepared to accept the verdict and had gathered enough sympathy and support to lodge an appeal to the High Court. The four principal grounds of appeal were published and plans were made. Apparently, that came as a bombshell to Dobell, who thought he would be cursed with the spectre of Joshua Smith forever. The portrait had been rehung in the Art Gallery of New South Wales, but because of the appeal, it was taken down and replaced by another of his paintings.

In the meantime, a public appeal was announced for donations towards the legal costs of Edwards and Wollensky. £100 was quickly received, and social functions were arranged to raise more money. It was announced that the appeal was listed for hearing during the early part of April 1945.

Dobell did not enter the 1944 Archibald Prize because by then he was a trustee of the Art Gallery, and he declined to take an active part in the vote. Joshua Smith, who had not

spoken to Dobell for a year, was one of the entrants with a portrait of Dr JS Rosevear, the Speaker of the House of Representatives. In January 1945, the trustees awarded the prize to Joshua Smith for that portrait. The award seemed to represent a consolation prize and a return to conservatism after the uncertainties and upsets of the previous year.

A few years later, Dobell and the trustees were freed of further Archibald Prize litigation when the Solicitor General would not allow Edwards and Wollensky to proceed with their appeal to the High Court. In a letter to their solicitors, the relevant Undersecretary of Justice stated that an opinion had been formed that the appeal did not raise any question of public importance and was devoid of merit. Apparently, that was only the direct result of the gallery trustees asking him to exercise his overriding powers and he directed the appeal to the High Court be discontinued. The legal manoeuvers delayed payment to Dobell, but he eventually got the prize money in May 1945, more than a year after the award.

The personal fallout

Some of the personal implications for the parties need discussion. Although Dobell won the prize, victory came at considerable cost for the painting, his subject, their friendship and the artist himself. Both men were damaged by the controversy. In an interview recorded in 1963 Dobell said:

> I was ill for years afterwards. I lost the use of my left leg for six months. I had a nervous breakdown, which left me with my eye damaged. I was so mad and irate about it. I felt like taking them all to court again for damages to my health, but I'd had court.

Dobell developed severe dermatitis, and retreated to his lakeside cottage at Wangi Wangi in New South Wales. He did not paint for a long time and when he started again, the criticism had made him self-conscious about his style.

Little is known about the consequences for Joseph Wollensky. Mary Edwards developed a life, much of it away from Australia. For family reasons, she took on a different name and appears to have reinvented herself in Fiji. She continued to paint portraits of public figures, including the former Chief Justice of New South Wales, a portrait that was controversial as to whether it would be accepted for hanging. She maintained an interesting commentary about the prize for some decades.

What about the subject? Joshua Smith did not give evidence in the case but was clearly part of it. In 1990, a journalist, Janet Hawley, interviewed him. This was the first interview he appears to have given since the prize decades earlier. He said: "I've never said a word against Dobell. I've never given my side of the whole affair. I've always refused to talk to the media. I'll do it just this once but never again. I can't bear the strain and the pain." Smith spoke of a curse: "a phantom that haunts me. It has torn at me every day of my life. I've tried to bury it inside me in the hope it would die. But it never does." Smith was also concerned about Dobell's comments about the painting because he'd agreed to have his portrait painted. Smith said he understood about Dobell's style of painting but recalled:

> Dobell said to me, and these are his exact words, "Joshua, you may not like it when it's finished, you know the character of my work", and to justify the use of distortion, Dobell added, "I believe an element of distortion makes the portrait more like the subject than he is himself." To that I replied, "Your job, Bill, do it how you like." I gave Dobell the artistic right to use distortion.

What Joshua Smith was concerned about, though, was when Dobell was giving evidence. Dobell did not focus on the distortion but said that this was very much a likeness of Joshua Smith. And that seems to have been the basis of the rift between them for the rest of their lives. Indeed, in 1990, Smith expressed the opinion that the painting was a caricature, "because in my opinion, distortion is caricature, but worthy of the prize". Smith's parents were also distressed: they had wanted to buy the portrait but Dobell was concerned they might destroy it. So nobody came out of the litigation happily.

Dame Mary Gilmore, who had posed for Joshua Smith's portrait, was torn in the whole exercise. She thought very greatly of Dobell as an artist and considered his portrait of Smith was a very fine painting. But she was also a close friend of Smith and felt very badly for him. She wrote, both publicly and privately, about her various concerns on both sides of the debate.

Interestingly, Sir Garfield Barwick also seems to have taken time to get over the case. The Honourable Michael Kirby has recorded that to the end of his life, Sir Garfield Barwick was still bristling over this notable failure. He put it down to his own poor advocacy. He thought that he had good material to establish that the work was not a portrait as required by the will but concluded he had tripped up the experts for the trustees. Alas, says Kirby, many advocates, perhaps a few artists, fall in love with their own brilliance. Frank Kitto survived as discussed shortly.

The portrait itself did not survive. Ultimately, it was destroyed by a fire. Although someone attempted to fix the painting, the renovation was nowhere near the quality of the original. Not only were the people defeated or destroyed by the litigation, but so, it seems, was the painting.

The 1975 and 1981 awards and the Bloomfield case

The 1975 Archibald Prize

Three decades passed before artists decided to challenge by litigation the grant of the Archibald Prize. 1975 was a memorable and controversial year in Australian history. Among the subjects of the portraits, finalists were Garfield Barwick, Sir John Kerr, Lionel Murphy and Bob Hawke. The award was presented to John Bloomfield for his portrait of Tim Burstall, a screenwriter, film director and producer. The picture was almost two metres square. Bloomfield had submitted a painting at 28 years of age, the youngest winner of the Archibald Prize — and the most fleeting.

Although Bloomfield's entry form provided that the entrant agreed to abide by the condition that the portrait must be painted from life, and Bloomfield made a statutory declaration that this was the case, his picture was painted from a photograph. Indeed, it was a photograph from *Cleo* magazine. Bloomfield had never met Burstall, although he had seen him on public occasions, and Burstall did not know that his portrait had been painted. Bloomfield was reported to have said he carefully considered the clause that required the work be painted from life, which he took to mean that the subject should be a real person and not someone from imagination.

After the trustees had judged the prize for the best entry, they learned that it was not painted from life but from a photograph. The trustees met again and resolved that the painting was not eligible, as it was not painted from life. They had apparently received legal advice to this effect from a Queen's Counsel. As a consequence, they re-judged the competition and awarded the prize to another painting. According to the Art Gallery website, the trustees made it clear that their decision did not reflect in any way on the artistic merit of Bloomfield's entry.

The *Sydney Morning Herald* reported Bloomfield had said:

> I didn't expect to win in the first place, so it doesn't bother me that much that I have lost it. At least that's how I feel now. In 15 minutes, I might have to think about it. I might feel differently. The best thing is that it's all over.

According to the article, Bloomfield had been on tenterhooks for nearly five weeks, waiting to know which way the decision would go. Swamped by publicity, much of it controversial, he resigned his job as a teacher. Having had the prize withdrawn, he hoped to find part-time work teaching art, and getting back to painting. His painting had already been sold by an art gallery dealer, on the understanding that the buyer would donate it to the Art Gallery of New South Wales. Bloomfield was quoted as saying: "It would make me pretty happy if they accepted it."

In the end, the portrait for which the 1975 Archibald Prize was awarded in place of Bloomfield's is noteworthy because it links the history of the Archibald Prize litigation. The prize was ultimately awarded to Kevin Connor for a portrait of his father-in-law, Sir Frank Kitto, who had been counsel for the trustees of the art gallery in the Dobell case more than 30 years earlier. This was the fifth time Connor had entered the Archibald Prize competition, and the third time with a portrait of Kitto. As noted earlier, the portrait of Sir Garfield Barwick, who had been counsel for the plaintiffs in the Dobell case, was also among the finalists that year. The lead advocates, or at least their pictorial images, were reunited in the contest and controversy around the Archibald Prize more than 30 years after the Dobell case.

The 1981 Archibald Prize

Although the award was made for an alternative portrait in 1975, the matter did not end here. Bloomfield was agitated by the award of the 1981 Archibald Prize to Eric Smith for his painting of prominent art gallery owner Rudy Komon. Apparently, there were similarities between the painting and an old photograph of Komon from 1974. Again, the issue was whether the portrait had been painted from life.

There were differences between the circumstances of this portrait and Bloomfield's portrait of Tim Burstall. In common was that the artist, Eric Smith, admitted that he had seen and used photographs, but he stated that he had used other sources as well, including multiple sittings with Komon, whom he knew very well and had painted frequently over the years. Komon said he could produce 10 other photographs of himself in similar pose, and that Smith had painted his portrait probably 10 times since first exhibiting the painting in question. Just as the Art Gallery had acquired Mr Bloomfield's portrait of Burstall, it also purchased Smith's portrait of Komon, with funds provided by Komon. However, Bloomfield threatened

to take legal action for the award of the prize to Smith. He also instructed solicitors to sue for the return of the 1975 prize money, with interest.

The case was heard by the Chief Judge in Equity, Justice Helsham, in September 1983. His Honour's reasons for judgment were delivered on the 23rd of September 1983.[3] In his view, the only question to be answered was, what is a portrait? Or more accurately, what is the meaning of the word "portrait" when used by Archibald in his will? Chief Justice Helsham made no reference to any legal authority. Rather, he referred to dictionary definitions, including one of the *Shorter Oxford English Dictionary*, which defined a portrait as "a likeness of a person especially of the face, made from life by drawing, painting, photography, engraving, etc.", to which his Honour added the words:

> The meaning that the word has today is a picture of a person painted from life. That is the meaning that it has for me, and I believe for other ordinary people in the community. There is no suggestion that when Mr Archibald used the word, it was intended to have any special meaning or other meaning other than its ordinary one.

His Honour made two observations about the condition that the entry must have been painted from life. First, no deception by Bloomfield was intended when he declared that the picture was painted from life. No deception was alleged. Rather, His Honour stated, Bloomfield put a different meaning upon the requirement. Second, which is right in my view, the condition imposed by the trustees that the portrait must have been painted from life is immaterial to the legal problem. If a portrait means "painted from life", then the condition is otiose. If a painting does not meet that requirement, then it is invalid as an entry. If Bloomfield's entry was not a portrait (as defined), then it was not entitled to the prize.

So the only question at issue was, what is a portrait? His Honour noted that in 1919, it was not unknown for artists to make copies of photographs of persons as paintings. Indeed, there was material before the court that the camera was used as an aid to art for a number of years before 1919. It was anyone's guess whether a person in Archibald's position would have had any information, and if so how much, about the use of photographs in producing a painting of a person. But his Honour did not think that mattered. Rather, his Honour stated that the terms of the will make it clear that the artist must have painted the portrait in the 12 months preceding the entry date. If the testator did not use the word "portrait" in what is called its conventional sense, that is, involving the notion of "from life", then the painting could be of any Australian, alive or dead, provided it was painted in the preceding 12 months. In his view, "if portrait involves the notion from a photograph, then the range of subjects cannot be limited to those living at the time the portrait was painted".

His Honour's impression, based on the annual recurrent nature of the bequest, was that

> the testator intended that the subjects of the paintings be contemporary subjects, persons "distinguished in the field of Arts, Letters, Science or Politics", whose names would be likely to be known, and features perhaps recognized by all those likely to be interested in the competition and the prize. The whole idea of the testator seems to have been to give the competition a contemporary ring. And if this be so, then the competition requires portraits from life. If you are required to portray the actual dignitary, then you cannot include the dead dignitary. If the picture was painted during the preceding 12 months, it could not be excluded, even if the subject's contemporary nature could not be assured. I think that is what was intended to be the case.

3 *Bloomfield v Art Gallery of New South Wales* (Supreme Court of New South Wales, Helsham J, 23 September 1983).

His Honour continued: “This is only another way of saying that the impression I get is that the word ‘portrait’ when used in the context here under scrutiny includes the notion ‘from life’.”

Chief Justice Helsham concluded that Bloomfield had not made out a case and his claim for relief failed. However, his Honour also stated that “if an artist makes use of a photograph or photographs in painting a picture of a person from life, then whether that painting is a portrait may be a questions of degree”.

That observation continues to be potentially relevant both as to whether a painting is by definition a portrait, and the quality of the painting. For artistic rather than legal reasons, reviews of the Archibald Prize finalists often comment adversely on pictures which appear to be based on photographs rather than painted from life. Bloomfield has published a critique of the court’s decision on his website. He was not the only one to criticise the decision. A legal commentator in the *Australian Law Journal* concluded that as there had been no express requirement under the will to the effect that the painting be from life, an equally compelling case can be made to support a conclusion that the Bloomfield portrait should not have been disqualified. To quote:

> If a live sitting was a primary criterion, there will be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens in, respectively, the Victorian and Australian galleries. These must have been painted on the basis of images in a mirror. If there is any distinction of significance between a photographic image and a mirror image, a self-portrait cannot possibly be done from a live sitting. That point was reinforced when the trustees awarded the 1976 Archibald Prize to Brett Whiteley for his painting *Self portrait in the studio*, where the image of the artist’s face is shown only in a mirror, apparently held in the artist’s hand.

The 2004 Archibald Prize and the Johansen case

The next litigation concerned the 2004 Archibald Prize, which was awarded to Craig Ruddy for his portrait of the well-known Aboriginal actor David Gulpilil, titled *David Gulpilil, two worlds*. The picture also won the 2004 People’s Choice Award. Tony Johansen, an unsuccessful entrant for that year’s Archibald Prize, went to the New South Wales Supreme Court seeking a declaration that the award of the prize was invalid on the ground that the portrait could not be said to have been painted by its creator.[4] Johansen argued that the portrait was a drawing rather than a painting. The case was heard in May 2006, and each party was legally represented. As noted earlier, the terms of the bequest referred to the “best portrait painted by an artist”. Despite the use of the word “painted”, the defendants, the Art Gallery of New South Wales and the winning artist,

> both contended (a) that it was not necessary for the picture to be a “painting” in order to be awarded the prize, but only to be a portrait, which it [was] not disputed that it was; [and] (b) that, insofar as the portrait was required to be “painted” or a “painting”, it satisfied that criterion.[5]

The case was decided by Justice Hamilton, who stated that the Court was in no way concerned about the merits of the portrait, which he observed were generally agreed to be high, unlike the subject of at least one earlier set of proceedings involving the Archibald Prize. Rather, the sole issue for the Court, as a court of equity, was whether the award of the prize was in breach of the terms of the charitable trust governing the award.

4 *Johansen v Art Gallery of New South Wales Trust* [2006] NSWSC 577.
5 Ibid [2] (Hamilton J).

His Honour set out in some detail the evidence about the portrait and the way it was created. He noted:

> Mr Gulpilil has a mass of tangled hair. This is represented in the portrait by massive lines. It is hard to think how it could be otherwise. Close examination of the portrait shows the presence of many lines, some appearing almost as line on line, as has been said, in the depiction of Mr Gulpilil's face and body.[6]

Not set out in detail is evidence provided by the artist, who said, according to Justice Hamilton, that

> the principal medium he used was charcoal in various forms, including sticks, blocks and crushed charcoal. This he applied in layers and supplemented at various stages with other materials, including acrylic paint, aquarelle pencils, chalk, pastels, graphite pencil, ordinary color pencils, Conté sticks and raw black pigment. Initially he applied the charcoal dry, using sticks in a manner similar to a pencil, blocks rubbed against the surface of the wallpaper and crushed charcoal rubbed with his fingers. During the following stages, he built up layers of pigment, most of which was charcoal, but which also included other materials. … Of the process he said: "All of the painting except the hair and raw wallpaper around the sides, was created by mixing and spreading raw pigment with varnish and/or water."[7]

So, on that basis, the award was upheld.

His Honour set out a dictionary definition of the words "draw", "paint", "drawing" and "painting" as they applied to the creation of a work of art. He noted that only one of the defined words — "painted" — appears in the Archibald bequest. He concluded that there was no relevant change of the meaning of the word "painted" since it was used in Archibald's will, and added that it did not matter "if the work was executed by some particular technique not known in 1916 or 1919, provided that the work falls within the definition current at that time (and today)".[8]

Justice Hamilton remarked that the definitions include "terms that are wide in import and of uncertain boundaries. The definitions are on the face somewhat overlapping."[9] He continued:

> I think it flows from the above that the terms are not matters of strict denotation, their boundaries are uncertain and that there are overlaps between them. It is clear that the techniques of each are at times employed in the other. Some works may fall into both categories, as was contemplated by Roper J in the case of portrait and caricature.[10]

Justice Hamilton noted:

> If trustees, in exercising their discretionary powers, act in good faith, responsibly and reasonably, and inform themselves of matters relevant to the decision prior to making it, the court will not interfere with the exercise of that discretion.[11]

6 Ibid [6].
7 Ibid [7].
8 Ibid [16].
9 Ibid [18].
10 Ibid [19].
11 Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 359, quoted by Hamilton J in *Johansen* (n 3) [24].

Justice Hamilton also concluded:

> In the context, "painted" conveys the meaning that the portrait must be a painting, not a work made by some other means. … In the face of the ordinary understanding of the word and the content of the dictionary definitions profferred, I am of the view that [the word "painted"] does not in its context bear the meaning contended for by the defendants. [Rather,] it does the important work of excluding from the Prize various forms of creation, including photographs, which would otherwise fall within the category of works defined.[12]

As to a second argument that if the picture was required to be a painting, as a drawing it did not qualify for the prize, Justice Hamilton took into account the impression the portrait creates on the viewer, the dictionary definitions that he had discussed, and the evidence about the creation of the work, particularly the use of what may be regarded as techniques of painting as opposed to drawing. He reached the conclusion that minds may well differ as to whether, if the picture must be placed in a single category, that category should be painting or drawing. But in view of those matters, he found it "impossible on any objective basis to exclude the portrait from the category of a work which has been 'painted' ".[13] Accordingly, he reached this conclusion "without reference to the expert evidence" given in the case about paintings and drawings. Because of his conclusion that the portrait could not be excluded from the category of a work which had been painted, it could not be said that the trustees' exercise of judgement or opinion was wrong.[14]

There is a final thread which attaches to the case involving the portrait of Gulpilil. The award of the 2023 Archibald Prize went to Julia Gutman for a portrait of singer-songwriter Montaigne. Newspaper reports raised the issue of whether, as with Ruddy's portrait of Gulpilil, this portrait is a painting. The artist sewed secondhand textiles under the canvas, including an old apron she used to wear as an art teacher, an old pair of jeans and an old blanket. The description of the work was "oil, found textiles and embroidery on canvas". She was quoted as saying:

> The form itself has come out of painting. I studied painting, I teach painting. In terms of the way the figure is composed, it's very close to the process of making an oil painting. This isn't a traditional textile format. I've made it up and it's come out of my painting practice. The form of canvas is an oil painting.

Although the art critic for *The Australian* asked whether this is really a painting and therefore eligible for the prize, the art critic for the *Sydney Morning Herald* wrote that, although the portrait is the first embroidered Archibald winner, it qualifies as a painting because the background rather than the figure has been painted.

The legal challenge to the trust's charitable status

Many decades after the first award of the Archibald Prize, there was a challenge to the charitable trust itself. One clause in Archibald's will stipulates that the value of the prize must be reassessed within 20 years of the death of the last surviving beneficiary. Under the terms of the will, the money set aside for the Portrait Prize was to go to the Australian Journalists Association, if it were found that the competition was no longer a good charitable bequest.

12 *Johansen* (n 3) [25] (Hamilton J).
13 Ibid [29].
14 Ibid [30]–[31].

In 1985 the Supreme Court of New South Wales heard an application that the prize had become irrelevant and should no longer be awarded. There was a complex and somewhat underprepared case that came before Justice Powell in the Supreme Court. Justice Powell noted that it would come as a matter of considerable surprise that the case concerned a will made in 1916, under which a prize had been awarded annually for 65 years since 1921. Given that the bequest had been the subject of consideration by the Court on at least two occasions, his Honour set out in detail a range of procedural issues in the case, including the want of some parties and defects in the summons, such that the relief claimed was inadequate to dispose of the case. Questions raised in the proceedings had been left in an unsatisfactory state. He remedied some of these matters in the orders he made and dealt with the substantive issues.

Consistently with the approach taken by other judges, Justice Powell offered no opinion as to the quality of the entries which have been submitted over the years. He did so, not merely because the field of portrait painting is one in which he said he could claim not the slightest expertise, but as well because, as Justice Roper wrote in the Dobell judgment, awarding the prize will "normally involve the exercise of great delicacy of judgment. The question of which is the best portrait will always be answered according to the individual tastes and propensities of the observer."

Dealing with the legal issues, His Honour stated that the intended trust involved a purpose trust. The testator's bequest must fail unless the intended purpose in establishing and perpetuating the Archibald Prize was that it be regarded in law as charitable. It was clear to Justice Powell that if the bequest or bequests were to be valid, they must come within the class of trusts for the advancement of education or some other purpose beneficial to the community. Having reviewed numerous authorities in relation to both types of purpose trusts, and having noted that the Court was not bound by the motive or opinion of the testator, his Honour concluded that Archibald's object in providing the subject bequest or bequests was at least "the continuing production and exhibition to the public of portraits of high quality". It matters not that the popularity of portrait painting, as such, may have declined over the years, or that in the view of some the quality of any particular winning portrait may have been dreary and uninspired or negative, indeed, quite insipid. Rather, he said he would suggest that "even those who came but to stand and stare must learn something". His Honour found that the prize, or the bequest, was to establish and maintain the Archibald Prize for the advancement of education.

In the alternative, Justice Powell stated that a bequest to establish and maintain any competition which encourages participation on the scale revealed by the evidence in this case, and public interest on the scale revealed by evidence in this case, in one of the fine arts, to this day and age would be regarded as being of general public utility. His orders included a declaration that the bequest provided for in clause 10 of Archibald's will was a valid charitable bequest.

Scope for future litigation?

This last section deals with some loose ends. It is possible that the number of cases or possible causes of action in relation to the Archibald Prize will not have been exhausted.

There are at least three matters that have not been the subject of litigation. First, must the artist be resident in Australia? Second, can the subject of the portrait pretend to be someone else? And third, must the portrait include a representation of the subject's face?

Must the artist be resident in Australia?

As noted earlier, the bequest provided for the prize to be awarded for the best portrait painted by an artist resident in Australia during the 12 months preceding the date fixed by the trustees for sending in the pictures. I am not aware of any litigation on these issues, although in the early days, an opinion was given by Mr Langer Owen KC about some early entries by George Lambert and John Longstaff, who maintained homes in England and Australia. And there was some dispute about whether at least one of the portraits qualified for the prize. Longstaff was awarded the prize in 1925, and the point was not challenged in court.

Another controversy related to a Sidney Nolan entry, the portrait entitled *Arthur Boyd at Fitzroy Falls*. For many years, the subject and the artist had lived in the United Kingdom, and the notes on the Art Gallery's website stated: "A portrait of artist Arthur Boyd by Sidney Nolan was withdrawn from the exhibition after the trustees received a complaint that Nolan had not been resident in Australia for 12 months preceding the date of entry, as required by the rules."

Can the subject of the portrait be, or pretend to be, someone else?

If to qualify for the Archibald Prize, the portrait is "preferentially of some man or woman distinguished in the field of Art, Letters, Science or Politics", must the subject be the person as that person, or could it be a painting of that person in the guise of someone else? The late Barry Humphries was undoubtedly a man distinguished in the Arts. A portrait of him by Louise Hearman was awarded the Archibald Prize in 2016. But could the prize be awarded for a painting of him as one of his famous characters? That question has not been litigated, but it seems the trustees have had no problem including as finalists, even as a prize winner, portraits of actors as characters rather than themselves.

Two well-known examples are John Brack's painting *Barry Humphries in the character of Mrs Everage*, a finalist in 1969. Subsequently, Tim Storrier's 2014 entry, titled *The Member, Dr Sir Leslie Colin Patterson KCB AO* won the Packing Room Prize in 2014. Storrier had a statement included with his entry:

> Saville Row tailors say certain men are moving targets, and Sir Les is no exception. … During our long sittings, I attempted to keep him engaged with his tipple and cigarettes. To paint such a dynamic, thrusting personality with the sensitivity that a percentage of his flamboyance deserves, I drew on my knowledge of historic portraits of great men of destiny. In portraying our revered elder statesman, retired politician, former chairman of the Cheese Board and our most celebrated critical and cultural ambassador, I found a strange resemblance to Sir Leslie's manager Humphries.[15]

15 "Tim Storrier: *The Member, Dr Sir Leslie Colin Patterson KCB AO*", *Art Gallery of New South Wales* (Web page) <https://www.artgallery.nsw.gov.au/prizes/archibald/2014/29516/>.

The late Nicholas Harding won the Archibald Prize with a painting of actor *John Bell as King Lear* in 2001. If an actor in a role is a proper subject for the actual prize, at what stage is the actor so unrecognisable that the subject is not qualified for that purpose? Evert Ploeg caused Archibald controversy in 1997 with a portrait of the television characters *Bananas in Pyjamas*. The portrait was deemed ineligible by the trustees because the Bananas in Pyjamas are not real people. But the question remains, were King Lear and Mrs Everage real people?

Must a portrait include a representation of the subject's face?

In the Dobell case, Justice Roper said

> I think the word "portrait", as used in [Archibald's] will, incorporated in its meaning the limitations imposed by its context, namely a pictorial representation of a person painted by an artist. This definition connotes that some degree of likeness is essential, and for the purpose of achieving it, the inclusion of the face of the subject is desirable, and perhaps also essential.

Yet, in 2012, the Archibald Prize was awarded to Tim Storrier for his self-portrait, *The histrionic wayfarer (after Bosch)*. The text on the Art Gallery of New South Wales website includes the following: "Though there is no face to identify him, Storrier believes that identity is made clear by the clothes and equipment carried. Storrier has included a drawing of himself in the painting, scribbled on a piece of paper being blown away in the wind." The text also notes that Storrier was represented in the previous year's Archibald Prize with another self-portrait without a face. Entitled *Moon boy (self-portrait as a young man)*, the figure was represented by a suit of empty clothes hanging, as if on a scarecrow in a barren landscape.

Another finalist in 2012 was by Juan Ford, *Ultrapilgrim*, a self-portrait about his journey through life. And again, there is no image of the subject's face, although it is a very detailed painting of a body cloaked and carrying a bag. The finalists in 2017 included the painting by Tjungkara Ken, *Kungkarangkalpa tjukurpa (Seven Sisters dreaming), a self-portrait*. As the artist said:

> When the ancestors painted their *tjukurpa* or dreaming, on the caves and on their bodies, it was a celebration of our culture, a way of identifying people and places and a way of continuing our stories. Today, we have new materials and ways but the celebration and commitment to the *tjukurpa* and cultural identity is always the same. My painting is a portrait of the Seven Sisters dreaming, a self-portrait of my country. For an ancestor they are one and the same.

As one writer has observed of this painting, the picture is a coalescing of the genres of landscape and portraiture.

Conclusion

Finally, as the former director of the Art Gallery of New South Wales, Edmund Capon, wrote:

> The Archibald is a rich and wonderful contradiction. It is about realism in an age of abstraction; it is about tradition in an age of perpetual evolution and contrived revolution. It is about the art of painting, when the established norms of the visual arts are constantly being challenged and undermined, and it is about an art form which the pundits pronounced dead and buried decades ago. The art of the portrait is far from dead. And an ever-evolving and open-minded view as to the nature of a portrait in applying the rules of Mr Archibald's Prize will ensure that its future will be as lively as its past.

This survey of the litigation surrounding the Archibald Prize has illustrated that it might be as the Honorable Michael Kirby has opined, that "[a]rt and law but rarely intersect. It is probably best to keep it that way." But despite its toll on artists, subjects, trustees and others, the litigation might also have fuelled interest in the prize and thus contributed to its ongoing popular success. Even if the entries are not to your taste, or do not meet your exacting personal standards, you can be encouraged by the words of Justice Powell that "even those who came but to stand and stare must learn something".

The Australian integrity oversight system — fit for purpose?

*John McMillan**

The objective of the Australian integrity oversight system is to ensure that government agencies and officials observe proper standards of conduct and are publicly accountable. In effect, integrity agencies examine whether officials have done the wrong thing.

And therein lies the tension. People who have risen to the top in Parliament and government are customarily committed to integrity and the rule of law, but can quickly reject any allegation pointed at them.

Other cultural clashes arise too. Decision-makers are typically outcomes-focused and results-driven. Integrity oversight agencies often slow that process by asking questions that focus on procedure and authority. There are related debates about how intrusive the law should be in recasting matters as official conduct that is drawn into the integrity prism.

Those contrasting perspectives on integrity are brought out daily in public debate, as illustrated in three recent examples.

The first example is of contrasting views about the role of integrity agencies. One is from the Royal Commission into the Robodebt Scheme, which called on integrity agencies to play a more active role in preventing government program fiascos:

> Truly … disheartening was the ineffectiveness of what one might consider institutional checks and balances — the Commonwealth Ombudsman's Office, the Office of Legal Services Coordination, the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal — in presenting any hindrance to the Scheme's continuance.[1]

A different view was given by former Premier Dan Andrews in a podcast on his reflections on government:

> There's not an accountability officer that doesn't want more money, more power … They're not entitled to pretend that anyone voted for them … that they've somehow got a mandate that is equal to, let alone superior to, the duly elected government.[2]

A second example of contrasting views has to do with the power of anti-corruption commissions to publish corruption findings in the absence of prosecution action. On one

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* John McMillan AO is an Emeritus Professor at the Australian National University. This article is an edited version of his address to the Law Society of South Australia conference, Forum 2024, Adelaide, 15–16 February 2024. As a speech paper it gives a high-level overview of a large topic, rather than a thorough analysis.

1 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023) iii.

2 Broede Carmody and Rachel Eddie, "Andrews' attack on corruption watchdogs stuns integrity experts", *The Age* (online, 8 December 2023) <https://www.theage.com.au/politics/victoria/daniel-andrews-slams-integrity-agencies-he-says-no-one-voted-for-20231208-p5eq68.html>.

side is the view of the Chair of the Queensland Crime and Corruption Commission (CCC), Bruce Barbour:

> [I]t is absolutely unarguable that it's in the public interest for the CCC, to be able to have robust reporting provisions, to be able to report publicly and to tell the community about our work, what we do, how we do it.[3]

Contrast that with a ruling of the United Nations Human Rights Committee in favour of an Australian businessman who appealed against an adverse finding against him by the NSW Independent Commission Against Corruption (ICAC). The UN Committee ruled that publication of a corruption finding that did not lead to prosecution

> violated human rights under Article 17 of the ICCPR covenant, concerning the right to not be subjected to arbitrary or unlawful interference with privacy, family, home, correspondence, honour and reputation.[4]

In the third example, contrasting views were expressed about a bedrock element of the Australian integrity system, freedom of information legislation. A Senate Committee recently observed:

> It is clear that the Commonwealth Freedom of Information (FOI) system is not working effectively and for some time has not functioned as it was intended. …
>
> [T]here needs to be a recalibration of the culture across much of the [Australian Public Service] so that transparency and accountability within the framework of the FOI regime are promoted.[5]

A different emphasis was expressed by Andrew Metcalfe, a respected former Commonwealth departmental secretary and national president of the Institute of Public Administration:

> There is a risk in this desire for immediate transparency of all transactions between senior public servants and ministers …
>
> This is not an issue of integrity. This is an issue of governments being able to confidently have difficult discussions, workshop ideas, think about different options and do so not thinking that it's going to be in the newspapers the next day because that stifles that type of interaction.[6]

A take-out message from those contrasting views is that designing an integrity system involves choice and possible compromise. There is no single or accepted view on what is "fit for purpose". I take that theme forward in discussing four major pillars of the Australian integrity system from a dual angle — the impact and relative success of each integrity element, and areas of tension and controversy relating to it.

3 Lydia Lynch, "Queensland's corruption watchdog makes fresh call for urgent law changes to allow release of Trad report", *The Weekend Australian* (online, 2 February 2024) <https://www.theaustralian.com.au/nation/politics/queenslands-corruption-watchdog-makes-fresh-call-for-urgent-law-changes-to-allow-release-of-trad-report/news-story/f1ca9ef032760bd4b31766bd2f51effe>.

4 Shannon Tonkin, "Sydney businessman Charif Kazal's human rights violated by ICAC, United Nations declares", *The Daily Telegraph* (online, 29 November 2023) <https://www.dailytelegraph.com.au/news/nsw/sydney-businessman-charif-kazals-human-rights-violated-by-icac-united-nations-declares/news-story/3fa8fd13197d955396b862b17452ac5f>.

5 Senate Legal and Constitutional Affairs Reference Committee, *The Operation of Commonwealth Freedom of Information (FOI) Laws* (Report, December 2023) 89–90 [5.9], [5.11].

6 Andrew Metcalfe, Valedictory address to the Institute of Public Administration Australia (ACT) (National Portrait Gallery, Canberra, 2 August 2023), <https://act.ipaa.org.au/wp-content/uploads/2023/09/Event-Transcript-Andrew-Metcalfe-valedictory.pdf> 19, 20.

Ombudsman offices

Impact and importance

Durability and consistency over 50 years

Australian public sector Ombudsman offices are currently celebrating their 50th anniversaries — Western Australia, South Australia and Victoria have already done so, and the Commonwealth will in two years.[7] These 50th anniversaries highlight the durability of the Ombudsman integrity model: it is still called the Ombudsman, it mostly retains its original statute, and Ombudsman offices have largely avoided the major rethink and restructure that many other agencies have undergone.

The impact and success of the model can be seen in other ways too.

New Ombudsman functions and offices

Complaint handling and administrative investigation remain the core Ombudsman role, but many new functions have been added, leading to a growth in some offices to over 200 staff. Examples of new functions are compliance auditing of law enforcement records, freedom of information review, public interest disclosure (PID) handling, child death review, coordinating official visitors, inspecting places of detention, and conducting mediation and conciliation.

Specialist Ombudsman offices now abound — such as the Fair Work Ombudsman, Small Business Ombudsman, Telecommunications Ombudsman, Water and Energy Ombudsman, Health Ombudsman, Transport Ombudsman and — currently foreshadowed — National Student Ombudsman.

Growth of complaint handling

Ombudsman offices pioneered complaint handling as an effective method of dispute resolution. It has since been taken up in all corners of government, business and the community, with most large and medium-size organisations inviting online and telephone complaints. Ombudsman offices themselves receive upward of half a million complaints and enquiries a year, and smartphone complaint apps such as “Snap Send Solve” receive over one million complaints annually.

Impact of Ombudsman investigations

The Ombudsman’s high continuing caseload attests to its success. This feeds into major reports that have a significant impact on public administration and citizen rights. Recent examples include reports on deportation procedures, social housing, Aboriginal programs, political data harvesting, compulsory detention, COVID lockdowns, e-vehicle road user charging, and politicisation in the Victorian public service.

7 See generally John McMillan, “Fifty years of the Ombudsman in Australia” (2023) 109 *AIAL Forum* 19; Fay Woodhouse, *Watchdog for the People: 50 years of the Victorian Ombudsman 1973–2023* (Report, Victorian Ombudsman, 31 October 2023).

Tension points

The principle of independence underpins the Ombudsman's role. There are many facets to independence, and these have been the main tension points in recent years.

Full use of Ombudsman powers

The Ombudsman can assert and demonstrate its independence by using its statutory powers to command information, interrogate public officials, question legal stances and publish findings critical of government. It was the failure of the Commonwealth Ombudsman to use those powers fully when investigating Robodebt complaints that drew sharp criticism from the Robodebt Royal Commission.[8]

This should cause deep reflection in Ombudsman offices. In the last decade or so they have perhaps given too much emphasis to working cooperatively with the public service, and not enough emphasis to playing the watchdog role of probing and publicly highlighting maladministration.

Appointment of the Ombudsman

Over the last 50 years a rich variety of people have been appointed Ombudsman around Australia — barristers, academics, politicians, administrators, and social policy advocates. Diversity over time has been important in the growth and adaptation of the office.

In the last decade it has become more common to appoint senior government officers to the role, often a deputy secretary. One reason is the greater emphasis now given to demonstrated managerial skills in a complex world. Another possibility is that it reflects a desire within government to "play it safe". At any rate, the topic of appointment should be discussed more openly so that we do not forget the value of diversity over time.

Budgetary independence

Ombudsman and other integrity agencies are increasingly vocal that their independence is threatened by having to negotiate their annual budget in the same way as other government agencies, when their role is to hold those agencies to account. Alternative approaches have been proposed in several reports around Australia. Examples include an oversight agency's budget going through a specialist parliamentary committee or the Speaker of the Parliament, or being proposed by an independent statutory commission akin to a remuneration tribunal.[9]

Oversight of the Ombudsman

The Ombudsman is in the unique position that there is no formal mechanism for reviewing Ombudsman findings or receiving complaints against the Ombudsman. An aggrieved person can commence judicial review action, though courts have expressed hesitation about

8 *Royal Commission into the Robodebt Scheme* (n 1) ch 21.
9 See McMillan, "Fifty years of the Ombudsman in Australia" (n 7) 26.

granting traditional remedies such as certiorari, as the Ombudsman has an advisory rather than determinative function.[10]

An alternative is to appoint an independent inspector of the kind that provides oversight of anti-corruption commissions. The most comprehensive model for such an office is the Victorian Inspectorate that monitors most of the State integrity agencies, including the Victorian Ombudsman, the Independent Broad-based Anti-corruption Commission (IBAC), the Victorian Auditor-General's Office, the Office of the Victorian Information Commissioner and the Judicial Commission of Victoria. An interesting anecdotal development is that the Victorian Ombudsman has made strong public criticism of the Victorian Inspectorate for being overreaching and interfering.

This issue of *quis custodiet ipsos custodes* — "who watches the watchman?" — will not go away.[11]

Administrative tribunals

Impact and importance

Spread of general jurisdiction merit review tribunals

The creation of the Commonwealth Administrative Appeals Tribunal in 1975 as a generalist tribunal with a wide public law jurisdiction was a landmark development that halted the proliferation of specialist and smaller tribunals.[12]

All states and territories have now adopted this model by amalgamating existing tribunals into a new "super" tribunal, commonly called the civil and administrative tribunal. The states have gone a step further by giving the tribunal both a public law and private law jurisdiction in areas such as commercial and tenancy disputes.

Nationally, these generalist tribunals have jurisdiction under more than 1,300 pieces of legislation and have a combined annual caseload of roughly 230,000 cases.

Reshaping the justice system

The generalist tribunals have become a separate pillar of the justice system and have ushered in many innovations — doctrinal coherence in the concept of merit review; procedural informality in non-judicial dispute resolution; a modified test for standing; an obligation on decision-makers to prepare reasons for decision and to assist the tribunal; and greater diversity in the qualifications and experience of adjudicators.

10 See, eg, *King v Ombudsman* (2020) 137 SASR 18.

11 See, eg, Industry and Regulators Committee, House of Lords, *Who Watches the Watchdogs? Improving the Performance, Independence and Accountability of UK Regulators* (HL Paper 56, 8 February 2024).

12 See Robin Creyke, "From sewers to 'super' adjudicators: what next for tribunals?" (2023) 107 *AIAL Forum* 31; Editorial, "The proposed Administrative Review Tribunal" (2024) *Australian Journal of Administrative Law* (forthcoming).

The tribunal system directly connects external review and improved decision-making. Decision-makers are required to explain and justify their decisions to the tribunal, and the merit review process itself models good administrative decision-making.

Tension points

There is perennial debate about the correctness of individual tribunal decisions, and the types of decision appropriate for tribunal review. I will put those conflicts to the side and focus on more immediate tension points.

Tribunal appointments

The concern has grown that governments around Australia exploit their frequent opportunity to appoint new tribunal members by appointing political cronies. That trend has damaged tribunals and underlay the Commonwealth decision in 2022 to abolish the Administrative Appeals Tribunal (AAT) and create a new Administrative Review Tribunal (ART). A Bill currently before the federal Parliament will bring about a major overhaul.[13]

A parallel process is running to select new ART Members through a transparent and arms-length selection process. Hopefully a new era is dawning, though advocacy will continue for more far-reaching reforms, such as an independent appointments commission.

Case delays and tribunal resourcing

A growing fear is that case delays are endemic and insoluble. A year back the AAT backlog was close to 70,000 cases, nearly 80% immigration; and the Victorian Civil and Administrative Tribunal backlog was close to 35,000 cases, nearly one-third tenancy. Many factors are debated as being among the causes — resourcing, internal tribunal management, opportunistic appeal patterns, and overly-demanding expectations imposed by appellate courts.

One response in the ART Bill is to establish an internal Tribunal Advisory Committee to undertake performance monitoring and quality assurance work, including through stakeholder consultation.

Member expertise

There is constant gossip of friction within tribunals tied to alleged political appointments, and also between members in the tribunal's general division and those in the larger specialist divisions.

Here, too, there are interesting reforms proposed for the new ART. One is the creation of a Guidance and Appeals Panel that has the dual function of appellate review and issuing guidance decisions as a precedent for ART Members. Another is that the President can devise a code of conduct and performance standards for non-judicial Members, and receive and investigate complaints that a Tribunal Member is in breach.

13 Administrative Review Tribunal Bill 2023 (Cth).

Combining administrative and civil jurisdictions

Tribunal amalgamation has brought many benefits in economies of scale, access to justice and specialisation in the legal profession.

Again, however, the combined administrative and civil jurisdiction is a continuing tension point. In some state tribunals the civil jurisdiction comprises up to 90% of their work. There can be differences between administrative and civil review as to rules of evidence and procedure, but also as to outcome. While the objective of an administrative tribunal is to make the correct or preferable decision consistently with principles of good public administration, the objective may differ in matters of guardianship, vocational suitability, tenancy rights or commercial disputation. In effect, form follows function.

Constitutional snags

Federal tribunals are part of the executive branch of government and cannot exercise federal judicial power. The trickle-down effect at state level is that, unless created as a state court (a not altogether easy question), a state tribunal cannot resolve a dispute that requires the exercise of federal judicial power.[14] Simple examples are a dispute between interstate residents, or a matter that requires interpretation of the *Australian Constitution* or the resolution of a claimed inconsistency between Commonwealth and state laws. A litigant who anticipates an uncomplicated tribunal case may be drawn into a world of complexity and pain.

Anti-corruption and integrity commissions

Impact and importance

National integrity framework

The commencement in July 2023 of the National Anti-Corruption Commission (NACC) was another integrity milestone in creating a comprehensive national integrity framework. Though there are significant differences among jurisdictions in how corruption is defined and investigated, the message is clear in every government corner that corruption is a serious threat and must be prevented.

Detecting, investigating and preventing corruption

There have been ups and downs, but overall the corruption commissions in Australia have achieved a lot. Numerous public officials, from Premiers down, have had corruption findings made against them, and several Ministers, lobbyists and local councillors have gone to gaol. The workload of the commissions is high: the NACC announced that in its first seven months it received nearly 2,500 complaints and referrals, and was conducting 12 corruption investigations.

14 *Burns v Corbett* (2018) 265 CLR 304.

Corruption work has triggered major public sector reforms. For example, New South Wales announced in early 2024 that it would introduce expanded disclosure and grant management rules following the ICAC's corruption findings against former Premier Gladys Berejiklian and former Members of Parliament Daryl Maguire and John Sidoti.[15]

Mandatory reporting of corruption information

A key feature of anti-corruption statutes is the mandatory reporting obligation placed on agency heads, to refer to the commission any allegation or incident of suspected corruption. This creates a clear reporting and investigation pathway and reminds public servants to take their ethical obligations seriously. A wealth of guideline information and training links to this reporting obligation.

Tension points

Litigation and oversight

An old adage is that when you fight corruption, it fights back. One fight-back arena is the courts. There is a steady stream of litigation challenges around Australia. The High Court, for example, has recently given judgment in two cases — one restricting the authority of the Queensland CCC to release public reports; and another expanding on the statutory obligation of the Victorian IBAC to provide adverse material to a person under investigation.[16]

Parliamentary committees also play an active oversight role. In 2022 the head of the Queensland CCC resigned after the Parliamentary oversight committee expressed lack of confidence in him. The head of Victoria's IBAC complained last year that the government-appointed parliamentary oversight committee was deliberately undermining IBAC's work.

All integrity commissions are oversighted by an independent inspector who can monitor the commission's work through audits, investigations and complaints. Public spats between the inspectors and the commissions are not uncommon.

Public hearings

The issue that attracts most controversy is public hearings. Some argue they are necessary to shine a light on corruption and to alert the bureaucracy to the risks and the consequences. Others argue they are a modern Star Chamber that unfairly damages the reputation of innocent, or at least incautious, politicians and bureaucrats. The legislative response in most jurisdictions has been to tighten the criteria and process to be followed before a public hearing can be conducted, usually restricting it to "special circumstances".

There is a brewing storm in Queensland following the High Court's 2023 decision that the CCC lacked legal authority to publish a corruption investigation report that did not result in a

15 Nick Dole, "NSW government to rewrite ministerial code in wake of Berejiklian ICAC findings", ABC News (online, 7 February 2024) <https://www.abc.net.au/news/2024-02-07/nsw-government-icac-findings-berejiklian-sidoti/103436156>.

16 Respectively, *Crime and Corruption Commission v Carne* [2023] HCA 30 (*Carne*); *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2024] HCA 10.

criminal finding.[17] The CCC says the Court's decision means that 32 previous reports and 256 media releases were wrongly published.[18] The Queensland Government initially signalled it was sympathetic to a legislative amendment, but has since hesitated and appointed an independent inquiry into the issue.[19]

Witness welfare and exoneration protocols

A related criticism of the commissions is that they are unmindful of the impact of their investigations on witness welfare. There have been several well-publicised suicides across Australia.

A related debate is whether a commission should amend the public record when an adverse finding falls over or is not pursued. The commissions have generally opposed that suggestion.

Investigation timeliness and reporting delays

Delay is the enemy of justice in this area no less than others. There has been much commentary on the 33 months taken by the NSW ICAC in the public phase of its corruption inquiry affecting former Premier Berejiklian. An inquiry by the Inspector of ICAC concluded the time taken did not constitute maladministration, but said the Commission nevertheless needed a speedier process.[20]

Freedom of information legislation

Impact and importance

The impact of FOI legislation over 40 years is generally well known, and can be noted briefly in two points.

Changed government culture

FOI Acts replaced the convention of discretionary Crown secrecy with the legal obligation of transparency, enforceable in an independent forum. This has had immense flow-on effects on public administration and decision-making. Government agencies are demonstrably more open than in pre-FOI days, and all public servants intuitively know their work has a public-facing element.

17 *Carne* (n 16).

18 Neil Laurie, "Removing the watchdog's bark: *Crime and Corruption Commission v Carne*", *AUSPUBLAW* (Blog post, 24 October 2023) <https://www.auspublaw.org/blog/2023/10/removing-the-watchdogs-bark-crime-and-corruption-commission-v-carne>.

19 The Hon Steven Miles, Queensland Premier, and the Hon Yvette D'ath, Queensland Attorney-General, "CCC reporting powers under the microscope in former chief justice-led review" (Media Statement, 15 February 2024) <https://statements.qld.gov.au/statements/99713>.

20 Inspector of the Independent Commission Against Corruption (NSW), *Investigation into the time taken by the ICAC to furnish its Operation Keppel Report to Parliament* (Special Report 20223/02, August 2023).

Public interest document disclosures

Every week or so there is a news story based on FOI requests or public interest disclosures. Recent high-profile examples are the release of National Cabinet papers, government monitoring of the social media response to major policy announcements (such as COVID lockdowns), and public service advice provided to Ministers on topics of national security prosecutions, release of immigration detainees and land zoning.

Tension points

FOI is, of course, one big tension point that causes parties on all sides to go red in the face at its mere mention. That tension will never go away,[21] which is why a rethink of FOI fundamentals is needed.[22]

An outdated law focused on document disclosure

FOI architecture was designed 50 years ago in a world of hard-copy documents against a backdrop of Crown secrecy. We live now in a world of digitised information that governments pump out daily through the Web and social media. What role should FOI Acts play in that changed setting? A simple example is that FOI could be reframed around a person being able to request information rather than a specified document.

Building a proactive disclosure culture and rules

A common thread in FOI reforms over the past decade is that government agencies should move from a reactive to a proactive disclosure culture. Everyone embraces that principle, but little has been done to spell out what it means in practice. An obvious example is to design specific rules requiring selected publication of Ministerial diaries, meeting records, and incident and inspection reports.

Streamlining the review process

A key FOI innovation is that a decision-maker must justify an FOI refusal before an independent commissioner, Ombudsman or tribunal. That has generally worked well, except that it is frequently a slow and drawn-out process. A primary reason is that independent reviewers are required, when faced with disagreement between the agency and the applicant, to conduct a full merits review that is capped off by a closely reasoned decision (which is commonly delivered months if not years later).

An alternative to consider is a two-stage process — at stage one the information commissioner would give a "sound-out" decision that is completed within a short time and without elaborate

21 John McMillan, "FOI in Australia: building on a turbulent past", *AUSPUBLAW* (Blog post, 29 January 2016) <https://www.auspublaw.org/blog/2016/01/foi-in-australia>.

22 See generally Senate Legal and Constitutional Affairs Reference Committee (n 5). In 2024 the Victorian Parliament Integrity and Oversight Committee was undertaking an inquiry into the operation of its FOI legislation, including through public hearings. See Integrity and Oversight Committee, "Inquiry into the operation of the *Freedom of Information Act 1982*", *Parliament of Victoria*, <https://www.parliament.vic.gov.au/foi>.

reasons; and a dissatisfied party could (upon payment of an appeal fee) invoke stage two, in which the commissioner would conduct a more traditional merits review process, ending with a reasoned decision.

Separating privacy and FOI

FOI legislation preceded privacy legislation, and understandably applied to all government records, including personal records. Personal information requests now constitute over 80% of FOI work. An overdue question is whether access to personal records should be taken out of the FOI Act, allowing different procedures and considerations to apply to both categories of documents. FOI work could appropriately focus on the policy and public participation aspects of government administration.

Review of other aspects of the integrity framework

Other elements of the Australian integrity framework are also under review, with a similar focus on adaptation of established rules to a contemporary setting. The following three Commonwealth examples are Illustrative:

- **Privacy:** An extensive review of the *Privacy Act 1988* (Cth) commenced following recommendations in the Australian Competition and Consumer Commission's Digital Platforms Inquiry in 2019.[23] The latest development was the release in late 2023 of the Australian Government's response to the *Privacy Act* review report.[24]

- **PID:** A review of the *Public Interest Disclosure Act 2013* (Cth) commenced in 2016. The latest development was the publication of a government consultation paper in late 2023 to improve "the effectiveness and accessibility of protections for whistleblowers".[25]

- **Administrative Review Council:** The Bill to establish the Administrative Review Tribunal retains (with some revision) existing provisions that establish the Administrative Review Council as an advisory body on administrative law reform. The Council was effectively disbanded in 2012 when its last meeting was held. The re-establishment of the Council will be welcomed by many — not least because its absence has been linked in public debate to many of the tension points mentioned in this article, such as the delayed introduction of a federal integrity commission, the Robodebt scandal, politicised tribunal appointments, and FOI breakdowns.

That last point is an appropriate one on which to conclude. While debate will inevitably continue on the precise design and operation of a comprehensive national integrity framework, the lesson for government is that it acts at its peril if it undermines or disregards the system.

23 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).

24 Attorney-General's Department (Cth), *Privacy Act Review: Report* (Report, 16 February 2022); Australian Government, *Government Response: Privacy Act Review Report* (Report,28 September 2023).

25 Attorney-General's Department (Cth), *Public Sector Whistleblowing Reforms: Stage 2 — Reducing Complexity and Improving the Effectiveness and Accessibility of Protections for Whistleblowers* (Consultation Paper, November 2023). A similar review occurred in Queensland in 2023: The Hon Yvette D'ath, Queensland Attorney-General, "Comprehensive review of the *Public Interest Disclosure Act* released" (Media Statement, 8 August 2023) <https://statements.qld.gov.au/statements/98418>.

Some more legal implications of pork barrelling — part 2: Commonwealth sanctions and investigatory powers

*JC Campbell**

This article seeks to outline some provisions of the law of the Commonwealth that have a bearing on pork barrelling, as well as some developments in the law of New South Wales relevant to pork barrelling. It builds on and updates a 2022 article on the subject in relation to New South Wales.[1] The present article is in three parts. Part 1 covered the *Public Governance, Performance and Accountability Act 2013* (Cth) and subordinate legislation made under it, and the role of the Commonwealth Ministerial Code of Conduct, while Part 3 will focus on relevant New South Wales legislation and case law that clarifies principles around pork barrelling.[2] In this issue, Part 2 continues the focus on the Commonwealth by looking at relevant Commonwealth sanctions and investigatory powers.

The *National Anti-Corruption Commission Act 2022* (Cth)

The *National Anti-Corruption Commission Act 2022* (Cth) (*NACC Act*) was assented to on 22 December 2022 and most of its operative provisions commenced on 1 July 2023.[3] The Act establishes a body called the National Anti-Corruption Commission (NACC) which is headed by a Commissioner and provides for up to three Deputy Commissioners.[4] The Commissioner has a variety of functions connected with the investigation and prevention of corrupt conduct, as set out in s 17:

> (a) to detect corrupt conduct;
>
> (b) to conduct preliminary investigations into corruption issues or possible corruption issues;
>
> (c) to conduct corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic;
>
> (d) to report on corruption investigations and public inquiries;
>
> (e) to refer corruption issues to Commonwealth agencies and State or Territory government entities;
>
> (f) to oversee investigations into corruption issues conducted by Commonwealth agencies;
>
> (g) to conduct public inquiries into:
>
> (i) the risk of corrupt conduct occurring; and
>
> (ii) measures directed at dealing with that risk and preventing that conduct;
>
> (h) to provide education and information in relation to corrupt conduct and preventing that conduct;

* The Hon J C Campbell KC FAAL is an Adjunct Professor at the University of Sydney Law School, and a former judge of the NSW Court of Appeal. This article is an edited version of the paper presented at the AIAL National Administrative Law Conference, Adelaide, 27–28 July 2023.

1 JC Campbell, "Some legal implications of pork barrelling" (2022) 52 *Australian Bar Review* 129 (*ABR*); also published as Professor Joseph Campbell, "Appendix 3: Some legal implications of pork barrelling", Independent Commission Against Corruption (NSW), *Report on Investigation into Pork Barrelling in NSW* (ICAC Report, August 2022) 186.

2 See JC Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (2023) 109 *AIAL Forum* 101. Part 3 will appear in issue 111 of *AIAL Forum*.

3 *National Anti-Corruption Commission Act 2022* (Cth) s 2 (*NACC Act*).

4 Ibid pt 3.

(i) to collect, correlate, analyse and disseminate general information and intelligence about corrupt conduct;

(j) to report, and make recommendations, to the Minister concerning the need for, or desirability of, legislative or administrative reform in relation to any matters dealt with by this Act;

(k) to provide relevant information and documents to the Committee;

(l) to receive public interest disclosures (within the meaning of the *Public Interest Disclosure Act 2013*) and to deal with those disclosures;

(m) any other functions conferred on the Commissioner by this Act or another Act;

(n) to do anything incidental or conducive to the performance of any of the above functions.

The functions of the NACC and of the Deputy Commissioners are to assist the Commissioner in performing these functions.[5]

The *NACC Act*'s governing legislation, like that of the *Auditor-General Act 1997* (Cth) considered below, is drafted to work in conjunction with the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*). For example, s 7 of the *NACC Act* provides that several key expressions in that Act — "accountable authority", "Commonwealth company", "Commonwealth entity", "corporate Commonwealth entity", "finance law", and "subsidiary" — have the same meaning as they have in the *PGPA Act*, and there are several cross-references to operative provisions of the *PGPA Act*.[6]

Meaning of "corrupt conduct"

A central concept in the *NACC Act* is that of "corrupt conduct" as defined in s 8. For conduct to be considered corrupt under s 8(1)(a), the person who engaged in the conduct does not have to be a public official. By contrast, to be corrupt conduct under s 8(1)(b), (c) or (d), the conduct has to have been engaged in by a public official. Section 8(1) says:

(1) Each of the following is ***corrupt conduct***:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:

(i) the honest or impartial exercise of any public official's powers as a public official; or

(ii) the honest or impartial performance of any public official's functions or duties as a public official;

(b) any conduct of a public official that constitutes or involves a breach of public trust;

(c) any conduct of a public official that constitutes, involves or is engaged in for the purpose of abuse of the person's office as a public official;

(d) any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official.

Pork barrelling — defined as "the allocation of public funds and resources to targeted electors for partisan political purposes"[7] — could fall within any of the paragraphs of this definition.

5 Ibid ss 19, 22.

6 Ibid ss 8(13)(b), 12(1)(c), 247, 253(3), 261(2)(d), and 271(4).

7 Campbell *ABR* 129; ICAC Report 186 (n 1). See also Susanna Connolly, "The regulation of pork barrelling in Australia" (2020) 35 *Australasian Parliamentary Review* 24.

It is conduct that adversely affects or could adversely affect the honest or impartial exercise of the powers, functions or duties of a public official; it involves a breach of public trust;[8] and it is an abuse of the office of a public official. Depending on the form the conduct took, it might involve misuse by a public official or former public official of information or documents acquired in the person's capacity as a public official.

Although most operative provisions of the *NACC Act* commenced on 1 July 2023, some provisions can be retrospective. Conduct that occurred before that date, or that had been engaged in by a person who was no longer a public official on 1 July 2023, can still be corrupt conduct within the meaning of the Act.[9] Of particular relevance to pork barrelling, when one remembers that pork barrelling is usually engaged in to benefit a political party or a particular politician, not to benefit the person who engages in the pork barrelling, is that the legislation expressly states that conduct of a public official can be corrupt conduct even if it is not for the personal benefit of the person who engaged in it.[10]

Meaning of a "corruption issue"

Another central concept in the *NACC Act* is that of a "corruption issue", defined in s 9. It is, broadly,[11]

> an issue of whether a person:
>
> (a) has engaged in corrupt conduct; or
>
> (b) is engaging in corrupt conduct; or
>
> (c) will engage in corrupt conduct.[12]

There is no definition of what an "issue" is, so the ordinary English meaning of that word would apply. Of the various possible meanings that the *Macquarie Dictionary* recognises for "issue" when used as a noun, the most appropriate ones are:

> 5. a point in question or dispute, as between contending parties in an action at law.
>
> 6. a point or matter the decision of which is of special or public importance: the political issues.[13]

Thus, before there is a "corruption issue" within the meaning of the Act, it is not necessary for anyone to have actually come to the conclusion that a person has engaged, is engaging or will engage in corrupt conduct; all that is necessary is that there be an unresolved question about whether a person has engaged, is engaging, or will engage in corrupt conduct.

8 The concept of "public trust" in s 8(1)(b) of the *NACC Act* (n 3) is the same concept of public trust that was discussed at length in Campbell, *ABR* and ICAC Report (n 1) 2.

9 *NACC Act* (n 3) s 8(4)–(5). Whether the NACC chooses, as a matter of discretion, to investigate a matter that pre-dates its own existence is a different question.

10 *NACC Act* (n 3) s 8(8).

11 There is an exception under ibid s 9(2) of an "NACC corruption issue", a term defined in s 201 as a corruption issue that relates to conduct of or concerning a staff member of the NACC.

12 Ibid s 9(1).

13 *Macquarie Dictionary* (online at June 2023) "issue" (defs 5, 6).

How the NACC acquires matters to consider

Section 32 of the *NACC Act* enables "any person" to "refer a corruption issue or provide other information about a corruption issue to the Commissioner". That provision would be interpreted analogously to provisions which enable "any person" to seek a particular type of relief from a court — that is, it is a provision which enables any person whatsoever to refer a corruption issue to the Commissioner, or to provide the Commissioner with information about a corruption issue. There is no requirement for the person who refers the issue or provides the information to have any personal right or interest at stake in the issue.[14] The "person" could be a natural person, or a body that the law recognises as having corporate personality.[15] Thus, anyone (or any corporate body) who believes or suspects that there might possibly have been pork barrelling of a type that counts as corrupt conduct under the *NACC Act* (or who believes or suspects it to be possible that pork barrelling of that type is currently occurring or will occur) has the right to refer, or provide information about, that conduct to the Commissioner.

Section 32 of the *NACC Act* confers a *power* on any person to refer a corruption issue to the Commissioner, but does not create any obligation on a person who suspects that there is a corruption issue to refer that issue to anyone. By contrast, ss 33–35 impose an *obligation* on certain officials to refer certain corruption issues that they become aware of and that concern a person who is or was a staff member of the organisation for which that official has responsibility.[16] Section 36 states that the obligation applies regardless of any secrecy provision unless the provision is specifically exempt. A referral under ss 33–36 is usually to the NACC, although a corruption issue in an intelligence agency can be referred to either the Commissioner or the Inspector-General of Intelligence and Security.[17]

The obligation to refer arises only concerning a corruption issue that the relevant officer "suspects … could involve corrupt conduct that is serious or systemic".[18] It is not necessary for the officer to *be sure* that there actually is corrupt conduct, nor to *be sure* that the corrupt conduct is serious or systemic. Nor is it necessary for the officer to be of the view that it is *more likely than not* that there is corrupt conduct and that it is serious or systemic before

14 Where a statute confers rights on "any person" to bring proceedings of a particular type in a court, that "transcends traditional notions of standing under the general law": *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, [84] (Kirby J). In *Oshlack v Richmond River Council* (1998) 193 CLR 72, [86], McHugh J described such a provision as a "wide standing provision", and noted that such provisions are "by no means a new feature" in Australian law: "Cf *Patents Act 1903* (Cth), ss 56 and 84(2) allowing 'any person' to oppose the granting of a patent on specified grounds and the extension of a patent, respectively; *Trade Marks Act 1905* (Cth) s 38 permitting "any person" to oppose the registration of a trade mark within a specified time period; *Commonwealth Electoral Act 1902* (Cth), s 41 allowing 'any person' to object to the inclusion of any name on the lists of persons entitled to be placed on the electoral roll. Section 80 of the *Trade Practices Act* permits 'any … person' to apply to a court for injunctive relief against contraventions of Pts IV, IVA or V of the Act." (ibid n 128). See also ibid [118] (Kirby J); *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383, 386–7; *Melville v Craig Nowlan & Associates Pty Ltd* (2002) 54 NSWLR 82, [102] (Heydon JA).

15 *Acts Interpretation Act 1901* (Cth) s 2C.

16 *NACC Act* (n 3) s 33 (an agency head), s 34 (the head of an intelligence agency), s 35 (any staff member who becomes aware of a corruption issue in the course of (broadly) acting under the *Public Interest Disclosure Act 2013* (Cth)).

17 *NACC Act* (n 3) s 34.

18 Ibid ss 33(2), 34(2), 35(1).

the obligation to refer arises. It is enough if the officer *suspects* that there *could* be corrupt conduct and *suspects* that that corrupt conduct is serious or systemic.

A much-quoted exposition of the meaning of "suspect" is that of Kitto J in *Queensland Bacon Pty Ltd v Rees*:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as *Chambers' Dictionary* expresses it.[19]

That exposition was given in relation to s 122 of the *Bankruptcy Act 1966* (Cth), where it occurred concerning the phrase "knew, or had reason to suspect … that the debtor was unable to pay his debts as they became due from his own money". As Young J explained in *Harkness v Commonwealth Bank of Australia Ltd*[20] concerning s 122 of the *Bankruptcy Act*,

> what must be suspected under the objective test is that the debtor is insolvent. It is not enough to suspect that the debtor is under financial pressure or may have liquidity problems or has suffered reverses in the market which require care in granting further credit. What is required is that the suspicion be that the debtor is insolvent. As Barwick CJ said in the *Queensland Bacon* case at 291–2:
>
> > It is not enough that the circumstances are such as to lead to the inference that the creditor had reason to suspect that the debtor might be insolvent. The words of the subsection, to my mind, are quite clear that it is the fact of actual insolvency which must be known or suspected. To be insolvent, the debtor must be unable, as distinct from being merely unwilling, to pay his debts as they fall due. It is one thing to suspect a man's solvency in the sense that one doubts whether he is solvent or insolvent. It is another thing to suspect that he is in fact insolvent.[21]

This quotation draws attention to a significant difference between s 122 of the *Bankruptcy Act* and ss 33–36 of the *NACC Act*. To give rise to the obligation under the *NACC Act* of an official to refer a corruption issue to the NACC, it is enough that the official suspects that the issue *could* involve corruption that is serious or systemic. It is not necessary for the suspicion to rise to the level of suspecting that there actually *is* corruption that is serious or systemic. The ordinary English meaning of the word "could" involves a recognition of a possibility that some state of affairs might arise, or might not arise, but does not have any element of the degree of likelihood of that state of affairs arising or not arising. That this is so borne out by the relevant *Macquarie Dictionary* definitions of the word:

> 2. (referring to a potential event or situation): *you could do it if you tried; her health could be better; they could take a day's leave*.
>
> 3. (indicating inclination): *sometimes I could throttle her*.
>
> 4. (expressing uncertainty): *this could indicate instability of mind; they could still be alive*.[22]

Further, it is enough, to trigger the obligation to report, that the official suspects that there could be corruption that is serious *or* systemic. It is not necessary that the official suspects that there could be corruption that is *both* serious and systemic.

19 (1966) 115 CLR 266, 303–4 (*Queensland Bacon*).
20 (1993) 12 ACSR 165.
21 Ibid 168, quoting *Queensland Bacon* (n 19).
22 *Macquarie Dictionary* (online at June 2023) "could" (defs 2–4).

To many people the notion that there could be a corruption issue that is not serious is one verging on the oxymoronic. However, by stating a separate requirement for the obligation of the official to refer a corruption issue, that the issue could involve conduct that is serious or systemic, the *NACC Act* seems to contemplate a possibility that a corruption issue might not be serious. Thus, the Act must be construed in a way that allows for that possibility.

However, the *NACC Act* provides machinery for investigating and dealing with corrupt conduct of all kinds. Even if in general terms one admits the possibility of there being a corruption issue that is not serious, it is hard to see how that possibility has any operation in relation to the type of corruption that is involved in pork barrelling. While there might be some kinds of corruption that might not be labelled as serious — for example, a member of the Australian Federal Police taking a $5 bribe to overlook an isolated traffic offence in which there was no damage to any person or property — it is hard to envisage an example of pork barrelling that would not count as being serious. After all, pork barrelling involves those administering large sums of public money pretending that a particular expenditure is being used for a legitimate public purpose, when their real motive for spending it that way is to give an advantage to a particular political party or politician. That is a clear breach of public trust, and is corrosive of proper government. The remarks of judges when imposing a sentence for a crime where a senior governmental official has breached the public trust bear out the seriousness of such conduct.[23] Thus, the mandatory obligations of officials to report any suspected pork barrelling that has been or could have been engaged in by a staff member of an organisation for which that official has responsibility has a fairly wide potential scope of operation.

It is one thing for a corruption issue to be referred to the Commissioner; it is another thing whether anything will happen once that referral has been made. There is no obligation on the Commissioner to deal with any corruption issue that comes to their attention.[24] However, once the Commissioner becomes aware of a corruption issue, they have a power to deal with it. This power exists whether the Commissioner becomes aware of the corruption issue through a referral or in any other way. In particular, the Commissioner can deal with a corruption issue on their own initiative.[25]

The NACC's options for dealing with a corruption issue

Section 41(1) of the *NACC Act* provides:

> The Commissioner may deal with a corruption issue in any one or more of the following ways:
>
> (a) by investigating the corruption issue;
>
> (b) by investigating the corruption issue jointly with a Commonwealth agency or a State or Territory government entity;
>
> (c) by referring, for investigation, the corruption issue to a Commonwealth agency to which the corruption issue relates (if the Commissioner is satisfied that the agency has appropriate capabilities to investigate the issue);
>
> (d) by referring, for consideration, the corruption issue to a Commonwealth agency or a State or Territory government entity.

23 Some of these remarks will be discussed in Part 3 of this article (forthcoming).
24 *NACC Act* (n 3) s 41(7).
25 Ibid s 40.

An investigation conducted under s 41(1)(a) or (b) is defined in s 41(2) as a "corruption investigation". There is a limit under s 41(3) to the Commissioner's power to conduct such an investigation, namely:

> The Commissioner may conduct, or continue to conduct, a corruption investigation only if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.

I noted above, concerning the obligation of an official to refer a corruption issue, that the word "could" refers to a possibility rather than a certainty or a likelihood, that "serious" and "systemic" are alternative requirements, not cumulative ones, and the unlikelihood of corrupt conduct involving pork barrelling not being serious. Those same remarks apply in the construction of this limit under s 41(3) on the Commissioner's power to conduct a corruption investigation.

By contrast, where a person forms an opinion that a corruption issue could involve corrupt conduct that is serious or systemic, there is no limit on the Commissioner's power to refer the corruption issue to another governmental entity under s 41(1)(c) or (d).

There are some additional specific limitations, besides those under s 41(3), on the Commissioner's power to investigate a matter. The *NACC Act* identifies certain governmental bodies as being "Commonwealth integrity agencies", a list that includes statutory office holders whose functions include investigating or inquiring into action taken by public officials.[26] The Commissioner may commence an investigation into a corruption issue involving conduct of a public official that has previously been investigated by a Commonwealth integrity agency only if the Commissioner is satisfied that it is in the public interest to do so.[27] That limitation applies even if the previous investigation by the Commonwealth integrity agency was one that was not concerned with whether the conduct of the public official was corrupt. Other limitations on the Commissioner's power to investigate apply concerning conduct that either is or could be the subject of an investigation by the Parliamentary Expenses Authority or the Electoral Commissioner.[28]

Even bearing these limitations on the powers of the Commissioner in mind, the NACC has power to investigate a wide range of corruption issues involving pork barrelling.

The NACC's power to hold hearings

One difference between the procedures of the Independent Commission Against Corruption of New South Wales (NSW ICAC) and those of the NACC concerns the circumstances in which hearings can be held in public. Section 73(2) of the *NACC Act* says:

> The Commissioner may decide to hold a hearing, or part of a hearing, in public if the Commissioner is satisfied that:
>
> (a) exceptional circumstances justify holding the hearing, or the part of the hearing, in public; and
>
> (b) it is in the public interest to do so.

26 Ibid s 15.
27 Ibid s 45(2).
28 Ibid ss 46, 47.

There is no analogous limitation on the power of the NSW ICAC to hold a hearing or part of a hearing in public.

The requirement for "exceptional circumstances" is unlikely to prove to be a significant cause of NACC hearings being held in private rather than in public. The phase "exceptional circumstances" is one that has been construed by courts on many occasions. Some of them are collected in *San v Rumble (No 2)*[29] and *Yacoub v Pilkington (Australia) Ltd*.[30] Some of the relevant principles were summarised in *Yacoub*:

> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).
>
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).[31]

Our society has not yet reached the stage where corrupt conduct is an ordinary or usual matter, nor is it regularly, routinely or normally encountered.

A matter which might influence the decision about whether it is in the public interest to have the hearing or part of the hearing in public is that, if the report on an investigation is one that is required to be given ultimately to the Prime Minister or a Minister, there is an obligation for the Prime Minister or that Minister to table that report in the Parliament if in the investigation leading to that report there was one or more public hearings.[32] In making the decision under s 73(2)(b) whether it is in the public interest to have all or part of a hearing in public, the Commissioner will have to take into account that deciding to have the public hearing will mean not only that the particular evidence given at the hearing or part of the hearing that is

29 (2007) 48 MVR 492, [59]–[67], a decision referred to with apparent approval (mentioning only decisions in appellate courts) in *Dungan v Padash (No 2)* (2021) 98 MVR 61, [18], and *Sovereign Grange Pty Ltd v A V Truck Services Pty Ltd (No 2)* [2017] WASCA 142, [74].

30 [2007] NSWCA 290, a decision referred to with apparent approval (mentioning only decisions in appellate courts) in *New South Wales v Tyszyk* [2008] NSWCA 107, [206]; *Knight v The Queen* [(2021) 138 SASR 156, [60]; *Cummins Generator Technologies Germany Gmbh v Johnson Controls Australia Pty Ltd* (2015) 326 ALR 556, [165]; *Kroon v The Queen* [2022] SASCA 77, [24]; *Karpany v The Queen* [2021] SASCA 48, [26]; *Zefi v The Queen* [2021] SASC 15, [38]; *R v Skinner* [2016] SASCFC 106, [96]; *Ritson v Leighton* [2015] NSWCA 62, [24]–[26]; *R v Duncan* [2015] NTCCA 2, [26]; and *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98, [93].

31 *Yacoub* (n 30) [66] (Campbell JA).

32 *NACC Act* (n 3) s 155.

in public will become public, but as well, if the report is one that will eventually be given to the Prime Minister or a Minister, the investigation report itself will be tabled. However, the "investigation report" that is required to be tabled has excluded from it certain information that is classified as "sensitive information" or "section 235 certified information".[33]

Even if some of a hearing is held in public, certain types of evidence, relating broadly to confidential, privileged or sensitive information, are required to be given in private.[34]

It is beyond the scope of this article to explain fully the various powers that exist when the Commissioner investigates a matter, or the various provisions of the *NACC Act* that aim to ensure the effectiveness and integrity of investigations. However, a few should be mentioned. There is a partial abrogation of the privilege against self-incrimination and the privilege against exposure to a penalty.[35] There is also a partial abrogation of a person's right to claim legal professional privilege or public interest privilege.[36] There is a power for the Commissioner or an authorised officer to enter certain Commonwealth premises and examine and seize documents found there, without first obtaining a search warrant.[37]

Sensitive information

A concept that recurs throughout the *NACC Act* is that of "sensitive information", which is defined in s 227(3). The definition is long, and needs to be read to understand it fully, but a broad and incomplete explanation is that "sensitive information" includes information the disclosure of which

- could prejudice the security, defence or international relations of Australia;
- would[38] prejudice relations between any of the Australian governments;
- would involve disclosing deliberations or decisions of the Cabinet of any Australian government;
- could disclose the source of confidential information concerning enforcement of the criminal law;
- could reveal the identity of a person involved in intelligence operations;
- could reveal information about past, present or future intelligence or defence operations or capabilities, or information provided by a foreign government or governmental organisation that does not consent to the release of the information;

33 Broadly, information that the Attorney-General certifies is such that disclosure would be prejudicial to the public interest, on any of a long list of grounds set out in ibid s 235.
34 Ibid s 74.
35 Ibid s 113.
36 Ibid s 114.
37 Ibid s 115.
38 The definition switches its language between "could" and "would" from one paragraph to another, and that change in language is very important to understanding the concept of "sensitive information". It marks, broadly, the difference between a possibility and a likelihood.

- could endanger a person's life or physical safety, or prejudice the protection of public safety;

- would prejudice a trial or the proper enforcement of the law;

- would involve disclosing information the disclosure of which is prohibited under another Commonwealth law;

- would involve unreasonably disclosing a person's personal affairs or confidential commercial information.

The restrictions that the *NACC Act* imposes concerning sensitive information include on sending it to certain other governmental officials;[39] requiring that evidence in a hearing be taken in private if the evidence would disclose sensitive information;[40] restricting the disclosure of information that has come to light in an investigation, if disclosure of that material might lead to the publication of sensitive information;[41] not including in an investigation report any sensitive information;[42] and not including any sensitive information in any information about the outcome of an investigation that the Commissioner gives to the person who raised the issue that was investigated.[43] If sensitive information is excluded from an investigation report, the Commissioner must prepare another type of report, called a protected information report, that sets out the information and the reasons for its exclusion from the investigation report.[44]

Reports following an investigation

When an investigation is complete the Commissioner must prepare a report on the investigation.[45] It must contain the Commissioner's findings or opinions on the corruption issue, a summary of the evidence or other material on which that is based, recommendations that the Commissioner thinks fit to make and, if recommendations are made, the reasons for those recommendations.[46] There is a specific requirement that if the Commissioner has formed the opinion that a person whose conduct has been investigated has engaged in corrupt conduct of a serious or systemic nature, a statement to that effect must be included in the report.[47] Conversely if the Commissioner forms the opinion that a person whose conduct has been investigated has not engaged in corrupt conduct, that must be expressly stated in the report.[48]

39 *NACC Act* (n 3) s 54(6) and (7).
40 Ibid s 74(b)(iii).
41 Ibid s 77(d).
42 Ibid s 151.
43 Ibid s 158.
44 Ibid s 152.
45 Ibid s 149.
46 Ibid s 149(2).
47 Ibid s 149(3).
48 Ibid s 149(4).

Section 149(2)(c) contains the requirement that the Commissioner must set out in the report "any recommendations that he thinks fit to make". However, there is express provision in s 149(6) for particular kinds of recommendations:

> Without limiting paragraph (2)(c), the Commissioner may make one or more of the following recommendations:
>
> (a) taking action in relation to a person, in accordance with relevant procedures, with a view to improving their performance;
>
> (b) terminating the employment of a person in accordance with relevant procedures;
>
> (c) taking action to rectify or mitigate the effects of the conduct of a person;
>
> (d) adopting measures to remedy deficiencies in the policy, procedures or practices that facilitated:
>
> (i) the employment or engagement of an unsuitable person; or
>
> (ii) a person engaging in corrupt conduct; or
>
> (iii) the failure to detect corrupt conduct engaged in by a person.

However, there is also express provision in s 149(7) that s 149 "does not limit what may be included in an investigation report".

Thus, if the Commissioner investigated an issue concerning pork barrelling, it would be open to the Commissioner to recommend that the Commonwealth Director of Public Prosecutions (DPP) consider whether there are grounds for bringing a particular criminal charge against a person whose conduct was investigated, if it appeared that there might have been a contravention of a Commonwealth criminal law, such as s 142.2 of the *Criminal Code*.[49] It would also be open to the Commissioner to recommend that a copy of the report be sent to a state or territory DPP, to consider bringing proceedings for a breach of the criminal law that exists as a matter of common law or of a state or territory statute.[50] It would be open to the Commissioner to recommend that action be taken to recover, under ss 69 and 70 of the *PGPA Act* or any applicable tort, from the Minister or official responsible, the amount of any loss that the Commonwealth had suffered as a result of pork barrelling.

An investigation report must be given to the appropriate Minister or public official, depending on the particular corruption issue that was investigated.[51] The effect of this is that an investigation report will be given to either the Prime Minister, a Minister, the President of the Senate or the Speaker of the House of Representatives, and might, depending on the particular allegation that was investigated, be given to another public official as well. If the report is given to the Prime Minister or a Minister, and one or more public hearings were held in the course of the investigation to which the report relates, the Minister or Prime Minister must table the report in each House of Parliament within 15 sitting days of the House after

49 *Criminal Code Act 1995* (Cth) sch (*Criminal Code*). Section 142.2 of the *Criminal Code* is considered below on pp 97–100.

50 *NACC Act* (n 3) s 99 gives a very wide meaning to "investigation material", which would extend to any information or document that came to light pursuant to a notice to produce, or at a hearing. Under s 104(1) a prosecuting authority (which includes a person or body authorised by the law of the Commonwealth, a state or a territory to prosecute an offence: s 105) "may lawfully use or disclose investigation material for the purpose of obtaining derivative material". Section 133 defines "derivative material" widely as "[a]ny evidence, information, document or thing obtained directly or indirectly from investigation material".

51 Ibid s 154.

its receipt.[52] There does not appear to be any obligation on the Prime Minister or a Minister to table an investigation report if the investigation that led to it did not include any public hearing, but presumably the Prime Minister or Minister would be free to do so if they chose to.[53]

Even if the Prime Minister or the Minister does not table an investigation report, the Commissioner has power to publish the whole or part of a report provided the report has been given to the Prime Minister or the Minister, and the Commissioner is satisfied that it is in the public interest for the whole or part of the report to be published.[54]

NACC annual reports

The Commissioner is required, under s 271(1) of the *NACC Act*, to make an annual report for each financial year to the Minister. Section 271(2) requires that the annual report must include:

(a) the particulars prescribed by the regulations about the following:

(i) corruption issues referred to the Commissioner during that year;

(ii) corruption issues dealt with by the Commissioner during that year;

(iii) corruption investigations conducted by the Commissioner during that year;

(iv) corruption issues that the Commissioner referred to a Commonwealth agency or State or Territory government entity for investigation during that year;

(v) public inquiries conducted by the Commissioner during that year;

(vi) certificates issued by the Attorney-General under section 235 during that year;

(vii) international relations certificates[55] issued during that year; and

(b) a description of the corruption investigations conducted by the Commissioner during that year that the Commissioner considers raise significant issues for, or reflect developments in, Commonwealth agencies; and

(c) a description of any patterns or trends, and the nature and scope, of corruption in Commonwealth agencies or by public officials that have come to the Commissioner's attention during that year; and

(d) any recommendations for changes to the laws of the Commonwealth or administrative practices of Commonwealth agencies that the Commissioner, as a result of performing the Commissioner's functions during that year, considers should be made; and

(e) the extent to which corruption investigations have resulted in the prosecution in that year of persons for offences; and

52 Ibid s 155.

53 This freedom would be subject to not disclosing any sensitive information or s 235 certified information.

54 Ibid s 156. Again, this would be subject to the publication not including any sensitive information or s 235 certified information.

55 An international relations certificate is one issued by the Attorney-General that certifies that disclosure to the Commissioner or the Inspector of Information about a matter specified in the certificate, or the contents of a document specified in the certificate, would be contrary to the public interest, on one of the grounds specified in ibid s 236 (4). Those grounds relate to the information having been communicated in confidence under an international agreement by certain foreign entities to the government of the Commonwealth or a representative of that government.

(f) the extent to which corruption investigations have resulted in confiscation proceedings[56] in that year; and

(g) the details of the number and results of:

(i) applications made to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the *Administrative Decisions (Judicial Review) Act 1977* for orders of review in respect of matters arising under this Act in connection with the performance of functions or exercise of powers by the Commissioner; and

(ii) other court proceedings involving the Commissioner;

being applications and proceedings that were determined, or otherwise disposed of, during that year.

At the time of writing, s 271(2)(a) had no content because no regulations had been made.[57] However, once regulations have been made, the annual reports are likely to provide useful information about any investigations that the Commissioner has undertaken concerning pork barrelling.

The Commissioner's annual report must be tabled in each House of Parliament within 15 sitting days of that House after its receipt.[58] This way of proceeding could have the effect that there could be a delay of more than two months, and sometimes more than three months, between the report being given to the Minister and it being made public. The House of Representatives usually has four sitting days per week in those weeks when it is sitting, and in 2023, for example, it was not scheduled to sit in more than two consecutive weeks at a time.[59] The effect of this, together with there being some weeks when a House does not sit, is that in 2023, a report given to the Minister on 14 August need not have been made public until 26 October; if it were given to the Minister on 18 September it need not have been made public until 30 November; and if it were given to the Minister on 30 October, it need not be made public until 6 February 2024. There is no provision in the *NACC Act* analogous to that in the NSW ICAC legislation which requires an annual report to be made to the presiding officer of each House of Parliament, and enables ICAC to include in a report a recommendation that it be made public forthwith, in which case the presiding officer may publish it immediately, whether or not the House is in session.[60] Nor does the NSW ICAC legislation have a provision, so far as annual reports are concerned, analogous to s 156 of the *NACC Act*, which enables the Commissioner to publish the whole or part of an investigation report as soon as it has been given to the Minister or Prime Minister. It is hard to see the justification for these delays in the publication of an annual report.

56 "Confiscation proceedings" are defined in ibid s 136. They are proceedings under the *Proceeds of Crime Act 2002* (Cth), or a corresponding Act. It is hard to envisage circumstances in which confiscation proceedings would be appropriate even if there had been a crime involving pork barrelling.

57 *Editor's note:* Two regulations have since been made: *National Anti-Corruption Commission Regulations 2023* (Cth) (*NACC Regulations*) and *National Anti-Corruption Commission (Treasury) Delegations 2023* (Cth). Requirements for the Commissioner's annual report are set out in pt 6 of the *NACC Regulations*.

58 *NACC Act* (n 3) s 271(3).

59 The scheduled sitting dates of both Houses are shown in the calendar accessible at "Parliamentary sittings", *Department of the Prime Minister and Cabinet* (Web page) <https://www.pmc.gov.au/resources/parliamentary-sittings>.

60 *Independent Commission Against Corruption Act 1988* (NSW) s 78.

NACC public inquiries

In addition to having power to inquire into a particular corruption issue, the Commissioner has power to conduct public inquiries into "corruption risks and vulnerabilities in Commonwealth agencies" and "measures to prevent corruption in Commonwealth agencies".[61] Such an inquiry must not be, or involve, an inquiry into a particular corruption issue.[62] It could, however, be an inquiry into a particular type of corruption, such as pork barrelling that involved corruption. Such an inquiry would differ from the NSW ICAC inquiry into pork barrelling (considered in Part 3 of this article) in that it could not take as examples particular instances of pork barrelling that had come to its attention. It could, however, examine in greater depth than this article has done the legal standards that are contravened by pork barrelling and the remedies available concerning each such contravention.

After conducting a public inquiry, the Commissioner must prepare a report, which must include:

> (a) the Commissioner's findings or opinions on corruption risks, vulnerabilities, and the effectiveness of corruption prevention arrangements in Commonwealth agencies; and
>
> (b) a summary of the evidence and other material on which those findings or opinions are based; and
>
> (c) any recommendations concerning the need for, or desirability of, legislative or administrative reform to prevent corruption; and
>
> (d) if recommendations are made—the reasons for those recommendations.[63]

It is foreseeable that the NACC will provide a useful forum for the investigation of allegations of pork barrelling that counts as "corrupt conduct" within the *NACC Act*, and a useful source of recommendations for how to lessen the incidence of such pork barrelling, and of recommendations for how to improve the available remedies if it occurred.

The *Ombudsman Act 1976* (Cth)

The *Ombudsman Act 1976* (Cth) provides for there to be a Commonwealth Ombudsman.[64] The Ombudsman has power to investigate "action that relates to a matter of administration … in respect of which a complaint has been made to the Ombudsman".[65] There is no definition in the statute of what counts as a "matter of administration", so the manner in which a scheme in which pork barrelling was alleged to have occurred would often fall within the ordinary meaning of that expression. However, the Ombudsman has no power to investigate action taken by a Minister or a delegate of a Minister.[66] This could be a significant restriction on the power of the Ombudsman to investigate pork barrelling.

61 *NACC Act* (n 3) s 161(1).
62 Ibid s 161(2).
63 Ibid s 164(2).
64 *Ombudsman Act 1976* (Cth) s 4 (*Ombudsman Act*).
65 Ibid s 5(1)(a).
66 Ibid s 5(2), (3).

Anyone can make a complaint to the Ombudsman.[67] The Ombudsman has a discretion whether to investigate any complaint.[68] Any investigation occurs in private.[69] If in the course of an investigation the Ombudsman forms the view that a governmental official has breached their duty, the Ombudsman is to inform the superior officer of that official.[70]

Section 15(1) of the *Ombudsman Act* sets out the circumstances in which a report by the Ombudsman can lead to further action:

> (1) Where, after an investigation under this Act into action taken by a Department or prescribed authority has been completed, the Ombudsman is of the opinion:
>
> (a) that the action:
>
> (i) appears to have been contrary to law;
>
> (ii) was unreasonable, unjust, oppressive or improperly discriminatory;
>
> (iii) was in accordance with a rule of law, a provision of an enactment or a practice but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;
>
> (iv) was based either wholly or partly on a mistake of law or of fact; or
>
> (v) was otherwise, in all the circumstances, wrong;
>
> (b) that, in the course of the taking of the action, a discretionary power had been exercised for an improper purpose or on irrelevant grounds; or
>
> (c) in a case where the action comprised or included a decision to exercise a discretionary power in a particular manner or to refuse to exercise such a power:
>
> (i) that irrelevant considerations were taken into account, or that there was a failure to take relevant considerations into account, in the course of reaching the decision to exercise the power in that manner or to refuse to exercise the power, as the case may be; or
>
> (ii) that the complainant in respect of the investigation or some other person should have been furnished, but was not furnished, with particulars of the reasons for deciding to exercise the power in that manner or to refuse to exercise the power, as the case may be;
>
> this section applies to the decision, recommendation, act or omission constituting that action.

If the Ombudsman were to investigate an allegation that there had been pork barrelling, it is possible that one or more of these triggers for further action by the Ombudsman would be found to apply. The nature of the further action that the Ombudsman can then take is set out in s 15(2)–(3):

> (2) Where the Ombudsman is of the opinion:
>
> (a) that a decision, recommendation, act or omission to which this section applies should be referred to the appropriate authority for further consideration;
>
> (b) that some particular action could be, and should be, taken to rectify, mitigate or alter the effects of, a decision, recommendation, act or omission to which this section applies;
>
> (c) that a decision to which this section applies should be cancelled or varied;

67 Ibid s 7.
68 Ibid ss 6, 7A.
69 Ibid s 8.
70 Ibid s 8(10)–(11).

(d) that a rule of law, provision of an enactment or practice on which a decision, recommendation, act or omission to which this section applies was based should be altered;

(e) that reasons should have been, but were not, given for a decision to which this section applies; or

(f) that any other thing should be done in relation to a decision, recommendation, act or omission to which this section applies;

the Ombudsman shall report accordingly to the Department or prescribed authority concerned.

(3) The Ombudsman:

(a) shall include in a report under subsection (2) his or her reasons for the opinions specified in the report; and

(b) may also include in such a report any recommendations he or she thinks fit to make.

The Ombudsman has power to make a report to Parliament concerning any investigation they have conducted and the outcome of the investigation.[71]

The capacity of the Ombudsman to investigate pork barrelling is constrained by it not being possible to investigate action of a Minister. This is a significant limitation, as past examples of pork barrelling have included several where a Minister was closely involved.

Even if the Ombudsman investigated an example of pork barrelling, and one or more of the triggers for further action set out in s 15(1) was found to apply, the possible courses of action that the Ombudsman could then recommend set out in s 15(2)(a)–(e) would often not be ones that were appropriate. If Commonwealth funds had been disbursed, or Commonwealth assets disposed of,[72] there would be no real scope for reconsideration, cancellation or variation of the decision, and it would usually not be possible to retrieve the assets. Informing the superior officer that the Ombudsman has formed the view than an official has breached their duty is of very limited usefulness. If the words in s 15(2)(f) had stood on their own, without the word "other", it would be open to the Ombudsman to recommend that the matter be referred to the Commonwealth DPP to consider prosecution, or that action be taken to recover a debt from an official, or that any of the administrative sanctions open under s 15 of the *Public Service Act 1999* (Cth) or s 15 of the *Parliamentary Service Act 1999* (Cth) be taken.[73] However, in the *Ombudsman Act*, when s 15(2)(f) follows s 15(2)(a)–(e) and includes the word "other", there is a serious argument open that s 15(2)(f) should be read *eiusdem generis* to s 15(2)(a)–(e), and would not enable the Ombudsman to make recommendations that went as wide as these. For these reasons, the *Ombudsman Act* is likely to be of far less use than the *NACC Act* as a tool for dealing with pork barrelling.

Role of the Australian National Audit Office

The *Auditor-General Act 1997* (Cth) establishes a statutory officer called the Auditor-General, who is an independent officer of the Parliament,[74] and an Australian National Audit Office

71 Ibid ss 17, 19.

72 Analogously to selling council houses, as occurred in *Porter v Magill* [2002] 2 AC 357. See discussion in Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2) 116–17.

73 These provisions are discussed in Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2) 117–18.

74 *Auditor-General Act 1997* (Cth) s 7.

(ANAO) to assist the Auditor-General.[75] The *Auditor-General Act* was extensively amended in 2013 to enable it to work in conjunction with the *PGPA Act*. As a result of that amendment, many defined terms in the *Auditor-General Act* were given the same meanings those terms have in the *PGPA Act*, and certain functions of the Auditor-General had their detail defined by the *PGPA Act*. For example, s 11 of the *Auditor-General Act* states:

> The AuditorGeneral's functions include auditing the:
>
> (a) annual financial statements of Commonwealth entities in accordance with the *Public Governance, Performance and Accountability Act 2013*; and
>
> (b) annual financial statements of Commonwealth companies in accordance with that Act; and
>
> (c) annual financial statements of subsidiaries of corporate Commonwealth entities and Commonwealth companies in accordance with that Act.

As well, the Auditor-General was given a function of auditing annual performance statements of Commonwealth entities in accordance with the *PGPA Act*.[76] The Auditor-General can also conduct a performance audit of a Commonwealth entity.[77]

Section 17 of the *Auditor-General Act* requires the Auditor-General to table a performance report in Parliament, and to give a copy of the report to the relevant Minister and certain other officials. The Auditor-General must also make an annual report to Parliament,[78] and has the power to make a report to Parliament on any matter.[79]

The Auditor-General does not have a specific function of investigating whether there has been a breach of any law, nor of instigating litigation concerning any breach of the law, nor of reporting any of its findings to any body with responsibilities for law enforcement. However, it would be open to the Auditor-General to include in the annual report any departures from standards required by the *PGPA Act* or subordinate legislation made under it. Previously, some of the Auditor-General's reports have shown facts concerning inadequacies in grant administration that, upon further analysis, might be found to be pork barrelling.[80]

Commonwealth criminal sanctions

Abuse of public office

Section 142.2 of the Commonwealth *Criminal Code* is part of ch 7 of that Code. The heading to ch 7 is "The proper administration of Government", and is part of the statute.[81] That heading can be used as an aid to construction, to identify the general topic with which s 142.2 deals.

75 Ibid s 38.
76 Ibid s 15.
77 Ibid s 17.
78 Ibid s 28.
79 Ibid s 25.
80 For two examples, see Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2) 120–23 (Appendix 1).
81 *Acts Interpretation Act 1901* (Cth) s 13(1).

Section 142.2, headed "Abuse of public office", states:

> (1) A Commonwealth public official commits an offence if:
>
> (a) the official:
>
> (i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or
>
> (ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or
>
> (iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and
>
> (b) the official does so with the intention of:
>
> (i) dishonestly obtaining a benefit for himself or herself or for another person; or
>
> (ii) dishonestly causing a detriment to another person.
>
> Penalty: Imprisonment for 5 years.[82]
>
> (2) A person commits an offence if:
>
> (a) the person has ceased to be a Commonwealth public official in a particular capacity; and
>
> (b) the person uses any information that the person obtained in that capacity as a Commonwealth public official; and
>
> (c) the person does so with the intention of:
>
> (i) dishonestly obtaining a benefit for himself or herself or for another person; or
>
> (ii) dishonestly causing a detriment to another person.
>
> Penalty: Imprisonment for 5 years.
>
> (3) Paragraph (2)(a) applies to a cessation by a person:
>
> (a) whether or not the person continues to be a Commonwealth public official in some other capacity; and
>
> (b) whether the cessation occurred before, at or after the commencement of this section.

The Dictionary to the *Criminal Code* gives a long list of who is a "Commonwealth public official". Among the people on that list are Ministers, employees of the Australian Public Service, and officers and employees of Commonwealth authorities.[83]

Thus, all or nearly all of the people who have the capacity to engage in pork barrelling concerning Commonwealth funds or other assets would count as a "Commonwealth public official". As Fullerton J has said, the offence created by s 142.2

> applies to the conduct of current and former Commonwealth public officials in terms wide enough to criminalise the conduct of a wide range of individuals who operate with different levels of authority in the Commonwealth sphere, including third parties who might contract with government.[84]

82 The offence under s 142.2 of the *Criminal Code* (n 49) is very similar in wording to s 251 of the *Criminal Law Consolidation Act 1935* (SA), so decisions on the South Australian legislation could in theory be helpful in applying the Commonwealth legislation. However, I have not come across any decision that seeks to apply the South Australian provision to any situation like pork barrelling.

83 *Criminal Code* (n 49) Dictionary (definition of "Commonwealth public official" paras (a), (j) and (o)).

84 *R v Macdonald (No 18)* (2021) 394 ALR 125, [164].

Section 5.2 of the *Criminal Code* gives a special meaning to "intention" for the whole of the Code, namely:

> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
>
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
>
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Both subss (1) and (3) of that definition could apply concerning the construction of s 142.2(b).[85]

Section 130.1 gives a special meaning to "duty" for the purposes of ch 7 of the *Criminal Code*. Thus, the special definition of "duty" applies to s 142.2. The special meaning is:

> ***duty***:
>
> (a) in relation to a person who is a Commonwealth public official — means any authority, duty, function or power that:
>
> (i) is conferred on the person as a Commonwealth public official; or
>
> (ii) the person holds himself or herself out as having as a Commonwealth public official; and
>
> (b) in relation to a person who is a public official — means any authority, duty, function or power that:
>
> (i) is conferred on the person as a public official; or
>
> (ii) the person holds himself or herself out as having as a public official.

Thus, the duties of a Commonwealth public official, within the meaning of s 142.2(a)(ii), need not be confined to the tasks that are expressly conferred on the official by legislation or some other official document, but extend to what the official actually does in the course of their work.

The Dictionary to the Code defines "benefit" as including "any advantage and is not limited to property". Thus, obtaining a better prospect of election for a political party can be a "benefit" within the meaning of s 142.2(b)(i) of the Code. A political party, as a corporate body recognised under law, can be "another person" within the meaning of s 142.2(b)(i).

85 Fortunately, it is not necessary to rely on *Criminal Code* (n 49) s 5.2(2). Concerning s 5.2, Crispin J has said that, "like much contemporary legislation, [it] must be approached with the enquiring mindset that one brings to a cryptic crossword. In the absence of such an approach an unwary reader might assume that the phrase, 'intention with respect to a circumstance' must mean that the person has an intention to bring about that circumstance. Yet subs 5.2(2) deems a person to have such intention if he or she believes that the circumstance exists or will exist. What does this mean? It obviously cannot mean that a terminally ill person should be taken to have intended to contract the illness that does exist or to have intended the death that will follow. Yet the provision is not confined to circumstances that have come into existence or will come into existence as a result of the impugned conduct of the offender. Furthermore, if it were so confined, the provision would be superfluous because any such circumstance would be a 'result' of such conduct and hence covered by subs 5.2(3). I think it is probably intended to refer to the state of mind that an offender must have in relation to circumstances within which his or her allegedly criminal intention must be considered. For example, if a person were to be charged with attempting to steal money by means of a forged cheque, this provision would enable the Crown to rely upon the fact that he or she had believed that there were or would be sufficient funds in the account to permit the intended theft.": *R v Bradley* [2007] ACTSC 35, [15].

There is a definition of "dishonest" in s 130.3 that also applies to ch 7 of the Code, namely:

> For the purposes of this Chapter, ***dishonest*** means:
>
> (a) dishonest according to the standards of ordinary people; and
>
> (b) known by the defendant to be dishonest according to the standards of ordinary people.

Because that definition applies to the whole of ch 7, it applies to s 142.2. In the situation where there is pork barrelling, a public official acts as though the purpose in making a grant is to advance some legitimate public purpose for which grants can be made, but the official knows that the real purpose is to advantage a particular political party. This is likely to be held to be "dishonest according to the standards of ordinary people". It will depend on the evidence in the particular case whether it can also be shown that the public official knew that it was dishonest according to the standards of ordinary people. As a matter of forensic reality, if the public official did not give evidence that they did not know that it was dishonest according to the standards of ordinary people, and there was evidence from which the judge could infer that a person in the position of the public official was likely to realise that such conduct was dishonest according to the standards of ordinary people, then the failure of the official to give evidence would entitle the judge to draw that inference more strongly.[86]

Incitement or conspiracy to commit pork barrelling

If a person does not have authority to authorise the making of a payment that amounts to pork barrelling, but tries to persuade a person who has that authority to make the payment, it could be possible that the first person commits an offence of incitement. That offence arises under s 11.4 of the *Criminal Code*:

> (1) A person who urges the commission of an offence commits the offence of incitement.
>
> (2) For the person to be guilty, the person must intend that the offence incited be committed.

The special meaning of "intend" that arises under s 5.2 of the Code would apply.

There are other provisions of the *Criminal Code* that might also be breached when there is pork barrelling (eg s 135.4(8), conspiring with the intention of dishonestly influencing a Commonwealth public official in the exercise of the official's duties as a public official).

The *Public Interest Disclosure Act 2013* (Cth)

The *Public Interest Disclosure Act 2013* (Cth) (*PID Act*) came into operation in January 2014. It provides an avenue for public officials and former public officials to report suspected wrongdoing in the Australian public sector. The *PID Act* protects anyone who makes what the Act calls a "public interest disclosure" from any legal consequences or reprisals for having made the disclosure.[87] It also enables the identity of a person who has made a public interest disclosure to not be disclosed.[88] This section of the article considers the extent to which the *PID Act* can provide protection to a public official who discloses pork barrelling.

86 *Jones v Dunkel* (1959) 101 CLR 298; *Manly Council v Byrne* [2004] NSWCA 123; *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242.

87 *Public Interest Disclosure Act 2013* (Cth) ss 10 (legal consequences), 13–19A (reprisals) (*PID Act*).

88 Ibid ss 20–21.

Definition of "disclosable conduct"

A central definition in the *PID Act* is that of "disclosable conduct", as set out in s 29. The parts of the definition that could catch pork barrelling are:

29 Meaning of disclosable conduct

(1) ***Disclosable conduct*** is conduct of a kind mentioned in the following table that is conduct:

(a) engaged in by an agency; or

(b) engaged in by a public official, in connection with his or her position as a public official; or

(c) engaged in by a contracted service provider for a Commonwealth contract, in connection with entering into, or giving effect to, that contract.

Disclosable conduct

Item	Kinds of disposable conduct
1	Conduct that contravenes a law of the Commonwealth, a State or a Territory.
2	…
3	Conduct that: (a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or (b) involves, or is engaged in for the purpose of, corruption of any other kind.
4	Conduct that constitutes maladministration, including conduct that: (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.
5	Conduct that is an abuse of public trust.[89]
6	…
7	Conduct that results in the wastage of: (a) relevant money (*within the meaning of the Public Governance, Performance and Accountability Act 2013*); or (b) relevant property (within the meaning of that Act); or (c) money of a prescribed authority; or (d) property of a prescribed authority.
8	…
9	…
10	Conduct of a kind prescribed by the PID rules.[90]

89 For the notion of "public trust" that applies here, see Campbell, *ABR* and ICAC Report (n 1) pt 2.

90 The *Public Interest Disclosure Rules 2019* (Cth) are the only ones made so far, but they ceased operation on 1 July 2023. They did not identify any additional types of disclosable conduct.

(2) Without limiting subsection (1), the following are also ***disclosable conduct***:

(a) conduct engaged in by a public official that involves, or is engaged in for the purpose of, the public official abusing his or her position as a public official;

(b) conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action resulting in the termination of the official's engagement or appointment.

…

(3) For the purposes of this section, it is immaterial:

(a) whether conduct occurred before or after the commencement of this section; or

(b) if an agency has engaged in conduct — whether the agency has ceased to exist after the conduct occurred; or

(c) if a public official has engaged in conduct — whether the public official has ceased to be a public official after the conduct occurred; or

(d) if a contracted service provider has engaged in conduct—whether the contracted service provider has ceased to be a contracted service provider after the conduct occurred.

This definition would catch most examples of pork barrelling. There is no defined meaning given to "corruption" or to "maladministration" in the *PID Act*, so the ordinary meanings of those words would apply. Both are capable of extending to pork barrelling.

A "public interest disclosure"

Another central concept in the *PID Act* is that of a "public interest disclosure". A necessary requirement for making such a disclosure is that the discloser is a person who is, or has been, a public official.[91]

There are four categories of public interest disclosure: internal, external, emergency and legal practitioner disclosures.[92]

An internal disclosure is one made to an authorised internal recipient, or a supervisor of the discloser, and where the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.

An external disclosure is one made to any person other than a foreign public official. The disclosure is not only one where the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct, but as well, on a previous occasion the discloser must have made an internal disclosure of information that consisted of, or included, the information now disclosed.

Of much more significance, so far as the potential usefulness of the *PID Act* is concerned in providing protection for the making of an external disclosure, is that each of the following criteria must be met before an external disclosure qualifies as a "protected disclosure":

91 *PID Act* (n 87) s 26(1)(a).
92 These categories, and the criteria for each category, are identified in ibid s 26.

(c) Any of the following apply:

(i) a disclosure investigation relating to the internal disclosure was conducted under Division 2 of Part 3, and the discloser believes on reasonable grounds that the investigation was inadequate;

(ii) a disclosure investigation relating to the internal disclosure was conducted (whether or not under Division 2 of Part 3), and the discloser believes on reasonable grounds that the response to the investigation was inadequate;

(iii) this Act requires an investigation relating to the internal disclosure to be conducted under Division 2 of Part 3, and that investigation has not been completed within the time limit under section 52.

(e) The disclosure is not, on balance, contrary to the public interest.

(f) No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct.

(h) The information does not consist of, or include, intelligence information.

(i) None of the conduct with which the disclosure is concerned relates to an intelligence agency.[93]

The third category, an emergency disclosure, is a type of disclosure that is unlikely to arise concerning pork barrelling.

A legal practitioner disclosure requires the disclosure to have been made for the purpose of obtaining legal advice, or professional assistance, from the recipient in relation to the discloser having made, or proposing to make, a public interest disclosure.[94] The making of a legal practitioner disclosure will have little if any effect in exposing or remedying pork barrelling.

Practical problems in making an external disclosure that is a public interest disclosure

The extra requirements for an external disclosure being a public interest disclosure, listed in paras (c)–(f) quoted above, will create serious difficulties in applying the protections of the *PID Act* to external disclosures of pork barrelling.[95] There is a significant limitation on the requirement that "the discloser believes on reasonable grounds that the response to an internal investigation was inadequate". It is:

> A response to a disclosure investigation is taken, for the purposes of item 2 of the table in subsection (1), not to be inadequate to the extent that the response involves action that has been, is being, or is to be taken by:
>
> (a) a Minister; or
>
> (b) the Speaker of the House of Representatives; or
>
> (c) the President of the Senate.[96]

93 Ibid s 26(1)(c) table item 2.

94 There are also requirements where the information relates to national security or intelligence (see ibid s 41), but those requirements are not likely to arise concerning pork barrelling.

95 The requirements listed in ibid s 26(1)(c) table item 2 paras (h) and (i) are not free from difficulty. In particular, the definition of "intelligence information" in s 41 is complex, and a potential discloser might not be in a position to know whether information fell within the definition. However, those requirements would seldom be a real practical problem in relation to most situations of pork barrelling.

96 Ibid s 26(2A).

If an example of pork barrelling is one that has involved a Minister, there is a real possibility that the Minister's response to an internal investigation will be one of self-justification, or no or minimal action, and the legislation will deem that to be an adequate response.

There are also practical difficulties in the way of a discloser being confident, before making an external disclosure, of the requirement for being a public interest disclosure in para (e) that "the disclosure is not, on balance, contrary to the public interest". If disclosers could not be confident that they would have the protections of the *PID Act*, they might well decide they would rather not take the risk of making the disclosure. Section 26(3) states:

> In determining, for the purposes of item 2 of the table in subsection (1), whether a disclosure is not, on balance, contrary to the public interest, regard must be had to the following:
>
> (aa) whether the disclosure would promote the integrity and accountability of the Commonwealth public sector;
>
> (ab) the extent to which the disclosure would expose a failure to address serious wrongdoing in the Commonwealth public sector;
>
> (ac) the extent to which it would assist in protecting the discloser from adverse consequences relating to the disclosure if the disclosure were a public interest disclosure;
>
> (ad) the principle that disclosures by public officials should be properly investigated and dealt with;
>
> (ae) the nature and seriousness of the disclosable conduct;
>
> (a) any risk that the disclosure could cause damage to any of the following:
>
> (i) the security of the Commonwealth;
>
> (ii) the defence of the Commonwealth;
>
> (iii) the international relations of the Commonwealth;
>
> (iv) the relations between the Commonwealth and a State;
>
> (v) the relations between the Commonwealth and the Australian Capital Territory;
>
> (vi) the relations between the Commonwealth and the Northern Territory;
>
> (vii) the relations between the Commonwealth and Norfolk Island;
>
> (b) if any of the information disclosed in the disclosure is Cabinet information — the principle that Cabinet information should remain confidential unless it is already lawfully publicly available;
>
> (c) if any of the information disclosed in the disclosure was communicated in confidence by or on behalf of:
>
> (i) a foreign government; or
>
> (ii) an authority of a foreign government; or
>
> (iii) an international organisation;
>
> the principle that such information should remain confidential unless that government, authority or organisation, as the case may be, consents to the disclosure of the information;
>
> (d) any risk that the disclosure could prejudice the proper administration of justice;
>
> (e) the principle that legal professional privilege should be maintained;
>
> (f) any other relevant matters.

A person contemplating making a disclosure would often not have the information necessary to assess many of the factors that enter into deciding whether the disclosure is, on balance, contrary to the public interest. As well, deciding whether a disclosure is "not, on balance, contrary to the public interest" requires the making of a complex judgement, on a topic on which minds could easily differ. Thus, quite apart from possibly not knowing all the facts that would be relevant, the discloser would face a real risk that their assessment of whether the disclosure was contrary to the public interest was one that a court later disagreed with. If that happened, the *PID Act* would provide no protection for the making of the disclosure.

Further, it will be difficult for an intending discloser to be confident that they have complied with para (f) in the list of essential criteria for being an external disclosure. There is a difficult exercise of judgement in deciding how much information is "no more information than is reasonably necessary to identify one or more instances of disclosable conduct". As well, the meaning of the paragraph is obscure. Does one "identify an instance" of disclosable conduct if one says that it occurred on a particular date at a particular place between particular people, but does not say what are the facts by virtue of which the conduct is disclosable conduct?

The result is that, in practice, for a public official or former public official who is contemplating disclosing pork barrelling, the *PID Act* only provides a significant level of protection concerning an internal disclosure.

The *Commonwealth Electoral Act 1918* (Cth)

Section 326 of the *Commonwealth Electoral Act 1918* (Cth) provides:

> **326 Bribery**
>
> (1) A person shall not ask for, receive or obtain, or offer or agree to ask for, or receive or obtain, any property or benefit of any kind, whether for the same or any other person, on an understanding that:
>
> (a) any vote of the firstmentioned person;
>
> (b) any candidature of the firstmentioned person;
>
> (c) any support of, or opposition to, a candidate, a group of candidates or a political party by the firstmentioned person;
>
> (d) the doing of any act or thing by the firstmentioned person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
>
> (e) the order in which the names of candidates nominated for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;
>
> will, in any manner, be influenced or affected.
>
> Penalty: Imprisonment for 2 years or 50 penalty units, or both.
>
> (2) A person shall not, with the intention of influencing or affecting:
>
> (a) any vote of another person;
>
> (b) any candidature of another person; or
>
> (c) any support of, or opposition to, a candidate, a group of candidates or a political party by another person;

(d) the doing of any act or thing by another person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or

(e) the order in which the names of candidates for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;

give or confer, or promise or offer to give or confer, any property or benefit of any kind to that other person or to a third person.

Penalty: Imprisonment for 2 years or 50 penalty units, or both.

(3) This section does not apply in relation to a declaration of public policy or a promise of public action.

An offence against s 326 is an indictable offence.[97]

Pork barrelling is conduct which could easily fall within s 326(2). However, as explained in the 2022 article,[98] the exception created by s 326(3) is likely to result in many, but not all, of the situations that fall within s 326(2) being taken outside the scope of the crime that the section creates. The exception created by s 326(3) has a long history — it appeared in substance as s 160 of the original *Commonwealth Electoral Act* as enacted in 1918 — but does not appear to have been the subject of any judicial consideration.

Application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

Because the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*) is well known amongst lawyers and extensively written on, this section gives only a brief sketch of its potential for operation concerning a decision by which pork barrelling was carried out.

Decisions open to challenge under the AD(JR) Act

The potential scope of application of the *AD(JR) Act* arises from the definition of "decision to which this Act applies" in s 3 of the Act:

> ***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
>
> (a) under an enactment referred to in paragraph (a), (b), (c), (d) or (e) of the definition of ***enactment***; or
>
> (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca), (cb) or (f) of the definition of ***enactment***;
>
> other than:
>
> (c) a decision by the GovernorGeneral; or
>
> (d) a decision included in any of the classes of decisions set out in Schedule 1.
>
> Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

97 *Commonwealth Electoral Act 1918* (Cth) s 384, although s 384(2) permits a court of summary jurisdiction to hear proceedings in respect of the offence if the court is satisfied it is proper to do so and the prosecutor consents.

98 Section 326 bears a close similarity to s 209 of the *Electoral Act 2017* (NSW), discussed in Campbell, *ABR* 129; ICAC Report 186 (n 1).

Many of the decisions by which pork barrelling involving the distribution of Commonwealth money or other assets was carried out would fall within the chapeau and para (a) or (b) of this definition.

The exclusion in para (c) of decisions by the Governor-General is unlikely to be of practical importance, so far as pork barrelling is concerned. While the list in sch 1 of classes of decision that are excluded by para (d) from the operation of the Act is a long one, only a few entries in it seem likely to include decisions under which pork barrelling might be carried out. Those that could be relevant are decisions under s 15 or s 23 of the *PGPA Act*. Section 15 is discussed above in Part 1 of this article.[99] Section 23 provides:

> **23 Power in relation to arrangements and commitments**
>
> (1) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth:
>
> (a) enter into arrangements relating to the affairs of the entity; and
>
> (b) vary and administer those arrangements.
>
> (2) An ***arrangement*** includes a contract, agreement, deed or understanding.
>
> (3) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth, approve a commitment of relevant money for which the accountable authority is responsible.

Many examples of pork barrelling will be ones where the governing authority has not promoted the proper use and management of public resources, and will not have promoted the purposes of the entity, and so will be situations where s 15 of the *PGPA Act* has not been complied with. The approval of the commitment of the relevant money will be a decision that is at the core of many an instance of pork barrelling. Decisions of these types are excluded from examination under the *AD(JR) Act*.[100]

Who can seek review under the AD(JR) Act

Section 5 of the *AD(JR) Act* confers on "a person who is aggrieved by a decision to which this Act applies" the opportunity to apply to the Federal Court or the Federal Circuit and Family Court (Division 2) for review of a decision. That review can be on any of the grounds listed in s 5, which are, in broad terms, the same grounds on which the common law would have permitted review of an administrative decision. Under s 3(4)(a), a reference in the *AD(JR) Act* to a "person aggrieved by a decision" includes a reference:

> (i) to a person whose interests are adversely affected by the decision; or
>
> (ii) in the case of a decision by way of the making of a report or recommendation — to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; …

99 See Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2) 104.

100 A decision made under s 85 of the *Public Governance, Performance and Accountability Act 2013* (Cth) is also excluded, but this section seems unlikely to catch many, if any, cases in which pork barrelling occurred.

In relation to a decision involving pork barrelling, such a person could be a person who had applied for a grant but been unsuccessful. However, the class of potential applicants for review under the *AD(JR) Act* of a decision involving pork barrelling is quite limited.

Obtaining a statement of facts and reasons under the AD(JR) Act

Section 13 of the *AD(JR) Act* confers on a person who is entitled to make an application under the Act a right to obtain a statement of the factual basis and the reasons for a decision to which the Act applies. Having such a statement is often an important aid to making out one of the grounds of review. However, there is no right to obtain such a statement concerning a type of decision in relation to which the right to obtain the statement is excluded under s 13(11), namely:

> (a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;
>
> (b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or
>
> (c) a decision included in any of the classes of decision set out in Schedule 2.

Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) enables any person who can make an application for review of an administrative decision to the Administrative Appeals Tribunal (AAT) to give notice in writing to the person who made the decision seeking, broadly, a statement of the facts relied on and the reasons for the decision. A person has a right to apply to the AAT for a review of a decision only if that person's interests are affected by the decision, and an Act enables an application to be brought to the AAT for review of that type of decision.[101] Many decisions that involve pork barrelling will be ones made under an Act that says nothing about enabling an appeal to the AAT, or will be ones that are not made under an Act at all but rather as an exercise of executive power. Thus, many decisions involving pork barrelling in the Commonwealth sphere will escape s 13(11)(a) of the *AD(JR) Act*.

It will depend on the individual decision whether it is one for which the factual basis and the reasons are given, and thus whether s 13(11)(b) of the *AD(JR) Act* will apply. However, it would be unusual for a decision to make a payment that amounted to pork barrelling to be one that purported to set out the factual basis and reasons why it was made.

The list of types of decisions in sch 2 of the *AD(JR) Act* is long and varied. While many types of decision listed there seem unlikely to be ones that would involve pork barrelling, it would be necessary to check, concerning any individual decision, whether it fell within sch 2 before deciding whether it was possible to obtain reasons for it under s 13.

As well as the exclusions arising under s 13(11), it is possible for regulations to make further exclusions from the types of decisions concerning which it is possible to obtain a statement of facts and reasons.[102]

101 *Administrative Appeals Tribunal Act 1975* (Cth) s 27.
102 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(8), (9).

There are also time limits within which the application for the statement should be made.[103]

In the absence of some particular decision to consider, it is not possible to say anything more than that there may be some decisions that involve pork barrelling concerning which an applicant could obtain a statement of facts and reasons, and others concerning which a statement could not be obtained.

The available relief

The sort of relief that can be given in an application under the *AD(JR) Act* is set out in s 16(1):

> (1) On an application for an order of review in respect of a decision, the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) may, in its discretion, make all or any of the following orders:
>
> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
>
> (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

If a decision that involved pork barrelling is quashed or set aside, but only as from the date on which the order is made, it will not stop the recipient of the federal money from having a good title to it. Even if the decision is quashed as from the date it was made, it will not, by itself, result in the applicant receiving any money. If not all the money that was to be distributed under the pork barrelling has been paid out, the applicant may be able to obtain an injunction to stop any further distribution until the relevant authority had reconsidered the distribution on a correct basis that did not involve pork barrelling, and the applicant may obtain the opportunity to apply again. However, even on that renewed application the applicant might still not receive any money.

The class of those who could seek relief under the *AD(JR) Act* is quite narrow. Not all decisions that involve pork barrelling with federal money or other assets are reviewable under the *AD(JR) Act*. There is a real risk that even if an applicant succeeds in its application, it will not succeed in ultimately obtaining any federal money. As well, as a usual incident of taking court proceedings, if the applicant loses it may well have a substantial liability to pay costs. Thus, the *AD(JR) Act* does not provide a very fruitful type of litigation for dealing with pork barrelling.

[Part 3 of this article will appear in (2024) 111 *AIAL Forum* (forthcoming).]

103 Ibid s 13(5).