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DEVELOPMENTS IN ADMINISTRATIVE LAW

Ron Fraser*

Government initiatives, inquiries, legislative and parliamentary developments

Migration litigation legislation introduced

The *Migration Litigation Reform Bill 2005* was introduced into the House of Representatives and debate on the second reading adjourned on 10 March 2005: its provisions were referred to the Senate Legal and Constitutional Legislation Committee on 16 March 2005 for report by 11 May 2005. Twenty-four submissions have been received by the committee. The Bill is designed to implement the Government's response to a review of migration litigation by Ms Hilary Penfold (see (2004) 43 *AIAL Forum* at 5 and 40 *AIAL Forum* at 5). The Government's stated purposes are to address the high volume of migration litigation, in particular 'unmeritorious litigation', and to reduce delays and facilitate quicker handling of cases. A central element in the Bill is the enhanced role of the Federal Magistrates Court (FMC), which has grown from 16 magistrates in 2000 to 31 after the appointment in 2005 of eight new magistrates; the Bill provides for the Chief Federal Magistrate to become responsible for administration of the FMC. Most applications for judicial review of migration decisions will be heard initially in the FMC as the result of limiting the migration jurisdiction of the Federal Court to more complex matters transferred to the court from the FMC and to review of 'character-related' decisions by the Administrative Appeals Tribunal and the Minister. In addition, the grounds of review in relation to migration cases in the FMC's original jurisdiction are to be the same as in the High Court under section 75(v) of the Constitution, and remission by the High Court to the FMC in migration matters may now occur on the papers without the need for a hearing. The Federal Court retains appellate jurisdiction from the FMC in migration matters, and the Bill mandates the current practice of single judges hearing most migration appeals, except where a hearing by the Full Court is considered appropriate by a judge. Uniform time limits apply to applications for judicial review in all three courts, and these are subject to extension if made within 84 days of notification of the relevant decision; the bill's provisions on time limits incorporate revised amendments from a previous bill (the lapsed Migration (Judicial Review) Bill 2004) to accommodate criticisms by the Senate Legal and Constitutional Legislation Committee. The Bill also broadens the grounds on which a court can summarily dispose of proceedings where it is satisfied that there are no reasonable prospects of success, and prohibits persons, including lawyers and migration agents, from encouraging the initiation or continuation of 'unmeritorious migration litigation', providing for costs orders against such persons in certain cases.

A submission by the Administrative Review Council (ARC) points out that the summary judgment provisions will apply to *all* applications before the FMC, the Federal Court and the High Court, not merely migration applications, although there is no indication of that in the short title of the Act. It considered that there was little risk of the courts interpreting the provisions 'rashly or without careful regard to countervailing access to justice principles', but noted that the Government's own research indicated that, apart from migration matters, special leave applications to the High Court and vexatious claims to the Family Court, 'there was no evidence of an increase in unmeritorious claims across the board'. Among other things, the ARC supported the provisions of the Bill to 'limit the jurisdiction of the Federal Court to certain kinds of cases in migration matters'. The ARC noted concerns by

stakeholders that the third party costs provisions could result in discouraging pro bono assistance in migration matters, and commented that the breadth of the provision would affect the likelihood of this consequence ensuring. Other submissions are critical of many elements of the Bill, such as that of the Law Council of Australia. (For submissions to the committee see:
www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/index.htm).

Government responses to immigration detention issues

The Government has responded to criticisms of the immigration detention of an Australian citizen, Cornelia Rau, based on the mistaken belief that she was an unlawful non-citizen, by appointing the former Australian Federal Police Commissioner, Mr Mick Palmer, to conduct an internal inquiry. Mr Palmer had not reported at the time of writing. The Government also announced changes to procedures of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) following the Rau case. (**Senator Amanda Vanstone, Media Releases,** 8 & 26 February 2005; **Peter Prince, *The detention of Cornelia Rau: legal issues***, **Parliamentary Library, Research Brief No 14, 2004–05,** 31 March 2005, which includes a general discussion of the legal basis of detention)

The Rau case may also have helped precipitate the announcement by the Government of the introduction of a new category of bridging visa (Removal Pending Bridging Visa) designed to allow community release with reporting obligations of unsuccessful asylum seekers (other than those detained on Nauru) whose removal from Australia is not possible at least in the short term. For a detainee to qualify for such a visa the Minister must believe the person has done everything possible to facilitate his or her removal from Australia, and the detainee must agree to abide by all prescribed conditions and to cooperate with arrangements for their removal if that becomes possible. Holders of the new visa will be entitled to the same social support as Temporary Protection Visa Holders, access to trauma and torture counselling and access to the English as a second language service for school age minors. The visa is not available to detainees with current visa applications, or who are challenging decisions in the RRT or the courts. While *The Age* has said there are up to 120 people who have been in immigration detention for more than three years, the Minister has said the visa will apply only to a small number of detainees, none of whom had been publicly identified at the time of writing, nor had the regulations been amended. (**Senator Amanda Vanstone, Media Release,** 23 March 2005; see also reference in **Prince** (above) at 5)

Reintroduction of lapsed bills

Several bills which lapsed when the 40th Parliament was dissolved were reintroduced into the new Parliament which first met in November 2004. These included:

- Administrative Appeals Tribunal legislation. The *Administrative Appeals Tribunal Amendment Act 2005* was assented to on 1 April 2005. It finally passed all stages of the Parliamentary process on 17 March 2005, following a report by the Senate Legal and Constitutional Legislation Committee on 8 March 2005. A number of the committee's recommendations were accepted by the Government, including retaining the provision in the existing Act that the President of the AAT be a Federal Court judge. The committee's report is available from its website:
  www.aph.gov.au/senate/committee/legcon_ctte/index.htm
  (See also (2004) 43 *AIAL Forum* at 12 for a description of the original bill, and Parliamentary Library, *Bills Digest No 54, 2004–05: Administrative Appeals Tribunal Amendment Act 2004*, 26 November 2004.)

- National Security legislation. The *National Security Information (Criminal Proceedings) Act 2004* and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004* were passed by Parliament on 8 December 2004 and assented to on 14 December 2004. The first of these Acts incorporated a number of amendments proposed by the Government and accepted by the Opposition that reflected some of the recommendations of the Senate Legal and Constitutional Legislation Committee for changes to the original lapsed bills in order to give the courts greater discretion in relation to exclusion of evidence, holding closed hearings and ensuring a fair trial. Among other things, the consequential amendments Act excludes from the reasons provisions of section 13 of the *Administrative Decisions (Judicial Review) Act 1977* decisions by the Attorney–General under the principal Act to give a certificate relating to disclosure of information, as well as limiting a court's jurisdiction to review an application for review of such a certificate decision. (See (2004) 43 *AIAL Forum* at 3 and 14 for summaries of the original principal bill and the ALRC report relating to these issues, and Parliamentary Library, *Bills Digests Nos 59 & 60, 2004–05*, 29 November 2004.) See also later amendments to the principal Act made by the *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005*, assented to on 21 March 2005. The provisions of the *National Security Information Legislation Amendment Bill 2005*, which among other things extends the principal Act to include certain civil proceedings, was referred to the Senate Legal and Constitutional Legislation Committee on 16 March 2005 for report by 11 May 2005; a public hearing by the committee was held on 13 April 2005.

- The *Australian Communications and Media Authority Bill 2004* and its companion transitional and consequential amendments bill completed the Parliamentary process on 17 March 2005 and were assented to on 1 April 2005. (See (2004) 43 *AIAL Forum* at 3 for a short summary.)

- The *Postal Industry Ombudsman Bill 2005* had not yet been passed by the Parliament at the time of writing (see (2004) 43 *AIAL Forum* at 13 for the nature of the scheme).

- Indigenous affairs legislation. The *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* was assented to on 22 March 2005. It abolishes ATSIC with effect from the proclamation date of 23 March 2005 and makes consequential amendments. It also abolishes Regional Councils with effect from 1 July 2005. The assets and liabilities of ATSIC will largely transfer to Indigenous Business Australia and the Indigenous Land Corporation. The Government has appointed a National Indigenous Council to advise it on Indigenous issues and has created an Office of Indigenous Policy Coordination and Indigenous coordination centres across the country. The legislation is largely contrary to the majority recommendations of the Senate Select Committee on the Administration of Indigenous Affairs. (**Senator Amanda Vanstone, Media Release on Indigenous Affairs,** 24 March 2005**; Senate Select Committee on the Administration of Indigenous Affairs, *After ATSIC – Life in the Mainstream?*,** 8 March 2005; see also: **Angela Pratt & Scott Bennett, *The end of ATSIC and the future administration of Indigenous affairs*, Parliamentary Library, Current Issues Brief No 4*,* 2004–05*,* 9 August 2004**)

Government legislative program Autumn 2005

The following are among the new bills proposed by the Government for the Autumn Sittings 2005. The comments on the bills are drawn from the Government release at: www.pmc.gov.au/parliamentary/index.cfm, or from Parliamentary Bills lists where the Bill has already been introduced.

- The *Archives Amendment Bill* will 'update the *Archives Act 1983* in accordance with current practice and assist the National Archives of Australia to promote good record-keeping across the Commonwealth'.
- *Australian Citizenship Legislation Amendment Bill*: To 'amend the *Australian Citizenship Act 1948* to improve the integrity and equity of the citizenship process; to substitute simplified provisions; to restructure and tidy up the Act; and to ensure that the Act is an exhaustive statement of Australian citizenship'.

- *Migration Amendment (Migration Zone) Bill*: To amend the Migration Act to 'provide greater certainty in the definition of "migration zone"', and to 'clarify detention powers to remove persons to a place outside Australia'.

- Other proposed migration legislation includes the *Migration Legislation Amendment (Border Protection and Visa Integrity) Bill* and the *Migration Legislation Amendment (Information Management) Bill*.

- *Australian Human Rights Commission Legislation Bill*: To 'restructure, refocus and rename the Human Rights and Equal Opportunity Commission'. This will presumably be in similar terms to the Bills that have previously been unsuccessful in the Parliament (see (2003) 38 *AIAL Forum* at 2).

- *Defence Legislation Amendment Bill (No 1)*: Among other things, the Bill will establish the position of the Inspector General of the Australian Defence Force on a statutory basis and create the statutory appointments of Director of Military Prosecutions and Registrar of Military Justice.

- The *Legislative Instruments (Technical Amendment) Bill 2004* was introduced into the Parliament on 16 November 2004 and debate adjourned. It amends the *Acts Interpretation Act 1901* to clarify the effect of the expression 'by legislative instrument'. The legislation program also referred to other proposed technical amendments which have not yet been introduced.

- For the *Migration Litigation Amendment Act 2005* see separate item above.

Introduction of website for Commonwealth law incorporating the Federal Register of Legislative Instruments

The Attorney–General's Department has developed a new legislative repository known as ComLaw which contains Commonwealth primary legislation and ancillary documents in electronic form and the new Federal Register of Legislative Instruments established on 1 January 2005 under the *Legislative Instruments Act 2003* as the authoritative source for legislative instruments and compilations of legislative instruments. Material from SCALEplus is up to date as at 1 January 2005 but no new material has been added since then. The new website is: www.comlaw.gov.au

ACT Human Rights Commission and the activities of the Human Rights and Discrimination Commissioner

Following the report of an external review, and the enactment of the *Human Rights Act 2004* (ACT) (see (2004) 41 *AIAL Forum* at 1–2), the ACT Government has introduced legislation to establish a Human Rights Commission which will comprise a President, a Disability and Community Services Commissioner, a Health Services Commissioner and a Human Rights and Discrimination Commissioner, supported by specialist staff including conciliators, investigators and legal advisers. In addition to its human rights activities, the Commission is

intended to provide a single, easily accessible office to receive complaints and concerns about health and disability services, services for older people, and discrimination across a range of service and employment areas, and to improve service provision and public education. (**ACT Chief Minister, Media Release**, 7 April 2005)

The ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, presented an ANU–Toyota Public Lecture on 22 February 2005 in which she discussed experience of the operation of the ACT Human Rights Act since 1 July 2004, referring to a number of court and tribunal cases in which the application of the Human Rights Act was raised. The Commissioner outlined her office's work in promoting public and agency knowledge of human rights. She noted that the Victorian Government has committed itself to introducing a Charter of Rights and Responsibilities, and that the UK Government intends to introduce a Human Rights Commission in 2006 with functions similar to those of the ACT Commissioner. After the first year of operation the government will review whether the rights covered by the Human Rights Act should extend to economic, social and cultural rights. (**Dr Helen Watchirs, 'The ACT Human Rights Act 2004: its impact and potential', ANU-Toyota Public Lecture**, 22 February 2005, available from the ANU website: www.anu.edu.au/disabilities/ANU-Toyota_lecture_Watchirs.htm. See also **Hon JJ Spigelman, 'Blackstone, Burke, Bentham & the Human Rights Act 2004 (ACT)', Keynote address 9th International Criminal Law Congress, Canberra**, 28 October 2004, available from: www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman)

Brief items

- The Parliamentary Joint Committee on ASIO, ASIS and DSD is conducting a review of ASIO's questioning and detention powers under Division 3 of Part III of the *Australian Security Intelligence Act 1979*, inserted by the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* and later amendments. The review is to be completed by 22 January 2006. Forty-seven submissions were received, and public hearings will be held in the future. For materials relating to the committee's review see: www.aph.gov.au/house/committee/pjcaad/index.htm

- On 31 August 2004 the Senate Legal and Constitutional References Committee tabled its report *The road to a republic: Inquiry into an Australian Republic*. On 8 June 2004 it tabled a report on its *Inquiry into Legal Aid and Access to Justice*, including recommendations that the Commonwealth Government adopt a new model for funding legal aid.

  For these reports see:
  www.aph.gov.au/senate/committee/legcon_ctte/index.htm

The courts

All decisions discussed below may be accessed on the Australian Legal Information Institute website: http://www.austlii.edu.au

Aliens power extends to children born in Australia of parents who are not Australian citizens or permanent residents

In *Singh* the High Court decided by a majority of 5:2 (McHugh and Callinan JJ dissenting) that the aliens power in section 51(xix) of the Australian Constitution extends to a child born in Australia of parents who are not Australian citizens or permanent residents. Section 10(2) of the *Australian Citizenship Act 1948* (Cth) excludes such a child from the provision in section 10(1) that a person born in Australia is an Australian citizen. Ms Singh was born in

Mildura of Indian parents who had originally arrived on valid visas but later sought and were refused refugee status, a matter which was still under appeal at the date of the High Court's decision. As a result of that decision, Ms Singh could become liable to the removal provisions of the *Migration Act 1958* (Cth) if her parents' appeal is unsuccessful.

All members of the court enunciated views about how the Constitution should be interpreted in such a case. Chief Justice Gleeson, in the majority, and McHugh and Callinan JJ, in dissent, considered it crucial to ascertain the meaning of the word 'alien' in the historical context of the drafting and adoption of the Constitution around 1900, but differed on what that meaning was. The Chief Justice agreed with the joint judgment of Gummow, Hayne and Heydon JJ that in 1900 there was no established legal requirement that an Indian citizen, born of Indian citizens, be excluded from the class of aliens, and noted that the issue of race was of great concern to the framers of the Constitution. Parliament was therefore empowered by section 51(xix) of the Constitution to decide whether such a person should be treated as an alien. Both McHugh and Callinan JJ, however, considered that it was central to the common law notions of allegiance and alienage, and remained so in 1900 despite statutory modifications, that those born within the dominions of the Crown became natural-born subjects of the Crown. In the view of McHugh J, because of her birth in Australia, Ms Singh was a person who owed permanent allegiance to the Queen of Australia and could not be treated as an alien: Parliament itself could not define who is an alien. The authors of the joint judgment started from the premise that, while it was essential to ascertain the meaning of words used in the Constitution at the time of federation, the Constitution must be construed bearing in mind that it is an instrument of government intended to endure. Justice Kirby also rejected 'the notion that the meaning of a word or phrase is fixed forever by reference to understandings that existed in 1901', noting that international law left it to nation states to determine their own nationality laws and principles. (***Singh v Commonwealth of Australia* (2004) 209 ALR 355**, 9 September 2004)

Whether mandatory detention invalid in relation to children – limits on power to detain aliens

The High Court unanimously refused an application founded on a claim that the mandatory detention regime in the *Migration Act 1958* (Cth) was invalid in its application to infant children. The applicants, through their father as next friend, were the children of asylum seekers from Afghanistan whose appeals against refusal of refugee status were still in process, although the applicant children had been granted temporary protection visas in July 2004 and were no longer in detention. In essence, the applicants claimed that the mandatory detention provisions of the Migration Act either did not apply to children, or were invalid because they were punitive in character in relation to children and that mandatory detention of children under those provisions (ss 189 and 196) therefore involved an exercise of judicial power by the executive in breach of the separation of powers mandated by Chapter III of the Constitution. Detention was for an indefinite time, and even if adult detainees could seek removal from Australia (s 198), children lacked the legal capacity to do so.

All members of the court held that the current administrative detention regime was not punitive, either generally or in relation to children, so as to bring the provisions of Chapter III into play. The court could see no relevant distinction between the mandatory detention provisions upheld in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 and those in the current ss 189 and 198. However, there were significant differences between the justices in their assessment of *Lim*'s continuing effect particularly in the light of the recent decision in *Al-Kateb v MIMIA* (2004) 208 ALR 124 (see (2004) 43 *AIAL Forum* at 9–10). As he did in *Al-Kateb*, Justice McHugh called in question a number of statements in the joint judgment in *Lim*, while both Kirby and Gummow JJ supported the interpretation of the Constitution in *Lim*, and saw no reason to revisit it in the present case. In particular, McHugh J considered

that since *Al-Kateb* the test stated by the majority in *Lim*, that to be valid detention must be 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered', was no longer good law. All that was necessary to satisfy the requirements of Chapter III was that the purpose be non-punitive: one should not start with the assumption that detention laws are punitive. Both Gleeson CJ and Callinan J used the terminology employed in *Lim*, which may indicate an overall majority in the present court for that approach. Finally, Kirby and Gummow JJ maintained their dissenting view in *Al-Kateb* that detention was not unlimited in circumstances where a detainee requested removal from Australia and 'where such removal is unlikely as a matter of reasonable practicability'. (***Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 210 ALR 369**, 7 October 2004; see also: **Peter Prince, 'The High Court and indefinite detention: towards a national bill of rights?', *Research Brief No 1,* 2004–05**, 16 November 2004)

Time limit for appeal to Federal Court from RRT or MRT commences only on notification of both decision and reasons of the tribunal

By a majority of 4:1 (Gleeson CJ, McHugh, Gummow and Heydon JJ; Kirby J dissenting), the High Court in *WACB* allowed an appeal from the Full Court of the Federal Court. The High Court held that the legislative history of s 478 of the Migration Act, which requires that an application to the Federal Court must be lodged within 28 days of the applicant being notified of a decision of the RRT, supported the construction that an applicant must also be notified of the reasons for the decision in the manner provided by ss 430 and 430D(2) of that Act. (Similar provisions apply to appeals from the Migration Review Tribunal.) The applicant, an asylum seeker claiming to be from Afghanistan who was unable to read, had been told by staff of the Curtin detention centre of the unsuccessful outcome of his appeal to the RRT, but was at that time neither informed of his rights to apply to the Federal Court nor provided with the reasons for the decision. Three weeks later at his request he was provided by an employee of the detention centre with the RRT's reasons expressed in English. His appeal was lodged three weeks after expiry of the time limit assuming it commenced the day he heard of the RRT's decision. The majority held he had not been 'notified of the decision' under s 478 until he received the statement of the RRT's reasons in English, and his appeal was therefore within time. Justice Kirby, though expressing considerable sympathy for the applicant, considered that the legislative history established that the Parliament had deliberately repealed an earlier provision that notification of a decision of the relevant tribunal at the time had to be accompanied by a statement of the tribunal's reasons for a decision: 'those provisions were intended by the Parliament to impose extremely severe limitations which are very short and rendered expressly unyielding even to special circumstances'. (***WACB v MIMIA* (2004) 210 ALR 190**, 7 October 2004)

Failure to complete hearing a breach of procedural fairness

In *NAFF* the High Court unanimously overturned a majority decision of the Full Federal Court refusing relief against a decision of the RRT to uphold refusal of refugee status to a Tamil Muslim from India, requiring the RRT to determine the matter according to law. The court's decision was made in light of statements by the RRT member to the applicant at the end of the hearing of his matter that there were inconsistencies in evidence in relation to alleged periods of detention, that she would write to him about these in the next few days and that he would have 21 days 'in which to respond to my questions and to put any more information that you wish to the Tribunal'. She did not do so, and proceeded to hand down a decision adverse to the applicant without explaining why no further information had been sought.

The authors of the joint judgment (McHugh, Gummow, Callinan and Heydon JJ) decided the matter on the basis that the RRT had not met its statutory requirements to conduct a review

and to allow the applicant to give evidence and to present arguments. While the RRT was under no obligation to give the applicant an opportunity to provide further material, it had indicated 'that the review could not be completed until further steps had been directed and performed' and could not then conclude the review by peremptorily making a decision without taking those steps. Justice Kirby decided the matter in terms of the requirements of the general law of procedural fairness that had not at the time of the RRT's decision been abolished or diminished by statute (s 422B of the Migration Act inserted in 2002: see below under heading 'Effects of legislation removing ground of procedural fairness'). Failure to follow up as foreshadowed at the end of the proceedings represented a procedural unfairness because the 'inconsistencies' remained relevant. Justice Kirby commented that, while this was not a case in which to explore the notion of 'legitimate expectations' in relation to procedural fairness, there was nothing in *Lam's* case (see (2003) 36 *AIAL Forum* at 8) requiring abandonment of that fiction as a tool of judicial reasoning, although its utility was somewhat limited in view of the expanded notion of procedural fairness in Australia. (***Applicant NAFF of 2002 v MIMIA* (2004) 211 ALR 660**, 8 December 2004)

Exclusion of student from PhD course not a decision made under an enactment

Tang was concerned with whether a decision by Griffith University to exclude a student from a PhD program on the ground of academic misconduct was subject to review under the Queensland *Judicial Review Act 1992*, which is similar in material respects to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The High Court allowed an appeal from the decision of the Queensland Court and ordered that Ms Tang's application for judicial review be dismissed without consideration of the evidence for her claims that there had been breaches of the bias and hearing principles of procedural fairness, together with other grounds for relief set out in the Judicial Review Act.

By a majority of 4:1 (Kirby J dissenting) the High Court held that Ms Tang's exclusion from the PhD program was not a decision of an administrative character 'made under an enactment', in this case the *Griffith University Act 1998* (Qld), and therefore was not subject to review under the Judicial Review Act. The High Court's consideration of this matter occurred in the context of differing lines of interpretation in the Federal Court of the phrase 'made under an enactment'. In their joint judgment, Gummow, Callinan and Heydon JJ held that in order to qualify as a decision 'made under an enactment', it was necessary not only that a decision be expressly or impliedly required or authorised by the relevant enactment, but it had also to affect legal rights and obligations and in that sense derive from the enactment. On the basis of Ms Tang's application it appeared that no legal rights or obligations under private law subsisted between her and the university that could be affected by the decision to exclude her. Chief Justice Gleeson held similarly that, although the exclusion was within the university's general statutory powers, as it related only to the termination of a voluntary relationship the statute itself did not give the exclusion decision 'legal force or effect'.

As with the majority judges, Kirby J rejected a number of other formulations of the bases on which a decision should be characterised as having been 'made under an enactment'. In contrast to the majority judgments, however, he held that the correct test of whether a decision was 'made under an enactment' is to determine first whether the lawful power to make the decision lies in the enactment, and secondly whether an individual would apart from that source have power to make it. There was no justification for the joint judgment's addition of a 'gloss' that the decision must also affect 'legal rights or obligations'; this was particularly so in light of the general remedial nature of the legislation and the fact that the legislation is concerned with effects on the complaining party's 'interests' not his or her 'legal rights or obligations'. Ms Tang's 'interests' would be profoundly affected by the finding of

misconduct and her exclusion from obtaining a PhD degree, decisions directly traceable to the University Act and of a kind that 'only a university operating under the [Qld] Higher Education Act could lawfully perform'. It was 'not unreasonable that such bodies should be answerable for their conformity to the law', including the law of procedural fairness. (***Griffith University v Tang*** **[2004] HCA 7**, 3 March 2005; **Michael Will, 'High Court decision may add to government power'**, ***Canberra Times***, 30 March 2005)

Entitlement to protection visas of refugees able to obtain 'effective protection' in another country

The High Court has handed down an important decision on the question whether acknowledged refugees from one country who are able to claim 'effective protection' in a 'safe' third country are entitled to a protection visa in Australia. The issue was decided on the basis of the provisions of s 36(2) of the *Migration Act 1958* as they were when the applicants applied for protection visas, before the amendment of s 36 in 1999. The applicants were Russian Jews each of whom met the definition of a refugee in the Refugees Convention, but who were entitled to immigrate to Israel and obtain nationality status under its *Law of Return*. They had never been to Israel and did not speak Hebrew, and had no desire to immigrate to Israel for those and other reasons. The High Court in effect rejected the view of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 that Australia had no protection obligations in those circumstances because Article 33 of the Convention (concerning 'non-refoulement') did not prevent their removal to the third country. *Thiyagarajah* had been followed by subsequent benches of the Full Court, reluctantly in the present case (see (2004) 41 *AIAL Forum* at 6). Six judges delivered a joint judgment in which they refused to imply the limitation sought by the Minister in relation to a Convention refugee's right to a protection visa. Justice Kirby expressed the belief that it would be absurd to hold by implication that the Convention or the Migration Act removed Australia's protection obligations because of the generosity of other States' refugee laws, an interpretation that if universalised could potentially 'send refugees shuttling between multiple countries'. (***NAGV & NAMW v MIMIA*** **[2005] HCA 6**, 2 March 2005)

Effects of legislation removing ground of procedural fairness

The provisions introduced into the Migration Act by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (the Procedural Fairness Act) have begun to affect applications for review made after 4 July 2002 (see (2002) 35 *AIAL Forum* 2–3). In *WAID*, for example, French J was of the opinion that, when read with the new provisions, s 424A (concerning provision of information by the RRT) was to be treated as 'exhaustive of the requirements of procedural fairness relating to the applicant's right to comment on adverse material which is known to and is to be relied on by the (RRT)'. The legislation purports to make a number of Divisions or Sub-Divisions of the Migration Act an 'exhaustive statement of the natural justice hearing rule *in relation to the matters [the Division etc] deals with*'. However, the words emphasised have created problems of interpretation, and it is unclear how far the provisions go to exclude the application of procedural fairness.

The state of authority is sparse and indeterminate. The view taken by French J in another decision (*WAJR*), was that the 'matters' dealt with in the Division within which s 424A occurs are 'to be identified by reference to its particular provisions and not by reference to its general subject matter, ie the conduct of reviews by the RRT' (see also *WAID*). In *WAJR* the result was that the requirements in s 424A concerning provision by the RRT of information to an applicant had become 'an exhaustive statement of the requirements of procedural fairness relating to adverse material' known to the RRT which it intends to rely on. However, that left open the question whether there might be other aspects of procedural fairness which could be relevant to decisions under the appropriate Divisions (cf *obiter dicta* of Lindgren J in

NAQF). On the basis of his comments in *Wu*, Hely J would clearly not have held there was any residual procedural fairness obligation to provide the adverse material. By contrast, in a recent decision that examines the authorities (*Moradian*), Gray J found that, despite the evident intention of the Minister in introducing the Procedural Fairness Act to overcome the High Court's decision in *Re MIMIA; Ex parte Miah* (2001) 206 CLR 57, the relevant provision was too ambiguous to operate as 'plain words of necessary intendment' capable of excluding the principles of procedural fairness. The issue of principle would seem to require further consideration at the level of the Full Court. (***Moradian v MIMIA* [2004] 1590**, 6 December 2004, Gray J; ***WAJR v MIMIA* [2004] FCA 106**, 18 February 2004, French J; ***NAQF v MIMIA* (2003) 130 FCR 456**, Lindgren J; ***Wu v MIMIA* [2003] FCA 1249**, 13 November 2003, Hely J; ***WAID v MIMIA* [2003] FCA 220**, French J, 19 March 2003; on other issues relating to s 424A note forthcoming High Court decision in *SAAP v MIMIA*)

Full court quashes land acquisition by Commonwealth as not authorised by legislation

In a judicial review action brought by the South Australian State Government under both the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth), the Full Court of the Federal Court has quashed actions of the Parliamentary Secretary to the Commonwealth Minister for Finance and Administration purporting to acquire two parcels of land in South Australia for the purpose of constructing a repository for near-surface radioactive waste. The Commonwealth had made it known that it wished to acquire certain land in South Australia for that purpose, and the State Government indicated that it would introduce legislation in the near future designed to declare the land a public park which, under s 42 of the *Lands Acquisition Act 1989* (Cth) (the LAA), would have prevented the acquisition occurring without the State Government's consent. Shortly afterwards, the Parliamentary Secretary, acting for the Minister, signed certificates under s 24(1) of the LAA stating his satisfaction that there was an urgent necessity for the acquisition of the interests in the land and that it would be 'contrary to the public interest for the acquisition to be delayed by the need for the making, and possible reconsideration and review, of a pre-acquisition declaration'. He immediately afterwards signed declarations under s 41(1) of the LAA that all the interests in the land were compulsorily acquired by the Commonwealth for the public purpose of disposal of short-lived intermediate level radioactive waste. In a statement of reasons under s 13 of the ADJR Act, the Parliamentary Secretary stated that the reason for urgency was the proposed introduction of the public park bill in the South Australian Parliament.

The court unanimously allowed an appeal against the decision of the primary judge upholding the acquisition. Justice Branson, with whom Finn and Finkelstein JJ agreed, held that the power to give a certificate of urgency under s 24(1) of the LAA did not extend to exercise of it for the purpose of preventing the application of section 42 to the acquisition, nor could it be contrary to the public interest for the acquisition to be delayed for that reason. Alternatively, it could be said that the Parliamentary Secretary had exercised his power under s 24(1) for an improper purpose. Justice Finn, with whom Branson and Finkelstein JJ agreed, held also that a reading of the LAA in the light of the ALRC report which preceded its enactment did not reveal any basis for excluding the application of procedural fairness principles to the exercise of power under s 24, and that in the present circumstances where both the State and others had important interests at stake there was no reason for the content of those requirements to be reduced to 'nothingness'. (See also the Court's useful summary of the usual principles of procedural fairness.) (***South Australia v The Hon Peter Slipper, MP* [2004] FCAFC 164**, 24 June 2004)

Administrative review and tribunals

ARC report on automated assistance in administrative decision making

Following consultations on the basis of its earlier Issues Paper (see (2004) 40 *AIAL Forum* at 7), the Administrative Review Council (ARC) has released its final report on automated assistance in administrative decision-making. Starting from the administrative law values of lawfulness, fairness, rationality, openness (or transparency) and efficiency, the report propounds a series of principles directed to those involved in the construction and maintenance of expert (automated) systems used in administrative decision-making (noting their applicability in many cases also to agency decision-making manuals). The report concludes that using an expert system to actually make a decision, as distinct from providing assistance to a decision-maker to make it, 'would generally be suitable for decisions involving non-discretionary criteria'. However, there were at least four approaches brought to the ARC's attention where expert systems could appropriately be used as an administrative tool to help a decision maker in the exercise of their discretion. The report also noted that the design of expert systems needs to reflect government policy while not fettering or narrowing a decision-maker in the exercise of the discretion. The remaining principles are set out in chapter 4 of the report, and fall broadly under three headings: primary administrative law considerations; system development and operational considerations; and new service delivery considerations. The first category deals with issues such as compatibility with legislation; when it is appropriate to override a decision made with the assistance of an expert system; and the need to comply with administrative law standards and privacy obligations. (***Automated Assistance in Administrative Decision Making*, Report No 46, Administrative Review Council**, November 2004; available from: www.law.gov.au/arc)

UK reforms in the area of administrative justice

The UK Government published a White Paper in July 2004 setting out the broad measures proposed in the areas of improving the processes of 'administrative justice', in response to the Review of Tribunals headed by Sir Andrew Leggatt, presented in March 2001 (see (2002) 35 *AIAL Forum* at 7–8 for a brief summary of the Leggatt Report). The White Paper accepts the fundamental view of the Leggatt report that the tribunals system is 'incoherent and inefficient'. In addition to the bringing of tribunals under one administrative umbrella, the paper proposes also to find ways to improve: the standard of decision-making, explanations of decisions (reasons statements), provision of advice to those dissatisfied with decisions, and the utilisation of means of resolving disputes other than proceeding to full hearings by a tribunal. The paper proposes a timetable for progressive integration of tribunals under the new Tribunals Service as an Executive Agency within the Department of Constitutional Affairs (DCA), beginning with the ten largest tribunals, and extending to the remaining central government tribunals by early 2009. The aims include to provide efficiencies between tribunals including accommodation; to improve their standard of operation; to strengthen the reality and appearance of the independence of tribunals from decision-making agencies; to bring procedures in different tribunals more into line where possible; to improve training and performance appraisal of members of tribunals; and generally to provide users of the system with more and better targeted support. A Senior President with the knowledge, experience and standing equivalent to a Lord Justice of Appeal is to be appointed with responsibility in relation to all tribunals. There will also be an appellate tier (called the Administrative Appeals Tribunal!) to hear appeals from individual tribunals by leave, as well as more complex primary cases. Administrative actions to implement the proposals have commenced, legislation concerning tribunal members is proposed to be introduced in June 2005 (Courts and Tribunals Bill), and the formal launch of the service is proposed for April 2006.

A significant element of the new proposals is the recasting of the present Council on Tribunals – which Sir Andrew Leggatt found 'had given insufficient emphasis to strategic thinking about administrative justice generally or about tribunals in particular' – to become an Administrative Justice Council with a greater role in the development and support of the new system. Unfortunately, unlike the Administrative Review Council in Australia, it will not have a research function. In the meantime, the present Council on Tribunals will have a greater consultative role on legislation affecting tribunals. (**Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton, *Transforming Public Services: Complaints, Redress and Tribunals***, Cmd 6243, July 2004, available from: www.dca.gov.uk/legalsys/tribunals.htm)

WA State Administrative Tribunal in operation

The Western Australian State Administrative Tribunal (SAT) commenced formal operation on 1 January 2005 (for the Barker Report leading to its establishment see (2002) 35 *AIAL Forum* at 1–2). The new tribunal brings together the work of a large number of existing tribunals and other bodies in reviewing or making original decisions (over 600 in all) under 137 enactments. Applications to the tribunal are divided into four streams: Human Rights, Development and Resources, Commercial and Civil, and Vocational Regulation. The tribunal became fully operational on 24 January 2005 with the addition of the power to make decisions under the WA *Guardianship and Administration Act 1990* in place of the Guardianship and Administration Board. The SAT intends to emphasise mediation rather than formal hearings to resolve disputes wherever possible. Justice Michael Barker QC is President of the SAT, assisted by two Deputy Presidents, with 12 other fulltime members and 100 sessional members. The tribunal's website includes a decisions database: www.sat.justice.wa.gov.au.

Application of legal professional privilege and public interest immunity in the AAT

In proceedings in the Administrative Appeals Tribunal (AAT) concerning objections to amendments to tax assessments, the Commissioner of Taxation claimed exemption from disclosure of certain documents on the grounds of legal professional privilege and public interest immunity. Deputy President Forgie held that, while under s 37(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) legal professional privilege cannot prevent provision by a government agency of the 'T' documents both to the AAT *and to the other party*, or the provision to the AAT of documents requested by it under s 37(2) of that Act, the AAT's power under s 33 to give the other party copies of documents it has obtained is subject to the application of legal professional privilege. Similarly, there is no implied or express provision to do away with any privilege in relation to documents produced to the AAT under summons (s 40). The documents in question were properly subject to legal professional privilege and could not be ordered to be produced under the AAT's general powers in s 33, the only avenue for their production.

The AAT also held that claims for public interest immunity in relation to information in documents were not limited to the case where the Attorney–General of the Commonwealth, or a State or Territory, issued a certificate under ss 36 or 36B of the AAT Act to the effect that disclosure would be contrary to the public interest. Where a certificate is issued, the AAT is governed by the provisions of s 36D(6) which exclude 'the operation of any rules of law that relate to the public interest' that would otherwise apply to disclosure of information or matter in documents. The better interpretation of s 36D(6) was that, where no public interest certificate had been issued, it was 'not intended to exclude the general operation of considerations of public interest immunity in proceedings in the Tribunal'. In the present case the balance of public interest favoured non-disclosure of information given in confidence to a

government agency that would have revealed the identity of informers, but the relevance to the proceedings of other non-confidential information outweighed any public interest in its non-disclosure. (***Re Hobart Central Child Care and Commissioner of Taxation*** **(2004) 57 ATR 1368**, 19 November 2004)

Ombudsman

Activities of the Commonwealth Ombudsman in 2003 to 2004

The Ombudsman's annual report for 2003–04 contains a wealth of material on the activities of his office. The report is significant for a greater attention than in the past to the systemic effects of the work of the Ombudsman's office, including chapters on problem areas in government decision-making, ways in which the Ombudsman helped people as a result of complaints, and some of the Ombudsman's contributions to promoting good administration, including his own motion investigations (see next item). During the year there was a decrease of 12% in the number of complaints received (17,496), but a steady increase in the number of more complex matters raised. The Ombudsman investigated 30% of all complaint issues finalised (5,910); agency error or deficiency was identified in 20% of cases investigated, compared to 29% last year, and no error or defect was found in 43%. New functions for the Ombudsman include assuming responsibility as the Postal Industry Ombudsman during 2004–05 (see (2004) 43 *AIAL Forum* at 13), conducting an annual review of the information-gathering powers of the Building Industry Taskforce, and possible assumption of the role of Ombudsman in relation to Norfolk Island. The Government has provided additional funding of $7.061 million over four years to establish the office's new roles, as well as to expand delivery of Ombudsman services in regional and remote areas, to improve oversight of surveillance devices, and for partial funding of Comcover premiums. The Ombudsman intends to appoint an Outreach Manager in 2004–05.

The Ombudsman's office is considering whether, as with some of its State counterparts, it should be excluded from the FOI Act for documents relating to its investigation activities, arising in part out of a review by Professor Ian Freckleton concerning unusually persistent complainants. Again, in view of the absence of comprehensive review of the work of the Ombudsman since the establishment of that position in 1976, the Ombudsman's office, with the Prime Minister's approval, is also conducting a review of the legislative framework for the Ombudsman's work. As part of this exercise the Ombudsman is considering the best way of conferring jurisdiction on the Ombudsman to cover the actions of Commonwealth contractors. (***Commonwealth Ombudsman: Annual Report 2003–2004***, 5 October 2004, available from the Ombudsman's website at: www.comb.gov.au/publications)

Reports of own motion and other investigations by the Commonwealth Ombudsman

Investigations initiated by the Commonwealth Ombudsman (known as 'own motion' investigations), often relating to systemic problems identified as a result of a series of complaints, continue to form a significant aspect of the Commonwealth Ombudsman's work. In 2003–04 the Ombudsman released four own motion reports, relating to: complaint handling by the Australian Taxation Office (ATO) and by Job Network; changes to assessment decisions by the Child Support Agency (CSA); and the operational and corporate implications for the Australian Crime Commission (ACC) arising from alleged corrupt activity by two former secondees.

At the beginning of the 2004–05 financial year, there were four own motion investigations under way, into: the treatment of underaged people in the military; the administration by the AFP of traffic infringement notices; the use of coercive powers by the ATO; and the quality of

FOI processing by government agencies, building on the Ombudsman's and the Auditor–General's previous reports on these matters. The Ombudsman published a report after an audit of the use of coercive access powers in one area of the ATO (August 2004), and proposes to continue the own motion investigation by auditing the use of access powers in a different sphere of ATO operations. In November 2004, the Ombudsman published a report on his own motion investigation into the implementation by the Australian Crime Commission (ACC) of the Ombudsman's recommendations relating to allegations of corrupt behaviour by two officers seconded from State services and of the findings of a review commissioned by the ACC, concluding that the actions taken by the ACC had been appropriate and proportional responses to the recommendations and the review.

In line with an earlier decision of the Ombudsman, reports of investigations that culminate in a formal finding of agency deficiency will be published in full – or in an abridged version where privacy, confidentiality or secrecy provisions require it – on the ombudsman's website (above).

Freedom of information, privacy and other information issues

Amendment of Public Service Regulation 2 in relation to disclosure of official information

As a result of the finding by the Federal Court in *Bennett v President, HREOC and CEO, ACS* (2003) 204 ALR 119, that the previous equivalent of then regulation 2.1 was invalid because it breached the constitutional freedom of communication on political and governmental matters, the Government has amended regulation 2 of the *Public Service Regulations 1999*, made under s 13(13) of the *Public Service Act 1999*, with effect from 23 December 2004. As amended, regulation 2.3 prohibits the disclosure of information obtained or generated by an APS employee in connection with his or her employment 'if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policy or programs'. In addition, regulation 2.4 prohibits the disclosure of such information which was, or is to be, communicated in confidence within the government, or was received in confidence by the government from a person or persons outside the government (not confined to circumstances where disclosure would found an action for breach of confidence). Disclosure is not prohibited in the course of an employee's duties or in accordance with an authorisation of an Agency Head, or if it is 'otherwise authorised by law'. The new provisions respond to the court's concerns that the former legislation was a 'catch-all' provision, and to the Australian Law Reform Commission's (ALRC) recommendation that the legislation should only apply to information that genuinely requires protection. They do not pick up the additional recommendation of the ALRC that the duty of secrecy should apply only where unauthorised disclosure is likely to harm the public interest. (***Public Service Amendment Regulations 2004 (No 2)*****,** gazetted 23 December 2004; see also (2004) 41 *AIAL Forum* at 10)

FOI: public interest in government confidentiality upheld

Two recent decisions of the President of the AAT (Downes J) under the *Freedom of Information Act 1982* (Cth) (FOI Act) have attracted considerable public comment. They concerned FOI requests made by the FOI Editor of the *Australian*, Mr Michael McKinnon, to the Department of the Treasury for documents relating to 'bracket creep' in taxation collection, and to the First Home Buyers Scheme, including fraudulent applications under the scheme, and another request to the Department of Foreign Affairs and Trade for documents relating to the Australian Government's response to the situation of Mr David Hicks, including advice on the legality of his detention in Guantanamo Bay.

A number of the exemption claims in the Treasury matter related to deliberative process material which was covered by a conclusive certificate given under s 36(3) of the FOI Act. His Honour found that reasonable grounds existed for those claims, in effect endorsing grounds advanced by Treasury of two main kinds. Broadly speaking, these were either (a) the need for confidentiality of communications within government, in particular between Ministers and advisers on controversial matters of ongoing sensitivity, and for confidentiality of written communications relating to decision-making and policy formulation processes where disclosure might lead to future reluctance by officers to make written records, or (b) the alleged misleading or confusing effect of disclosing various kinds of provisional or superseded analysis, recommendations or options, or material that would be difficult to understand. The applicant has appealed to the Federal Court against that decision. In the Foreign Affairs matter, after balancing other aspects of the public interest, the AAT upheld exemption claims under s 36 similar to those in the Treasury matters even in the absence of a conclusive certificate; claims under ss 33 (international relations) and 34 (Cabinet documents) were also upheld on the evidence. (***Re McKinnon v Secretary, Department of the Treasury*** **[2004] AATA 1364**, ***Re McKinnon v Secretary, Department of Foreign Affairs and Trade*** **[2004] AATA 1365**, both 21 December 2004; **Denis O'Brien, 'FOI law is well and truly in need of an overhaul',** ***The Public Sector Informant*** (a *Canberra Times* publication), 2 March 2005; **'FOI rulings squeeze access' (editorial**), ***Canberra Times***, 23 December 2004)

Commencement of access provisions of the UK FOI Act

On 1 January 2005 the access provisions of the *Freedom of Information Act 2000* (UK) came into force (a separate Act applying in Scotland also came into force on that day). The Act joins the *Data Protection Act 1998* (UK) and the *Environmental Information Regulations 2004* (UK) as the principal means for the disclosure of publicly-held information in the UK. Opinions differ on how wide and productive the right of access will turn out to be, with much depending on the way in which public authorities, the Information Commissioner and the courts interpret the public interest override that applies to a number of exemptions. (For a useful description and analysis of the UK FOI Act, see: **Philip Coppel, 'Freedom of information in the United Kingdom: the public interest, prejudice and practice' (2005) 12** ***Aust Jo of Admin Law*****,** forthcoming; for comment and criticisms see: **Robert Hazell, 'Fear of information stalks corridors of Whitehall',** ***Independent***, 23 December 2004, and articles and leader in ***Independent***, 2 February 2005)

AAT privacy decision

In the first substantive decision on such a matter, the AAT (Justice Downes, President, Senior Member Constance and Member Miller) recently held that the Federal Privacy Commissioner, acting as Privacy Commissioner in relation to the ACT, had been in error in not awarding compensation to an applicant, whose privacy the Commissioner had found had been breached by the ACT Department of Justice and Community Safety (DJACS). The CEO of DJACS had unlawfully provided personal information about the applicant's employment and private affairs to the Ombudsman who was investigating a public interest disclosure by the applicant (see *Public Disclosure Act 1994* (ACT)). The Privacy Commissioner declared that DJACS should apologise to the applicant (which it did in formal terms), but in view of the fact that disclosures did not go beyond the Ombudsman's investigating team and were not known more widely in the community, he made no declaration as to compensation.

The *Privacy Act 1988* (Cth) provides for compensation for any loss or damage suffered by reason of an act or practice complained about; and loss or damage includes 'injury to the complainant's feelings or humiliation suffered by the complainant'. In the absence of

authority concerning compensation decisions in relation to breaches of privacy, the AAT accepted the applicability of principles endorsed by the Full Court of the Federal Court in relation to compensation for breaches of the *Sex Discrimination Act 1984* (Cth), awarding compensation of $8,000 on the basis of ordinary principles of tort law for injury to the applicant's feelings and humiliation suffered. Playing the man and not the ball was as unfair in public administration as in sport, the AAT commented. (***Re Rummery and Federal Privacy Commissioner* (2004) 39 AAR 166**, 22 November 2004, relying on the reasoning of the Full Federal Court in *Hall v A&E Sheiban Pty Ltd* (1989) 20 FCR 217)

Public administration

Establishment of Commonwealth anti-corruption body foreshadowed

The Commonwealth Government announced in June 2004 that it would establish a new independent body to address corruption amongst law enforcement officers at a national level. It will have the powers of a Royal Commission, including telephone intercept powers. The move arose out of the allegations of corruption by state service officers seconded to the Australian Crime Commission (see above in relation to Ombudsman own motions). (**Commonwealth Attorney–General and Minister for Justice, Media Releases**, 16 June 2004)

Report on corruption and democracy

A report by Professor Barry Hindess of the Australian National University examines the question of corruption and democracy, in particular issues relating to institutional corruption. Among the report's recommendations are Commonwealth legislative whistleblower protections, country-wide anti-defamation legislation to provide more protection for bona fide public interest discourse, statutory codes of conduct for ministerial staff, parliamentarians and ministers, and an independent ethics commissioner. (**Barry Hindess, *Corruption and Democracy in Australia*, Democratic Audit of Australia, Report No 3, ANU**, 2004, available from the following website:
http://democratic.audit.anu.edu.au/)

New collaborative public administration body formed

An interesting recent development in the field of public administration is the establishment of the Australia and New Zealand School of Government Ltd (ANZSOG), a not for profit public company limited by guarantee. The new body has a vision of creating a world-class institution which focuses on the needs of the government and community sectors and seeks 'to enhance the breadth and depth of policy and management skills and invest in the further education and development of those who are destined to be leaders in the public sector'. It organises a public lecture series and a number of public seminars, as well as offering an Executive Master of Public Administration program. ANZSOG has sponsored a Chair of Public Management located at Monash University with the aim of providing leadership to ANZSOG in relation to research, teaching, professional activities, and academic administrative matters. The body functions through a number of core academic staff, fellows and adjunct professors, as well as drawing on other teaching staff in Australia and New Zealand. ANZSOG is an initiative of five governments (Commonwealth of Australia, New Zealand, New South Wales, Queensland and Victoria) and ten higher education institutions. Its program and publications are available through its website. A recent ANZSOG public lecture was given by Professor Rob Rhodes on changes in government practice in the UK (and Australia). (See **Rob Rhodes, 'End of an era: is Westminster dead in Westminster?', *The Public Informant*** (a *Canberra Times* publication), 2 March 2005, and the full lecture at: htttp://anzsog-research.anu.edu.au/events.html)

Provision for long-term planning processes in Australia

Dr Ian Marsh and Emeritus Professor David Yencken have recently provided a stimulating discussion of the deficit in long-term planning processes in Australia and some possible ways of rectifying the situation. They argue that social and political changes in the last 30 years or so have reduced the effectiveness of the two-party political system 'to provide the setting for sustained review and analysis of long-term trends', and that new structures are required to enable long-term issues to be identified and considered in a non-partisan way and then brought into the political arena for consideration and decision. In their view, the present political arrangements lack a 'transparent "contemplative" phase in the consideration of longer-term issues'. They suggest that improvement will involve, first, strengthening capabilities for identifying and analysing such issues, and, secondly, providing for the engagement of interest-group and public opinion. Among suggestions on the former are building independent research capacity by government-supported bodies, including advisory committees and consultative forums, and promoting the growth of independent think tanks and community organisations concerned with policy issues. More fundamentally, they propose restructuring the Council of Australian Governments (COAG) to fit it better for bringing about key nationwide reforms, and a major reconfiguration of the national Parliamentary committee system to involve interest groups and the public generally in policy-making and to give careful consideration to significant issues before the major political parties take a stand on policy. One model would involve parliamentary committees or bodies that either included both parliamentarians and outside experts, or that worked with groups of such experts. While recognising the difficulties in bringing such changes about, they point to the popular support they would have and the existence of similar processes in other countries. (**Ian Marsh & David Yencken, *Into the Future: The Neglect of the Long Term in Australian Politics*, Australian Collaboration & Black Inc, Public Interest Series**, **Melbourne**, 2004; **Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?', Senate Occasional Lecture**, 26 November 2004)

Other developments

Law Council President warns on erosion of fundamental rights

In a wide-ranging address to the LawAsia conference in Brisbane on 24 March 2005, the President of the Law Council, John North, expressed deep concern at the direction of 'law making in a climate of fear'. His concern related both to federal measures, such as anti-terrorism legislation and the treatment of asylum seekers, and to state measures such as those increasing police powers, limiting the availability of bail and amending the law concerning personal injuries compensation. He raised the issues of a better parliamentary process for closely scrutinising legislation before enactment, and the need for codified and entrenched basic human rights and fundamental freedoms, perhaps through an Australian bill of rights. The Law Council has established a new Human Rights Observer Panel to monitor citizens' rights around the world. It includes a large number of distinguished practitioners and judges; Nicholas Cowdery QC was appointed last year to co-chair the panel. (**Law Council of Australia, Media Releases**, 23 March & 6 April 2005; **John North, 'Restoring rights and liberties and restraining executive power in a climate of fear'**, available from the Law Council's website:
www.lawcouncil.asn.au/)

Law Lords declare indefinite detention of non-UK nationals incompatible with human rights

A recent decision of the House of Lords throws considerable light on the interpretation and application in the UK courts of the European Convention for the Protection of Human Rights

and Fundamental Freedoms (the Convention), largely adopted into UK law by the UK *Human Rights Act 1998*. Nine detainees held for over three years in Belmarsh prison challenged legislation enacted following the terrorist attacks of 11 September 2001 on the United States. The legislation provided in effect for the detention of non-UK nationals in relation to whom the Home Secretary certified that their presence was a risk to national security and that they were reasonably suspected of being terrorists who could not for the moment be deported because of fears for their safety or other practical considerations. Some 17 persons in all have been detained under the legislation. Before enactment of the legislation the British Government made an Order of derogation from Article 5 of the Convention (concerning the right to liberty). The Special Immigration Appeals Commission (SIAC) quashed the Order and declared the legislative provisions incompatible with Articles 5 and 14 (concerning unwarranted discrimination) of the Convention, a decision reversed by the Court of Appeal. The House of Lords allowed the appeal (Lord Walker of Gestingthorpe dissenting), quashed the order and made a declaration in similar terms to that of SIAC. (Under the Human Rights Act the courts cannot strike down legislation that is incompatible with the Convention. Parliament and the executive must decide what to do following a declaration of incompatibility.) The majority held that the derogation provisions had not been met, all but Lord Hoffman holding that, although there were adequate grounds for claiming there was 'a public emergency threatening the life of the nation', a law of such severity that applied only to non-national terrorist suspects and not UK nationals suspected of similar terrorist connections was disproportionate to the need presented by the public emergency, and was unwarrantably discriminatory. Lord Hoffman based his decision that the derogation was invalid on the ground that the current terrorist threat to lives and property did not threaten 'the life of the nation' in terms of its survival as an organised nation. In his Lordship's view, 'the real threat to the life of the nation … comes not from terrorism but from laws such as these', and it was now up to Parliament and the executive to decide 'whether to give the terrorists such a victory'. As a result of the Law Lords' decision, the UK Parliament has passed a highly contentious Bill providing for a range of surveillance and control measures, including house arrest, curfews, electronic tags and internet bans, that would apply both to foreign nationals and British citizens; the Act as modified in the House of Lords is to be reviewed in 12 months time. (***A & ors v Secretary of State for the Home Department* [2005] 2 WLR 87; [2004] UKHL 56**, 16 December 2004; ***Prevention of Terrorism Act 2005* (UK)**; see eg ***Independent***, 8, 9, 11 & 14 March 2005)

Ongoing US Federal Court decisions on Guantanamo Bay detainees

Following the US Supreme Court decision in *Rasul v Bush* (28 June 2004) that US courts had jurisdiction to consider challenges to the legality of the detention and trial of foreign nationals captured abroad and incarcerated in Guantanamo Bay (see (2004) 43 *AIAL Forum* at 17–18), litigation by detainees has continued in the Federal courts. In one case involving a number of detainees, Judge Joyce Hens Green of the District of Columbia (DC) District Court held on 31 January 2005 that, following the Supreme Court's decision in *Rasul*, 'Guantanamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply', in particular due process rights under the Fifth Amendment. The procedures set up following *Rasul* to determine whether detainees were 'enemy combatants' did not satisfy due process requirements concerning access and challenge to evidence, which in some cases could have been coerced. While the Geneva Conventions on treatment of prisoners of war did not apply to those detained as members of terrorist organisations, they did apply to those detained as Taliban fighters or because of association with both the Taliban and al Qaeda. In direct contrast, in actions brought by seven other detainees in the same jurisdiction, Judge Richard J Leon ruled on 21 January 2005 that their habeas corpus petitions should be dismissed on the ground that there was no basis on which they could succeed against the government. These differences will have to be resolved on appeal.

In the meantime, litigation concerning the situation of the Australian David Hicks is being held in abeyance until resolution of all appeals in *Hamdan v Rumsfeld* in which Judge James Robertson of the DC District Court ordered on 8 November 2004 that, until such time as a competent tribunal determined that Mr Hamdan (captured during hostilities in Afghanistan in late 2001) was not entitled to prisoner of war status under the Geneva Conventions, he could not be tried for charged offences by a Military Commission but only by a court-martial under the Uniform Code of Military Justice. The court held that so long as the rules governing the Military Commission permitted his exclusion from commission sessions and withholding of evidence from him, trial before such a commission would be unlawful. Mr Hicks's trial by military commission, due to start on 15 March 2005, appears to have been deferred, and the Australian Government has sought assurances that Mr Hicks can be successfully prosecuted. The other Australian Guantanamo detainee, Mr Mamdouh Habib, was returned to Australia by the US Government without trial. (***In re Guantanamo Bay Cases*, US District Court (DC)**, 31 January 2005; ***Khalid et al v Bush*, US District Court (DC)**, 21 January 2005; ***Hamdan v Rumsfeld*, District Court (DC)**, 8 November 2004; **Angus Martyn, *Progress of the United States Military Commission trial of David Hicks*, Parliamentary Library, Research Note No 33, 2004–05**, 14 February 2005); **Lex Lasry QC, *United States v David Matthew Hicks: First Report of the Independent Legal Observer for the Law Council of Australia – September 2004***, see link on Law Council's Media Release of 15 September 2004, available from: www.lawcouncil.asn.au)

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THE INEQUALITY OF TREATING UNEQUALS EQUALLY: THE FUTURE OF DIRECT DISCRIMINATION UNDER THE DISABILITY DISCRIMINATION ACT 1992 (CTH)?

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Paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.

Introduction

It is over twelve years since the *Disability Discrimination Act 1992* (Cth) ('DDA') was enacted in Australia with the object of eliminating discrimination against persons on the ground of disability.[1] During that time many issues have challenged the bodies hearing and deciding complaints of unlawful discrimination made pursuant to the DDA[2] and the superior courts hearing appeals from those decisions.

One recurring theme in disability discrimination has been how to interpret discrimination in a context that is predicated on difference. The gravaman of the legal test of discrimination on the basis of race or sex is that there is no inherent difference between genders or races, only perceived difference. In contrast, implicit in the concept of disability discrimination is actual (or imputed) difference, namely the existence (or imputation) of the relevant disability and the consequences that it may have or be perceived as having for the physical, intellectual or emotional functioning of the person with the disability.

A recent decision of the High Court, *Purvis (on behalf of Daniel Hoggan) v New South Wales (Department of Education and Training*)[3] ('*Purvis*') has examined the issue of how the direct discrimination provision of the DDA is to be interpreted and applied. It also provides a convenient framework in which to consider the inadequacies of the test for direct discrimination as it exists in the DDA and the difficulties in proving an allegation of direct discrimination under the DDA.

In summary this paper considers:

(a) the definitional requirements of direct discrimination;
(b) the consideration of the legal test for direct discrimination by the majority and dissenting members of the High Court in *Purvis*;
(c) the inadequacies of the characterization of direct discrimination as defined by the DDA; and
(d) the practical consequences of the interpretation of the direct discrimination that is now binding precedent as a result of *Purvis*.

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The tests for discrimination under the DDA

There are two types of discrimination provided for in the DDA: direct discrimination and indirect discrimination.

The consideration of direct or indirect discrimination under the DDA is in relation to work[4]; education[5]; access to premises[6]; goods, services and facilities[7]; accommodation[8], land[9]; clubs and incorporated associations[10]; sport[11]; Commonwealth laws and programs[12]; and requests for information.[13]

Direct discrimination

The concept of direct discrimination refers to a comparison of the way in which a person with a disability is treated with the way a person without that disability (known as the 'comparator') is treated in the same or similar circumstances. The complainant must then establish a casual link between the disability and any less favourable treatment. Section 5 of the DDA contains the legal test for direct discrimination. Section 5(1) provides:

> For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

Two related elements arise when considering section 5(1) of the DDA[14]. They are:

(a) *a conduct element*: that 'the discriminator treats… the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person with the disability'; and

(b) *a causation element*: the conduct occurs 'because of the aggrieved person's disability'.

Some clarification of the term 'circumstances that are the same or are not materially different' is provided by section 5(2):

> For the purpose of subsection 5(1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

It should be noted that the reference to 'accommodation' in section 5(2) means 'the making of suitable provision for the disabled person'[15] in the sense of an adjustment or adaptation.

The fact that direct discrimination focuses on the equality of treatment (rather than equality of outcome) is said to reflect the concept of 'formal equality' which is discussed below.

Indirect discrimination

Indirect discrimination refers to a situation where the same treatment applies to people with and without a disability but the effect of such treatment is to disadvantage or exclude people with a disability in a way which is not reasonable. For example, stairs are the same for everyone but some people cannot use them; print on paper is the same for everyone but some people cannot read it.

Section 6 of the DDA relates to indirect discrimination and provides:

> For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:
>
> (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

As the focus of indirect discrimination is on the outcome of the same treatment, it is said to reflect the concept of 'substantive equality'.

Unjustifiable hardship

In most but not all[16] of the areas of life covered by the DDA, an alleged discriminator may claim the defence of 'unjustifiable hardship' in response to a finding of less favourable treatment under section 5 or indirect discrimination under section 6.[17] The 'unjustifiable hardship' defence allows for discrimination to occur if the alleged discriminator can prove that to provide the services or facilities required to accommodate the needs of the person with the disability would impose a hardship that cannot (after the consideration of certain matters contained in section 10 of the DDA) be justified.

Formal vs substantive equality

As mentioned above, generally speaking, direct discrimination is concerned with formal equality (being, equality of treatment) and indirect discrimination with substantive equality (being, equality of outcome). By way of explanation:

> The notion that different treatment may be required to prevent or compensate for disadvantage involves the concept of what has come to be referred to as 'substantive equality'… different treatment is said, in some circumstances, to be necessary to achieve those goals or outcomes… 'formal equality'… insists upon equal treatment to the extent the people should be assessed without regard to certain characteristics (or 'grounds' of discrimination) such as sex and race.[18]

In Australia, the objects of the DDA include objectives 'to eliminate, as far as possible, discrimination against persons on the ground of disability' and 'to ensure, as far as practicable, that persons with disabilities have same rights to equality before the law as the rest of the community'.[19] The majority of the High Court in *Purvis* (being Gummow, Hayne and Heydon JJ) and the dissenting judges (McHugh and Kirby JJ) came to different conclusions as to whether direct discrimination in the DDA embodies the concept of formal or substantive equality. As will be seen below, this informed the different approaches that were taken by them to the interpretation of the direct discrimination provision in the DDA.

Purvis' case

Purvis concerned the schooling of Daniel Hoggan who has an intellectual disability that manifests itself in Daniel learning differently and displaying disturbed, and at times aggressive, behaviour.

Daniel was enrolled at a State school and the proceedings, which were brought by his foster father, Mr Purvis, focused on his suspension and ultimate exclusion from that school because of incidents involving verbal abuse and punching and kicking. An element of the complaint was the manner in which the school sought to manage Daniel's behaviour and what the complainant asserted were inadequacies in the accommodation of his disability.

It was alleged that Daniel's treatment by the school constituted a breach of section 22(2) of the DDA. This section provides that it is unlawful for an educational authority to discriminate against a student on the ground of the student's disability by among other things expelling the student or subjecting the student to any other detriment.

The case was argued as one of direct discrimination. The complainant's case was that Daniel had been treated less favourably than other students in a materially similar position because of his disability.

Purvis could have been argued as an indirect discrimination case under section 6 of the DDA. If it had, it could have been framed in the following way:

(a) it was a requirement or condition of attending the school that one not exhibit violent behaviour; and
(b) this was a requirement or condition with which a substantially higher proportion of persons without Daniel's disability were able to comply and Daniel could not comply with.

Establishing, however, that the requirement or condition was unreasonable would have created difficulties for Daniel's case.[20] This limb of section 6 creates an objective test of reasonableness in all the circumstances of the case[21] with the onus on the complainant to establish unreasonableness. The concept of reasonableness is not present in section 5.

The defence to a claim of discrimination against an educational authority that 'unjustifiable hardship'[22] would be imposed upon a respondent in order for them to avoid a finding of unlawful discrimination is limited to the admission process of the student and does not extend to situations where the student is a member of the student body.[23]

Pleading the facts as an allegation of unlawful direct discrimination by an educational authority avoided a consideration of reasonableness as well as the application of the defence of unjustifiable hardship.

The complaint was upheld by the Human Rights and Equal Opportunity Commission ('the Commission'), sitting as it then did as a tribunal.[24] That decision was found to be wrong in law on review in the Federal Court by Emmett J.[25] The decision of Emmet J was affirmed on appeal by both the Full Court of the Federal Court[26] and the High Court (McHugh and Kirby JJ dissenting).

I will now consider in detail the meaning of the elements of direct discrimination as set out in section 5 in light of the High Court's decision in *Purvis*.

The elements of direct discrimination under the DDA as decided in *Purvis*

As stated above, the elements to be considered when applying section 5 of the DDA are:

(a) the conduct element which focuses on comparing the treatment of a person with a disability to that of a person without a disability in the same or not materially different circumstances so as to determine whether the person with the disability was treated less favourably; and

(b) if the person with the disability was treated less favourably, then it is necessary to consider the causation element: was the person treated less favourably because of their disability?

The operation of each of these elements of direct discrimination depend on the complainant's 'disability'. Section 4 of the DDA provides a definition of the term but does not expressly state whether the functional limitations that may result from a disability are included within the meaning of 'disability'.

All of the members of the High Court (other than Callinan J who did not express a view) rejected the approach of the Full Federal Court below that the definition of disability contemplated distinguishing between the disability and the conduct that it causes.[27] The majority of the Court (being Gummow, Hayne and Heydon JJ) held that the term 'disability' includes the behaviour that flows from the disability. They stated,

> to focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person 'different' in the eyes of others.[28]

McHugh and Kirby JJ went beyond a consideration of behaviour. They concluded that the definition of 'disability' included 'the functional limitations that result from the underlying condition'.[29]

The conduct element

The conduct the subject of comparison is the treatment of the person with the disability (on the one hand) and the treatment that would have been given to a person without the disability in the same or similar circumstances (on the other). The person without the disability can be real or notional.[30] Formulating the characteristics of this comparator underscores the interplay between the definitional requirement that the person be without the disability of the aggrieved person but be in the same or similar circumstances as the person with the disability.

The dissenting judges on the one hand and the majority (and Gleeson CJ) on the other came to a different conclusion as to the proper construction of section 5 and the formulation of the comparator.

The majority's approach

The majority laid the foundations for their approach to the conduct element of direct discrimination by acknowledging that legislation in other jurisdictions such as the United Kingdom,[31] European Union[32] and United States,[33] expressly obliges persons to treat people with disabilities differently from others in the community.[34] They did not see, however, that this is the case with the DDA. Their Honours stated that 'the principal focus of the [DDA]… is on ensuring equality of treatment..[i]n this respect it differs significantly from other, more recent, forms of disability discrimination'.[35]

Their Honours identified two consequences of the focus on equality of treatment in the DDA.

Firstly, if the purpose of the legislation is to ensure equality of treatment then the 'focus of inquiry' to be made in undertaking a comparison as contemplated by a provision such as section 5 'will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other sense, for example, economic, social or cultural equality'.[36] They stressed that section 5 by requiring a comparison between the treatment given to the person with the disability with the treatment that would be given to a person without a disability, involves 'a comparison which is very different from the comparisons required by other forms of disability discrimination legislation'.[37]

This flows into what the majority saw as the second consequence of the unique focus of the DDA namely that 'considerable care' should be taken in applying what is said about other forms of disability discrimination legislation in other jurisdictions to the construction of the DDA.[38] This recognizes the fact that in some legislative schemes, direct disability discrimination embodies a concept of substantive equality. The DDA, in the majority's view, does not.

In identifying the relevant comparator for the purposes of section 5, their Honours focused on what is meant by the 'same or not materially different circumstances'. Their Honours stated that section 5(2) assists in identifying one circumstance which does *not* prevent the circumstances from being the same or similar: the aggrieved person's need for different accommodation or services.[39] They were of the view that section 5(2) does not create a requirement or positive obligation for the respondent to provide the accommodation or services but in the event that they are needed by the aggrieved person those needs will not render the circumstances materially different.[40]

The appellant argued that an identification of these circumstances should not include any circumstance that related to the disability of the complainant. Their Honours responded:

> It may be readily accepted that the necessary comparison to make is with the treatment of a person without the relevant disability. Section 5(1) makes that plain. It does not follow, however, that the 'circumstances' to be considered are to be identified in the way the appellant contended. Indeed to strip out of those circumstances any and every feature which presents difficulty to a disabled person would truly frustrate the purposes of the [DDA]… The appellant's contention… sought to refer to a set of circumstances that were wholly hypothetical – circumstances in which no aspect of disability intrudes. That is not what the [DDA] requires.[41]

Their Honours held that the circumstances referred to in section 5(1) are:

> all of the objective features which surround the actual or intended treatment of the disabled person by the [respondent]. It would be artificial to exclude (and there is not basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability.[42]

Applied to the facts of *Purvis*, it was held that the circumstances in which Daniel was treated included that he had acted violently towards teachers and others. The questions then to be asked were formulated[43] by the majority as being:

(a) how in those circumstances would the school have treated a person without Daniel's disability: that is, how would the school have treated another student without Daniel's disability but with his violent actions; and

(b) if Daniel's treatment was less favourable was that because of Daniel's disability.

The majority did not proceed to answering these questions as it found that Commissioner Innes had erred in not applying section 5 in the way they had described. He had not made the relevant determinations required by those questions.

Gleeson CJ (who also dismissed the appeal) did proceed to consider what the answer to the first question may have been:

> such a comparison requires no feat of the imagination. There are students who have no disorder, and who are not disturbed, who behave in a violent manner towards others. They would probably be suspended and, if the conduct persisted, expelled in less time than the pupil in this case.[44]

To support their construction of section 5, the majority argued that it:

(a) gives proper operation to all aspects of section 5, in particular the requirement in the section that the circumstances be the same or similar;[45]

(b) still gives effective operation of the indirect discrimination provisions which can be engaged if the discriminator requires compliance with a requirement or condition which is not reasonable;[46]

(c) permits for the proper intersection between the operation of the DDA and State and federal criminal law by making the violent actions (which may have constituted assaults) as a matter that can be taken into account and enables an alleged discriminator, for example an educational authority or employer, to require that its students or employees to comply with the criminal law;[47] and

(d) still enables section 5(1) to do 'important work by preventing the different treatment of persons with the disability'.[48]

Analysis of majority's approach

The reasons for and consequences of the majority's approach are discussed in detail below. For the moment, it is sufficient to illustrate the difficulties arising from their approach by applying their construction of the conduct element to another factual context.

For example, what if a blind woman is denied access to a china shop on the basis that to admit him or her will or is likely to result in damage to fragile and valuable stock. The blind woman brings a complaint under section 5 alleging less favourable treatment on the ground of being blind. She alleges that a person who was not blind would have been granted entry to the shop and she was not because of her disability. On the majority's construction of section 5, the treatment afforded to the blind woman is to be compared to the treatment that would be afforded to a person who was not blind in the same or not materially different circumstances. The formulation of the relevant circumstances would include the fact that the complainant is unable to see where she is going. It does not matter on the approach taken by the majority that this is a consequence of being blind.

The comparator could then be identified as someone who is not blind but unable to see (for example, because they are wearing a blindfold or may have their eyes closed). A comparison would then be made between the manner in which the complainant was treated and how the comparator would be treated if they tried to enter the shop. It is most likely (for reasons that will be expanded upon below) that it would be found that there was no less favourable treatment because the comparator would be excluded from the shop in the same way that the complainant had been.

This simple example illustrates that on the majority's approach it will be very difficult for a complainant to establish less favourable treatment under section 5.

The dissenting view

McHugh and Kirby JJ found that Daniel was treated less favourably than a student without his disability in the same or similar circumstances and that this was because of his disability. Their Honours' approach to the conduct element had its foundation in their view that the elimination of disability discrimination is more likely that sex and race discrimination to require different, rather than equal, treatment. Their Honours stated:

> Disability discrimination is different from other types of discrimination, such as sex or race discrimination in that its elimination is more likely to require affirmative action than is the case with sex and race discrimination. Disability discrimination is also different from sex and race discrimination in

> that the forms of disability are various and personal to the individual while sex and race are attributes that do not vary. The elimination of discrimination against people with disabilities is not furthered by 'equal' treatment that ignores their individual disabilities. The Act imposes a *prima facie* requirement on persons falling within its terms to accommodate the disabilities of each disabled person in order to achieve real – not notional – equality.[49]

McHugh and Kirby JJ found the requirement (they stress that it is not an obligation[50]) to accommodate in section 5(2) of the DDA. As stated above, section 5(2) provides that in relation to section 5(1), 'circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability'. Their Honours stated that 'section 5(2) has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities'.[51] The effect given to section 5(2) by McHugh and Kirby JJ, however, extends beyond this and its significance will be seen shortly.

Turning to the construction of the comparator in section 5(1), McHugh and Kirby JJ took the view that for the comparator to be a person without a disability then there should not be imputed to the comparator any characteristic or behaviour that is a manifestation of the complainant's disability.[52] This is consistent with the approach taken by their Honours that the definition of disability includes the functional limitations that result from the disability. McHugh and Kirby JJ commented that:

> if the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations.[53]

This approach is also consistent with the interpretation adopted by some decision makers in the past in relation to the issue of the comparator under the *Sex Discrimination Act 1984* (Cth)[54] and in relation to disability discrimination.[55] That line of authority holds that the comparator should not be imputed with the characteristics of the complainant because to do so would 'fatally frustrate the purposes' of the relevant discrimination legislation.[56]

The comparator on McHugh and Kirby JJ's analysis is a student who did not have Daniel's disability (including its functional limitations): that is, a student who did not have behavioural problems – a student who behaved.[57]

McHugh and Kirby JJ then proceeded to compare the treatment received by Daniel to the treatment that would have been received by the comparator in the same or not materially different circumstances. Their Honours relied upon Commissioner Innes' findings that:

(a) Daniel was denied access to the benefits of an education at the school and was subjected to detriments by being suspended and ultimately expelled;[58]

(b) in order to access the benefits of an education at the school Daniel 'required' accommodation in various ways including the adjustment of policies to suit his needs, the provision of teachers with the skills to deal with his behavioural problems and obtaining expert assistance to formulate proposals to overcome his problems;[59] and

(c) if the accommodation had been made then it is likely that the school would not have denied the benefits to Daniel or subjected him to detriments because it is likely that he would have behaved.[60]

The significance of section 5(2) to the dissenting judgement becomes apparent again when it is used to construct the 'same or not materially different circumstances'.

Section 5(2) recognizes, if it does not imply, that the comparison of 'material circumstances' may require the injection into the equation of all those matters and things that the disabled person requires to compete on equal terms with the able bodied comparator. So in this case, s 5(2) required the issue of less favourable treatment to be determined by reference to [Daniel's] circumstances upon being given the required accommodation or services. On the Commissioner's findings, it is probable that he would not have misbehaved. So… the correct comparator was a student who did not misbehave, not a student who misbehaved. When that comparison is made, it is plain that the student comparator would not have been treated as unfavourably in respect of the benefits and detriments as [Daniel] was actually treated.[61]

It is their Honours' interpretation and application of section 5(2) that determines the nature of the comparator rather than a strict application of the past line of authority that the characteristics of the person with the disability should not be imputed to the comparator. This is evident from a hypothetical example given by McHugh and Kirby JJ:

> Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the [DDA] requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the [DDA] unless it can make out a case of unjustifiable hardship as defined in section 11 of the [DDA].[62]

The comparator, therefore, becomes the non-disabled equivalent of the person with the disability with their needs for different accommodation or services met.

On their construction of section 5, McHugh and Kirby JJ concluded that Daniel was treated less favourably than a student without his disability in same or not materially different circumstances and that the less favourable treatment was because of his disability (see below for the construction of the causation element).

Analysis of the dissenting approach

McHugh and Kirby JJ use section 5(2) to inject into the test in section 5(1) all of the accommodation or services that the person with the disability needs in order to be on equal terms with the comparator. This essentially treats a requirement to accommodate as existing in section 5(2). With respect, it does not. The sub-section refers to the different accommodation or services that *may be required* by the person with the disability. Its effect is that in the event that the complainant *needs* different accommodation or services than a person without a disability then that need will not render the circumstances materially different. It does not require the accommodation to be given nor does it provide that not to give that accommodation constitutes less favourable treatment.

The approach of McHugh and Kirby JJ, with respect, strains the wording of the section. Effect is given to section 5(2) that is not present in its terms. The sub-section is used to change the characterization of the complainant. The complainant becomes a person with a disability but with their functional limitations neutralized as it is assumed that their needs for accommodation have been met. The comparator becomes the non-disabled equivalent of the person with the disability with their needs met. The complainant is then placed on a equal footing with the comparator. On this construction of section 5, it is difficult for an alleged discriminator to avoid a finding of less favourable treatment.

The causation element

If it is determined from a consideration of the conduct element of section 5 that the person with a disability has been treated less favourably, the next question to ask is whether that

was because of the complainant's disability. The decisions of the majority and the dissenting judges on this element are similar and uncontroversial.

Given their findings on the conduct element, there was no need for the majority in *Purvis* to make a finding on the causation element nor to consider the test for causation in detail. There is some disagreement between the majority and dissenting judges as to the relevance of motive or purpose to causation. The majority indicate that they may have some relevance[63] whereas McHugh and Kirby JJ quote from authorities that find motive, intention and purpose to be largely irrelevant.[64]

There is, however, agreement between the majority, Gleeson CJ and the dissenting judges that the correct test to be applied is a 'but why' test. The question to be asked is '*why* was the aggrieved person treated as he or she was.'[65] Such a test focuses on the mental state of the alleged discriminator and the 'real reason'[66] or 'true basis'[67] for the alleged discriminator's conduct.

Why is the interpretation of section 5 problematic?

As indicated above, both the approaches adopted by the majority and the dissenting judges are undesirable. The consequences of each approach are at the opposite ends of the spectrum. The majority's approach restricts the likelihood of establishing less favourable treatment to very limited circumstances considered below. The approach of McHugh and Kirby JJ is not supported by an interpretation of section 5(2) and skews the test in favour of the complainant.

There are two primary reasons for the decision in *Purvis* producing two different but equally problematic interpretations of direct discrimination. They are:

(a) the uniquely difficult circumstances present in *Purvis*; and

(b) more problematically, that the direct discrimination provision of the DDA is a strange legislative creature that is out of step with equivalent provisions in other legislative schemes.

Hard cases make bad law

The factual scenario in *Purvis* was extreme. Daniel was displaying violent behaviour in a classroom setting. Accordingly, the case gave rise to a balancing of legal and policy issues in a manner that has not been seen previously in a case decided under the DDA. There was possible criminal behaviour (which raised the issue of the intersection of the DDA and state and federal criminal law[68]) in a setting that found agents of the State having to consider duties of care to children (Daniel's fellow students) and employees (teachers).

Gleeson CJ, in particular, appeared to be concerned with these competing considerations:

> If the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same. Furthermore, if the appellant's argument is correct, the [DDA] places a school authority in a position of conflict between its responsibilities towards a child who manifests disturbed behaviour and its responsibilities towards other children who are in its care, and who may become victims of that behaviour. The language of the [DDA] does not require such a result. In characterizing the actions of the [State] for the purpose of applying a law against unjust discrimination by making the comparison required by section 5 of the [DDA], and in considering all the circumstances in which the school principal acted, to compare the treatment of the pupil with the treatment of some other pupil who, without any disability, behaved violently permits due account to be taken of the [State's] legal responsibilities towards the general body of pupils.[69]

It should be remembered that the defence of 'unjustifiable hardship' was not available to the respondent in this case. Its operation in relation to educational authorities is limited to where a student is allegedly treated less favourably in relation to their admission. If the defence had been available then these issues could have been considered in that context. Indeed McHugh and Kirby JJ held that the defence:

> … would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides… the [DDA] provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff. This provision also allows for consideration of the duty of care owed by the educational authority to the other pupils..[and]… also permit consideration of the possibility that behaviour of the proposed student would violate the criminal law.[70]

The fact that these matters could not be considered via the defence of 'unjustifiable hardship' may well have persuaded the majority and Gleeson CJ to adopt the construction of section 5 they did. It permitted the duties of carers to be taken into account (in the case of Gleeson CJ as mentioned above) as well as consideration to be given to the operation of the criminal law (in the case of the majority[71]). As one commentator has observed in relation to *Purvis*, 'in this scenario, disability is seen very much as a risk management issue as opposed to a human rights concern.[72]

It could be argued that the construction of section 5 was arrived at by working backwards from the desired outcome: it has to be possible for policy reasons for a school to be able to exclude a student who is seen as being a danger to others so what legal construct of section 5 has to exist for this to be achieved? This may explain the inconsistency of the majority's approach to the meaning of 'disability'. The manifestation of a disability is seen as being part of the disability for the purposes of determining the definition of 'disability'. However, that characteristic or behaviour is separated out from the disability and imputed to the non-disabled comparator when it comes to identifying what constitute the same or similar circumstances.

Purvis was not the best factual vehicle for a consideration by the High Court of section 5: particularly given that it may have been more appropriately pleaded as a case of indirect discrimination. A more straightforward case may have better highlighted some of the consequences that would flow from the construction adopted (as shown by the example of the blind woman above).

It can equally be suggested, however, that both approaches are the product of the direct discrimination provision of the DDA being inherently deficient. This is particularly evident when it is compared to disability discrimination legislation in other jurisdictions.

Is it a hard case or just bad legislation?

The philosophical basis for eliminating disability discrimination is different from that inherent in legislation relating to other forms of discrimination such as sex and race. In the case of people with disabilities, the elimination of discrimination is not furthered by 'equal' treatment that ignores their individual disabilities.[73] Rather the aim of achieving real equality for people with disabilities starts from the premise that 'in order to treat some persons equally, we must treat them differently'.[74] As discussed above, such concepts are embodied in formal and substantive equality.

The point was made by the Supreme Court of Washington in *Holland v Boeing Co*[75] as follows:

> Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

> The physically disabled employee is clearly different from the non-handicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment **fails** to take into account the unique characteristics of the handicapped person. … Identical treatment may be a source of discrimination in the case of the handicapped, whereas **different** treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

The perceived need for different treatment in order to eliminate discrimination is manifested in some disability legislation by provisions that require the alleged discriminator to treat people with disabilities differently by expressly obliging them to make reasonable adjustments or give reasonable accommodation to persons with disabilities.[76]

Unlike other jurisdictions such as the UK,[77] European Union[78] and United States[79], the DDA does not expressly oblige persons to treat people with disabilities differently from others in the community. There is no express obligation in the DDA to accommodate or make adjustments so that the needs of persons with disabilities are met. McHugh and Kirby JJ by seeking to read a notion of different treatment as opposed to equal treatment into the direct discrimination provision of the DDA, were forced to construe section 5(2) as including a requirement to accommodate that does not exist.[80] Some decision makers and commentators have gone further, locating a positive obligation to make reasonable accommodation in section 5(2) or finding it to exist in the defence of unjustifiable hardship.[81] It may be argued that one exists in relation to indirect discrimination in section 6.[82] It is clear that one cannot be found within the concept of direct discrimination as defined by the DDA.

Another way to define direct discrimination is to avoid comparing the treatment of a person with a disability with the treatment of a person without a disability. The definition of discrimination in the *Disability Discrimination Act 1995* (UK):

> does not contain an express provision requiring the comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the 'reason' for the treatment of the disabled employee and the comparison to be made is with the treatment of 'others to whom that reason does not or would not apply'. The 'others' with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons 'to whom that reason does not or would not apply.[83]

The majority in *Purvis* were correct when they reminded the reader on several occasions that the DDA is different in its approach to direct discrimination than other jurisdictions.[84] It is very different. Direct discrimination in the DDA does not relate to equality of outcome: it only provides for equality of treatment between a person with a disability and one without a disability.

The fact that section 5 requires a comparison of treatment and there is no express obligation to accommodate permits the construction given to the section by the majority. The difficulties associated with direct discrimination that will be considered below are as a much a result of the wording of section 5 as they are a result of the majority decision in *Purvis*.

The difficulty of proving direct discrimination

The consequences of the manner in which section 5 is formulated and its interpretation by the majority will now be considered.

In summary, the problems are:

(a) the evidentiary burden of establishing direct discrimination will be so onerous that few cases will succeed;

(b) the differences inherent in the concept of disability will be ignored; and

(c) the focus on equality of treatment will reward stereotypic assumptions.

The evidentiary burden of establishing direct discrimination

Traditionally, direct discrimination has been considered less challenging to establish than indirect discrimination as 'the propositions to be asserted are in distinct categories and do not raise the range of circumstances which are essential to address an indirect discrimination case'.[85] This may no longer be true now that *Purvis* has highlighted the evidentiary burden that has to be discharged in order to establish less favourable treatment under section 5.

The majority stated that their construction of section 5 meant 'the provision still has very important work to do by preventing the *different* treatment of persons with disability'.[86] This is true in a limited compass: for example, it may be possible to prove less favourable treatment where an employee is told, 'You are fired because you have a disability'.

Section 5 has operated to this effect in a case decided since *Purvis* albeit in unusual circumstances. In *Power v Aboriginal Hostel's Limited*,[87] Brown FM found that the complainant had been discriminated against on the basis of his disability even though there had been issues as to his absences from work and the potential for further absences. On appeal,[88] it was held that Brown FM had not applied the relevant comparison as required by *Purvis*. This did not result in the success of the appeal for the following reason:

> There was some evidence before the Federal Magistrate that would appear to have supported an argument that the respondent would have terminated the appellant's employment whether or not he had a disability (whether real or imputed). However, Ms Henderson, who appeared for the respondent, declined to make any submission to that effect. Instead, she informed me that her client only dismissed the appellant because of her client's understanding that the appellant had a disability that meant that he could not perform the duties of the position. She said her client would not have dismissed the appellant merely for his absences from work. These concessions seemed to me to go considerably further than the evidence required or than the findings made by the learned Federal Magistrate. Nevertheless, having been made, it seems to me that they answer the requirements for discrimination as identified by the High Court in *Purvis*. Given that this is an appeal by way of rehearing, it is appropriate for me to take account of these concessions. On the basis of the concessions made by the appellant, it can be accepted that, in dismissing the appellant, the respondent discriminated against him by reason of a disability.[89]

While it is still very important and necessary to be able to find such different treatment to be unlawful, discrimination against persons with disabilities is often less obvious than in that example.

It appears now that the best chance that a complainant has of establishing direct discrimination under section 5 will be for there to be evidence (or a concession by counsel) that there was no other reason for the less favourable treatment than the fact that the complainant had a disability. It is necessary and important that such blatant discrimination be found to be less favourable treatment under section 5. It has to be asked though how often will such evidence exist or such a concession occur.

Rather than being told that he or she is being dismissed because they have a disability, a person with a disability is more likely to be told that they are being dismissed because, for example, inadequate interpersonal skills,[90] unacceptable work performance[91] or absences from work.[92] On the majority's construction of section 5, it does not matter that these reasons may be manifestations of the person's disability such as paranoid schizophrenia, dyslexia or depression. The reason for the dismissal will be added into the same or not materially different circumstances considered under section 5. The person with the disability will be compared to a person without a disability who also had inadequate interpersonal skills,

unacceptable work performance or a poor attendance record. The complainant will then have the onus of proving that they were treated less favourably than the comparator would have been and if they were then that was because of their disability.

Another evidentiary problem is that in many instances there is only a notional comparator. The fact that a complainant's chances of discharging the evidentiary burden of proving less favourable treatment will be considerably enhanced if a real comparator exists is illustrated in *Randell v Consolidated Bearing Company*[93]('*Randell's* case'). This decision of the Federal Magistrates Court was decided before *Purvis* but the construction adopted of section 5 was similar to that of the majority. The applicant, who had a mild dyslexic learning difficulty, was dismissed from his traineeship sorting and arranging stock on the basis of his poor work performance. Raphael FM found that the appropriate comparator was other trainees employed by the respondent who had performance difficulties. The evidence established that in the past the respondent had sought assistance from Employment National with such trainees but in the case of the applicant, it did not do so before he was dismissed and he was therefore treated less favourably.

Randell's case is one of the few (if not the only) case decided under section 5 where a comparator existed. The comparator is usually notional. This requires a degree of speculation as to how the respondent *would* have treated the comparator. Relevant witnesses for the respondent may try to predict how the comparator would have been treated. Evidence from the respondent may be that the comparator would have been treated no differently. In reality it may be the case that the person with the disability would have been treated less favourably. Stereotypic assumptions that because their behaviour or the relevant characteristic was part of a larger 'problem', being a disability, may have resulted in special assistance not being considered as a possible option as there may have been doubt as to whether behaviour could in fact be changed or improved.[94] Proving this though will not be easy for the complainant.[95]

A further consequence of the decision in *Purvis* is that proving discrimination pursuant to section 5 will require the rigorous factual inquiries (through subpoenas and the process of discovery) that are usually associated with indirect discrimination.[96] As stated above, indirect discrimination puts the onus of the complainant to prove that the requirement or condition was unreasonable and this may prove difficult to establish because much of relevant evidence will be in the possession of the respondent. The same difficulties will confront the complainant seeking to establish under section 5 that the respondent would have treated him or her less favourably than the notional comparator. Most of the relevant evidence will not be in the complainant's hands and obtaining it will depend upon knowing whether it exists or the correct questions to ask. The pursuit of a complaint of direct discrimination through the relevant court will, therefore, take longer and require considerable resources.

Section 5 fails to appreciate unique features of disability

The majority's approach to defining the comparator can be seen as seeking to simplify or normalize disability by suggesting that a characteristic or behaviour that is part of a disability can be equated with that characteristic or behaviour existing in a person without a disability.

Sopinka J of the Canadian Supreme Court has stated:

> It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment.[97]

Is it possible to say, for instance, that the lack of interpersonal skills exhibited by a person with paranoid schizophrenia[98] are akin to the poor communication skills that may exist in someone without a disability?

The facts of *Purvis* make the creation of the comparator appear easier than it actually is. As Gleeson CJ comments 'the law does not regard all bad behaviour as disturbed behaviour; and it does not regard all violent people as disabled'.[99] Similarly, other behaviour such a poor communications skills or aggressive behaviour while playing sport[100] can be features of persons without a disability.

What happens with characteristics or behaviour that are unique to the disability and do not occur in the absence of a disability? For example, being contagious or infectious. Similarly, as one commentator has noted in relation to people with intellectual impairments 'it is virtually impossible to establish comparability with a real or hypothetical intellectually normal person'.[101] . In such cases, it is arguable that if the characteristic can only exist because of a disability, it is nonsensical to impute it to a person without the disability. It would follow that discrimination on the ground of that characteristic would be discrimination on the ground of a disability.

In *City of Perth City v DL (representing the Members of People Living with AIDS (WA) Inc* ('*City of Perth* case'),[102] the Full Court of the Supreme Court of Western Australia adopted an approach similar to that of the majority in *Purvis* to the construction of the relevant direct discrimination provision in the *Equal Opportunity Act 1984* (WA). The Court, however, made the caveat that the imputation of the characteristic to the comparator would occur if the characteristic was not unique to people with such an impairment.[103]

The majority's analysis in *Purvis* of section 5 does not contain any such caveat. It would appear that the characteristic or manifestation of the disability is considered as part of the same or not materially different circumstances whether it could in reality exist independently of a disability or not. This increases the likelihood of the comparator being notional given that a real comparator *without* the relevant disability but *with* the manifestations of the disability will never exist. The use of a notional comparator creates the evidentiary issues referred to above.

The approach rewards stereotypic assumptions

The majority's construction of section 5 may reward the adoption of stereotypical and prejudicial assumptions. It enables a discriminator to be found not to have treated a person with a disability less favourably if it is established that he or she treats all people displaying that particular characteristic or behaviour in the same prejudicial manner.[104] As was stated in the *City of Perth* case:

> … if the comparison involves a notional person who has the very same characteristics generally imputed to the impaired person, anomalous consequences might arise. If, say a hotelier refuses services to an impaired person because of characteristics that are generally imputed to such persons, and the hotelier can prove that he treats or would treat in the same way other persons, not being so impaired, but to whom the same characteristics are generally imputed, he would not have performed a discriminatory act.. Thus the less favourably disposed the notional hotelier is against persons to whom these characteristics are generally imputed, the easier it would be for him to prove that there has not been an unlawful discrimination...This would be a consequence of some irony.[105]

With respect it would not only be an ironic consequence of the majority's construction of section 5 but another reason why an approach to direct discrimination predicated on equality of treatment can be ineffectual.

The future of direct discrimination law

The true limitations of section 5 have now been revealed in the case of *Purvis*. The opportunities for proving less favourable treatment under section 5 for the purposes of establishing direct discrimination under DDA are now limited to:

(a) those rare cases where there will be irrefutable evidence that the less favourable treatment was on the ground of the person's disability (as in *Power's* case);

(b) those rare cases where there is a real comparator and the evidence is available to prove that the comparator was actually treated differently (as in *Randell's* case); or

(c) in the case of a notional comparator, the existence of evidence available to the complainant that proves that the comparator would have been treated differently from the the person with the disability.

As mentioned above, the limited role that direct discrimination can play is due to section 5 providing for the equality of treatment between persons with and without disabilities. The interpretation by the majority only compound the difficulties inherent in the legislature's construction of section 5. A likely result is that few cases in the future will be pleaded as direct discrimination and a claim of indirect discrimination will be pursued instead.

Does indirect discrimination save the day?

The majority in *Purvis* emphasised on a number of occasions that their interpretation of direct discrimination does not detract from 'the importance of giving full effect to the indirect disability discrimination provisions of the DDA'.[106]

The definition of indirect discrimination has been described as 'complex' and requiring 'a substantially different approach to presenting the factual material in a complaint than with complaints of direct discrimination'.[107] As mentioned above, establishing indirect discrimination requires the complainant to prove the unreasonableness of the relevant requirement or condition. Furthermore, 'one of the overwhelming difficulties with the proof of indirect discrimination is that it can require complex statistical or other technical evidence'.[108]

Other commentators, however, have warned that 'it is important not to overrate the frequently asserted difficulties of proving indirect discrimination'.[109] Indeed, it could be argued that indirect discrimination does 'not involve some of the notorious problems encountered in trying to prove direct discrimination'. Proof of less favourable treatment in the same or not materially different circumstances is not a separate element of indirect discrimination nor does the causal link need to be established between the less favourable treatment and the disability. Furthermore, it is clear that motive or intention is not relevant to indirect discrimination.[110]

In the end, it will depend upon the courts' application of the requirements of indirect discrimination that will determine if proving a matter under section 6 is any more onerous than attempting to prove less favourable treatment under section 5. The court's approach will determine if the test for indirect discrimination is viewed as being highly complex and burdensome[111] or a test that can be approached in a straightforward and commonsense manner.[112]

Conclusion

The complainant who has little chance of succeeding under a claim for direct discrimination, may succeed if the proper approach to indirect discrimination is taken by the decision-maker.

It is unfortunate though that the application of one type of discrimination under the DDA is limited to rare circumstances. Without legislative reform, the effect of section 5 will be to treat unequals as equals.[113] The inequality that flows from such equal treatment does not achieve the object of the DDA to eliminate discrimination against persons with disabilities. Rather it perpetuates the discrimination.

Endnotes

1 Section 3(a) of the DDA.

2 The Human Rights and Equal Opportunity Commission heard and determined complaints of unlawful discrimination as a tribunal from 1986 until the Federal Court assumed responsibility for the unlawful discrimination jurisdiction on 13 April 2000 when the substantive provisions of the Human Rights Legislation Amendment Act No. 1 1999 (Cth) (HRLA Act) (passed by Parliament on 23 September 1999) commenced operation. The relevant provisions of the Federal Magistrates (Consequential Amendments) Act 1999 (Cth) also commenced operation on that day and amended the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (as amended by the HRLA Act) so as to extend the jurisdiction for the hearing of proceedings arising out of complaints of unlawful discrimination to the Federal Magistrates Court.

3 (2003) 78 ALJR 1.

4 Division 1 of the DDA.

5 Section 22 of the DDA.

6 Section 23 of the DDA.

7 Section 24 of the DDA.

8 Section 25 of the DDA.

9 Section 26 of the DDA.

10 Section 27 of the DDA.

11 Section 28 of the DDA.

12 Section 29 of the DDA.

13 Section 30 of the DDA.

14 This dichotomy was adopted by the appellant in *Purvis*.

15 *Purvis* 16 [86].

16 The exception is not provided for in relation to qualifying bodies (s 19), registered organisations under the *Workplace Relations Act 1996 (Cth)* (s 20), employment agencies (s 21), land (s 26), sport (s 28) and the administration of Commonwealth laws and programs (s 29). The exception does apply to educational authorities but only in relation to the admission of a student (s 22(4).

17 Though such matters are often already covered by the issue of reasonableness.

18 See paper by Craig Lenehan referred to in fn 1 at 11.

19 Paragraphs 3(a) and (b) of the DDA.

20 A difficulty noted by Gleeson CJ in *Purvis* at 3 [3].

21 *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621, 623.

22 Section 11 of the DDA.

23 Section 22(4) of the DDA.

24 Unreported, HREOC, Commissioner Innes, 13 November 2000.

25 *New South Wales (Dept of Education) v Human Rights and Equal Opportunity Commission* [2001] 186 ALR 69.

26 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237.

27 Ibid 248 [28].

28 *Purvis* 38 [212].

29 Ibid 14 [67].

30 *Commonwealth v HREOC* (1997) 147 ALR 469 at 493.

31 *Disability Discrimination Act 1995* (UK).

32 The EC Directive, (2000) *Official Journal of the European Communities* L303/19.

33 *Americans with Disabilities Act 1990*.

34 *Purvis* 36 [203].

35 Ibid. Their Honours do imply on a number of occasions though that the indirect discrimination provisions of the DDA may provide some scope for the operation of substantive equality concepts: see 37 [207] and 40 [226].

36 Ibid 36 [201].

37 Ibid 38 [214].

38 Ibid 37 [206].

39 Ibid 39 [217].

40 Ibid 39 [218].

41 Ibid 39 [222].

42 Ibid 40 [224].

43 Ibid 40 [225].

44 Ibid 5 [11].

45 Ibid 5 [12].

46 Ibid 40 [226].

47 Ibid 40 [227]-[228].

48 Ibid 40 [229].

49 Ibid 17 [86].

50 Ibid 20 [104]. Cf *Mrs J v A School* [1998] EOC 92-948 at 78,313 per Sir Ronald Wilson; *Cowell v School* Unreported, HREOC, Commissioner McEvoy, 10 October 2000 at [5.2.2].

51 *Purvis* 20 [104].

52 Ibid 24 [130].

53 Ibid 23-24 [119] - [130].

54 *Sullivan v Department of Defence* [1992] EOC 92-421 at 79,005; *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC 92-417 at 78,980; *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 at 209; *Human Rights and Equal Opportunity Commission v Mount Isa Mines* (1993) 46 FCR 301 at 307, 327

55 *IW v City of Perth* (1997) 191 CLR 1 at 33-34 and 66-67; *Humphries & Ors v DEETYA* Unreported, HREOC, Commissioner Charlesworth, (1997) HREOCA 66 (19 December 1997); *Garity v Commonwealth Bank of Australia* [1999] EOC 92-966 at [6.5]; *Purvis v State of New South Wales*, Unreported, HREOC, Commissioner Innes, 13 November 2000.

56 *Dopking v Department of Defence*, Unreported, HREOC, Sir Ronald Wilson, 13 March 1992 at 9.

57 *Purvis* 25 [136].

58 Ibid 25 [134].

59 Ibid 25-26 [136].

60 Ibid.

61 Ibid 26 [137].

62 Ibid 25 [130].

63 Ibid 41 [236].

64 Ibid 29-30[158] - [165].

65 Ibid 41 [236].

66 Ibid 30 [166].

67 Ibid 5-6 [13].

68 Ibid [227] 40.

69 Ibid [12] 5.

70 Ibid [93] 18.

71 Ibid [227] – [228] 40.

72 Ronni Redman, *'Burning down the House: Conversations in Law and Disability'* DSARI Seminar Paper, 13 February 2004.

73 Ibid [86] 154.

74 *Regents of University of California v Bakke* (1978) 438 US 265 at 407 per Blackmun J.

75 (1978) 583 P2d 621 at 623.

76 See section 28B-28G of the *Disability Discrimination Act 1995* (UK).

77 *Disability Discrimination Act 1995* (UK).

78 The EC Directive, (2000) *Official Journal of the European Communities* L303/19.

79 *Americans with Disabilities Act 1990*.

80 As did the decision makers in *Mrs J v A School* [1998] EOC 92-948 at 78,313 per Sir Ronald Wilson and *Cowell v School* (unreported, Human Rights and Equal Opportunity Commission, 10 October 2000) at [5.2.2]. Cf *Clark v Internet Resources* Unreported, HREOC, Commissioner Mahoney, 20 July 2000 and *Cth of Australia v Humphries* [1998] 1031 FCA where no such positive obligation was found.

81 Productivity Commission Report at 187-188.

82 *Catholic Education Office v Clarke* (2004) 81 ALD 66.

83 *Clark v TDG Ltd* [1999] 2 All ER 977 at 983.

84 *Purvis* 36 [203], 38 [214] and 40 [229].

85 C Ronalds and R Pepper, *Discrimination Law and Practice*, (2004) at 42.

86 *Purvis* 40 [229].

87 [2003] FMCA 42 at first instance and [2004] FMCA 452 on remittal.

88 [2003] FCA 1475.

89 Ibid [9], [10].

90 *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-623

91 *Randell v Consolidated Bearing Company* [2002] FMCA 44.

92 *Forbes v Australian Federal Police (Cth)* [2004] FCAFC 95.

93 [2002] FMCA 44.

94 Cf Gleeson CJ's comment in *Purvis* that Daniel's behaviour was tolerated longer than it would have been from another student because Daniel had a disability: 5 [11].

95 By analogy, see a consideration of the difficulties of proving racial discrimination in J Hunyor, 'Skin Deep: Proof and Inferences of Racial Discrimination in Employment', (2003) 24 *Syd L Rev XXX*.

96 See the matters considered under indirect discrimination below.

97 *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at 272-273 [67].

98 See facts of *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-623.

99 *Purvis* 5 [11].

100 *Tate v Rafin* [2000] FCA 1582.

101 M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (1990) at 79.

102 (1996) EOC 92-796. This case arose under the direct discrimination provision of the *Equal Opportunity Act 1984* (WA) where an organisation consisting of members who were HIV positive had an application to establish a drop-in centre rejected for reasons that included concerns about the spread of AIDS.

103 See consideration of issue by Kirby J in *IW v City of Perth* (1997) 191 CLR 1 at 66-67.

104 R Dubler, 'Direct Discrimination and a Defence of Reasonable Justification' (2003) 77 *ALJ* 514 at 522.

105 Above n 103, at 78,869-78,870.

106 *Purvis* 37 [207] and 40 [226].

107 C Ronalds and R Pepper, op cit n 86 at 42.

108 Ibid at 48.

109 R Hunter, *Indirect Discrimination in the Workplace*, (1992) at 191.

110 Ibid 191-192.

111 For example, *Hinchcliffe v University of Sydney* [2004] FMCA 85.

112 For example, *Clarke v Catholic Education Office* (2003) 202 ALR 340.

113 'It was a wise man who said there is no greater inequality than the equal treatment of unequals' *Dennis v United States* 339 US 162 at 184 per Frankfurter J.

CAN STATUS BE A NEW GROUND IN AUSTRALIAN DISCRIMINATION LAWS

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Introduction

2004 saw the addition of yet another ground of discrimination with the enactment of the Federal *Age Discrimination Act 2004*. This prompted me to look at the growing number of grounds upon which discrimination is prohibited and ask, 'Are we ready to embrace a principled approach to the grounds of discrimination or are we to continue *ad infinitum* adding new grounds?'

I have always been intrigued by the formulations in various international human rights instruments of the grounds of discrimination. There is usually an apparently exhaustive list including not just the primary grounds of race and sex but a number of related and apparently unrelated grounds such as religion, political opinion, social origin and even property. Dangling at the end of the list is the phrase 'or other status' indicating that the grounds enumerated are not exhaustive. What is this phrase intended to achieve? Is it just meant to be a peg upon which the international body can hang categories of persons worthy of protection at a future date or is there some greater use for the phrase? How does it fit in with the enumerated grounds?

The use of the concept is well established in the jurisprudence of the European Court of Human Rights, the Human Rights Committee and the Canadian Supreme Court. It has been adopted recently in South Africa.[1]

What I want to look at today is whether the use of a 'catch-all' provision such as 'other status' would benefit those suffering from discrimination on grounds not enumerated in Australian anti-discrimination laws or those that fall between the inevitable cracks created by a federal system. I will consider the problems experienced in Australian discrimination laws that might be ameliorated by the introduction of status as a ground. I will then look at the way in which status has operated in other jurisdictions and how Australia fits within those approaches. Finally, I propose some ways in which status might be introduced at a Federal or State and Territory level.

The Inequality of Australian Equality Laws

The maturity of anti-discrimination legislation in Australia is undermined by the federal system. Each State and Territory has its own anti-discrimination legislation. At the Federal level the *Age Discrimination Act 2004* is the fourth example of ground specific legislation

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after the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*. The approach of both levels of government has been to add new grounds incrementally. Different enforcement mechanisms exist depending on whether an applicant seeks a remedy from a State/Territory tribunal or a Federal court.

There is a considerable disparity in the grounds available. At the Federal level discrimination on the grounds of race, sex, disability and age are established. All those grounds are available under the State and Territory legislation but other grounds have been added such as nationality, sexuality, transexuality, political belief, religious belief and trade union activity. There is no reason to think that the Commonwealth is any less susceptible to the forms of discrimination prohibited in the States and Territories. Because of that difference there remains confusion as to the coverage of specific discrimination laws.

There has also been a considerable time lag between the protection of certain grounds at a State or Territory level compared to the Federal legislature. The prohibition on age discrimination found in the *Age Discrimination Act 2004* was to be found in legislation in NSW in 1994. Similarly, the prohibition of discrimination on the ground of (physical) disability in the *Anti-Discrimination Act 1977* (NSW) from 1981 was not enacted by the Commonwealth until 1992. More than twenty years after the NSW Government added homosexuality to the list of prohibited grounds in 1982 it has yet to receive similar protection at the Commonwealth level.

A third point of complexity and a source for criticism is the strict definition of the grounds. This point applies to both State/Territory and Federal anti-discrimination laws. It is nowhere more obvious than in the *Sex Discrimination Act 1984*. In order to deal with the rigidity of the definition of sex and particularly the characterics of a comparator the legislature has been forced to add additional grounds such as pregnancy, marital status and family responsibilities. In some States breast feeding has been added as a further ground. It seems extraordinary to me that a broad protection against sex discrimination has been unable, in and of itself, to incorporate pregnancy or breastfeeding as prohibited grounds. On the other hand some have sought to unduly stretch prohibitions on sex discrimination to include discrimination against homosexual spouses within its ambit.[2]

In Australia it is well understood that discrimination occurs and needs to be prohibited so that persons of all races, both sexes, irrespective of age and with a disability are able to fully participate in Australian society. From that proposition can be drawn the principle that there is wide acceptance that people should not suffer from some detriment based on a criterion which is not objectively justified. One might venture to say that this is part of the idea of ‘a fair go’. That fair go is being denied to people while they wait for the Commonwealth to enact protections available in the States and Territories or where the characteristic of a group (which may later form a prohibited ‘ground’) has yet to be recognised.

I want to explore today whether on that foundation provided by the principle of equality of treatment can be erected a general ground (called ‘status’) in anti-discrimination legislation which can be used to prohibit such discrimination. The question remains whether ‘status’ is the appropriate vehicle and particularly how one might prevent the use of the concept dissolving into a free-for-all based on any form of differentiation. In the next section I look at how various national and international jurisdictions have dealt with this exact problem.

The Experience of Status

Each of the national and international jurisdictions considered have dealt with the issue of increasing the grounds upon which discrimination is prohibited in different but related ways. The key issues to consider are (a) how they have allowed for the grounds to be expanded and (b) what checks they have placed on this expansion. What will emerge from this

discussion is that a principled approach may be used to selection of grounds and that, once selected, discrimination may still be permissible in circumstances where it is objectively and reasonably justified.

According to Sandra Fredman there appear to be three approaches.[3] The first allows for a broad statement of the principle of equality with the enumeration of the grounds and whether such differentiation is reasonable or justified left to the judiciary. The second approach is for the legislature to specify the grounds upon which discrimination is prohibited. The third approach and that adopted in various international human rights instruments is to specify primary grounds and then leave a 'catch-all' provision by using the words 'or other status'. Certainly that is the case with the *International Covenant on Civil and Political Rights* (ICCPR)[4] and the *European Convention on Human Rights* (ECHR).[5]

Australia falls into the second category because the enumerated grounds in its anti-discrimination statutes are limited. What the Australian protections *prima facie* lack is the flexibility with which the ICCPR and ECHR were drafted.

The starting point must be the 14th Amendment to the US Constitution otherwise known as the equal protection clause which provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'. The clause falls within the first category.

The equal protection clause has allowed for the development of jurisprudence providing a sliding scale of review depending on the 'category' upon which the differentiation is based. At the top of the list (those in the 'suspect category') is race and the level of scrutiny applied by the Court must be strict and the government must have a 'compelling government interest' and the measure must be narrowly tailored to achieve its purpose.[6] Sex falls into an intermediate category where an 'exceedingly persuasive' justification must be established and the measure must be substantially related to the achievement of important government objectives. At the bottom of the scale the government needs only to establish that there is a rational relationship between the measure and a legitimate state interest.[7]

By contrast the Council of Europe has chosen to enumerate specific grounds. Article 14 of the European Court of Human Rights (ECHR) states,

> The enjoyment of the rights set forth in this Convention shall be secured without discrimination *on any ground such as* sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status.* (emphasis added)

The restriction on the applicability of the non-discrimination protection only to the rights set forth in the ECHR has recently been dramatically expanded by Article 1 of Protocol No 12 to the ECHR to include a right to the enjoyment of 'any right set forth by law.'[8]

'Other status' has been interpreted to include sexual orientation, marital status, illegitimacy, trade union membership, military status, conscientious objection, professional status, imprisonment and disability.[9] The emphasis in the ECHR is on the justification for categorisation rather than the placing of strict limitations on new grounds.

The width of the grounds that may come under Article 14 of the ECHR is tempered by the availability of a substantial defence. The principle of equality of treatment is violated if the distinction has no objective and reasonable justification.[10] If an applicant is able to establish differentiation on an impugned ground then the discriminator may justify its action if there is a legitimate aim for the measure or there is a relationship of proportionality between the means employed and the aim.[11] The state is afforded a 'margin of appreciation' where it is necessary to choose between different means.[12] For certain enumerated grounds, such as sex, very weighty reasons are required before a difference in treatment on the grounds of

sex could be considered compatible with the ECHR.[13] There is an obvious similarity here to the suspect categories under the equal protection clause which necessitate strict scrutiny.

A more sophisticated approach is found in the application of the non-discrimination clause of the *Canadian Charter of Rights and Freedoms* ('the Charter'). Section 15 is in the following terms:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination *and, in particular,* without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (emphasis added)

Section 15 is binding on the legislatures of Canada and its provinces and the laws they enact as well as action taken under statutory authority.[14] Private acts are excluded from coverage of the Charter.[15]

The formulation of the grounds of discrimination is open ended but it is now well established that an 'analogous ground' may also come within the protection.[16] The criteria applied to establish whether a particular ground is an analogous ground include:

(a) the distinction is based on an immutable characteristic;

(b) the group has suffered historical disadvantage;

(c) the group constitutes a 'discrete and insular minority'; or

(d) the distinction is made on the basis of a characteristic attributed to the individual not on merit but on the basis of association with the group.[17]

There is some discussion as to weighting and influence of particular criteria but immutability appears to be at its core. Accordingly, the type of ground which comprises an analogous ground is narrower than that found under the ECHR. The ECHR has included grounds which are (arguably) changeable such as membership of a trade union or political opinion.[18] Whereas the Supreme Court has rejected a number of grounds on the basis that each was not analogous: employment status[19] and membership of a group wishing to make a claim against the Crown[20] being two examples.

The decision in *Egan v Canada* provides an example of the application of the test. In that case La Forest J held that sexual orientation was an analogous ground on the basis that sexuality was a deeply personal and immutable characteristic the changing of which would come at some considerable cost to the person.[21]

Section 1 of the Charter requires that the rights and freedoms set out in the Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a democratic society.' That check on the non-discrimination provision in s 15 is, generally speaking, the same approach taken with respect to the ECHR. That is, the principle of proportionality between means and end has a central role to play in the exercise required by s 1. *R v Oakes*[22] is the seminal case in the application of s 1, the main principles of which may be summarised as follows:

(a) the measure must have a sufficiently important objective which warrants overriding a constitutionally protected right or freedom;

(b) the means chosen must be proportionate to the detrimental effects upon the right or freedom violated which may be assessed as follows:

(i) the measure must have a rational connection to the objective in the sense that it cannot be arbitrary or unfair;

(ii) the least drastic means must be employed; and

(iii) there must be proportionality between the effects of the measure and its objective.

Finally I come to the non-discrimination protection in the ICCPR. Article 26 is in the following terms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination *on any ground such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*. (emphasis added)

The jurisprudence of the Human Rights Committee confirmed 20 years ago that the protection provided by Article 26 goes beyond the enumerated rights in the ICCPR and is a stand alone protection against discrimination.[23] That protection is balanced by a democratic check that allows for such discriminatory requirements, practices or acts if they correspond to objective criteria.[24] In its General Comment (No 18) on Article 26,[25] the Human Rights Committee confirmed that if the differentiating criteria are reasonable and objective and their aim is to achieve a purpose which is legitimate under the Covenant, then the criteria will not be discriminatory.[26] The Human Rights Committee also chose to adopt the formula for discrimination found in the *International Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Elimination of all Forms of Discrimination Against Women*[27] and which also appears in a modified form in the *Racial Discrimination Act 1975*.[28]

It is difficult to extract from the cases a clear line of jurisprudence upon which an *un*enumerated ground in Article 26 may be a ground upon which discrimination is prohibited. Certainly the Human Rights Committee has added grounds such as nationality, marital status, place of residence, foster versus natural children, public versus private schools, sexual orientation, age, family responsibility and disability.[29] The more likely interpretation is that the task undertaken in determining whether there is discrimination under Article 26 is one that concentrates on the reasonableness or objectiveness of a measure. The hurdle to establish a 'new' ground is low and need only be identified. However, the nature of the ground is important for the application of the reasonableness test.

The Human Rights Committee appears also to have adopted a sliding scale of review not dissimilar to that applicable to the equal protection clause of the US Constitution. Some grounds are seen to be inherently more suspect than others and deserving of greater scrutiny.[30] Those grounds will not surprise and include the enumerated grounds of sex and race as well as the grounds that fall under 'other status' such as sexual orientation and disability. Sarah Joseph in her excellent book on the ICCPR argues that the more important grounds have the attribute of either immutability or a history of unjustified discrimination or both.[31]

It is important to contrast the positions of the European Court of Human Rights and the Human Rights Committee as against that of the Canadian Supreme Court. At one time Peter Hogg argued for a position which appears analogous to that in the European Court of Human Rights. However, that position was rejected by McIntyre J in *Andrews v Law Society of British Columbia* because it gave s.15 little work to do.[32] One could legitimately conclude that the position under the ECHR and the ICCPR places greater emphasis on the analysis of reasonableness and objective justification than on whether a purported ground falls into one of the enumerated grounds or status.

Looking then at the three approaches there are some clear conclusions. The equal protection clause found in the 14th Amendment provides for perhaps an undue reliance on the judiciary to determine the grounds upon which discrimination will be unlawful and the degree of scrutiny required for particular rights. The imbalance between race and sex found in the US jurisprudence has been overtaken by international concern for specific grounds such as sex. Australia has followed the lead set by the UN standard setting conventions in that regard.

Turning to the third category there is a clear difference between the approach under the ECHR and ICCPR and that in Canada. The former grouping provides the judiciary with considerable power over determining what the relevant grounds are to be. Both the European Court of Human Rights and the Human Rights Committee have used that power to expand the grounds freely but balanced that with considerable deference to the legislature in permitting such discrimination. That balance may be because it is both unwieldy and time consuming to amend such an instrument. A question arises as to whether that is an appropriate model for domestic legislation.

The Canadian position is more attractive to Australia. It provides flexibility in the sense that the grounds upon which discrimination may be established are not arbitrarily limited and a strongly principled approach is applied to the expansion of the enumerated grounds. At the same time the review provided by the application of s 1 of the Charter is also strongly principled and is without the sometimes questionable principle of a margin of appreciation found in difficult cases heard by the European Court.

The Use of Status in Australia

The first observation that may be made in the light of the above discussion is that Australia has advanced down the path of prohibiting discrimination on grounds where the characteristic is immutable. Certainly at a Federal level the four pieces of primary legislation enacted so far fall into that category. It is useful to note that age and disability are not included in the enumerated grounds of Article 26 of the ICCPR although they have been recognised under the 'other status' category. The States and Territories have followed suit but have also gone further, prohibiting discrimination on grounds which would not strictly fall under the immutable characteristic category such as political opinion or trade union membership.[33]

Is it then possible to allow for the addition of further grounds upon which discrimination is prohibited without continual resort to more legislation? The answer to that question must be 'yes' if done carefully and with sufficient safeguards.

In many ways the easiest means to solve the restrictiveness of specific grounds is to enact the equivalent of Article 26 of the ICCPR with some teeth. That, however, is likely to be caught by the current lack of enthusiasm, perhaps even opposition, to a Bill of Rights. Certainly at a Federal level the government appears reluctant to provide the judiciary with an open ended mandate to create new grounds in the manner given to the European Court of Human Rights and the Human Rights Committee.

I use the term 'with some teeth' because the *Human Rights and Equal Opportunity Commission Act 1986* already allows for a complaint to be made to the Commission for a breach of a human right including Article 26.[34] The provision applies only to acts or practices of the Commonwealth[35] and, if there is a finding by the Commission of a breach, results in a non-binding notice issued to the respondent containing recommendations together with a report to the Minister.[36] The provisions are not well known and have only infrequently been exercised. Successive Federal governments have been reluctant to provide for enforceable rights in the nature of those found in the primary discrimination statutes.[37]

But there is another way – dare I call it a 'third way' – where the legislature retains sufficient control. The way proposed builds upon the existing legislation rather than providing a whole new model. Adding 'status' as a separate ground to existing discrimination legislation is a simple and, on the basis of international and overseas experience, well established way in which to provide for new grounds. A process with two parts is proffered. First, a set of criteria must be satisfied by an applicant in order for a new ground to be accepted by the judiciary. Secondly, a respondent should be provided with a defence where the differentiation concerned is objectively reasonable.

The first part of the process is to establish criteria (similar to that in Canada) that will provide a State, Territory or Federal legislature with sufficient comfort that the grounds upon which discrimination is prohibited are not being unduly expanded. A non-exclusive (and overlapping) list should include the following criteria:

÷ The proposed new ground is analogous to enumerated grounds (eg in the Federal sphere: race, sex, disability and age);

÷ The characteristic which forms the ground is immutable[38];

÷ The characteristic which forms the ground is shared by a group that has historically suffered disadvantage.

The use of the first criterion would allow for the different approaches of State and Federal governments. In the Federal sphere the enumerated grounds have been restricted to grounds which are immutable or 'suspect'.[39] Accordingly, the use of the first criterion would ensure that all new grounds are of a similar order. Whereas in the States and Territories a more expansive approach has meant the inclusion of grounds beyond those categories regarded as 'suspect'. The use of the first criterion would allow for those wishing to establish a new ground to benefit from the more liberal attitude of the State or Territory.

The second part of the process should be similar to the formulation of reasonableness used to provide a 'defence' to indirect discrimination in the *Sex Discrimination Act 1984*. That defence was clearly built on the jurisprudence available on the principle of proportionality from *inter alia* the European Court of Human Rights, the Human Rights Committee and the Canadian Supreme Court.[40]

Section 7B of the *Sex Discrimination Act 1984* sets out the matters that are to be taken into account when considering the reasonableness of an act that falls within the prohibition on indirect discrimination:

> (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
>
> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

The similarities with the decision of the Canadian Supreme Court in *R v Oakes* are obvious. The formulation in s 7B should be improved so that rather than a bland reference to 'disadvantage' there is specific consideration by the adjudicator of the nature of the ground upon which the discrimination has occurred. There is room here for a sliding scale of scrutiny depending on the nature of the right.

The check provided by the second part of the measure is conservative but important. It will not be as easy to prove as a claim of direct sex or race discrimination but it will satisfy the legislature that the hurdle is sufficiently high not to allow through grandiose or otherwise unwarranted claims. Once a particular ground has been established jurisprudentially it may well spur the legislature onto a full consideration of the ground including whether the safeguard should be abandoned, whether indirect discrimination should be included and whether there should be exceptions. In the meantime those discriminated against will have recourse to the courts and will not languish as they currently do waiting for the legislature to act.

The introduction of status as a basis upon which discrimination is prohibited must be accompanied by sufficient enforcement measures to be truly effective. The addition need only be inserted into the current enforcement mechanisms. The prohibition should be of direct discrimination with indirect discrimination left for further legislative consideration.[41] The areas in which discrimination on the ground of status are prohibited should include employment, education, goods and services, access to premises, accommodation, clubs and associations and the other areas which are well established as being caught by anti-discrimination legislation. There is also no need to depart from the system of conciliation and adjudication found at the State/Territory and Federal levels.

Conclusion

What emerges then is that there is a way for the grounds of discrimination to be expanded in a limited and cautious way which does not require continual resort to the legislature. At the State and Territory level this will assist with difficulties over categorisation of particular forms of discrimination. If the Commonwealth was to introduce status into its discrimination laws then at least some of the grounds available at the State level would be likely to be made available in the Commonwealth sphere.

Returning to the question posed in my introduction, there is a principled way in which to advance the grounds upon which discrimination is prohibited. However, despite the theoretical attraction of a single principle covering all grounds of discrimination there is real merit in advancing an approach which builds on current protections.

Endnotes

1 See s 1(1)(xxii)(b) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000.*

2 See for example the argument advanced in *Grant v South West Trains Ltd* [1998] ECR I-621

3 S Fredman, *Discrimination Law*, Oxford 2002, pp 67-68.

4 Article 26. The International Covenant on Civil and Political Rights is to be found at *Human Rights and Equal Opportunity Commission Act 1984*, Schedule 2.

5 Article 14.

6 S Fredman, op cit n 117, p 117

7 Ibid at p 76.

8 The Explanatory Memorandum further sets out that the right extends to obligations and discretionary rights exercised by a public authority or other such acts or omissions: [22] www.humanrights.coe.int/Prot12.

9 D Harris et al, *Law of the European Convention on Human Rights,* London, 1995, p 470.

10 *Belgian Linguistics Case* (1968) 1 EHRR 252 [10]

11 K. Starmer, *Blackstone's Human Rights Digest,* London, 2001, p 340.

12 *Rasmussen v Denmark* (1984) Series A 87 [41].

13 *Abdulaziz v UK* (1985) 7 EHRR 471 [78], Burghartz v Switzerland (1994) Series A Vol 280B [27]. Other suspect categories are race and illegitimacy: D. Harris, op cit n 123, at p 482.

14 See Hogg, *Constitutional Law of Canada,* Ontario, p 980.

15 Section 32, *Canadian Charter of Rights and Freedoms.*

16 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 181-182 per McIntyre J, Wilson and La Forest agreeing on this issue.

17 Fredman op cit at p78, *Miron v Trudel* [1995] 2 SCR 418 at 496-497 per McLachlin J for the majority.

18 Hogg argues that this is because these are constitutional protections and that other grounds lacking in immutability need to be specifically protected by the legislature: PW Hogg, op cit n 128, at p 997.

19 *Re Workers Compensation Reference 1983* [1989] 1 SCR 922.

20 *Rudolf Wolff & Co v Canada* [1990] 1SCR 695.

21 [1995] 2 SCR 513 at 528 per La Forest J (Lamer CJ, Gonthier and Major JJ agreeing).

22 [1986] 1 SCR 103 per Dickson CJ at 138-139.

23 *Broeks v Netherlands* (172/84). This expansive interpretation was confirmed in General Comment No 18 at par [7]. That is, Article 26 includes a protection from discrimination in relation to 'all rights and freedoms' not just those found in the ICCPR.

24 See, for example, *Vos v Netherlands* (218/86).

25 HRI/GEN/1/Rev.5 pp134-137.

26 At par [13].

27 ' … [T]he Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based *on any ground such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.' General Comment No 18 par [7]

28 Sections 9 and 10. See also the definition of discrimination at s 3 *Human Rights and Equal Opportunity Commission Act 1986*.

29 S Joseph et al *The International Covenant on Civil and Political Rights* Oxford 2000, p 530.

30 Ibid at p 532.

31 Ibid.

32 [1989] 1 SCR 143, 181-182; P Hogg, op cit n 128, at pp 987-988.

33 See the anti-discrimination statutes of Queensland, Tasmania, Victoria, WA, the ACT and the NT.

34 Section 20(1)(b).

35 Sections 3, 11(1)(f) and 20(1)(b).

36 Section 29(2).

37 The *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004.*

38 In the wider sense used in *Egan v Canada.*

39 Race, sex, disability and age.

40 Sections 7B-7D were introduced by the *Sex Discrimination Amendment Act 1995* sometime after the decision in *R v Oakes*.

41 One approach of the Commonwealth has been to prohibit discrimination on the ground of family responsibilities only where there has been direct discrimination: s 7A *Sex Discrimination Act 1984.*

NEGLECTFUL STATUTORY INTERPRETATION? A commentary on *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs*

Oliver R Jones*

Introduction

In *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs*[1] ('*Goldie v MIMIA*'), the Full Court of the Federal Court was faced with two issues of statutory interpretation. On the one hand, it had to ascertain the meaning of the term 'notification', in s 42A(8) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), while, on the other, it had to resolve the scope of the term 'error', in s 42A(10) of that Act. In the process, the Full Court had to negotiate an applicant with an extensive record of litigation, relevant decisions by previous Full Courts and the tension between the text of legislation, its purpose and its extrinsic materials. The decision that emerged is worth examining, not only to understand the conclusions that the Full Court reached, but also to evaluate how far those conclusions accord with the law relating to statutory interpretation generally.

Background

Mr Goldie as a litigant

After travelling from the United Kingdom to Australia, in 1992, Brian Gerald James Goldie became a prolific, and consistently successful, litigant in Australian courts. There were several strands to Mr Goldie's litigation. First, there was a series of proceedings before the Administrative Appeals Tribunal (AAT), single judges of the Federal Court and the High Court, and the Full Court of the Federal Court, in relation to the refusal of a Transitional (Permanent) Visa.[2] Second, there was a similar series of proceedings in the AAT, the Federal Court and the High Court, concerning a bridging visa.[3]

Another strand to Mr Goldie's litigation involved claims in tort against the Commonwealth, which arose out of advice to him regarding bridging visas and his placement in immigration detention.[4] Moreover, there were Mr Goldie's proceedings in the Supreme Court of Western Australia and the District Court of that State, as well as before a single judge of the Federal Court, in relation to criminal charges of stealing as a servant.[5] Finally, to facilitate much of the above, Mr Goldie brought proceedings against the Minister for Immigration, seeking reasonable facilities for the purposes of prosecuting legal action in relation to his immigration status.[6]

Throughout the litigation, Mr Goldie regularly represented himself, but he was also often represented by counsel. Either way, he was generally unsuccessful before the AAT, Western Australian courts and single judges of the Federal Court and the High Court. However, he had several significant victories in the Full Court of the Federal Court. One such victory recently resulted in Mr Goldie, on remittal from the Full Court to a single judge of the Federal Court, being awarded $22 000 in damages, against the Commonwealth, for wrongful arrest and imprisonment.[7] Yet, it is another, and lesser, of Mr Goldie's Full Court victories that is the subject of this paper: *Goldie v MIMIA*.[8]

Events leading to Goldie v MIMIA[9]

This case marked the final point in the series of proceedings concerning the Transitional (Permanent) Visa. As such, its background was as follows. On 29 May 1997, a delegate of the Minister for Immigration decided to refuse Mr Goldie a Transitional (Permanent) Visa. Mr Goldie applied to the AAT for review of the delegate's decision, but the AAT affirmed the decision.[10] Mr Goldie appealed to a single judge of the Federal Court from the AAT's decision, but that judge, Cooper J, dismissed the appeal.[11] Mr Goldie then appealed, from Cooper J's judgment, to the Full Court of the Federal Court, constituted by Spender, Drummond and Mansfield JJ. Their Honours allowed the appeal, set aside the orders of Cooper J and the AAT, and remitted the matter to that tribunal.[12]

It was on the remittal that the events critical to *Goldie v MIMIA*[13] began. The matter was listed for hearing by the AAT on 16 and 17 December 1999. On 16 December 1999, Mr Goldie appeared at the hearing, by counsel, but was not personally present. Under instructions, Mr Goldie's counsel applied for an adjournment. The AAT, constituted by Deputy President Gerber, granted an adjournment, until the following day.[14] On that occasion, Mr Goldie again appeared by counsel, without being personally present. Mr Goldie's counsel made another application for an adjournment. Deputy President Gerber refused to grant the adjournment. Mr Goldie's counsel then indicated that, apart from the adjournment application, he had no instructions to act in the matter at the hearing. Accordingly, with the leave of the Deputy President, Mr Goldie's counsel withdrew.[15]

Once this had occurred, Deputy President Gerber took the view that Mr Goldie had failed to appear in person, or by a representative, at the hearing and dismissed Mr Goldie's application, without proceeding to review the decision to which it related, being the refusal of the Transitional (Permanent) Visa.[16] In doing so, the Deputy President was acting under s 42A(2) of the AAT Act, which relevantly states:

> **42A Discontinuance, dismissal, reinstatement etc. of application**
>
> …
>
> (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 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; …
>
> …

However, s 42A(2) of the AAT Act is subject to s 42A(8)–(10) of that Act, which are in the following terms:

> (8) If the Tribunal, under subsection (2), has dismissed an application (other than an application in respect of a proceeding in which an order has been made under subsection 41(2)), the person who made the application may, within 28 days after receiving notification that the application has been dismissed, apply to the Tribunal for reinstatement of the application.
>
> (9) If it considers it appropriate to do so, the Tribunal may reinstate the application and give such directions as appear to it to be appropriate in the circumstances.
>
> (10) If it appears to the Tribunal that an application has been dismissed in error, the Tribunal may, on the application of a party to the proceeding or on its own initiative, reinstate the application and give such directions as appear to it to be appropriate in the circumstances.

Thus, Mr Goldie, having been informed of the dismissal by his counsel orally, on 17 December 1999, made an application, dated 24 March 2000, for the reinstatement of his application, under s 42A(8)–(9) and s 42A(10) of the AAT Act.[17] Then, apparently on 9 May

2000, Mr Goldie applied for an extension of time within which to make a fresh application for review of the refusal of the Transitional (Permanent) Visa, under s 29(7) of the AAT Act.[18]

Both the application for reinstatement and the application for the extension of time were determined by the AAT, constituted by Deputy President Hotop, on 11 June 2001.[19] The Deputy President held that he had no power to act under s 42A(9) and 42A(10) of the AAT Act and, accordingly, dismissed Mr Goldie's application for reinstatement.[20] The Deputy President also indicated that, while the dismissal of the application for reinstatement would not have prevented him from granting the application for an extension of time, under s 29(7) of the AAT Act, he had decided to dismiss that application as well.[21]

Mr Goldie applied to a single judge of the High Court, Kirby J, for an order nisi for constitutional writs and other relief to be issued in relation to the refusal of the Transitional (Permanent) Visa, but that application was refused.[22] In those circumstances, Mr Goldie applied to the Federal Court for an extension of time within which to appeal from Deputy President Hotop's decision, under s 44(2A)(a) of the AAT Act. Mr Goldie's application was, apparently, referred to the Full Court of the Federal Court, under s 44(3)(b)(ii) of the AAT Act, constituted by Wilcox, Downes and Carr JJ.[23]

Before the Full Court, Mr Goldie's counsel argued the application for extension of time by reference to the proposed grounds of Mr Goldie's appeal from Deputy President Hotop's decision. Those grounds concerned the application for reinstatement, rather than the application for an extension of time within which to apply to the AAT, under s 29(7) of the AAT Act. Accordingly, the principal issue before the Full Court was whether Deputy President Hotop was correct in holding that he had no power to reinstate Mr Goldie's application under s 42A(9) and 42A(10) of the AAT Act.[24]

The decision

Deputy President Hotop's reasoning

As indicated, s 42A(9) of the AAT Act enabled the Tribunal to reinstate an application dismissed under s 42A(2) of that Act, so long as the person who made the application had, within 28 days after receiving notification of the dismissal of the application, applied for the reinstatement under s 42A(8) of the AAT Act. In Mr Goldie's case, his counsel informed him of the dismissal orally, on the day it took place, being 17 December 1999. There was no documentary evidence that the Tribunal had given Mr Goldie written notification of the dismissal. However, Deputy President Hotop felt able to infer that Mr Goldie had received the written notification shortly after the dismissal.[25]

It was unnecessary, therefore, for the Deputy President to decide whether oral communication of a dismissal, by counsel, as opposed to its written communication, by the Tribunal, constituted notification, for the purposes of s 42A(8) of the AAT Act. Rather, given the inference of the written notification, Deputy President Hotop was able to conclude that Mr Goldie's application for reinstatement, dated 24 March 2000, had been out of time. As a result, in the absence of any ability to extend the 28 day requirement imposed by s 42A(8) of the AAT Act, the Tribunal had no power of reinstatement under s 42A(9) of the AAT Act.[26]

This left for consideration s 42A(10) of the AAT Act, which enabled the AAT to reinstate the application, where it had been dismissed in error. In Mr Goldie's submission, there had been a dismissal in error, on the basis that the AAT had made various errors of law.[27] Accordingly, Deputy President Hotop had to decide whether an error, within the meaning of s 42A(10) of the AAT Act, consisted of administrative errors only or, rather, extended to errors of law.

The Deputy President held that s 42A(10) of the AAT Act was limited to administrative errors. In doing so, the Deputy President referred to statements made by the Full Court of the Federal Court in *Brehoi v Minister for Immigration and Multicultural Affairs*[28] ('*Brehoi*').[29] In that case, the Full Court, consisting of Whitlam, Moore and Katz JJ, had indicated that the term 'error', for the purposes of s 42A(10) of the AAT Act, appeared to mean administrative error only.[30]

The principal basis for their Honours' conclusion was the legislative history to s 42A(10) of the AAT Act, which had taken the following form. It had been inserted into the AAT Act by the *Administrative Appeals Tribunal Amendment Act 1993* (AAT Amendment Act). The Attorney-General had clearly indicated in, for example, the Explanatory Memorandum relevant to the AAT Amendment Act, that s 42A(10) of the AAT Act was intended to give effect to the *Report of the Review of the Administrative Appeals Tribunal*.[31] The Report had, in turn, recommended the enactment of a provision that would enable the vacation of dismissals by administrative error.[32]

In reaching their conclusion, Whitlam, Moore and Katz JJ were also influenced by the fact that the Explanatory Memorandum discussed the operation of s 42A(10) of the AAT Act, in a manner that conformed to the Report's recommendation.[33]

After referring to *Brehoi*,[34] Deputy President Hotop mentioned s 15AA of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act),[35] which states:

> **Regard to be had to purpose or object of Act**
>
> (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Deputy President Hotop accepted that the purpose or object underlying s 42A(10) of the AAT Act was as articulated by the Full Court in *Brehoi*,[36] adding that '[t]here was no suggestion that s 42A(10) was intended by the legislature to provide a means of correction by the Tribunal of errors of law made by it in dismissing an application for review'.[37] On this basis, the Deputy President felt obliged, under s 15AA of the Acts Interpretation Act, to interpret s 42A(10) of the AAT Act as being limited to administrative errors.[38] In circumstances where Mr Goldie's submissions related to dismissal through errors of law, and there was no evidence of any relevant administrative errors, it followed that the AAT lacked the power to reinstate Mr Goldie's application, under s 42A(10) of the AAT Act.[39]

The response of Wilcox and Downes JJ

In relation to s 42A(9) of the AAT Act, Wilcox and Downes JJ reached the same result as Deputy President Hotop, but came to it by a different route. With reference to decisions of previous Full Courts on similar provisions of the *Migration Act 1958* (Cth), *Long v Minister for Immigration, Local Government and Ethnic Affairs*[40] ('*Long*'), and *WACA v Minister for Immigration and Multicultural Affairs*[41] ('*WACA*'), Wilcox and Downes JJ held that notification, for the purposes of s 42A(8) of the AAT Act, may be oral. Accordingly, given the communications by Mr Goldie's counsel, their Honours accepted that Mr Goldie's application for reinstatement had been out of time, with the result that Deputy President Hotop had not had any power of reinstatement, under s 42A(9) of the AAT Act.[42]

Their Honours took a different attitude to the Deputy President's conclusion regarding s 42A(10) of the AAT Act. In essence, Wilcox and Downes JJ held that the term error, in s 42A(10) of the AAT Act, appeared without any qualification or limitation. In other words, to their Honours, error, within the meaning of s 42A(10) of the AAT Act, necessarily meant error

of any kind. It could not, in the absence of an express qualification or limitation, be confined to administrative errors.[43]

Under this approach, Wilcox and Downes JJ refused to follow the statements of Whitlam, Moore and Katz JJ in *Brehoi*.[44] In the first place, their Honours observed that those statements were obiter dictum,[45] presumably leaving them without the substantial weight accorded decisions of previous Full Courts.[46] Further, to Wilcox and Downes JJ, the statements of the Full Court in *Brehoi*[47] were not correct, since, according to their Honours, the qualification or limitation relating to administrative matters could not be read into s 42A(10) of the AAT Act, irrespective of the legislative intent or extrinsic materials.[48]

Wilcox and Downes JJ also referred to a number of additional factors, which they considered to support, or be consistent with, their interpretation of s 42A(10) of the AAT Act. In particular, their Honours suggested that if errors, for the purposes of s 42A(10) of the AAT Act, were limited to administrative errors, that provision would become imprecise.[49] Further, their Honours indicated that, while their interpretation might have the consequence that one member of the AAT could, in effect, sit in judgment on orders made by another member, there was nothing remiss in that consequence.[50]

Finally, Wilcox and Downes JJ held that there was no necessary inconsistency between their interpretation of s 42A(10) of the AAT Act and s 44 of that Act, which provided for appeals on questions of law, from AAT decisions, to the Federal Court. This appeared to be for the reason that s 42A(10) of the AAT Act was limited to default dismissals, under s 42A(2) of the AAT Act, while s 44 of that Act, although it covered such dismissals, also extended to decisions following review.[51]

As a result, Wilcox and Downes JJ concluded that Deputy President Hotop had erred in holding that the AAT had no power to grant Mr Goldie's application for reinstatement under s 42A(10) of the AAT Act.[52] Yet, their Honours nonetheless decided that there was no material before the Deputy President that would have justified an exercise of s 42A(10) of the AAT Act in Mr Goldie's favour. Wilcox and Downes JJ, therefore, ordered that Mr Goldie's application for an extension of time within which to appeal to the Federal Court, from the Deputy President's decision, be dismissed.[53]

Carr J's dissent

Carr J dissented from those orders, since his Honour thought it clearly arguable that Deputy President Hotop should have exercised s 42A(10) of the AAT Act in Mr Goldie's favour.[54] Even so, his Honour's interpretation of s 42A(8) and 42A(10) of the AAT Act was consistent with that of Wilcox and Downes JJ. In relation to s 42A(8) of the AAT Act, Carr J concluded that the relevant notification could be oral,[55] for the reasons given in *Long*[56] and *WACA*.[57] As to s 42A(10) of the AAT Act, Carr J reached the same conclusion as Wilcox and Downes JJ, under different reasoning. His Honour accepted that the ordinary meaning of the term error, in s 42A(10) of the AAT Act, was error of any kind.[58]

Further, Carr J did not feel compelled to depart from that ordinary meaning, by virtue of s 15AA of the Acts Interpretation Act. Although his Honour appeared to accept that error, in this context, could be construed as being limited to administrative errors, he considered that the provision of a power of reinstatement, in the event of administrative error, was merely one of the purposes of s 42A(10) of the AAT Act. As a result, s 15AA of the Acts Interpretation Act did not require any relevant limitation of the term error, in s 42A(10) of the AAT Act. Nonetheless, Carr J did not discuss the material that had led him to conclude that s 42A(10) of the AAT Act had more than one purpose, nor did his Honour reveal what the purposes of that provision, apart from reinstatement for administrative error, were.[59]

Carr J went on to refer to a number of other matters that, in his view, supported his interpretation of s 42A(10) of the AAT Act. In particular, like Wilcox and Downes JJ, Carr J did not consider the observations in *Brehoi*[60] to be anything more than obiter dictum,[61] nor did his Honour see any difficulties with s 42A(10) of the AAT Act being exercised by one member of the AAT to overturn a dismissal by another member.[62]

Further, his Honour was influenced by s 15AB(3) of the Acts Interpretation Act, which states:

> 15AB Use of extrinsic material in the interpretation of an Act
> …
> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
>
> (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
>
> (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

Given this provision, Carr J apparently felt that the Explanatory Memorandum referred to by the Full Court in *Brehoi*[63] did not, any more than s 15AA of the Acts Interpretation Act, compel him to depart from the ordinary meaning of the term error, in s 42A(10) of the AAT Act. In particular, Carr J indicated that, for the purposes of para 15AB(3)(a) of the Acts Interpretation Act, there was a significant degree of desirability to persons being able to rely on that ordinary meaning. Further, Carr J believed that, under his interpretation, s 42A(10) of the AAT Act would, in the widest possible range of situations, provide a convenient, prompt and inexpensive procedure for the correction of dismissals made in error. As such, the provision would, in accordance with para 15AB(3)(b) of the Acts Interpretation Act, avoid prolonging legal or other proceedings without compensating advantage.[64]

It should be noted, in passing, that Carr J's statements regarding s 15AB(3) of the Acts Interpretation Act may well be incorrect. It could just as easily be said that any interpretation to the effect that the term error, in s 42A(10) of the AAT Act, is limited to administrative error would also give effect to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act, and what is at least one of the purposes or objects underlying the Act, within the meaning of para 15AB(3)(a) of the Acts Interpretation Act.

Further, Carr J appears to have understood para 15AB(3)(b) of the Acts Interpretation Act as referring to the consequences of a particular interpretation. In other words, if an interpretation would produce the result of avoiding unnecessary prolonging of legal or other proceedings, then, according to Carr J, para 15AB(3)(b) of the Acts Interpretation Act would support the adoption of that interpretation, over an interpretation based on extrinsic materials. It is probably instead the case that para 15AB(3)(b) of the Acts Interpretation Act refers to the proceedings relating to interpretation itself, rather than any proceedings that emerge under the interpretation so established.

Status of the full court's reasoning

Clearly, in *Goldie v MIMIA*,[65] the more contentious issue of statutory interpretation was the meaning of the term error, in s 42A(10) of the AAT Act. In these circumstances, it is important to understand how the Full Court's reasoning on s 42A(10) of the AAT Act interacts with general principles of construction, as they exist under the Acts Interpretation Act, and at common law.

Section 15AA of the Acts Interpretation Act

As indicated, s 15AA of the Acts Interpretation Act requires a court, in interpreting a provision of an Act, to prefer a construction that would promote the purpose or object underlying that Act. There are two conditions precedent to the application of s 15AA of the Acts Interpretation Act. The first condition precedent is that the provision being interpreted needs, at one point or another, to be susceptible to more than one construction,[66] while the second is that the purpose or object underlying the Act must be ascertainable.[67] If those conditions precedent are satisfied, then it appears that the court has no choice in the matter, but is, instead, obliged to adopt the construction favouring the legislative intent.[68]

The question, then, is: did the Full Court in *Goldie v MIMIA*[69] adhere to s 15AA of the Acts Interpretation Act, so understood? Wilcox and Downes JJ did not expressly address the application of that provision in relation to s 42A(10) of the Acts Interpretation Act. However, as indicated, the lynchpin of their Honour's conclusion regarding s 42A(10) of the AAT Act was that the term error, in the absence of any express qualification or limitation, necessarily meant error of any kind. If this were correct, then it would follow that s 15AA of the Acts Interpretation Act would not have applied, as one of its conditions precedent, being the availability of more than one construction, would not have been satisfied.

Yet, can it be said that the term error, for the purposes of s 42A(10) of the AAT Act, can *only* mean error of any kind? In determining whether a statutory word or phrase is amenable to more than one construction, within the framework of s 15AA of the Acts Interpretation Act, it is necessary to consider the context in which that word or phrase appears.[70] In this respect, as indicated, s 44 of the AAT Act would permit appeals on questions of law to the Federal Court, in relation to dismissals under s 42A(2) of the AAT Act. As such, there is an independent procedure for the correction of dismissals, under s 42A(2) of the AAT Act, involving errors of law. It must follow that the term error, in s 42A(10) of the AAT Act, when read in the context of s 44 of that Act, could be construed as meaning error of an administrative kind, rather than error of law.

This is not to suggest that Wilcox and Downes JJ were wrong in holding that their construction of the term error, in s 42A(10) of the AAT Act, was not inconsistent with s 44 of the AAT Act. It is simply to say that the presence of s 44 of the AAT Act reveals another credible construction of that term.[71] If this point is reached and if, as Wilcox and Downes JJ apparently accepted, *Brehoi*[72]is taken correctly to express the purpose of s 42A(10) of the AAT Act, then, much as Deputy President Hotop recognised, the term error, in s 42A(10) of the AAT Act, must, under s 15AA of the Acts Interpretation Act, be limited to administrative errors.

Perhaps, though, the application of s 15AA of the Acts Interpretation Act is not quite this simple. In *Brehoi*,[73] Whitlam, Moore and Katz JJ had, in essence, gleaned the purpose of s 42A(10) of the AAT Act from the relevant Explanatory Memorandum, which incorporated, by reference, the *Report of the Review of the Administrative Appeals Tribunal*.[74] In other words, their Honours had ascertained the purpose of s 42A(10) of the AAT Act by reference to extrinsic materials. The question is whether such an approach satisfies the second condition precedent to the application of s 15AA of the Acts Interpretation Act, namely that the purpose or object underlying the Act be ascertainable.

It is submitted that this condition precedent does not mean that the relevant purpose or object must be capable of being ascertained, in any way. Rather, it requires that the relevant purpose or object be amenable to ascertainment, *in accordance with s 15AA of the Acts Interpretation Act*. In this respect, in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*,[75] ('*NAQF*') Lindgren J said the following:

> It is questionable whether it is permissible to ascertain the underlying purpose or object for the purpose of s 15AA from extrinsic materials; cf *Federal Commissioner of Taxation v Trustees of the Lisa Marie Walsh Trust* (1983) 48 ALR 253 at 260 per McGregor J, 278 per Fitzgerald J. ... I do not think s 15AB provides authority for doing so. Moreover, s 15AA was inserted by the *Statute Law Revision Act 1981* (Cth), whereas s 15AB was inserted later by the *Acts Interpretation Amendment Act 1984* (Cth), and s 15AA was therefore at least intended to be capable of having effect without reference to extrinsic materials. But it may be appropriate to consider the Explanatory Memorandum and the Second Reading Speech for the purpose of identifying the mischief which s 357A was intended to address, as part of the general law purposive approach to statutory interpretation, and in the course of doing so to identify the purpose or object underlying the Act for the purposes of s 15AA; cf *Saraswati v R* (1991) 172 CLR 1 at 21 per McHugh J.[76]

The suggestion that extrinsic materials cannot be utilised to ascertain purpose, in relation to s 15AA of the Acts Interpretation Act, while arguable, may not be correct. It is probable that, read in isolation, s 15AA of the Acts Interpretation Act is, subject to certain modifications, meant to operate in conjunction with the principles comprising the common law of statutory interpretation, as they exist from time to time, including on the question of gleaning legislative purpose from extrinsic materials.[77]

Further, it does not seem right to say that this position should be altered by the presence of s 15AB of the Acts Interpretation Act. Apart from anything else, s 15AB of the Acts Interpretation Act does not displace the common law regarding extrinsic materials, in its application generally,[78] making it unlikely that s 15AB of the Acts Interpretation Act would do otherwise, so far as the relevant common law is engaged by s 15AA of the Acts Interpretation Act. This approach is supported by the recognition that s 15AB of the Acts Interpretation Act is supplementary to s 15AA of that Act. That is, it only applies once interpretation under s 15AA of the Acts Interpretation Act, whatever that requires, has taken place.[79]

Finally, in *North Australian Aboriginal Legal Aid Service Inc v Bradley*,[80] McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ proceeded, without elaboration, on the footing that extrinsic materials could be used to ascertain purpose when applying s 62A of the *Interpretation Act* (NT), independently of s 62B of that Act.[81] These provisions are materially identical to ss 15AA and 15AB of the Acts Interpretation Act.

Accordingly, this paper will assume that the purpose of s 42A(10) of the AAT Act, as gleaned from extrinsic materials in *Brehoi*,[82] may be utilised in the context of s 15AA of the Acts Interpretation Act, with the result that the term error, in s 42A(10) of the AAT Act, must be limited to administrative errors.

However, could this conclusion, irrespective of *NAQF*,[83] still misunderstand s 15AA of the Acts Interpretation Act? In *Chugg v Pacific Dunlop Pty Ltd*,[84] Dawson, Toohey and Gaudron JJ, with the general agreement of Brennan J[85] and Deane J,[86] made the following comments about the Victorian equivalent to s 15AA of the Acts Interpretation Act:

> The choice directed by s 35(a) of the *Interpretation of Legislation Act* is not as to the construction which 'will best achieve' the object of the Act. Rather, it is a limited choice between 'a construction that would promote the purpose or object [of the Act]' and one 'that would not promote that purpose or object'.[87]

It follows from their Honours' comments that, if a statutory provision is amenable to two constructions, both of which promote the purpose or object underlying the provision, to different degrees, then the obligation in s 15AA of the Acts Interpretation Act does not apply. Sub-section 42A(10) of the AAT Act may fall into this category. That is, if its purpose or object, as expressed in *Brehoi*,[88] is to provide a procedure for overturning dismissals made through administrative error, then that purpose or object might be fulfilled regardless of whether its term error was limited to errors of an administrative kind or extended to errors of

any kind. It is just that, in the latter event, the purpose or object underlying s 42A(10) of the AAT Act would also be exceeded.

Yet, while the foregoing is superficially attractive, it probably fails to comprehend the purpose or object underlying s 42A(10) of the AAT Act, in full. As Deputy President Hotop largely indicated, it is more likely than not that the relevant purpose or object is the provision for a procedure for overturning dismissals made through administrative error, *to the exclusion of errors of law*.[89] On this basis, the competing interpretations of the term error, in s 42A(10) of the AAT Act, would not promote the purpose or object underlying that provision, to varying degrees, thus excluding s 15AA of the Acts Interpretation Act. Rather, only the interpretation that would limit error, within the meaning of s 42A(10) of the AAT Act, to administrative errors, would promote the relevant purpose or object, with the result that its adoption would, under s 15AA of the Acts Interpretation Act, be required.

As a final point, it is worth noting that it is unclear whether Carr J's reasoning is preferable to that of Wilcox and Downes JJ, so far as s 15AA of the Acts Interpretation Act is concerned. Unlike Wilcox and Downes JJ, his Honour did refer to that provision and appeared to concede that the term error, in s 42A(10) of the AAT Act, was open to more than one construction. Further, Carr J did seem to overcome any effect that s 15AA of the Acts Interpretation Act might have by characterising s 42A(10) of the AAT Act as a provision of multiple purposes, only one of which was permitting the vacation of dismissals made through administrative error. However, Carr J's conclusion is not obviously correct, and it is weakened by his Honour's failure to indicate the factors that had led him to it, or to explain what the additional purposes of s 42A(10) of the AAT Act were.

Statutory interpretation at common law

The courts, notwithstanding s 15AA of the Acts Interpretation Act, continue to draw upon the principles of statutory interpretation, as they exist at common law. Thus, even if s 15AA of the Acts Interpretation Act required Wilcox, Downes and Carr JJ, in *Goldie v MIMIA*,[90] to take a particular course, their Honours' reasoning should also be assessed against the common law.[91] At the time *Goldie v MIMIA*[92] was decided, Brennan CJ, Dawson, Toohey and Gummow JJ, when interpreting the *Insurance Contracts Act 1984* (Cth), in *CIC Insurance Ltd v Bankstown Football Club Ltd*[93] ('*CIC Insurance*'), had said the following:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.[94]

This passage was, prior to *Goldie v MIMIA*,[95] extended to cover explanatory memoranda by Toohey, Gaudron and Gummow JJ, and McHugh J, in *Newcastle City Council v GIO General Ltd*.[96] It was also, more recently, approved by McHugh ACJ, Gummow and Hayne JJ, in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*.[97]

The reasoning of Wilcox and Downes JJ is not directly inconsistent with the principles enunciated in *CIC Insurance*.[98] Their Honours, when analysing *Brehoi*,[99] did consider the mischief to which s 42A(10) of the AAT Act was directed, in light of extrinsic materials. So,

too, did Wilcox and Downes JJ apparently consider whether the relevant interpretations of error, for the purposes of s 42A(10) of the AAT Act, would carry inconvenience or improbability of result.

However, on balance, the *CIC Insurance*[100] approach more easily accommodates the conclusion that the term error, for the purposes of s 42A(10) of the AAT Act, is limited to administrative errors. In the first place, under *CIC Insurance*,[101] it would have been unproblematic if, as Wilcox and Downes JJ believed, error, for the purposes of s 42A(10) of the AAT Act, necessarily meant error of any kind. The term could, despite its lack of ambiguity, be considered in light of its context. Then, at this point, the existing state of the law, presumably including s 44 of the AAT Act, and the mischief to which s 42A(10) of the AAT Act is directed, as expressed in the relevant Explanatory Memorandum and the *Report of the Review of the Administrative Appeals Tribunal*[102], would favour error, as a general word, being constrained by its context, to become error of an administrative kind.

It should be added that Carr J's reasoning is in much the same position, vis-à-vis *CIC Insurance*,[103] as it was in relation to s 15AA of the Acts Interpretation Act. Like Wilcox and Downes JJ, his Honour's approach to s 42A(10) of the AAT Act does not plainly contradict *CIC Insurance*.[104] Further, Carr J's views on the multiple purposes of s 42A(10) of the AAT Act could be applied to prevent *CIC Insurance*[105] from undermining his Honour's conclusion regarding the meaning of that provision. However, as indicated, Carr J's view that s 42A(10) of the AAT Act has more than one purpose is not free from doubt.

Conclusion

Despite a complex history, and the presence of several issues of statutory interpretation, *Goldie v MIMIA*[106] basically came down to the meaning of s 42A(10) of the AAT Act. Although the Full Court, consisting of Wilcox, Downes and Carr JJ, split on the orders to be made, their Honours were in agreement on the interpretation to be accorded the term error, in that provision. That is, the term referred to errors of any kind, as opposed to administrative errors only. In order to reach their conclusion, Wilcox, Downes and Carr JJ departed from an interpretation of s 42A(10) of the AAT Act suggested by an earlier Full Court, comprising Whitlam, Moore and Katz JJ, in *Brehoi*.[107]

The reasoning of Wilcox and Downes JJ, in *Goldie v MIMIA*,[108] is not convincing. While their Honours did not expressly consider the provision, it is probable that s 15AA of the Acts Interpretation Act requires that the term error, in s 42A(10) of the AAT Act, be limited to administrative errors. This is because, contrary to the views of Wilcox and Downes JJ, that term, when read in light of s 44 of the AAT Act, is susceptible to more than one construction, thus satisfying the first condition precedent to s 15AA of the Acts Interpretation Act.

Further, notwithstanding *NAQF*,[109] this paper has proceeded on the basis that the purpose of s 42A(10) of the AAT Act, as gleaned from extrinsic materials in *Brehoi*,[110] may be utilised in relation to s 15AA of the Acts Interpretation Act, thereby satisfying its other condition precedent. Finally, it is probable that s 42A(10) of the AAT Act was intended to exclude errors of law, with the result that the approach of Wilcox and Downes JJ does not, to any degree, promote the purpose or object underlying that provision.

Similarly, while the reasoning of Wilcox and Downes JJ is not directly inconsistent with the common law principles of statutory interpretation, as enunciated in *CIC Insurance*,[111] those principles do, on balance, favour the limitation of the term error, in s 42A(10) of the AAT Act, to administrative errors.

The judgment of Carr J is no more defensible than that of Wilcox and Downes JJ. If his Honour's characterisation of s 42A(10) of the AAT Act as having multiple purposes is

correct, then his extension of the term error, in that provision, to errors of any kind might withstand s 15AA of the Acts Interpretation Act and the common law principles of statutory interpretation. However, it is not immediately apparent that s 42A(10) of the AAT Act does have more than one purpose, and Carr J's conclusion to that effect is weakened by his Honour's failure to articulate it comprehensively.

Overall, though, whatever should be the interpretation of error, for the purposes of s 42A(10) of the AAT Act, it is unfortunate that the Full Court, in *Goldie v MIMIA*,[112] went about its task without a more detailed consideration of the law relating to statutory construction, under s 15AA of the Acts Interpretation Act, and at common law.

Endnotes

1 (2002) 121 FCR 383.
2 *Goldie v Minister for Immigration and Multicultural Affairs* [1998] AATA 95 (Unreported, Forgie D-P, 18 February 1998); *Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 349 (Unreported, Cooper J, 31 March 1999); *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321; *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (Unreported, High Court of Australia, Kirby J, 3 September 2001); *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AAT 513 (Unreported, Hotop D-P, 12 June 2001); *Goldie v MIMIA* (2002) 121 FCR 383. See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
3 *Goldie v Minister for Immigration and Multicultural Affairs* [2000] AATA 467 (Unreported, Barnett D-P, 12 June 2000); *Goldie v Minister for Immigration and Multicultural Affairs* [2000] FCA 1922 (Unreported, French J, 22 December 2000); *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (unreported, High Court of Australia, Kirby J, 3 September 2001); *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378. See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
4 *Goldie v Commonwealth* (unreported, Federal Court of Australia, Cooper J, 31 July 1998); *Goldie v Commonwealth* (2000) 180 ALR 609; *Goldie v Commonwealth* (2002) 117 FCR 566; *Goldie v Commonwealth (No 2)* [2004] FCA 156 (Unreported, French J, 27 February 2004).
5 *Goldie v R* [2001] WASC 153 (Unreported, Roberts-Smith J, 16 May 2001); *R v Goldie* (2001) 26 SR (WA) 348; *Goldie v Commonwealth* [2002] FCA 261 (Unreported, French J, 18 March 2002).
6 *Goldie v Minister for Immigration and Multicultural Affairs* [2002] FCA 687 (Unreported, Nicholson J, 31 May 2002).
7 *Goldie v Commonwealth (No 2)* [2004] FCA 156 (Unreported, French J, 27 February 2004). See also *Goldie v Commonwealth* [2004] FCA 973 (Unreported, Carr J, 23 July 2004).
8 (2002) 121 FCR 383.
9 Ibid.
10 *Goldie v Minister for Immigration and Multicultural Affairs* [1998] AATA 95 (Unreported, Forgie D-P, 18 February 1998).
11 *Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 349 (Unreported, Cooper J, 31 March 1999).
12 *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321.
13 (2002) 121 FCR 383.
14 Ibid 384 (Wilcox and Downes JJ).
15 Ibid 385 (Wilcox and Downes JJ).
16 Ibid 385 (Wilcox and Downes JJ).
17 Ibid 386 (Wilcox and Downes JJ). Mr Goldie's application for reinstatement, though dated 24 March 2000, was received on 6 April 2000: ibid, 393 (Carr J). See also *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [39].
18 *Goldie v MIMIA* (2002) 121 FCR 383, 393 (Carr J). See also *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [45]. Compare *Goldie v MIMIA* (2002) 121 FCR 383, 386 (Wilcox and Downes JJ).
19 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001).
20 Ibid [39], [44].
21 Ibid [49], [56].
22 *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (unreported, High Court of Australia, Kirby J, 3 September 2001). See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
23 *Goldie v MIMIA* (2002) 121 FCR 383, 386 (Wilcox and Downes JJ).
24 Ibid 386–387 (Wilcox and Downes JJ).

25 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [39].
26 Ibid [38]–[39].
27 Ibid [37].
28 (1999) 58 ALD 385 ('*Brehoi*').
29 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [40].
30 *Brehoi* (1999) 58 ALD 385, 392.
31 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
32 *Brehoi* (1999) 58 ALD 385, 389–390.
33 Ibid 390.
34 (1999) 58 ALD 385.
35 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [41].
36 (1999) 58 ALD 385.
37 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [42].
38 Ibid [43].
39 Ibid [44].
40 (1996) 65 FCR 164.
41 (2002) 121 FCR 463.
42 *Goldie v MIMIA* (2002) 121 FCR 383, 388.
43 Ibid 388–390.
44 (1999) 58 ALD 385.
45 *Goldie v MIMIA* (2002) 121 FCR 383, 389.
46 See, eg, *Telstra Corp v Treloar* (2000) 102 FCR 595, 602–603 (Branson and Finkelstein JJ). Compare the application of *Goldie v MIMIA* (2002) 121 FCR 383 by Wilcox J in *Guo v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1585 ('Guo') at [33], [38].
47 (1999) 58 ALD 385.
48 *Goldie v MIMIA* (2002) 121 FCR 383, 389–390.
49 Ibid 388–389.
50 Ibid 389.
51 Ibid. See also, generally, *Director-General of Social Services v Chaney* (1980) 31 ALR 571.
52 *Goldie v MIMIA* (2002) 121 FCR 383, 390.
53 Ibid 391-392.
54 Ibid 399.
55 Ibid 401.
56 (1996) 65 FCR 164.
57 (2002) 121 FCR 463.
58 *Goldie v MIMIA* (2002) 121 FCR 383, 398.
59 Ibid 397.
60 (1999) 58 ALD 385.
61 *Goldie v MIMIA* (2002) 121 FCR 383, 396.
62 Ibid 398–399.
63 (1999) 58 ALD 385.
64 *Goldie v MIMIA* (2002) 121 FCR 383, 398.
65 (2002) 121 FCR 383.
66 See, eg, *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).
67 See, eg, *Whittaker v Comcare* (1998) 86 FCR 532, 544 (Drummond, Cooper and Finkelstein JJ).
68 See, eg, *Vanit v The Queen* (1997) 190 CLR 378, 386 (Brennan CJ and Gaudron J).
69 (2002) 121 FCR 383.
70 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–382 (McHugh, Gummow, Kirby and Hayne JJ).
71 Compare *Rieson v SST Consulting Services Pty Ltd* [2005] FCAFC 6 ('*Rieson*'), [20] (Wilcox and Finn JJ), [71] (Sackville J).
72 (1999) 58 ALD 385.
73 (1999) 58 ALD 385.
74 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
75 (2003) 130 FCR 456 ('*NAQF*').
76 Ibid, 472.
77 As to the common law on the question, see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ('*CIC Insurance*'), 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
78 Ibid.
79 See *NAQF* (2003) 130 FCR 456, 471-472.
80 (2004) 206 ALR 315.
81 Ibid, 331-332. See also *Rieson* [2005] FCAFC 6, [18]-[20] (Wilcox and Finn JJ), [71] (Sackville J).
82 (1999) 58 ALD 385.

83 (2003) 130 FCR 456.
84 (1990) 170 CLR 249.
85 Ibid 251.
86 Ibid 253.
87 Ibid 262.
88 (1999) 58 ALD 385.
89 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [42]. See also *Guo* [2004] FCA 1585 at [23]-[25], [31]-[42] (Wilcox J).
90 (2002) 121 FCR 383.
91 As to the extent to which, in substance, they differ, see *Rieson* [2005] FCAFC 6, [19] (Wilcox and Finn JJ), [71] (Sackville J).
92 (2002) 121 FCR 383.
93 (1997) 187 CLR 384.
94 Ibid 408 (footnotes omitted).
95 (2002) 121 FCR 383.
96 (1997) 191 CLR 85, 99 (Toohey, Gaudron and Gummow JJ), 112-113 (McHugh J).
97 (2004) 205 ALR 1, 4. See also, generally, *Rieson* [2005] FCAFC 6, [20] (Wilcox and Finn JJ), [71] (Sackville J).
98 (1997) 187 CLR 384.
99 (1999) 58 ALD 385.
100 (1997) 187 CLR 384.
101 Ibid.
102 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
103 (1997) 187 CLR 384.
104 Ibid.
105 Ibid.
106 (2002) 121 FCR 383.
107 (1999) 58 ALD 385.
108 (2002) 121 FCR 383.
109 (2003) 130 FCR 456.
110 (1999) 58 ALD 385.
111 (1997) 187 CLR 384.
112 (2002) 121 FCR 383

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'WAS THERE AN EM?'—EXPLANATORY MEMORANDA IN THE COMMONWEALTH PARLIAMENT 1901-82

Patrick O'Neill*

Executive Summary

Explanatory memoranda now accompany every government bill introduced into the Parliament, but this has not always been the case. From 1901 to 1982, there was no easy way of knowing if an explanatory memorandum had been produced for a particular bill. An online *Index to Explanatory Memoranda* (the Index), produced by the Parliamentary Library, will now make it possible for legislators and researchers to know if a memorandum was produced.

In the first half of the twentieth century, memoranda more commonly took the form of comparative memoranda: documents that set out the text of a Principal Act as it would appear if the current bill was passed, and identified the additions or deletions made by the bill to that Act. From the 1950s, explanatory memoranda in the modern sense have been more common: documents that assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of a bill.

Explanatory statements are similar to explanatory memoranda, but the term is used for documents that explain the purpose of Commonwealth regulations rather than bills. These have been supplied by government departments to the Senate Regulations and Ordinances Committee since 1932, but there is presently no easy way to obtain copies of explanatory statements prior to 1991. From 2005, explanatory statements to all subordinate legislation are available from the Federal Register of Legislative Instruments.

Introduction

Since 1984, section 15AB of the *Acts Interpretation Act 1901* has provided for the use of extrinsic material in the interpretation of an Act of Parliament. Included in the list of relevant extrinsic material is:

> any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;1

Previously, explanatory memoranda (EMs) had been used principally as an aid in the *legislative* process, but with this amendment, they assumed much more importance in the *interpretative* process. This change was not matched, however, by an increase in the availability of past EMs, and in fact, the early history of EMs has been simply unknown. Judging from the number of phone calls received by the Parliamentary Library in Canberra, the question 'Was there an EM?' must be asked frequently by law librarians, but the only certain way to establish whether or not there *was* in fact an EM to a particular bill has been to look physically at the bound volumes of bills held by certain libraries.

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* *Law Information Specialist, Parliamentary Library, Canberra. The views expressed in this paper are the author's own and should not be attributed to the Parliamentary Library's Information and Research Services.*

This is about to change, with the publication by the Parliamentary Library of an online Index to all EMs from 1901 to 1982.[2] This Index has been established by the only possible means, that of checking all 198 volumes of bills for that period. From 1983, it has been standard practice for an EM to be presented to Parliament with every *government* bill. (This practice does not however apply to private Senators' and Members' bills.) Thus the availability of EMs will now be clear for the whole history of the Commonwealth Parliament. The aim of this paper is to explain some of the history revealed by the new Index.

The first explanatory memorandum: Copyright Bill 1905

So, when *was* the first EM presented to Parliament? The answer is, surprisingly early. When the Copyright Bill was introduced in the Senate in August 1905, questions were asked during debate about the origins of the clauses in the bill. Senator George Pearce stated that:

> Senator Keating in introducing the measure, indicated that it is largely based on the report of the [1875–78 UK] Royal Commission. It would have been helpful to honorable senators in the case of a highly technical measure of this description, if some indication had been given as to what portions of the bill are based on the report of the Commission, and what are based on existing legislation. We should then have been able to see how far the Bill clashes with, or takes away, existing rights in the States.3

Senator Henry Dobson complained that:

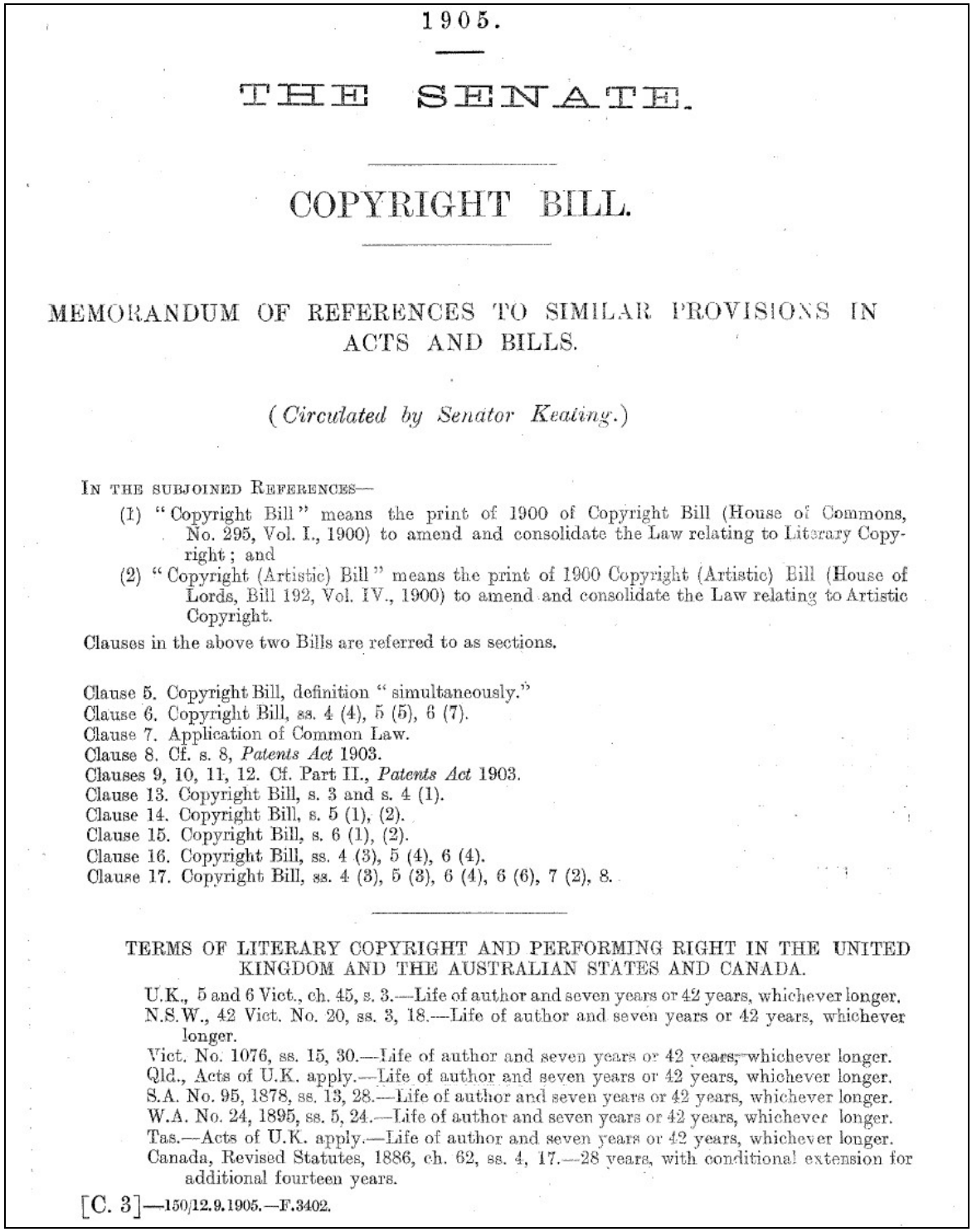
> I notice from this Bill an absence of marginal notes, telling us from what source the clauses are taken. We have often found such notes of great service in the consideration of Bills. I am, however, informed that many of the clauses have been taken not from English Acts, but from Bills prepared as the result of various conventions and conferences on copyright. Those Bills, as Senator Symon tells us, have not yet been placed upon the statute-book of Great Britain.[4]

In replying to these concerns, Senator John Keating spoke for the government:

> I wish to indicate that I heard the representations made by some honorable senators in discussing the second reading. I think it might facilitate the consideration of the measure if some information of the character they referred to were supplied to them. Originally it was my intention to have a memorandum prepared on this highly technical Bill, which would help honorable senators to understand its provisions. Before the consideration of the Bill in Committee is resumed, I shall endeavour to get such information supplied to them as will enable them to properly approach its consideration.[5]

The resulting document, 'Memorandum of references to similar provisions in acts and bills', bears a printer's date of 12 September 1905, and was referred to in the parliamentary debate on 13 September as 'a very useful paper which has been circulated'.[6] It lists every clause in the Bill, and states the precedents from which the drafting has been derived (see Figure 1).[7]

The Copyright Bill 1905 was amended before it passed the Senate, and so when the Bill came to the House of Representatives in October 1905, a new version of the EM was prepared.[8] The main differences were caused by the addition or deletion of a clause or two, and are in the numbering of the clauses rather than in the text itself.



1905.

THE SENATE.

COPYRIGHT BILL.

MEMORANDUM OF REFERENCES TO SIMILAR PROVISIONS IN ACTS AND BILLS.

(Circulated by Senator Keating.)

IN THE SUBJOINED REFERENCES—

(1) "Copyright Bill" means the print of 1900 of Copyright Bill (House of Commons, No. 295, Vol. I., 1900) to amend and consolidate the Law relating to Literary Copyright; and

(2) "Copyright (Artistic) Bill" means the print of 1900 Copyright (Artistic) Bill (House of Lords, Bill 192, Vol. IV., 1900) to amend and consolidate the Law relating to Artistic Copyright.

Clauses in the above two Bills are referred to as sections.

Clause 5. Copyright Bill, definition "simultaneously."
Clause 6. Copyright Bill, ss. 4 (4), 5 (5), 6 (7).
Clause 7. Application of Common Law.
Clause 8. Cf. s. 8, *Patents Act* 1903.
Clauses 9, 10, 11, 12. Cf. Part II., *Patents Act* 1903.
Clause 13. Copyright Bill, s. 3 and s. 4 (1).
Clause 14. Copyright Bill, s. 5 (1), (2).
Clause 15. Copyright Bill, s. 6 (1), (2).
Clause 16. Copyright Bill, ss. 4 (3), 5 (4), 6 (4).
Clause 17. Copyright Bill, ss. 4 (3), 5 (3), 6 (4), 6 (6), 7 (2), 8.

TERMS OF LITERARY COPYRIGHT AND PERFORMING RIGHT IN THE UNITED KINGDOM AND THE AUSTRALIAN STATES AND CANADA.

U.K., 5 and 6 Vict., ch. 45, s. 3.—Life of author and seven years or 42 years, whichever longer.
N.S.W., 42 Vict. No. 20, ss. 3, 18.—Life of author and seven years or 42 years, whichever longer.
Vict. No. 1076, ss. 15, 30.—Life of author and seven years or 42 years, whichever longer.
Qld., Acts of U.K. apply.—Life of author and seven years or 42 years, whichever longer.
S.A. No. 95, 1878, ss. 13, 28.—Life of author and seven years or 42 years, whichever longer.
W.A. No. 24, 1895, ss. 5, 24.—Life of author and seven years or 42 years, whichever longer.
Tas.—Acts of U.K. apply.—Life of author and seven years or 42 years, whichever longer.
Canada, Revised Statutes, 1886, ch. 62, ss. 4, 17.—28 years, with conditional extension for additional fourteen years.

[C. 3]—150/12.9.1905.—F.3402.

Figure 1: Explanatory memorandum to the Copyright Bill 1905, Senate version

This first known EM for the Commonwealth Parliament is one of a very select group whose main task was to outline the precedents—from the United Kingdom, Australian states, New Zealand or Canada—from which the provisions of a Commonwealth bill were drawn. (This information was usually included in marginal notes; see further on p. 65 below). There are only four such explanatory memoranda in the Index, three of which date from before 1910.[9]

This brief history reveals already some of the complexity of early EMs:

- Different versions could be presented to either the Senate or the House of Representatives, if a bill was amended during its passage through the chamber in which it was introduced. Nowadays the differences may be highlighted by the use of the term 'Revised Explanatory Memorandum' or 'Supplementary Explanatory Memorandum', but this was certainly not the case during most of the 20th century. For the period 1901–82, 22 instances have been found of different Senate and House of Representatives EMs, and these are indicated in the Index with the phrase 'Takes account of [Senate/House of Representatives] amendments to the bill.' On the other hand, there are many cases—460 in the Index—where identical EMs were presented to each chamber.

- The differences may be visible only by a close reading of the two documents.

- The EM may be mentioned in the parliamentary debate, but there is usually no mention of it in the Senate *Journals* nor in the House of Representatives *Votes and proceedings*.

- The only way of dating many EMs is to rely on the printer's date, which seems to be consistently used only until 1959. Thereafter, the date of the *introduction* of a bill is supplied in the Index as an approximation.

The second explanatory memorandum: Commonwealth Electoral Bill 1905

Two days after the EM for the Copyright Bill was printed, the same Minister, Senator Keating, made the Second Reading speech for the Commonwealth Electoral Bill 1905, saying:

> … I hope by Saturday morning to have [senators] supplied with a printed memorandum which will not only give a reference to the sections of the Act sought to be amended, but point out concisely the effect of each amendment and the necessity or reason for its enactment.[10]

Later, in response to a request for a copy of the principal Act, he reiterated:

> I shall supply [senators] … with a copy of the principal Act, and a memorandum which will clearly indicate, in concise form, the effect of each amendment, and the necessity or reason for its amendment.[11]

This description would sit well with any of today's EMs, and qualifies the Commonwealth Electoral Bill 1905 as in fact the first bill to have an EM *in the modern sense*. The four-page EM was printed on 16 September 1905, and although it has at most 3–4 sentences per clause of the bill, and concentrates on explaining *what* has changed rather than *why* it has changed, it is easily recognisable as an EM.[12] Again, since the bill was amended in the Senate before being sent to the House of Representatives, a revised EM was printed six days after the Bill was introduced into that chamber.[13]

The differences between the Senate and House of Representatives versions are best seen in the handwritten annotations of Robert Garran, then secretary of the Attorney-General's Department, in the file on the bill now held by the National Archives.[14] Finally, one could note that a 'Comparative table of the clauses of the bill and the sections of the Commonwealth Electoral Act 1902' had been prepared for an earlier version of the Bill, in mid-July 1905, and is available in the same file at the National Archives.[15]

Although these first EMs were revised to reflect parliamentary amendments to the bills concerned, it was to be over 24 years before similar cases occurred, with the Excise Tariff 1933, the Navigation Bill 1935 and the Australian Soldiers' Repatriation Bill 1935.

The first comparative memoranda

Although the natural tendency today is to regard EMs as the primary tool to assist the Parliament in its task, this was not the case during the first decades of the 20th century. A number of approaches were tried until the EM established its supremacy.

On a few occasions in 1901–2, when the first laws of the new nation were being made, versions of bills were produced that showed, in **bold font** or ~~strikethrough font~~, the **additions** or ~~deletions~~ being made during passage through Parliament. This happened for such contentious legislation as the Post and Telegraph Bill 1901, the Commonwealth Public Service Bill 1901, the Commonwealth Electoral Bill 1902, and the Customs Tariff Bill 1902.

Today, new versions of bills are routinely produced once a bill has passed one of the houses of Parliament, if amendments have occurred, but what is different about these early examples is that the amendments are made obvious to the eye. This practice seems not to have persisted into 1903, but was replaced by a couple of other approaches. On one occasion, a sheet of amendments was circulated explaining the differences between the Judiciary Bill 1902 and the Judiciary Bill 1903.[16] More often, large bills that had been subjected to many amendments were reprinted during the course of debate, but without highlighting the amendments by use of different fonts.

In 1905, in the debate on the Copyright Bill, there were allusions to the practice:

> Senator KEATING.—If an entirely new Bill were submitted, it would be very difficult for honorable senators to appreciate where an alteration was being made.
>
> Senator BEST.—Not unless it was shown in different type.
>
> Senator KEATING.—That method has been adopted, but experience has shown that it is attended with some difficulties.[17]

Another legislative aid, used on a couple of occasions, was the production of a table of contents of the sections of a bill. This was done for the Commonwealth Public Service Bill 1901 and the Navigation and Shipping Bill 1904. It did not however become a common practice until 1973.[18]

Marginal notes were also inserted into some early bills, showing the location of precedents from other jurisdictions for particular provisions of a bill. These marginal notes were used from 1901 until at least 1945, and some were still present in the 1973 reprint of Commonwealth Acts.[19]

A slightly new approach was tried later in 1905, the same year that the first EMs were produced. A document was produced setting out certain sections of the existing *Immigration Restriction Act 1901*, as they would be if amended. Again, in 1906, a part of the Australian Industries Preservation Bill 1906 was printed with the proposed amendments incorporated.

Most of these dozen documents related to completely new laws. As time went by, however, the practice of passing amending acts prompted new ways of conveying information. The developments outlined in the preceding paragraphs culminated in the production of a new type of document.

Late in 1909, a document was presented to the House of Representatives entitled ‘Reprint of the Commonwealth Electoral Acts, showing the amendments proposed by the Commonwealth Electoral Bill 1909’ (see Figure 2).[20] The amending Bill was only twelve pages long, but the anticipatory reprint of the Act contained 54 pages, and began with this note: ‘Type ruled through indicates the matter proposed to be omitted. Black type indicates

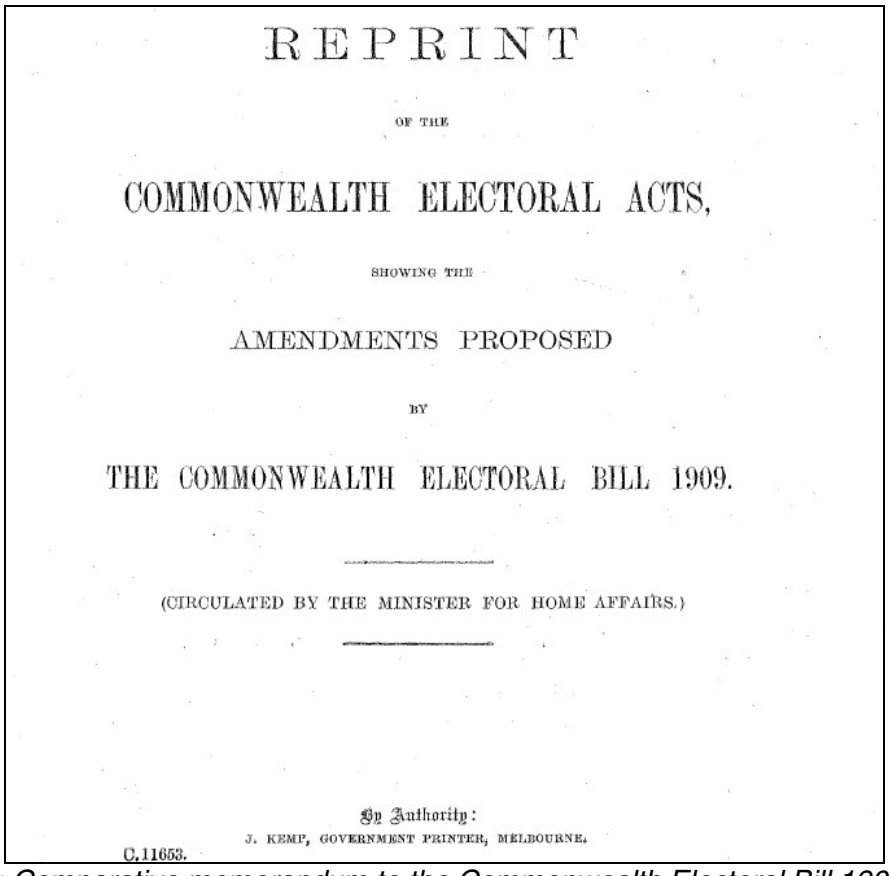
matter proposed to be inserted' (see Figure 3 for a later example). Users of word-processing software that tracks changes would be familiar with the practice adopted here.

This reprint contains nothing by way of summary or explanation of the bill, and therefore cannot really be called an *explanatory* memorandum. The term 'black-type memorandum' is used for this type of document, even today, by staff of the Attorney-General's Department and the Office of Parliamentary Counsel, because new material was shown in bold type. However, the term 'comparative memorandum' (CM) has been used before, and is adopted in the Index for this class of document.[21] A working definition might be this:

> A document that sets out the text of a Principal Act as it will appear if the current bill is passed, and identifies the additions or deletions made by the bill to that Act. Alternatively, it sets out differences between a current bill and a former version of that bill, or between an existing rate of tariff and a proposed rate.

Although the dozen documents produced from as early as 1901 do fit this definition of CM, the significant innovation in 1909 is that for the first time an anticipatory reprint of an existing Act, with proposed amendments highlighted by different fonts, was produced. The innovation did not pass unnoticed. During the Second Reading debate on 29 October, Mr J. H. Catts (Labor, Cook) spoke as follows:

> I have not, so far, heard any honorable member congratulate the Minister of Home Affairs on the way in which this Bill has been presented for our consideration. I wish to do so now. Under the practice hitherto adopted in the framing of amending measures it has been very difficult for honorable members to compare the proposed amendments with the various provisions of existing legislation. I am very glad to note in this case a new departure. The Minister has supplied honorable members with a copy of the existing Act as proposed to be amended by this measure, in which the amendments are indicated in black letters. Honorable members are thus enabled very readily to understand the changes proposed to be made in the existing law.[22]



REPRINT

OF THE

COMMONWEALTH ELECTORAL ACTS,

SHOWING THE

AMENDMENTS PROPOSED

BY

THE COMMONWEALTH ELECTORAL BILL 1909.

(CIRCULATED BY THE MINISTER FOR HOME AFFAIRS.)

By Authority:
J. KEMP, GOVERNMENT PRINTER, MELBOURNE.

C.11653.

Figure 2: Comparative memorandum to the Commonwealth Electoral Bill 1909 (No. 2)

In the period covered by the Index, there are 300 CMs, the latest having been issued for the Freedom of Information Bill 1981 (showing the differences between it and the Freedom of Information Bill 1978).[23] Of the 300, 112 constitute a subset that is probably of lesser interest for legal research: these are the documents that show the differences between old and new rates of customs and excise tariffs. That leaves 188 CMs that may be of interest to law librarians and other researchers, but be warned not to order a CM when you really want an EM! In contrast to CMs, there are 1423 EMs in the Index.

As with EMs, different versions of CMs may have been presented to each chamber of Parliament, depending on amendments in the originating chamber. This has occurred six times during the period covered by the Index, the last time being with the Conciliation and Arbitration Bill 1956.

Later developments

One of the more interesting EMs is the one presented for the Land Tax Assessment Bill 1909. Although the title of the Bill sounds innocuous, and one would, these days, expect a rather dry outline of taxation, the EM in fact outlines the political objectives of the Bill as being to increase the white population of Australia:

> A population sufficiently large to effectively develop its various resources and defend it from invasion is essential to the progress and even the very existence of every country. While this is true of all countries, it is particularly true of Australia. No land has greater natural resources; none, by reason of geographical situation or by the enormous extent of its coastline, is so vulnerable to attack.
>
> … Our need is for men—of our own or kindred races—to settle upon our lands, to further develop our great resources, to create new wealth.[24]

The first bill that received both an EM *and* a CM seems to have been the Income Tax Assessment Bill 1930, which occasioned this exchange in the House of Representatives:

> Mr THEODORE (Dalley—Treasurer)[11.25].—I move—
>
> That the bill be now read a second time.
>
> Honorable members will no doubt appreciate the fact that the income tax laws are very complex, and have become highly technical. Amendments of a comprehensive character have become difficult to follow, and extremely difficult to understand.
>
> Dr. Earle PAGE.—Difficult to explain, too.
>
> Mr THEODORE.—As my predecessor, the right honorable member for Cowper (Dr. Earle Page) remarks, it is difficult to explain them. I have endeavoured to assist honorable members by circulating, in addition to the bill, a printed memorandum, showing, in black type, the proposed amendments to the original law, and also giving explanatory notes that are very extensive.

Cabinet documents

29. (1) A document is an exempt document if it is—

(*a*) *a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;*

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of the Cabinet;

(*c*) *a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or*

(c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) **(c) or** (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

(4) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in a request would, if it existed, be one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that, if such a document exists, it is an exempt document of that kind.

(5) Where a certificate in accordance with sub-section (4) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of sub-section (1) that is specified in the certificate.

(6) A reference in this section to the Cabinet shall be read as including a reference to a Committee of the Cabinet.

Figure 3: extract from a typical comparative memorandum: comparison of the Freedom of Information Bill 1978 with the Freedom of Information Bill 1981; deletions are in italics, additions are in bold

Mr. STEWART.—A most welcome innovation!

Mr THEODORE.—I think that they will be welcomed, although the notes themselves make somewhat tedious reading because of the technical terminology that must be employed. The circulation of the explanatory memorandum will, perhaps, make it unnecessary for me to traverse the whole bill, and to deal with every provision in detail. …[25]

In this case, the term 'memorandum' appears to be used for what I have called the comparative memorandum, and 'explanatory notes' is used for what is now termed the explanatory memorandum.

The first EM for a private Senator's bill was the one presented for the Wheat Industry Insurance Bill 1938, but as a general rule, private Senators' or private Members' bills have not been accompanied by EMs. Only three other instances of EMs for private bills are noted in the Index, though there may have been more.[26] Even today, the requirement for EMs is applied to government bills rather than private bills, although recently there has been a trend to produce EMs for major private bills, such as the National Animal Welfare Bill 2003, which was introduced by the Australian Democrats.

Up to the 1940s, the numerical balance between EMs and CMs remained heavily in favour of CMs, but with the 1950s, EMs began to predominate, and during the 1970s, there were only 8 CMs but 518 EMs. As to why CMs have apparently gone out of fashion, the answer might be that a good EM is normally superior to a CM, because it should explain not only the changes, but also the reasons for them. To take a random example, the EM for the Australian Citizenship Amendment Bill 1986 states:

> Section 10 of the Act presently provides that persons born in Australia (other than children of diplomats, consular officials and enemy aliens) automatically become Australian citizens. This clause amends section 10 so that a person born in Australia after the amendment comes into effect will be an Australian citizen only if at the time of birth, at least one of the parents of the person is either an Australian citizen or a permanent resident. … (clause 4, at p. 2)

Up to the 1960s, the terms 'explanatory memorandum' and 'memorandum' were used almost interchangeably for what I am now calling comparative memoranda, and during the 1970s the term 'explanatory memorandum' was used interchangeably with 'notes on clauses'.

From unpredictability to codification

It was only in the early 1980s that the availability of an EM for a bill began to become more predictable. The two sources for today's rules relating to EMs are the *Legislation handbook* and the *Standing orders* of the House of Representatives. Below is an outline of the changes.

Legislation Handbook

The earliest incarnation of the *Legislation handbook* was prepared by the Australian Public Service Board in 1975, and it gives a good description of the practice that prevailed up till then:

> 5.142 It is the practice of Ministers, from time to time, to arrange for the preparation of explanatory memoranda or other documents in connexion with Bills that are to be introduced into the Parliament. Though the memoranda take various forms, they usually relate to Bills of some complexity. The memoranda are prepared primarily for the information of Senators and Members and copies are circulated to them at the time of the introduction of the relevant Bill in each Chamber. A further distribution of copies to other persons may be made subsequently by the sponsoring department. In the past, the physical form of memoranda has varied, some being duplicated and others printed by letterpress, offset or photo-lithography.
>
> 5.143 In the case of those memoranda printed by the A.G.P.S. in letterpress format it has been the practice of the Parliament to order the prin ting of further copies so that the memorandum may be published and sold by the A.G.P.S. in the same manner as the Bill to which it relates.
>
> 5.144 Directions were given in 1968 by the Clerks of the Senate and of the House of Representatives that, in future, all memoranda circulated for the information of Members and Senators in connexion with Bills should be published and sold by the A.G.P.S.[27]

The *Legislation handbook* has been published by the Department of the Prime Minister and Cabinet since 1980, and has gone through four editions since then.[28]

The 1980 edition of the *Legislation handbook* stipulates for the first time that EMs shall be prepared for *all bills that need explanation*:

> Previously, explanatory memoranda have been prepared on certain complex bills only. These documents are circulated for the information of senators and members at the time of the introduction of a bill in the relevant Chamber and serve a similar purpose to notes on clauses. A unified terminology will now be used and explanatory memoranda should be prepared on all bills the clauses of which require any explanation. Simple bills will require only the heading and outline, described in para 2.73 below. Under this revised format, explanatory memoranda will replace both the notes on clauses and general outline.[29]

In March 1981, the Attorney-General's Department held an in-house symposium on statutory interpretation.[30] This led to the announcement, on 27 May 1981, that a discussion paper would be produced on extrinsic aids to statutory interpretation. (On the same day, the amendments to the Acts Interpretation Act requiring the purpose or object of an Act to be taken into account in interpreting it were introduced into the Senate.) The discussion paper was tabled in the Parliament on 14 October 1982,[31] leading to a public symposium in Canberra on 5 February 1983. The proceedings of the Symposium were tabled on 30 November 1983,[32] and the resulting amendments to the Acts Interpretation Act—for the purposes of this paper, principally the insertion of s. 15AB—were introduced into the Senate on 8 March 1984, receiving assent on 15 May 1984.[33] From that date, EMs have been a valid extrinsic aid for the interpretation of statutes.

Meanwhile, the second edition of the *Legislation handbook* had been published, taking into account legislative procedures as at June 1983. This edition for the first time required an EM for *every* government bill:

> An explanatory memorandum is prepared for every bill. Where a number of closely interrelated bills are being introduced into the Parliament simultaneously, a single document incorporating explanatory memorandums for all the bills in the package may be produced if that is a more convenient way of providing the information.[34]

The 1983 *Handbook* also specified for the first time that supplementary EMs should be produced for government amendments unless the amendments were brief and straightforward. It also required EMs to be revised before amended bills were presented to the other house of the Parliament.[35] This had of course happened with the first EM in 1905, so the *Handbook* was merely codifying a practice that had been followed many times. This also means that from 1983, simply requesting 'the EM' *for a bill that was amended before passing to the next house of Parliament* is not a clear-cut request: one should specify *which* EM is required.

Current practice had, however, preceded both the *Legislation handbook* and the amendments to the Acts Interpretation Act. By the end of 1982, if not sooner, it was standard practice for an EM to be prepared for every government bill, making 1982 a logical time to conclude the Index. However, during the 33rd Parliament (March 1983–October 1984), there were in fact three government bills that did not have EMs, perhaps because of the speed of their passage through Parliament.[36]

The later editions of the *Legislation handbook* spell out in more detail the structure that was already in place. The main changes relate to such things as financial impact statements and regulation impact statements. However, they do include a succinct summary of the purpose of an EM:

> 8.1 An explanatory memorandum is a companion document to a bill, to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill.
>
> 8.2 The Acts Interpretation Act 1901 (section 15AB) allows an explanatory memorandum (and also a second reading speech – see paragraph 8.28) to be used by a court to interpret legislation to:
>
> (a) confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) determine the meaning of a provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable.[37]

Standing Orders

The *Standing orders* of the House of Representatives currently provide as follows:

> For any bill presented by a Minister, except an Appropriation or Supply Bill, the Minister must present a signed explanatory memorandum at the conclusion of his or her second reading speech. The explanatory memorandum must include an explanation of the reasons for the bill.[38]

A similar provision was first inserted into the House of Representatives *Standing orders* in February 1994.[39] There is no similar provision in the *Standing orders* of the Senate.

Other sources for research on bills

Another source for research on the history of bills—although not a source covered by the Acts Interpretation Act—is the original government file on almost every bill passed since 1901. These files were produced by the Attorney-General's Department from 1901 to 1970, and since then have been produced by the Office of Parliamentary Counsel, which was established by the *Parliamentary Counsel Act 1970*. The files occupy 448 metres of shelf-space at the National Archives, and contain 'manuscript drafts, proof and final copies (with manuscript amendments) of Bills as at their first and subsequent readings, and correspondence directing the preparation of them'.[40] Although there are gaps in the early years, one can find equivalents to EMs, such as a draft EM for the Judiciary Bill 1905, along with what appear to be Robert Garran's annotations.[41]

One could also note here that Bills Digests, providing independent analysis of bills, have been produced by the Parliamentary Library since 1977. Comprehensive coverage of Government bills begins around 1993. Digests have been produced for significant private Member's/Senator's bills, but this is not done as a matter of course. The Digests are available online from August 1990.[42] There is at present no online index of those published from 1977–90, but they are available from various libraries.

Online sources for explanatory memoranda

ScalePlus and ParlInfoWeb, 1996–present

It is well known that explanatory memoranda from 1996 are currently made available online in the ScalePlus database.[43] These will presumably be migrated to the new ComLaw website during 2005.[44] Users should remember that memoranda are entered in the database in the year in which the related bill is introduced, which may not be the same year as when the bill is passed.

A parallel source to ScalePlus is the ParlInfoWeb service from the Parliament's website.[45] The Old Bills database within ParlInfoWeb contains both bills and explanatory memoranda from 1996. The fastest way to access memoranda through this database is to browse Legislation—Old Bills, then select the title of the Bill; the memorandum appears as an option along with the text of the bill, the Parliamentary Library's Bills Digest, and the Second Reading speeches.[46]

Other websites, 1936–present

A less well known site for explanatory memoranda is the Australian Taxation Office's Legal Database, which has an Extrinsic Materials subset dating back to 1936.[47] Although the earlier years represented include materials relating specifically to taxation bills, there is a surprisingly wide range of material in later years: 1991, for example, includes material relating to data-matching, political broadcasts, the Medicare levy, superannuation, petroleum resource rent, income tax, fringe benefits tax and the wool tax.

There are also a couple of memoranda, relating to the unsuccessful 1985 and 1988 bills of rights, on the Parliamentary Library website.[48]

Rather than maintain a set of bookmarks or links to all these websites in one's browser, a good alternative is to simply keep a link to the National Library's GovPubs database.[49]

Explanatory memoranda in the states and territories

Although the states and territories are not the main concern of this paper, this is a useful place to summarise research carried out for the National Library's GovPubs database in 2002.[50] GovPubs is a mini-website that presents the history and availability of the following types of parliamentary and legal publications: bills, EMs, acts, regulations, budget papers, Hansards, notice papers, gazettes, votes and proceedings/journals, government directories and parliamentary handbooks. It is a very useful library of concise data and URLs for legal researchers. The information below is available in the GovPubs database, but is more easily viewed in one place here.

ACT

From 1975 to 1981, a form of EM was attached to 'Messages from the Minister [for the Capital Territory]' and was included in the ACT Hansard.

Since 1989, ACT EMs have been issued as separate documents along with the bills. They are now known as explanatory statements (not to be confused with explanatory statements for Commonwealth subordinate legislation; see p. 73 below). They are available online from 2000, along with explanatory statements to subordinate laws (regulations), disallowable instruments, notifiable instruments, and exposure drafts of bills.[51]

New South Wales

Explanatory notes have been issued for many, if not most, New South Wales bills since about 1964. Before that period, very brief explanatory notes were attached to bills such as money bills. One of the earliest occurrences found was for the Statute Law Revision Bill 1937. These explanatory notes have varied from a few paragraphs to a page in length, though from the 1980s they have become longer. From 1987, a separate annual volume of explanatory notes has been issued; before then, the explanatory notes were attached to the front of bills. They are available online from 1990.[52]

Northern Territory

EMs are rarely issued for Northern Territory bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the Northern Territory Hansard.

Queensland

Explanatory notes have been issued for Queensland bills since 1990. Since 1992, they have also been published as a separate volume of the Queensland Acts. They are available online from November 1992.[53]

For the period 1944 to 1989, the published *Record of the legislative acts* contains descriptions of the purposes of Acts as passed.

South Australia

EMs are not issued for South Australian bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the South Australian Hansard.

Tasmania

EMs are not issued for Tasmanian bills. For explanations of the objectives of bills, see the Second Reading speech for each bill in the Tasmanian Hansard.

Victoria

Documents entitled notes on clauses, explanatory memoranda, or explanatory notes have been issued for Legislative Assembly bills since about 1971, and for some Victorian Legislative Council bills since about 1983. In the early years these titles were used almost interchangeably.

Since 2000, EMs for bills *that have been passed* are included in the annual volumes of acts, before the text of the act itself. They are available online from 2001.[54]

Western Australia

EMs began to be issued for Western Australian bills about 1997. They are available online from about 2001.[55] For explanations of the objectives of earlier bills, see the Second Reading speech for each bill in the Western Australian Hansard.

Explanatory statements to Commonwealth regulations

The importance of explanatory statements to regulations has been growing in recent years, and has fully come of age with the passing of the *Legislative Instruments Act 2003*. Explanatory statements are to Commonwealth regulations what EMs are to bills. In other words, they fulfil exactly the same function, and the different terminology serves merely to distinguish them from EMs.

The early history of explanatory statements is just as shrouded in mystery as the history of EMs, and they are far more difficult to locate.

The story begins with the establishment of the Senate's Standing Committee on Regulations and Ordinances in March 1932. This Committee, the oldest Senate committee apart from the in-house committees such as the Standing Orders Committee or the Library Committee, was established in response to concerns about the volume of regulations that were being laid

before the Parliament. The figure of 3708 pages of Acts for the period 1901–27 was compared with the figure of 11 263 pages of regulations for the same period.[56]

The first recommendation for a standing committee was made in April 1930. A second proposal was made in July 1930,[57] the necessary changes to the Standing Orders were drafted by July 1931,[58] and were approved by the Senate on 4 March 1932, with the new Committee appointed on 17 March 1932.[59] Contrast the success of this proposal with the fate of the companion proposal in 1930 to establish a Senate Standing Committee on External Affairs: it did not come to fruition until 1970–71, an indication of the relative importance given to parliamentary oversight of regulations.

Not until the appointment of this Committee had there been any effective scrutiny of the Executive Government's regulation-making power. It is a vastly important area of responsibility and the committee is most vigilant in watching that no use is made of the regulation-making power for matters which should be the subject of parliamentary enactment, and in the protection of personal liberties. It is fair to say that both Houses of Parliament are content to leave to this important committee the parliamentary surveillance of the Government's regulation-making power.[60]

From its beginning, the Regulations and Ordinances Committee has applied four criteria in assessing the validity of subordinate legislation:

- Is delegated legislation in accordance with the statute?
- Does it trespass unduly on personal rights and liberties?
- Does it make rights unduly dependent on administrative decisions rather than judicial decisions?
- Does it contain matters more appropriate for parliamentary enactment?

The availability of explanatory statements from government departments that were making regulations, or the call for explanatory statements to be produced, has been a feature of this Committee's history since 1932. In its *Second report*, in 1933, the Committee commented:

> Your Committee acknowledges the great assistance it has received from the practice, instituted last year, of the department concerned in the issue of a new or an amending regulation supplying an explanation of the effect of, or the changes worked by, such regulation.[61]

Three years later, the *Third report* repeated the statement:

> The Committee again expresses its appreciation of the assistance which Departments generally have given it by the provision of explanatory statements accompanying regulations and ordinances.[62]

Again in 1938, the *Fourth report* stated:

> In the absence of direction as to procedure in considering the regulations and ordinances, the Committee has formulated its own procedure, which consists of obtaining from the public department responsible for the issue of a regulation or ordinance a full explanation of it, with the reasons for the making thereof. These explanations are considered by the Committee in conjunction with the regulation or ordinance under examination, and have been found helpful.[63]

Later references to explanatory statements, which were also known as 'departmental explanations', make it clear that explanatory statements continued to be provided through the 1940s and 1950s, and even through to the 1980s.[64] One report includes the text of an explanatory statement:

> The explanatory statement circulated by the Department of Air in relation to the regulations reads as follows:
>
> > The purpose of this amendment to Air Force Regulations is to provide adequate authority for the Air Board to make deductions from the pay of members of the R.A.A.F. for losses of public money or property or for damage to property occasioned by their neglect or misconduct. The amendment makes provision for delegation of the Air Board's authority.[65]

The first complaints by the Committee appear to have been raised in 1982, fifty years after the Committee—and the provision to it of explanatory statements—began:

> In pursuing its work of examining delegated legislation on behalf of the Senate, the Committee is dependent upon Explanatory Statements, provided with the instruments, for the reasons for making the legislation, and the effects it might have, in the same way as the Senate itself is dependent upon Ministers' Second Reading speeches and Explanatory Memoranda on parent legislation.
>
> During the past year, the Committee has noted some deficiencies in the Statements, ranging from what the Committee regarded as inadequacies in stating the purpose of the instrument, […] through omissions of reasons for provisions […] to inadequate descriptions of features of provisions.
>
> In view of the fact that matters of concern to the Committee, and the principles under which it operates, are well understood to those involved in the preparation of delegated legislation, it appears to the Committee that more comprehensive and detailed statements, where appropriate, would assist it in its operations, thereby lessening the burden on both the Committee and Ministers.[66]

These concerns about quality were raised again in 1984, 1986, and at some length in 1988, when a whole chapter was devoted to 'A request for better explanatory statements'.[67]

This history is presented at some length here in order to demonstrate that explanatory statements to subordinate legislation have always been a creature of the Senate Regulations and Ordinances Committee, and have been very much a working instrument for the Committee. Which explains why they are so difficult to obtain!

For the period before 1982, there is currently no access at all to explanatory statements, simply because no-one knows where they are! Being as brief perhaps as one to three paragraphs, they appear to have not been tabled in the Parliament until the 1970s or possibly as late as the mid-1980s, and so apparently they are not preserved in the Senate Table Office archives. This leaves two possible sources: the files of the Regulations and Ordinances Committee, or the files of the departments themselves that created the regulations. Good luck to anyone seeking a departmental file on the creation of a particular regulation: who would know where to start? The files of the Regulations and Ordinances Committee 1932–1988, however, comprise nearly 6 metres of shelf-space at the National Archives, which would be a more manageable research target—if the files were open for research. Since they are Class A parliamentary records, however, they are exempt from the normal 30-year rule applying to government archives, and permission to access them must currently be sought from the President of the Senate.[68] Further research will reveal whether these files are a useful source for explanatory statements, and whether they can be made more easily accessible.

To complicate matters further, the *Legislation handbook* (1975) indicates that an explanatory memorandum—single-spaced—was presented to the Executive Council with proposed new regulations, while an explanatory statement—double-spaced—was sent to the Parliament.[69] Again, only further research will reveal if the two types of documents contained differences.

A bound set of explanatory statements for the period 1982–90 is held by the Attorney-General's Department Library. There are restrictions on the copying and loan of this material, but the National Library has scheduled it for microfilming in the near future. Most of

the explanatory statements from 1991 onwards are available online in ScalePlus,[70] and will presumably be migrated in due course to ComLaw.

From 1 January 2005, with the establishment of the Federal Register of Legislative Instruments under the Legislative Instruments Act, explanatory statements have fully matured into documents not only for parliamentary use, but for the use of the legal profession and the wider public: they are now compulsory for all subordinate legislation, and will be placed online with the legislation itself.[71] Not only that, but there is now a legislative definition of explanatory statements, whereas there is none for EMs:

> 'explanatory statement', in relation to a legislative instrument, means a statement that:
>
> (a) is prepared by the rule-maker; and
>
> (b) explains the purpose and operation of the instrument; and
>
> (c) if any documents are incorporated in the instrument by reference—contains a description of the documents so incorporated and indicates how they may be obtained; and
>
> (d) if consultation was undertaken under section 17 before the instrument was made—contains a description of the nature of that consultation; and
>
> (e) if no such consultation was undertaken—explains why no such consultation was undertaken; and
>
> (f) contains such other information as is prescribed.[72]

The requirement for a consultation statement in particular represents a significant new explanatory element.

The status of explanatory statements for use as extrinsic aids to judicial interpretation was previously governed by s. 46(1)(a) of the Acts Interpretation Act. This stated that all regulations and other instruments should be treated for interpretative purposes as if they were Acts. Thus, as long as explanatory statements were 'laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted'—fulfilling the conditions of s. 15AB of the Acts Interpretation Act—they were given similar status to EMs.

Although the 1984 amendments with which this paper began were designed primarily for EMs, the conditions applied by s. 15AB (see p. 2) were probably fulfilled for explanatory statements from 1932, because they were 'furnished to the members' of Parliament from that date, or from the mid-1980s, when they apparently began to be 'laid before' Parliament. The 1984 amendments thus appear to have applied to explanatory statements as well as EMs from the time the amendments were passed.

Since 1 January 2005, s. 46 of the Acts Interpretation Act has been replaced by s. 13(1)(a) of the Legislative Instruments Act. The previous provisions have been expressed in more modern language, and applied to all legislative instruments, including regulations.

The *Index to explanatory memoranda*

Twenty years after the 1984 amendments to the Acts Interpretation Act with which this paper began, it is timely that an index to pre-1983 EMs should at last be made available. The online *Index to explanatory memoranda* (http://www.aph.gov.au/library/pubs/explanmem) contains the data necessary to know whether an EM or a CM was produced for any bill between 1901 and 1982, as well as its date, the number of pages, notes such as the full title and whether different versions were produced, and its location in the volumes of bills held by various libraries. In a very few instances there are links to online copies of EMs. There are

also instructions as to how to obtain copies, principally through the National Library or the Parliamentary Library. The Index is available to browse in HTML format, or download in Word, Excel or PDF format.

Updates to the information in this Research Brief may be made to the online version accompanying the Index to explanatory memoranda*: see http://www.aph.gov.au/library/pubs/explanmem/was_there_an_EM.htm.*

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Endnotes

1 *Acts Interpretation Act 1901*, s. 15AB(2)(e).
2 The Index is to be published at http://www.aph.gov.au/library/pubs/explanmem.
3 Senator George Pearce, 'Second reading speech: Copyright Bill 1905', Senate and House of Representatives, *Debates*, 30 August 1905, p. 1642.
4 Senator Henry Dobson, ibid., p. 1646.
5 Senator John Keating, 'Committee stage: Copyright Bill 1905', Senate and House of Representatives, *Debates*, 30 August 1905, p. 1651.
6 Senator Sir Josiah Symon, 'Committee stage: Copyright Bill 1905', Senate and House of Representatives, *Debates*, 13 September 1905, p. 2151.
7 Explanatory memorandum to the Copyright Bill 1905, Senate version, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905CopyrightSen.pdf (512 KB).
8 Explanatory memorandum to the Copyright Bill 1905, House of Representatives version, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905CopyrightHR.pdf (505 KB).
9 The others were for these bills: Marine Insurance Bill 1907, Bills of Exchange Bill 1909, Bankruptcy Bill 1924.
10 Senator John Keating, 'Second reading speech: Commonwealth Electoral Bill 1905', Senate and House of Representatives, *Debates*, 14 September 1905, p. 2274.
11 ibid., p. 2284.
12 Explanatory memorandum to the Commonwealth Electoral Bill 1905, Senate version, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralSen.pdf (661 KB).
13 Explanatory memorandum to the Commonwealth Electoral Bill 1905, House of Representatives version, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralHR.pdf (1 MB).
14 Explanatory memorandum to the Electoral Bill 1905, annotated Senate version, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905ElectoralSenAnnotated.pdf (504 KB); source: National Archives of Australia A2863, 1905/29 Part 1.
15 Explanatory memorandum to a draft Electoral Bill 1905, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905Electoraldraft.pdf (468 KB); source: National Archives of Australia A2863, 1905/29 Part 1).
16 Hon. Alfred Deakin, 'Second reading speech: Judiciary Bill 1903', Senate and House of Representatives, *Debates*, 9 June 1903, p. 588.
17 Senator John Keating, 'Second reading speech: Commonwealth Electoral Bill 1905', Senate and House of Representatives, *Debates*, 14 September 1905, p. 2284.
18 The change occurred as a result of Drafting Instruction No. 1 of 1973, 'New practices with respect to the form of legislation', issued by the Office of Parliamentary Counsel. Among other things, this Instruction required a table of contents for bills containing 25 clauses or more. A table of contents has been required for all bills since 1995.
19 The latest example that has been identified is the Life Insurance Bill 1945. For the reprint, see for example the *Bills of Exchange Act 1909–1973*, in *Acts of the Parliament 1901–1973*, vol. 2, at pp. 258–9.
20 Comparative memorandum to the Commonwealth Electoral Bill 1909 (No. 2), at http://www.aph.gov.au/library/pubs/explanmem/docs/1909ElectoralHR.pdf (10.8 MB).
21 Justice Kirby used the term as long ago as 1983: Attorney-General's Department, *Symposium on statutory interpretation*, Australian Government Publishing Service, Canberra, 1983, p. 56.
22 J. H. Catts, 'Second reading speech: Electoral Bill 1909 (No. 2)', Senate and House of Representatives, *Debates*, 29 October 1909, p. 5179.

23 Later CMs known to me are those for the National Crime Authority Bill 1983 ('Memorandum showing the changes proposed to be made to the National Crime Authority Bill 1983 by amendments to be moved on behalf of the Government', Senate, 28 May 1984), the Child Support (Assessment) Bill 1989 ('Memorandum showing the Bill as introduced and as proposed to be amended by the Government', House of Representatives, 16 August 1989), and the Privacy Amendment Bill 1989 ('Memorandum showing the Bill as introduced and as proposed to be amended by the Government', Senate, 17 November 1989).
24 Explanatory memorandum to the Land Tax Assessment Bill 1909, at http://www.aph.gov.au/library/pubs/explanmem/docs/1909LandTaxHR.pdf (414 KB). This Bill also holds a place among the arcana of parliamentary history, since it was introduced as the 'privilege bill' for the 1909 session of Parliament: a bill presented to assert the right of the Parliament to deliberate without reference to the immediate cause of summons (*House of Representatives practice*, 4th edition, 2001, p. 218). These bills are traditionally not dealt with during the remainder of the session, and so the subject of land tax was not considered again until August 1910, eventually resulting in the *Land Tax Assessment Act 1910*, which remained on the statute books until 1953.
25 Edward Theodore, 'Second reading speech: Income Tax Assessment Bill 1930', Senate and House of Representatives, *Debates*, 4 July 1930, pp. 3723–4.
26 The other bills were: Conciliation and Arbitration Amendment Bill (No. 2) 1981, Offences against the Parliament Bill 1981, Constitution Alteration (Fixed Term Parliaments) Bill 1982.
27 *Legislation handbook*, Australian Public Service Board, Canberra, [1975], p. 91.
28 The later editions are: 1983, 1988, 1999, 1999 with 2000 update.
29 *Legislation handbook*, Australian Government Publishing Service, Canberra, 1980, p. 18.
30 Published as: Attorney-General's Department, *Another look at statutory interpretation*, Australian Government Publishing Service, Canberra, 1982.
31 Attorney-General's Department, *Extrinsic aids to statutory interpretation*, Canberra, Australian Government Publishing Service, 1982. See also Senator the Hon. F. Chaney, 'Paper and Ministerial Statement: Extrinsic Aids to Statutory Interpretation', Senate, *Debates*, 14 October 1982, pp. 1483–5.
32 Attorney-General's Department, *Symposium on statutory interpretation*, Australian Government Publishing Service, Canberra, 1983.
33 See the first paragraph of this research brief for the relevant text.
34 *Legislation handbook*, second edition, Australian Government Publishing Service, Canberra, 1983, p. 31.
35 ibid, p. 32.
36 The three bills were: Racial Discrimination Amendment Bill 1983 (introduced in response to a High Court decision), Public Accounts Committee Amendment Bill 1983 (arguably not a government bill but a parliamentary bill, increasing the number of members on the Committee), and Christmas Island Agreement Amendment Bill 1983.
37 *Legislation handbook*, fourth edition, Dept. of the Prime Minister and Cabinet, Canberra, 1999 (with 2000 update), http://www.pmc.gov.au/guidelines/docs/legislation_handbook.pdf, accessed on 6 December 2004, p. 38.
38 House of Representatives, *Standing orders as at 16 November 2004*, Standing Order 142(c).
39 Similar text was first added to Standing Order 215 on 10 February 1994, amended on 22 February 1994, renumbered as Standing Order 217 on 1 May 1996, and again renumbered as Standing Order 142, with slight revisions, from 16 November 2004.
40 National Archives of Australia, *Series notes for series A2863*, from the RecordSearch database, http://www.naa.gov.au/the_collection/recordsearch.html, accessed on 6 December 2004.
41 Draft explanatory memorandum to the Judiciary Bill 1905, at http://www.aph.gov.au/library/pubs/explanmem/docs/1905Judiciary.pdf (296 KB); source: National Archives of Australia A2863, 1905/32.
42 See http://www.aph.gov.au/library/pubs/bd/index.htm.
43 See http://scaleplus.law.gov.au/html/ems/browse/TOC.htm, accessed on 20 January 2005. The memorandum for the Trade Practices Bill 1974 is also available.
44 ComLaw (http://www.comlaw.gov.au/) was launched on 1 January 2005; material from ScalePlus is to be progressively migrated to ComLaw.
45 http://parlinfoweb.aph.gov.au/piweb/, accessed on 20 January 2005.
46 Readers should be wary of assuming that the bill text in this database is the first reading print: the version available is always the latest version to have been before the Parliament, which means that *for bills that were passed, the version available is equivalent to the Act*. For first-reading prints of bills, the ScalePlus database should be used.
47 http://law.ato.gov.au/atolaw/browse.htm?toc=02:EXT, accessed on 20 January 2005.
48 http://www.aph.gov.au/library/intguide/law/civlaw.htm#bill, accessed on 20 January 2005.
49 http://www.nla.gov.au/govpubs/, accessed on 20 January 2005. Here, click on 'Search', select 'Explanatory Memoranda' from the drop-down box, click on 'Find', and the complete range of resources is set out.
50 See http://www.nla.gov.au/govpubs, select 'Browse by Publication', then 'Explanatory Memoranda'.
51 See http://www.legislation.act.gov.au/es/default.asp.
52 See http://www.legislation.nsw.gov.au/maintop/scanact/sessional/NONE/0.
53 See http://www.legislation.qld.gov.au/Bills.htm.
54 See http://www.dms.dpc.vic.gov.au/domino/web_notes/LDMS/pubhome.nsf/ under the heading 'bills'.
55 See http://www.parliament.wa.gov.au/ under the heading 'bills'.

56 Senate, Select Committee ... upon the Advisability of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, etc., *Report*, 9 April 1930, p. ix.
57 Senate, Select Committee ... upon the Advisability of Establishing Standing Committees of the Senate upon Statutory Rules and Ordinances, etc., *Second report*, 10 July 1930.
58 Senate, Standing Orders Committee, *First report: proposed new Standing Orders and amendments of existing Standing Orders*, 24 July 1931.
59 Originally operating under Senate Standing Order 36A, the Regulations and Ordinances Committee now operates under Standing Order 23.
60 J. R. Odgers, *Australian Senate practice*, sixth edition, Royal Australian Division of Public Administration (ACT Division), Canberra, 1991, p. 732.
61 Senate, Standing Committee on Regulations and Ordinances, *Second report*, 8 December 1933, p. 1.
62 Senate, Standing Committee on Regulations and Ordinances, *Third report*, 31 October 1935, p. 4.
63 Senate, Standing Committee on Regulations and Ordinances, *Fourth report*, 23 June 1938, pp. 1–2.
64 Senate, Standing Committee on Regulations and Ordinances, *Sixth report*, 29 April 1947, p. 2; *Eighth report*, 29 May 1952, p. 2; *Sixteenth report*, 11 May 1960, p. 3; *Twenty-sixth report*, 23 September 1969, p. 1.
65 Senate, Standing Committee on Regulations and Ordinances, *Tenth report*, 22 May 1956, p. 3, referring to Statutory Rules 1955, No. 92.
66 Senate, Standing Committee on Regulations and Ordinances, *Seventy-first report*, 11 March 1982, pp. 16–17.
67 Senate, Standing Committee on Regulations and Ordinances, *Seventy-fifth report*, September 1984, p. 16; *Eightieth report*, October 1986, p. 30; *Eighty-third report*, April 1988, pp. 18–27.
68 *Archives Act 1983*, s. 31(5), as inserted by the Archives (Records of the Parliament) Regulations 1995, schedule, item 9.6.
69 *Legislation handbook*, Australian Public Service Board, Canberra, [1975], pp. 122–3.
70 See http://scaleplus.law.gov.au/html/ess/browse/TOCN.htm, accessed on 20 January 2005.
71 See especially *Legislative Instruments Act 2003*, ss. 20 and 26. The Federal Register of Legislative Instruments is available at http://www.frli.gov.au, or from within the ComLaw website.
72 *Legislative Instruments Act 2003*, s. 4