AIAL FORUM

ISSUE 113 APRIL 2025

Australian Institute of
Administrative Law

AIAL FORUM

ISSUE 113 APRIL 2025

The *AIAL Forum* is published by:

Australian Institute of Administrative Law Incorporated
ABN 97 054 164 064

PO Box 9141, Deakin ACT 2600
Ph: (02) 6290 1505; Fax: (02) 6290 1580
Email: aial@commercemgt.com.au
www.aial.org.au

Publishing in the *AIAL Forum*

The Institute is always pleased to receive papers on administrative law from writers who are interested in publication in the *AIAL Forum*. It is recommended that the style published in the *Australian Guide to Legal Citation* be used in preparing manuscripts. Manuscripts should be sent in Word format to the Editor, *AIAL Forum*, at the above email address.

Articles marked # have been refereed by an independent academic assessor. The refereeing process complies with the requirements of the Department of Education and the *AIAL Forum* is included in the 2018 Submission Journal list (ERA Journal id 35396). Refereeing articles is a service the Institute offers contributors to its publications including the *AIAL Forum*.

Copyright and licence information

CAL payments

The Institute regularly receives payments from the Copyright Agency Limited (CAL) in respect of articles published in the *AIAL Forum*. These CAL payments are applied to the costs of publishing the *AIAL Forum* and make a significant contribution to the ongoing viability of the journal.

Please direct any inquiries about these policies to the AIAL Secretariat
at email: aial@commercemgt.com.au

This issue of the *AIAL Forum* should be cited as (2025) 113 *AIAL Forum*.

Cover design by Voodoo Creative

Printed by Instant Colour Press

ISSN 1 322-9869

FSC

Printed on Certified Paper

AIAL FORUM

CONTENTS

Recent developments

Anne Fisher

Better access to justice for remote and regional areas

The Australian Government plans to improve access to justice for Australians in remote and regional areas seeking reviews of government decisions.

The Government is providing $0.8 million in funding to enable the Administrative Review Tribunal (ART) to conduct hearings in regional and remote communities around Australia.

This new funding will:

- enhance the ability of people living in and near those communities to seek reviews of government decisions, and
- enable people living in regional and remote communities to deal directly with the ART rather than having to rely on video or telephone hearings or lengthy travel to capital city registries.

The investment in access to justice in regional and remote communities across Australia is part of a $9.6 million package of funding announced in the 2024–25 Budget to ensure the accessibility of the new Tribunal, including:

- improved accessibility for users
- a responsive, demand-driven funding model
- more flexible procedures and greater harmonisation across different case types
- mechanisms to escalate issues of significance to administrative law and decision-making effectively, and
- funding for a new case management system.

<https://ministers.ag.gov.au/media-centre/better-access-justice-remote-and-regional-areas-16-02-2025>

Action to stop Robodebt happening again

The Oversight Legislation Amendment (Robodebt Royal Commission Response and Other Measures) Bill 2024 (Cth) was passed by Parliament on 12 February 2025. The purpose of this Bill is to help protect Australians against a repeat of the Robodebt scheme by ensuring Commonwealth agencies are subject to stronger and more rigorous scrutiny.

The Final Report of the Robodebt Royal Commission found that some officials and agencies engaged in behaviour designed to mislead the Commonwealth Ombudsman and impede investigation into the Robodebt Scheme. The Bill helps ensure this can never happen again by:

- imposing a statutory duty on agency heads and the public service to assist the Ombudsman in the performance of their functions, and
- ensuring the Ombudsman has strong powers to obtain full, free and direct access to records, including by establishing a new offence for withholding reasonable facilities and assistance from the Ombudsman.

The legislation also enhances the Ombudsman's ability to undertake full, independent and transparent investigations. This includes modernising the Ombudsman's information-gathering powers to enable remote access to agency records.

These amendments are supported by a commitment of $2.3 million over four years from 2023–24 and $700,000 ongoing to enable the Office of the Commonwealth Ombudsman to handle complaints and undertake investigations of systemic issues.

This legislation recognises the important role that impartial, independent and robust oversight plays and complements the Government's existing reforms responding to the Royal Commission including:

- legislating a powerful, independent and transparent National Anti-Corruption Commission
- reforming Australia's system of administrative review in creating the ART
- strengthening protections for public sector whistleblowers
- strengthening the Code of Conduct for Ministers
- establishing an APS Integrity taskforce, and
- delivering a new National Action Plan under the Open Government Partnership.

<https://ministers.ag.gov.au/media-centre/action-stop-robodebt-happening-again-13-02-2025>

Australian Law Reform Commission's report on justice responses to sexual violence

On 22 January 2025 the Australian Law Reform Commission (ALRC) delivered the report of its inquiry into justice responses to sexual violence.

The ALRC report considered how the Australian Government could improve the experience of victims and survivors of sexual violence in the justice system by examining relevant laws and legal frameworks, justice sector practices, support services, and transformative approaches to justice.

The terms of reference for the report asked 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.

This inquiry is a key element of the Australian Government's $14.7 million investment to strengthen the way the criminal justice systems respond to sexual assault and prevent further harms to victims and survivors through the justice process.

The report will be tabled in Parliament.

<https://ministers.ag.gov.au/media-centre/australian-law-reform-commissions-report-justice-responses-sexual-violence-22-01-2025>

Legal professional privilege in Commonwealth investigations discussion paper

The Australian Government has released a discussion paper on the use of legal professional privilege claims in Commonwealth investigations, as part of the Government's comprehensive response to the PwC tax leaks scandal.

Legal professional privilege is a fundamental tenet of our legal system but abuse of it can undermine investigations and erode trust.

The discussion paper tests key issues identified through initial consultation in the Government's review of the use of legal professional privilege in Commonwealth investigations.

Around 100 stakeholders from across government, the legal profession, academia and industry contributed to the initial stage of consultation, jointly led by the Attorney-General's Department and the Treasury.

The legal professional privilege discussion paper can be found on the Attorney-General's Department website at <https://consultations.ag.gov.au/legal-system/lpp-review/>.

Feedback on the discussion paper will inform the development of a final options paper in 2025. Submissions closed 28 February 2025.

<https://ministers.ag.gov.au/media-centre/legal-professional-privilege-commonwealth-investigations-discussion-paper-23-12-2024>

Australian Law Reform Commission to review Australia's surrogacy laws

The Government has asked the ALRC to undertake an inquiry into Australian surrogacy laws.

Australian surrogacy law protects the human rights of children born of surrogacy, their surrogate mothers and intended parents. However, surrogacy arrangements can be medically, emotionally, financially and legally complex.

The terms of reference for this inquiry ask the ALRC to conduct a review of Australian surrogacy laws, policies and practices to identify legal and policy reforms, particularly proposals for uniform or complementary state, territory and Commonwealth laws, that:

- are consistent with Australia's obligations under international law and conventions; and
- protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.

In particular, the ALRC is asked to consider:

- how to reduce barriers to domestic altruistic surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy;
- how surrogacy arrangements made outside of Australia should be addressed by Australian law;
- what is the appropriate recognition of legal parentage in Australia for children born of surrogacy overseas, and how citizenship, visa and passport requirements for children born of surrogacy overseas might be aligned;
- the information that should be available to children born from surrogacy arrangements, including what information should be included on a child's birth certificate in order to meet Australia's human rights obligations under the *Convention on the Rights of the Child*.

In conducting its inquiry, the ALRC will consider Australia's human rights obligations and the findings and recommendations of other relevant reviews into surrogacy laws.

The ALRC President, the Hon Justice Mordecai Bromberg, will lead the inquiry.

Information about the inquiry, including the terms of reference, is available at <https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/>.

The ALRC will report to the Government by 29 July 2026.

<https://ministers.ag.gov.au/media-centre/australian-law-reform-commission-review-australias-surrogacy-laws-06-12-2024>

Government response to the review of the *Modern Slavery Act*

The Australian Government has outlined its next steps for tackling modern slavery in its response to the statutory review of the *Modern Slavery Act 2018* (Cth).

Modern slavery deprives victims of their dignity, fundamental rights and freedoms. It encompasses a range of exploitative practices, including human trafficking and slavery-like practices such as forced marriage, forced labour, deceptive recruiting and debt bondage.

The response agrees in full, in part or in principle to 25 of the 30 recommendations from the review completed by Professor John McMillan AO, in line with the Government's commitment to strengthening the Act, including by increasing the clarity of reporting obligations and simplifying the regulatory framework.

The response also commits the Government to consulting on, among other things, a potential model for written declarations of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk.

The new Commonwealth Anti-Slavery Commissioner, Mr Chris Evans, commenced his five-year term on 2 December 2024.

The Government will work with the Commissioner, business, civil society and other stakeholders in this next phase of Australia's response to modern slavery.

Consultation opportunities will be published on the Attorney-General's Department's Consultation Hub at <https://consultations.ag.gov.au/>.

The Government response to the review of the *Modern Slavery Act* can be found at <https://www.ag.gov.au/crime/publications/australian-government-response-review-report-modern-slavery-act-2018-cth>.

<https://ministers.ag.gov.au/media-centre/government-response-review-modern-slavery-act-02-12-2024>

National Student Ombudsman announced

On 28 November 2024, the Parliament of Australia passed the Universities Accord (National Student Ombudsman) Bill 2024 (Cth) which establishes an independent National Student Ombudsman to investigate student complaints and resolve disputes with universities.

Sarah Bendall will lead the new National Student Ombudsman function of the Commonwealth Ombudsman's office.

Ms Bendall brings extensive expertise in complaints management, investigations and dispute resolution from a variety of state departments and agencies.

The National Student Ombudsman forms part of the Action Plan to address gender-based violence in higher education, agreed to by education ministers earlier this year. The Action Pan can be accessed at <https://www.education.gov.au/action-plan-addressing-genderbased-violence-higher-education>.

The Ombudsman will allow higher education students to escalate complaints about the actions of their higher education provider, including complaints about sexual assault and sexual harassment.

The Ombudsman will:

- consider whether decisions and actions taken by higher education providers are unreasonable, unjust, oppressive, discriminatory, or otherwise wrong;
- recommend a provider takes specific steps to resolve the complaint;
- share information with relevant regulators for further compliance action if needed;
- offer a restorative engagement process between the student and the provider where appropriate; and
- bring parties together to resolve complaints through an alternative resolution process.

The Ombudsman will have strong investigative powers, including requiring a person or university to provide information.

A National Higher Education Code to Prevent and Respond to Gender-based Violence will also be established.

The Ombudsman will also be able to take complaints from students about a provider's handling of other matters — for example, where a student is subjected to homophobia, antisemitism, Islamophobia, or other forms of racism on campus. It will not handle complaints about issues such as academic judgement or employment matters.

The independent National Student Ombudsman commenced on 1 February 2025.

More about the National Student Ombudsman can be accessed at <https://www.nso.gov.au/>.

<https://ministers.ag.gov.au/media-centre/national-student-ombudsman-announced-29-11-2024>

Commonwealth Ombudsman Report on agency engagement with merits review

The Commonwealth Ombudsman has released the investigative report *Learning from Merits Review: Best Practice Principles for Agency Engagement with Merits Review*.

Undertaken in 2024, the investigation occurred at the same time as the reforms to the Administrative Appeals Tribunal (AAT), which transitioned to the ART on 14 October 2024. The Ombudsman investigated four Commonwealth agencies with high Tribunal caseloads: Comcare, the Department of Home Affairs, the National Disability Insurance Agency, and Services Australia. Overall, matters relating to these four agencies comprise 95.8% of total Tribunal lodgements.

"The AAT reforms have afforded an opportunity to review how agencies are engaging with the Tribunal, as well as establish best practice principles that will help guide agencies in learning from merits review decisions," the Ombudsman said. "High numbers of Tribunal applications result in both high administration loads and litigation costs for the Commonwealth. It is important that agencies are continuously, and proactively, seeking opportunities to improve internal administration to reduce the need for decisions to go to a merits review."

The report provides all Commonwealth agencies with best practice guidance on Tribunal engagement according to six key principles:

1. A strategic vision for learning from merits review
2. Constructive engagement
3. Action orientated
4. Appropriately supportive
5. Inquiring, data driven and reflective
6. Improvement focused.

These six foundation principles underscore three recommendations and two suggestions to assist agencies to strengthen processes and implement continuous improvement to their administration.

The report can be found on the Ombudsman's website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0029/314867/Learning-from-merits-review.pdf>.

<https://www.ombudsman.gov.au/__data/assets/pdf_file/0026/314873/Media-Release-Learning-from-merits-review.pdf>

Information Commissioners and Ombudsman urge public sector leaders to invest in data governance and proactive disclosure practices

The Association of Information Access Commissioners of Australia and New Zealand (AIAC) held a meeting in Adelaide, South Australia, on 1 November 2024.

Discussion built on the theme explored in the March 2024 meeting regarding the challenges that new technologies present to government transparency and accountability.

Members remind agencies that good data governance is more important than ever as governments increasingly rely on emerging technologies to capture and store information and to assist administrative decision-making.

Data governance is also important in an environment where trust in government is declining, and disinformation represents a real threat to democracies around the world.

The role of government chief executives in this context is crucial: as stewards of the information their agencies hold, public sector leaders should ensure the management of government information in a way that reflects it is a public resource which represents an important source of truth in a post-truth world. Members urge chief executives to elevate the information stewardship aspect of their role, and to invest in good data governance and proactive disclosure policies and practices.

AIAC members as regulators are committed to working alongside agencies to build this capacity, to preserve the immense value of government information and elevate trust in democratic systems and institutions. These responsibilities are increasingly challenging in a digital world, and regulator resourcing must be commensurate to meet statutory obligations and the legitimate expectations of communities.

The AIAC intends to explore opportunities to develop training for the public sector that promotes good disclosure practices and data governance as well as the inherent value of government transparency.

<https://www.ombudsman.sa.gov.au/publications/news/information-commissioners-and-ombudsman-urge-public-sector-leaders-to-invest-in-data-governance-and-proactive-disclosure-practices>

Appointments

Administrative Review Council

The Government has announced the appointments of Professor Margaret Allars SC as Chair and Professor Matthew Groves, Dr Graeme Innes AM and Mrs Kerry Staines as members of the re-established Administrative Review Council (ARC).

They will join the standing Members of the ARC; the President of the ART, the Hon Justice Emilios Kyrou AO; the Commonwealth Ombudsman, Mr Iain Anderson; and the Australian Information Commissioner, Ms Elizabeth Tydd.

The ARC was originally established under the *Administrative Appeals Tribunal Act 1975* (Cth) with bipartisan support. At its first meeting in 1977 the then Attorney-General described the ARC as a “watchdog for the citizen” and said that its role was “to ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be”.

The ARC performed its role with distinction for almost 40 years. It was discontinued in 2015, with the majority of its functions being consolidated into the Attorney-General’s Department.

The re-establishment of the ARC responds to recommendations of the Robodebt Royal Commission. Together with the new, fit-for-purpose ART, the ARC will be tasked with promoting better decision-making across government.

The ARC is an independent advisory body established under the *Administrative Review Tribunal Act 2024* (*ART Act*). Its role is to strengthen the integrity and operation of the Commonwealth administrative law system. The ARC is not a merits review body. It does not examine individual claims or hear appeals.

Its current functions, as set out in s 249 of the *ART Act*, are to:

- inquire into systemic challenges in administrative law;
- monitor the performance of the Commonwealth administrative review system; and
- support education and training for Commonwealth officials.

The new Chair and Members of the ARC commenced in their roles from 12 December 2024, for a period of five years.

We congratulate Professor Allars, Professor Groves, Dr Innes and Mrs Staines on their appointments.

More information about the ARC can be accessed via the Attorney-General’s Department website at <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council>.

<https://ministers.ag.gov.au/media-centre/appointments-re-establish-administrative-review-council-06-12-2024>

Administrative Review Tribunal

The Australian Government has appointed 19 new General Members to the ART, on two- and three-year terms, to commence between January and March 2025.

The new General Members are:

- Mrs Daniela Chiew
- Ms Catherine Clarke
- Mr Richard Coates
- Ms Erika Cornwell
- Mr David Dobell
- Mr Timothy Griffiths
- Miss Lisa Harris
- Ms Kate Scarlett
- Mr Frank Schoneveld
- Mr Grant Schubert
- Mr Mal Zraika
- Mrs Holly Casey
- Mr Brendan Fox
- Mr Timothy Griffin
- Prof Susan Harris Rimmer
- Mr Len Jaffit
- Ms Sandra Koller
- Ms Aneita McGregor
- Ms Anne Trengove.

We congratulate each of these Members on their appointment.

<https://ministers.ag.gov.au/media-centre/appointments-administrative-review-tribunal-16-12-2024>

<https://ministers.ag.gov.au/media-centre/appointments-administrative-review-tribunal-21-02-2025>

Federal Circuit and Family Court of Australia (Division 1)

The Government has announced the appointment of Dianne Simpson as a Judge of the Federal Circuit and Family Court of Australia (Division 1). Ms Simpson commenced on 3 February 2025 in the Sydney Registry.

Ms Simpson graduated from the University of Melbourne with a Bachelor of Laws and a Bachelor of Arts in 1992, and was admitted as a legal practitioner to the Supreme Court of Victoria in 1993. She became an Accredited Specialist in family law in New South Wales in 2009.

We congratulate Ms Simpson on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-federal-circuit-and-family-court-australia-division-1-12-12-2024>

Federal Court of Australia

The Government has announced the appointment of eight new judges to the Federal Court of Australia:

- the Hon Justice Samuel Vandongen — Western Australian Registry, commenced 17 December 2024
- Mr Cameron Moore SC — New South Wales Registry, commenced 18 December 2024
- Mr Nicholas Owens SC — New South Wales Registry, commenced 18 December 2024
- Professor James Stellios — New South Wales Registry, commenced 19 December 2024
- Ms Houda Younan SC — New South Wales Registry, commenced 19 December 2024
- Ms Elizabeth Bennett SC — Victorian Registry, commenced 20 December 2024
- Ms Erin Longbottom KC — Queensland Registry, commenced 20 December 2024
- Ms Amelia Wheatley KC — Queensland Registry, commenced 6 January 2025.

Four of these appointments are supported by new funding made available through the 2024–25 Budget:

- Funding for two appointments was included in reforms to increase capacity to resolve significant backlogs in migration and protection applications.
- Funding for two appointments was included in a package to support better legal outcomes for Aboriginal and Torres Strait Islander people, including by accelerating the resolution of unresolved native title claims through the expansion of the Federal Court's case management and mediation model.

We congratulate them all on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-06-12-2024>

National Native Title Tribunal

The Australian Government has announced the appointment of Mr Simon Grant as a full-time member of the National Native Title Tribunal. Mr Grant’s five-year appointment commenced on 17 March 2025.

As a Member of the Tribunal Mr Grant will work closely with First Nations peoples, as well as non-Indigenous Australians, to:

- assist with the negotiation of First Nations Land Use Agreements,

- facilitate the resolution of disputes about proposed future acts (such as the grant of a mining lease) or native title claims, and

- contribute to broader community education on native title.

Mr Grant’s appointment will provide an additional Member to the Tribunal as part of the Government’s 2024–25 Budget measures to improve outcomes at all stages of the native title process.

We congratulate Mr Grant on his appointment.

For more information about the Tribunal see the Tribunal’s website: <https://www.nntt.gov.au/>.

<https://ministers.ag.gov.au/media-centre/national-native-title-tribunal-member-appointment-20-02-2025>

Recent decisions

The status of judicial immunity for inferior courts

Queensland v Stradford (a pseudonym) [2025] HCA 3

In April 2017, the respondent, Mr Stradford, commenced proceedings in the Federal Circuit Court against his then wife seeking property adjustment orders under s 79 of the *Family Law Act 1975* (Cth). During the hearing, Judge Vasta ordered the respondent to make “full and frank disclosure” of various categories of financial documents or be dealt with for contempt. When the respondent failed to produce the documents, the matter was adjourned for hearing of the contempt application. On 6 December 2018, Judge Vasta declared the respondent in contempt and sentenced Mr Stradford for a period of imprisonment for 12 months, to be served immediately. After delivering the judgment, Judge Vasta asked the MSS Security Guards (contracted to the Court) to escort the respondent to the holding cell in the court complex until the appropriate officers could come to take him to prison. Judge Vasta subsequently signed a “Warrant for Commitment” ordering respective persons to “take and deliver Mr Stradford to the Commissioner of Queensland Corrective Services”.

The respondent appealed the contempt decision. On 15 February 2019, the Full Court of the Family Court (as it was then) upheld the respondent's appeal against Judge Vasta's decision and set aside the contempt decision and the imprisonment order.

The respondent subsequently sued each of Judge Vasta, the Commonwealth and the State of Queensland for the tort of false imprisonment, in the Federal Court of Australia. The primary judge upheld the respondent's claim for false imprisonment against each of them. Their respective appeals from that judgment, which were previously pending in the Full Court of the Federal Court of Australia, were removed to the High Court under s 40 of the *Judiciary Act 1903* (Cth).

The High Court found that there were three principal issues raised by the appeals before it.

The first issue dealt with by the High Court was whether the effect of s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) was that the order made by Judge Vasta imprisoning the respondent was valid until it was set aside by the Full Court of the Family Court, even though it was affected by jurisdictional error. The plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) agreed with the primary judge's findings that the imprisonment order was made by an inferior court and was affected by jurisdictional error. It thus had no legal force from the time it was made, so a failure to obey such an order cannot be, for example, a contempt of that court: *Stradford* [53], citing see *New South Wales v Kable* (2013) 252 CLR 118, 140–1.

The jurisdictional error consisted of several elements. First, Judge Vasta was found to have lacked the power to make the imprisonment order in the absence of a finding that the respondent had breached any court order. Second, Judge Vasta failed to comply with r 19.02 of the *Federal Circuit Court Rules* in that no contempt application was filed in the Court and Judge Vasta failed to put to the respondent the particulars of the allegation of contempt or give him the opportunity to admit or deny the allegation; nor did Judge Vasta hear any evidence concerning the allegation. Third, Judge Vasta denied the respondent procedural fairness. Lastly, Judge Vasta was affected by actual bias in prejudging that the appropriate sanction for the respondent's non-compliance with the orders was a substantial sentence of imprisonment.

Justice Gordon, in contrast, in a separate judgment held that orders of the Federal Circuit Court punishing contempt, and any warrant, were valid until set aside or quashed, even if affected by jurisdictional error: *Stradford* [168]. Justice Gordon noted that s 17 of the Act conferred on the Federal Circuit Court the "same power to punish contempts of its power and authority" as is possessed by the High Court. The power and authority of the High Court to punish contempt is reflected in orders that are valid until set aside. In conferring the "same power" on the Federal Circuit Court, Parliament conferred power on that Court to make contempt orders which were valid until set aside. Additionally, the Act established a court to produce judgments enforceable throughout Australia and to resolve proceedings finally (ss 10(3) and 14(c))). This aspect of finality, Gordon J suggested, meant that the court's orders are intended to be effective in all circumstances and should not always give rise to an open question as to their authority: *Stradford* [181].

Justice Edelman took the same view as Gordon J, in holding that orders of "inferior courts" are nullities and devoid of any legal effect if made with jurisdictional error is not, or at least should no longer be taken to be, correct: *Stradford* [224]. Such an order should be obeyed until it is quashed or set aside, and failure to obey can amount to a contempt. Justice Edelman stated that "the distinction between 'superior courts' and 'inferior courts' is an historical anachronism of English and Australian legal history which, if it ever had any sensible justification, lost that justification by the 18th century at the latest": [227].

The second issue dealt with by the High Court was the scope of the immunity from civil suit of judges of "inferior courts", such as judges of the Federal Circuit Court. Justice Gordon succinctly set out the rationale for judicial immunity and its important role in upholding the institution of the judiciary: *Stradford* [204]–[208]. First, judicial immunity exists for the public interest in judicial independence, and not for the private advantage of the judges. Second, judicial immunity seeks to secure the independence of the judges and prevent their being harassed, so that judges "may act fearlessly and without the harassing concerns that they will be made personally liable for the performance of their functions before another judge at the suit of a person disgruntled by the decision": [205] (citation omitted). Third, judicial immunity protects against a risk of bias arising from threats of litigation. Fourth, judicial immunity is an aspect of finality of litigation. Fifth, judicial immunity does not eliminate judicial accountability. Judicial immunity is only from civil law, the criminal law still applies, and the ultimate sanction for judicial misbehaviour is removal from office.

The plurality noted that judicial immunity does not extend to the judge's private acts unrelated to their judicial office, nor does it extend to them attempting to perform the judicial function of a court to which they were not appointed.

In enacting the *Federal Circuit Court of Australia Act*, the plurality held that Parliament left the immunity of judges of the Federal Circuit Court to the common law, noting that this was the first occasion the High Court had been required to address the scope of the common law immunity of a judge of an inferior court: *Stradford* [104]. In doing so, the plurality stated that once the scope of judicial immunity was "untethered" from any connection to the circumstances in which the judgment of an inferior court can be challenged, then there should not be any difference between the scope of the immunity afforded to a superior court judge and an inferior court judge: [107]. The immunity should be expressed to apply to judges of both superior and inferior courts as immunity from actions arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity (see *Re East* (1998) 196 CLR 354, 365–6). As such, the scope of the immunity was held to extend to circumstances where the court to which the judge is appointed ceases to have jurisdiction over the relevant matter, or the judge commits a jurisdictional error in dealing with the relevant matter over which the court has jurisdiction: *Stradford* [112].

The plurality held that this common law rule of immunity not only applies to the High Court, but to all courts referred to in s 71 of the *Constitution*, including any court of a territory and any court of a state as referred to in s 77(ii) of the *Constitution*: *Stradford* [112].

The Court concluded that at all times Judge Vasta was acting in the purported exercise of the judicial function of a judge of the Federal Circuit Court, such that his actions were protected by judicial immunity and he was thus not liable to the respondent.

The third issue considered was whether persons such as the MSS Security Guards, the Queensland police officers and the Queensland correctional officers had a defence to the respondent's action before they executed an order or warrant issued by a court that appeared valid on its face.

In relation to this issue, the plurality confirmed that the common law affords protection from civil liability to those who have a legal duty to enforce or execute orders or warrants made or issued by a court in judicial proceedings, including an inferior court, even if those orders or warrants are invalid. This is because in order to perform their role effectively, courts must have their orders enforced and that must be done by officials not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them: *Stradford* [149]. However, the protection will not cover the acts of an official charged with the enforcement of an order or warrant from tortious liability if they exceed the authority the order or warrant confers.

The plurality held that, as a judge of the Federal Circuit Court, Judge Vasta was empowered to make an imprisonment order and issue a warrant of the kind his Honour purported to make, and there was nothing apparent on the face of the imprisonment order or warrant that could rase any issue about their validity. As such, the MSS Security Guards, Queensland police officers and the Queensland correctional officers were entitled to protection for acts undertaken in discharge of their duty, even though the imprisonment order and the warrant were invalid. They were therefore not liable to the respondent for false imprisonment.

The Court ordered that all three appeals should be allowed, the orders of the primary judge be set aside, and the proceedings brought by the respondent against each appellant be dismissed.

The purpose of a "confidential source of information" exemption is to protect the discloser, not the recipient nor the information

Bachelard v Australian Federal Police [2025] FCAFC 5

On 30 June 2021 the applicant, Michael Bachelard, made a request to the respondent, the Australian Federal Police (AFP), for access to documents under the *Freedom of Information Act 1982* (Cth) (*FOI Act*).

The applicant's request for documents under the *FOI Act* was for witness statements and a report concerning an investigation relating to certain conduct of a former Commissioner of the AFP, Mr Keelty, which concerned the provision of confidential information to Ben Roberts-Smith.

On 26 November 2021 a delegate of the Commissioner of the AFP advised that four documents falling within the scope of the request had been identified (three witness statements and a report) but access to the documents was refused in full. The applicant sought internal review of the decision which was affirmed on 19 December 2021. On 3 May 2022 the applicant applied to the Office of the Australian Information Commissioner (OAIC) for review of the internal decision. The OAIC declined review on the basis that the interests of the administration of the *FOI Act* made it desirable that the decision be decided by the then AAT. The applicant applied to the AAT for review and on 29 February 2024 the Tribunal made a decision affirming the decision under review.

The applicant appealed to the Full Court of the Federal Court of Australia against the Tribunal's decision. The applicant relied on eight grounds of appeal. Six of those grounds were upheld; grounds 3 and 7 were not considered necessary to determine.

Ground 1 was given the most consideration by the Full Court. In it, the applicant contended that the Tribunal misconstrued s 37(1)(b) of the *FOI Act* in finding that the providers of the three statements were "confidential sources of information". Justice McDonald held that this finding was based on the Tribunal's misunderstanding of the secrecy offence under s 60A of the *Australian Federal Pollice Act 1979* (Cth) (*AFP Act*), the object of which was not, as otherwise determined by the Tribunal, to create a regime of complete secrecy or confidentiality in relation to "prescribed information" of the identity of persons who provide "prescribed information". Rather, its concern is with the improper use or disclosure of information obtained in the course of performing official duties and functions: *Bachelard* [129]. The assessment of whether a particular person is a confidential source, however, depends on the uses that may be made of the information they provide and whether those uses are such that the person could reasonably have expected that their identity as a source of information was to be kept confidential.

Justice McDonald went on to find that the application of s 60A of the *AFP Act* does not, by itself, establish that the persons who provided the statements were "confidential sources". They could be, but that could only be the case if they provided information in circumstances where it is required to be kept confidential, to which there was no evidence to that end provided.

Justices Wigney and Thawley similarly agreed with McDonald J's position on this ground.

Justice Wigney provided additional reasons focusing on the Tribunal's misconstruction of the expression "confidential source of information" in s 37(1)(b) of the *FOI Act*. First, Wigney J explained that s 37(1)(b) has traditionally been construed with the principles applicable to public interest immunity attaching to information that would reveal the identity of a confidential police informant. The rationale was that if police could be compelled to reveal the identity of confidential informers, "sources of information would dry up and the police would be hindered in their duty of preventing and detecting crimes": *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667, 674. However, the heart of this exemption is the protection of the informer and not the subject matter of the communication. Second, it must be determined that the person was a confidential source of information, which requires consideration of the circumstances and basis on which they provided information to the police — was it under an express or implied assurance or undertaking that their identity would remain confidential, or on the understanding gleaned from the circumstances in which the information was provided that the law enforcement agency would not reveal their identity? Both lines of inquiry were held not to have been contemplated by the Tribunal in coming to its conclusion. Rather, the Tribunal's focus was on the position of the AFP as the recipient of the information bound by a secrecy obligation under s 60A of the *AFP Act*. Justice Wigney held that this was an overly broad and erroneous construction of the expression and a reliance on s 60A of the *AFP Act*, which was in error.

Justice Thawley similarly held that the Tribunal misconstrued s 37(1)(b) of the *FOI Act*, noting that the existence of an obligation of confidentiality with respect to information provided is not a requirement for s 37(1)(b) to be engaged: *Bachelard* [37].

As for the other grounds, Wigney J and Thawley J each agreed with McDonald J's reasoning. Notably, McDonald J observed that the Tribunal failed to consider whether part of the report and statements could be revealed to the applicant without revealing the identity or existence of confidential sources. Redacting a document to avoid disclosing the identity of a source is a different exercise from redacting to avoid disclosure of personal information, the latter being the exercise the Tribunal engaged in erroneously: [168].

Justice McDonald also held that the failure of the Tribunal to put the applicant on notice that there were additional provisions on which the documents were held to be exempt, which were only discussed in confidential proceedings, was a denial of procedural fairness, and a material one such that there was a reasonable possibility that the Tribunal's decision could have been different had the error not been made: [202].

The Full Court held that the question of whether the documents are exempt from the *FOI Act* should be re-determined. The appeal was allowed and the matter was remitted to the ART to be determined in accordance with the law.

Petitions for mercy and the decision-maker's consideration

Zhong v Attorney-General (Vic) [2025] VSCA 1

In October 2021 the applicant was convicted by a jury and sentenced for having committed the offence of inciting the murder of his then de facto wife. The applicant unsuccessfully appealed his conviction to the Victorian Court of Appeal. The applicant was then unsuccessful in obtaining special leave from the High Court to appeal against the decision of the Court of Appeal.

After exhausting his rights of appeal, the applicant petitioned the respondent, the Attorney-General of Victoria, on three separate occasions, seeking that his case be referred to the Court of Appeal under s 327(1)(a) of the *Criminal Procedure Act 2009* (Vic) (*CP Act*). The respondent declined on all three occasions. The applicant sought judicial review of the respondent's denial of his second and third petitions, both of which were unsuccessful.

The matter for consideration before the Victorian Court of Appeal concerned the applicant's application for leave to appeal to obtain judicial review in respect of the applicant's third petition.

Namely, in exercising her discretion under s 327 of the *CP Act* to refuse to refer the applicant's case to the Court of Appeal, the respondent's decision was based on the petition and material before her that, overall, the applicant's petition did not raise a reasonable possibility that the Court of Appeal would allow an appeal if the matter was referred to it under s 327: *Zhong* [35].

The applicant proposed seven grounds of appeal to the Court of Appeal, essentially alleging errors at his trial of erroneous judicial directions, lack of evidence, wrongful jury empanelment, bias, corruption and incompetence on the part of his legal representation. The primary submission was that the respondent had committed *Wednesbury* or legal unreasonableness by refusing to refer the applicant's case to the Court of Appeal.

The Court turned first to a consideration of the scope and purpose of s 327 of the *CP Act* to determine whether the respondent's decision complied with the standard of reasonableness indicated by the true construction of the statute, or whether the statutory power had been abused. The Court noted that "how an abuse of statutory power may manifest itself is not closed; nor is it 'limited by particular categories of conduct, process or outcome' or limited to a decision 'affected by specific errors which bring about an improper exercise of power' ": *Zhong* [89], quoting *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 573. The Court then set out the principles in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 in relation to the test of legal unreasonableness, namely that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. However, a decision will not be unreasonable if it lies within the scope of rational decision-making. The question is concerned with both outcome and process.

With a focus on judicial review of the exercise by a decision-maker of a discretion whether to refer a petitioner's case to an appellate court, the Court considered (at [95]–[96]) the observations of Lander J in *von Einem v Griffin* (1998) 72 SASR 110, a case which concerned an analogous power to s 327 of the *CP Act*. Justice Lander found that the policy, purpose and scope of the particular provision was to ensure, "so far as practicable, that no person is the victim of a miscarriage of justice": *von Einem* 138. As such, the question for the decision-maker was whether it "would be appropriate to invoke the court's jurisdiction yet again, notwithstanding the appeal process has been exhausted, so that the court may determine whether, in any way, there has been a miscarriage of justice in relation to that petitioner": ibid. And although the "existence of a reasonably arguable case is a necessary condition for the commencement of litigation" it may not be sufficient on its own; the correct proposition is that the decision-maker "must not refer a case unless he or she is satisfied that it is reasonably arguable": *Zhong* [100] quoting *Attorney-General (Cth) v Ogawa* (2020) 281 FCR 1.

The Court held that the respondent had adopted an approach akin to that set out in the authorities drawn upon in exercising her discretion under s 327 of the *CP Act*, and thus in asking herself whether by virtue of the various errors and deficiencies relied on by the applicant there was a reasonable possibility that the Court of Appeal would allow the applicant's appeal, the respondent "did not stray beyond the bounds of a reasonable exercise of the conferred discretion": *Zhong* [101].

Overall, the Court found none of the proposed grounds of appeal relied on by the applicant was demonstrative of error. The leave to appeal was refused.

Is there too much access to administrative justice? A project for the revived Administrative Review Council

*Justice John Griffiths**

The welcome return of the Administrative Review Council

Unsurprisingly, there has been wide acclaim for the re-establishment of the Administrative Review Council (ARC). As some have pointed out, the ARC was never formally abolished. Rather, it was de-funded and its function of providing advice to the Commonwealth on Australia's system of administrative law was brought in-house into the Attorney-General's Department.[1]

There are some differences between the new ARC, which has risen phoenix-like from the ashes, and the original ARC. The President of the Australian Law Reform Commission is no longer an ex officio member and the total membership is now capped at 10. Interestingly, there is a new requirement that the membership include at least one member "who has direct experience and knowledge of the needs of people, or groups of people, significantly affected by government decisions".[2]

The ARC now has a broad discretion to inquire into, report on and make recommendations to the Attorney-General on any of its functions. Importantly, it can now do so either of its own initiative or at the Attorney's request.[3] This should enhance its independence and autonomy.

The ARC's functions and powers have also been widened. They include monitoring the integrity and operation of the Commonwealth "administrative law system", which arguably goes beyond those parts of the system which relate to judicial review, Administrative Review Tribunal (ART) review and the Commonwealth Ombudsman.[4] It is notable that the functions also include providing guidance in the making of administrative decisions and exercise of administrative discretions, as well as supporting education and training for Commonwealth officials in relation to such matters. Thus the ARC's work will be more strongly directed not only to review and complaint processes, but to primary decision-making which underlies those processes. Those are welcome developments.

As I understand matters, although the ART commenced operations on 14 October 2024, the ARC is not yet operating. Thus the final new membership is not known. There is some uncertainty concerning ARC staff arrangements. ARC staff are to be Australian Public Service employees in the Attorney-General's Department whose services are made

* Acting Justice of the New South Wales Court of Appeal. This article is an edited version of the paper presented to the Australian Institute of Administrative Law on 13 November 2024. The author expresses his gratitude to his tipstaff, Jasmine Robertson, for her helpful research assistance.

1 Calls for the re-establishment of the ARC were made by the Callinan Report (IDF Callinan AC, *Review: section 4 of the Tribunal's Amalgamation Act 2015 (Cth)* (Final report, 23 July 2019); the Senate Legal and Constitutional Affairs References Committee, *The Performance and Integrity of Australia's Administrative Review System* (Interim report, 31 March 2022) ch 6; the Attorney-General's Department (Cth), Administrative Review Taskforce, *Administrative Review Reform* (Issues Paper, April 2023); and the *Royal Commission into the Robodebt Scheme* (Final report, 7 July 2023).

2 *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*) s 254.

3 See ibid s 249(2).

4 Ibid s 249(1)(a).

available to the ARC by the Secretary of that Department. There is a specific provision in s 263(3) of the *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*) that, when performing services for the ARC, the staff are subject to the directions of the Council (and not the Secretary of the Department). Hopefully, these provisions will ensure the independence of the ARC from the Department.

Is there too much access to administrative justice?

In mid-July 2017 I gave a paper at the AIAL National Conference on the topic of access to administrative justice.[5] The focus was on how greater use could be made of online and digital technology in enhancing access to administrative justice.

Perhaps more controversially I now wish to raise for discussion and debate whether, at an appropriate time, the ARC should undertake a project directed to the complex question whether there are adequate controls in the existing administrative justice system to address abuse of processes.

My comments will be directed primarily to the Commonwealth system of administrative law (and the possible need for reform), with a particular focus on the Federal Court exercising judicial review and administrative appeals jurisdictions (space limitations prevent consideration of the position concerning the Federal Circuit and Family Court), the ART and the Commonwealth Ombudsman to control unreasonably persistent applicants. It must be acknowledged, of course, that the ARC's functions do not extend to the Federal Court generally, but are confined to its judicial review and administrative appeal jurisdictions.

This is not a new topic. In May 2014 the former NSW Deputy Ombudsman, Mr Chris Wheeler, gave a paper entitled "Responding to unreasonably persistent litigants".[6] He described the work of nine Australasian parliamentary ombudsmen who developed strategies for managing the unreasonable conduct of some complainants. He examined how these strategies might also assist courts in responding to unreasonably persistent litigants. Mr Wheeler noted that there was an overlap between persons who were on the Supreme Court's vexatious litigant register and who were also complainants to bodies such as the NSW Ombudsman, the Judicial Commission of NSW, the Office of the Legal Services Commissioner and the NSW Independent Commission Against Corruption. Mr Wheeler noted that while the *Vexatious Proceedings Act 2008* (NSW) had been amended in 2018, there was still the need for reform of this particular process for managing unreasonable litigant behaviour.

The problem (if there is one) should not be exaggerated. Let me acknowledge at the outset that there is a surprising lack of accessible information and data to assess the nature and extent of the issue. Much of the material is anecdotal or is only gleaned by detailed analysis of individual reported cases or outcomes which reveal instances of abuse of process. This includes, for example, an analysis of individual cases where the Federal Court has summarily dismissed proceedings under s 31A of the *Federal Court of Australia Act 1976* (Cth) in judicial review applications or administrative law appeals.

5 See Justice John Griffiths, "Access to administrative justice" (2017) 89 *AIAL Forum* 25.

6 C Wheeler, "Responding to unreasonably persistent litigants", Paper presented at the Land & Environment Court Annual Conference, Katoomba, May 2014; (2014) 12 *Judicial Review* 101.

If there is a problem, it is not confined to administrative law remedies; it can affect all civil proceedings. This is so notwithstanding that, as Chief Justice Gageler recently highlighted in his address titled "The state of the Australian judicature in 2024", the overall civil workload of federal, state and territory courts has fallen steadily over the 20 years to 2022 by a total of almost 35%.[7] Presumably alternative dispute resolution, the costs of litigation and the availability of alternative relief in tribunals partly explain such a dramatic decline.

Statistics published by the Federal Court suggest that judicial review and administrative law appeals have not declined to the same extent during that period, underpinned in large part, I suspect, by the Court's migration caseload (see below). The overall caseload of the previous Administrative Appeals Tribunal (AAT) has increased, rather than decreased, over that period.[8]

The conduct of litigation by both litigants in person and legal representatives is affected by the "overarching" purpose of procedural rules set out in the *Federal Court Rules*. But the potential for abuse of administrative justice remedies and procedures is heightened with self-represented litigants (SRLs) and complainants. The ethical constraints which operate to check unreasonable conduct by a legal representative do not apply to SRLs and adverse costs orders do not deter many persistent or obdurate SRLs.

As the Full Court of the Federal Court recently observed in *Storry v Parkyn (Vexatious Proceedings Order)*:

> Most self-represented litigants behave courteously and are often forced to do so because of circumstances outside their control and sometimes, of course, they present valid claims and defences. But a few self-represented litigants, unrestrained by the norms regulating the professional conduct of lawyers and aggrieved by a perceived wrong, become serial litigants obsessed with seeking vindication of their position and in doing so mount, often repeatedly, arguments which would never be advanced by a responsible practitioner. **This phenomenon has occasioned significant problems for this Court in the efficient exercise of its original and appellate jurisdiction**.[9]

Of course, I do not suggest that the difficulties are systemic and apply to all SRLs/complainants. It is a minority of SRLs/complainants who create a disproportionate number of difficulties and challenges. My impression is that where legal representatives are not involved there is a greater risk that the following behaviours may occur with some SRLs:

- agitating substantially the same grievance in multiple places, either together or consecutively;
- pursuing cases or complaints which are entirely without merit or substance;
- commencing substantive proceedings but then making multiple and sometimes repetitive interlocutory applications which are time-consuming and resource-intensive and which delay a final determination of the substantive matter;

7 Stephen Gageler, "The state of the Australian judicature in 2024", Address delivered at the Australian Judicial Officers Association Colloquium, Canberra, 12 October 2024; (2024) 98 *Australian Law Journal* 885, 893.
8 See eg the Administrative Appeals Tribunal, *Annual Report 2022–23* (Report, 2023), ch 3 figure 3.8.
9 *Storry v Parkyn (Vexatious Proceedings Order)* (2024) 304 FCR 318; [2024] FCAFC 100, [3] (emphasis added).

- repeatedly re-agitating a grievance even after it has been heard and conclusively determined, including by way of appeal;

- making extravagant or scandalous allegations (not only against decision-makers, but also against legal representatives personally) with no prospect of them being substantiated or justified and sometimes increasingly drawing in a range of defendants into a widening circle of litigation where, for example, there is an association with a respondent against whom a prior proceeding has failed;

- not complying with procedural rules and case management directions which are designed to have cases heard and determined expeditiously; and

- acting querulously in both courts and tribunals and in dealings with staff working in administrative review bodies.

As Mr Wheeler stated,[10] it is the conduct of a small percentage of complainants and litigants which unacceptably affects:

- the health and safety of the staff of an organisation;

- the limited resources of the institutions in which the grievances and complaints are raised; and

- perhaps most importantly of all, the equitable distribution of the resources of the organisation between all users, both current and potential.

I suspect that the problems have become even more acute during and after the pandemic, which has also coincided with increasing cost of living pressures. The issues are more likely to present where the people concerned are suffering from mental health challenges.

Legal advice and assistance services provided by bodies such as Justice Connect (funded by the Attorney-General's Department) and pro bono schemes run by bodies like the Law Society and Bar Association are helpful, but the demand seems to far outweigh the supply. Additionally, some persistent litigants will not accept independent legal advice where it does not suit their personal agendas.

Helpful assistance may also be provided by non-legally qualified people, known as a "McKenzie Friend". McKenzie Friends may play a greater role in administrative justice in Britain than is the case here. There is a practice note there with the title *McKenzie Friends (Civil and Family Courts)*.[11] A McKenzie Friend may provide moral support to a litigant in person, take notes, help with case papers and quietly give advice to the litigant in person on the conduct of their case.[12]

10 Wheeler (n 6).
11 Courts and Tribunals Judiciary (UK), *Practice Guidance: McKenzie Friends (Civil and Family Courts)*, 21 May 2012.
12 Ibid para 3.

I turn now briefly to describe the powers of the Federal Court, the ART and the Commonwealth Ombudsman to control unreasonably persistent SRLs/complainants, and how those powers might be strengthened, drawing on British experience.

Federal Court

In 2022–23, 83% of all original proceedings commenced in the Federal Court by SRLs related to causes of action in administrative law, appeals and related actions, and first-instance migration decisions. Of all appeals commenced by SRLs in that year, 72% were migration appeals. Interestingly, however, migration appeals as a proportion of all appellate proceedings (including cross appeals and interlocutory applications) have gradually fallen over the last five years, decreasing from 80.6% of all appellate proceedings in 2019 to 53.4% in 2022–23.[13]

The conduct of migration applications and appeals is subject not only to the Court's ordinary powers, including summary dismissal, but by other customised procedures designed to streamline the preparation and conduct of such proceedings. There is, for example, an internal procedure which involves one or two Judges reviewing all migration matters with a view to identifying cases raising similar issues or where there is a history of previous litigation. The process allows for similar cases to be managed together and for the Chief Justice to make a decision whether, for example, a migration appeal from the Federal Circuit and Family Court of Australia (Div 2) should be heard by a Full Court constituted by one or three Judges.

I am not aware of published statistics which reveal the extent to which the Court uses its powers of summary dismissal under s 31A of the *Federal Court of Australia Act* in administrative law matters. The s 31A power stands apart from the Court's powers to strike out a deficient pleading. The Court is empowered to dismiss a proceeding (or a part of it) summarily if the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting all or part of it. A proceeding need not be "hopeless" or "bound to fail" for it to have no reasonable prospect of success, as is made clear in s 31A(3).

The extrinsic materials leave no doubt that the legislative intention was to strengthen the Federal Court's power to deal with unmeritorious matters "by broadening the grounds on which federal courts can summarily dispose of unsustainable cases".[14]

In *Spencer v Commonwealth*[15] the High Court adopted a restrictive view of s 31A. French CJ and Gummow J said that the "exercise of powers to summarily terminate proceedings must always be attended with caution",[16] including where it is claimed that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous, vexatious or an abuse of process.

13 Federal Court of Australia, *Annual Report 2022–23* (Report, September 2023) 26.
14 Second reading speech, Migration Litigation Reform Bill 2005 (Cth), Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005 3 (Philip Ruddock, Attorney-General).
15 (2010) 241 CLR 118.
16 Ibid [24].

A close reading of the decision suggests that the High Court was particularly concerned not to have Mr Spencer's proceedings summarily dismissed where the pleadings left open the possibility (even if not fully formulated or adequately particularised) that there was an informal arrangement between the Commonwealth and New South Wales which was designed to avoid the just terms constraint under s 51(xxxi) of the *Australian Constitution*.[17]

By virtue of s 31A(3) of the *Federal Court of Australia Act*, it is no longer necessary for a party seeking summary dismissal to demonstrate that a claim is certain to fail, or hopeless or bound to fail. But before making an order under that provision, the Court needs to be satisfied that the applicant has "no reasonable prospect of prosecuting the proceeding". Cases post *Spencer* have emphasised that summary dismissal under this statutory power "is a serious step taken only with great care and if it is possible to conclude with confidence that there is no reasonable prospect of success".[18]

The Federal Court also has the power under s 37AO of the *Federal Court of Australia Act* to prohibit vexatious litigants from instituting proceedings generally or of a particular type in the Court or to make some other order which the Court considers appropriate. The powers are only engaged if the Court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. The expression "vexatious proceeding" is defined in s 37AM to include proceedings that are an abuse of process, proceedings instituted to harass or annoy or for some other wrongful purpose, and proceedings instituted or pursued without reasonable ground. The Court may make a vexatious proceedings order on its own initiative or on application by a party or a person who has a sufficient interest in the matter.

The power was exercised in *Rana v Department of Defence*[19] so as to prevent an SRL from commencing or continuing in the Federal Court proceedings against the Commonwealth in connection with his past employment with the Department of Defence. Mr Rana had brought more than 20 separate proceedings over a 30-year period stemming from his dissatisfaction with the outcome of his claim for employees' compensation. They include unsuccessful proceedings he brought in the AAT (in 1988, 2004, 2005 and 2008), in the Federal Court (in 2005, 2007, 2008, 2009 and 2013) as well as appellate-related proceedings in the Full Court (in 2005, 2006, 2008, 2010 and 2011). All the proceedings were dismissed.

Justice Charlesworth said:

> I take into account that some of the proceedings commenced by Mr Rana are instances in which he sought to exercise rights of appeal from a judgment of the Court or rights to merits review of an administrative decision. Care should be taken before concluding that such proceedings are commenced for a wrongful purpose. An appellate proceeding may nonetheless bear the character of a "vexatious" proceeding if it is unmeritorious and so pursued "without reasonable ground". Similarly, an application for merits review of an administrative decision may be vexatious if the claimed right subject to the application is one that has previously been agitated unsuccessfully and previously subject to an unsuccessful merits review application. Mr Rana's litigation history has these features.[20]

17 See ibid, in particular at [31].
18 *Danthanarayana v Commonwealth* [2016] FCAFC 114, [4].
19 [2018] FCA 1642.
20 Ibid [99].

Her Honour added the following concluding remarks:

> I place substantial weight on the imposition and inconvenience the order will place upon Mr Rana, particularly having regard to his status as a self-represented litigant and the nature of the personal injuries upon which his claims are based. I nonetheless consider those interests to be outweighed by the need to prevent Mr Rana from again becoming an unreasonable imposition upon the respondent and upon the finite judicial and administrative resources of this Court in respect of this particular type of proceeding against this particular respondent.[21]

A vexatious proceedings order was also recently made by the Full Court in *Storry*. Ms Storry had brought 26 individual proceedings against various respondents over a period of seven years. Many of them involved judicial review or administrative review proceedings. After concluding that some of those proceedings were vexatious, the Full Court made a vexatious proceedings order and observed:

> [M]ost importantly, the present circumstances represent a clear example of where the Court must act to protect itself from the expense, burden, and inconvenience of baseless and repetitious proceedings instituted by Ms Storry. Ms Storry has had plenty of days in Court, but she is not entitled to another person's day in Court to pursue quixotic and misconceived complaints. We are amply satisfied a vexatious proceedings order in this case is reasonably necessary to protect Court resources so that they are available to other litigants.[22]

Vexatious litigant declarations or orders are viewed by some as a blunt instrument. For example, in *Kitoko v Sydney Local Health District* Fagan J said that applications under the *Vexatious Proceedings Act 2008* (NSW) "often do no more than absorb further resources of the Court and of aggrieved parties, who find themselves engaged upon contestable issues to which the Act gives rise".[23] In that case, notwithstanding that the litigant in person had brought at least 11 separate matters over roughly a ten-year period, Fagan J saw "no utility" in taking any step under that legislation, largely because a vexatious litigant order applies only *after* unfounded or harassing claims have occurred. His Honour said that such an order engages too late to attend the mischief caused by a litigant such as the plaintiff there, whom he described as "unrepresented, unreasonable, heedless of facts and unconcerned by failure".[24]

Earlier, Fagan J described the effects of the plaintiff's litigation history:

> The overall effect of the plaintiff's litigious activity has been to inflict significant loss on public institutions — the University, the hospitals and the courts — to the detriment of the community, in whose interests the people of those institutions endeavour to provide their services efficiently, conserving public funds and resources for their proper objects. Individual judges can do no more than determine the specific proceedings brought before them. Despite feeling a responsibility to address the cumulative effect of this barrage of misconceived, futile and publicly damaging litigation, the only course available to a judge would be to invoke the unsatisfactory provisions of the *Vexatious Proceedings Act 2008* (NSW).[25]

The Judge proposed that, in the case of *any* unrepresented litigant, there should be a requirement that any new claim must be approved for filing by a judge in chambers, who could assess on the papers whether the claim has a reasonably arguable foundation.[26]

21 Ibid [106].
22 *Storry* (n 9) [74].
23 [2023] NSWSC 898, [73].
24 Ibid [80].
25 Ibid [72].
26 Ibid [78].

This proposed requirement mirrors aspects of the requirement in England and Wales that applicants for judicial review (not only SRLs) must obtain the Administrative Court's permission to proceed with any such application (see further below).

The limitations of legislation concerning vexatious litigants may partly explain why the Supreme Court of New South Wales has developed a procedure known as a *Teoh* direction.[27] In *Teoh v Hunters Hill Council (No 4)*,[28] the applicant (an SRL), having failed to obtain leave to appeal against a decision of the Land and Environment Court, sought to have that decision set aside or varied on the basis that the decision was irregular, illegal or against good faith. Her application failed but she applied twice again under the same rule, with the objective of obtaining leave to appeal as initially sought. Both further applications failed. The NSW Court of Appeal acknowledged that because an order refusing leave to appeal was interlocutory, a renewed application for leave to appeal was technically competent. But the Court said that if the applicant were to make a fourth application seeking the same relief based on the same grounds and relying on the same materials, that would be vexatious and an abuse of process.

The Court noted that, even in the absence of an application to have Ms Teoh declared a vexatious litigant, it had a duty to conserve its resources and ensure as far as possible that they were available to other litigants. In order to protect against abuse, the Court acted of its own motion to exercise its inherent power to direct that, if Ms Teoh applied again for the same relief, the application would promptly be referred to a judge for a review on the papers to determine whether there is a case for hearing that application. If the judge concluded that a fourth hearing was not warranted, the applicant would be invited to show cause in writing why the court should not, in chambers, summarily dismiss the proceedings as vexatious and an abuse of process.

The limitations of vexatious litigant orders and summary dismissal powers in controlling some persistent litigants were recognised last year when amendments were made to the *Family Law Act 1975* (Cth). In addition to the Family Court's powers in family law proceedings (which mirror those of the Federal Court) to make vexatious proceedings orders or give summary decrees,[29] the Court is now empowered to make "harmful proceedings orders".[30] Such an order may be made where the Court is satisfied that there are reasonable grounds to believe that another party would suffer harm if a party instituted further proceedings against them. Harm is defined to include psychological harm or oppression, major mental distress, the other party's capacity to care for a child and financial harm. A harmful proceedings order prohibits a party from instituting proceedings under the *Family Law Act* against another party to the proceedings without the Court's leave under s 102QAG.

The 2023 amendments are an appropriate and creative legislative response aimed at arming courts in the family law jurisdiction with a range of powers to control particular kinds of unreasonably persistent litigants.

27 See Judicial Commission of New South Wales, *Civil Trials Bench Book* (online at 16 February 2025) [2-7610].
28 (2011) 81 NSWLR 771.
29 See *Family Law Act 1975* (Cth) pt XIB div 2 and div 1A, respectively.
30 Ibid s 102QAC.

Should there be a leave requirement for judicial review proceedings?

The issue of whether or not there should be a requirement to obtain leave before commencing judicial review proceedings was considered by the ARC in its 2012 report *Federal Judicial Review in Australia*.[31] The requirement to obtain permission to apply for judicial review in England and Wales was noted but the ARC did not support the introduction of a leave requirement in Australia, at least at that time. It concluded that leave requirements were unlikely to have much of an effect. It added that if there was an oral hearing on a leave application, that would defeat its purpose of saving time and resources. It also was concerned that dissatisfied applicants for leave would appeal adverse decisions and simply create more appeal work.

The ARC noted that experience in the migration jurisdiction suggested that judges were likely to give leave to proceed even if no error was demonstrated in the original application on the basis that a real issue may subsequently emerge. This was said to reflect the British experience where one (possibly dated) study revealed that 37% of judicial review applications were refused permission but of those that were re-filed, 40% subsequently obtained permission.[32]

The ARC also commented that, if there was a requirement of leave, it would be necessary to have clear criteria specified in order to add certainty and guidance to the process.[33] Another stated concern was that a requirement to obtain leave may simply prompt unsuccessful applicants to bring proceedings under s 75(v) of the *Constitution* in the High Court.[34]

The ARC concluded that, "[g]iven the small number of judicial review applications and the availability of alternative paths of review" in the High Court, there was "no merit in requiring leave to proceed" under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).[35]

Some of the ARC's concerns may still have some force but it may be appropriate and timely to revisit the issue with particular reference to more up-to-date material regarding the effectiveness of the leave requirement in England and Wales, to which I now turn.

The requirement for permission to proceed in England and Wales

Claims for judicial review are brought in the Administrative Court, which is a division of the High Court. An applicant for judicial review must obtain permission from the Court to proceed.[36] Permission will only be granted where the Court is satisfied that there is an arguable case.[37]

31 Administrative Review Council (ARC), *Federal Judicial Review in Australia* (ARC Report No 50, September 2012) 188–9 [11.34]–[11.42].
32 Ibid [11.37].
33 Ibid [11.39].
34 Ibid [11.41].
35 Ibid [11.42].
36 See *Civil Procedure Rules 1998* (UK) (*CPR*) pt 54.
37 A similar procedure has more recently been adopted in Scotland under the *Courts Reform (Scotland) Act 2014* (Scot).

The decision whether or not to grant permission is usually decided on the papers and without an oral hearing. Where permission is refused the applicant may, within seven days, request a renewal hearing. The right to request a renewal is not available if the judge has certified the application to be “totally without merit”.[38] A request for a renewal must be made within seven days. The renewal is conducted on the papers only.

Where an application has been certified as “totally without merit”, the aggrieved applicant may appeal to the Court of Appeal where, again, the matter is determined on the papers only. There is no right to apply for an oral hearing.[39]

Even if the judge considers that there are arguable grounds for judicial review, permission may still be refused on one or more discretionary grounds. These include delay, the availability of an adequate alternative remedy, the claimant has suffered no injustice or the impugned error is not material.[40]

Where permission is refused, the judge is required to give reasons.[41]

In Australia, constitutional requirements would require the provision of reasons for judgment in refusing leave.[42] But the reasons need not be extensive, bearing in mind the interlocutory nature of an application for leave and the need to avoid defeating the very purpose of having a leave gateway.[43]

The Administrative Court also has a discretion to conduct a concurrent hearing of an application for permission and the substantive hearing.[44] Where permission is refused, costs will usually be granted to the respondent.[45]

In 2022, approximately 40% of applications for permission were granted and of the 60% which did not proceed to a judicial review, 11% were certified to be totally without merit. Case law has established that the concept of “totally without merit” encompasses cases which are bound to fail. It is not necessary that the application be abusive or vexatious.[46]

The material outlined above (including the Australian constitutional requirements) suggests that there may be a case for the ARC to revisit the views it expressed in its 2012 report concerning the appropriateness of introducing a leave requirement for judicial review proceedings (both whether brought under the *ADJR Act* or the *Judiciary Act 1903* (Cth)).

38 *CPR* (n 36) r 54.12(7).
39 Ibid rr 54.2, 52.8–52.10.
40 See *Criminal Justice and Courts Act 2015* (UK) s 84.
41 *CPR* (n 36) r 54.12(2).
42 See *Wainohu v New South Wales* (2011) 243 CLR 181, [56].
43 See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, [26]; *Mohareb v Local Court of NSW* [2024] NSWCA 235, [34]–[36].
44 See *R (Lunn) v Revenue and Customs Commissioners* [2011] EWHC 240 (Admin).
45 See *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346.
46 See *R (Grace) v Secretary of State for the Home Department* [2014] 1 WLR 3432.

Additional powers to address abuse in judicial review proceedings in England and Wales

One leading English commentator recently stated that the Administrative Court has "powerful weapons to deter vexatious litigants".[47]

It appears that there are available broader powers in England and Wales to deal with vexatious litigants than is the case with the Federal Court. In particular, there are powers to make a civil restraint order (CRO). These powers are more flexible than making a vexatious litigant order (known in England and Wales as a civil protection order (CPO)).

A CRO may be made where a person has brought claims or made applications which are considered to be "totally without merit". A CRO can take one of three forms. First, a limited CRO may be made where a party has made two or more applications which are totally without merit — the order remains in force for the duration of the proceedings and restrains the party from bringing any further applications in those proceedings without obtaining permission from a specified court. An aggrieved party may apply to amend or discharge such an order but only with the permission of the judge. Permission is also required if the aggrieved party wishes to appeal against the order.

Second, an extended CRO restrains a party from issuing claims or applications in specified courts which are related to the proceedings in which the order is made. If the aggrieved party wishes to challenge an extended CRO, similar restrictions apply as to limited CROs.

Third, a general CRO restrains a person from issuing any claim or making any application in specified courts without obtaining the permission of a particular judge specified in the order. Such an order may be made where a person has persistently issued claims or applications which are totally without merit and where an extended CRO would not be sufficient or appropriate. That is the case, for example, where the litigant adopts a scattergun approach and makes multiple different applications relating to different grievances.[48] A general CRO may be made where the litigant has repeatedly breached an extended CRO. A general CRO remains in force for a specified period not exceeding three years but is capable of being extended for further periods of up to three years at a time.

The Administrative Court is empowered to make a CRO, which is a separate process from the requirement to seek permission to apply for judicial review.

The power to make a CRO is not confined to judicial review proceedings. It appears to be a valuable tool in controlling meritless litigation.

A CPO is substantially similar to a vexatious litigant declaration or order in Australia, save that such an order can only be made on application by the Attorney General.[49]

47 Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) [27-057].
48 See *Re Glass Slipper Live Events-Event 1 Ltd* [2022] EWHC 519 (Ch).
49 See *Senior Courts Act 1981* (UK) s 42.

If a person who is subject to a CRO or CPO files a judicial review claim or makes an application to the Administrative Court without first making an application for permission to start proceedings and obtains such permission, the claim or application will not be issued.

Before seeking permission to start judicial review proceedings, a person who is subject to a CRO must set out the nature and grounds of the application and give the other party at least seven days to respond. The application for permission to start proceedings is determined without an oral hearing. There is a right of appeal unless the court has ordered that the decision to dismiss the application will be final. Where a person is subject to a CPO and wishes to bring a judicial review action, the person is required to identify themselves, give the title and reference number of the proceedings in which the CPO was made, identify the subject matter of the permission and why the person is seeking to bring a claim, as well as disclose previous occasions on which the person has made a previous application for permission.

An application by a person who is subject to a CPO is determined by a judge in chambers who is empowered to:

- make an order giving the permission sought;
- give directions for further written evidence to be supplied by the litigant before an order is made on the application;
- make an order dismissing the application without a hearing; and
- give directions for the hearing of the application.

For the application not to be dismissed the court must be satisfied that it is not an abuse of process and that there are reasonable grounds for bringing it.[50]

Where the application is dismissed, the judge's decision is final and may not be subject to reconsideration or appeal.[51]

The ART's powers to address abuse of process

The ART's powers to dismiss an application appear to be broadly similar to those of the AAT. They are set out in div 8 of the *ART Act*. I set out a comparative table of provisions in Table 1.

50 Ibid s 42(3).
51 Ibid s 42(4).

Table 1. Comparison of Tribunal powers to dismiss an application

Administrative Review Tribunal Act 2024 (Cth)	Administrative Appeals Tribunal Act 1975 (Cth)
97 Tribunal must dismiss application if decision is not reviewable decision The Tribunal must dismiss an application if: (a) the application is made for review of a decision; and (b) the Tribunal is satisfied that the decision is not reviewable by the Tribunal.	**42A Discontinuance, dismissal, reinstatement etc. of application** *Dismissal if decision is not reviewable* (4) The Tribunal may dismiss an application without proceeding to review the decision if the Tribunal is satisfied that the decision is not reviewable by the Tribunal.
99 Tribunal may dismiss application if applicant does not appear If: (a) the applicant fails to appear at a Tribunal case event that relates to a proceeding in relation to an application; and (b) the Tribunal is satisfied that the applicant received appropriate notice of the date, time and place of the Tribunal case event; the Tribunal may dismiss the application. Note 1: Tribunal case events include hearings, directions hearings and dispute resolution processes (see the definition of Tribunal case event in section 4). Note 2: For how to appear at a Tribunal case event, see section 73.	**42A Discontinuance, dismissal, reinstatement etc. of application** *Dismissal if party fails to appear* (2) If a party to a proceeding before the Tribunal in respect of an application for the review of a decision (not being the person who made the decision) fails either to appear in person or to appear by a representative at a directions hearing, or an alternative dispute resolution process under Division 3, held in relation to the application, or at the hearing of the proceeding, the Tribunal may: (a) if the person who failed to appear is the applicant — dismiss the application without proceeding to review the decision; or (b) in any other case — direct that the person who failed to appear shall cease to be a party to the proceeding.
100 Tribunal may dismiss application if applicant fails to comply with order etc. The Tribunal may dismiss an application made to the Tribunal if the applicant fails to do either of the following within a reasonable time: (a) proceed with the application; (b) comply with this Act or an order of the Tribunal in relation to the proceeding in relation to the application.	**42A Discontinuance, dismissal, reinstatement etc. of application** *Dismissal if applicant fails to proceed or fails to comply with Tribunal's direction* (5) If an applicant for a review of a decision fails within a reasonable time: (a) to proceed with the application; or (b) to comply with a direction by the Tribunal in relation to the application; the Tribunal may dismiss the application without proceeding to review the decision.
101 Tribunal may dismiss application if frivolous, vexatious etc. (1) The Tribunal may, at any time, dismiss an application made to the Tribunal if the Tribunal is satisfied that the application: (a) is frivolous, vexatious, misconceived or lacking in substance; or (b) has no reasonable prospects of success; or (c) is otherwise an abuse of the process of the Tribunal. (2) If the Tribunal dismisses an application (the substantive application) under subsection (1), the Tribunal may, on application by a party to the proceeding in relation to the substantive application or on its own initiative, order that the applicant for the substantive application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a specified kind or kinds. (3) The order has effect despite any other provision of this Act or any other Act.	**42B Power of Tribunal if a proceeding is frivolous, vexatious etc.** (1) The Tribunal may dismiss an application for the review of a decision, at any stage of the proceeding, if the Tribunal is satisfied that the application: (a) is frivolous, vexatious, misconceived or lacking in substance; or (b) has no reasonable prospect of success; or (c) is otherwise an abuse of the process of the Tribunal. (2) If the Tribunal dismisses an application under subsection (1), it may, on application by a party to the proceeding, give a written direction that the person who made the application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a kind or kinds specified in the direction. (3) The direction has effect despite any other provision of this Act or any other Act.

Section 42B was inserted in the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) by the *Tribunals Amalgamation Act 2015* (Cth). Previously, the AAT's power of summary dismissal was limited to where the AAT was satisfied that an application was frivolous or vexatious. There is a helpful discussion of s 42B by Senior Member Linda Kirk in *Whitlock and Comcare*.[52] The applicant's proceedings there were dismissed summarily under s 42B(1)(c) as an abuse of process where the applicant provided to the Tribunal material in support of her application knowing that it was misleading and then failed to correct the misinformation after it was brought to her attention. Senior Member Kirk noted[53] that the applicant was obliged by s 33(1AB) of the *AAT Act* to use best endeavours to assist the Tribunal to fulfil its statutory objective of undertaking a review that is fair, just, economical, informal and quick, and which promotes public trust and confidence in its decision-making. The applicant's failure to carry out this obligation underpinned the decision to dismiss her application summarily.

The AAT's power to dismiss an application summarily as an abuse of process has also been used where an applicant engaged in harassing and abusing behaviour towards AAT staff, which caused unnecessary delays and costs, and also displayed an unwillingness on the applicant's part to participate as required in the proceedings.[54]

In *Novosel v Comcare*, it was stated that there was an evident intention underlying s 42B that the AAT protect its own processes against analogous forms of abuse to those in judicial proceedings.[55] There is no reason to doubt that a similar intention applies to the new ART.

It is notable that the ART has the power under s 101(2) of the *ART Act* to make what is in effect a *Teoh* order in respect of specified kinds of subsequent applications.

The AAT's power under s 42B(1)(a) to dismiss an application at any stage of the proceeding if it is satisfied it is frivolous or vexatious has been discussed in cases such as *Re Williams and Australian Electoral Commission*,[56] *Fearnley v Australian Fisheries Management Authority*[57] and *Singh v Secretary, Department of Employment and Workplace Relations*.[58]

Singh involved multiple proceedings brought by Mr Singh over a ten-year period concerning an order by the County Court of Victoria that Centrelink should be refunded an amount of approximately $90,000 in respect of social security payments received by Mr Singh and his wife. He brought proceedings in the Social Security Appeals Tribunal (SSAT), the AAT, the Federal Court and the Full Federal Court. In 2006, Mr Singh brought another appeal in the AAT against a further decision of the SSAT. His appeal substantially repeated his previous unsuccessful claims but he also raised a new claim of fraud.

52 [2019] AATA 1911.
53 Ibid [26].
54 See *Bringolf and Secretary, Department of Human Services (Freedom of information)* [2018] AATA 2004.
55 (2017) 72 AAR 269, [107].
56 (1995) 38 ALD 366.
57 [2006] FCAFC 3.
58 (2007) 46 AAR 447.

The AAT dismissed his appeal under s 42B and made an order preventing Mr Singh from making any further application without the AAT's leave in respect of the Centrelink debt. After Mr Singh failed in an appeal to the Federal Court under s 44 of the *AAT Act*, he appealed to the Full Court.

The Full Court held that the AAT was entitled to dismiss the application under s 42B(1)(a) on the basis that Mr Singh's application was vexatious in that its purpose was to annoy and irritate. In addition, and significantly, the Full Court held that although the allegation of fraud had not previously been raised by Mr Singh, an *Anshun* estoppel applied to prevent him from seeking to raise a matter which ought to have been raised in his earlier proceedings. The case illustrates the potential for the *Anshun* principle to be used in judicial review and appeal proceedings so as to avoid an abuse of process.[59]

The AAT's *Annual Report 2022–23* contains statistics concerning the number of applications dismissed by the Tribunal in that year. The figures relate to only four of the AAT's divisions but, when consolidated, they indicate that approximately 3% of applications for review of decision in those divisions were disposed of by dismissals relating to non-appearance (s 42A(2)), failure to proceed with an application or comply with a Tribunal direction (s 42A(5)) or under s 42B(1).[60] It is unclear how many of these cases were dismissed under s 42B(1) above.

A more detailed study is needed to ascertain whether the existing powers of the ART are adequate to deal with the different kinds of conduct by unreasonably persistent applicants, including the effectiveness of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*[61] and whether it might be expanded to address some of the issues highlighted above.

More time is needed to see whether there are shortcomings in the ART's powers, with particular reference to its capacity to handle its voluminous migration jurisdiction. Subject to any constitutional law constraints, there may be a case for the ART to be able to use powers such as those available to the Administrative Court in respect of CROs, limited to proceedings in the ART itself.

Commonwealth Ombudsman

The Ombudsman has a discretion not to investigate certain complaints or to terminate an existing investigation where the Ombudsman is of the opinion that the complaint is frivolous or vexatious, or not made in good faith, the complainant does not have a sufficient interest in the subject matter of the complaint or an investigation, or further investigation is not warranted having regard to all the circumstances.[62]

If a person complains to the Ombudsman without first having complained to the department or authority concerned, the Ombudsman has a discretion not to investigate the action until a complaint has been made to the responsible agency.[63]

59 Ibid [32].
60 Administrative Appeals Tribunal (n 8) ch 3.
61 Administrative Review Tribunal, *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*, 14 October 2024.
62 *Ombudsman Act 1976* (Cth) s 6(1).
63 Ibid s 6(1)(a).

The Ombudsman also has a discretion not to investigate, or continue to investigate, a complaint where the complainant has a right to bring proceedings in a court or tribunal, unless the Ombudsman is of the opinion that there are “special reasons” justifying an investigation.[64]

Section 6 of the *Ombudsman Act 1976* (Cth) also empowers the Ombudsman to decline to investigate or further investigate particular complaints in some specific contexts, including complaints that could be investigated by the Australian Communications and Media Authority, the Australian Public Service Commissioner, or the Australian Federal Police Commissioner.

It is unclear whether these statutory discretions provide an adequate basis for the Ombudsman to deal with unreasonable conduct by some persistent complainants. As noted in the Ombudsman’s *Annual Report 2020–21* the Office experienced an increase in complainants who presented with vulnerable circumstances and engaged in what was described as “unreasonable conduct” including aggression towards staff, threats of self-harm, threats of harm against others and unreasonable expectations in relation to the timeliness or influence of the Ombudsman’s Office. The emotional effects of the pandemic on the broad community were said to provide context for the problem.[65]

As a result of a joint project by the Australian Parliamentary Ombudsmen, led by the NSW Ombudsman, a manual was developed for use by frontline staff, supervisors and senior managers of government agencies for handling unreasonable conduct by a complainant. The latest manual is dated April 2021.[66] It builds on earlier versions dated 2009 and 2012.

The manual states that the feedback received indicated that for most organisations “unreasonable conduct by complainants is only an issue in about 3–5% of cases … However, such unreasonable conduct can … [t]ake up approximately 25–30% of an organisation’s resources”.[67] Those figures are alarming, and highlight the significant drain on resources created by a relatively small number of people.

Other impacts of unreasonable conduct include “significant equity problems for organisations that are forced to substantially and unreasonably divert resources away from other complaints and functions to manage it”[68] and “negative consequences for external review agencies and regulatory bodies that have to dedicate time and resources to dealing with review requests/ applications that have little or no merit and have been escalated by people who cannot ‘let go’ of their issue”.[69]

The Commonwealth Ombudsman released two fact sheets in 2021 which are based on the manual: *Unreasonable Complainant Conduct* and *Managing Unreasonable Persistence*.

64 Ibid s 6(2).
65 Commonwealth Ombudsman, *Annual Report 2020–21* (Report, October 2021) 28–9.
66 NSW Ombudsman, *Managing Unreasonable Conduct by a Complainant: A Manual for Frontline Staff, Supervisors and Senior Managers* (Manual, April 2021).
67 Ibid 6.
68 Ibid.
69 Ibid 7.

The former defines “unreasonable complainant conduct” to include:

- **unreasonable persistence** — refusing to accept that a complaint is closed, reframing an old complaint, persevering obstinately with an argument, continuing to phone or contact an agency after a matter is closed.

  If a person is unreasonably persistent, the agency should be ready to say “no” — for example, to advise that a complaint issue will not be investigated further, an unproductive telephone call will be terminated, only one internal review will be undertaken, or no further correspondence on the complaint will be answered. The complainant may need to be told that they have reached the end of the line.

- **unreasonable demands** — raising issues beyond an agency’s responsibility, asking for a remedy that is impractical or disproportionate, insisting that more time be spent on a complaint than is warranted, insisting on speaking to the head of an agency, directing an agency on how to handle the complaint.

  If a person makes unreasonable demands, limits should be set on what the agency will do — for example, which issues will be investigated, who will investigate the complaint, how it will be investigated, the possible outcomes, and how communication should occur between the complainant and the agency.

- **unreasonable lack of cooperation** — poor or confused definition of a complaint, unnecessary presentation of a large quantity of material, failing to provide key documents, constantly re-defining a complaint, dishonestly presenting the facts.

  If there is an unreasonable lack of cooperation from a complainant, the agency should set conditions — for example, the complainant should be required to define the complaint issue, identify the supporting evidence, provide key correspondence or documents, be truthful in dealing with the agency, or explore some other avenue before the complaint will be investigated.

- **unreasonable arguments** — exaggerating issues, holding irrational beliefs, being obsessed with irrelevancies or trivialities, refusing to consider counter-arguments, being guided by conspiracy theories.

  Unreasonable arguments should be identified and set aside. Limits should be placed on what the agency will examine and the style of communication that is expected. If it becomes clear the complaint is groundless, it should be declined.

- **unreasonable behaviour** — threatening violence, abusing investigation staff, being rude or aggressive, threatening self-harm.

  Unreasonable behaviour should not be tolerated: a complainant can be told that a telephone call will be terminated unless more moderate language is used, that threats are unacceptable and may be reported to the police, that rude and intemperate correspondence may not be answered or may be returned, or that special contact arrangements with the complainant will be implemented.[70]

The fact sheet styled *Managing Unreasonable Persistence* includes a case study involving a persistent complainant.[71] Although the complainant had had many complaints investigated and had been told that no more assistance could be provided, the complainant continued to contact the Ombudsman’s Office by phone, wanting to lodge another complaint about the same issue. The complainant called the office multiple times in a short timeframe asking to speak to different people with a view to obtaining a different answer, and then became aggressive and threatening towards staff. The Office assigned two complaint resolution officers as primary contacts for this complainant. The complainant was permitted to maintain access to the Office while ensuring that messaging and decisions were consistent.

70 Commonwealth Ombudsman, *Unreasonable Complainant Conduct* (Fact sheet, April 2021) 3–4.
71 Commonwealth Ombudsman, *Managing Unreasonable Persistence* (Fact sheet, April 2021) 3.

Conclusion

The Commonwealth administrative law reforms which have been copied in many jurisdictions, both within Australia and overseas, are now more than 50 years old. Unsurprisingly, their practical operation has led to some variations and modifications. Probably the most notable is the recent replacement of the AAT with the ART.

In this paper, I have raised for discussion whether there is a case for the ARC to undertake a project directed to the question whether the Federal Court, the ART and the Ombudsman have adequate powers to control abuse of process. In the particular case of the Federal Court, some valuable lessons might be learned from the power of the Administrative Court in England and Wales to make civil restraint orders. It may also be timely for the ARC to revisit the question whether there should be a requirement to obtain leave prior to commencing judicial review proceedings.

Citta: Chapter III chases the CATs

*Peta Spender**

This article discusses the High Court judgment in *Citta Hobart Pty Ltd v Cawthorn*.[1] It refers to "chapter III jurisprudence", which involves federal claims and defences mainly arising under ss 75, 76 and 77 of the *Australian Constitution* and whether raising such a claim or defence deprives the state- and territory-based[2] civil and administrative tribunals — that is, the "CATs"[3] — of jurisdiction. The article then considers the implications of *Citta* and the chapter III jurisprudence for state tribunals, leading to broader comments and questions about the design of our justice system.

The cases below

Citta involved a complaint about disability discrimination under the *Anti-Discrimination Act 1998* (Tas) (State Act). The appellants had redeveloped land as part of a project in Hobart. The respondent, Mr Cawthorn, had paraplegia and required a wheelchair for mobility. He made a complaint to the Tasmanian Anti-Discrimination Tribunal (ADT), alleging that the appellants had failed to provide adequate wheelchair access in their redevelopment which constituted disability discrimination under the State Act. The appellants alleged in their defence to the complaint that they had complied with the Commonwealth Act — the *Disability Discrimination Act 1992* (Cth) — and relevant Commonwealth standards, and that this covered the field in relation to disability discrimination and rendered the State Act inoperable by force of s 109 of the *Constitution*.[4]

At first instance, the ADT dismissed Mr Cawthorn's complaint because it found that the Tribunal lacked jurisdiction on the basis that the issues raised by s 109 of the *Constitution* meant that the matter was within federal jurisdiction and could not be heard or determined by the ADT.[5]

The developer appealed to the Full Court of the Supreme Court of Tasmania, which analysed the substance of the appellants' constitutional arguments and unanimously rejected them.[6] The Full Court ordered that the matter be remitted to the ADT to be heard and determined.[7]

---

* Professor Emeritus, ANU Law School, Australian National University. This article is an edited version of a presentation given at the Australian Institute of Administrative Law 2024 National Conference in Canberra on 19 July 2024 titled "Recent administrative law decisions in the High Court".

1 (2022) 276 CLR 216; [2022] HCA 16 (*Citta*).

2 In this article I will not traverse the question of how the chapter III jurisprudence applies in the territories, on which see generally James Stellios, *The Federal Judicature* (LexisNexis Butterworths, 2020) 596ff.

3 Australian Capital Territory Civil and Administrative Tribunal (ACAT), New South Wales Civil and Administrative Tribunal (NCAT), Northern Territory Civil and Administrative Tribunal (NTCAT), Queensland Civil and Administrative Tribunal (QCAT), South Australian Civil and Administrative Tribunal (SACAT), Tasmanian Civil and Administrative Tribunal (TASCAT), Victorian Civil and Administrative Tribunal (VCAT), and the State Administrative Tribunal (SAT) of Western Australia.

4 *Disability (Access to Premises — Buildings) Standards 2010* (Cth): *Citta* (n 1) [4].

5 *Citta* (n 1) [5].

6 Ibid [6].

7 Ibid.

The High Court decision

Upon appeal, the High Court unanimously held that the ADT lacked jurisdiction to hear and determine a complaint of disability discrimination in these circumstances. There was a firm majority judgment by Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ,[8] with Edelman J agreeing in separate reasons.[9]

The first issue the High Court had to decide was whether the ADT is exercising judicial power when it makes a determination about complaints regarding disability discrimination. The High Court unanimously accepted that it does.[10]

The plurality stated:

> The constitutional defence was genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument. That being so, the complaint and the defence together formed part of a single justiciable controversy comprising a matter within the description in each of s 76(i) and s 76(ii) of the *Constitution*. The Tribunal was on that basis correct to order that the complaint be dismissed for want of jurisdiction.[11]

Argument by the Australian Human Rights Commission as amicus

In one interesting part of the judgment the High Court rejected an argument, advanced by the Australian Human Rights Commission (AHRC) (appearing as amicus curiae), to the effect that a jurisdiction which would otherwise involve the exercise of judicial power by the tribunal could be transformed into the exercise of administrative power by disapplying s 90 of the State Act. This section provides for the registration and enforcement of orders.

The previous case of *Commonwealth v Anti-Discrimination Tribunal (Tas)*[12] (*Commonwealth v ADT*) had decided that the hearing and determination of a complaint referred to the ADT under the State Act involves the exercise of a judicial power. In *Citta* the AHRC challenged one aspect of the reasoning adopted in *Commonwealth v ADT*:

> Proceeding on the indisputable premise that the jurisdiction conferred on the Tribunal to hear and determine a complaint cannot involve the exercise of judicial power unless such order as the Tribunal may make if it finds the complaint to be established is binding on the parties, the AHRC argue[d] that the State Act on its proper construction makes the binding effect of the Tribunal's order [under s 89 of the State Act] contingent on registration of that order in the Supreme Court [under s 90 of the same Act].[13]

The plurality in *Citta* found that

> [t]he essential flaw in the AHRC's argument is that it confuses the order of the Tribunal with the mechanism for enforcement of that order. As Dixon CJ and McTiernan J observed in *R v Davidson*[14] …, "[t]he power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power".[15]

8 Ibid [1]–[47].
9 Ibid [48]–[86].
10 Ibid [12]–[16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [53]–[57] (Edelman J).
11 Ibid [10].
12 (2008) 169 FCR 85.
13 *Citta* (n 1) [13].
14 (1954) 90 CLR 353, 368. This passage is also referred to in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257.
15 *Citta* (n 1) [15].

The plurality found that the State Act "on its proper construction makes clear that an order made by the Tribunal on finding a complaint established" under s 89 of the State Act "takes immediate effect as an order with which the person to whom it is directed is bound to comply".[16] Registration of the order made by the ADT in the Supreme Court is not a precondition to the requirement that the order be complied with.[17]

The plurality judgment does not describe judicial power but Edelman J's separate judgment provides a clear test :

> Numerous statements in this Court, following the classic formulation by Kitto J,[18] have established that, as a general rule, judicial power involves five elements: (i) a decision following a process of inquiry including finding of facts and application of law; (ii) that settles for the future; (iii) a dispute between defined persons or classes of persons; (iv) as to the existence of a legal relation between them; (v) creating a binding norm by reference to which that legal relation will be applied in the future.[19]

Edelman J used Kitto J's test to respond to the AHRC argument about enforcement under the State Act. His Honour found:

> The remedial provision in s 89 of the State Act is the "final act" that "determines the nature of the previous inquiry".[20] Contrary to the submission of the [AHRC], the orders of the Tribunal sought by Mr Cawthorn under s 89 of the State Act are not merely "recommendations". Although a power for a tribunal to enforce its own orders is sometimes described as an essential element of judicial power, that is because enforcement is a powerful indicator that a binding norm has been created. But, even without enforcement, s 89 is a remedial provision that is the epitome of judicial power.[21]

Incidental jurisdiction

Importantly, the High Court found that the state tribunal must be taken to have incidental jurisdiction to determine whether the hearing and determination of a particular claim or complaint would be within the legislated limits of its state jurisdiction.[22]

What is the test for the federal claim or defence?

Plurality view

The plurality rejected an invitation by the respondent to use the threshold of arguability that is consistent with abuse of process tests,[23] weaved around the tests for summary dismissal such as that in *General Steel Industries Inc v Commissioner for Railways (NSW)*,[24] and finally settled on the following:

> [I]t is enough that the claim or defence be genuinely in controversy and that it gives rise to an issue capable of judicial determination. … [I]t is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument.[25]

16 Ibid [16].
17 Ibid.
18 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374.
19 *Citta* (n 1) [54].
20 *R v Davison* (1954) 90 CLR 353, 370.
21 *Citta* (n 1) [56].
22 Ibid [25] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
23 Ibid [41].
24 (1964) 112 CLR 125.
25 *Citta* (n 1) [35].

The test will exclude “unarguable” and “colourable” claims or defences that are made for the purpose of “fabricating” jurisdiction.[26] The claim or defence cannot amount to “constitutional nonsense”.[27]

The plurality noted that the ADT had specifically found that the appellants’ constitutional defence was “not colourable” and that finding had not been challenged.[28]

Justice Edelman’s view

Edelman J decided that the strikeout test for frivolous or vexatious claims or defences or one that discloses no reasonable cause of action under the *General Steel* test was inapt,[29] and stated that “[s]ome of these verbal formulae do not capture the height of the threshold”.[30]

Although Mr Cawthorn submitted that the test should be whether the s 109 issue involved a “real question”, Edelman J preferred to express that test as requiring the issue to be “manifestly hopeless”. His Honour equivocated about this test, but ultimately applied it by concluding that the “s 109 issue raised by the appellants is not manifestly hopeless”.[31]

The ambit of the incidental jurisdiction

It is good that the High Court has recognised the incidental power that exists at the threshold for tribunals to determine their own jurisdiction.

The High Court provided a small window for the ADT to exercise state judicial power to make a decision about its own jurisdiction, but the plurality was very clear that a tribunal cannot delve into constitutional questions. They stated:

> But examination of what the prospects of success of a legally coherent claim or defence might be, were that claim or defence to be judicially determined on its merits, forms no part of the requisite assessment.[32]

That is why the test of the majority (not incapable on its *face* of legal argument) and Edelman J’s *manifestly* hopeless test are framed as they are: they are a superficial or surface evaluation which does not permit any delving into the merits.

Implications

There has been a snowballing of challenges to tribunals’ jurisdiction based on ch III of the *Constitution* which have arguably accelerated since *Burns v Corbett*[33] was decided

26 Ibid [36], referring to, inter alia, *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219.
27 *Citta* (n 1) [37].
28 Ibid [45].
29 Ibid [71].
30 Ibid [72].
31 Ibid [79].
32 Ibid [37].
33 (2018) 265 CLR 304.

in 2018.[34] *Citta* has once again emphasised the importance of ch III for the CATs. The implications of the ch III jurisprudence for the CATs are potentially vast.

In 2013 Sian Elias stated that "[t]he sphere reserved for judicial authority is strictly patrolled in Australian constitutional law".[35] Scholars have argued that the courts have ensured the tribunals do not intrude into federal judicial power under ch III of the *Constitution*, thereby excluding them from wielding binding judicial power over sensitive federal topics such as the implied freedom of political communication.[36]

Although the rationalisation for exclusion of the CATs from what might uncharitably be called the "Chapter III Club" varies, it is gathering momentum and consistency, and may ultimately be founded upon doubts about the CATs' authority and legitimacy.[37] Are those doubts justified?

Court of a state

The cases about whether tribunals are a "court of a State" under s 77 of the *Constitution* are instructive. For the moment, the Queensland Civil and Administrative Tribunal (QCAT) is relatively safe because it was held to be a court of a state by the Queensland Court of Appeal in *Owen v Menzies*.[38] In that case the Court significantly relied upon the designation in QCAT's constitutive legislation that the Tribunal is "a court of record".[39] But questions arise about what characteristics a tribunal must have in order to be found to be a court of a state, regardless of what the state legislature has stipulated in the relevant legislation.[40] For example, several intermediate appellate courts have found that the CATs are not courts of a state, notably the NSW Civil and Administrative Tribunal (NCAT) by the NSW Court of Appeal in *Attorney General (NSW) v Gatsby* (*Gatsby*),[41] the Victorian Civil and Administrative Tribunal (VCAT) by the Victorian Court of Appeal in *Meringnage v Interstate Enterprises Pty Ltd*,[42] and the State Administrative Tribunal by the Western Australian Court of Appeal in *Hanssen Pty Ltd v Owners of Strata Plan 58161*.[43] In *Gatsby* and *Meringnage*[44] the courts

34 See generally Rebecca Ananian-Welsh, "CATs, courts and the *Constitution*: the place of super-tribunals in the national judicial system" (2019) 43(3) *Melbourne University Law Review* 852; Anna Olijnyk and Stephen McDonald, "The High Court's decision in *Burns v Corbett*: consequences, and ways forward, for state tribunals" [2019] 95 *AIAL Forum* 10.

35 Rt Hon Dame Sian Elias, "National Lecture on Administrative Law: 2013 National Administrative Law Conference" (2013) 74 *AIAL Forum* 1, 3.

36 David Rowe, "State tribunals within and without the Integrated federal judicial system" (2014) 25 *Public Law Review* 48, 61.

37 Ibid; Geoffrey Kennett, "Fault lines in the autochthonous expedient: the problem of state tribunals" (2009) 20 *Public Law Review* 152; Duncan Kerr, "State tribunals and chapter III of the *Australian Constitution*" (2007) 31 *Melbourne University Law Review* 622.

38 [2013] 2 Qd R 327, [20] (de Jersey CJ), [61] (McMurdo P) and [103] (Muir JA).

39 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164. See *Owen v Menzies* (n 38) [10], [19] (de Jersey CJ); [48], [49], [56] (McMurdo P).

40 See generally Graeme Hill, "State tribunals and the federal judicial system" in Greg Weeks and Matthew Groves (eds), *Administrative Redress in and out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 203.

41 (2018) 99 NSWLR 1 (*Gatsby*).

42 (2020) 60 VR 361 (*Meringnage*).

43 [2024] WASCA 87 (*Hanssen*).

44 In *Hanssen* it was "common ground that the Tribunal is not a 'court of a State' within the meaning of s 77(iii) of the *Constitution*": ibid [51].

found that this conclusion was compelled due to the aggregation of many features, but the most significant of those features was the lack of security of tenure for tribunal members.[45]

Corporations

There have been some suggestions that the ch III jurisprudence may lead to the CATs lacking jurisdiction where corporations are parties to proceedings[46] due to the operation of s 76 of the *Constitution*.[47] This is said to require the exercise of judicial power in respect of a matter arising under ch III because "[t]he parties to the adjudication [are] corporations registered under and created by the *Corporations Act 2001* (Cth) and so their rights and liabilities owe their existence to federal law".[48]

The Victorian Court of Appeal provided clear guidance on this issue in *Thurin v Krongold Constructions (Aust) Pty Ltd*,[49] which was decided after *Citta*. In *Thurin* the Court differentiated between a controversy arising under s 76 of the *Constitution* between a corporation and another actor and the status or capacity of the corporation under the *Corporations Act*. The mere fact that a company is registered under the *Corporations Act* and is a party to tribunal proceedings does not mean that a federal claim or defence is involved. The relevant passages state:

> If a corporation is in dispute with another person about a contract, and nothing else, then the "very subject" of the dispute is the contract — it is not the corporate status and capacity of the corporation. If the contract is regulated by a Commonwealth law …, or the property the subject of the contract owes its existence to a Commonwealth law …, then the matter is one arising under that law. But if the property the subject of the contract has no relevant connection with a Commonwealth law, the contract is not regulated by a Commonwealth law, and the only connection with a Commonwealth law is that a party is a corporation incorporated under the *Corporations Act*, then in our opinion the authorities do not compel, or even point towards, the matter being one "arising under" a Commonwealth law.
>
> Thus, we consider that a matter in which the sole connection with a Commonwealth law is that one or more of the parties to the dispute is a corporation incorporated under the *Corporations Act* lacks the necessary sufficiency of connection required to characterise the matter as one that arises under the *Corporations Act*. …[50]

The NSW Court of Appeal[51] and the Federal Court[52] have reached the same conclusion.

So, for the moment it does not appear that corporations as parties in CAT proceedings would inevitably lead to a ch III intrusion. That is good news because such an intrusion would potentially destroy the CATs' jurisdiction across many of their divisions.

45 *Gatsby* (n 41) [180], [187], [203]; *Meringnage* (n 42) [2], [80], [92], [96]–[98], [149].
46 See, for example, Jason Min, "Corporate litigants in NCAT: does it 'matter'?" *Butterworths Corporation Law Bulletin*, December 2022, [361].
47 The relevant parts of s 76 of the *Constitution* state: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter — (i.) Arising under this Constitution, or involving its interpretation: (ii.) Arising under any laws made by the Parliament".
48 *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* (2023) 168 ACSR 58; [2023] NSWCA 56, [13].
49 (2022) 407 ALR 187; [2022] VSCA 226 (*Thurin*).
50 Ibid [112]–[113] (citations omitted).
51 *Allianz Australia Insurance* (n 48) [13], [50].
52 *DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission (No 3)* (2021) 156 ACSR 539; [2021] FCA 1041, [16].

Exercising the incidental jurisdiction in the CATs

As discussed above, the High Court in *Citta* recognised that the CATs have incidental jurisdiction to determine whether a claim or defence is incapable on its face of legal argument or manifestly hopeless. However, in the hurley-burley of tribunal decision-making, how robust will tribunal members be when exercising this jurisdiction? Certainly, the reported decisions show that the tribunals can boldly hold onto jurisdiction by deciding that an alleged federal claim or defence does not meet the *Citta* standard,[53] but in other contexts, both before and after *Citta*, tribunals have been naturally reticent and declined jurisdiction when faced with a federal claim or defence. Let me give you some examples.

Competition and Consumer Act

In *Thurin* a litigant relied upon provisions of the *Competition and Consumer Act 2010* (Cth) (*CCA*) and its predecessor the *Trade Practices Act 1974* (Cth) (*TPA*). The case involved a defence of apportionment and contribution under the *CCA*/*TPA*. The Victorian Court of Appeal applied the *Citta* tests to find that VCAT lacked jurisdiction because the matter that was the subject of the VCAT proceedings came within the federal jurisdiction. The Court (McLeish, Neill and Walker JJA) stated:

> Krongold served a defence dated 3 August 2018 to Mr and Mrs Thurin's amended points of claim in the VCAT proceeding alleging, relevantly, that it was entitled to apportionment and contribution in respect of losses said to have been caused to Mr and Mrs Thurin by Swan Hardware. When it did so, Krongold introduced into the VCAT proceeding allegations of breach of a Commonwealth law, namely the TPA.[54]

The Court continued:

> It follows that, once the federal claims in respect of Swan Hardware were raised — which they were at least by the time Krongold served its defence dated 3 August 2018 — the matter the subject of the VCAT proceeding came within federal jurisdiction. VCAT thereafter lacked jurisdiction to hear and determine it. One consequence is that VCAT lacked power to order that Swan Hardware be joined as a party to the VCAT proceeding.[55]

This approach seems sensible when considering the apportionment and contribution provisions of the *CCA*/*TPA*. However, when it is extended to claims and defences which are prevalent in the lists in the CATs, such as s 18 of the *Australian Consumer Law* (*ACL*), the issue becomes more problematic. It is commonplace that the *ACL* is set out in sch 2 of the *CCA* and by various legislative provisions operates as state, territory and federal law. Section 6(3) of the *CCA* extends the Commonwealth *ACL* (sch 2 s 18) to conduct engaged in by persons in trade and commerce by means of involving postal, telegraphic or telephonic service (which includes email).

53 See, for example, *Kerslake v Sunol* [2023] ACAT 18, [15], referring to *Kerslake v Sunol* [2022] ACAT 40, [68] where Orr SM found that a federal claim about freedom of religion was manifestly hopeless. This was upheld on appeal in *Sunol v Kerslake (Appeal)* [2024] ACAT 35.

54 *Thurin* (n 49) [54].

55 Ibid [64].

Gleeson v Cavers involved a contract claim by a builder against homeowners.[56] All litigants were humans who were situated in New South Wales[57] but the owners raised the federal version of s 18 of the *ACL* in their defence, arguing that the builder had engaged in misleading and deceptive conduct. They said that the federal law applied because the conduct engaged in was via media that engaged s 6 of the *CCA*, namely, postal, telegraphic or telephone service. NCAT declined jurisdiction. *Gleeson* was decided before *Citta* was handed down but the analysis adopted by the Senior Member can be transposed to the *Citta* tests. Charles SM found that the owners were entitled to elect to rely upon the federal legislation or, to put it another way, that their "legal representatives made a forensic decision not to plead the *Fair Trading Act 1987* (NSW) and the ACL NSW, and that this decision was not taken for an improper purpose".[58] The Senior Member stated:

> I find that the claim and defence put by the Owners under the federal legislation are legitimately made and not lacking in bona fide merit. Nor do I find that the claim and defence were put by the Owners for the sole purpose of manufacturing jurisdiction. I accept that putting their claim and defence in respect of misleading or deceptive conduct under the federal legislation is consistent with a proper forensic purpose in the Owners' case. … I am satisfied that s 6(3) of the federal legislation expresses the scope of any contravening conduct to include the use of postal, telegraphic or telephonic services, being media which are key elements in the factual basis of the Owners' claim …, and in a way that is not dealt with in the ACL NSW.[59]

The recognition of the *election* of the litigant to rely upon the federal claim is important in this reasoning. It is interesting to consider the incentives of litigants to elect to rely on the federal defence in this situation. Where a claim or defence involves the federal jurisdiction, application may be made to an "authorised court" (such as a Magistrates or District Court[60]) but the process is not necessarily straightforward.[61]

So far, there has been no exodus of s 18 *ACL* claims or defences from the CATs and I note that the CATs still hear and resolve a "staggering number" of civil disputes,[62] but the use of the media nominated in s 6 of the *CCA* in the formation of contracts is almost universal now, so we need to watch this space.

Implied freedom of communication

The implied freedom of political communication is commonly raised in cases involving vilification under the state and territory Discrimination Acts. Where this has been raised, the tribunals have usually declined jurisdiction.[63] As discussed above, some of the CATs' enabling legislation provides for the transfer of the proceedings from the relevant tribunal to

56 [2021] NSWCATCD 158 (*Gleeson*).
57 Therefore not raising issues that would attract the application of *Burns v Corbett* (n 33).
58 *Gleeson* (n 56) [20].
59 Ibid [20].
60 See, for example, *Civil and Administrative Tribunal Act 2013 No 2* (NSW) pt 3A.
61 *Dalton v Qantas Airways Ltd* [2020] NSWCATCD 2, [36].
62 Ananian-Welsh (n 34) 854.
63 Usually because of the operation of s 76(i) of the *Constitution* (quoted in n 47 above). See, for example, *Blanch v Smith* [2024] NSWCATAD 20.

a Magistrates or District Court.[64] However, in my view, solving the problem by way of transfer to the closest court in hierarchy to the CAT raises serious questions about the way that we design our justice system. The CATs have developed significant expertise in discrimination law due in part to the amalgamation of the specialist anti-discrimination tribunals into the CATs, so sending a matter to a Magistrates or District Court may be sub-optimal because those sites of justice have a different focus. As stated succinctly by Justice Beech-Jones:

> Without being too blunt about it, [the Local and District Courts] have other cases which they must prioritise and which their members must develop expertise in, specifically, crime, child protection … domestic violence … and ordinary civil claims.[65]

The Tasmanian case of *Hindle v Elliot* illustrates the problem.[66] The case involved a person who made a complaint about vilification on the grounds of transgender. Proceedings were commenced in the Tasmanian Civil and Administrative Tribunal (TASCAT), but the respondent raised defences in the federal jurisdiction, including the implied freedom of political communication. TASCAT considered that it lacked jurisdiction to determine the complaint because its determination might involve the exercise of federal jurisdiction. The matter was transferred to the Magistrates Court. The Magistrates Court remitted the case to TASCAT without reference to *Citta*. When the case returned to TASCAT, the Tribunal had to decline jurisdiction again. The combination of the need to decline jurisdiction in a tribunal that has significant expertise in discrimination law and innovative procedures,[67] together with a weak human rights framework at the federal level,[68] is unfortunate.

Conclusion

In *Citta* the High Court provided clear guidance to us by recognising the incidental jurisdiction that state tribunals can exercise when faced with a claim or defence that may fall within the federal jurisdiction. However, in other respects it is another episode in the wider saga about the effect of the ch III jurisprudence upon state tribunals. Justice Beech-Jones described the problem by paraphrasing Bob Dylan: “every time a little bit of federal jurisdiction is busy being born, some part of the jurisdiction of State tribunals is busy dying”.[69] His Honour poses the question: will there be an attempt to vest policymakers and those responsible for state courts and tribunals with more flexible means of determining these cases? The search for a more flexible solution raises fundamental questions about the design of our justice system.[70]

64 *Civil and Administrative Tribunal Act 2013 No 2* (NSW) pt 3A; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) pt 3A; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) pt 9; *South Australian Civil and Administrative Tribunal Act 2013* (SA) pt 3A, but note that this part deals with claims or defences in the federal diversity jurisdiction which addresses the mischief discussed in *Burns v Corbett* (n 33) which involve residents of different states but not wider issues such as the implied freedom of political communication.

65 Justice Robert Beech-Jones, “The *Constitution* and state tribunals” (2024) 1(2) *Judicial Quarterly Review* 41, 50–1.

66 [2024] TASCAT 45.

67 On this aspect, note the comments of Kirk JA in *Searle v McGregor* (2022) 405 ALR 556; [2022] NSWCA 213, [20] referring to *Gaynor v A-G (NSW)* (2020) 102 NSWLR 123; [2020] NSWCA 48, where Basten JA and Leeming JA each discussed that preliminary steps under anti-discrimination legislation, such as attempting conciliation, could permissibly be undertaken by administrative bodies, even when a final determination of the complaint would involve judicial power: [94]–[99] (Basten JA), [124] and [138] (Leeming JA).

68 See Rosalind Croucher, “Difficult conversations — the cultural shift to rights-mindedness” (2024) 111 *AIAL Forum* 29.

69 Beech-Jones (n 65) 53.

70 Graeme Hill provides some options that may be available to state governments to address these issues: see Hill (n 40) 203, 213–15. In the meantime, experimentation exemplified by the AHRC arguments in *Citta* (discussed above) may be needed.

Filling the GAP — the guidance and appeals panel created under the *Administrative Review Tribunal Act 2024* (Cth)

*Peter Britten-Jones**

The Administrative Review Tribunal was created by s 8 of the *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*) and commenced operation on 14 October 2024. One of the more innovative aspects of the *ART Act* is the establishment of the guidance and appeals panel (GAP) which will review decisions made by government decision-makers and decisions made by the Administrative Review Tribunal.[1] This article provides an overview of the GAP's operation and legislative scheme.

Overview of the guidance and appeals panel

The GAP will conduct a review on the merits by standing in the shoes of the original decision-maker and making a fresh decision by considering the material before it and determining what is the correct or preferable decision.

Decision-making by the Tribunal has always had a greater purpose than simply resolving the grievance of a party affected by a particular government decision. Decisions of the Tribunal often serve as guidance for the original decision-maker and lead to better decision-making processes by the minister or government agency. Decisions of the Tribunal also serve as guidance for members of the Tribunal when they consider similar issues on a merits review application. Whilst a member is not bound by another decision of the Tribunal, the need for consistency in administrative decision-making has long been recognised and can be traced to Sir Gerard Brennan in *Drake and Minister for Immigration and Ethnic Affairs (No 2)* who said:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.[2]

In 2005, Justice Downes, as President of the Administrative Appeals Tribunal, in *Re Confidential and Australian Prudential Regulation Authority* referred to the importance of consistency in administrative decision-making but added: "Consistency cannot be achieved unless what there is to be consistent with is known."[3]

A key feature of the GAP which will promote consistency is that decisions of the GAP in relation to matters considered significant to administrative decision-making will usually be designated as "Tribunal guidance decisions" (discussed in more detail below). These decisions will not be binding on Tribunal members but there is a legislated requirement that non-judicial members, when making a decision, have regard to Tribunal guidance decisions that raise facts or issues similar to those raised in a proceeding. Over time, it is expected that the Tribunal will build up its own quasi-jurisprudence as the opportunity arises for Tribunal guidance decisions to be made.

* Deputy President, Administrative Review Tribunal. This article is an edited version of a paper about the Guidance and Appeals Panel delivered by Deputy President Britten-Jones at an Administrative Review Tribunal induction session in Melbourne.

1 *Administrative Review Tribunal Act 2024* (Cth) pt 5 (*ART Act*).

2 (1979) 2 ALD 634, 639 (Brennan CJ).

3 (2005) 42 AAR 297, [21].

When will a matter be referred to the GAP?

Broadly speaking, the Tribunal may be constituted as a GAP to deal with two situations:

(a) where there is an issue of significance to administrative decision-making; and

(b) where a Tribunal decision may contain an error of fact or law materially affecting the Tribunal decision.

The President decides what matters will be heard by the GAP. The President may refer a current application to the GAP before a Tribunal decision has been made. This is the first way that a GAP proceeding can start. The second way is that a party may apply to the President to refer a Tribunal decision for rehearing to the GAP. The alternative to a party applying to refer a decision to the GAP is for the party to appeal on a question of law to the Federal Court, in which case the matter will proceed by way of judicial review. That alternative will not be lost even after a referral to the GAP because the decision made by the GAP can be appealed to the Federal Court.

Tribunal decisions that will not go to the GAP

Subject to the President being appropriately satisfied, there is no limit on the types of Tribunal applications (yet to be heard and determined) that may be referred to the GAP, but there are significant restrictions on the types of Tribunal decisions that may be referred to the GAP for rehearing. The Tribunal decisions that will not go to the GAP are:

(a) decisions made by a Judicial Deputy President sitting alone or with other members;[4]

(b) most or all of the decisions made in the jurisdictional areas of veterans,[5] social security,[6] intelligence and security,[7] migration and protection (including character-related visa decisions made under ss 501–501CA of the *Migration Act 1958* (Cth)),[8] and taxation and business;[9] and

(c) decisions made under the *Freedom of Information Act 1982* (Cth).[10]

4 *ART Act* (n 1) s 123(4).

5 *Military Rehabilitation and Compensation Act 2004* (Cth) s 355A; *Veterans' Entitlements Act 1986* (Cth) s 176(10).

6 *ART Act* (n 1) s 131W. However, the President may refer an application for review of an eligible social services decision or for second review to the GAP under s 122.

7 Ibid s 155. Also, under ss 4 and 155, decisions made under the *Archives Act 1983* (Cth) and the *Freedom of Information Act 1982* (Cth) in relation to documents or records claimed to be exempt on national security grounds are “exempt security record decisions” and comprise an “intelligence and security decision” which cannot be referred to the GAP (with an exception in the *Archives Act* s 55A(5)(2)).

8 *Migration Act 1958* (Cth) s 500AA (which does not apply in relation to an application for review of a decision under pt 3).

9 *Administrative Review Tribunal Rules 2024* (Cth) r 15 lists legislation whose decisions are not reviewable by the GAP, including a “taxation law”.

10 *Freedom of Information Act 1982* (Cth) s 57A(3).

With respect to migration and protection matters, the relevant explanatory memorandum states:

> The legitimate objective pursued by restricting visa related reviewable decisions from appeal to the guidance and appeals panel is to support the efficient and timely resolution of matters, to preserve the finality of Tribunal decisions (ensuring clear visa status for applicants), and to prevent applications being made to the guidance and appeals panel to prolong an applicant's stay in Australia. Given the significant volume of reviewable migration and protection decisions, it is both reasonable and necessary to limit the number of external reviews an applicant may pursue.
>
> The measure is also proportionate, as the President of the Tribunal retains the ability to refer matters to the guidance and appeals panel, should the President be satisfied that the application raises an issue of significance to administrative decision-making and if it is appropriate in the interests of justice to re-constitute the Tribunal. This provides that the key systemic benefits of the guidance and appeals panel remain available for these types of decisions.[11]

With respect to social security, veterans and freedom of information matters, applicants have already had the benefit of an external review (through tier 1 of the Tribunal, the Veterans' Review Board or the Information Commissioner respectively) and therefore it was considered unnecessary to allow access to a further layer of review, noting that judicial review may still be pursued in the courts on points of law and that the President may still refer an application for review of a decision to the GAP on the basis it raises an issue of significance to administrative decision-making.[12]

The legislative scheme

The relevant legislation with respect to the GAP is in:

- part 5 of the *ART Act*; and
- division 3 of the *Administrative Review Tribunal Rules 2024* (Cth).

The President has also made the *Administrative Review Tribunal (Guidance and Appeals Panel) Practice Direction 2024* (*GAP Practice Direction*), the purpose of which is to make directions about the practices and procedures applicable to referral of matters to the GAP.[13] The *GAP Practice Direction* refers to first instance referrals and second instance referrals.

First instance referrals

Section 122(1) of the *ART Act* provides:

> If:
>
> (a) an application for review of a decision is made to the Tribunal (other than a guidance and appeals panel application); and

11 Revised explanatory memorandum, Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2024 (Cth) 9 [52]–[53].
12 With respect to social services decisions, see the note to *ART Act* (n 1) s 131W.
13 Administrative Review Tribunal, *Administrative Review Tribunal (Guidance and Appeals Panel) Practice Direction 2024*, 14 October 2024, para 1.4 (*GAP Practice Direction*).

(b) the President is satisfied that:

(i) the application raises an issue of significance to administrative decision-making; and

(ii) it is appropriate in the interests of justice that the Tribunal be constituted by the guidance and appeals panel for the purposes of the proceeding in relation to the application;

the President may refer the application to the guidance and appeals panel.

This provision enables the President to identify and transfer an application for review directly to the GAP. It applies where there is no existing Tribunal decision on the matter. A referral under s 122(1) is described as a first instance referral.

A first instance referral may be:

(a) on the President's own initiative; or

(b) on request of a party.

Part 2 of the *GAP Practice Direction* deals with first instance referrals.

First instance referral on the President's own initiative

With respect to the first instance referral on the President's own initiative, para 2.2 of the *GAP Practice Direction* provides that members and staff of the Tribunal will inform the President of any application for review that may warrant consideration of whether it is appropriate for first instance referral to the GAP. Jurisdictional area leaders (JALs) are responsible for informing the President of systemic issues and identifying suitable cases for referral to the GAP.[14] List leaders[15] will assist their JAL to perform this function by identifying novel or systemic issues and raising them for their JAL's consideration.

If the President considers referral is appropriate, the parties would usually be asked for written submissions as to whether the matter should be referred or not. The President will consider those written submissions and make a decision on the papers (without an oral hearing) as to whether to refer or not.

First instance referral on request of a party

With respect to the first instance referral on request of a party, para 2.6 of the *GAP Practice Direction* provides that a referral request (whether by the applicant or the respondent) should be made as soon as possible. The requirements of a referral request are set out in para 2.7 of the *GAP Practice Direction* and includes setting out why the matter is of significance to administrative decision-making and why it is in the interests of justice that the matter be referred to the GAP. The other parties must respond to any referral request stating whether they support or oppose it in accordance with paras 2.8 to 2.14 of the *GAP Practice Direction*.

14 *ART Act* (n 1) s 197(5)(f).
15 The President may assign a Deputy President or senior member to be a list leader under ibid s 198(1).

There is scope for reply submissions. The President will then determine whether to grant or refuse a referral request on the papers, unless an oral hearing is requested and considered necessary.[16]

Discretionary considerations

In considering whether to make a first instance referral, the President will be guided by considerations set out in paras 5.2 to 5.5 of the *GAP Practice Direction*:

> 5.2 … [T]he President will consider the circumstances of the parties to the proceeding, including whether a referral is likely to disadvantage a party unfairly or cause an unacceptable delay in reaching an outcome.
>
> 5.3 … [T]he President may consider whether the proceeding is likely to have a broader impact on persons outside the parties to the proceeding or is likely to improve administrative decision-making.
>
> 5.4 Proceedings that raise an issue of significance to administrative decision-making may include matters that are novel, complex, could potentially affect large numbers of individuals, or involve significant systemic issues that require guidance. For example, matters that:
>
> (a) raise issues concerning the legality of an agency's practice, procedure or policy;
>
> (b) impact or alter an agency's existing policy or practice across similar types of matters;
>
> (c) involve inconsistent or contrary outcomes to recent decisions on matters that are substantially similar in issue and fact;
>
> (d) involve a pattern of decision-making that affects significant numbers of people; or [sic]
>
> (e) involve consideration of a new, complex or untested legislative provision;
>
> (f) raise issues of complexity or controversy warranting the making of a Tribunal guidance decision.
>
> 5.5 Other discretionary factors may also be relevant. Examples of discretionary factors that may justify refusal of a referral request include:
>
> (a) the stage in the progress of the Tribunal proceeding at which a referral request is made[:] … the closer to a scheduled hearing of proceeding the application is made, the stronger the discretionary factors in favour of refusing the request may be; and
>
> (b) where a referral to the GAP would hinder the Tribunal's ability to effectively pursue the [Tribunal's] objective in section 9 of the [*ART Act*].

Second instance referrals

Section 123(1) of the *ART Act* provides a general rule:

> Application may be made to the President to refer a decision of the Tribunal under section 105 … to the guidance and appeals panel.

These referrals are described as second instance referrals because they refer a decision of the Tribunal for a second hearing. Sections 124 to 126 provide how and when to apply and require parties to be notified. Section 127(2) deals with stay applications.

16 *GAP Practice Direction* (n 13) para 2.19.

Section 128(1)–(2) provides:

> *President's decision*
>
> (1) If a person applies to refer a decision of the Tribunal to the guidance and appeals panel, the President may refer the Tribunal decision to the guidance and appeals panel or refuse the application.
>
> *Requirements for decision*
>
> (2) The President may refer the Tribunal decision to the guidance and appeals panel if the President is satisfied that:
>
> (a) the Tribunal decision raises an issue of significance to administrative decision-making; or
>
> (b) the Tribunal decision may contain an error of fact or law materially affecting the Tribunal decision.

Part 3 of the *GAP Practice Direction* deals with second instance referrals.

Paragraph 3.1 of the *GAP Practice Direction* provides that a party to a Tribunal decision may apply to the President to refer the Tribunal decision to the GAP for fresh review. A note refers to s 131 of the *ART Act*, which allows the GAP to have regard to evidence and documents in the earlier Tribunal proceeding, warns against unnecessary repetition, and sets out what the primary focus of a referral application should be.

Paragraph 3.2 of the *GAP Practice Direction* provides the form for the referral application and what it should include. Paragraph 3.3 specifies the required particulars identifying errors of fact and law in the paragraphs of the reasons for the Tribunal decision. If these particulars are not provided, the Tribunal will not accept a referral application. There is a form and requirements for a response to a referral application, which include whether the responding party supports or opposes the referral application. There is scope for reply submissions.

The relevant explanatory memorandum provides:

> Even if the President is satisfied that the Tribunal decision meets either of these criteria, the President retains the discretion regarding referral and is not obliged to refer the Tribunal decision to the guidance and appeals panel.
>
> This threshold is intended to be high. Issues that do not materially affect the Tribunal's substantive decision, such as administrative decisions of the Tribunal, are more appropriately dealt with through judicial review as they would raise issues concerning the appropriate exercise or improper exercise of power. It also avoids resources being expended unnecessarily if, for example, the Tribunal has made a minor factual error that does not affect the substance of the decision. This promotes an efficient use of resources and is consistent with other Tribunals, such as various state and territory civil and administrative tribunals, which provide a similar internal mechanism of review for errors of fact or law.[17]

Paragraph 5.6 of the *GAP Practice Direction* reiterates that the President is not required to refer any decision of the Tribunal to the GAP.

17 Revised explanatory memorandum, Administrative Review Tribunal Bill 2024 (Cth) 118 [828]–[829].

Discretionary considerations

In considering whether to make a second instance referral, the President will be guided by considerations set out in paras 5.7 to 5.10 of the *GAP Practice Direction*:

> 5.7 … [T]he President will consider the circumstances of the parties. These may include (but are not limited to):
>
> (a) the financial burden on a party to have the matter heard by the GAP;
>
> (b) the risk of trauma that further proceedings may have on a party;
>
> (c) whether parties have adequate representation; and
>
> (d) concerns over safety, health or confidentiality of a party, and any other concern.
>
> 5.8 In determining whether to refer a Tribunal decision that may contain a material error of fact or law, other relevant considerations may include:
>
> (a) the likelihood that the error occurred, and its significance to the Tribunal's decision on review;
>
> (b) whether the error is one that is likely to be repeated if not identified and resolved;
>
> (c) whether the error involves a matter of law that is better left to the courts to determine;
>
> (d) the impact on the resources of the Tribunal and parties to the review of conducting a further review into the matter;
>
> (e) any other factor the President considers relevant.
>
> 5.9 [The significance of the matter, taking into account relevant considerations including] those specified at paragraph 5.4 …
>
> 5.10 Other discretionary factors may also be relevant. Examples of discretionary factors that may justify refusal of a referral application include:
>
> (a) where there may be an error of fact or law which may have materially affected a Tribunal decision but the error involved a very small monetary amount;
>
> (b) where, after a Tribunal decision was made, one of the parties to the earlier Tribunal proceeding offered to place the GAP applicant in the position the GAP applicant would have been in if the Tribunal decision had been entirely in favour of the GAP applicant, but the GAP applicant unreasonably refused the offer;
>
> (c) where one of the parties has appealed to the Federal Court, on a question of law, from the Tribunal decision; and
>
> (d) where a referral to the GAP would hinder the Tribunal's ability to effectively pursue the objective in section 9 of the [*ART Act*].

Decision regarding referral by the President

The President will determine whether to grant or refuse a referral request on the papers without conducting an oral hearing, unless an oral hearing is requested and considered necessary.[18]

18 *GAP Practice Direction* (n 13) para 6.2.

Once matters have been referred to the GAP, the Tribunal will generally manage those matters in accordance with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*.[19] A directions hearing will be held within two weeks and parties must be prepared to address issues set out in para 7.3 of the *GAP Practice Direction*, which are designed to progress the matter expeditiously to a hearing. Paragraph 7.3 states:

> Where a party is represented, the representative must attend the directions hearing and must be prepared to address the issues raised including:
>
> (a) the filing of any evidence and documents that are supplementary to the evidence and documents already filed with the Tribunal;
>
> (b) the filing of any written submissions, supplementary to the written submissions already filed with the Tribunal as part of the application or request that the proceeding be referred to the GAP;
>
> (c) the parties' estimate of the length of the hearing before the GAP;
>
> (d) the filing of hearing certificates, if required; and
>
> (e) the filing of an agreed statement of facts.

Constitution of the GAP

Where a matter is referred to the GAP for a first or second instance hearing on the basis that it raises an issue of significance to administrative decision-making, the GAP must be constituted by two or three Tribunal members, one of whom must be the President or a Deputy President.[20]

Where a Tribunal decision is referred to the GAP for a second instance hearing on the basis that it may contain a material error of law, it may be constituted by one, two or three members, provided that the GAP presiding member is more senior than the member who made the first instance Tribunal decision. There is an exception to the seniority requirement where the first instance decision was made by a Non-Judicial Deputy President and the GAP is constituted by two or three members; in such a case, the GAP presiding member can be the President or a Judicial or Non-Judicial Deputy President.[21]

Tribunal guidance decisions

Section 109 of the *ART Act* provides for a Tribunal guidance decision. In effect, a Tribunal guidance decision is a decision of the GAP that arises from a Presidential referral of an application or Tribunal decision that raises an issue of significance.

The President may declare that such a GAP decision is not a Tribunal guidance decision, where, for example, the decision is specific in nature and not likely to be applicable to the general decision-making of the Tribunal, turns on outdated legislation or precedents, or for such other reason as the President considers appropriate.[22]

19 Administrative Review Tribunal, *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*, 5 December 2024.
20 *ART Act* (n 1) ss 40 and 41.
21 Ibid s 42.
22 *ART Act* (n 1) s 128; *GAP Practice Direction* (n 13) paras 2.19, 5.2, 5.6, 6.2.

Section 110 provides that the Tribunal (excluding Judges) must have regard to Tribunal guidance decisions that it considers raise facts or issues similar to those raised in a proceeding when making its decision in that proceeding. The relevant explanatory memorandum states:

> Whether the Tribunal considers that the guidance decision raises facts or issues similar to those in the proceeding is a matter for the Tribunal. The Tribunal is not expected to have to comprehensively distinguish each Tribunal guidance decision from the matter at hand. Rather, if there is a guidance decision that the Tribunal considers relevant, it must consider it in making its decision.[23]

Section 110(3) provides that a failure by the Tribunal to have regard to a Tribunal guidance decision "does not affect the validity of its decision". The explanatory memorandum says:

> This is because, while Tribunal guidance decisions are intended to have a normative effect on the decision-making of the Tribunal, they are not binding precedent. … [A] party may use a contrary guidance decision to strengthen their case that the Tribunal erred in making its decision when making an application to refer a decision to the [GAP]. Further, Tribunal members are expected to consider matters consistently with Tribunal guidance decisions, and non-compliance with [s 110(1)] would be able to be addressed through a number of means, such as the performance and conduct management framework. However, decisions remain final and valid provided they are lawfully made by the Tribunal.[24]

Referral decisions do not require reasons and cannot be appealed

A decision of the President to refer or not refer a Tribunal decision to the GAP does not require a statement of reasons and cannot be the subject of an appeal under s 172(1) of the *ART Act*. Because the refusal application is made to the President and not the Tribunal, the application does not come within the definition of "proceeding" in s 4 of the Act. Section 172(2) states, to avoid doubt, that sub-s (1) does not apply to a s 128 decision and it includes a note that a decision under s 128 is not a decision of the Tribunal.

Conclusion

The decisions of the GAP will provide internal guidance to the Tribunal, promote consistency, and have a normative effect on its decision-making and on administrative decision-making more broadly. The relevant explanatory memorandum says further that the GAP "is intended to promote rapid responses to emerging and systemic issues and ensure that they are resolved and can be acted on more quickly, by both the Tribunal and government agencies".[25]

I believe this innovation of introducing the GAP will deliver benefits in three areas:

- first, to those who make decisions within government that are the subject of review to the Tribunal;
- second, to Tribunal members to help them write better decisions; and

23 Revised explanatory memorandum, Administrative Review Tribunal Bill 2024 (Cth) 105 [738].
24 Ibid 106 [741].
25 Ibid 106 [739].

- third, to the applicant who will have the benefit of better decisions and being able to challenge an error of fact or law without the expense of judicial proceedings.

The Administrative Review Tribunal will be better able to achieve its statutory objectives through the innovation of the GAP. I would expect that over the next few years the Tribunal will *fill the GAP* with many Tribunal guidance decisions which will improve the quality of government decision-making.

Current issues in the extent and limits of the powers of APRA and ASIC in superannuation — Part 1: Into the labyrinth

*Dominique Hogan-Doran SC**

The Australian superannuation sector is experiencing unprecedented growth, underscoring the importance of maintaining systemic stability through sound regulation and management.[1] Mounting geopolitical risk, rising interest rates and high inflation, persisting threats of cyber-attacks, and growing frequency and intensity of natural disasters have prompted regulators to prioritise activities that address these key challenges. This context makes the sector's regulators increasingly primed to exercise an expanded suite of regulatory powers. They do so not merely to stop or deter misconduct, but to mandate preferred policy outcomes, including trustee resiliency, fund sustainability, better transparency in relative performance, and improved member outcomes.

This article places the extent and limits of the expanded powers of regulators of the superannuation sector under the microscope. In the aftermath of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[2] (Financial Services Royal Commission), a suite of policy changes resulted in a material increase in the exposure to, and risk of, regulatory liability for Australia's licensed superannuation trustees. Increased liability *exposure* was a consequence of expanded statutory duties and strengthened sanctions for non-compliance. Increased liability *risk* was a function of enhanced regulatory powers and heightened enforcement postures adopted by the key superannuation regulators, the Australian Prudential Regulation Authority (APRA)[3] and the Australian Securities and Investments Commission (ASIC).[4]

The article is in three parts. Part 1 begins with an examination of the incidence and consequences of the complexity of the legislative regime, and recent recommendations by the Australian Law Reform Commission (ALRC) for the regime's simplification. The regulators' powers of modification and relief from perceived statutory burdens are given illustrative focus. Next, the regulatory architecture as embodied in the "twin peaks" model is explored, contrasting APRA's role as a promoter of *stability* and ASIC's role as a promoter of consumer *confidence*. Coordination and cooperation between the regulators post Financial

* Dominique Hogan-Doran SC is a Senior Counsel of the Australian Bar and a past trustee director of APRA-regulated industry superfund Club Plus Super (since merged with AustralianSuper). This article is a revised and updated version of a paper first presented to the Law Council of Australia's Superannuation Lawyers Conference in March 2024. This Part I is current as at 28 February 2025.

1 As at 31 December 2024, total superannuation assets had reached $4.2 trillion. Of this, $2.9 trillion were in APRA-regulated funds, which saw a 14% increase over the year. See "APRA releases superannuation statistics for December 2024" (Media release, 27 February 2025) <https://www.apra.gov.au/news-and-publications/apra-releases-superannuation-statistics-for-december-2024>.

2 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 4 February 2019) (*Financial Services Royal Commission Final Report*). (The author acted for the Commonwealth Bank of Australia and the Energy Industries Superannuation Scheme.)

3 The Australian Prudential Regulation Authority (APRA) was established under s 7 of the *Australian Prudential Regulation Authority Act 1998* (Cth) (*APRA Act*).

4 The Australian Securities and Investments Commission (ASIC) was established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth) and is continued in existence by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*).

Services Royal Commission is examined, including by reference to the distribution of their licensing responsibilities and coordination of their investigations and enforcement action.

In Part 2,[5] a range of tools available to the regulators will be considered, including powers to: impose (and revoke) additional licence conditions; give directions; issue infringement notices; suspend, remove, or cancel licences; appoint acting trustees; ban and disqualify regulated persons; accept enforceable undertakings; commence civil penalty proceedings; intervene in proceedings; seek compensation; and resolve proceedings by agreement.

Finally, in Part 3,[6] the potential avenues to review and challenge wayward regulatory action will be examined. Beyond internal merits review, this includes independent merits review by external bodies such as the new Administrative Review Tribunal, and by means of judicial review, including through examination of declaratory orders, and an overview of the varieties of prerogative relief.

Complexity of the legislative regime

Navigability challenges

The law governing the Australian superannuation ecosystem is highly interconnected, creating navigability challenges[7] in what is a "labyrinthine" regime.[8] The sector is subject to a host of general law principles, Acts, standards, instruments, regulatory guidance materials and self-regulatory regimes.[9]

Primary among these is the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*), which establishes the broader framework for the regulation of superannuation funds.[10] In their provision of superannuation trustee services, which requires them to be simultaneously holders of registrable superannuation entity (RSE) licences and Australian financial services (AFS) licences, licensees are subject to both the *SIS Act* and ch 7 of the *Corporations Act 2001* (Cth), in which general regulatory obligations are "scattered throughout".[11] The *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) is also relevant, pt 2 div 2 governing conduct relating to financial services, including unconscionable

5 Part 2 will be published in (2025) 114 *AIAL Forum*.
6 Part 3 will be published in (2025) 115 *AIAL Forum*.
7 This is particularly evident in respect of defined terms, with crossover occurring between legislation and regulations. For illustrations, see Australian Law Reform Commission (ALRC), *Improving the Navigability of Legislation* (Background Paper Financial Services Legislation (FSL) 3, October 2021).
8 *Sandys Swim Pty Ltd v Morgan* [2022] FCA 1574, [20] (S Derrington J); see also ALRC, *Initial Stakeholder Views* (Background Paper FSL1, June 2021) [30], citing the Association of Superannuation Funds of Australia submission.
9 There is a "roiling intermingling of trust, contract, tort and statute": M Scott Donald, "Parallel streams? The role of contract, trust, tort and statute in superannuation funds and managed investment schemes" (2020) 14(2) *Journal of Equity* 151, 152.
10 The main object of the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*) is "to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts": s 3(1).
11 ALRC, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Report No 141, November 2023) 129 [5.62] (*Confronting Complexity Report*).

and misleading or deceptive conduct.[12] There is also a complex interrelationship between these various pieces of legislation and delegated legislation.[13]

Under the general law, a superannuation trust is not a juristic person with a legal personality distinct from that of the trustee and beneficiary. It is an equitable obligation binding a person to deal with property that is owned and controlled as a discrete fund, segregated from the personal estate of the trustee, to carry out particular purposes or for the benefit of particular persons (beneficiaries), who may enforce the obligation.[14] Yet under statute, an RSE is treated as a separate entity.[15] When established as trusts (as they invariably are[16]), RSE licensees are subject to the entire body of trusts law and the state/territory trustee legislation,[17] save to the extent that those principles are inconsistent with Commonwealth law.[18] Other areas of the general law, including the law governing contract and tort, may also be relevant. Misconduct can thus attract liability under multiple sources of law.

Powers to change the law

As confronting as that complexity may be, the applicable law is not always as it seems. To illustrate, "notional amendments", also known as "modifications", are provisions that change the legal effect of another provision without changing the text of that provision. The High Court has confirmed that these notional sections create new rights and liabilities.[19] The grant of this kind of power to a regulator involves "a compromise between the technique of general legislative prescription applying inflexibly to all cases, and that of administrative discretion addressing issues on a case-by-case basis".[20]

12 See ALRC, *All Roads Lead to Rome: Unconscionable and Misleading or Deceptive Conduct in Financial Services Law* (Background Paper FSL9, December 2022).

13 All forms of delegated legislation are legally binding. Delegated legislation includes regulations — for example, *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*SIS Regulations)*, *Corporations Regulations 2001* (Cth) (*Corporations Regulations*), and *Australian Securities and Investments Commission Regulations 2001* (Cth) — as well as APRA's prudential and reporting standards and ASIC's legislative instruments (subject to parliamentary disallowance).

14 John Dyson Heydon and Mark Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 1 [1-01] (*Jacobs' Law of Trusts*).

15 *SIS Act* (n 10) s 10 (definitions of "registrable superannuation entity" and "regulated superannuation fund"). Per s 19(1), in order to be a regulated super fund, (i) a superannuation fund must have a trustee (sub-s (2)), and either the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules (sub-s (3)(a)) or the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions (sub-s (3)(b)); and (ii) the trustee must give to the Commissioner of Taxation a signed written notice in the approved form (irrevocably) electing that the *SIS Act* is to apply in relation to the fund (sub-s (4)).

16 *Jacobs' Law of Trusts* (n 14) 630 [29-07]. Exceptions include some public sector superannuation schemes.

17 *Trustee Act 1925* (ACT); *Trustee Act 1925* (NSW); *Trustee Act 1893* (NT); *Trusts Act 1973* (Qld); *Trustee Act 1936* (SA); *Trustee Act 1898* (Tas); *Trustee Act 1958* (Vic); *Trustees Act 1962* (WA). In 2024, a new Trusts Bill 2024 (Qld) was before the Queensland Parliament, the aim of which was to replace the existing Act with new, modernised and simplified trusts legislation: see generally, Explanatory Notes, Trusts Bill 2024 (Qld). The Bill, however, lapsed on the dissolution of Parliament in October 2024.

18 See *SIS Act* (n 10) s 350, which provides that "[i]t is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act". See further M Scott Donald and Aryan Mohseni, "Resolving statutory overlap in the superannuation system" (2025) 99(2) *Australian Law Journal* 114.

19 *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, 341.

20 Ibid 333 (the appeal concerned an ASIC declaration under s 739 of the now repealed *Corporations (New South Wales Act) 1990* (NSW) that the compulsory acquisition provisions should apply to a particular takeover as if they were modified or varied by adding, deleting and substituting certain words).

The ALRC argues that these modification tools to build the legislative framework create more problems than they aim to solve. Notional amendments create substantial uncertainty because users cannot assume that the text of a provision actually reflects the law as it is applied.[21] Notional amendments can also create an opaque puzzle for users of the legislation.[22]

The *Corporations Act* is exceptional in the extent to which it uses notional amendments. In conducting the first ever stocktake of notional amendments affecting the *Corporations Act*, the ALRC identified over 1,200 distinct notional amendments in force, affecting over 600 provisions of the Act and its regulations.[23] Parts 7.7 and 7.9 alone account for half of all notional amendments to the *Corporations Act*, as well as 27% of the words in ch 7 of the Act.[24]

Alongside its power to grant exemptions from the application of specific provisions in the *Corporations Act*, ASIC also has the power, in certain instances, to change the operation of the Act and the *Corporations Regulations 2001* (Cth) by omitting, modifying or inserting provisions.[25] This might be done by notional amendments, conditions exemptions or (proliferating) legislative instruments. ASIC's power to modify primary legislation extends to those directly affecting licensed providers of superannuation trustee services:

- section 926A(2)(c) of the *Corporations Act* grants power to modify pt 7.6 (licensing of financial services providers);
- section 951B(1)(c) grants power to modify pt 7.7 (financial services disclosure);
- section 992B(1)(c) grants power to modify pt 7.8 (other provisions re financial products and financial services); and
- section 1020F(1)(c) grants power to modify pt 7.9 (financial product disclosure).

21 For example, s 1012G of the *Corporations Act 2001* (Cth) (concerning the giving of a product disclosure statement) was replaced by a notional amendment in 2005. The text of the provision in the Act has not had any legal effect since then, and the "real" s 1012G is in reg 7.9.15H of the *Corporations Regulations* (n 13). Yet there is nothing on the face of the *Corporations Act* to alert users to this change.

22 For example, ASIC Class Order 14/1262 notionally amends s 1012D of the *Corporations Act* (n 21), which is also notionally amended by reg 7.9.07FA of the *Corporations Regulations* (n 13). To understand the law, users must therefore read the original s 1012D of the Act, alongside the subsection notionally inserted by the *Corporations Regulations*, and the additional six subsections notionally inserted by ASIC Class Order 14/1262.

23 ALRC, *Recommendation 18 — Notional amendments database* (Interim Report B — Additional Resources, September 2022).

24 ALRC, *Confronting Complexity Report* (n 11) [5.51].

25 The history of legislation giving ASIC the power to modify the corporations legislation goes back to the *Companies (Acquisition of Shares) Code* of 1980 and the *Companies Code* of 1981 concerning prospectuses: see Stephen Bottomley, "The notional legislator: the Australian Securities and Investments Commission's role as a law-maker" (2011) 39(1) *Federal Law Review* 1, 12–14. Prior to 2015, legislative instruments were referred to as class orders to differentiate them from other instruments. ASIC used the prefix "CO" before their number; for example, instrument 03/67 is a class order, and is referred to as CO 03/67. From 2015 legislative instruments are cited first using their full title, for example, "*ASIC Corporations (Advertising by Product Issuers) Instrument 2015/XXX*" and subsequently as "ASIC Instrument 2015/XXX".

Since 2021, ASIC has also published a list of notifiable instruments issued by ASIC that are currently in operation.[26] A "notifiable instrument" is an instrument that is likely to be of long-term public interest for which public accessibility and centralised management is desirable. It is not legislative in character. Some examples include:

- instruments declared to be notifiable instruments by primary law or regulations, and

- instruments that are neither legislative instruments nor notifiable instruments under primary law or regulations but are made under a power given by law or delegated by Parliament and are registered as notifiable instruments to enable public accessibility.

APRA enjoys similar powers to modify the application of the law. Part 29 of the *SIS Act* confers power on APRA to grant exemptions from, and make modifications of, certain provisions of that Act and its regulations.[27] Section 332(1) of the *SIS Act* has the effect that APRA may, in writing, declare that a "modifiable provision"[28] is to have effect as if it were modified as specified in the declaration. Indeed, s 334 has the effect that a declaration made by APRA may relate to a *particular* superannuation entity.

ASIC emphasises the existence of its modifications to the Australian financial services licensing regime to minimise potential overlap in licensing, although, as a practical matter, there remains the potential for substantial overlap in a dual-regulated licensee's day-to-day operations.

On a broad view, any modification or change to the way in which an Act applies to a class of persons constitutes a reform of the law, at least as far as it affects that class of person.[29] On the one hand, the absence of specific legislative guidance on the boundaries of the regulators' discretionary powers of modification has led the Federal Court to confirm that "there is no statutory foundation for stating that the power [of modification] … should be used 'sparingly' ".[30] On the other hand, the discretionary nature of the power means if the regulator is cautious, it will be difficult to review the decision when relief is not granted. It also means that if used broadly, the power bypasses the processes of substantive public scrutiny and accountability that can be applied to statutory rules.

26 "Notifiable ASIC Instruments", *ASIC* (Web page, 1 September 2024) <https://asic.gov.au/regulatory-resources/find-a-document/legislative-instruments/notifiable-asic-instruments/>.

27 *SIS Act* (n 10) s 326.

28 An illustration of the convoluted definition of "modifiable provision" in ibid s 327 can be seen in the advice of Robb J in *Re AUSCOAL Superannuation Pty Ltd atf the Mine Superannuation Fund; Application for Judicial Advice* [2024] NSWSC 32, [210]:

> Section 327 of the SIS Act provides that the meaning of "modifiable provision" includes: "(h) a provision of any regulations made for the purposes of a provision referred to in paragraphs (a) to (g) [of s 327]". One of the provisions referred to in paragraph (a) of s 327 is "a provision of Part … 3." Part 3 concerns "Operating Standards", and s 31, within Part 3, provides in subsection (1): "The regulations may prescribe standards applicable to the operation of regulated superannuation funds (*funds*) and to trustees and RSE licensees of those funds." Subsection (2) contains, on an inclusive basis, the matters in relation to which standards may be prescribed. They include: "(s) the financial position of funds … (t) the funding and solvency of funds; (u) the winding-up of funds."

(The author appeared for the Mine Super trustee in the proceedings.)

29 Bottomley, "The notional legislator" (n 25) 7.

30 *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 25 ACSR 382, 389.

ASIC has published guidance, albeit discretionary, for its decisions to grant relief from the operation of the law.[31] Regulatory Guide 51 *Applications for Relief* makes it clear that this is only one aspect of the Commission's wider discretion to grant relief from the *Corporations Act*. The guide also deals with relief from the *SIS Act*. ASIC emphasises it may exercise the power in response to:

- "problems of the moment" (for example, short selling class orders made during the 2008 global financial crisis (GFC));
- perceived gaps in legislation (for example, to accommodate new financial products that were not contemplated when the legislation was written[32]);
- unintended or unanticipated consequences of the operation of the legislation in particular cases;[33] and
- anticipated or foreshadowed amendments to the legislation or regulations.[34]

According to Regulatory Guide 51, in responding to applications ASIC seeks to exercise its discretion consistently with existing policy, and "on the basis of principles which are definite and whose limits are clearly defined".[35] A key principle is that ASIC will grant the relief being sought where it is demonstrated that there is a net regulatory benefit or that any regulatory detriment is minimal and is outweighed by commercial benefit.[36] Relief will take the form of a legislative instrument where "it is not necessary to consider any relevant factual matters on a case-by-case basis".[37] Further, ASIC emphasises in the regulatory guide that,

> [i]n general, we will not use our discretionary powers to effect law reform. That is, relief will not be given to reverse the usual and intended effect of the *Corporations Act* …[38]

A recent example of an ASIC legislative instrument concerning superannuation is the instrument made under s 328(1) of the *SIS Act* exempting RSE licensees from having to comply with s 29QC(1) of the Act before 1 January 2026.[39] A recent notifiable instrument

31 ASIC classifies applications for relief as "standard" (where relief is sought in accordance with published ASIC policy), "minor and technical" (seeking the application of existing policy to a new situation that is not contemplated by the Act), or "new policy" (asking ASIC to formulate substantive new policy).
32 Explanatory Memorandum, Financial Services Reform Amendment Bill 2003 (Cth) [3.66].
33 Ibid [3.65].
34 As it did in response to the Australian Government's announced intention to make regulations in response to the decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11, holding that a funded representative action was a "managed investment scheme" as defined in s 9 of the *Corporations Act* (n 21).
35 ASIC, *Applications for relief* (Regulatory Guide 51, July 2020) [RG 51.51]–[RG 51.53].
36 Ibid [RG 51.57].
37 Ibid [RG 51.63].
38 Ibid [RG 51.62].
39 ASIC, *ASIC Superannuation (Disclosure and Reporting Consistency Obligations) Instrument 2023/941* (20 December 2023). Section 29QC(1) of the *SIS Act* (n 10) requires that information given to the public (eg, in disclosure documents) be calculated in the same way that the information is reported to APRA under an APRA reporting standard. APRA's reporting standards have been evolving as part of APRA's superannuation data transformation project, so there is some uncertainty in aligning the obligations. The new legislative instrument continues the temporary relief previously provided under ASIC Class Order14/541 which was due to expire on 1 January 2024.

concerning disclosures by a *particular* trustee (Vanguard Super) relied on s 328(1) of the *SIS Act* to modify s 29QB(1) of that Act (website information) and on ss 926A(2), 994L(1) and 1020F(1) of the *Corporations Act* to modify s 912A(2) (complaints management documentation), s 994B(9) (target market determination) and s 1017BA(1) (product dashboard information) of that Act.[40]

Simplification agenda

A prominent justification for a mechanism that permits a regulator to modify an Act or regulations is that it allows a *prompt* response to problems that arise in an often fast-changing financial setting. But there are obvious problems of transparency. Parliamentary scrutiny occurs only *after* a legislative instrument has been made and, in most cases, after it has commenced operation.[41] Indeed, most ASIC class orders were expressed to commence operation on the date they were registered.[42] The mechanism of disallowance — or veto — is thus essentially reactive, not proactive.

To confront the complexity, the ALRC's recommended legislative model for regulation of the financial services industry comprises primary legislation (in the form of the "Financial Services Law"), together with "scoping orders" and "rulebooks" which would replace notional amendments and complex conditional exemptions,[43] while maintaining regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances of regulatory arrangements through delegated legislation and individual relief.[44]

Any evaluation of the ALRC's recommendations would appreciate that a legal system can be described as complex to the extent that it exhibits four features: density, technicality, differentiation, and indeterminacy or uncertainty.[45] The laws applicable to Australian licensed superannuation trustees can be seen to answer that description when assessed against each criterion:[46]

- *First*, the laws are *dense* in that their rules are numerous and encompassing, and they seek to control a broad range of conduct that can lead to conflicts between rules and their "animating policies".

- *Second*, the rules are *technical*: they require special sophistication or expertise on the part of those who wish to understand and apply them.

40 ASIC, *ASIC Corporations and Superannuation (Website Disclosure Deferral) Instrument 2022/808* (16 September 2022).
41 The making of instruments is governed by statutory provisions contained in the *Legislation Act 2003* (Cth). The main provisions are that legislative instruments must be registered in the Federal Register of Legislation and laid before each House of the Parliament within six sitting days, and are then subject to disallowance by either House. See further Department of the Senate (Cth), *Odgers Australian Senate Practice* (Parliament of Australia, 14th ed, 2022) especially ch 15 "Delegated legislation, scrutiny and disallowance".
42 Bottomley, "The notional legislator" (n 25) 16.
43 See ALRC, *Confronting Complexity Report* (n 11), Recommendation 53.
44 Ibid, Recommendations 44–46.
45 Peter H Schuck, "Legal complexity: some causes, consequences, and cures" (1992) 42(1) *Duke Law Journal* 1, 3.
46 The same point has been made for Australian corporate law more generally: Stephen Bottomley, "Corporate law, complexity and cartography" (2020) 35(2) *Australian Journal of Corporate Law* 142.

- *Third*, the rules span the public/private divide; they are institutionally *differentiated*, being located in primary and subordinate legislation, in prudential standards, in trust deeds, and corporate constitutions.

- *Finally*, the rules demonstrate a high degree of *indeterminacy* — while there are many detailed specific procedural requirements, core parts of the legal landscape are framed as broad or open-textured standards (for example, the requirement that a trustee must perform its duties and exercise its powers "in the best financial interests" of fund members[47]).

Simplification of the legislative regime finds increasing support.[48] The Financial Services Royal Commission concluded that the existing legislative framework for corporations and financial services is unnecessarily complex, fails to communicate fundamental norms, and hinders compliance.[49] In its final report on legislative complexity in the financial services laws, delivered in November 2023, the ALRC concluded that the legislative regime could be simplified and rationalised.[50] The ALRC made 35 recommendations[51] aimed at transforming corporations and financial services legislation from what one judge has described as "porridge"[52] to a "more adaptive, efficient, and navigable legislative framework".[53]

There is obvious merit in the ALRC's view that a more adaptive, efficient and navigable framework in financial services legislation generally should benefit the superannuation industry in particular.[54] The ALRC rightly observed that the provisions relating to disclosure for financial products and services are among "the most complex and least coherent" in the *Corporations Act*.[55] The sector already consists of an intricate and diverse range of funds,

47 *SIS Act* (n 10) s 52(2)(c).
48 In this context, "simplification" is wholly distinct from "deregulation": see ALRC, *Complexity and Legislative Design* (Background Paper FSL2, October 2021) [26].
49 See *Financial Services Royal Commission Final Report* (n 2) vol 1, 494–6.
50 The ALRC's terms of reference did not require it to consider whether the substantive law and policy settings by which corporations and financial services are regulated require reform. Rather, the focus of the inquiry was on the extent to which reform of the existing regulatory framework (including Acts, regulations, class orders, other instruments, and guidance documents) can be undertaken within the context of existing policy settings.
51 ALRC, *Confronting Complexity Report* (n 11). These recommendations are in addition to 23 recommendations made in interim reports. *Interim Report A* demonstrated how the existing use of definitions and defined terms in the *Corporations Act* (n 21) creates complexity and impedes navigability: ALRC, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021). *Interim Report B* demonstrated that the use of delegated legislation made under the *Corporations Act* is a significant source of complexity, particularly where delegated legislation makes notional amendments: ALRC, *Financial Services Legislation: Interim Report B* (Report No 139, September 2022). *Interim Report C* demonstrated that the structure and framing of ch 7 of the *Corporations Act* do not help users to navigate and understand the legislation or identify its fundamental norms of behaviour: ALRC, *Financial Services Legislation: Interim Report C* (Report No 140, June 2023).
52 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 7 BFRA 1, [948] (Rares J).
53 ALRC, *Confronting Complexity Report* (n 11) [1.3].
54 ALRC, *Superannuation and the Legislative Framework for Financial Services* (Background Paper FSL11, May 2023) [4].
55 ALRC, *Confronting Complexity Report* (n 11) [5.51] ("Their existing structure and framing do little to help users of the legislation find the law that applies to relevant products, services, or circumstances. These difficulties are compounded by the extensive use of notional amendments, conditional exemptions, and excessively prescriptive primary legislation.")

products and administrative structures, although these distinctions are not neatly set out in legislation, even though legislation often hinges (and impinges) on them.

Whether a simplification mantra will make its way into an already crowded parliamentary agenda remains to be seen. In the meantime, those affected will remain burdened by the costs of that complexity. For regulated entities it entails compliance costs and a less predictable regulatory environment; for consumers and investors it carries the greater risk of harm and difficulty in understanding and exercising rights; for the government and the legal system it makes legislating policy difficult, and makes it harder to interpret and apply the law; and for the community at large, it lowers competition and productivity, prompts more expensive services, and means complex law will be less likely to be complied with.

The regulatory architecture: the "twin peaks" model

Financial stability and protection

An objectives-based structure of financial regulation, the "twin peaks" model envisages two specialist mega-regulators: one charged with maintaining financial system stability and the other with market conduct and consumer protection.[56] The model was first proposed in the United Kingdom in the mid-1990s.[57] Australia was the first to adopt the model, has been using it the longest, and fared the best among the Group of 20 during the GFC. Other countries, including more recently South Africa,[58] and previously the United Kingdom[59] and the Netherlands,[60] have adopted strategies based on the twin peaks model to enhance

56 For a comprehensive analysis see: Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021).

57 Michael Taylor, *Peak Practice: How to Reform the UK's Regulatory System* (Centre for Study of Financial Innovation, October 1996).

58 South Africa established the Prudential Authority and the Financial Sector Conduct Authority on 1 April 2018, pursuant to Ch 7 of the *Financial Sector Regulation Act 2017* (South Africa). Like in the UK, the South African prudential regulator operates as a separate juristic person within the central bank (whereas the agencies are separate in Australia). See further Roy Havemann, "Twin peaks in South Africa" in Godwin and Schmulow (eds) (n 56) 133.

59 Although the model was initially developed and promoted in the UK during the mid-1990s, in the face of opposition from the Bank of England, a single financial regulatory agency for all banking, securities, investment management and insurance activities with respect to both prudential and business conduct matters was established — the Financial Services Authority (FSA). Following the GFC, the FSA was accused of having prioritised business conduct regulation over prudential regulation. The criticism led to the *Financial Services Act 2012* (UK) (in force 1 April 2013), which established the current Prudential Regulation Authority (as part of the Bank of England) and the Financial Conduct Authority. A standalone and increasingly active agency, the Pensions Regulator governs occupational pension schemes.

60 The Dutch model was introduced in 2002. The full transition to the twin peaks model was completed in 2007, with the introduction of the *Financial Supervision Act 2007* (Netherlands). Prior to the reform, there was a traditional sectoral setup with a banking supervisor (De Nederlandsche Bank (DNB), a member of the European System of Central Banks within the euro area), an insurance and pensions supervisor, and a securities supervisor. The reform created a simple objectives-based setup, with DNB permutated into a single supervisor responsible for prudential stability of all financial institutions (so-called micro-prudential) as well as for stability of the financial system (so-called macro-prudential) and a new supervisor, the Authority for Financial Markets (AFM), responsible for conduct of business supervision of all financial firms. The securities regulator was developed into the AFM, while the insurance and pensions supervisor was abolished, with a large part of its organisation merged with DNB. See further Jeroen Kremers and Dirk Schoenmaker, "Twin peaks: experiences in the Netherlands" (Special Paper 196, LSE Financial Markets Group Paper Series, December 2010) (concluding that the Dutch experience "shows that separating conduct of business from micro-prudential makes sense and can be made to work well in practice").

supervision of financial institutions and safeguard consumer interests.[61] By utilising the twin peaks model, these countries aim to create a more secure financial environment for both institutions and consumers. The approach emphasises the importance of *proactive* oversight and regulation to prevent potential risks and promote stability in the financial sector.

Appropriately for “twins”, APRA and ASIC share the same birthday, both being first established on 1 July 1998 following the Wallis Inquiry into the financial system.[62] Australia had 11 regulators at state and federal level prior to introducing the twin peaks model. The twin peaks model was intended to separate prudential and conduct regulation through two separate and independent agencies.[63] APRA’s regulatory focus would be on financial system stability, whereas ASIC’s regulatory objective would be to promote consumer protection and financial market integrity.[64]

With a long history of cooperation and collaboration, distinct and independent personalities have developed: APRA as micro-prudential regulator, ASIC as conduct regulator.[65] In theory, at least, these distinctions might imply a different level of *priority* for ASIC and APRA, and so inspire a different regulatory *response*.[66] Yet notwithstanding their different purposes, both regulators report facing similar issues with respect to enforcement, communication, bureaucracy and resources. And as will be seen, there is now a convergence in their focus on member outcomes in superannuation — in particular, on member *service*.

APRA’s role: promoter of stability

APRA has historically had three main types of powers with respect to superannuation: licensing and authorisation powers; supervision and monitoring powers; and powers to help financially distressed trustees (or funds) to protect members and beneficiaries. Consistent with the main object of the *SIS Act*, including making provision for *prudent* management of certain superannuation funds and supervision by APRA,[67] APRA has the substantive administration of the *SIS Act*, as well as the operating and prudential standards.[68]

The primary rationale for prudential regulation is to ensure effective management of *risk* within financial institutions and across the financial system, so that finance supports (rather than disrupts) the real economy, and does not harm the communities it serves.[69]

61 In the euro area, France and Belgium, like the Netherlands, have moved to a twin peaks model. The models of Spain, Italy and Portugal also have twin peaks features.
62 See *Financial System Inquiry Final Report* (March 1997).
63 See further Cindy Davies, Samuel Walpole and Gail Pearson, “Australia’s licensing regimes for financial services, credit, and superannuation: three tracks toward the twin peaks” (2021) 38(5) *Company and Securities Law Journal* 332.
64 Andrew Godwin and Ian Ramsay, “Twin peaks — the legal and regulatory anatomy of Australia’s system of financial regulation” (2015) 26 *Journal of Banking and Finance Law and Practice* 240, 248.
65 The Reserve Bank of Australia has oversight for macro-prudential regulatory matters and pursues the objective of financial stability.
66 See M Scott Donald, “Regulating superannuation in the shadows of the twin peaks” (2020) 31 *Journal of Banking and Finance Law and Practice* 57, 64.
67 *SIS Act* (n 10) s 3(1).
68 Ibid s 6(1). This includes reg 6.29 of the *SIS Regulations* (n 13) concerning “successor fund transfers”.
69 See, eg, APRA, “Layers of safety in the Australian financial system” (Factsheet No 1, June 2015) 1; Harald A Benink and Reinhard H Schmidt, “Europe’s single market for financial services: views by the European Shadow Financial Regulatory Committee” (2004) 1(2) *Journal of Financial Stability* 157, 159.

Many policy-makers and scholars have reframed this rationale over the last decade as the promotion of financial stability.[70] Thus, the legislated objectives of APRA include "financial safety and efficiency, competition, contestability and competitive neutrality"[71] with an overarching goal "to promote financial system stability in Australia".[72]

Even so, financial system stability is not defined in the *APRA Act*. Internationally, financial stability has been understood to be a state whereby the build-up of *systemic* risk is prevented,[73] where systemic risk is defined as a "risk of widespread disruption to the provision of financial services that is caused by an impairment of all or parts of the financial system, and which can cause serious negative consequences for the real economy".[74]

Systemic risk can derive from many sources. Currently, they include geopolitical and trade tensions; contagion effects across institutions, markets, intermediaries and infrastructure; climate-related risks; cybersecurity weaknesses; and the rise of artificial intelligence.[75] The management of financial stability, therefore, encompasses private and public participants and financial infrastructure, including the legal system and regulatory frameworks for financial regulation, supervision and surveillance.[76]

To achieve its objectives, APRA must prevent or constrain the build-up of financial system risks that may disrupt the Australian economy and community.[77] To this end, APRA establishes principles-based *prudential standards* to ensure that the institutions it supervises are "financially sound, well-managed and profitable",[78] and publishes detailed guidance on how its principles-based standards can be satisfied.[79]

APRA's record of supervision of prudential risk is not unblemished. The final report in 2003 of the Royal Commission into the Collapse of HIH Insurance[80] (HIH Royal Commission) found that APRA had been reluctant to intervene when HIH was showing signs of trouble. Although finding that APRA "did not cause or contribute to the collapse of HIH", Justice Owens did find

70 Gill North and Therese Wilson, "Has the Australian Prudential Regulation Authority done enough to meet its legislated objectives and prepare Australia for the next financial crisis?" (2020) 43(2) *UNSW Law Journal* 552, 554.

71 *APRA Act* (n 3) s 8(2).

72 Ibid; see also APRA, Submission No 22 to Productivity Commission, Parliament of Australia, *Inquiry into Competition in the Australian Financial System* (September 2017) 4; Adam Creighton, "APRA keeps focus on 'stability' ", *The Australian* (Canberra, 2 April 2018) 16.

73 European Central Bank, *Financial Stability Review* (Report, May 2016) 3. See also Garry J Schinasi, "Defining financial stability" (International Monetary Fund, Working Paper No WP/04/187, October 2004).

74 International Monetary Fund, Financial Stability Board and Bank for International Settlements, *IMF–FSB–BIS Elements of Effective Macroprudential Policies: Lessons from International Experience* (Report, 31 August 2016) 4.

75 See European Central Bank, *Financial Stability Review* (Report, November 2024). The next review is set for release on 28 May 2025 (at <https://www.ecb.europa.eu/press/financial-stability-publications/fsr/html/index.en.html>).

76 Productivity Commission, *Competition in the Australian Financial System* (Inquiry Report No 89, 29 June 2018) 73.

77 Gill North and Therese Wilson, "Supervision of the responsible lending regimes: theory, evidence, analysis and reforms" (2018) 46(2) *Federal Law Review* 193.

78 See, eg, *Insurance Act 1973* (Cth) pt IIIA; *Banking Act 1959* (Cth) div 1A.

79 Prudential Standards are legislative instruments determined by APRA pursuant to *SIS Act* (n 10) s 34C. There are currently 19 distinct Prudential Standards, elaborated and extended by 25 non-binding Prudential Guidance Notes, applying in the superannuation context.

80 *Royal Commission into the Failure of HIH Insurance* (Final Report, April 2003) vol 1.

that APRA "missed many warning signs, was slow to act, and made misjudgements about some vital matters".[81] Although HIH's collapse was ultimately due to corporate governance failures, there were weaknesses in APRA's approach: it did not have staff with the relevant skills or experience; its resources were inadequate; there was a lack of information flow upwards to APRA's board and managers; and APRA adopted a laissez-faire approach to regulation.[82]

Following revelations that emerged during the HIH Royal Commission, in 2002 APRA introduced, in addition to various internal reforms, new risk assessment and supervisory response tools known as the Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS). Eventually, in November 2020, the PAIRS and SOARS model was replaced with the Superannuation Risk Intensity (SRI) model, which now explicitly assesses matters such as cyber risk, resolvability, governance, culture, remuneration, and accountability.[83]

While the current SRI model remains chiefly a risk assessment tool, any licensed superannuation trustee will be concerned to discover that APRA has determined to raise its stage of supervision from "routine" (stage 1) or "heightened" (stage 2) to "escalated action" (stage 3), or even "formal remediation" (stage 4), if for no other reason to fear it could soon move to "resolution" (stage 5); that is, a managed exit from the sector. While APRA has indicated that no entity should remain permanently in any of the elevated stages of supervision, there is insufficient transparency as to how APRA applies the criteria when making these decisions. Presumably, APRA will be reluctant to de-escalate a supervision stage while any investigation remains ongoing.

ASIC's role: promoter of confidence

As a conduct regulator for superannuation, ASIC has professed itself to be "issues-driven" and states that its focus is "on trustee conduct that affects superannuation fund members".[84] ASIC has explained that it focuses on the behaviour of trustees of superannuation funds "impacting consumers" and warns that it may take action against trustees of superannuation funds "in cases of serious misconduct or where trustees fail to meet their key obligations".[85] ASIC describes its broader mandate as one in which it "wants to see superannuation funds operate in a way that is fair to members and promotes confidence in the superannuation system".[86]

ASIC holds a "uniquely powerful position"[87] as Australia's combined companies' registrar, securities and markets regulator, and financial services regulator. ASIC has a statutory

81 Ibid li.
82 Ibid lii–liii. See further Julia Black, "Managing regulatory risks and defining the parameters of blame: a focus on the Australian Prudential Regulation Authority" (2006) 28(1) *Law and Policy* 1.
83 See "Supervision Risk and Intensity (SRI) Model", *APRA* (Web page, November 2020) <https://www.apra.gov.au/supervision-risk-and-intensity-sri-model>.
84 "ASIC's role in super", *ASIC* (Web page) <https://asic.gov.au/regulatory-resources/superannuation-funds/asic-s-role-in-super>.
85 "ASIC's role in superannuation", *ASIC* (Web page) <https://asic.gov.au/for-consumers/superannuation/>.
86 Ibid.
87 Pamela Hanrahan, "ASIC and managed investments" (2011) 29(5–6) *Company and Securities Law Journal* 287, 287.

responsibility to perform its functions and exercise its powers so as to "promote the confident and informed participation of investors and consumers in the financial system".[88]

From 1 January 2021, legislative reforms expanded ASIC's role in superannuation. Designed to improve ASIC's effectiveness as the conduct regulator for superannuation, and to increase ASIC's consumer protection powers, the reforms would seek to:

- enable ASIC to regulate superannuation trustee conduct more effectively, without detracting from or duplicating APRA's role as prudential regulator;
- ensure that there are no gaps in regulatory oversight of the superannuation system;
- ensure that all trustees are treated in the same way and held to the same standards;
- increase ASIC's responsibilities related to consumer protection, market integrity, disclosure and record-keeping under the *SIS Act*; and
- increase ASIC's powers to take action in relation to a broader range of trustee conduct under the *Corporations Act* and the *ASIC Act*.

Regulatory overload: distorting the twin peaks model?

The future of the twin peaks model appears a live issue, at least in light of the Senate Economics Reference Committee's final report on ASIC's investigation and enforcement record, tabled in July 2024.[89] The Opposition-led Committee asserted significant failures within the regulator, including an alleged lack of transparency, insufficient prosecutions, and deep-seated cultural and governance issues. The report attributed these failures to under-resourcing, reluctance to take on challenging cases, and a flawed approach to handling misconduct.

Relevantly, in his submission, Associate Professor Andy Schmulow argued that the breadth of ASIC's responsibilities has distorted Australia's twin peaks framework:

> The irony is therefore withering, in that Australia — the benchmark example of Twin Peaks – does not have a dedicated financial-industry prudential regulator and a financial-industry conduct regulator. Instead, what we have is a dedicated financial-industry prudential regulator and a financial-industry-and-every-other-industry-and-everything-to-do-with-licensing-reporting-corporate-governance-(generally)-insolvency-money-commerce-business-and-the-economy-except-partnerships conduct regulator.[90]

The Committee report concluded that Australia's twin peaks model of financial regulation was never intended to operate with ASIC administering such an extensive set of responsibilities, and recommended separating ASIC into two distinct bodies: one focused on corporates and

88 *ASIC Act* (n 4) s 1(2)(b).
89 Senate Economics References Committee, Parliament of Australia, *Inquiry into Australian Securities and Investments Commission Investigation and Enforcement* (Final Report, July 2024).
90 Associate Professor Andy Schmulow, Submission No 19 to Senate Economics References Committee, Parliament of Australia, *Inquiry into Australian Securities and Investments Commission Investigation and Enforcement* (28 February 2023) 5.

the other on financial services enforcement. According to the report, this restructuring would equip the two resulting bodies with more specific and deliberate mandates, providing a more coherent and consistent approach to corporate regulation and law enforcement. The report argued that splitting ASIC's broad remit into these two focused entities would address its current shortcomings and improve its effectiveness in protecting consumers and enforcing corporate governance.

In their additional comments, government senators were broadly supportive of ASIC transparently reporting data on the handling of reports of alleged misconduct. Without accepting the "headline" recommendation to split ASIC, they agreed with evidence provided to the inquiry that ASIC's remit is broad, and that this is unique when compared to comparable regulators globally. They noted that while some evidence showed that the broad remit "assists enforcement", some evidence "suggested it leads to ASIC being spread too thin". Government senators noted that the organisational restructure to streamline decision-making and improve responses to misconduct took effect from July 2023, and encouraged ASIC's expansion of thematic, campaign approaches to maximise enforcement outcomes.

Criticism of ASIC is not new. During the Financial Services Royal Commission, ASIC faced criticism and scrutiny similar to that of the United States Securities Enforcement Commission after the GFC.[91] In his interim report, Commissioner Hayne concluded:

> Much more often than not, the conduct now condemned was contrary to law. Passing some new law to say, again, "Do not do that", would add an extra layer of legal complexity to an already complex regulatory regime. What would that gain? Should the existing law be administered or enforced differently? Is different enforcement what is needed to have entities apply basic standards of fairness and honesty: by obeying the law; not misleading or deceiving; acting fairly; providing services that are fit for purpose; delivering services with reasonable care and skill; and, when acting for another, acting in the best interests of that other? The basic ideas are very simple. Should the law be simplified to reflect those ideas better?[92]

In his final report, Commissioner Hayne noted that "[t]he conduct regulator, ASIC, rarely went to court to seek public denunciation of and punishment for misconduct. The prudential regulator, APRA, never went to court".[93] He concluded that ASIC could have engaged in a much higher level of enforcement, including suspending licences or obtaining court orders, or other measures.[94] He recommended that "ASIC should adopt an approach to enforcement that takes, as its starting point, the question of whether a court should determine the consequences of contravention".[95]

Neither the Australian Financial Stability Inquiry in 2013[96] nor the Financial Services Royal Commission in 2019 recommended changes to the twin peaks model. Commissioner

91 Zehra Gulay Kavame Eroglu and Karen E Powell, "Role and effectiveness of ASIC compared with the SEC: shedding light on regulation and enforcement in the United States and Australia" (2020) 31 *Journal of Banking and Finance Law and Practice* 71.
92 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018), Executive Summary.
93 *Financial Services Royal Commission Final Report* (n 2) vol 1, 39.
94 Ibid 332–442.
95 Ibid 37, Recommendation 6.2.
96 Treasury (Cth), *Financial System Inquiry* (Final Report, December 2014).

Hayne discussed the twin peaks model in some detail in his final report.[97] Ultimately, he recommended that the model be maintained, but he did suggest that consideration should be given to the (potential) establishment of a specialist civil enforcement agency if, “over the coming years, it becomes apparent that ASIC is not sufficiently enforcing the laws within its remit, or if the size of its remit comes at the expense of its litigation capability”.[98]

Do APRA and ASIC remain fraternal twins, no more alike than siblings born at separate times? Their regulatory purpose, as Parker and Braithwaite express it, is to steer the flow of events.[99] Originally, the *SIS Act* was solely administered by APRA. While Commissioner Hayne recommended licensing of RSEs should remain the responsibility of APRA, he also recommended that ASIC share responsibility for some conduct obligations. Consequently, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) (*Royal Commission Response Act*) caused sections of the *SIS Act*, including the trustee covenants in ss 52(2) and 52A(2), to become *co-regulated* by ASIC and APRA, who now *both* have roles in enforcing regulatory compliance.[100]

Regulator coordination and cooperation post Royal Commission

November 2019 marked a “new era” of cooperation when, undoubtedly stung by Commissioner Hayne’s criticism, APRA and ASIC entered into an updated Memorandum of Understanding (MOU) which set out “a framework for engagement, including coordination, cooperation and information sharing” between them.[101] Pursuant to the updated MOU, each agency agreed:

- “to engage on investigations or enforcement actions and share appropriate, relevant information wherever possible”;
- “to inform the other agency of breaches, and suspected or potential breaches of regulatory requirements that are relevant to the other’s responsibilities”;
- “to engage with the other when considering or conducting an investigation and/or enforcement action against entities regulated by both agencies that may affect the responsibilities of the other agency”;

97 *Financial Services Royal Commission Final Report* (n 2) vol 1, 415–43.
98 Ibid 431.
99 See further Christine Parker and John Braithwaite, “Regulation” in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119–45.
100 *Royal Commission Response Act 2020* (Cth) sch 9 substituting into the *SIS Act* (n 10) new ss 4–9.
101 *Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, ASIC and APRA* (at 28 November 2019) cl 2 <https://www.apra.gov.au/news-and-publications/asic-and-apra-issue-updated-mou> (*Memorandum of Understanding*, MOU). The MOU notes that APRA and ASIC “have distinctive and independent mandates, reflecting the ‘twin peaks’ model for financial regulation in Australia. Broadly, APRA focuses on financial and non-financial risks to the soundness of regulated entities and on the financial stability of the overall system, while ASIC focuses on preserving market integrity, conduct and investor protection”: cl 8. See also *Joint Administration Agreement between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, ASIC and APRA* (at 3 October 2023) <https://www.apra.gov.au/joint-administration-agreement-between-australian-prudential-regulation-authority-and-australian> in respect of the Financial Accountability Regime which commenced operation for authorised deposit-taking institutions and their authorised non-operating holding companies on 15 March 2024. The arrangements in the *Joint Administration Agreement* “build on the [MOU].”

- “to consult on whether referral is appropriate and to identify any supporting information that may be required”; and

- “to consult and collaborate on potential delegations”.[102]

A new engagement structure also saw both agencies regularly meet to discuss and share information on important and emerging issues, and to allow for the coordination of joint activities. The structure is led by APRA Members and ASIC Commissioners, who form the APRA–ASIC Committee (AAC), supported by five standing committees, one of which is dedicated to superannuation.[103]

There is plainly much for these regulators to discuss and coordinate. Given financial constraints upon them, there is an expectation (if not need) to prioritise activity by assessing potential and existing licensees in terms of the risks they pose to regulatory objectives. A risk-based approach to regulation means that regulators must have sufficient expertise and capacity to collect and analyse material and information about licensees and the environment in which they operate, and they will need to be prioritise taking pre-emptive action, that is, activities attempting to prevent harm before it happens. But regulators also need to know their industry, both because it is required by the Acts that establish and confer powers on them, and because it promotes efficient and effective regulation. In turn, by an industry knowing the regulator, efficient compliance and business practices are supported.[104]

When dealing with dual-regulated licensees, experience demonstrates that there is an increasing overlap of activity, given their now shared focus on member outcomes. Where once there was concern that regulatory breaches would “fall through the cracks” as a result of their divided responsibilities,[105] is there a residual risk of regulators tripping over each other in a shared enthusiasm for a post–royal commission world?

Dual licensing and enforcement — duelling agencies?

Despite good intentions, there remains an unwelcome level of opacity to the current engagement structures. Licensees must already contend with the significant complexity in the legislative framework governing superannuation outlined above. What are the implications for licensed trustees and their boards who must strive to thrive — and survive — within this regulatory architecture?

102 *Memorandum of Understanding* (n 101) cll 21–25.
103 See “APRA and ASIC: a new era of cooperation”, *APRA* (Web page, 2020) <https://www.apra.gov.au/apra-and-asic-a-new-era-cooperation>.
104 Katie Miller, “Know your industry; know your regulator” (2002) 104 *AIAL Forum* 36.
105 In its 2018 report *Superannuation: Assessing Efficiency and Competitiveness* (Report No 91), the Productivity Commission criticised failures in both the detection and deterrence of poor conduct, by both APRA and ASIC, observing (at 27):

> In part, this is attributable to confusing and opaque arrangements for regulating trustee conduct, with significant overlap and no clear delineation between the roles of APRA and ASIC. There is a very real and ongoing risk that regulatory breaches “fall through the cracks” as a result of divided responsibilities — with each regulator believing the other should be dealing with a matter, and neither being held accountable for not doing so. It has also led to heavy reliance on cooperation between the regulators.

Licensing implications

A key aspect of the protection of consumers is to ensure regulated activities are undertaken only by those who are properly authorised. The effect of the licensing provisions — which distinguish between regulated activity (requiring authorisation) and unregulated activity (not requiring authorisation) — is to create a perimeter that needs to be monitored and "policed".

Trustees of APRA-regulated superannuation entities are required to obtain an RSE licence from APRA.[106] APRA is also responsible for authorising RSE licensees to offer so-called "MySuper" products.[107] APRA licensing concentrates on the probity and competence of superannuation trustees, as measured by the fitness and propriety of their "responsible persons". It also focuses on the operations, systems and resources (including risk management systems and financial resources) that trustees have in place to prevent or minimise losses to those who hold interests in the superannuation fund.

By contrast, the AFS licensing regime focuses on matters relevant to "consumer protection and market integrity".[108] A person who carries on a financial services business in Australia needs to obtain an AFS licence covering the financial services they provide. Since the commencement of the *Royal Commission Response Act*, a "superannuation trustee service" has been added to the list of financial services regulated under ch 7 of the *Corporations Act*. While most other financial services are defined in terms of the *attributes* of the service that is being provided, a superannuation trustee service is defined purely in terms of the *role* of the provider. APRA may authorise a trustee to hold an RSE licence "to operate a superannuation fund", while ASIC may authorise such trustee to "provide a superannuation trustee service" pursuant to an AFS licence,[109] although not all licence conditions will apply to an RSE-licensed superannuation trustee.[110]

The explanatory memorandum to the *Royal Commission Response Act* stated that a "superannuation trustee service" was intended to cover "all of the activities involved in operating a registrable superannuation entity, at all stages of the trustee's interactions and transactions with members and others".[111] Such activities are broad, including:

(a) product design and development;

(b) marketing to employers and consultants;

106 Part 2A of the *SIS Act* (n 10) concerns licensing of trustees and groups of individual trustees. Division 5 concerns conditions on RSE licences and includes in s 29E the conditions imposed on all licensees and on groups of licences.

107 Ibid ss 29S and 29T.

108 "How do RSE and AFS licensing application processes work together?", *ASIC* (Information Sheet 86, December 2021) <https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/how-do-rse-and-afs-licensing-application-processes-work-together/>.

109 A trustee of an RSE provides a "superannuation trustee service", which is a financial service: *Corporations Act* (n 21) s 766A(1)(ec), s 766H(1) ("a person provides a superannuation trustee service if the person *operates* a registrable superannuation entity"). See further Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [9.14]–[9.15].

110 See *Corporations Act* (n 21) s 914A (conditions on the licence). The additional condition imposed on AFS licence-holders by *Corporations Regulations* (n 13) reg 7.6.04(1)(a) (obligation to notify ASIC if any event occurs that may make a material adverse change to the financial position of the financial services licensee) is excluded for RSE licensees pursuant to reg 7.6.04(1A).

111 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [9.104]. When the new regime commenced, transitional provisions automatically extended the AFS licence authorisation to deal in a superannuation product where the licensee was already an RSE licensee: see *Corporations Act* (n 21) pt 10.49, in particular s 1676A.

(c) investment selection;

(d) fee charging;

(e) death benefit nominations;

(f) oversight of service providers; and

(g) insurance claims handling.

The core licence obligations that s 912A(1) of the *Corporations Act* imposes on dual-regulated licensees are, in turn, very substantial:

> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and
>
> (b) comply with the conditions on the licence; and
>
> (c) comply with the financial services laws; and
>
> (ca) take reasonable steps to ensure that its representatives comply with the financial services laws, except to the extent that:
>
> (i) those representatives are insurance fulfilment providers; and
>
> (ii) the financial services laws relate to the provision of claims handling and settling services by those representatives; and
>
> …
>
> (e) maintain the competence to provide those financial services; and
>
> (f) ensure that its representatives are adequately trained (including by complying with section 921D), and are competent, to provide those financial services; and
>
> (g) if those financial services are provided to persons as retail clients:
>
> (i) have a dispute resolution system complying with subsection (2); and
>
> (ii) give ASIC the information specified in any instrument under subsection (2A); and
>
> …
>
> (j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

As this list demonstrates, not all obligations in s 912A(1) are applicable when an APRA-regulated entity is required to hold an AFS licence, since particular obligations do not apply[112] — namely, the obligations to have available adequate resources[113] and to have adequate risk management schemes.[114] However, those obligations are imposed anyway, through the RSE licence regime, even if this partial overlap is avoided.[115]

112 *Corporations Act* (n 21) s 912A(4), (5).
113 Ibid s 912A(1)(d).
114 Ibid s 912A(1)(h).
115 Ibid s 915I.

Increased liability and solvency risk for licensees

Regulator choice among enforcement options can have significant repercussions for dual-regulated licensees. Contravention of certain obligations in s 912A(1) carries the risk of monetary penalties[116] far in excess of those provided previously,[117] or for breach of the *SIS Act*. Indeed, a total of 51 new civil penalties were introduced in five "Hayne Royal Commission Response Acts" (although financial services law still has fewer civil penalties than other significant regulatory regimes). That said, several financial services statutes demonstrate a particular preference for criminal over civil penalties, which appears to be more a product of historical anomaly (including ad hoc development of the law) rather than principled choice.[118]

Of critical importance to superannuation trustees, the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Act 2019* (Cth) (*Improving Accountability Act*) made contravention of the covenants in *SIS Act* ss 52 and 52A occurring on or after 6 April 2019 liable to civil penalties (not exceeding 2,400 penalty units).[119] Pursuant to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), the maximum pecuniary penalties under the *Corporations Act* were significantly increased[120] for bodies corporate[121] to the greater of:

- 50,000 penalty units[122] (currently $15.6 million);
- if the court can determine the benefit derived from (or detriment avoided by) the contravention — three times this amount; or
- 10% of annual turnover, up to a maximum value of 2.5 million penalty units (currently $782.5 million).

Recent litigation demonstrates the obvious appeal to ASIC of focusing enforcement action on contravention of the misleading or deceptive conduct prohibition, or of s 912A(1)(a) of the *Corporations Act*, rather than on contravention of the *SIS Act*. The practice more likely

116 Note that pursuant to *Corporations Act* (n 21) s 912A(1)(e), a civil penalty can only arise if there is a contravention of paras (1)(a), (aa), (ca), (cc), (d), (e), (f), (g), (h) or (j), from 13 March 2019: *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 1 s 76 (*Strengthened Penalties Act*). When ASIC detects contraventions in earlier periods, it seeks relief by way of declaratory orders: see, eg, *ASIC v AMP Superannuation Ltd* (2023) 168 ACSR 206, 220 [94] (Hespe J).

117 Previously, a body corporate convicted of an offence under the *Corporations Act* (n 21) could generally only be fined five times the maximum penalty for an individual (with limited exceptions). Most offences carried a maximum of 2,000 penalty units ($420,000) against an individual. A civil penalty up to a maximum of $1 million could be ordered against a body corporate, and up to $200,000 could be ordered against an individual.

118 See Nicholas Simoes da Silva and Matt Corrigan, "Civil penalties in the financial services sector" in Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023) 232–34; see also ALRC, *Corporate Criminal Responsibility* (Report No 136, 2020) 73.

119 *SIS Act* (n 10) s 196(3).

120 *Strengthened Penalties Act* (n 116) sch 1, amending *Corporations Act* (n 21) ss 1311B(3), 1317G(3), (4).

121 Under the new penalty provisions, the maximum civil penalty for *individuals* is the greater of 5,000 penalty units (currently $1.65 million) or three times the benefit obtained or detriment avoided.

122 The value of a penalty unit is currently $330 for offences committed on or after 7 November 2024. On 1 July 2026, the value of one penalty unit will be indexed based on the formula in s 4AA of the *Crimes Act 1914* (Cth). See "Fines and penalties", *ASIC* (Web page) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/>.

reflects a greater familiarity with the AFS regime than the public appeal of a higher penalty regime, per se. Other practical advantages include that a contravention of the "efficiently, honestly and fairly" standard does not require a contravention of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise,[123] and a contravention may be made out even though it is not shown that the contravener engaged in an intentional wrong.[124]

ASIC's evolving priorities

ASIC's formal approach to enforcement is still that as formally set out in Information Sheet 151 issued September 2013,[125] although explanation of ASIC's approach is routinely supplemented by periodic enforcement reports, speeches and media releases. ASIC "will generally consider criminal action for serious conduct that is dishonest, intentional or highly reckless".[126] ASIC has "the option of pursuing a civil penalty even where there are elements of criminal conduct, if that is the most appropriate action in the circumstances".[127]

In August 2019, ASIC Commissioner Sean Hughes explained the three steps to implement the "why not litigate" strategy advocated by Commissioner Hayne in his final report:

> [1] ASIC is satisfied breaches of the law are *more likely to have occurred than not* **and**
>
> [2] the facts of the case show pursuing the matter would be in the *public interest*,
>
> [3] **then** we will actively ask ourselves: *why not litigate* this matter?[128]

Factors ASIC says it will consider include (a) whether the offence is serious or trivial; (b) any mitigating or aggravating circumstances; (c) the passage of time since the alleged offence; and (d) the availability and efficacy of any alternatives to prosecution.

ASIC's first post–royal commission report concerning its enforcement activities reflected its more active "why not litigate" posture.[129] ASIC stated that in the reporting period, it had "continued to use its increased resourcing to build its capability to pursue court outcomes" and that, comparing the 2018 and 2020 calendar years, it has recorded a 64% increase in civil penalty proceedings a well as a 35% increase in the number of criminal proceedings commenced.[130] It disclosed that "ASIC will continue to act against misconduct that threatens the integrity of Australia's financial system and markets".[131]

123 *ASIC v Australia and New Zealand Banking Group Ltd* (2023) 169 ACSR 648, [57] (Beach J).

124 *ASIC v Westpac Banking Corporation (Omnibus)* (2022) 407 ALR 1, 15 [62] (Beach J). (The author advised ASIC in the investigation and appeared for ASIC in these proceedings.)

125 ASIC, "ASIC's approach to enforcement" (Information Sheet 151, December 2021) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>.

126 Ibid.

127 Ibid. An updated flowchart was published in November 2021. The commencement of civil proceedings by ASIC is not a bar to ASIC also seeking to pursue criminal penalties for breaches of the *Corporations Act* (n 21): see s 1317P(1); see also *R v Adler* (2004) 48 ACSR 693, [126] (James J).

128 Sean Hughes, "ASIC's approach to enforcement after the Royal Commission" (Speech, Annual Conference of the Banking and Financial Services Law Association, Gold Coast, 30 August 2019) <https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/> (numbering added; emphasis in original).

129 ASIC, *ASIC Enforcement Update: July to December 2020* (Report 688, 2021) 3.

130 Ibid.

131 Ibid.

ASIC's enthusiasm for litigation continued to grow in subsequent years, its appetite escalating against superannuation trustees in late 2023[132] following success against what had been ANZ Bank's retail superfund trustee.[133] By early 2025, ASIC had successfully sued the trustee of Australia's largest superannuation fund, industry fund AustralianSuper, for allowing multiple superannuation accounts for individual members.[134] ASIC also successfully pursued "greenwashing" claims against ActiveSuper, Vanguard Investments Australia, and Mercer.[135] ASIC awaits the outcome of proceedings against Telstra Super alleging, for the first time, failures to comply with internal dispute resolution requirements.[136]

In January 2024, in a statement presumably not at odds with its model litigation obligations,[137] ASIC chair Joe Longo announced that ASIC would pursue a "riskier" litigation strategy and accept more courtroom losses in 2024 "to protect investors and consumers from poor corporate governance".[138] Longo emphasised that "our focus on the best interests of members in the superannuation sector is part of our continuing work to make the financial system fair for all Australians".[139]

132 ASIC, "ASIC targets misconduct in superannuation sector" (Media Release 23-303MR, 15 November 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-303mr-asic-targets-misconduct-in-superannuation-sector/>.

133 In *ASIC v OnePath Custodians Pty Ltd* [2023] FCA 1485, the Federal Court (Stewart J) ordered OnePath Custodians Pty Ltd (OPC) to pay a $5 million penalty for making false or misleading representations about adviser service fees and improperly deducting $3.8 million in fees from members of the superannuation product "Integra Super" for advice services they did not receive between December 2015 and November 2021. OPC was sold by ANZ to IOOF (now Insignia) in 2019.

134 ASIC alleged that, for almost 10 years, AustralianSuper failed to put in place adequate policies and procedures to identify members who held multiple AustralianSuper accounts and to merge those accounts when this was in the members' best interests. AustralianSuper then continued to charge multiple sets of fees and insurance premiums to these members. In *ASIC v AustralianSuper Pty Ltd* [2025] FCA 102, the Federal Court (Hespe J) ordered the trustee of AustralianSuper to pay a total pecuniary penalty of $27 million.

135 In *ASIC v LGSS Pty Ltd* [2024] FCA 587, the Federal Court (O'Callaghan J) found that LGSS, trustee of ActiveSuper, misled investors by falsely claiming to exclude investments in sectors like gambling, tobacco, and coal mining, while actually holding such investments through pooled funds or direct investments. In *ASIC v Vanguard Investments Australia Ltd* [2024] FCA 308, ASIC successfully argued that Vanguard misrepresented its environmental, social and governance criteria by failing to exclude industries like fossil fuels and gambling, despite promises that its index fund would do so. In *ASIC v Mercer Superannuation (Australia) Ltd* [2024] FCA 850, Mercer Superannuation was penalised $11.3 million for misleading claims that its "Sustainable Plus" options excluded investments in industries such as fossil fuels, alcohol, and gambling.

136 ASIC alleges that 40% of Telstra Super's responses to complainants during the relevant period did not comply with its own dispute-resolution procedures, which included 106 complainants who were not responded to within the applicable 45-day timeframe. ASIC further alleges that Telstra Super failed to operate efficiently, honestly and fairly when it failed to comply with its procedures; sent delay notifications to complainants when it was not justified to do so; and did not have adequate resources to comply with its internal dispute-resolution procedures. See ASIC, "ASIC takes civil penalty action against Telstra Super in Australian-first case" (Media Release 23-95MR, 6 November 2023) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-295mr-asic-takes-civil-penalty-action-against-telstra-super-in-australian-first-case/>. A hearing is listed for 10 days before Nescovin J on 15 April 2025: see <https://www.comcourts.gov.au/file/Federal/P/VID926/2023/actions>.

137 See *Legal Services Directions 2017* (Cth) [4.7]: a non-corporate Commonwealth entity must have legal advice that there are "reasonable grounds for starting proceedings". See also Appendix B as regards the Commonwealth's obligation to act as a model litigant.

138 Ronald Mizen, "ASIC to pursue riskier litigation strategy in 2024", *Australian Financial Review* (online, 10 January 2024) <https://www.afr.com/politics/federal/asic-to-pursue-riskier-litigation-strategy-in-2024-20240108-p5evre>.

139 Ibid.

As presaged by its chair, ASIC's track record of success stalled in September 2024, when Justice Beach, a senior Federal Court judge with an extensive pedigree of regulatory enforcement decisions, dismissed ASIC's case against the trustee of the Retail Employees Superannuation Trust (REST).[140] Choice of fund and portability of funds are important rights for members, as they allow members to consolidate accounts and, among other benefits, to avoid superannuation balance erosion through unnecessary fees and costs.[141] Commencing proceedings in March 2021, ASIC had alleged the trustee had made misleading representations about limitations on members' rights to transfer superannuation funds out of REST between March 2015 and May 2018. However, Justice Beach concluded that even if ASIC's allegations were true and the trustee's statements did convey inappropriate representations, the trustee could not be found to have made false or misleading or deceptive statements because "they correctly reflected the legal position".[142] Moreover,

> even if ASIC had been correct on the construction question concerning "member's interest in the fund", it still has not made out its case as to the falsity of the statements made or that they were misleading or deceptive or likely to mislead or deceive.[143]

Following the decision, ASIC explained its intention in bringing the proceedings had been to "clarify" the law and to "emphasise the critical responsibility of trustees to provide accurate information to their members".[144] ASIC did not lodge an appeal.

APRA's emerging priorities

By contrast to ASIC, APRA did not adopt the "why not litigate" mantra of its co-regulator following the Financial Services Royal Commission. APRA instead emphasised it is not an enforcement-based agency, but rather a "safety-led organisation".[145]

The Financial Services Royal Commission had recommended that APRA build "a supervisory program focused on building culture that will mitigate the risk of misconduct".[146] The 2019 Capability Review was critical of APRA's preference to work with regulated entities "behind the scenes", explaining that "this limits its impact and authority".[147] The Capability

140 *ASIC v Retail Employees Superannuation Pty Ltd* [2024] FCA 1081 (*ASIC v REST*). ASIC was also ordered to pay 80% of the REST trustee's costs. (The author acted for REST's inhouse lawyers during the ASIC investigation.)

141 The *SIS Act* (n 10) and *SIS Regulations* (n 13) required the REST trustee to process full balance requests within three business days upon receiving specific mandatory information, subject only to some limited exceptions. The obligation to process rollovers within three days was introduced in 2013 as part of the government's "SuperStream" initiative to improve the efficiency of the superannuation system. Prior to this, rolling over and consolidating funds was a lengthy process which often ended in failure.

142 *ASIC v REST* (n 140) [947].

143 Ibid [950].

144 ASIC, "ASIC's proceedings against Rest alleging misleading member representations are dismissed" (Media Release 24-206MR, 18 September 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-206mr-asic-s-proceedings-against-rest-alleging-misleading-member-representations-are-dismissed/>.

145 Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 2 December 2019, 24 (John Lonsdale), cited in *Review of the Australian Prudential Regulation Authority Annual Report 2019* (Report, Parliament of Australia, February 2020).

146 *Financial Services Royal Commission Final Report* (n 2) vol 1, 393.

147 Treasury (Cth), *Australian Prudential Regulation Authority (APRA) Capability Review Report* (Report, 15 July 2019) xviii.

Review argued that APRA must broaden its approach to supervision with a more in-depth and transparent focus on governance, culture and accountability in regulated entities (all conduct-focused issues).[148] APRA accepted this recommendation, noting that it needs to adopt more transparent supervision and enforcement.[149]

APRA's new approach to enforcement was announced on 16 April 2019, and later updated on 3 September 2019 to include principles that APRA would take into account when considering when and how to *publicise* its enforcement actions, and guidance on APRA's approach to enforcement for data submissions.[150] APRA's rationalisation for its approach was explained as follows:

> A single serious accusation of misconduct can cause immense damage to an organisation's reputation, eroding public trust, deterring customers and investors, or attracting financial penalties such as fines. That is a prudential risk.[151]

APRA stated it "will use enforcement where appropriate to prevent and address serious prudential risks and to hold entities and individuals to account".[152] APRA stated:

> Issues that will lead APRA to consider enforcement action will include instances where an entity or individual has not:
>
> - adequately prevented or addressed prudential risks; or
> - conducted business with honesty and integrity, or with due skill, care and diligence; or
> - dealt with APRA in an open, cooperative and constructive way;
>
> and in such cases:
>
> - there has been an adverse impact on financial soundness, stability or, in the case of superannuation, the interests of members; or
> - the risk or behaviour could have, or could have had, an adverse impact on financial soundness, stability or, in the case of superannuation, the interests of members; or
> - APRA's ability to make an accurate and timely assessment of an entity's prudential risk profile has been, could be or could have been impeded.[153]

Since the Financial Services Royal Commission, APRA has commenced and prosecuted to conclusion only one enforcement action — and that was without success. APRA's failure in *APRA v Kelaher*[154] can chiefly be explained by the inadequacy of evidentiary proof for its case. Whether this outcome reflected APRA's lack of experience or a misplaced reliance upon the investigatory work of the Financial Services Royal Commission, or a combination of both, has not been fully ventilated.

148 Ibid 77–82.
149 APRA, "APRA welcomes Capability Review report and outlines action plan" (Media release, 17 July 2019) <https://www.apra.gov.au/news-and-publications/apra-welcomes-capability-review-report-and-outlines-action-plan>.
150 APRA, *APRA's Enforcement Approach* (Report, 3 September 2019).
151 Suzanne Smith, "Building a culture for success" (Speech, ASFA Spotlight on Risk & Compliance event, 27 May 2021) <https://www.apra.gov.au/news-and-publications/apra-executive-director-superannuation-division-suzanne-smith-speech-to-asfa>.
152 *APRA's Enforcement Approach* (n 150) 7 (Enforcement objective) (emphasis omitted).
153 Ibid 8 (Enforcement criteria).
154 (2019) 138 ACSR 459.

In any event, APRA has more recently bolstered and deployed its own investigatory resources,[155] and based on those investigations in September 2024 it commenced disqualification proceedings against Michael O'Connor, co-chair of First Super Pty Ltd, the trustee of First Super, and National Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU).[156] Those proceedings sit within a broader context of a flurry of regulatory action connected with the Construction and General Division of the CFMEU as it was put into administration by the Commonwealth Government in August 2024[157] (a decision under pending challenge on constitutional grounds[158]).

2025 regulator priorities

In August 2024, ASIC released its updated enforcement priorities for 2024 to 2028 in its *Corporate Plan 2024–25*.[159] ASIC chair Joe Longo commented that these priorities "represent the next step of ASIC's transformation journey to being a modern, confident, and ambitious regulator".[160] The priorities, in most respects, remain consistent with preceding plans, and relevantly include:[161]

- improving outcomes for consumers, particularly those vulnerable to misconduct, by utilising product design and distribution obligations and monitoring internal dispute resolution arrangements;
- addressing risks and integrity related to climate change disclosure[162] and "greenwashing";
- ensuring better services for superannuation members with a focus on progressively improving retirement outcomes, avoiding inappropriate erosion of member accounts, and acting against regulatory non-compliance by superannuation trustees;

155 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 4 June 2024, 49 (APRA Deputy Chair Margaret Cole).

156 *APRA v O'Connor* (Federal Court of Australia, VID898/2024, commenced 5 September 2024). (The author acted for the First Super trustee in the APRA investigation.) APRA alleges that Mr O'Connor breached a number of the directors covenants under the *SIS Act* (n 10), including failing to act honestly, with due care, skill and diligence, and in the best financial interests of First Super members, and seeks declarations, civil penalties, and orders disqualifying Mr O'Connor from acting as a responsible officer of any corporate trustee or superannuation entity. The allegations are denied. See <https://www.comcourts.gov.au/file/Federal/P/VID898/2024/actions>.

157 See the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth) made under pt 2A of the *Fair Work (Registered Organisations) Act 2009* (Cth) as inserted by the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth).

158 *Ravbar v Commonwealth* (High Court of Australia, S113/2024, commenced 21 October 2024).

159 ASIC, *Corporate Plan 2024–25* (22 August 2025); see also "ASIC enforcement priorities", *ASIC* (Web page) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-priorities/>.

160 See further ASIC, "ASIC expands strategic priorities for coming 12 months" (Media Release 24-184MR, 22 August 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-184mr-asic-expands-strategic-priorities-for-coming-12-months/>.

161 ASIC, *Corporate Plan 2024–25* (n 159) 13.

162 Of relevance to future potential enforcement action, the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* (Cth), assented to on 17 September 2024, in summary: requires companies that prepare annual financial reports under ch 2M of the *Corporations Act* (n 21) and meet certain thresholds to submit a sustainability report; implements a modified liability regime providing limited immunity for statements made in compliance with sustainability standards, covering scope 3 greenhouse gas emissions, scenario analysis, and transition plans, lasting three years from the commencement of the Act; and will be phased in over several years for different groups of entities, starting from January 2025 for the largest entities.

- ensuring better services for superannuation members with a focus on progressively improving retirement outcomes, avoiding inappropriate erosion of member accounts (for example, what ASIC refers to as “fee-for-no-service misconduct”), and acting against regulatory non-compliance by superannuation trustees; and

- driving consistency and transparency in public and private markets and in existing and emerging product spaces.

The announced plan includes a multi-year review of industry compliance with laws related to contact centres and trustee administration, with ongoing surveillance of death-benefit claims handling (impliedly signalling the potential for future enforcement action for detected misconduct). The plan also highlighted ASIC’s view that superannuation trustees need to adjust their investment strategies to reach preservation age, anticipating continued growth in the sector.

In November 2024, ASIC formally announced its enforcement priorities for 2025.[163] Apparently informed and shaped by “cost of living pressures”, superannuation industry targets include: misconduct exploiting superannuation savings; greenwashing and misleading conduct involving environmental, social and governance claims; and member services failures in the superannuation sector. In January 2025, the ASIC chair confirmed the regulator’s priorities in superannuation would remain unchanged from 2024, publicly accusing management and directors of “complacency” in outsourcing work amid concern over the poor handling of customer claims.[164]

APRA’s use of court-based remedies can be expected to continue to lag that of ASIC, reinforced by APRA’s preferred use of its power to impose additional licence conditions on regulated superannuation trustees to effect desired changes and outcomes.[165] In August 2024, APRA imposed additional conditions on two CFMEU-connected superannuation trustees (Cbus and BUSSQ), requiring preparation of an independent review into the governance of their boards “to address concerns regarding fitness and propriety processes and fund expenditure management”.[166] A challenge to those additional conditions by the BUSSQ trustee was rejected by the Federal Court in January 2025.[167] In February 2025,

163 ASIC, “ASIC announces new enforcement priorities with a focus on cost of living pressures” (Media Release 24-252MR, 14 November 2024) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-252mr-asic-announces-new-enforcement-priorities-with-a-focus-on-cost-of-living-pressures/>.

164 “ASIC chair Joe Longo readies regulator for fight over big super”, *The Australian* (online, 24 January 2025) <https://www.theaustralian.com.au/business/financial-services/asic-chair-joe-longo-readies-regulator-for-fight-over-corporate-misconduct/news-story/0d15af2969d8df5f715706e78718230b>.

165 The use by APRA and ASIC of their investigatory and enforcement powers will be explored further in Part 2 of this article.

166 APRA, “APRA imposes additional licence conditions on the trustees for Cbus and BUSSQ” (Media release, 14 August 2024) <https://www.apra.gov.au/news-and-publications/apra-imposes-additional-licence-conditions-on-trustees-for-cbus-and-bussq>.

167 *BUSS (Queensland) Pty Ltd atf The Building Unions Superannuation Scheme (Queensland) v APRA* [2025] FCA 31 (S Derrington J). The application was rejected on the discretionary ground that the trustee had an adequate alternative path of internal merits review. The trustee has lodged an appeal: see further APRA, “APRA statement on BUSSQ Federal Court appeal” (Media release, 19 February 2025) <https://www.apra.gov.au/news-and-publications/apra-statement-on-bussq-federal-court-appeal>. Challenges to the use of regulatory powers will be explored in more detail in Part 3 of this article.

APRA announced it had accepted a court-enforceable undertaking from the trustee of Cbus and launched a new investigation.[168] This followed ASIC commencing civil penalty proceedings against the trustee of Cbus, alleging systemic failures in claims handling.[169]

These regulatory actions suggested a more focused attention on the ongoing role of the trade union movement as trustee shareholders and service providers to industry super funds,[170] as well as on the perceived strengths and weaknesses of the equal representation model.[171] Whether these steps trigger a revival of a proposed requirement for independent directors as part of trustee board governance[172] or other structural reform within the sector, remains to be seen. For now, the activities of both regulators will continue to warrant close attention.

168 APRA, "APRA accepts court enforceable undertaking from Cbus and launches investigation" (Media release, 11 February 2025) <https://www.apra.gov.au/news-and-publications/apra-accepts-court-enforceable-undertaking-from-cbus-and-launches>.

169 ASIC, "ASIC sues Cbus alleging systemic claims handling failures" (Media Release 24-251MR, 12 November 2024), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-251mr-asic-sues-cbus-alleging-systemic-claims-handling-failures/>.

170 On the history of industry super, see Cathy Brigden and Bernard Mees, *Workers' Capital: Industry Funds and the Fight for Universal Superannuation in Australia* (Routledge, 2017).

171 Under the equal representation model, the trustee board is comprised of the same number of employer- and member-nominated directors. In the absence of an independent trustee, the equal representation rule mandatorily applies where a public offer fund has at least one standard employer sponsor: see *SIS Act* (n 10) s 93(3).

172 The requirement was endorsed by the Cooper Review and the Financial System Inquiry. However, the Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth) lapsed prior to the 2016 federal election. The 2019 Financial Services Royal Commission concluded that prescriptions around board composition or selection processes were secondary to the requirement of ensuring that a board is formed by skilled and efficient directors: *Financial Services Royal Commission Final Report* (n 2) vol 1, 243–4.

Politicisation of the Victorian Government and the Glass Review

*Scott Prasser**

This article gives attention to the report by Dr Deborah Glass, the then Victorian Ombudsman, in her report *Alleged Politicisation of the Public Sector—Part 2*[1] (*Glass Report*), released in December 2023.

The Ombudsman had been asked to review the issue, along with a raft of other matters, by the Legislative Council on 22 February 2022 (Glass Review).

Although the *Glass Report* was not as conclusive as expected on some issues, it nevertheless found that "[c]reeping politicisation is a reality in Victoria"[2] and highlighted the many problems of politicisation that it found was adversely affecting good governance in Victoria, including by undermining the key principles of Westminster democracy that provide the foundations for an independent, merit-based, professional and expert public service. The *Glass Report* is also important given that many of its assessments are just as applicable to other jurisdictions in Australia where politicisation of the public service has grown apace.

What makes the *Glass Report* even more compelling is the apparent lack of subsequent action by the incumbent Victorian Labor Government in accepting and implementing its recommendations and the seeming disinterest by the current Liberal Opposition to pursue any of the issues it raised.

Background

Why and how was the Glass Review appointed?

So, how did the Victorian Ombudsman come to conduct its review of politicisation? After all, the usual role for the Ombudsman is generally more concerned with administrative decisions and mistakes. Its involvement in this issue of politicisation can be traced back to November 2015 when the Legislative Council referred allegations that the Australian Labor Party (ALP) parliamentary members had misused their staff budget entitlements prior to the 2014 state election. The Legislative Council made this referral under s 16 of the *Ombudsman Act 1973* (Vic) whereby either House of Parliament can "refer to the Ombudsman for investigation and report any matter". This obliges the Ombudsman to "forthwith investigate that matter and report thereon". In other words, the Ombudsman is obliged to carry out the referred task.

The complaint was that electorate officers paid out of Parliament's budget were being used for campaign purposes — the so-called Red Shirts Affair.[3] The Ombudsman had to take legal

* Dr Scott Prasser is a Senior Fellow at the Centre for Independent Studies and a Councillor with the Institute of Public Administration (Queensland Division).

1 Victorian Ombudsman, *Alleged Politicisation of the Public Sector: Investigation of a Matter Referred from the Legislative Council on 9 February 2022—Part 2* (Final report, December 2023) (*Glass Report*).

2 Ibid 5.

3 Labor electorate offices donned "red shirts" to campaign in marginal seats during the 2014 election campaign, which is outside the Victorian Parliament's rules.

action in the Supreme Court of Victoria and then the High Court of Australia to confirm that it had jurisdiction to investigate such matters concerning Parliament. This was the first time in the Ombudsman's then 45-year history that it had investigated such an issue. Consequently, because of the delays that these court actions caused, the Ombudsman did not report on the Red Shirts Affair till March 2018.[4] The Ombudsman found the spending was inappropriate and cost $388,000, was a breach of the unenforceable *Parliament Members' Guide*, but was neither criminal nor corrupt. Nor was then Premier Daniel Andrews involved. The Red Shirts Affair was not finally resolved till July 2022 when the Ombudsman released its report as Part 1 of the Glass Review.[5] Other issues subsequently arose that were reviewed by the Ombudsman in conjunction with the Independent Broad-based Anti-corruption Commission (IBAC) concerning allegations of branch stacking (Operation Watts) following other referrals from the Legislative Council.

What was the Glass Review asked to investigate?

What sparked off this latest review that culminated in the *Glass Report* was another referral from the Legislative Council covering six issues, but particularly reference (d) concerning reports in *The Age* newspaper "that ALP activists are 'stacked' in the public service compromising objectivity and professionalism and increasing the risk of corruption".[6] The *Age* article stated that "[p]olitical apparatchiks in virtually every public service department and a radical centralising of power around the Premier's office are challenging traditional notions of Westminster government" and there had been a "marked shift in the number of political operatives installed in senior bureaucratic jobs".[7] Despite the seriousness of these allegations, the Andrews Government refused to appoint any independent inquiry to review these issues.

In addition to the prime issue of "stacking" of ALP "apparatchiks" in public service positions, the other issues to be investigated included: whether newly appointed directors-general of key departments made inappropriate appointments in their subsequent reorganisations of their agencies; alleged politicisation of Commonwealth Games delivery and a key transport infrastructure project, the Suburban Rail Loop; and alleged political intrusion into senior V/Line hiring. An additional request was the role of Premier Andrews' media unit and the relationship between lobbyists and factional party issues.

While some argue these issues should have been investigated by a royal commission, only executive government can appoint royal commissions, and clearly it was not in the Andrews Government's interests to do so. Of course, an Ombudsman shares many of the same powers as a royal commission; it just lacks the perceived prestige and status of the royal commission nomenclature. There is some argument that because a royal commission's

4 Victorian Ombudsman, *Investigation of a Matter Referred from the Legislative Council on 25 November 2015* (Report, March 2018).

5 Victorian Ombudsman, *Investigation of a Matter Referred from the Legislative Council 9 February 2022—Part 1* (Report, 28 July 2022).

6 Victorian Ombudsman, *Politicisation of the Public Service* (Issues Paper and Request for Submissions, May 2022) 1.

7 Chip Le Grand and Paul Sakkal, "The chosen few: how Victoria is really governed", *The Age* (online, 14 August 2021) <https://www.theage.com.au/politics/victoria/the-chosen-few-how-victoria-is-really-governed-20210803-p58fk4.html >.

terms of reference and membership are determined solely by executive government, and thus open to subtle manipulation, an ombudsman inquiry's terms of reference are decided by Parliament, and thus possibly more open and independent.

Key concepts in the *Glass Report*

Defining "politicisation"

With "politicisation" the focus of the referral, the Ombudsman invested some time in defining what it means. As Professor Richard Mulgan observed, "politicisation … is an imprecise concept and needs to be carefully defined".[8] Certainly the *Glass Report* agreed, noting that "politicisation can happen in different ways both obvious and subtle".[9] Understanding these "different ways" is important. The *Glass Report* therefore provided a range of different definitions (as outlined in Box 1), seeing politicisation as more than just the appointment of partisans into formal public service positions:

> Politicisation can take many forms. It is not just the hiring of people with political affiliations. It is also the closing down or marginalisation of apolitical, independent voices.[10]

The *Glass Report* further defined politicisation as

> breaches of the boundary between the political and non-political arms of government that put the apolitical character of the public sector at risk. It can take many forms, not all obvious.[11]

Box 1: Different types of public service politicisation

Type	Variations
Appointments to the public service	• Partisan and political appointments • Party affiliation in recruitment and promotion • Influence over professional appointments
Ministers' expanding roles	• Taking on and intervening in public service roles
Public servants in political roles	• Power sharing • Political roles at the interface • Political decision-making
Political advisers	• Ministerial cabinets and ministerial offices
Responsive bureaucrats	• Public servants operating beyond or ignoring professional judgements
Political patronage	• Rewarding personal and political loyalty
Public servants' political involvement	• Party activity and campaigning

Source: John Halligan, "Politicization of public services in comparative perspective", *Oxford Research Encyclopaedia of Politics* (2021), reproduced as Figure 5 in the *Glass Report* (n 1) 42.

8 Richard Mulgan, "Politicisation of senior appointments in the Australian Public Service" (1998) 57(3) *Australian Journal of Public Administration* 3.
9 *Glass Report* (n 1) 40 [172].
10 Ibid 4
11 Ibid 9.

Principles of Westminster government and good governance

The *Glass Report* placed great emphasis in assessing the level of politicisation and the quality of governance by comparing the Victorian Government's behaviour and processes with the ideals of the Westminster model. As Professor Weller observed:

> The concept of the Westminster system remains significant in political debate. It has normative implications, with Westminster providing a model against which it is possible to judge actions of Australian politicians: are they living up to the conventions adopted in Britain?[12]

Box 2 lists the core Westminster principles identified by the *Glass Report* and used in its assessment of level of politicisation in Victorian government. It argues that these Westminster principles are "fundamentals underpinning Victoria's current *Public Administration Act* [which] trace back to the seminal 1854 Northcote-Trevelyan report on the British Civil Service".[13]

Box 2: Westminster principles of government

1. Responsible government with ministers elected and members of parliament accountable to it.
2. Politically neutral, expert and professionally based public service able to serve whatever government is elected.
3. Merit selection of appointments ("a key defence against politicisation"[a]) and a career system.
4. Permanent employment not on contract or able to be dismissed easily important in providing frank, fearless and expert advice.
5. Career structure promotion based on merit, experience and performance not by political interference.
6. Advice and policy developed separately from direct partisan politics and the electoral cycle.
7. Responsive to elected government decisions but "balanced against the public service's requirement to remain independent and apolitical".[b]
8. Individual ministerial responsibility and accountability for decisions.

a *Glass Report* (n 1) 8 [10].
b Ibid 159 [625].

What the Glass Review found

On its release in December 2023 the *Glass Report* disappointed some in that it did not find some of the specific allegations of politicisation it had been asked to review. However, it did find other types of politicisation.

Stacking of public service offices

Concerning the media allegation that there was "stacking" of public service positions by partisans, the Glass Review

> did not find evidence of partisan hiring of former ministerial staffers to inappropriately advance ALP objectives. Nor did [the review] find evidence these staffers engaged in inappropriate partisan conduct while employed in the public sector.[14]

12 P Weller, "Westminster" in B Galligan and W Roberts (eds), *The Oxford Companion to Australian Politics* (Oxford University Press, 2007) 637.
13 *Glass Report* (n 1) 32 [132].
14 Ibid 11.

This is reiterated in its final section of the report where it concludes “there is no widespread partisan ‘stacking’ of ‘ALP activists’ happening within the public sector”.[15]

Takeover of departments with new appointments

Nor did the Glass Review find any systematic takeover in the Department of Justice and Community Safety or the Department of Jobs, Precincts and Regions (DJPR) by new directors-general making inappropriate appointments of large cohorts of senior staff following an election.[16] The insinuation was that the selection processes had been skewed to allow the appointment of staff who were particularly “responsive” to the government.[17] This was not found.

Politically aligned staff appointed to key project management roles

Another issue was whether the appointment of a former ministerial staffer to manage the Suburban Rail Loop, a large infrastructure project, was done to drive the Victorian Government’s agenda at the 2018 Victorian election.

While a former ministerial staffer had been appointed to this role, just three months prior to the election, the Glass Review did not find hiring a former ministerial staffer to head the Suburban Rail Loop project had been used to advance the project through the public sector, nor that the appointee had acted “in an inappropriately politicised way”.[18]

Similarly, the Glass Review did not find politicisation of the appointment of a former Labor ministerial staffer in place of a candidate heavily vetted by the V/Line Board to be CEO of V/Line (the state’s regional rail operator) nor of other dubious senior appointments.[19]

The Glass Review investigated allegations of politicised hiring to key roles associated with delivery of the (now aborted) 2026 Victorian Commonwealth Games. There were concerns about senior public service appointments relating to the Commonwealth Games – chiefly within the DJPR, the department initially responsible for event planning and coordination. The Review also attempted to establish whether the decision to cancel the hosting agreement was linked to the broad theme of politicised hiring identified in the Legislative Council referral.

Despite finding some issues of secrecy and use of consultants, the Glass Review did not conclude these were unusual for projects of this type. Nor were there were inappropriate political considerations in appointments, including those of former Labor Party ministers’ staffers or the Premier to positions at the department that was managing the 2026 Commonwealth Games.

15 Ibid 240 [992].
16 Ibid 116 [414]–[421].
17 Ibid 116 [420].
18 Ibid 12 [31].
19 Ibid 13 and 237.

Appointment and recruitment processes — undermining of Westminster principles

Nevertheless, the *Glass Report* stresses that these findings do not mean, say in relation to the stacking complaint, there was "nothing to see".[20] As the *Glass Report* said, "[a] single media report does not always tell the full story".[21]

Its findings are more to do with those principles of Westminster outlined in Box 2 than with blatant patronage or partisanship, which is only one type of politicisation identified in Box 1. Overall, the Glass Review concluded that the "weight of the evidence we reviewed suggests there are cracks in the pillars upholding our Westminster tradition of responsible government".[22]

The Glass Review did find, for instance, that there was "frequent side stepping of merit-based recruitment processes by agencies"[23] and "rushed and shoddy recruitment practices"[24] for a variety of public service positions.[25] It also found that "[c]andidates were often hand-picked without an open and advertised process".[26] Further, records of selection decisions were missing and especially so in relation to the reappointment processes of certain departments. It concluded, therefore, that "senior appointments in Victoria do not always reflect the merit selection principle" and that "direct appointments are used too frequently".[27]

In addition, although the review did not find evidence of direct partisan appointments, it did identify that shortcomings in recruitment practices "led or contributed to perceptions of politicised hiring".[28] This critical assessment was seen in other related findings.

Loss of frank and fearless advice

The other aspect of "politicisation" noted in Box 1 and in a clear abrogation of Westminster principles (Box 2) was the public service's loss of independence from the political arm of government in providing expert and professional advice. Critics argue this has been driven by the loss of permanence in the senior ranks of the public service with increased lateral recruitment of staff on time-limited contracts. This is a trend across all Australian jurisdictions and not confined to Victoria. While there are, as acknowledged in the *Glass Report*,[29] certain benefits to these arrangements, in the hands of an ideologically committed government with little regard to the conventions that underpin the Westminster system, such arrangements allow the public service to be manipulated as just an extension of the incumbent political party. According to this view, the public service is there to accommodate factional deal-making, to further careers of supporters and to enhance party resources at elections.

20 Ibid 240 [992].
21 Ibid 1.
22 Ibid 14 [50].
23 Ibid 11 [21].
24 Ibid 5 and 13 [45].
25 Ibid.
26 Ibid 11 [21].
27 Ibid 14 [51] and [52].
28 Ibid 11 [26] and 116 [422].
29 Ibid 32–5.

These developments have been made in the name of “responsiveness” – of ensuring the public service responds to the wishes of a democratically elected government. Professor Andrew Podger AO, a former Commonwealth Public Service Commissioner and department secretary, is cited in the *Glass Report* as commenting that “responsiveness has been taken too far, leading to directly partisan behaviour and public servants crossing the line to please ministers”.[30] This is exactly what the Glass Review found. It concluded the Victorian Public Service had become “over responsive”[31] to the demands of the Andrews Government and that “frank and fearless advice” had been subordinated to partisan considerations or bypassed altogether by an increasingly centralised system (see below under “Ministerial overreach”).

Further, there was marginalisation of those senior public servants (and departments) whose views may have contradicted or, more pertinently, questioned the Andrews Government’s decisions that had been made with little regard to their proper assessment. This was further driven by the aforementioned lack of job security for senior public servants which made “public officials … more pressured to tailor their advice to the preferences of the government” and thus be “influenced by inappropriate political considerations”[32] in tendering such advice. Career insecurity, characterised by fixed-term employment and at-will termination clauses, acts as a barrier to completely frank, impartial and timely advice.[33]

Using consultants to bypass official departmental advisory channels

Further undermining the role of the professional public service and thus also frank and fearless advice was the Andrews Government’s extensive use of specially selected external consultants. Such consultant reports “proved up”[34] politically driven policy decisions that had not gone through the normal policy development and checking processes of cabinet decision-making involving departmental inputs and their expert and professional assessments.[35] Moreover, the *Glass Report* details how the use and costs of consultants had increased dramatically under the Andrews Government.[36]

Ministerial overreach

Another form of politicisation identified by the Glass Review was the increasing role of ministers and the Premier in the day-to-day running of the public service (see Box 1). This was enabled by the greatly expanded numbers of staff in ministerial offices, including and especially the Premier’s Private Office where staffing levels were higher than its New South Wales or Commonwealth counterparts combined.[37] This centralisation of decision-making was reinforced by the expanded role of the Department of Premier and Cabinet, headed by an Andrews-appointed departmental secretary, which was “overly intrusive in the affairs of other agencies”.[38]

30 Ibid 45 [208].
31 Ibid 5, 14 [57].
32 Ibid 14 [57].
33 Ibid 243 [1019].
34 Ibid 4.
35 Ibid 12 [33].
36 Ibid 199.
37 Ibid 65.
38 Ibid15 [60].

Perceptions count

Although the Glass Review did not substantiate the allegations of direct partisan appointments, it nevertheless acknowledged that perceptions of these and other practices undermined public service morale and public trust in the efficacy of government decisions:

> Perceptions of politicisation are highly corrosive to integrity and trust. Even if misinformed, they can deeply affect the behaviour and actions of public officials, sometimes in unseen ways. They can stoke insecurity and fear, create division, suppress debate, and ultimately distort outcomes.[39]

In short, there were just too many questionable appointments, and too many protocols and procedures broken, ignored or short-circuited, that made both public servants and the public sceptical of many government decisions.

Does politicisation matter?

The *Glass Report* argues one of the virtues of the Westminster model is that it leads to "better decisions and outcomes".[40] This is because it allows expert advice by professionals with experience to provide "frank and fearless" advice on a government's proposals. It ensures proposals go through a process of consultation across other departments so that the full range of public service knowledge is brought to bear on the issue. It creates an environment where the government can at least hear, if not always heed, the apolitical, professional and expert advice of its public service on its latest "bright idea", rather than the sycophantic views of its partisan-appointed staff in ministerial offices and senior departmental positions.

Consequently, the Glass Review devoted considerable attention to the "possible impacts of politicisation on public administration and outcomes".[41] In considering, for instance, the Suburban Rail Loop,[42] it noted that the project was developed "at odds with core aspects of the Westminster tradition".[43] Existing and relevant departments were bypassed in the decision-making process. Specially selected consultants, whose reports were often cloaked in secrecy or only partially released, resulted in a project that exceeded its original estimated costs and is of questionable public value.[44] The federal Australian National Audit Office is currently reviewing the project given the Commonwealth funding support. The Victorian Parliamentary Budget Office has highlighted in relation to certain parts of the project that there have been further blow-outs in costs.[45]

Victoria now is one of the worst states in terms of its financial performance, to which such project cost overruns are contributing factors.[46] Independent economist Saul Eslake

39 Ibid 241 [997].
40 Ibid 41
41 Ibid 68–73.
42 Ibid 191–212.
43 Ibid 12 [32].
44 J Kehoe, "Taxpayers to feel the pain of $239b debt", *Australian Financial Review*, 27 September 2023; *Glass Report* (n 1) 12 [33]–[34].
45 Victorian Parliamentary Budget Office, *Suburban Rail Loop: Cost–Benefit Analysis of East and North Sections* (Report, March 2024).
46 R Carling, *A Sea of Red: Tracking Australia's Debt Iceberg* (Centre for Independent Studies, Policy Paper No 45, March 2022).

argues Victoria's dire budgetary situation can be "directly linked to the quality of its public administration".[47] The *Glass Report* confirms this.

What can be done about politicisation? The Glass Review's recommendation

As noted, the Glass Review concluded that "creeping politicisation is a reality in Victoria and requires urgent attention",[48] and that there are "cracks in the pillars upholding our Westminster tradition of responsible government".[49]

The Glass Review is correct when it notes that politicisation was a long time coming in Victoria. It is a cumulative process. The issue, then, is what can be done about it? Can the politicisation genie now be put back into the Westminster bottle?

Reform proposals — some options

Criticism of the current state of Australian public administration and perceptions of its increasing level of politicisation abound across the jurisdictions. Viable options for reform, however, have been harder to develop.

Federally, the 2019 *Review of the Australian Public Service* (APS) (*Thodey Report*) was "aware of claims that, at times, the appointment of secretaries (departmental) reflect political patronage and do not follow due process — that who you know can be more important than what you can do".[50] It concluded that this could lead to a "loss of trust by the public and fear among public servants".[51] Nevertheless, the *Thodey Report* made no major recommendations to remedy this problem. At best, it proposed limited change from existing arrangements involving a joint process of nomination of department secretaries by both the head of the Department of Prime Minister and Cabinet and the Public Service Commissioner.[52] The issue is who nominates those persons to such key positions especially when there is a changeover of personnel with a new government. Appeals to improve the APS Code of Conduct and improved induction systems, while leading to some improvements, do not tackle the underlying causes of these trends in politicisation.

A more specific set of reform proposals came from the Grattan Institute, the Melbourne-based think tank, in its 2022 report, *New Politics: A Better Process for Public Appointments*.[53] Although primarily directed at the Commonwealth Government, the report is relevant to this discussion. The Grattan Institute opted for new institutional arrangements underpinned by legislation. It made seven recommendations, including:

47 Quoted in Editorial, "Victoria's decline shows fiscal buffer needed in crisis", *Australian Financial Review*, 31 May 2021.
48 *Glass Report* (n 1) 5.
49 Ibid 14 [50].
50 Independent Review of the Australian Public Service, *Our Public Service, Our Future* (Final Report, 2019) (*Thodey Report*).
51 Ibid 287.
52 Ibid 288–9.
53 Danielle Wood, Kate Griffith and Anika Stobart, *New Politics: A Better Process for Public Appointments* (Report, Grattan Institute, July 2022).

- all appointments to boards, tribunals and statutory bodies should be advertised with clear selection criteria;

- an independent panel with a new Public Appointments Commissioner should assess applicants and make a shortlist of nominations;

- ministerial discretion should be limited to choosing only from the shortlist;

- the Commissioner should report annually to Parliament on appointments.[54]

This set of proposals has been largely adapted from the United Kingdom where such arrangements have operated since 1995 and work under a *Governance Code for Public Appointments* with a Commissioner for Public Appointments and special panels across departments to nominate "preferred" members for a wide variety of positions. There is a further parliamentary committee to oversee these processes. Although ministers can override the recommendations, this courts controversy and further reviews. An independent review found these arrangements were bureaucratic and complex, causing long delays in appointments often lasting three months or more.[55] Criticisms from other sources were the stultifying conformity of those nominated in terms of views and outlooks.[56] Nevertheless, current arrangements largely persist in the United Kingdom.

The argument against the Grattan Institute's proposals is that it would spawn another layer of bureaucracy and legislation, is too wide-ranging, would be slow, and remove legitimate decision-making and discretion from elected governments. Moreover, having positions advertised and having selection panels is no guarantee of not appointing partisan sympathisers. After all, "meritorious mates"[57] will pass the test, and selection criteria and panels can be constructed to obtain the desired nomination.

The Glass Review's specific recommendations

The Glass Review made **eight recommendations**, some of which reflect many of the Grattan Institute's suggestions.

Recommendation 1 (R1) is a review of the Victorian *Public Administration Act 2004* and establishment of "an independent head responsible for evaluating, recommending and employing department secretaries and other agency leaders, rather than the Premier" and for other "executive vacancies".[58] This amounts to the Secretary of the Department of Premier and Cabinet no longer being the de facto head of the public service. It is akin to the New Zealand model of appointments, which is discussed in the report.[59] The recommendation also proposes that such appointments be approved by a Joint House Committee of Parliament.

54 Ibid 4.
55 This was the Sir Gerry Grimstone Review of 2015.
56 Charles Moore, "The Spectator's Notes", *The Spectator*, 21 April 2016 <https://www.spectator.co.uk/article/the-spectator-s-notes-21-april-2016/>.
57 This refers to those appointed who meet the required qualifications and even experience required in the position description, but who have sympathies or connections to the government of the day and are selected on those grounds.
58 *Glass Report* (n 1) 249.
59 Ibid 79; see also 247 [1045].

Recommendation 2 (R2), aimed at improving the provision of frank and fearless advice, is “overhaul of the employment framework including reconsideration of ‘at will’ termination clauses for executives” and extension of termination periods to nine months.[60]

This recommendation is about a partial restoring of the Westminster principle of permanency as the basis of ensuring the provision of a professional, experienced and knowledgeable public service. The Glass Review does not, however, propose restoring personnel control to a central independent agency like the public service board model of the past. Such bodies were abolished under the umbrella of “new public management” and their replacements have been, it has been argued, a mere shadow of the former boards in terms of their powers and status. It has been the diminution of the public service boards that Andrew Podger listed in his paper for the *Royal Commission into the Robodebt Scheme*, as another cause of increased politicisation at the Commonwealth level.[61]

Recommendation 3 (R3) is for the Victorian Public Sector Commission (VPSC) to be responsible for “explaining the minimum steps” to be taken “by public sector employees to give effect to the requirements of the *Standards for Application of the Public Sector Employment Principles 2017*, that documentation be sufficiently clear and comprehensive so that decisions are transparent and capable of effective review”.[62] This piece of bureaucratese seems to be requiring the public service to follow existing procedures and for the VPSC to do its job. Nevertheless, the Glass Review did find they were often lacking.

Recommendations 4, 5, and 6 (R4, R5, R6) concern improvements to employment documentation, clarification of when appointments can be made without an open and advertised selection process, and improved data collection and reporting of executive appointments.[63] That the recommendations had to be made though, highlights what a sorry state that the modern Victorian public bureaucracy has become. It is no longer doing what a competent public bureaucracy is supposed to do.

Recommendation 7 (R7) provides for “all Cabinet submissions, agendas, and decision papers” to be “proactively disclosed and published online within 30 days of a final Cabinet decision”.[64] This is similar to a recommendation of the 2022 Queensland Coaldrake Review.[65] Although that recommendation was accepted by the Queensland Government, two years later it has yet to implemented. It will be interesting to see what the new Liberal National Party government, elected in October 2024, will do about this proposal.

Recommendation 8 (R8) is that the Victorian Ombudsman has access to cabinet information for its future investigations,[66] reflecting, perhaps, some of the difficulties the Ombudsman encountered in conducting this review.

60 Ibid 16 [69], 249.
61 Andrew Podger AO, *Report to the Royal Commission on the Robodebt Scheme*, February 2023.
62 *Glass Report* (n 1) 249.
63 Ibid 250.
64 Ibid 251.
65 Peter Coaldrake AO, *Let the Sun Shine In: Review of Culture and Accountability in the Queensland Public Sector* (Final Report, 28 June 2022) 3 (recommendation 2).
66 *Glass Report* (n 1) 251.

The Glass Review's R1 to establish a new public service head who would have to be approved by a joint house parliamentary committee has the virtue of bringing Parliament more into the process of senior public service selection. There is a model for this with the current Victorian Joint Parliamentary Integrity and Oversight Committee, which not only monitors the performance of the IBAC, the Ombudsman, the Victorian Information Commissioner and the Victorian Inspectorate, but also has power to veto appointments to the IBAC.[67] The issue, of course, is whether the new process would be effective. Criticisms of a recent appointment to the IBAC suggest it is not, by itself, a completely satisfactory solution.[68]

Another area the Glass Review might have considered is a reconstitution of the VPSC along the previous public service board roles. Indeed, the VPSC gets off lightly throughout this whole saga, receiving no major criticism.

Nor do the recommendations directly tackle the growing numbers of politically appointed ministerial staff whose activities and seemingly frequent moves into public service positions are seen as a prime source of politicisation in Victoria and elsewhere.[69] It is increasingly understood that power in decision-making across most Australian governments has moved from the departments to the ministerial offices which in size and roles are far bigger and partisan than their UK counterparts. How to make these offices, and especially those in the very large Victorian Premier's Personal Office, more accountable is an issue that remains to be tackled. It is an issue that has been raging at the federal level for some time now.[70]

What happened to the Glass Review's recommendations?

Implementation is always a challenge for review bodies like ombudsman offices or royal commissions, because ultimately the decisions concerning the fate of recommendations fall back to executive government — which was often the very target of the review, as is the case with the Glass Review. Failure to implement recommendations remains one of the major criticisms of such bodies and the area of greatest disappointment.[71]

Sadly, in relation to the Glass Review, the response from the successor to the Andrews Government – the Allan Government – is not promising. The Attorney-General tabled the Government's response in the Legislative Council in June 2024,[72] six months after the release of the *Glass Report*, and without any accompanying statement, as listed below:

67 See *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 21.

68 See Stephen Charles, "Allan's new IBAC chief is inexperienced and a virtual unknown. Is that the point?", *The Age* (online, 17 October 2023) <https://www.theage.com.au/national/victoria/allan-s-new-ibac-chief-is-inexperienced-and-a-virtual-unknown-is-that-the-point-20231017-p5ed0m.html>, concerning criticism of the most recent appointment to head the IBAC.

69 Andrew Podger, "Politicisation is a bipartisan problem: Victoria's Labor joins the club", *The Mandarin* (online, 11 December 2023) <https://www.themandarin.com.au/236255-politicisation-is-a-bipartisan-problem-victoria-joins-the-club/>.

70 Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).

71 Dominique Hogan-Doran, "Implementing royal commission recommendations" (2024) 111 *AIAL Forum* 73; Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis, 2nd ed, 2021) 187–91.

72 Victorian Government, Response to the Victorian Ombudsman's Report: *Alleged Politicisation of the Public Sector: Investigation of a Matter Referred from the Legislative Council on 9 February 2022—Part 2* (Report, 2022) (*Government Response*); Victoria, *Parliamentary Debates*, Legislative Council, 20 June 2024, 2186 (Jaclyn Symes, Attorney-General). This report was tabled but not debated.

- **Two definite "supports"**:[73]
  - R3: "The VPSC is commencing a review of the Standards in 2024 and will address this issue both as part of that review and through parallel planned updates to recruitment policy settings and associated guidance materials."
  - R4: "The VPSC is commencing a review of the Standards in 2024 and will address this as part of that review"."

- **Two outright rejects**:[74]
  - R7: "Cabinet confidentiality, including after decisions are complete, supports robust policy development and Cabinet deliberation. Current arrangements … balance considerations of transparency and accountability with the importance of Cabinet confidentiality."
  - R8: "The government does not support a review or amendments … to authorise access to Cabinet information for the reasons outlined in response to recommendation 7".

- **Four "support in principle"** for recommendations covering a variety of areas including establishing a new public service head to oversee appointments (R1), termination issues (R2), improved data collection (R5), and public reporting of senior appointment that were made without advertisement (R6).[75]

So, the Allan Government only gave outright "support" for just two of the eight recommendations (R3 and R4). These were, as noted above, concerned with process issues of public administration – not unimportant but hardly pivotal to reform.

Half the recommendations only had "support in principle" responses. Such wording, when used by government in response to reviews and inquiries, needs to be viewed with caution. Some see such responses as being "a 'thanks but no thanks' message".[76] While indicating support, it is not wholehearted support. It implies further assessment. It does not indicate how long an issue will be reviewed before a final decision is made. Also, in this case, just where the government has given its "support in principle" is deceptive. For instance, there is a "supports in principle" for R1, but this includes the proposal for an independent head to oversee appointments, to which the response states "[t]he government does not support establishing a new office".[77] In effect, the Allan Government is only supporting those parts of R1 pertaining to reviewing the legislation.

More directly, the Allan Government rejects R7 that Cabinet submissions and papers be released after a Cabinet decision. There is no desire by the current Victorian Government to emulate the Queensland's Coaldrake Review proposals. Of course, other respected commentators agree that there are flaws with proposals of this type.[78]

73 *Government Response* (n 72) 3.
74 Ibid 4.
75 Ibid 2–3.
76 Alastair Stark and Sophie Yates, "Public inquiries as procedural tools" (2021) 40(3) *Policy and Society* 345, 357.
77 *Government Response* (n 72) 2.
78 Paddy Gourley, "Learning from Queensland's Coaldrake public sector review", *Canberra Times* (online, 8 August 2022) <https://www.canberratimes.com.au/story/7837937/its-awkward-but-democracy-needs-to-provide-a-degree-of-privacy-to-governments/>.

Also rejected is R8 of giving the Ombudsman access to cabinet documents. This arose from the difficulties the Glass Review had in conducting its investigations. It noted:

> Though as thorough as possible, our investigation was unable to fully explore every scenario highlighted by contributors. Restrictions on accessing Cabinet documents, poor recordkeeping, and reluctance of witnesses to "go on the record" were all significant barriers.[79]

Overall, in terms of being a response to a major public inquiry into an alleged wrong-doing and maladministration, the Allan Government's response is poor. Usually, governments when confronted with critical reports of this nature are eager to show their enthusiasm — at least publicly — to implement the recommendations. Of course, governments have a range of tactics to managing damaging inquiry reports, from just an initial delay in making a response to sometimes accepting all recommendations, thus reducing media criticisms, but being slow in subsequent implementation. In other cases further reviews might be established — offloading the report to other bodies is a common tactic. Or they can be ignored or even attacked.[80] The Allan Government's response, while not an outright attack, given its six-month delay and its minimal acceptance of just two of the eight recommendations, at best shows an attempt to downgrade the importance of the Glass Review. This has been a calculated decision on the part of the Allan Government. Andrew Podger best summed up the Government's approach when he noted that the current Secretary of the Premier's Department had a "nothing to see here" response to the *Glass Report*.[81]

If the Victorian Government's response is less than enthusiastic, the Liberal Opposition's reaction is not much better in showing almost complete disinterest in the *Glass Report*. To date, the Opposition has issued only one media statement on the *Glass Report* and that was in the immediate aftermath of the report's release.[82] It seems the current Opposition is not so much a "government in waiting" ready to seize the reins of office, but rather, as one commentator recently described it, nothing more than a "permanent Opposition" with little interest in holding the government to account.[83] Oddly, although it was a Legislative Council's referral to the Ombudsman that initiated the inquiry, there has been no debate in that chamber on the report or the Allan Government's response.

One of the essentials in ensuring implementation of such public inquiries is that those involved continue to take an interest. That this review was done by a permanent agency raised expectations that its fate might be better than sometimes occurs with ad hoc royal commissions that disband once the report has been delivered and its members, unless asked, are usually expected to make no further public advocacy for its recommendations. Of course, some inquiry chairs do take a more active advocacy role, sometimes to the chagrin of the government. In this case, the Ombudsman, Deborah Glass, retired after her ten-year term ended, so it is up to her successor to pursue this report. Glass's final press interview

79 *Glass Report* (n 1) 8 [7].

80 For different types of responses, see Prudence R Brown and Alastair Stark, "Policy inaction meets policy learning: four moments of non-implementation" (2022) 55(1) *Policy Sciences* 47.

81 Podger, "Politicisation is a bipartisan problem: Victoria's Labor joins the club" (n 69).

82 John Pesutto MP, "Labor's culture of fear make life hard for Victorians" (Media Statement, 5 December 2023) <https://www.johnpesutto.com.au/media-releases/2023-12-08-labors-culture-of-fear-makes-life-harder-for-victorians>.

83 Terry Barnes, "The Victorian Coalition 1990–2023: a permanent Opposition?", in Scott Prasser and David Clune (eds), *The Art of Opposition* (Connor Court Publishing, 2024) 339.

on her retirement reiterated her many battles with the Andrews Government.[84] So, it has not been totally unexpected that her successor would prefer not to continue the battles of the previous Ombudsman or to clash with the government so early in her term.

Conclusions — whither Westminster?

In the meantime, all can ponder the conundrum facing our democracy today that while an elected government is entitled to a "responsive" public service, how can the public interest, as distinct from the partisan interest, be best served? How can a public service be insulated from politicisation and manipulation, to be able and encouraged to provide independent, impartial, and expert advice? Recent events in Victoria have also highlighted that the Westminster model, which the *Glass Report* places such great emphasis on, is hardly functioning in Victoria. The issue is whether it can be restored and how or whether we should look for a replacement. Although the Glass Review concluded that "[c]reeping politicisation is a reality in Victoria and requires urgent attention",[85] no one, it seems, cares.

In addition, other reports have highlighted deficiencies in Victoria's system of public administration. The 2020 Covid-19 Hotel Quarantine Inquiry showed deficiencies in decision-making processes and a lack of responsibility in managing key aspects of Victoria's pandemic response.[86] The special report on IBAC's Operation Daintree in 2023 highlighted improper influences and the compromised procurement process for a $1.2 million contract for a union-established training group.[87] Then there was the 2024 Victorian Auditor-General's Office's critical assessment of the waste in the State's cancelled Commonwealth Games.[88] The 2020 Royal Commission into the Management of Police Informants identified a clear breakdown in the management of Victoria's police informants.[89] Yet in the end the special external investigations unit, led by former High Court Justice Geoffrey Nettle, that was to lead the implementation of its recommendations was disbanded by the Andrews Government when the Director of Public Prosecutions declined to act on the unit's referral of criminal charges against those involved in the infamous Lawyer X matter.[90] No-one took responsibility for anything. No-one was held to account.

The Glass Review has delivered a cutting assessment of government in Victoria, but there is no indication that any real change is going to occur.

84 Bridget Rollason, "After a decade in the job, Deborah Glass reflects on her time as Victoria's ombudsman", *ABC News* (online, 4 April 2024) <https://www.abc.net.au/news/2024-04-05/deborah-glass-victorian-ombudsman-daniel-andrews-jacinta-allan/103669618>.
85 *Glass Report* (n 1) 5.
86 *Covid-19 Hotel Quarantine Inquiry* (Final report, 21 December 2020).
87 Independent Broad-based Anti-corruption Commission (Vic), *Operation Daintree* (Special report, April 2023).
88 Victorian Auditor-General's Office, *Withdrawal from 2026 Commonwealth Games* (Independent Assurance Report to Parliament No 2023–24:13, March 2024).
89 *Royal Commission into the Management of Police Informants* (Final Report, November 2020).
90 See Damon Johnston and Rachael Baxendale, "Lawyer X investigator comes out firing", *The Australian*, 22 June 2023; Gerard Henderson, "Two standards of justice in Victoria", *The Australian*, 8 July 2023.