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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

A special issue on integrity in administrative decision making

In 2004 Chief Justice Spigelman delivered the AIAL National Lecture Series on the fourth branch of government, the integrity branch. The 2012 National Administrative Law Conference, held in July, revisited this subject. This issue of the AIAL Forum is devoted to papers from this Conference – more will be published in the next issue.

Telstra breaches Privacy Act

The Australian Privacy Commissioner, Timothy Pilgrim, has found Telstra in breach of the Privacy Act after the details of 734,000 Telstra customers were made available online in December 2011.

The investigation's findings were released on the same day that the Australian Communications and Media Authority also found that Telstra had breached the Telecommunications Consumer Protections Code (TCP Code) (see below).

A database containing the details of customers who had a range of Telstra services was made accessible via a link on the internet. The database contained information such as customer names, phone numbers, order numbers and, in a very limited number of cases, dates of birth, drivers licence numbers and credit card numbers.

The Commissioner's report found that a number of internal errors occurred in the lead up to the incident in December 2011.

'I found the privacy breach occurred because of a series of errors revealing significant weaknesses in Telstra's reporting, monitoring and accountability systems', Mr Pilgrim said.

'Of particular concern is that a number of Telstra staff knew about the security issues with the database but did not raise them with management. This incident could have been easily avoided if appropriate planning was undertaken.

'The failure by Telstra to correctly categorise the database project in its design phase as one involving customer data meant that the database did not receive the appropriate level of protection from the very beginning'.

The Commissioner found Telstra to be in breach of two National Privacy Principles under the *Privacy Act 1988* (Cth):

- National Privacy Principle 2.1 (Use and disclosure)
- National Privacy Principle 4.1 (Data security)

Mr Pilgrim warned businesses of the importance of conducting a Privacy Impact Assessment (PIA) when commencing new projects.

'Build your privacy in at the beginning, don't bolt it on as an afterthought. All businesses should conduct a PIA to make sure that potential privacy risks are considered at the start of any project and that risk mitigation strategies are put in place'.

Telstra has committed to a remediation project to introduce significant measures to protect the security of the personal information it holds and prevent unauthorised access and disclosure in the future. The Commissioner closed the investigation after reviewing the remediation plans Telstra has in place.

In ceasing his investigation into the matter, the Commissioner asked Telstra to provide him with a report on the progress of the remediation project by October 2012. He also asked Telstra to provide to him with a report on the completion of the remediation project by April 2013.

'The Privacy Act does not give me the power to impose any penalties or seek enforceable undertakings from organisations I have investigated on my own initiative. However, the privacy law reforms that are currently before Parliament will provide me with additional powers and remedies when conducting such investigations.'

The full investigation report can be accessed at:

http://www.oaic.gov.au/publications/reports.html#omi_reports

http://www.oaic.gov.au/news/media_releases/media_release_120629_telstra_breaches_privacy_act.html

ACMA finds Telstra in breach of TCP Code

Telstra breached its customer privacy obligations when personal information about 734,000 of its customers was made accessible online during 2011.

On 9 December 2011, Telstra advised the Australian Communications and Media Authority (ACMA) that the names and, in some cases, addresses of up to 734,000 Telstra customers had been accessible via a link available on the internet. Usernames and passwords of up to 41,000 of these Telstra customers had also been accessible.

'Under clause 6.8.1 of the Telecommunications Consumer Protections Code (TCP Code) a Carriage Service Provider must protect the privacy of each customer's billing and related personal information,' said Acting ACMA Chairman, Richard Bean. Mr Bean added that:

'We are most concerned about the length of time—more than eight months—during which a significant number of Telstra customers' personal information was publicly available and accessible.'

'Clearly there were gaps in Telstra's processes to identify and act on the matter prior to media reports of the disclosure.'

Telstra has taken steps to remedy its processes and the ACMA is considering those steps and its formal enforcement response.

Where the ACMA finds a TCP Code breach, it can issue the service provider involved with a direction to comply with the code or it can issue a formal warning. However, it cannot fine or otherwise penalise the provider.

http://www.acma.gov.au/WEB/STANDARD/233693/pc=PC_410412

Privacy protections now in place for the new eHealth system

Laws establishing the new eHealth system include a new role for the Office of the Australian Information Commissioner (OAIC) as the system's independent privacy regulator.

The Australian Privacy Commissioner, Timothy Pilgrim, welcomed the extension of his role to cover the new eHealth system and reminded Australians to make informed decisions about their privacy.

'The eHealth system is an important initiative aimed at improving the delivery of health services in Australia. I encourage individuals to read the terms and conditions of the system carefully.'

'You are in control, so make sure you understand how your personal and health information will be collected, used and disclosed. You can decide which healthcare providers can see your record and what information they can access. Have a conversation with your healthcare provider about what will be uploaded and accessed from your eHealth record,' Mr Pilgrim said.

The Privacy Commissioner also reminded Healthcare providers participating in the eHealth record system that they need to take steps to understand their obligations under the eHealth laws. These laws impose new obligations in addition to the existing obligations under the Commonwealth *Privacy Act 1988*.

'Healthcare providers' obligations include not collecting more information from a patient's eHealth record than is necessary, and making sure their staff are trained in how to handle eHealth records correctly,' Mr Pilgrim warned.

The Commissioner also encouraged people to exercise their privacy rights.

'If you think that information in your eHealth record has been mishandled you can make a complaint. I now have the power to seek civil penalties and accept enforceable undertakings from health providers who don't protect this information,' Mr Pilgrim said.

http://www.oaic.gov.au/news/media_releases/media_release_120701_ehealth_records_launch.html

Government fails on children's rights

Australia's treatment of suspected people smugglers, who said that they were children, has breached international human rights law and raised serious questions about the resilience of our criminal justice system, according to Australian Human Rights Commission President Catherine Branson QC.

Ms Branson has released '*An age of uncertainty*', the report of her inquiry into the treatment of suspected Indonesian people smugglers, who said that they were children. In releasing the report, Ms Branson said that between late 2008 and late 2011, Australian authorities apparently gave little weight to the rights of these young Indonesians.

'The events outlined in this report reveal that, between 2008 and 2011, each of the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department engaged in acts and practices that led to contraventions of fundamental rights, not just rights recognised under international human rights law but in some cases rights also recognised at common law, such as the right to a fair trial,' Ms Branson said.

‘It seems likely that some of those acts and practices are best understood in the context of heavy workloads, difficulties of investigation and limited resources.

‘Others, however, seem best explained by insufficient resilience in the face of political and public pressure to “take people smuggling seriously”; a pressure which seems to have contributed to a high level of scepticism about statements made by young crew on the boats carrying asylum seekers to Australia that they were under the age of 18 years.’

Ms Branson said the authorities involved failed to question practices and procedures that led to young Indonesians, who are now known to have been children or to have been highly likely to have been children, being held in detention in Australia for long periods of time, in many cases in adult correctional facilities.

She said the Australian Federal Police and the Commonwealth Director of Public Prosecutions (CDPP) continued to rely on wrist x-ray analysis as evidence of age despite increasing evidence indicating that the process was uninformative as to whether a young person was over the age of 18 years. Wrist x-ray analysis continued to be used for age assessment purposes despite the fact that the Royal Australian and New Zealand College of Radiologists, the Australian and New Zealand Society for Paediatric Radiology, the Australasian Paediatric Endocrine Group, and the Division of Paediatrics, Royal Australasian College of Physicians advised that the technique was unreliable and untrustworthy.

‘The Office of the CDPP also failed to identify that it was under a duty to examine whether it could continue to maintain confidence in the integrity of the evidence being given by the radiologist most commonly engaged by the Commonwealth as an expert witness, and under an obligation to disclose to the defence the material in its possession that tended to undermine his evidence,’ Ms Branson said.

She said the federal Attorney-General’s Department failed to review the contemporary literature which critically examined the technique, failed to seek independent expert advice and failed to provide informed and frank policy advice to the Attorney General—including advice concerning the risk that reliance on the technique had led and would continue to lead to children wrongly being identified as adults.

‘The dogged reliance on wrist x-ray analysis, together with inadequate reliance on other age assessment processes, resulted in the prolonged detention, sometimes in adult correctional facilities, of young Indonesians who it is now accepted were, or were likely to have been, children at the time of their apprehension.’

Ms Branson said she hoped that her Inquiry would also lead to ‘mature’ reflection on the strengths and weaknesses of the criminal justice system more generally.

‘The Inquiry has revealed that this system may be insufficiently robust to ensure that the human rights of everyone suspected of a criminal offence are respected and protected,’ she said.

‘To this end, I urge all of the agencies involved to give consideration to how the human rights of this cohort of young Indonesians came to be breached in the ways outlined in this report.’

The report makes a number of recommendations to assist in creating a lasting environment in which the rights of young Indonesians suspected of people smuggling are respected and protected in every interaction they have with Australian authorities. Key among these is the recommendation that the *Crimes Act* be amended so that wrist x-ray analysis can no longer be used as evidence that a person is over the age of 18 years.

‘Careful consideration should also be given to the steps that need to be taken to ensure that in the future Australia does respect the human rights of all who comes into contact with our system of criminal justice,’ Ms Branson said.

The report is available online at <http://www.humanrights.gov.au/ageassessment/report/>
http://www.humanrights.gov.au/about/media/media_releases/2012/57_12.html

President reports on *Cherkupalli v Commonwealth of Australia*

President of the Australian Human Rights Commission, Catherine Branson QC, has found that the Commonwealth arbitrarily deprived Mr Prashant Cherkupalli of his liberty for 509 days from 26 November 2004 to 19 April 2006.

Ms Branson found that in so doing the Commonwealth had breached Mr Cherkupalli’s human right not to be subject to arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

Mr Cherkupalli is an Indian national who came to Australia in July 2003 to undertake a Master of Computer Studies degree. At this time, successful completion of this course of study would have qualified him for a permanent Australian visa.

His initial student visa gave him a limited right to work but, after this expired on 13 August 2004, and pending the processing of his application for a further student visa, he was granted a bridging visa which precluded him from working.

On 26 November 2004, Mr Cherkupalli was found working at Michel’s Patisserie in Chester Hill in breach of the no work condition of his bridging visa. He was detained and taken to Villawood Immigration Detention Centre (VIDC) where his bridging visa was cancelled.

He was detained in the VIDC for 17 months before being granted another bridging visa on 19 April 2006 and ultimately a further student visa.

Mr Cherkupalli’s application for a further student visa was pending when he was detained.

On 22 December 2004 this application was refused because of his failure to comply with the ‘no work’ condition on his bridging visa. Mr Cherkupalli challenged this decision in the Federal Magistrates Court and, on 18 November 2005, that Court made a consent order remitting the decision to the Department of Immigration and Citizenship for reconsideration.

That reconsideration ultimately resulted in Mr Cherkupalli being granted a further student visa but that visa was not granted for nearly two years.

In the meantime, Mr Cherkupalli made at least ten applications for a bridging visa, three of which were refused and in respect of seven of which the Department sought surety in the amounts of either \$10,000 or \$8,000. As Mr Cherkupalli could not raise these amounts he withdrew the applications.

As a result, Mr Cherkupalli remained in detention at VIDC until April 2006 when, following community representations to the Minister, he made a further application for a bridging visa which was granted the same day.

He was granted a further student visa on 29 October 2007 and completed a Master of Engineering Studies in April 2009.

By this time, however, successful completion of his studies no longer qualified him for a permanent Australian visa.

President Branson found that the Commonwealth's actions in deciding to detain and, thereafter detaining, Mr Cherkupalli in an immigration detention centre, were inconsistent with article 9(1) of the ICCPR. A summary of President Branson's findings can be found in Part 2 of the Report.

The President recommended that the Commonwealth pay \$697,000 in financial compensation to Mr Cherkupalli.

Ms Branson made a number of other recommendations including the following: that the Department ensure its staff receive training in the importance of protecting the right to liberty; that regular reviews of detention of non-citizens include consideration of whether the non-citizen is in the least restrictive form of detention; and that the Commonwealth provide a formal written apology to Mr Cherkupalli.

The Commonwealth has noted the President's recommendations but has not agreed at this stage to pay Mr Cherkupalli compensation, as he has a separate ongoing compensation claim in the Supreme Court of New South Wales concerning the substance of the complaint. The President's recommendation will be considered in light of that litigation.

The Commonwealth has agreed to some of the recommendations pertaining to training and operational issues within the Department. Details of the Commonwealth's response can be found in part 15 of the Report.

The full report can be found at

<http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC49.html>

http://www.humanrights.gov.au/about/media/media_releases/2012/38_12.html

Next President of the Australian Human Rights Commission

Attorney-General Nicola Roxon has announced the appointment of Professor Gillian Triggs as the new President of the Australian Human Rights Commission.

'Professor Triggs is a distinguished and extensively published international lawyer with a strong foundation in human rights law,' Ms Roxon said.

'It is with great pleasure that I announce the appointment of Professor Gillian Triggs as the next President of the Australian Human Rights Commission.

'It is evident that Professor Triggs' experience in human rights law and her abilities as a senior administrator equip her with the skills necessary to fulfil this important role.

'The Australian Government looks forward to working with Professor Triggs on the protection and promotion of human rights in Australia.'

On 10 February 2012, the President of the Commission, Catherine Branson QC, announced her intention to leave the position in July 2012.

'The Government thanks President Branson for her dedication and hard work in leading the Commission and her passionate advocacy for the rights of all Australians, particularly those most vulnerable in our society,' Ms Roxon said.

Professor Triggs has been appointed as President for a period of five years commencing on the 30 July 2012.

Professor Triggs is currently Dean of the Faculty of Law at the University of Sydney. She has previously worked as the Director of the British Institute of International and Comparative Law in London and has been Chair and Member of several federal government advisory bodies.

<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/29-June-2012---Gillian-Triggs---Next-President-of-the-Australian-Human-Rights-Commission.aspx>

Ombudsman review leads to an overhaul of income management decision making

The Department of Human Services (DHS) income management decision making has undergone significant revision and improvement in response to concerns identified during an Ombudsman review.

On 7 June 2012, Acting Ombudsman Alison Larkins released her office's investigation report into two aspects of the DHS income management decision making. The investigation examined decisions not to exempt a person from income management because that person was financially vulnerable and decisions about applying income management to a person because they were considered vulnerable. The reviewed decisions had all been made between August 2010 and March 2011.

The report highlights that the initial decision-making tools and guidelines used by decision makers did not adequately assist them to meet legislative requirements. The Ombudsman's review also identified problems with the use of interpreters, record keeping, training and dealing with review and exemption requests.

Ms Larkins said that she was concerned that some decisions reviewed by her office showed that legislative criteria had not been met and many lacked a sound evidence base. Letters designed to explain decisions were inadequate and unclear and did not inform customers of their review rights.

'DHS decisions need to comply with the legal requirements, accord with policy instructions and meet the income management program objectives,' Ms Larkins said.

'And it is only fair and reasonable that letters should explain decisions, do so in clear language that is free from jargon or terms not widely known, and provide information about how to ask for a decision to be reviewed.'

Ms Larkins said that because of the seriousness of the issues found during her investigation, she took the unusual step of writing to DHS and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) part way through the investigation to raise her concerns. DHS immediately commenced its own internal review. Ms Larkins commended both agencies on their actions and their commitment to fix the problems identified. She said that since she first raised her concerns, the DHS and FaHCSIA have taken substantial action, which includes:

- establishing a taskforce to review decisions, training, decision-making tools and templates, policy and guidelines and to develop a quality framework for income management decisions;

- amending decision-making tools and processes to ensure decision makers properly address the legislative criteria;
- revising its training packages and delivering training to 300 staff;
- updating policy, reference material and guidelines to better reflect the intent of the legislation;
- improving procedures relating to the use of interpreters and establishing a working group to advise on the appropriate use of interpreters in line with best practice; and
- updating and improving templates for letters advising of decisions.

‘DHS and FaHCSIA have accepted all of my recommendations. I commend their commitment to improving administration of the income management program and look forward to reviewing their progress in three months,’ Ms Larkins said.

The Ombudsman’s report, *Review of Centrelink* Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions*, is available at www.ombudsman.gov.au.

*When the Ombudsman commenced the investigation, the responsible agency was Centrelink. Subsequently, Centrelink was incorporated into the DHS.

<http://www.ombudsman.gov.au/media-releases/show/206>

Appointment of new chairperson and members to Victorian Law Reform Commission welcomed by legal profession

The Law Institute of Victoria (LIV) has welcomed the appointment of a new Chairperson and members to the Victorian Law Reform Commission (VLRC).

Attorney-General Robert Clark announced the appointment of former Supreme Court judge Philip Cummins QC as the new Chairperson of the VLRC.

Mr Cummins will be joined by former Supreme Court judge Frank Vincent QC and Dr Ian Hardingham QC on the VLRC.

‘The LIV congratulates Mr Cummins on his appointment as Chairperson of the VLRC. He is a leader in the legal profession and brings a wealth of experience to the position,’ said LIV President Michael Holcroft.

‘The LIV also congratulates Mr Vincent and Dr Hardingham on their appointments. Experienced and highly regarded, they are welcome additions to the VLRC and their contribution will be invaluable on matters of law reform.

‘These are important positions in the justice system and the LIV thanks Mr Cummins, Mr Vincent and Dr Hardingham for accepting them.’

Dr Hardingham will undertake the review of Victoria’s succession laws announced earlier this year. The review will consider legal issues relating to wills, estate administration and inheritance.

Mr Cummins will join the VLRC on July 17 and assume the role of Chairperson on September 1 after a handover period with the current acting Chairperson, David Jones.

The LIV recognizes the excellent contribution made by Mr Jones in the role of acting Chairperson since March 1, 2012.

The LIV hopes the Victorian Government acts on recommendations made by the VLRC in relation to guardianship and the sex offenders register, which were handed down during Mr Jones' stewardship.

<http://www.liv.asn.au/About-LIV/Media-Centre/Media-Releases/Appointment-Of-New-Chairperson-And-Members-To-Vict.aspx?rep=1&glist=0&sdiag=0>

Camera Surveillance and Privacy Report

Queensland's Office of the Information Commissioner report, *Camera Surveillance and Privacy: Review of camera surveillance use by Queensland government agencies and compliance with the privacy principles in the Information Privacy Act 2009* (Qld) was tabled in the Queensland Parliament on 31 July 2012.

The *Camera Surveillance* review examined the practice of camera surveillance in Queensland government agencies and the extent to which camera surveillance systems were designed and operated with privacy considerations in mind.

The *Camera Surveillance* review involved an audit of camera surveillance usage by Queensland public sector agencies, including local government and public authorities, to examine the extent to which the increasing volume of surveillance footage is gathered and used in accordance with legislative requirements designed to protect Queenslanders' privacy.

Acting Privacy Commissioner, Lemm Ex, said, 'By and large, the 20,000 or more cameras being operated by Queensland government agencies are being operated with attention to privacy issues. This has largely been due to the efforts of the operational staff, who have applied common sense to the development and operation of the systems.'

'The ambiguity surrounding management responsibilities of camera surveillance systems represents a risk which, if left unmanaged, could result in a significant privacy breach' Mr Ex said. 'Agencies' privacy vulnerabilities would be greatly reduced if corporate attention was given to the operation of the camera surveillance systems with privacy considerations in mind.'

'This report recommends that all Queensland government agencies review their camera surveillance systems, and the policies and procedures regarding their governance to improve compliance with the privacy principles under the *Information Privacy Act 2009* (Qld)', Mr Ex said.

The report makes 15 recommendations, one of which is that all Queensland government agencies that operate camera surveillance systems should:

- ensure data security practices to protect camera surveillance footage against loss, unauthorised access, disclosure, modification or any other misuse, and that these practices are described in documented policies and procedures; and
- actively inform the community of the presence of camera surveillance systems, the rationale for their deployment, the privacy safeguards for the system and the mechanism by which members of the community can apply for access to the surveillance footage.

<http://www.oic.qld.gov.au/information-and-resources/documents/camera-surveillance-and-privacy-report%E2%80%94july-2012>

NSW Privacy Commissioner Report into RailCorp sale of unclaimed USB data keys released

On 13 June 2012, the Office of the NSW Privacy Commissioner released a report about its own motion investigation of the RailCorp sale of unclaimed USB Data keys under the *Privacy and Personal Information Protection Act 1998* (NSW) (the *PPIP Act*).

USB devices can contain data that includes personal and health information. NSW privacy law requires that public sector agencies, such as RailCorp, ensure that they do not disclose personal information without the consent of the person concerned. In the case of lost property this consent is difficult to obtain.

The investigation led by Deputy Privacy Commissioner, John McAteer, commenced following reports alleging that third party personal information was accessible by persons who had purchased USB keys through public auctions held by RailCorp in 2011.

RailCorp responded 'constructively and quickly once contacted by this office' said Deputy Commissioner McAteer. Of its own accord RailCorp ceased selling unclaimed USB keys and commenced a review of its approach to the auctioning of devices that may contain data capable of identifying individuals. 'RailCorp is consulting the Office of the NSW Privacy Commissioner on this review' said Mr McAteer.

This investigation found that while RailCorp undertook a data cleansing process of USB keys prior to auction, this process did not prevent the recovery of cleansed data using off the shelf, inexpensive software and that the obligations under section 12 (c) of the *PPIP Act* were not met.

The NSW Privacy Commissioner Dr Elizabeth Coombs commended both RailCorp's proactive approach and the investigation undertaken by the Deputy Commissioner. 'Technology advances have meant that there are now many mobile devices that store data concerning individuals. We will continue to assist RailCorp in the development of its policy towards the auction or appropriate disposal of such devices,' Dr Coombs said.

The report can be accessed on the Office of the Privacy Commissioner website at www.privacy.nsw.gov.au.

[http://www.privacy.nsw.gov.au/Lawlink/privacynsw/ll_pnsw.nsf/vwFiles/Railcorp_mediarelease_final.pdf/\\$file/Railcorp_mediarelease_final.pdf](http://www.privacy.nsw.gov.au/Lawlink/privacynsw/ll_pnsw.nsf/vwFiles/Railcorp_mediarelease_final.pdf/$file/Railcorp_mediarelease_final.pdf)

Legislation to establish Military Court of Australia

Legislation to establish the new Military Court of Australia was introduced into the Federal Parliament on 21 June 2012.

The Military Court of Australia Bill 2012 will establish the Military Court of Australia under Chapter III of the Constitution to provide a permanent and constitutionally sound system of military justice for Australia's defence forces.

The new Court will provide a modern system dedicated to trying serious service offences and will ensure independent and transparent military justice for service personnel on a long-term basis. It will play an important role in holding Australian Defence personnel accountable.

The Court's establishment follows a series of Senate Committee reports over a number of years recommending extensive changes to the system of military justice.

In 2005, the Senate Foreign Affairs, Defence and Trade References Committee report, *The Effectiveness of Australia's Military Justice System*, recommended that the Australian Defence Force abolish the court martial system and introduce a system of trials of serious service offences by a permanent military court, established under Chapter III of the Constitution.

The new Military Court of Australia will replace the interim system of military justice that has operated since 2009.

The interim system was put in place following the High Court's decision in *Lane v Morrison*, which found the Australian Military Court established by the previous Government to be unconstitutional.

'The Military Court of Australia will be a separate court with the same independence and constitutional protections as other Federal courts,' Attorney-General Nicola Roxon said.

'The Government has worked closely with the defence and legal communities to ensure that the Military Court of Australia will provide fair and effective justice for Australia's service personnel.'

Minister for Defence Stephen Smith said the reforms to Australia's military justice system would strengthen operational effectiveness and discipline in the Australian Defence Force (ADF).

'Military Court Judges will be able to sit overseas and on military bases, so the Court will be flexible enough to meet the needs of the ADF,' Mr Smith said.

The Court has been designed so it has a proper appreciation of the nature of service offences and the impact that they can have on maintaining service discipline.

Uniformed legal officers will continue to prosecute and to defend Australian Defence Force personnel charged with a service offence.

Judicial officers of the Military Court must, by virtue of their training or experience, understand the nature of service in the ADF but cannot be serving ADF members or reservists, due to the need for judges to be independent of the chain of command.

Existing judges of the Federal Court of Australia and Federal Magistrates of the Federal Magistrates Court may be appointed to the Military Court and so hold dual commissions. Certain administrative functions will be performed using existing Federal Court systems and resources.

Mr Smith said the bulk of disciplinary and less serious charges will continue to be dealt with and reviewed by commanders at the summary level unless the serviceman or woman elects trial by the Court.

The Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 will provide arrangements for transition to the new Military Court and includes additional enhancements to the Australian Defence Force military discipline system, not directly associated with the establishment of the Military Court.

On 29 June 2012 the Senate jointly referred the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 and the Military Court of Australia Bill 2012 for inquiry and report. The reporting date is 9 October 2012.

<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/21-June-2012---Legislation-to-establish-Military-Court-of-Australia.aspx>

Commonwealth legislation enacted in response to High Court's decision in *Williams v Commonwealth*

On 27 June 2012, the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act) was enacted in response to the High Court's decision in *Williams v Commonwealth* [2012] HCA 23 (*Williams*).

The High Court in *Williams* overturned the understanding on which the Commonwealth had acted since Federation, that the Commonwealth could develop and administer spending programs without the need for legislative authority for those programs. In *Williams* a majority of the High Court held that legislative authority is necessary for certain spending.

Williams involved a challenge to the constitutional basis for the Commonwealth's activities and expenditure in relation to the National School Chaplaincy Program. This was an administrative program for the funding of chaplaincy services in schools, administered most recently by the Department of Education, Employment and Workplace Relations pursuant to administrative guidelines. In 2012, the Program was expanded and renamed the National School Chaplaincy and Student Welfare Program.

In *Williams*, the High Court invalidated an agreement made by the Commonwealth under the National School Chaplaincy Program by a 6:1 majority. The majority also invalidated the making of payments by the Commonwealth under that agreement, on the ground that they were not supported by the executive power of the Commonwealth. In particular, four of the justices did so on the basis that the Commonwealth executive government could not enter into agreements and make payments under the Program without legislative authority. Appropriation legislation was not sufficient nor was subsection 44(1) of the *Financial Management and Accountability Act 1997* (the *FMA Act*).

Williams also has significant implications for the validity of Commonwealth spending programs that are not supported by legislation other than an appropriation Act, where there may be a constitutional need for legislative support to be provided.

Many Commonwealth spending programs and agreements are already authorised by legislation. The *Williams* decision has no implications for such programs and agreements. The decision also has no implications for Commonwealth agreements with and grants to the States (including grants in relation to health, education, transport, roads and the environment), nor does the decision have any implications for agreements and payments for the ordinary services of the government.

However, there remain a significant number of other spending programs and arrangements that are not supported by legislation other than an appropriation Act. The *FFLA Act* amends the *FMA Act* to ensure that the requisite legislative authority can be provided in such cases.

Specifically, the *FFLA Act*:

- amends the *FMA Act* to empower the Commonwealth, where authority does not otherwise exist, to make, vary or administer arrangements under which public money is or may become payable, or to make grants of financial assistance,

including payments or grants for the purposes of particular programs, where those arrangements or grants, or a class including those arrangements or grants, or relevant programs, are specified in regulations. The proposed amendments would also apply in relation to arrangements etc that were in force immediately before those amendments came into operation;

- clarifies that decisions under the proposed amendments are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* applies; and
- amends the *Financial Management and Accountability Regulations 1997* to specify arrangements or grants, or classes of arrangements or grants, or programs, in accordance with the proposed amendments to the *FMA Act*.

Recent decisions

***LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 (22 June 2012)**

This was an appeal from a Federal Court decision dismissing an application for review of a decision of the Administrative Appeals Tribunal. The Tribunal had dismissed the application for non-compliance with a Tribunal order in relation to the application under s 42A(5) of the *Administrative Appeals Tribunal Act 1975* (the *AAT Act*).

The appellant companies contended that the primary judge erred in finding that the Tribunal did not improperly exercise its power conferred by s 42A(5) of the *AAT Act* by reasons of failing to take into account a relevant consideration, namely an affidavit of HB Schokker (the Schokker affidavit) that was provided before the Tribunal's dismissal hearing. At that dismissal hearing counsel for the Taxation Commissioner made extensive oral submissions about the substance of the Schokker affidavit.

Although the appeal raised a short and orthodox question, the circumstances in which that question arose were, in the Court's experience, unique. Approximately 95% of the paragraphs of the Tribunal's reasons were taken from the Commissioner's written submissions and a further three or four paragraphs of the Tribunal's reasons were taken from the Commissioner's written reply to the appellants' written submissions.

The issue of the Tribunal's extensive copying of the respondent's submissions was not drawn to the attention of the primary judge.

In the Court's opinion, the Tribunal did not conduct an evaluation of the material in the Schokker affidavit, either by reference to Commissioner's written or oral submissions. Importantly, nowhere in the decision did the Tribunal refer to the detailed analysis of the Schokker affidavit by counsel for the Commissioner in oral submissions.

The Court held that the Tribunal did not have regard to the material in the Schokker affidavit and thus failed to have regard to the appellant's explanation relevant to both the question of breach of the Tribunal's directions and to the exercise of the Tribunal's discretion conferred by s 42A(5) of the *AAT Act*. For these reasons the Court set aside the Tribunal's decision and the matter was referred back to the Tribunal for further consideration.

***Khondoker v MIAC* [2012] FCA 654 (22 June 2012)**

This was an application for an extension of time to appeal from a judgment of the Federal Magistrates Court dismissing an application for an order setting aside orders made by the Federal Magistrates Court.

The applicant applied for the visa on 30 June 2008. On his visa application form he indicated that he was applying for a Skilled - Independent (subclass 885) visa. On 3 December 2008, the applicant emailed the Department stating that he had made a major mistake and he had actually intended to apply for a Skilled - Regional Sponsored (subclass 487) visa. The applicant sought to amend his visa application; however, the Department informed him that if he wanted to apply for a subclass 487 visa, he would have to lodge a new application.

The applicant did not lodge an application for a subclass 487 visa and, on 19 February 2009, the Minister's delegate refused to grant him a subclass 885 visa. On 11 March 2011, the applicant applied to the Migration Review Tribunal (the MRT) for a review of the delegate's decision. The MRT affirmed the delegate's decision but this decision was, by the consent, quashed by the Federal Magistrate and remitted to the MRT. On 21 October 2011, the MRT again affirmed the decision of the delegate not to grant the applicant a subclass 885 visa. In doing so the MRT rejected the applicant's contention that it was open to him to alter his application so as to render it an application for a subclass 487 visa.

Before the Federal Magistrates Court and the Federal Court, the applicant contended that, among other things, he had made a mistake when he placed a cross in the box indicating that he was applying for a subclass 885 visa and had at all times intended to apply for a subclass 487 visa. The applicant asserted that s 25C of the *Acts Interpretation Act 1901* (Cth) (the *Acts Interpretation Act*) (which relevantly provides that, where an Act prescribes a form, strict compliance with the form is not required and substantial compliance is sufficient) permitted him to convert his visa application into an application for a subclass 487 visa.

In dismissing the application for an extension, the Court considered, among other things that s 25C of the *Acts Interpretation Act* did not permit the applicant to convert his visa application into an application for a subclass 487 visa. Section 25C is not directed to a circumstance where a person incorrectly completes a form which actually or substantially complies with the prescribed form, even if the error on the part of the person completing the form was inadvertent. Rather it is directed to ameliorating the consequences of a person failing to comply with the prescribed form in circumstances where that person substantially complies with the requirements of that form.

The Court also stated that s 45 of the *Migration Act 1958* imposes an obligation upon the visa applicant to make clear to the Department precisely which visa he or she is applying for. The Act does not permit a visa applicant to amend his or her application by fundamentally altering the subject matter of the application by changing the class of visa applied for.

In the Court's view, the visa application which the applicant submitted conveyed only one meaning - it was not susceptible to multiple interpretations. When the applicant placed a cross in the box for a subclass 885 visa, he plainly and unequivocally indicated that he wanted this type of visa. The delegate assessed and determined the applicant's visa application on that basis. The Tribunal reviewed the delegate's decision on the same basis. It had no jurisdiction to do otherwise (s 338 and s 348 of the Act).

***The Herald and Weekly Times Pty Ltd v The Office of the Premier (General)* [2012] VCAT 967**

On 15 November 2011, the Herald and Weekly Times Pty Ltd sought access under s 17 of the *Freedom of Information Act 1982* (Vic) (*FOI Act*) to a copy of Mr Michael Kapel's diary. Mr Kapel was the former Chief of Staff to the Premier from December 2010 to January 2012.

The Office of the Premier (OTP) refused the request on the basis that the diary of the Premier's Chief of Staff did not fall within the meaning of 'an Official document of a Minister' as defined in section 5 of the *FOI Act*. Section 5(1) of the *FOI Act* provides:

Official document of a Minister or Official document of the Minister means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency, and, for the purposes of this interpretation, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access the document and the document is not a document of an agency ...

On 7 February 2012, the applicant sought review of the respondent's decision. The applicant contended that the document was 'an official document of the Minister'. The respondent contended that the document was not an official document of the Minister, as it was not in the possession of a Minister and did not relate to the affairs of an agency.

Mr Kapel left Australia in early May 2012 to take up the position as Victoria's Commissioner in the Americas and did not appear before the Tribunal. Instead, Mr Nutt, the Premier's current Chief of Staff, gave evidence.

On the basis of discussions between Mr Nutt and Ms Carney, the former personal assistant to Mr Kapel, Mr Nutt, among other things, informed the Tribunal that: Mr Kapel's diary related to appointments made in Mr Kapel's role as Chief of Staff to the Premier; and the only persons who had control over and access to the diary were Mr Kapel and Ms Carney. However, Mr Nutt also agreed under cross-examination that the Premier was entitled to access his diary and he assumed that the same situation would have existed between the Premier and Mr Kapel's diary. On this basis, the Tribunal found that the Premier was entitled to access the document, regardless of who created the document and therefore was deemed to be in possession of the diary.

The Tribunal held also that it was likely that some entries in the diary related to the affairs of an agency. The Tribunal found that the OTP supports and serves the Premier in his ministerial role as head of the government and the Minister for the Arts, and the Chief of Staff only acts on the instructions of the Premier. Therefore Mr Kapel's diary included entries directly related to his and the OTP's support of and service to the Premier in the Premier's ministerial capacity.

Following the earlier decision of *Davis v Office of Premier (General)* [2011] VCAT 1629, the Tribunal held that whenever a document contains a matter that relates to a Minister's exercise of ministerial functions, the document will also relate to the affairs of an agency. The fact that the document may also be of a party political nature does not preclude that matter from also relating to the affairs of an agency.

The Tribunal held that while there is no question that a ministerial advisor performs a separate and distinct function to that of a public servant, there can be overlap in the performance of their respective functions. Ultimately the question of whether a document relates to the affairs of an agency is a question of fact that requires an analysis of the document's actual contents.

Accordingly, the Tribunal found that the range of entries which qualify for release could include:

- attendances involving a range of stakeholders, both with and without the Premier and with and without public servants;
- interaction with public servants, both with and without the Premier;
- attendances involving Parliamentary colleagues, the media, unions, and community, business and ethnic parties and organisations;

- attendances involving foreign dignitaries, including politicians and diplomats;
- other entries which may record events, whether or not attended by the Chief of Staff; and
- entries in the nature of descriptions, observations or outcomes.

***Sunol v Collier* [2012] NSWCA 14 (20 February 2012)**

This was an interim judgment in a proceeding in the NSW Court of Appeal. The proceeding involved four questions of law referred to the Court of Appeal by the Appeal Panel of the Administrative Decisions Tribunal (ADT), pursuant to s 118 of the *Administrative Decisions Tribunal Act 1997* (NSW) (the *Tribunal Act*).

The proceedings concerned an appeal against a decision of the ADT to register a conciliation agreement between Mr Collier and Mr Sunol, that Mr Sunol would not post on any website material referring to homosexual people or homosexuality in a manner which breached the *Anti-Discrimination Act 1977* (NSW). The conciliation agreement was executed by the parties after Mr Collier previously made a complaint about a number of statements published by Mr Sunol on the internet, which, according to Mr Collier, vilified homosexual people in contravention of s 49ZT of the Act.

During the Appeal Panel proceedings it became apparent that Mr Sunol sought to raise questions about the constitutional validity of s 49ZT of that Act, namely whether it infringes the constitutional implication of freedom of political communication. The Appeal Panel accepted that it had no jurisdiction to determine constitutional questions and referred the issue to the Court of Appeal for determination under s 118 of the *Tribunal Act*.

The Court found that the ADT is not a court for the purposes of s 77(iii) of the *Australian Constitution*, and therefore is not the recipient of powers conferred by Commonwealth statutes affecting an investiture in accordance with that provision (*Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 185). However, it does not follow that the powers and authority conferred on the ADT by State law evaporate immediately when an issue is raised in a case about the constitutional validity of a provision of the State law under which a claim has been made.

The Court held that if the Appeal Panel is persuaded that the State law is invalid because it is unconstitutional, it may decline to grant relief. Alternatively, it may grant relief, in which case the unsuccessful party may disregard the order, or more prudently take steps to have the order set aside.

The Court held that this approach is not consistent with the Court's earlier approach in *Attorney General v 2UE Sydney Pty Ltd & Ors* [2006] NSWCA 349 (*Radio 2UE*). *Radio 2UE* involved a similar issue to that which arose in these proceedings, namely whether s 49ZT of the Anti-Discrimination Act contravened the implied constitution protection for freedom of communication.

In *Radio 2UE*, Spigelman CJ at [90] said:

there are of course a number of ways in which the issue sought to be agitated before the Appeal Panel can be resolved. Given the stage which the present proceedings have reached a reference of a question of law to the Supreme Court pursuant to s118 of the [Tribunal] Act would appear to be the most efficacious.

In this case the Court held that there is a fundamental difficulty with the procedure proposed by Spigelman CJ. The jurisdiction conferred on the ADT by the *Tribunal Act* does not permit

it to determine constitutional questions because: the operation of the Commonwealth Constitution involves an exercise of federal judicial power and the State cannot confer such power on its own courts or tribunals; and the Commonwealth, which has power to invest the court of a State with federal jurisdiction, has not done so in respect of the ADT because it is not a State court.

The Court held that, properly understood, s 118(1) empowers the ADT to refer questions of State law arising in the appeal. It cannot refer questions that involve the exercise of Federal jurisdiction. It followed that the referral of questions that involved an exercise of Federal jurisdiction to the Supreme Court were inappropriate and each question should be answered 'inappropriate to answer'.

Kable v State of NSW [2012] NSWCA 243 (8 August 2012)

From February to August 1995 the appellant was held in a New South Wales prison in accordance with an order made by a Supreme Court judge, on an application by the Director of Public Prosecutions, purportedly under the *Community Protection Act 1994* (NSW). That Act permitted a detention order to be made in respect of the appellant (and no one else) if a judge was satisfied that he was likely to commit a serious act of violence and it was appropriate to hold him in custody.

The appellant successfully challenged the constitutional validity of the Act in the High Court (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24). The High Court held that the Act was inimical to the exercise of judicial power. It was wholly invalid, as were all the steps taken under it.

In 1996 the appellant commenced proceedings seeking damages arising from the conduct of the State and its officers for detaining him for six months on the basis of the detention order made under the invalid Act.

The claim involved three causes of action: (i) abuse of process; (ii) malicious prosecution; and (iii) the tort of trespass to the person in the form of unlawful imprisonment. At first instance the NSW Supreme Court held that there was no case to go to a jury in respect of any of the three causes of action and dismissed the action.

On 1 November 2010 Mr Kable appealed this decision to NSW Court of Appeal.

In relation to (i) and (ii) the Court of Appeal held that there was no basis for finding that the Director of Public Prosecutions commenced the proceedings for any purpose other than that revealed by the legislation and that, applying the standards contained in the Act, there were not reasonable grounds for seeking the order provided by that Act. The possibility that the Act exceeded the constitutional powers of the legislature could not of itself turn otherwise legitimate proceedings into a malicious prosecution (*A v State of New South Wales* [2007] HCA 10).

Malice on the part of the Parliament could not be established. It is not open to a litigant to impugn the motives of the Parliament. To provide compensation for those who suffer from a purported but unconstitutional, legislative act is to confer a right to compensation based on unconstitutionality, in the absence of any common law tort.

In relation to (iii) the respondent tried to avoid this conclusion by relying, among other things, on the principle that an order of a superior court has effect until set aside, sufficient to provide lawful justification for a deprivation of liberty.

The respondent referred to numerous authorities for the proposition that an order of a superior court made in excess of jurisdiction is merely voidable not void and therefore has effect until set aside (see *Cameron v Cole* [1944] HCA 5; *DMW v CGW* [1982] HCA 73; *Ousley v The Queen* [1997] HCA 49; *Re Wakim; Ex parte McNally* [1999] HCA 27; *Re Macks* and *Matthews v Australian Securities and Investments Commission* [2000] FCA 288). However, as Hayne J stated in *MIMA v Bhardwaj* [2002] HCA 11 summarising the effect of those authorities at [151]:

In general, *judicial orders* of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. [Emphasis added.]

As such the principle depends on the order being made in the exercise of judicial power by a superior court.

While there was no doubt that the Supreme Court was a superior court; this did not mean that all exercises of statutory power by its judges constituted judicial orders. Accordingly, the central issue was whether the order that held Mr Kable in detention was an order made in the exercise of judicial power.

The Court held that the High Court had decided this issue when it ruled that the order that held Mr Kable in detention was an invalid non-judicial order. In doing so it held that an order made under the Act was not a judicial act and was void from the beginning. Therefore this basis for protection of the respondent against Mr Kable's claim for false imprisonment failed.

A FOURTH BRANCH OF GOVERNMENT?

The 2012 National Lecture on Administrative Law
presented to the
2012 National Administrative Law Conference
in Adelaide on 19 July 2012 by

The Hon Justice WMC Gummow AC*

The title of this Conference 'Integrity in Administrative Law Making' recalls the statement by Professor Bruce Ackerman in an article published in 2000 that 'a top priority for drafters of modern *Constitutions*' should be 'the credible construction of a separate "integrity branch"'. This would check what he saw as the 'corrosive tendencies' of corruption in the conduct of the bureaucracy and the use of 'slush funds' available to elected politicians.¹

Professor Ackerman began his career, leading to the position of Sterling Professor at Yale, as law clerk to Judge Friendly and then to Justice Harlan. Judge Friendly's biographer records that while he regarded Ackerman as the clerk who had come up with the most ideas he particularly averred that he did not use any of them; the biographer writes, 'He did, of course, but he may have made this remark because of Ackerman's unusual number of ideas and his unquenchable enthusiasm for them'.²

In fairness to Professor Ackerman, in the Harvard Law Review article he was advocating to those drawing up new Constitutions in other countries the provision of an 'integrity branch'. He was not saying that it already was to be found in the United States *Constitution*. Rather, the contrary.

However, the influence of Professor Ackerman's thinking may be seen in the proposal made by Chief Justice Spigelman in an address in 2004,³ that 'an integrity branch of government' would provide a broader context for the development of the case law on judicial review.

Let me say immediately that in this notion, whether it is distilled from the text and structure of the *Constitution*, or is introduced at the State level by changes to the more fluid *Constitutions* of the States, I see little utility and some occasion for confusion.

In part, at least, Professor Ackerman's dissatisfaction with the State of the Union may be a reaction to the operation of the *Chevron*⁴ doctrine. This requires deference by the judicial branch to the construction given by federal agencies and regulatory authorities in cases of competing statutory construction. In *Enfield City Corporation v Development Assessment Commission*⁵ the High Court rejected any such doctrine and, to that end, quoted remarks of Brennan J in *Attorney-General (NSW) v Quin*⁶ to which further reference will be made below.

Further, however, in Australia it may seem curious that the oversight of the federal bureaucracy by those appointed by the executive under the Ombudsman, privacy legislation and the like, take place within the one branch of government that was

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established by Ch II of the *Constitution*. It may appear that the emergence of the modern regulatory state and of the bureaucracy to run it only serves to demonstrate that the tripartite division of powers, sourced 250 years ago in the Enlightenment, today provides an inadequate constitutional structure.

But in the study of the law it is well to remember, as Lord Simonds LC said in *Chapman v Chapman*,⁷ that it is even possible that we are not wiser than our ancestors.

Further, at the federal level the tripartite structure is reflected in the text and structure of the *Constitution*. Whatever body be created to oversee the conduct of the bureaucracy, it will be manned by officers of the Commonwealth and thus constrained by s 75(v) of the *Constitution*. At the State level, somewhat the same position to that of the original jurisdiction of the High Court is assured to the Supreme Court by the *Constitution*, at least since *Kirk v Industrial Court of New South Wales*.⁸

With these reflections in mind, I begin by asking how it was in Australia that the term 'administrative law' entered legal discourse. The long and complex history of industrial relations, particularly at the federal level after the enactment of the *Conciliation and Arbitration Act* 1904 (Cth), saw the courts enter upon a new and unique field of judicial review. But the considerable body of case law upon s 75(v) of the *Constitution* which was built up tended, in the law schools and among practitioners, to be the province purely of 'industrial' lawyers. An appreciation of the full significance of s 75(v) in the scheme of the *Constitution* and public law generally was delayed for a century, until *Plaintiff S157/2002 v The Commonwealth*.⁹

Instead, the subject 'administrative law' was developed in Australian law schools in the second half of the twentieth century with heavy reliance upon an emergent body of English case law. Lord Goddard CJ, of all people, was put forward as an enlightened figure for his decision in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*¹⁰ respecting the scope of *certiorari*. With more cogency, Lord Greene MR was considered a significant figure for the *Wednesbury* decision.¹¹ Lord Atkin was praised for his dissent in *Liversidge v Anderson*¹² but not for his remarks in the *Electricity Commissioners* case,¹³ which seemed to require an express obligation to follow a judicial type procedure before *certiorari* would quash the decision of a public body. But Lord Atkin's speech in *Liversidge* retains considerable significance for its approach to the reading of statutes which confer power exercisable upon satisfaction of a specified criterion.

What the English cases had in common was a reaction, particularly in the post-war period, to the growing power of the executive in a modern regulatory state. Significant rights and obligations of citizens and corporations were sourced in discretionary powers conferred by statute and in delegated legislation. What also distinguished the English cases was their place in a system with no rigid constitution, let alone a federal constitution, but rather 'an unadorned Diceyan precept of parliamentary sovereignty'.¹⁴ Hence the emphasis upon 'the common law'.

However, for too long, in Australian law schools insufficient attention was paid to the consideration that, at least at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Section 61 places this within the executive branch. It is the superintendence, within the constitutional structure, of this executive activity which generates what we may call administrative law. But administrative law, so understood, is a subset of constitutional law.

As noted above, an important means for that superintendence is provided by s 75(v) of the *Constitution*. The phrase 'an officer of the Commonwealth' has a very broad meaning and is not restricted to Ministers and members of the Commonwealth Public Service.¹⁵ As late

as 1979, Barwick CJ referred to the term 'prohibition', used as a constitutional expression in s 75(v), as importing the law appertaining to the grant of prohibition by the Court of King's Bench.¹⁶ But, as explained at length in *Re Refugee Tribunal; Ex parte Aala*,¹⁷ prohibition goes against officers of the Commonwealth in circumstances not contemplated by the King's Bench and the preferred term is 'constitutional writs' rather than 'prerogative writs'.

It is misleading to speak in Australia of the common law as if it occupied a parallel universe to the *Constitution*. My colleague Justice Gaudron observed from time to time that, in approaching legal issues in this country, the starting point must be the *Constitution* itself. I am of the same mind. What we now recognise as the one common law of Australia¹⁸ (which includes canons of statutory construction) is informed by and must develop consistency with the *Constitution*.¹⁹

The very terms of the *Constitution* provide in significant respects for the oversight of each of the three branches of government by the other two. First, the review and audit by law of the receipt and expenditure of money on account of the Commonwealth is required by s 97 of the *Constitution*, and audit requirements had a lengthy provenance in the Australian colonies. Secondly, s 49 of the *Constitution* assumes the adoption by both chambers of the legislature of the committee system. It is the operation of this system which today most strongly manifests the function of the legislature as the inquisition of the nation.²⁰ Thirdly, s 28 of the *Constitution* provides the executive with the power of dissolution of the House before the end of its current three year term. And, in the special circumstances of s 57, the Governor-General may dissolve both Houses simultaneously. Finally, the power of appointment of federal judges is vested in the executive by s 72(i) of the *Constitution*, while that of removal 'on the ground of proved misbehaviour or incapacity' is vested in the executive but is exercisable only upon an address by both Houses of the Parliament.

Most significantly for present purposes, it is the scheme of Ch III which has been taken to embody the doctrine of *Marbury v Madison*.²¹ This carries with it more than the determination of the constitutional competence of legislative and executive activity. The point was made by Brennan J in a frequently cited passage in *Attorney-General (NSW) v Quin*:²²

The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In *Victoria v The Commonwealth and Hayden*,²³ Gibbs J said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, *but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.* (emphasis added)

However, it is not s 75(v) alone which provides for review of administrative action. As is well known, the Parliament moved in the 1970s to establish a legislative structure for judicial review by the Federal Court and administrative review on the merits by a non-judicial body, the Administrative Review Tribunal. Taken together, these innovations may be seen as creating, within the Australian constitutional framework, an integrity branch in the sense used by Professor Ackerman. But the functions of these bodies were not investigative and inquisitorial but were conferred by other legislation such as the *Australian Crime Commission Act 2002* (Cth). Who then is to oversee the activities of such inquisitorial bodies? The answer, not provided explicitly in Professor Ackerman's scheme, must be the judicial branch.

We have tended to appreciate insufficiently the significance of the legislative measures for judicial review made by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) and for 'merits' review under the *Administrative Appeal Tribunal Act 1975* (Cth)

(the AAT Act). The absence in many common law countries of such legislation must be borne in mind when reading, for example, Canadian and English judicial decisions.

The federal legislative scheme has exercised some gravitational pull upon State and Territory legislatures. Thus, the Supreme Court of Queensland under the *Judicial Review Act 1991* (Qld) exercises a jurisdiction comparable to that of the Federal Court under the *ADJR Act*. In *Griffith University v Tang*,²⁴ the issue was the familiar (if not easy) one of the application of the expression 'decision of an administrative character ... made under an enactment'. Again, it was the availability of judicial review under the Queensland statute in respect of parole board decisions which in *Wotton v Queensland*²⁵ assisted the case for validity of the legislation in question.

The legislation in Tasmania (the *Judicial Review Act 2000* (Tas)) and the Australian Capital Territory (the *Administrative Decisions (Judicial Review) Act 1989* (ACT)), is closely modeled on the *ADJR Act*. However, the Victorian statute, the *Administrative Law Act 1978* (Vic), is best described as *sui generis*.

But it is of the greatest significance that from its commencement on 1 October 1980, the *ADJR Act* has contained in Schedule 1 an ever expanding list of classes of decision to which the statute does not apply. At last count there were 46 entries in Schedule 1. Two more are contained in Sched 1, Item 1, to the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). This is a swift legislative response to the deficiencies in administration of public moneys disclosed in *Williams v The Commonwealth*.²⁶

There also is a persistent temptation to enact laws which create particular review regimes outside the framework of the *ADJR Act*. Revenue law matters are perhaps the best known instance. One more may be mentioned. A State access regime for the regulation of third party access to gas pipelines was authorised by federal law to confer functions on the Australian Competition and Consumer Commission (the ACCC), with 'review' by the Australian Competition Tribunal. But it was held in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*²⁷ that the review function conferred upon the Tribunal did not use the term 'unreasonable' in the *Wednesbury* sense; rather, the term encompassed failure by the ACCC in the exercise of a discretion; the failure being inferred from the 'plain injustice' of the result. The analogy was with the well-known passage in *House v The King*.²⁸

In the last 20 years the most significant addition to Schedule 1 of the *ADJR Act* has been the exclusion of migration decisions and the enactment of privative clauses in respect of those decisions. The result was to throw plaintiffs back to reliance upon s 75(v) of the *Constitution* and to burden the work of the High Court in its original jurisdiction, with the denial of a power of remitter to any other court exercising federal jurisdiction. Further, at the State level there is a long history of legislative insulation of 'specialist' tribunals from superintendence by the Supreme Courts (with an avenue of appeal to the High Court under s 73(iii) of the *Constitution*) in exercise of the jurisdiction inherited, in particular, from the Court of King's Bench.

Added to this state of affairs has been the appreciation, since 1986 and the final abolition of Privy Council appeals by s 11 of the *Australia Act 1986* (Cth), of two important but related matters. The first is the recognition of an Australian common law within our constitutional structure. The second is the paramount importance both of s 73 of the *Constitution*, stating the entrenched appellate jurisdiction of the High Court at the apex of what is an integrated court system, and of the original jurisdiction conferred by s 75(v).

Two developments in the constitutional case law which have followed, of significance for administrative law, should be noted.

The actual decision in *Plaintiff s157/2002 v The Commonwealth*²⁹ was that on its proper construction, the privative clause in s 474(1) of the *Migration Act 1958* (Cth) did not protect from review under s 75(v) of the *Constitution* decisions which involved jurisdictional error. But in the joint reasons of five Justices, it was emphasised that the jurisdiction of the High Court to grant relief under s 75(v) for jurisdictional error by an officer of the Commonwealth cannot be removed by the Parliament.³⁰ Their Honours added:³¹

The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court.

However, their Honours also emphasised that the privative clause in s 474(1) validly prevented the issue by the High Court of *certiorari* for non-jurisdictional error of law on the face of the record.³²

This state of affairs presents an important question. Which of the range of grounds of review listed in s 5 of the *ADJR Act* (and its State analogues) answer the description of 'jurisdictional error' and so attract s 75(v) of the *Constitution*? The answer probably is that not all of those grounds in s 5 involve 'jurisdictional error'. The identification of those grounds which do so remains for elucidation as the case law accumulates.

The *ADJR Act* was drawn with an eye to discarding the technicalities attending the notion of jurisdictional error. It has been said by some commentators that the upshot in Australia has been a reversion to notions of jurisdictional error which have been superseded elsewhere. That may be so, but two points are to be made. The first is that the legislature, particularly in migration cases, has denied to plaintiffs any other avenue of statutory judicial review beyond that entrenched by s 75(v). The second is that although this jurisdiction is posited upon jurisdictional error, the result does manifest the entrenchment in a rigid constitution of significant judicial remedies for administrative decision making which has gone awry.

In addition, even in those States, like South Australia,³³ which have retained the jurisdiction of the Supreme Court with respect to prohibition, *mandamus*, *certiorari*, habeas corpus, declaration and injunction, the legislative insulation of the decision making by statutory tribunals is of limited effectiveness. This is the consequence of *Kirk v Industrial Court of New South Wales*.³⁴ The actual decision was that the erroneous construction of s 15 of the *Occupational Health and Safety Act 1983* (NSW) and failure by the Industrial Court to comply with the rules of evidence in a criminal prosecution were jurisdictional errors and errors of law on the face of the record, requiring the grant of relief in the nature of *certiorari* to quash the conviction and sentences.

As to privative clauses, the joint reasons in *Kirk* of six Justices stated:³⁵

The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, *certiorari* and *mandamus* (and habeas corpus) was, and is, a defining characteristic of those courts. And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.

They added.³⁶

To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'.³⁷ And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

Most recently, in *Public Service Association of SA Incorporated v Industrial Relations Commission (SA)*,³⁸ the High Court affirmed that the reasoning in *Kirk* was not limited to the availability of *certiorari* for those species of jurisdictional error which the High Court earlier had identified in *Public Service Assn (SA) v Federated Clerks' Union*.³⁹ The upshot of these decisions is that notwithstanding what in some respects is the fluid nature of State constitutional arrangements, a State 'integrity branch' would not be immune from judicial oversight.

There is a final point to be made. It concerns the dichotomy often assumed in administrative law analysis between private and public power. However, there are contemporary issues respecting the distinction between curial supervision of the exercise of public or governmental power and such supervision of private decision making. The latter is exemplified by the arbitration process.

The current legislation in the Australian States with respect to domestic commercial arbitrations⁴⁰ requires that an award be in writing and state reasons.⁴¹ In addition to, and in advance of, statutory procedures for a limited measure of curial review, the Court of King's Bench exercised a jurisdiction to set aside arbitral awards for errors of law apparent on their face.⁴² This jurisdiction of the King's Bench would have passed to the Supreme Courts of the States. However, the scheme of the current legislation is to deny the jurisdiction of the Supreme Courts to set aside an award for error of law (or fact) on the face of the award. Nevertheless, this is subject to a new statutory jurisdiction of the Supreme Court, by leave, to determine an 'appeal' confined to questions of law.⁴³ Without that provision for an 'appeal', *Kirk* may have presented a serious question of the validity of the removal of the old jurisdiction.

There is a further point to be made here. The outcome of an arbitration may be said to manifest the consensual submission to that procedure, and to be purely a matter of private right and obligation. However, the utility of an arbitral award lies in the avenue provided for its enforcement by curial remedy. While the decision of the arbitrator is not an exercise of public power, the enforcement of the award requires the exercise of the judicial power. This tends to be overlooked by those who extol the virtue of privately achieved dispute resolution.

May a law, State or federal, which requires that the courts enforce an award upon a consensual submission to arbitration which on its face manifests an error of law, be said to oblige the court to act in a fashion repugnant in a fundamental degree to the judicial process?⁴⁴ To that extent would the law be invalid?⁴⁵

What conclusions for the application in Australia of Professor Ackerman's proposal for an integrity branch of government follow from the foregoing? It remains open to the Federal and State legislatures to create by statute organisations and bodies to oversee good governance and investigate corruption and malpractice. But those entities and their members cannot be placed by the enabling legislation in islands of power where they are immune from supervision and restraint by the judicial branch of government. That is the significance for present purposes of *Plaintiff S157* and *Kirk*, and a further application of the general propositions in the passage from *Quin* set out earlier in this paper.

Endnotes

- 1 Bruce Ackerman, 'The New Separation of Powers (2000) 113 *Harvard Law Review* 642, 694.
- 2 David M Dorsen, *Henry Friendly*, Greatest Judge of His Era (Harvard University Press, 2012) 109-110.
- 3 Given on 29 April 2004 to the Australian Institute of Administrative Law.
- 4 *After Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).
- 5 (2000) 199 CLR 135 at 151-154 [39]-[44]; [2000] HCA 5.
- 6 (1990) 170 CLR 1, 35; [1990] HCA 21.
- 7 [1954] AC 429, 444.
- 8 (2010) 239 CLR 531; [2010] HCA 1.
- 9 (2003) 211 CLR 476; [2003] HCA 2.
- 10 [1951] 1 KB 711; affd. [1952] 1 KB 338.
- 11 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
- 12 [1942] AC 206, 243-245; cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship (The Malaysian Declaration Case)* (2011) 244 CLR 144, 194 [109]; [2011] HCA 32.
- 13 *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171.
- 14 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570 [66]; [2003] HCA 67.
- 15 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 140 [161]; [2000] HCA 57.
- 16 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 201; [1979] HCA 6.
- 17 (2000) 204 CLR 82, 92-93 [19]-[22]; [2000] HCA 57.
- 18 *Lipohar v The Queen* (1999) 200 CLR 485, 505-510 [43]-[59]; [1999] HCA 65.
- 19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 526; [1997] HCA 25.
- 20 See *Egan v Willis* (1998) 195 CLR 424, [42]; [1998] HCA 71.
- 21 (1803) 1 Cranch 137, 177 [5 US 87 at 111].
- 22 (1990) 170 CLR 1, 35; [1990] HCA 21. See further, the joint reasons of the whole Court in *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 355-356; [2010] HCA 4.
- 23 (1975) 134 CLR 338, 380; [1975] HCA 52.
- 24 (2005) 221 CLR 99; [2005] HCA 7.
- 25 (2012) 86 ALJR 246; 285 ALR 1; [2012] HCA 2.
- 26 (2012) 86 ALJR 713; 288 ALR 410; [2012] HCA 23.
- 27 (2007) 233 CLR 229; [2007] HCA 44.
- 28 (1936) 55 CLR 499, 505; [1936] HCA 40.
- 29 (2003) 211 CLR 476; [2003] HCA 2.
- 30 (2003) 211 CLR 476, 512 [98].
- 31 (2003) 211 CLR 476, 514 [104].
- 32 (2003) 211 CLR 476, 507 [81].
- 33 *Supreme Court Act 1935* (SA), s 17(2); *Supreme Court Civil Rules 2006* (SA), Rules 199, 200.
- 34 (2010) 239 CLR 531; [2010] HCA 1.
- 35 (2010) 239 CLR 531, 580-581 [98].
- 36 (2010) 239 CLR 531, 581 [99].
- 37 (1957) 70 *Harvard Law Review* 953, 963.
- 38 (2012) 86 ALJR 862; 289 ALR 1; [2012] HCA 25.
- 39 (1991) 173 CLR 132; [1991] HCA 33.
- 40 Which exclude arbitrations to which the *International Arbitration Act 1974* (Cth) applies.
- 41 See, for example, *Commercial Arbitration Act 2011* (SA), s 31; *Commercial Arbitration Act 2010* (NSW), s 31.
- 42 *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 260-261, per Lord Diplock.
- 43 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 263 [26]-[27]; [2011] HCA 37.
- 44 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352-354 [49]-[54], 363 [87], 366-367 [97], 379 [140]; [2009] HCA 49.
- 45 cf *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 262 [21]-[23].

WHAT IS THE INTEGRITY BRANCH?

*David Solomon**

According to the former NSW Chief Justice, James Spigelman, 'the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.'¹ He says it is not a separate, distinct branch, because many of the three recognised branches of government, including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government.

I acknowledge that not all commentators take the Spigelman approach. Professor Bruce Ackerman, in a long article, 'The New Separation of Powers' in the Harvard Law Review, wrote this:

The credible construction of a separate 'integrity branch' should be a top priority for drafters of modern constitutions. The new branch should be armed with powers and incentives to engage in ongoing oversight. Members of the integrity branch should be guaranteed very high salaries, protected against legislative reduction. They should be guaranteed career paths that permit them to avoid serving later under officials whose probity they are charged with investigating. The constitution should also guarantee the branch a minimum budget of x per cent of total government revenues because politicians may otherwise respond to the threat of exposure by reducing the agency to a token number of high-paid help.²

Ackerman appears to be concerned primarily with systems of government that, like the United States, have a formal separation of power of governmental institutions.

Most of the Chief Justice's paper was concerned with the role of the courts and their performance of integrity functions, including the role of the High Court through judicial review – 'Constitutional law is a clear case of an integrity function directed towards the legislature'³ – and the role of administrative law as an integrity function of the superior courts generally.

Before discussing the integrity role of the courts he noted that, in recent decades, concern with the personal integrity of public officials had taken an institutional form, with the adoption of such documents as codes of ethics and the creation of separate institutions – such as my own office. Additionally, he said:

The integrity function of government has been the basis of the creation of new statutory rights designed, in part, to enable the function to be better performed, including by involvement of individual members of the public, non-governmental organisations and the media. Freedom of information legislation is of that character. So is whistleblower legislation.⁴

While the name, integrity branch, may be new, the function described by the former Chief Justice – of ensuring that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do and for the purposes for which those powers were conferred, and for no other purpose – can be traced back a long way in the Westminster system of representative government.

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Spigelman says the oldest such institution in Australia is that referred to as the Auditor-General. In England the office can be traced back to the 1860s; in Australia the office has an even longer history, the NSW Governor having appointed the first Auditor-General in 1824. Tasmania had its first Auditor-General two years later and Western Australia three years after that in 1829. Subsequent colonial governments made early appointments of Auditors-General to monitor spending by government officials.

In recent decades the audit role has been expanded, as Spigelman noted, into performance auditing, designed to cover the three Es, economy, efficiency and effectiveness of governmental programs. He considers that this goes beyond the integrity function, in that it is concerned with merits rather than probity.⁵

The next institutional development in the integrity branch did not take place for another 150 years, until the creation of the office of Ombudsman. The Ombudsman is an independent officer who can investigate complaints made by people about decisions or actions of government departments or agencies. In Australia the office has usually been created through legislation. If an investigation finds that the complaint is justified, the Ombudsman normally can only recommend that the agency change the decision and does not have the power to override or change it. The Ombudsman, like the Auditor-General, has expanded its roles in recent years, in particular in carrying out systemic investigations. The Ombudsman also may offer to help agencies improve their decision-making and administrative practice by providing training. This should enhance integrity but is probably better considered as an executive function.

My focus is on the integrity agencies that have been created in Queensland. Most have counterparts in other States and some at the Commonwealth level. But I think Queensland has more than any other single jurisdiction. That no doubt is a consequence of the Fitzgerald inquiry in the late 1980s into police and other corruption, and the change of government that followed.

I should note in passing that Tony Fitzgerald was appointed to carry out his investigation under Queensland's *Commissions of Inquiry Act 1950* –the equivalent of a Royal Commission in other Australian jurisdictions. That Act provided the executive government with an important integrity tool. But while investigations under the Act have no doubt been carried out independently, it was the executive government that decided on their scope and who would conduct them.

One of the first integrity outcomes of the Fitzgerald report was the creation of the Criminal Justice Commission (CJC), modelled to a considerable extent on the NSW Independent Commission Against Corruption. A decade later, the CJC had become the Crime and Misconduct Commission, after being merged with a Crime Commission created by a later government. The CMC's functions still include investigation of complaints against public sector misconduct by police, politicians, public sector officers and public officials, and working with public sector agencies, including the Queensland Police Service (QPS), to fight misconduct, including corruption.

A second result of the Fitzgerald report was the creation, in 1989, of the Electoral and Administrative Review Commission (EARC). This body was mainly concerned with making recommendations to government about reforms but was also empowered to carry out a redistribution of electoral boundaries. Many of the reforms recommended by EARC and adopted by the Government were concerned with integrity issues and resulted in additions being made to the integrity branch in Queensland, or changes to existing institutions to increase their independence, scope or effectiveness. For example, one of the early EARC reports was on Public Sector Auditing, and resulted in changes that increased the independence of the Auditor-General and expanded the Auditor-General's oversight of the

public sector to include, for example, Government Business Enterprises, as they were then called.

The first EARC report, in 1990, recommended guidelines for the declaration of registrable interests of elected representatives of the Parliament of Queensland. Parliament's register of Members' interests actually dates from the previous year. Since 2009, the register has been available to the public and can be viewed on the Parliamentary website, thus making it available to anyone concerned with this aspect of the integrity of Members of Parliament, including Ministers.

In 1991 the EARC produced a report on Codes of Conduct for public officials. This resulted in the passage of the *Public Sector Ethics Act 1994* which provided for the introduction of formal codes of conduct by public service agencies. A sector-wide code was introduced following amendments to the Act in 2010.

An important EARC report on judicial review of administrative decisions and actions resulted in the Supreme Court being given a specific judicial review jurisdiction.

This was followed by one which recommended that Queensland adopt a Freedom of Information (FOI) law. That legislation was duly passed and was similar to laws already in force in the Commonwealth and some other States. However it became less effective as changes were made by subsequent governments. The Act was replaced by the *Right to Information Act 2009* (Qld). As with similar developments in Tasmania and New South Wales, and to a lesser extent the Commonwealth, it ceased to be correct to characterise the laws as constituting freedom **from** information

The Information Commissioner, the Right to Information Commissioner and the Privacy Commissioner are all independent officers who hold statutory appointments: to oversee the working of the *Right to Information Act 2009* (RTI) and the *Information Privacy Act 2009*; to hear and investigate complaints; and to determine various appeals. The Information Commissioner is responsible for advancing the RTI's pro-disclosure of information agenda.

Also in 1991, the EARC produced a report on the protection of whistleblowers. This also resulted in new legislation, the *Whistleblowers Protection Act 1994*. Once again that legislation has recently been reviewed in Queensland and it has been replaced by a *Public Interest Disclosure Act 2010*, which should be more effective.

The following year the EARC conducted a review of archives legislation. The legislation that resulted from this review gave the Queensland State Archivist relative autonomy, though not complete independence from the government. Importantly, the new Act made it a legal requirement that 'A public authority must — (a) make and keep full and accurate records of its activities'⁶. That provision greatly assists other agencies and people concerned with and/or involved in the integrity process.

Not all EARC reports were adopted relatively quickly – a rewrite of the Queensland Constitution (8 years), the development of a single administrative review tribunal (18 years), or a review of the Parliamentary Committee system (about 17 years) – some were rejected, including human rights legislation. The EARC was disbanded less than four years after it was created.

Another integrity agency now known as the Public Service Commission (PSC) is essentially a management tool for the executive government, but it does have an integrity function, in overseeing the probity of appointments and discipline. The PSC also provides ethics advice to public servants at their request as well as coordination across the public sector on ethics

matters through the Queensland Public Sector Ethics Network, which holds regular (mostly monthly) meetings of relevant officers from agencies.

In 1998, the Government amended the *Public Sector Ethics Act 1994* to create the position of Queensland Integrity Commissioner. This was prompted by recognition by both sides of politics at the time that popular opinion of politicians was, as my predecessor put it, 'at an abysmally low level'.⁷ It was apparently thought that if politicians had a confidential sounding board available to them, advice given would contribute to their image and prevent possible blunders. The Act provided that the 'designated persons' who could seek advice were not restricted to politicians. Ministers and their staff could ask for advice, as could government MPs (Opposition MPs were later added to the list), statutory officers, the heads of government departments, and senior executives and other senior officers (but only with the consent of their chief executive), and some others who could be added by Ministers. In total, more than 5,000 people met the description of a designated person. A limitation was that these people could only ask for advice about conflicts of interest – it was not until 2010, when provisions in the *Public Sector Ethics Act 1994* affecting the Integrity Commissioner were transferred to a new Integrity Act, that the advice that could be sought was broadened to include any ethics or integrity issue.

Those who created the new position had no expectation that the Integrity Commissioner would be very busy. The first two Integrity Commissioners were appointed as 40 per cent of full time equivalent; neither lived in Brisbane and both were required to be in the office only two days a month. They were supported by one staff member. During the first 10 years of the office, an annual average of about 28 formal requests for advice were made. During my first year this leapt to 57; it then dropped to 40 but in this last financial year it has risen to the mid 60s.

In 2010 the Integrity Act added an additional integrity function to the role of the Commissioner – running the Register of Lobbyists and having responsibility for writing or rewriting a Lobbyists Code of Conduct. This is supposed to provide for more accountability and openness in the interaction between lobbyists and government representatives. In this it only partly succeeds, not least because only professional third party lobbyists need to register and abide by the Code of Conduct. I estimate that this represents only 20 per cent or so of actual lobbyists. As a consequence of this additional function, I have two additional staff and my official working hours have increased to 80 per cent of a full time equivalent.

Other bodies/organisations that perform some integrity functions are:

- the Anti-Discrimination Commission;
- the Commission for Children and Young People and the Child Guardian;
- the Health Quality and Complaints Commission; and
- the Energy and Water Ombudsman.

In Queensland we appear to have recognised the development of an integrity or fourth branch even before Chief Justice Spigelman drew it to general attention. More than 10 years ago the heads of some of the integrity agencies decided they should have regular meetings. They called their informal grouping the Integrity Committee. Meetings are held three or four times a year to discuss matters of mutual interest - that is, matters of interest to at least two of those present. The committee consists presently of the Chairman of the Crime and Misconduct Commission, the Auditor-General, the Ombudsman, the Integrity Commissioner, the Information Commissioner and the Chief Executive of the Public Service Commission. They are attended only by the heads of those bodies - deputies are not permitted – and, of course, all discussions are confidential. A page on the Ombudsman's website which lists all complaints agencies was one outcome of discussions of the

committee. These, then, are the governmental responses to the apparently growing need to create an official integrity branch, performing the functions described by Spigelman.

Has the fourth branch been outsourced by whistleblowing reform or FOI?

The recent developments in FOI/RTI referred to earlier have increased the openness and accountability of government. The 'push' model adopted in Queensland and elsewhere has encouraged departments and agencies to voluntarily make more information publicly available. At the same time, some governments have decided to increase the information they release on decisions by cabinet and more mundane matters such as contracts that agencies have entered into. For example, Queensland now publishes basic information about any contract worth \$10,000 or more and more detailed information about contracts for \$10 million or more. There is not much evidence of who accesses this information, other than those who made unsuccessful bids wanting to know why and how their competitors won their contracts.

While these developments are welcome, one has to look primarily to the way the media has used FOI/RTI to see whether there has been any significant contribution to integrity processes. Undoubtedly much interesting information has emerged that was not previously available such as, for example, large extracts from the blue or red briefing books that departments prepare for incoming governments at election time. FOI/RTI is also used for private purposes, by lawyers and their clients, and by corporations. It does not seem to have been taken up to the degree that has occurred in the United States, by lobby groups and activist non-profit organisations (such as environmental groups).

My impression is that these developments have not encouraged the development of non-government groups pursuing an integrity agenda, other than to a limited extent, the media.

Whistleblowing, in so far as it is provided for by legislation, is essentially an internal government integrity process. Disclosure of aberrant behaviour by officials is intended to be made to more senior officials or to agencies tasked with investigating complaints. In Queensland, it is only if a complaint has not been dealt with adequately that the whistleblower may make the problem public, while retaining the safeguards that the law provides. In most jurisdictions going public leaves the whistleblower without further protection. Of course, there are occasionally whistleblowers who put themselves completely outside the whistleblower laws by leaking directly to the media. They don't merely put themselves outside the protection that the law might offer – they expose themselves to prosecution under secrecy laws that are meant to protect what happens within government, including behaviour by public servants or ministers that might be improper or even illegal.

In my view whistleblowing legislation does not contribute to external integrity processes but can assist the internal integrity processes of the executive government.

Is the media part of the fourth branch?

The media is an obvious candidate for inclusion in the fourth branch. Most media would like to believe that some of their activities are specifically directed towards this end.

The press has long been referred to as the fourth estate and the media in general have tried to assume this designation. But being the fourth estate is not quite the same as being the fourth branch.

The term, fourth estate, was apparently applied to the press when journalists were formally admitted to report in the House of Commons. The other three estates were the Lords Spiritual, the Lords Temporal and the Commons. The name was meant to convey the

importance of the press in the political life of the nation. The press was part of the polity and exercised power, though not always beneficially, in the public interest. Its significance and influence has probably increased. As Professor Rodney Tiffin wrote in *The Oxford Companion to Australian Politics*:

In all technologically advanced countries, the media are central to the political arena. They are inevitably the primary link between citizens and state, governors and governed. Their political importance lies first in the huge audiences they reach, and the way those audiences transcend and cut across other social divisions and political constituencies. Equally significant is the massive presence of the media at political institutions. Their pressures for disclosure have transformed political processes and created tensions about the control and dissemination of information and impressions.⁸

The media contribute significantly to political accountability, as another author in the Oxford Companion wrote:

The media play an increasingly significant role in democratic accountability. They provide a forum for reporting and reinforcing the scrutiny exercised by specialised accountability agencies, such as parliament, the Auditor-General and the Ombudsman. They also engage in their own critical dialogue with politicians and officials, forcing them to answer directly to the public.⁹

To the somewhat limited extent that the media report the activities and views of the integrity agencies, they deserve to be considered at least as collaborators in the integrity process. Insofar as they have their own interactions with politicians and officials, they give the impression that they are playing the political game.

Media academic, Professor Matthew Ricketson of the University of Canberra, who assisted former Federal Court judge Ray Finkelstein, in his review of media regulation, refers to what many of us call serious journalism as 'accountability journalism'. He said recently:

There is much more media available to anyone who has access to a smartphone or internet connection, but the bulk of accountability journalism is still coming from the major news organisations and it is those – Fairfax and News here – which are struggling to a degree. The number of people doing accountability journalism does appear to be diminishing and that is a real problem for democracy.¹⁰

One more media commentator, the executive director of the Sydney Institute, Gerard Henderson, wrote under the headline *Power of the press a lot less muscular than some imagine*:

Politicians tend to overestimate the importance of the media and, in particular, media proprietors...
...journalists frequently overestimate the significance of their own role...
There is also a tendency for journalists to overestimate their role in facilitating public debate...
In this overcrowded media market, journalists need politicians more than politicians need journalists...¹¹

Having spent more than 40 years in journalism, I can see merit in each of those observations. I certainly agree with Ricketson that accountability journalism is decreasing and with Henderson's view that politicians and journalists overestimate the importance of the media's contribution to politics. While the media is still entitled to regard itself, and be regarded generally, as the fourth estate, I do not believe it has established itself as part of the fourth branch, the integrity branch. Indeed, much of its performance as the fourth estate probably disentitles it to any such recognition, even though occasionally its accountability journalism may contribute to integrity in government.

In what way can citizens be empowered/enlisted into the fourth branch?

The internet (in its various emanations) is supposed to make us all free to take part in the integrity function, using FOI/RTI, searching websites, questioning politicians; to be citizen-

journalists, with our own websites, , or latching onto the facilities developed by others, like Crikey, for example. We can carry out our research, using search engines, or sites developed by others – such as Open Australia. We are empowered far more than 20 years ago. Should we be enlisted?

I think we are already, though the various integrity agencies perhaps need to be more encouraging. I receive dozens of requests/demands each year that I should investigate or do something about alleged misbehaviour (actually, those who contact me do not allege, they insist that they know that some evil has occurred, generally affecting them personally) by police, public servants or the government. I used to get about the same number when I was contributing editor of *The Courier-Mail*. In my present position I am unable to investigate or respond positively to them, because my functions are tightly circumscribed by the Integrity Act. But I know that other integrity agencies receive many more complaints than I do. In Queensland the Ombudsman now has on its website a page labelled 'It's ok to complain' that lists the various independent complaint agencies, State and Commonwealth, and their respective functions. Not everyone goes to the appropriate authority, but it helps.

However, I think that in the foreseeable future, the integrity branch will remain the preserve of independent or autonomous agencies established by government, and of those branches of government that have an integrity function as part of their ordinary activities.

Independence – institutional autonomy

Like Professor Ackerman, I can see advantages in there being an integrity branch that is quite distinct and separate from the other branches of government. It would probably be more effective, not least because citizens could see what it was doing. But that is not our system. As Spigelman explains, each of the three branches of government – executive, legislature and judiciary – has taken on an integrity function in some way. Each can be effective. There would be no advantage in trying to remove those functions and send them off to a fourth branch.

What is important is that those individual agencies that have been created primarily to perform an integrity function, from the Auditor-General to the Ombudsman and to various specialised complaints and investigatory bodies, should have the appropriate degree of independence from government, or at the very least, operational autonomy. That independence/autonomy will not be a measure of whether a body has an integrity function, but it will be one characteristic to be considered in classifying it as a part of the fourth (integrity) branch.

Endnotes

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- 2 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review*.
- 3 Spigelman, 5.
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- 5 Spigelman, 4.
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- 7 Gary Crooke QC, 'Five Years as Integrity Commissioner: a Retrospective' (Paper presented at the Australian Public Sector Anti-Corruption Conference, July 2009), 1.
- 8 Rodney Tiffin, 'Media and Politics', in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne 2007, 336.
- 9 Richard Mulgan, 'Accountability', in Brian Galligan and Winsome Roberts (eds), *The Oxford Companion to Australian Politics*, Melbourne 2007, 13.
- 10 Matthew Ricketson, quoted by Debra Jopson, 'It's All About the Journalism, Stupid', *Sydney Morning Herald News Review*, June 23-24 2012, 6.
- 11 Gerard Henderson, 'Power of the Press a Lot Less Muscular than Some Imagine' *Sydney Morning Herald*, 26 June 2012, 13.

AN 'INTEGRITY' BRANCH

*Robin Creyke**

Common lawyers are familiar with the division of legal and political power between the parliament, the executive and the courts. However, some bodies such as Auditors-General, or tribunals never fitted happily within that structure and, with the expansion of the public sector and the increasing tendency for government to provide services through private sector bodies or non-central government agencies, that tripartite division has been under strain. This has forced a rethink of our foundational beliefs about the optimum structure of government. It is in that context that the notion of an integrity branch of government has emerged.

The role of the integrity branch is to enforce standards of integrity within public administration, that is, the broader integrity system. What are integrity standards, which bodies comprise the integrity branch and the wider integrity system, all require an understanding of what is meant by 'integrity'. That appreciation in turn enables the identification of which bodies or individuals within government are integral to government's integrity performance; and which institutions monitor whether the system is working with integrity.

What is 'integrity'?

'Integrity' is a commonly encountered word but the term is often used loosely. As Steve Harris, a journalist colourfully put it, 'integrity' is 'a slightly old-fashioned word that has come roaring back into vogue as the *lingua franca*, measure of debate and verbal weapon of choice to extol or excoriate the quality of people and organisations in all fields of human endeavour'. But, as he went on, 'the word itself is often used in an incomplete, contradictory, inconsistent, unprincipled, unmeasured, dishonest manner. In other words, the antithesis of what integrity actually means'.¹

This failure to use 'integrity' with sufficient particularity is regularly encountered in the literature. The term has been used to mean 'accountability';² professionalism/acting properly;³ 'honesty';⁴ 'good reputation';⁵ 'ethics';⁶ 'trust';⁷ and it is commonly used to mean incorruptibility. All these descriptions, when applied to the public sector contain shades of the sense in which integrity is used. But, integrity is not synonymous with accountability, ethics, or notions akin to the public trust; nor is integrity solely the opposite of corruption.

The word is based on the Latin *integritas* meaning 'whole, entire'⁸ and complete'.⁹ Hence, an integer means a whole number. So the predominant meaning of integrity is something which is whole and healthy, that is functioning well, as intended. In this sense the word applies in its holistic sense to the integrity system as a whole - its systemic meaning.¹⁰ However, the term has a related meaning, namely, the quality of being honest, uncorrupted and having strong moral principles, the focus in this sense being on the behaviour of individuals within the integrity system.¹¹

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The two meanings are interconnected in that unless you have honest, trustworthy, responsible members of public sector organisations, who comply with laws, procedures, policies and relevant codes of conduct, the healthy operation of the institutions are at risk. But they are also different in significant ways and that difference broadly speaking can be related to the two elements of the integrity system - the operation of the system as a whole, and that part of it which performs the monitoring function, the integrity branch.

This difference is understood by leading Australian writers and researchers in the field, such as Professor AJ Brown and Professor Charles Sampford, who published the seminal *National Integrity System Assessment Report*, (the NISA report).¹² However, the understanding is not apparent in most publications on the topic. There is no definition of integrity in the 320 pages of the Australian Law Reform Commission report *Integrity: but not by trust alone*,¹³ nor in the Acts or potential Acts dealing with integrity,¹⁴ in most media articles on the topic of integrity,¹⁵ or in the first annual reports by integrity commissioners, which might have been expected to contain a definition of integrity as a key descriptor of their role.¹⁶

Where a definition is provided, it focuses on the second, behavioural aspect of the meaning, rather than on its systemic meaning.¹⁷ That is true outside Australia as well. Both the OECD, in a key report on public sector integrity in 2005¹⁸ and the UN,¹⁹ in describing the need for integrity in its institutions, in effect defined integrity as the antithesis of corruption. That is, the emphasis in the discussion of integrity is on the individual's honesty or conduct, not on how well the system as a whole is functioning.

The reason for this failure to define integrity may be due to an assumption that the meaning of integrity is so well understood that to define it would insult the readership. Given the two senses in which the word is used - the first describing the overall integrity system, the second to what individual officers must do to contribute to the effective functioning of their specific agency and its programs or policy functions, the assumption is surprising. A system, including the integrity system, cannot be honest or have strong moral principles. In that sense the second meaning can only be applied to individuals. By contrast, a system can be healthy and operate as intended, that is, can exhibit integrity overall.

Does this definitional gap or myopia matter? The authors of the NISA report believe so. As they said of this issue: 'How we assess an integrity system depends to a significant degree on how we define 'integrity', not just in relation to the personal integrity of individuals but also in relation to the institutions through which most political and economic power is exercised'.²⁰ Assessment implies measures or standards against which the level of integrity of the system can be gauged. However, the measures to assess whether the system as a whole is operating with integrity must, logically, be different from those which determine whether individuals are behaving honestly, ethically and from a morally defensible standpoint. So the failure to differentiate may well cloud the integrity measures identification task.

An illustration of the distinction in meanings which does recognise the distinction in performance measures is seen in the different approaches to measurement of integrity adopted by Transparency International and by Australian public sector commissions.²¹ The assessment of a nation's level of integrity, the task performed annually by Transparency International in its comparison of national levels of corruption, involves an overview and summation of the performance of that system against global measures testing the system as a whole. By contrast, the tools for assessment of the integrity of individuals or particular institutions, as reported annually, for example, by the Australian Public Service Commissioner's *State of the Service* report, has set performance standards for testing the behaviour of individual APS officers. The two approaches illustrate the distinct meanings of integrity, the one institutional and the other behavioural.

Another problem which can arise from a failure to distinguish the two meanings of integrity is the elision of the two distinct elements of the integrity system, namely, the public institutions the operations of which are integral to the ability of government as a whole to operate with integrity, and the supervision or integrity branch. This means that it is often not clear whether the author is writing about the integrity system or that element of the system which is the integrity branch. In turn, that leads to confusion about what standards, institutions, individuals or bodies are being discussed. This too has clouded the debate.

This failure to differentiate the two arms of an integrity system, its monitoring and its operational arm, is illustrated by considering descriptions of the integrity system by some of the leading authors:

- *'[T]he totality of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power, and how they operate together'.²²* (Transparency International Australia)
- *'[O]ur society's means – be they institutions, laws, procedures, practices or attitudes – of pursuing integrity in daily public life'.²³* (NISA Study)
- *'...the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life'.²⁴* (C Sampford)
- *'...a collection of institutions, laws, procedures, practices and attitudes that promote and encourage integrity in the exercise of power in [a] society'.²⁵* (McMillan)

What is striking about these descriptions is the multiple strands of an integrity system: people, law, procedures and institutions. What is not overt in any of those statements is that achievement of the goal requires there to be some body or bodies the functions of which are to supervise those in the system, to educate and to set standards for the system in order that that goal can be met. It is implicit that there must be standards and they must be determined. However, there is no explicit recognition in these descriptions of the distinct elements - monitoring and performance - involved in the system, nor of the need for oversight institutions to perform the standard setting and monitoring tasks.

An illustration of this failure is provided by a consideration of the two familiar metaphors which have come to be associated with integrity systems: the Greek temple used by the OECD in its 2005 study,²⁶ and the bird's nest,²⁷ the image devised by Sampford and Brown to capture the findings of their NISA project. What these descriptions of the integrity system do is indicate that the 'coherence' of public institutions, that is, how well they interact and support each other, determines how well the structure works.

That supportive role of the elements of the integrity system was graphically described in this comparison between the two main descriptive images - the Greek temple and the bird's nest:

The birds nest lacks the majesty and coordination of a classic Greek Temple, and the geometric simplicity of a three-cornered separation of powers. However, in a well-constructed birds nest, single twigs that are individually frail can support more than their own weight and withstand turbulence that would destroy any one of the twigs. The strength of the structure comes not from its individual parts, but from their interrelationship. A weakness in any one integrity institution does not necessarily weaken the whole structure. Equally, the structure is stronger when all the pieces are interrelated.²⁸

What the descriptions do not do is separately identify and describe the role of the guardians of the system. A description of the Greek temple illustrates this failure to differentiate the distinct roles.

The roof of the Temple is the fundamental objective: national integrity in all areas of government business. Eleven columns in the Temple support a civilised system that conforms to that objective and upholds the rule of law. Three ancient columns - the legislature, executive and judiciary - are joined by the Auditor-General, Ombudsman, anti-corruption agencies, the media, the public service, civil society, private sector and international organisations.²⁹

The Temple is clearly a combination of an integrity system and the integrity branch: the overall integrity objective is the roof. However, the pillars are a combination of the institutions which make up the system as a whole, with the institutions such as the Auditor-General, the Ombudsman and the anti-corruption agencies which perform the oversight function. In other words, this description of the integrity system fails to distinguish the different perspectives - behavioural versus systemic - which are at play; nor does it explicitly identify the role of the institutions required to monitor and, if necessary, improve, the level of integrity within the integrity system.

Integrity branch

The concept of an integrity branch or arm of government is often said to have originated in a paper by Professor Bruce Ackerman, a US academic, at the turn of this century.³⁰ However, another Bruce, Bruce Topperwein, an Australian and a respected member of the Australian Public Service, had developed the notion in an article in 1999.³¹

The idea was then promoted in Australia by the Honourable James Spigelman, then Chief Justice of the NSW Supreme Court, and publicised in the *AIAL National Lectures* he presented in 2004.³² At the same time, AJ Brown and his NISA team³³ and more recently McMillan³⁴ injected a new sophistication into the debate.

In Spigelman's view the key institutions comprising the integrity branch were, 'the three recognised branches of government including the Parliament, the head of state, various executive agencies and the superior courts'.³⁵ McMillan expanded on that set of institutions to include not only Auditors-General and ombudsmen but also administrative tribunals, independent crime commissions, military disciplinary bodies, inspectors-general of taxation and of security intelligence, and a plethora of commissioners - dealing with privacy, information access, human rights and anti-discrimination, and public service standards.³⁶

Although these authors did not explicitly emphasise the distinction made in this paper between the oversight and the integrity performance functions, they did acknowledge that there is a spectrum of integrity bodies, and that it is the core institutions which undertake the watchdog function.

All Australian jurisdictions have institutions which comprise the integrity branch. They are not always identified as such, as is illustrated by the following list taken from publications listing their core public sector supervision bodies:

- *Commonwealth*: the Auditor-General, Ombudsman, Office of the Information Commissioner, security and anti-corruption bodies.³⁷
- *New South Wales*: a 2004 survey of an initial list of 130 agencies or institutions identified the Independent Commission Against Corruption, the Ombudsman and the Audit Office as the top three, with the Premier's Department, the courts, parliamentary committees and the police force as the next most important.³⁸
- *Queensland*: the Auditor-General, the Ombudsman's Office, the Crime and Misconduct Commission, Queensland Police Service, individual agencies to the extent that they manage disciplinary matters and deal with whistleblowers, along with

several parliamentary committees which monitor key integrity bodies such as the Crime and Misconduct Commission, and action within the parliament itself.³⁹

- *Tasmania*: the Integrity Commission, and the Ombudsman.⁴⁰
- *Victoria*: the Ombudsman, the Auditor-General, the Office of Police Integrity, the Local Government Investigations and Compliance Inspectorate, the Public Sector Standards Commissioner, Victoria Police, to the extent of their function relating to public sector misconduct, and the Special Investigations Monitor.⁴¹
- *Western Australia*: the state's Integrity Co-ordinating Group comprises the Auditor General, the Public Sector Commission, the Corruption and Crime Commissioner, the Western Australian Ombudsman, and the Office of the Information Commissioner.⁴²

As this survey indicates, some institutions are common to most lists. They are the Ombudsman, the Auditor-General, and intelligence and security bodies, including the police. Variations beyond this inner core reflect the existence of eponymous integrity bodies, and a recognition that information commissioners, public service commissions or specific parliamentary oversight committees have a key role to play in maintaining integrity.

What is striking about these institutions within the integrity branch is the absence of reference to courts or tribunals - the adjudicative arm of government. Their omission has not been universally accepted. Not surprisingly, Spigelman included the superior courts in his list and McMillan added tribunals. The failure to mention the adjudicative bodies is explicable since, although clothed with one of the key indicators of an oversight body, namely, independence, the courts and tribunals lack another of the essential features of the bodies in the integrity branch, namely, the authority to initiate action of their own motion.

In addition, the courts and tribunals are essentially reactive and although their output is influential in that they do set standards for the executive branch, that influence is generally achieved co-operatively, rather than through coercive means. This gap in their powers is the reason they are not generally acknowledged to have an oversight role akin to other institutions in the integrity branch.

Their omission, however, highlights the awkwardness of the place of the institutions within the integrity branch more generally, in a political environment which has historically embraced a tripartite system of government. Whether the courts should be included is debatable since they are set securely in a recognised branch of government. The situation is, however, particularly acute for tribunals, existing as they do somewhere in a no-man's land between the judiciary and the executive. This anomalous position of tribunals makes them vulnerable to challenges based on their status, as recent cases turning on whether a tribunal is, or is not, a court illustrate.⁴³ However, the uncertainty surrounding their position is shared, if perhaps to a lesser extent, by all the core institutions of the integrity branch.

This issue aside, the survey also illustrates another feature of the integrity branch, namely, that although there is an inner core of oversight bodies, there is a tiered or graduated system of such bodies, each of which is performing some monitoring function. Whether a body is to be placed in the top or a second or lower tier depends on their functions and the degree to which they possess the essential criteria for a fully-fledged supervision body. The graduated system explains why bodies like tribunals are not placed among the key and primary monitoring institutions.

The function and rationale of the integrity branch

As the earlier discussion illustrates, the principal function of the integrity branch is an examination and assessment of the integrity levels of government. The function discharged by the integrity branch 'embraces legal compliance, good decision-making and improved public administration'.⁴⁴ In other words the oversight bodies are to monitor and, if necessary, suggest ways to improve, public sector institutions WHEN measured against standards provided by law and by good public administration.

The goal of the integrity system is the exercise of public power within legal limits, but superimposed on that minimal requirement is the honest, incorruptible exercise of that power by individuals and institutions for the public good. As Spigelman said of this rationale:

[T]he integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.⁴⁵

As he said, the integrity branch was to ensure standards for and compliance with the accepted concepts of how mechanisms of governance should operate, namely, in a healthy or unimpaired, and particularly in an uncorrupted, state.⁴⁶

A key OECD publication has described the rationale thus:

Assessing measures for promoting integrity and preventing corruption is a technical exercise but the reason for doing it is profoundly political. Assessment makes it possible for public officials and governments to demonstrate whether they achieve agreed policy objectives and contribute to outcomes that matter to their managers and to citizens.⁴⁷

Compliance with and the nature of the legal standards are uncontroversial. However, it is the measures which go beyond those legal standards - the notions of ethics, the public trust, and honest and trustworthy behaviour as found, for example, in Codes or Charters of Conduct, which inject that additional integrity requirement.

Clearly there is a spectrum of institutions and of conduct to which the standards allied to notions of integrity can attach.⁴⁸ The focus in much of the literature is on integrity as the antithesis of corruption. That focus also permeates the suite of integrity legislation throughout Australia which is designed to combat the high or corruption end of the spectrum, dealing as it does with conduct within the criminal sphere such as theft, fraud (including identity fraud) and misappropriation of funds.⁴⁹ However, lack of integrity can be evident within the public sector in breaches of codes of conduct, misconduct, or matters attracting disciplinary sanctions. These are properly within the purview of administrative law.

Each of the core institutions has a part to play in this monitoring process. Whether it be the financial probity and performance which is the province of Auditors-General, good public administration as assessed by the Ombudsman, or the balance between transparency and privacy as decided by information and privacy commissioners, each is examining the health of the system from a particular vantage point.

Although their roles may be different, each of the guardians of the system faces a challenge in common, and that is how to set the standards and to measure the achievement of compliance. As two OECD researchers expressed it: 'Assessment of integrity and corruption prevention policies poses special challenges for policy makers and managers, in particular that of determining what is measurable'.⁵⁰ As they went on: 'Assessment makes it possible for public officials and governments to demonstrate whether they achieve agreed policy objectives and contribute to outcomes that matter to their managers and to citizens'.⁵¹

It is in that context, that mention should be made of the role of the successive Integrity Advisers in the Australian Taxation Office (ATO). Their role is to assess the integrity of the multi-faceted taxation system, and their work in establishing integrity standards for that Office has gone a considerable way towards assessing how best to operationalize the monitoring and correction function of the integrity branch.

In doing so they have identified a number of essential steps for an effective integrity monitor. The first of those steps is to decide on the activities which provide a litmus test of the health of the system;⁵² the second is to establish measures or standards which are indicative of effective operation;⁵³ the third, is to set up an effective system for reporting against those measures; finally there is a need to ensure that there is evidentiary support for claimed achievements against those standards. As others have noted '... assessment in this field raises specific challenges, in particular the definition of a thorough and objective methodology that supports evidence-based policy making'.⁵⁴ These objectives pose challenges for integrity supervisory bodies and for the policy makers.

Collectively they have created a reasonably robust system of monitoring the multiple activities conducted under the auspices of the ATO. However, like the integrity system as a whole, it requires constant monitoring to cater for the regular changes and developments occurring within the agency or within the system as a whole.

Conclusion

This description of the integrity system and its guardians, the integrity branch, illustrates that citizens have come to expect more of governments than compliance with laws, policies and procedures. This is where the twin facets of integrity, the health and wholeness of the system, which in turn is dependent on the honesty, incorruptibility and morality of individual officers, comes in. It is only by injecting a further element into the system - integrity - that those aspirations will be met. And it is only through the presence of an active and sensitive integrity branch to supervise and monitor the system, that integrity and the aspirations of citizens can be assured.

Endnotes

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- 13 ALRC *Integrity: but not by Trust Alone: AFP & NCA Complaints and Disciplinary Systems* (1996).

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- 45 The Hon James J Spigelman AC, 'The Integrity Branch of Government', Lecture 1, in *AIAL National Lecture Series on Administrative Law No 2* (2010) 31 *AIAL Forum* 2-3.
- 46 Id at 2.
- 47 OECD *Public Sector Integrity: A Framework for Assessment* (2005) 26.
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THE INTEGRITY BRANCH OF GOVERNMENT AND THE SEPARATION OF JUDICIAL POWER

*Joseph Wenta**

The influence of the separation of judicial power on the development of Australia's governmental institutions is widely recognised. The generally strict approach to the separation of federal judicial power has both facilitated and constrained the continued development of the institutions and processes of government and of administrative law. Institutions which test the boundaries of the *Constitution* continue to be designed; the various accountability mechanisms of the 'new' administrative law provide relevant examples.¹ The identification of a 'fourth' or 'integrity' branch of government represents one attempt to conceptualise and explain the wider range of accountability mechanisms comprising contemporary Australian government. This paper examines the relationship between the judicial branch and the 'fourth arm' of government, and explores the potential impact of established constitutional principles on the development and operation of the integrity branch.

This paper argues that the range of integrity functions performed by the judicial branch of government and its members extends beyond judicial review of governmental action. While judicial review of administrative action no doubt constitutes a significant proportion of the integrity activity of the judicial branch, members of the judiciary are often asked to engage in a wider range of integrity functions and processes. This activity often involves extra-judicial functions. However, the constitutionality of extra-judicial activity remains unclear, and the desirability of extra-judicial activity is contestable; this casts some doubt on the capacity of the judiciary and its members to participate in the further development and operation of the integrity branch of government.

The paper begins with an exploration of the concept of the integrity branch of government and established constitutional principles affecting the interaction of the integrity branch and the judiciary. Part I of the paper examines the nature of the integrity branch of government, and identifies as 'integrity functions' a number of activities and processes performed by members of the judiciary as extra-judicial activities. Part II outlines the development of the separation of judicial power in the Australian context, with an emphasis on the development and operation of the *persona designata* exception and the incompatibility condition. The paper suggests that any interference with the decisional independence of judicial officers performing functions as designated persons is likely to raise questions of incompatibility, and will potentially compromise extra-judicial participation in the integrity branch.

Part III considers the extent to which established principles of Australian constitutional law may permit members of the judiciary to perform a wider range of integrity functions. The paper argues that participation of judicial officers in the operation of the integrity branch is potentially accommodated by the *persona designata* exception to the strict separation of judicial power. Further, the paper suggests that integrity functions and processes are not necessarily incompatible with judicial office; careful attention must be paid to the nature and mode of performance of each integrity function in order to ensure that an assessment of

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incompatibility is accurate. Part IV of the paper evaluates briefly factors affecting the desirability of extra-judicial participation in the operation of the integrity branch. While many of the objections to extra-judicial activity have merit, this paper argues that extra-judicial involvement in the performance of integrity functions is, on balance, an acceptable element of modern government. While the separation of judicial power necessarily controls judicial participation in the development and operation of the integrity branch, the paper concludes that the separation of judicial power does not prohibit the participation of judicial officers in a range of integrity activities and processes.

Part 1 The integrity branch of government

The ‘integrity branch’ is the most recent manifestation of a ‘fourth arm’ of government,² intended to both interact with and supervise each of the legislative, executive and judicial branches of government. Chief Justice Spigelman (as he then was) identified the core responsibility of the integrity branch as ‘ensur[ing] that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose’.³ A wide range of institutions, including the executive, legislature and judiciary, the public service, the Auditor-General, ombudsmen, ‘watchdog’ agencies (such as the Independent Commission Against Corruption, the Police Integrity Commission and the Crime Commission in the New South Wales context), civil society, the media and international agencies have been included within the family of bodies that comprise the integrity branch.⁴

Early contributions to exploration of the integrity branch attributed a ‘semi-constitutional’ status to the fourth arm.⁵ However, integrity branch scholarship has increasingly recognised the wider range of bodies and process that perform integrity functions. The integrity branch has more recently been characterised as an ‘integrity system’, ‘[consisting] of the broad range of institutions, processes, people and attitudes working to ensure integrity in the exercise of our society’s many different forms of official power’.⁶ The concept of an integrity system extends beyond institutions contemplated by the ‘semi-constitutional’ foundation to include private sector bodies.⁷ The wide range of institutions, functions and process comprising the integrity system has seen the integrity branch described as a ‘bird’s nest’,⁸ in order to demonstrate that it is the combined effect of those institutions, functions and processes which comprise the integrity branch that is of greatest significance. While some institutions are no doubt quintessentially ‘fourth arm’, it is the totality of the integrity branch that is most important.

Although this paper may appear to favour the ‘semi-constitutional’ conception of the integrity branch by virtue of its subject-matter, the arguments canvassed are intended to apply equally to the wider notion of an integrity system.⁹ Neither the ‘semi-constitutional’ nor the ‘integrity system’ account of the integrity branch is superior; each is developed with a foundation in the same principles and ideas. Both constructions accept the significance of a wider range of functions (extending beyond those performed by the traditional institutions of government) in the operation and maintenance of a democratic system of government which observes the rule of law. It is in this context that the arguments in this paper are developed.

Integrity functions and the judiciary

Integrity branch scholarship has long recognised that the judicial and integrity branches intersect.¹⁰ However, the full range of integrity functions performed by the judiciary has not been explored in detail. This section of the paper considers the relationship between the integrity and judicial branches, both identifying the wider range of integrity functions performed by judicial officers, and exploring the extent to which judges are in fact involved in the performance of those functions.

The integrity functions performed by the judicial branch and its members can be divided into three categories. Judicial review of both legislative and administrative action forms the first and most widely recognised integrity function performed by the judiciary.¹¹ The availability of an independent judiciary with powers to examine the legality of legislative and executive activity is a core feature of the Australian integrity system. The second integrity function performed by the judicial arm of government is the supervision of the institutions and processes comprising the integrity system. An exercise of power to engage in judicial review for the purpose of monitoring the integrity branch is arguably of a unique character; the judiciary performs an essential integrity task by ensuring mutual accountability *within* the integrity system.¹²

The extra-judicial¹³ performance of public functions by judicial officers should also be recognised as a third broad category of integrity function. Examples of these functions include participation in quasi-judicial review bodies; the conduct of quasi-judicial investigations; and supervision or oversight of executive activity.¹⁴

Quasi-judicial review bodies

Judges often participate in the operation of quasi-judicial review bodies. A body or function may be described as 'quasi-judicial' either where it is performed in a 'judicial' or 'judicial-like' manner or where it does not clearly involve the exercise of judicial power.¹⁵ Merits review tribunals (such as the Administrative Appeals Tribunal (AAT)) are a prominent example of a quasi-judicial review body.¹⁶ The task of a merits review tribunal is to 'stand in the shoes of the original decision maker'¹⁷ and to identify the 'correct or preferable' exercise of administrative power.¹⁸ The AAT is then empowered to affirm, vary, or set aside the decision under review.¹⁹

It is not immediately clear that the AAT performs an integrity function; the process of merits review need not involve consideration of any factors other than what is 'right' or 'fair' in the circumstances.²⁰ However, although the power of the AAT in relation to questions of law is limited, the Tribunal may be required to form an opinion on a point of law in order to complete the task of merits review.²¹ Identification of the correct or preferable exercise of an administrative discretion will almost certainly necessitate some consideration of the legal boundaries placed upon a decision-maker; the Tribunal cannot make the 'correct or preferable' decision without some appreciation of the nature and extent of the power to be exercised. Review of legality, which would include the manner and purpose of the exercise of power, is inherent in the process of merits review.²² It can be argued, therefore, that the AAT performs an integrity function.

The AAT is an excellent example of a quasi-judicial body which involves judicial officers in the extra-judicial performance of an integrity function. The President of the AAT must be a Judge of the Federal Court.²³ Additional Ch III judges²⁴ can be appointed as presidential members of the Tribunal.²⁵ It has long been accepted that judicial members are appointed to the AAT as *persona designata*.²⁶ These provisions have been accepted as compelling some adherence to the 'judicial model [of decision making], separate from, and independent of, the Executive'.²⁷ Members of the judicial branch remain available to participate in the operation of the Tribunal; the AAT reports that judicial officers comprised 20% of the membership of the Tribunal in the 2010-2011 reporting period.²⁸ However, former members of the AAT note that the involvement of judges in the activities of the Tribunal has declined in more recent years, particularly when compared with the operation of the Tribunal in its formative years.²⁹ These observations seem to be accurate; the AAT itself reports that judicial officers were engaged in less than 1% of all hearings conducted by the Tribunal in 2010/2011.³⁰ While judicial officers are involved in the activities of the AAT, it seems that the extent of that participation is not particularly extensive.

Quasi-judicial investigations

Judicial officers have historically undertaken quasi-judicial investigative tasks such as the conduct of Royal Commissions. A Royal Commission is an 'ad hoc advisory [body] appointed by governments to obtain information which is presented in the form of a report', and which can be deployed for an infinite variety of purposes.³¹ Prasser has developed a typology for the classification of public inquiries, which allows broad categorisation of Royal Commissions based upon the function that they perform.³² Royal Commissions may be classified as 'inquisitorial/investigative inquiries', which '[investigate] allegations [of] suspected impropriety or maladministration of individuals and organisations in both government and the private sector [or] find the cause of a particular catastrophic event'.³³ Inquisitorial/investigative Royal Commissions not only collect publicly available data and receive evidence from witnesses, but may also utilise a range of coercive powers to gather further information.³⁴ Many inquisitorial/investigative Royal Commissions are conducted by either active or former judicial officers,³⁵ and in a manner that is broadly analogous with judicial proceedings.³⁶ 'Public Advisory inquiries', on the other hand, 'are not concerned with investigating allegations [or] improprieties ... instead, their aim is to inform, summarise and make suggestions to government on the possible solution to a particular policy problem'.³⁷

Royal Commissions are widely identified as a component of the integrity branch of government.³⁸ However, it is submitted that only those inquisitorial/investigative Royal Commissions directed to the investigation of allegations of impropriety and maladministration truly perform an integrity function. Many Royal Commissions have been established in order to examine systematic misuse of public power;³⁹ the emerging trend seems to be to use Royal Commissions almost exclusively for this purpose.⁴⁰ Policy advisory Royal Commissions, which focus primarily on the provision of information to government, are far less likely to address questions of the use and misuse of public power.⁴¹ Consequently, it is doubtful that policy advisory Royal Commissions are accurately described as an integrity activity.

Royal Commissions are often mischaracterised as judicial inquiries, when they are more appropriately regarded as manifestations of executive government;⁴² it is well-established that the power to issue a Royal Commission stems from the prerogative.⁴³ This may simply be a by-product of the historical practice (in some jurisdictions) of conferring Royal Commissions upon judicial officers (in their personal capacity).⁴⁴ It is difficult to reach a general view as to the extent of judicial participation in Royal Commissions. However, Prasser's study of governmental inquiries allows identification of some significant features of the modern approach to the use of Royal Commissions and the selection of Royal Commissioners. The Commonwealth is most likely to initiate an inquisitorial/investigative Royal Commission; all Commonwealth Royal Commissions conducted after 1990 have been inquisitorial/investigative in nature.⁴⁵ Former judges are most likely to be tasked with the conduct of a Royal Commission; all but one of the Commonwealth Royal Commissions issued after 1990 have been conducted by a retired judge.⁴⁶

Supervision of administrative activity

Judicial officers may also be involved (extra-judicially) in administrative processes which seek to supervise and/or control executive activity. In some instances, rather than undertaking an administrative task directly, judicial officers may supervise and either authorise or prevent, the exercise of executive power. Although strictly speaking an administrative task, this 'supervisory' process imposes a significant check on the activities of the executive, as a judicial officer mediates the application of executive power to the individual citizen. An example of this form of administrative function is the power to issue a warrant. As the majority of the High Court in *Kuru v New South Wales* observed:

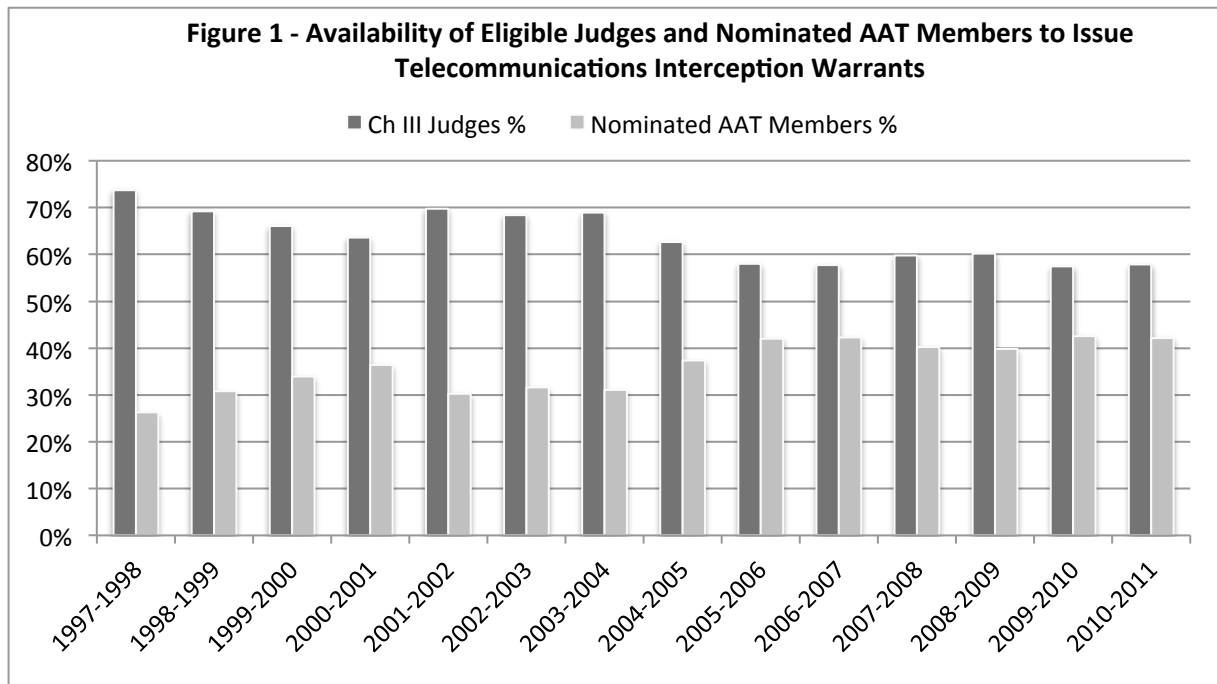
Although the grant of a warrant is an administrative act, it is performed by an office-holder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual ... [The warrant is issued by] *an officer who is not immediately involved in the circumstances of the case and who may thus be able to approach those circumstances with appropriate dispassion and attention to the competing principles at stake.* ...⁴⁷

It is possible to characterise such a supervisory process as an integrity activity. The judicial officer is not directly involved in the performance of a 'primary' executive activity (that is, the judicial officer does not decide that particular action is necessary, and then proceed with that action); rather, the judicial officer examines executive activity with a view to ensuring that the activity is consistent with limits upon the power of the executive branch of government. It is the 'secondary' or 'supervisory' nature of this involvement that merits recognition as an integrity process. The purpose of involving a judicial officer in the warrant issuing process is to ensure that the significant powers conferred upon the executive are exercised for the purpose and in the manner intended by parliament.

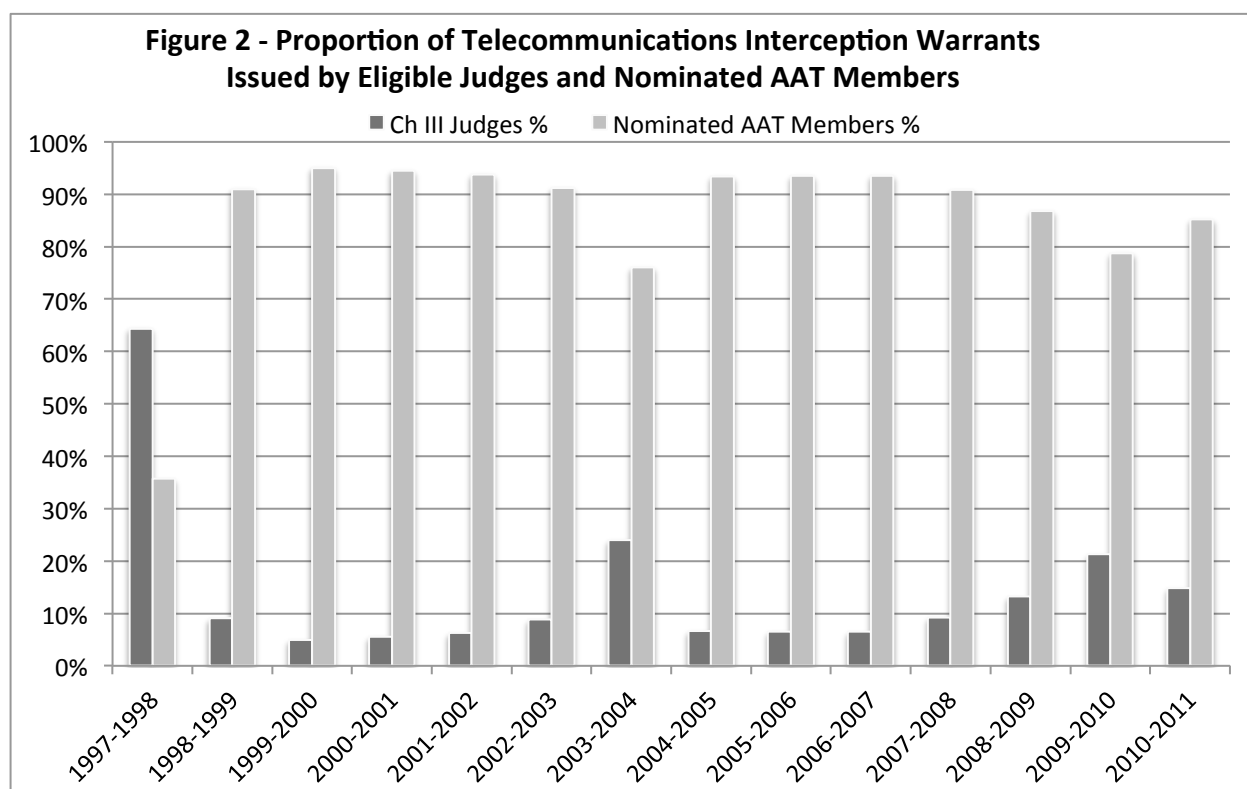
Participation of judicial officers in processes of this nature has been the source of controversy.⁴⁸ Nevertheless, both the Commonwealth and New South Wales Parliaments have continued to involve judicial officers in the administrative process of issuing warrants.⁴⁹ In the Commonwealth jurisdiction, for example, eligible Ch III judges (being those judges who have consented to the conferral of power to issue warrants in their personal capacity) are empowered to issue telecommunications service warrants under s 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth).⁵⁰ Nominated AAT members have also been permitted to issue warrants under the same provision since 1997.⁵¹ The character of the available issuing authorities⁵² (and the real activities of those authorities) has been monitored since that time.⁵³ The data collected and published in accordance with statutory requirements provides some useful insight regarding the true extent of extra-judicial performance of the warrant issuing function.

Figure 1 (below) shows that Ch III judges have remained available to issue warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) s 46, and have formed approximately 60% of the officers available to issue warrants under the provision for the last 10 years.⁵⁴ Table 1 shows that the total number of officers available to issue warrants, and the number of warrants issued, have both essentially doubled since the 1999-2000 reporting period.⁵⁵ The proportion of Ch III judges available to issue warrants has, however, remained relatively stable at approximately 60% (Figure 1). Figure 2 shows that, while the proportion of warrants issued by federal judges under s 46 was relatively low, between 5% and 7% in the period 2001-2002 to 2005-2006; the proportion of warrants issued by federal judges has increased in the period 2006-2007 to 2010-2011, reaching a peak of approximately 21% in the reporting period 2009-2010.⁵⁶ Finally, Table 48 in the 2010/2011 Report itself shows that the identity of the issuing authority varies significantly between Australian jurisdictions.⁵⁷

Collectively, this information demonstrates that judges both appear (and in fact continue) to perform the warrant issuing function under the *Telecommunications (Interception and Access) Act 1979* (Cth),⁵⁸ defying expectations that the function would be transferred to nominated AAT members in the period following the 1997 amendments.⁵⁹ If there is any identifiable trend, it is that judges continue to make themselves available to perform the warrant issuing function. It is not immediately apparent, however, that judicial involvement in these activities is preferred. As Table 48 in the 2010/2011 Report shows, the identity of the issuing officer differs significantly between jurisdictions. In many instances, this may be a product of practicality or administrative practice rather than any preference for the participation of judicial officers. However, it is clear that extra-judicial participation in this particular warrant issuing function persists, and it appears likely to continue.



| Year | Total Authorising Officers | Total Warrants Issued |
|-------------|-----------------------------------|------------------------------|
| 1997-1998 | 61 | 675 |
| 1998-1999 | 52 | 1284 |
| 1999-2000 | 53 | 1689 |
| 2000-2001 | 55 | 2157 |
| 2001-2002 | 66 | 2512 |
| 2002-2003 | 57 | 3058 |
| 2003-2004 | 58 | 3028 |
| 2004-2005 | 75 | 2883 |
| 2005-2006 | 69 | 3011 |
| 2006-2007 | 90 | 3279 |
| 2007-2008 | 92 | 3244 |
| 2008-2009 | 93 | 3220 |
| 2009-2010 | 101 | 3584 |
| 2010-2011 | 109 | 3313 |



What is to be made (collectively) of these examples of judicial participation in the integrity system? The scale of judicial participation in these activities aside, judicial officers are at least prepared to give the appearance that they will undertake extra-judicial activities. A portion of these extra-judicial functions can be characterised as integrity functions; while the identification of activities of merits review tribunals and Royal Commissions as integrity functions is not necessarily controversial, the recognition of extra-judicial supervision of executive action as an integrity process potentially represents an expansion of the integrity branch concept. This is, however, consistent with the prevailing trend in integrity branch scholarship favouring the recognition of a wider range of activities and processes as integrity functions. Finally, we must note that these extra-judicial functions are performed by judges, not as judges, but in their personal capacity. The scope of permissible extra-judicial activity is a vexed issue in Australian public law. Two closely related questions arise; (i) Is the extra-judicial participation of judicial officers in the operation of the integrity branch of government constitutionally permissible? (ii) Is the extra-judicial performance of a wider range of integrity functions by judicial officers appropriate or desirable?

Part II The separation of judicial power

The Australian approach to the separation of federal judicial power takes, as its starting point, the constitutional expression 'judicial power of the Commonwealth'.⁶⁰ A power or function must be characterised as 'judicial' or 'non-judicial' before the principles affecting the separation of federal judicial power can be applied.⁶¹ While the constitutional expression 'judicial power' is not easily defined, key features include the 'binding and authoritative'⁶² determination of a controversy⁶³ by application of 'the law as it is'⁶⁴ to facts ascertained by the decision-making body⁶⁵. No magical constellation of factors identifies any particular power as 'judicial' or 'non-judicial';⁶⁶ rather, an assessment of all relevant factors, including the context in which the power is to be exercised, is required before a particular power is characterised.⁶⁷

The strict separation of federal judicial power rests on two propositions developed by the High Court in the first half of the 20th century, and ultimately affirmed in the *Boilermakers'* case.⁶⁸ The first proposition requires that the judicial power of the Commonwealth only be exercised by federal courts established in accordance with the provisions of Ch III *Constitution*.⁶⁹ The second requires that federal courts be permitted only to exercise the judicial power of the Commonwealth, or non-judicial functions that are incidental to the exercise of judicial power.⁷⁰ The first proposition has not been questioned.⁷¹ The second proposition, however, has been the subject of some concern.⁷² The identification of exceptions to the second element of the separation of federal judicial power has mitigated the effect of that proposition.⁷³ The *persona designata* exception is of particular importance where the constitutionality of extra-judicial activity is considered.⁷⁴

The persona designata concept

The *persona designata* concept has an extended history in Australian public law. As Walker has noted, the concept appeared in the legal systems of the Australian colonies prior to federation, and was addressed by the early High Court without apparent disapproval.⁷⁵ At this point the *persona designata* concept operated simply as a principle of statutory interpretation;⁷⁶ Gordon outlined the operation of the concept in relatively clear terms:

[The *persona designata* concept is applied] where a person is indicated in a statute ... not by name, but by his name of office or as one of a class [that is, as a judge]. Then question arises whether he is meant in his [capacity as a judge], or whether the intention is to single him out ... as an individual, the reference to [the holding of judicial office] being merely a descriptive means of identifying him.⁷⁷

The *persona designata* concept also found life as an exception to the second element of the separation of federal judicial power in *Boilermakers'*.⁷⁸ In this context, the term '*persona designata*' is used 'as a shorthand expression of a limitation on the principle of *Boilermakers'*, acknowledging that there is no necessary inconsistency with the separation of powers mandated by Ch III of the *Constitution* if non-judicial power is vested in individual judges detached from the court they constitute'.⁷⁹ Although the potential for the *persona designata* concept to thwart high constitutional principle was immediately recognised,⁸⁰ the doctrine was not formally condemned.⁸¹

The High Court returned to the *persona designata* concept in *Hilton*, concluding that the conferral of power to issue telecommunications intercept warrants on 'Judges' did not violate Ch III of the *Constitution*.⁸² The majority (Gibbs CJ, Deane and Dawson JJ) applied the *persona designata* concept in construing the relevant statute, concluding that the intention of Parliament in conferring power upon 'Judges' was to empower the class of person to perform the warrant issuing function in their personal capacity.⁸³ While Mason and Deane JJ accepted that the *persona designata* concept existed as a matter of 'settled principle',⁸⁴ their Honours maintained that 'a clear expression of legislative intention'⁸⁵ was required in order for a function to be conferred on a judicial officer as a designated person. In concluding that that the intention of Parliament to confer power upon Judges as designated persons was not clear in this instance, Mason and Deane JJ noted as factors affecting their decision the use of the descriptor 'Judge' to identify the class of person, the quasi-judicial nature of the power in question, the absence of protection for 'judges' exercising the warrant issuing power and the failure to seek consent of judges prior to conferral of the function.⁸⁶ The concerns of Mason and Deane JJ were largely addressed in a recasting of the statutory regime in 1987; the majority of the High Court in *Grollo* effectively endorsed *Telecommunications (Interception) Act 1979* (Cth) s 6D as providing a formula which could be utilised validly to confer a non-judicial function upon a judicial officer in their personal capacity.⁸⁷

Although the *persona designata* concept was again subjected to criticism as an 'elaborate charade'⁸⁸ designed to subvert the separation of federal judicial power, it seems that the

concept remains of significance in Australian public law. Most significantly, the *Constitution* does not expressly prohibit the conferral of extra-judicial functions on judicial officers.⁸⁹ Second, the *persona designata* concept operates as an adjunct to the *Boilermakers'* doctrine (which is, at least presently, well established in Australian constitutional law), ameliorating the strict nature of the proposition established in that case. Further, the practice of conferring functions on judges as designated persons persists, and does not appear likely to cease in the near future. Although each piece of legislation must be construed independently, both the Commonwealth and New South Wales Parliaments seem inclined to utilise the statutory formula that was accepted in *Grollo*.⁹⁰ As a result, the *persona designata* concept seems to remain relevant both as a matter of constitutional principle and as a rule of statutory interpretation which is of significance beyond the scope of the *Boilermakers'* doctrine.

The incompatibility condition

Having recognised the capacity of the *persona designata* concept to effectively neutralise the separation of federal judicial power, both the majority and dissenting opinions in *Hilton* suggested that the operation of the concept should be limited.⁹¹ The 'incompatibility condition'⁹² was developed as a limit on the operation of the *persona designata* concept, with the purpose of ensuring that the principles underpinning the separation of federal judicial power were not compromised by the operation of the *persona designata* concept.⁹³ The incompatibility condition was explained in a trilogy of cases in the mid-1990s; in *Grollo* and *Wilson*⁹⁴ the High Court identified the scope and operation of the concept in relation to federal judges, while the landmark decision in *Kable* considered the application of the incompatibility principle to State courts forming part of the integrated federal judicature.

Development of the incompatibility condition

The decision of the High Court in *Grollo* cemented the incompatibility condition as a gloss on the *persona designata* concept. In *Grollo*, a majority of the High Court confirmed that the non-judicial function of issuing telecommunications intercept warrants was validly conferred upon federal judges as designated persons, that function not being incompatible with judicial office.⁹⁵ The conferral of non-judicial functions on judges as designated persons was subject to two conditions: the consent of the judge in question was required before a non-judicial function could be validly conferred upon them; and, in addition, the non-judicial function could not be 'incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.⁹⁶ The joint judgment in *Grollo* (Brennan CJ, Deane, Dawson and Toohey JJ) went on to outline three circumstances in which incompatibility might arise; the performance of non-judicial functions might require 'so permanent and complete a commitment' that the performance of 'substantial' judicial functions was impractical ('practical incompatibility'); the nature of the non-judicial functions might compromise or impair the ability of the judge to perform judicial functions with integrity ('judicial integrity incompatibility'); and finally, 'the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished'⁹⁷ ('public confidence incompatibility').⁹⁸

The 'public confidence'⁹⁹ category of incompatibility was explored in greater detail in the High Court's later decision in *Wilson*. In *Wilson*, a majority of the High Court held that the preparation of a report for the purposes of s 10 of the *Aboriginal and Torres Strait Islander Heritage and Protection Act 1984* (Cth) was incompatible with federal judicial office as it would jeopardise public confidence in the independence and impartiality of the judiciary.¹⁰⁰ In order to determine whether public confidence incompatibility existed, the function under consideration must satisfy the detailed criteria set out in the joint judgment of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ. First, the statute conferring a function on a judge as designated person must be examined; if the function is not 'an integral part of, or

closely connected with, the functions of the Legislature or the Executive Government', no incompatibility appears, and the inquiry ceases at this point (the 'close connection question'). If the function is part of or closely connected with the Legislature or the Executive Government, the mode of performance is considered in more detail; if the function is not performed 'independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under law', incompatibility exists (the 'decisional independence question'¹⁰¹). If the function must be performed independently, the basis on which any discretionary power is to be exercised must be explored; if a discretion is to be exercised on political grounds (that is, on 'grounds that are not confined by factors expressly or impliedly prescribed by law'), public confidence incompatibility may exist (the 'political grounds question'). Although 'a judicial manner of performance' does not guarantee that a discretion will not be exercised on political grounds, a failure to comply with the requirements of procedural fairness suggests that 'it is unlikely that the performance of the function will be ... free of political influence or without the prospect of exercising a political discretion' (the 'judicial manner qualification').¹⁰²

The close relationship of the incompatibility condition and the *persona designata* concept virtually guaranteed that the incompatibility condition would endure a level of criticism. Those concerned with the potential effect of the *persona designata* concept suggested that the incompatibility condition did not go far enough to adequately safeguard the independence of the federal judiciary.¹⁰³ The public confidence incompatibility test developed in *Wilson* has been impugned as inflexible,¹⁰⁴ and is said to rely upon vague and indeterminate criteria (the 'close' connection and 'political' grounds questions).¹⁰⁵ Despite recognising that the public confidence incompatibility test has 'not always been observed in practice',¹⁰⁶ the joint judgment does not seem to contemplate circumstances in which the question of compatibility (or constitutionality more broadly) requires some consideration of factors beyond those found in the public confidence test. The approach of Gaudron J, who acknowledged historical practice as permitting the performance of functions that might otherwise give rise to incompatibility, presents a noteworthy contrast.¹⁰⁷

Incompatibility and persona designata in the States

It is widely acknowledged that the constitutional arrangements of the Australian States do not require the strict separation of the judicial arm of government required by the federal *Constitution*.¹⁰⁸ However, the High Court recognised in *Kable* that it is beyond the power of a State Parliament to confer upon State courts functions that are incompatible with the position of those courts as potential repositories of federal jurisdiction.¹⁰⁹ The High Court has also recognised that the federal *Constitution* requires that there exist bodies fitting the description of the 'Supreme Court of a State', with all the characteristics that the expression entails.¹¹⁰ Despite initially appearing to be a concept of restricted application, the *Kable* principle has provided the basis for findings that legislation of State Parliaments impermissibly interfered with State courts on several occasions.¹¹¹

Given the proximity of the decisions in *Kable* and *Wilson*, it is unsurprising that the *persona designata* concept was referred to in *Kable*. Perhaps most famously, McHugh J observed that the interplay of the *Kable* principle and the *persona designata* concept remained unexplored.¹¹² The potential application of the *persona designata* concept to State judges was not considered by the High Court until its decision in *Wainohu*.

Wainohu v New South Wales

The decision of the High Court in *Wainohu* addressed a number of important questions regarding the role of the *persona designata* concept at the State level¹¹³ and the operation of the incompatibility condition.¹¹⁴ These questions arose in relation to the power purportedly conferred upon judges of the Supreme Court of New South Wales to designate a particular

group as a 'declared organisation' for the purposes of the *Crimes (Criminal Organisation Control) Act 2009* (NSW) (CCOCA). The High Court found (by a 6:1 majority, Heydon J dissenting) that the CCOCA was invalid as it impaired the institutional integrity of the Supreme Court of New South Wales.¹¹⁵ Despite being concerned with State courts and judges, *Wainohu* provides some insight as to the likely future application of the *persona designata* concept and the incompatibility condition.

Although the *persona designata* concept is treated with varying levels of enthusiasm in *Wainohu*, it seems that the concept remains relevant only as a factor in the process of determining whether the institutional integrity of a State court is compromised. For French CJ and Kiefel J the *persona designata* concept was simply an unwarranted complication in a State jurisdiction not directly affected by a constitutionally mandated separation of powers, and should not be elevated to the status of constitutional principle.¹¹⁶ Nevertheless, their Honours noted that an attempt to confer a function on a judicial officer as a designated person should be considered in determining whether the institutional integrity of a State court was affected by a particular legislative scheme, but would 'generally not be determinative'.¹¹⁷ The joint judgment of Gummow, Hayne, Crennan and Bell JJ seems equally reluctant to adopt the *persona designata* concept as a matter of constitutional principle in relation to State judges and courts.¹¹⁸

The future operation of the incompatibility condition (as it relates to functions conferred on judicial officers as designated persons) after *Wainohu* is also uncertain. Although both majority judgments in *Wainohu* refer to *Wilson*, neither clearly applies the 'public confidence incompatibility' test articulated in the joint judgment in *Wilson*. While Gummow, Hayne, Crennan and Bell JJ go so far as to rely upon the statement of principle found in Gaudron J's judgment in *Wilson*,¹¹⁹ French CJ and Kiefel J do not expressly rely upon any statement of principle from *Wilson*.¹²⁰ In what may be a related observation, French CJ and Kiefel J suggest that precisely formulated tests are of little utility in attempting to engage in evaluative judgments such as that associated with the concept of incompatibility.¹²¹ The implication seems to be that the evaluative judgment regarding incompatibility is best made without reliance upon a restrictive predetermined formula.

It is submitted that the reasoning in *Wainohu* indicates that emphasis should be placed upon the decisional independence of a judicial officer when assessing the question of compatibility of extra-judicial activities. The 'decisional independence question' and 'judicial manner qualification', both key elements of the public confidence incompatibility test, are effectively replicated in Gaudron J's reasoning in *Wilson*.¹²² The approach adopted by Gaudron J has the advantage of avoiding the two more contentious issues identified by the joint judgment in *Wilson*,¹²³ and seems to be framed in more flexible terms. This proposition is a shift in emphasis; the absence of a strict separation of judicial power seems to diminish the relevance of certain elements of the *Wilson* public confidence incompatibility test in the context of State judges.¹²⁴ It seems that any definitive re-examination of the *Wilson* principles would be more appropriately undertaken in the context of extra-judicial activity undertaken by federal judges.

The previously undeveloped concept of 'practical incompatibility' received limited attention in *Wainohu*. Only French CJ and Kiefel J turn their attention directly to the quantity of extra-judicial activity, noting simply that the identification of declared organisations might well be 'burdensome'.¹²⁵ Although Gummow, Hayne, Crennan and Bell JJ suggest that the capacity of the Chief Justice of the Supreme Court to withdraw a judge from extra-judicial activity¹²⁶ might balance the risk of practical incompatibility,¹²⁷ their Honours do not explain the source of any such incompatibility in the case. The demands of the CCOCA were explored in oral argument in *Wainohu*, with the parties accepting that a designated judge might be required to spend months if not years undertaking extra-judicial activity under the CCOCA.¹²⁸ The plaintiffs contrasted this with the relatively minor time commitment associated with other

forms of extra-judicial activity, such as addressing applications for warrants.¹²⁹ Although *Wainohu* does not suggest that a quantitative measure can be used to determine the existence of practical incompatibility, it is suggested that the scale of the functions conferred upon a judge should not be overlooked when addressing the question of incompatibility.

Wainohu does not indicate clearly the significance of a determination that practical incompatibility exists. The High Court in *Grollo*¹³⁰ suggested that practical incompatibility goes directly to the *validity* of legislation conferring functions on judges as designated persons; this reasoning appeared to be accepted by Gummow, Hayne, Crennan and Bell JJ in *Wainohu*.¹³¹ However, French CJ and Kiefel J imply that practical considerations are more directly related to the *desirability* of the conferral of extra-judicial functions.¹³² Were it applied rigidly, the concept of practical incompatibility might cast some doubt upon the validity of many long-established forms of extra-judicial activity.¹³³ The approach of French CJ and Kiefel J is perhaps best viewed as a pragmatic compromise which aims to incorporate practical considerations in a wider evaluative assessment of incompatibility. This flexibility would potentially alter the range of extra-judicial activity that might avoid invalidity as a result of practical incompatibility.

The decision of the High Court in *Wainohu* leaves unanswered some significant questions of constitutional principle affecting the capacity of judicial officers to engage in extra-judicial activity. The High Court confirms that the *persona designata* concept cannot be used to avoid the operation of the *Kable* principle and recognises the relationship of the concept of incompatibility at both the federal and State levels. However, the High Court does little to clarify the operation of the incompatibility condition and the public confidence incompatibility test. Although the *Wainohu* majority seem to de-emphasise some of the more challenging elements of *Grollo* and *Wilson*, the fate of the concepts developed in those cases is ultimately unclear. While the decision in *Wainohu* relates specifically to State judges and courts, and comments relating specifically to extra-judicial activities of federal judges might best be regarded as obiter, the approach adopted by the High Court suggests that, in the future, the incompatibility condition and the public confidence incompatibility test may not be applied rigidly where incompatibility is assessed in relation to federal judges.

Persona designata, incompatibility and extra-judicial activities

Several important points emerge from the High Court's development of the *persona designata* concept and the incompatibility condition. The *persona designata* concept is presently entrenched in the federal jurisdiction as a matter of constitutional principle, and will likely inform (but not determine) any assessment of the effect of a legislative scheme on the institutional integrity of a State court. The conferral of a function on a judicial officer as designated person requires a clear expression of legislative intention. Factors to be considered in determining the effect of legislation purporting to confer functions on judicial officers as designated persons include the descriptor used to identify the designated person, the nature of the power purportedly conferred, the source from which any decision of the designated person derives its legal effect and the extent of the protection afforded the designated person. The legislative formulation refined in the wake of *Hilton*, and effectively endorsed by the High Court in *Grollo*, demonstrates clearly the legislative intention required to confer a non-judicial function upon a judicial officer in an individual capacity.

A function conferred on a judicial officer as a designated person (or simply undertaken by a judge in a personal capacity) must not be incompatible with judicial office. Incompatibility might be found to exist where extra-judicial activity diminishes public confidence in the capacity of an individual judge or the judiciary, as an institution, to perform judicial functions with integrity. 'Public confidence' may be diminished where the judicial officer does not retain decisional independence in the performance of an extra-judicial function, or where an extra-judicial function is to be exercised on political grounds. A judicial manner of performance of

the function in question influences the approach to issues of both decisional independence and political grounds. Incompatibility might also be found to exist where the performance of extra-judicial activity is practically incompatible with ongoing performance of judicial functions.

The participation of judicial officers in extra-judicial activities remains constitutionally permissible. However, the range of activities which might be validly conferred upon judicial officers in a personal capacity is narrowed by the operation of the incompatibility condition. The precise scope of extra-judicial activities that might be compatible with the retention of judicial office remains uncertain; the question of compatibility is one of substance rather than form, and cannot be resolved without reference to a particular function or activity.¹³⁴ This means that individual legislative schemes and functions must be assessed with reference to the criteria of compatibility established by the High Court.

Part III The judiciary and integrity functions: incompatible?

The question that remains is whether integrity functions (as a subset of extra-judicial activity) might be validly conferred on judicial officers as designated persons or undertaken by judicial officers in their individual capacity. Integrity functions that cannot be validly conferred upon a Ch III court might be validly conferred upon Ch III judges as designated persons (or exercised by judges in their individual capacity), subject to satisfaction of the incompatibility condition. As the validity of the conferral of a function on a judicial officer requires consideration of the substance of the statutory regime under which the function is conferred, it is again necessary to address each of the examples identified individually. The statutory scheme purportedly conferring extra-judicial power is assessed, and questions of decisional independence and practical incompatibility are considered in relation to each function or activity.

Quasi-judicial review bodies

The participation of judges as presidential members of the AAT has been the source of controversy since the inception of the Tribunal. In *Drake*, the Full Federal Court found that judges were validly appointed to the AAT as designated persons,¹³⁵ a conclusion which has subsequently been endorsed by the High Court.¹³⁶ More challenging questions arise when the compatibility of AAT membership with the retention of judicial office is assessed. While the question of public confidence incompatibility has been the source of some concern, the joint judgment in *Wilson* persuasively asserted that the AAT retains decisional independence in conducting merits review.¹³⁷ Applications for merits review are assessed in accordance with the procedure established by the *Administrative Appeals Tribunal Act 1975* (Cth).¹³⁸ Further, the AAT is free from direction in the form of governmental policy.¹³⁹ While the AAT has wide remedial powers, those powers are not exercised in accordance with executive direction; the AAT conducts a hearing *de novo* before determining the 'correct or preferable' outcome in any given matter.¹⁴⁰ When combined, these factors demonstrate the independence of the Tribunal in the performance of its functions. The fact that the AAT tends to undertake activities in a manner reflective of judicial method also supports this conclusion.

Questions regarding the extent to which the procedure of the AAT might be constrained without affecting the perception that the Tribunal is independent of the executive government remain. In *Hussain*, the Full Federal Court addressed (in *obiter*) the validity of ss 39A and 39B of the *Administrative Appeals Tribunal Act 1975* (Cth), which affect proceedings in the Security Appeals Division of the AAT.¹⁴¹ Despite recognising the divergence of opinion regarding the desirability of the provisions, Weinberg, Bennett and Edmonds JJ concluded that the participation of a presidential member in the operation of the Security Appeals Division of the AAT was not incompatible with Ch III judicial office.¹⁴² Although the statutory regime would potentially deprive an applicant of procedural fairness in the form of a fair

hearing, the Tribunal was said to retain its decisional independence; despite the modified procedure, the Tribunal retained power to vary or set aside the decision under review.¹⁴³ In this sense, the conclusion in *Hussain* appears to be consistent with the principles identified in *Wilson* and affirmed in *Wainohu*; ss 39A and 39B certificates do not limit the power of the AAT to examine in full the evidence considered by the original decision maker, and to determine the correct or preferable outcome in the circumstance.¹⁴⁴ Further, certificate(s) issued under ss 39A and/or 39B would seem to be ‘an instrument made under law’, which the *Wilson* joint judgment did not regard as interfering impermissibly with the decisional independence of the designated judge.¹⁴⁵ It would seem that the provisions do not, on their face, restrict the decisional independence of the Security Appeals Division of the AAT and the presidential members involved in its activities.

However, the challenge might be found in the departure from a judicial manner of performance required by the provisions. By depriving the person seeking review in the Security Appeals Division of the AAT of both the opportunity to know the material informing the decision maker and the chance to comment on that material, the fair procedure generally associated with the Tribunal’s activities is removed.¹⁴⁶ It is well established that the requirements of procedural fairness are not static, and that the standard of conduct expected of an administrative decision-maker is not that required of a judicial officer.¹⁴⁷ Nevertheless, the fact that a judicial officer is involved in a process which does not require a fair hearing might suggest an absence of decisional independence (or at least create the appearance of the absence of decisional independence), and casts some doubt on the compatibility of the function with judicial office.

An assessment of practical incompatibility associated with membership of the AAT requires careful analysis. It seems clear that appointment as President of the Tribunal requires a substantial commitment of time, which would effectively prevent the performance of substantial judicial activities.¹⁴⁸ However, the mere fact that judicial officers are available to serve as members of the AAT in their extra-judicial capacity poses no immediate threat of practical incompatibility. The AAT itself reports that judicial officers participate in less than 1% of hearings conducted by the Tribunal.¹⁴⁹ It seems unlikely that any individual judicial member of the AAT, other than the President, is involved in the activities of the Tribunal to an extent which compromises their capacity to engage in judicial activities. Put simply, it is not clear that merely accepting appointment as a member of the AAT generates practical incompatibility.

Ultimately, it seems that the participation of judges in the activities of quasi-judicial review bodies such as the AAT is constitutionally permissible. Indeed, the example of the AAT demonstrates effectively the manner in which judicial officers (as designated persons) can be involved in a review process which ensures that they retain decisional independence, and avoids ongoing involvement in integrity functions to an extent which compromises ongoing performance of judicial functions. However, the example of the AAT also demonstrates the potential for any interference in the decision-making process (in which a judicial officer is involved) to cast immediate doubt upon the compatibility of a function with judicial office. The mere fact that a judicial officer has accepted an appointment to a quasi-judicial review body which performs integrity functions does not generate incompatibility.

Quasi-judicial investigations

Quasi-judicial investigative tasks may also be validly conferred upon Ch III judges in their personal capacity. In the Commonwealth jurisdiction, the *Royal Commissions Act 1902* (Cth) allows the Governor-General to issue a Royal Commission to ‘a person or persons’ of their choosing.¹⁵⁰ Although this provision does not evidence an intention to confer power upon a judicial officer as a designated person,¹⁵¹ features of the legislative scheme indicate an awareness that the provision may be used to confer a Royal Commission on a judicial officer

in a personal capacity.¹⁵² The widely held view that the power exercised by a Royal Commissioner is non-judicial supports this conclusion. Although the *Royal Commissions Act 1902* (Cth) does not attempt to confer a function on a judicial officer as a designated person, it contemplates that judicial officers will perform the function in their individual capacity.

The question that remains is whether the performance of a quasi-judicial investigative task such as a Royal Commission is compatible with the retention of judicial office. The 'person' conducting an inquisitorial/investigative Royal Commission concerned with the exercise of public power¹⁵³ is empowered to review and report upon the manner in which public power has been exercised, and may identify measures which might ensure that public power is utilised appropriately in the future. An inquiry of this nature is largely retrospective, focusing primarily on past conduct before addressing any future concerns. Although interaction with the legislative and executive arms of government may be necessary in exploring past conduct, the expectation is that the task will be performed free of executive direction. A judicial mode of performance, including public hearings and reporting, reinforces the conclusion that power is exercised free of influence.¹⁵⁴ The appointment of a judicial officer is often said to be an indication that independence from political influence exists.¹⁵⁵ However, an argument that decisional independence exists because a judicial officer is responsible for the conduct of a function, and that the function is therefore compatible with judicial office seems to be somewhat circular. Ultimately, it is difficult to conclude with certainty that decisional independence is retained by a judicial officer performing a quasi-judicial investigative activity such as a Royal Commission.

Quasi-judicial investigative tasks raise serious questions of practical incompatibility. The time commitment involved in the conduct of a Royal Commission is likely to be measured in months if not years. While seven Royal Commissions were issued by the Commonwealth government in the period between 1990 and 2006, on only one occasion was the final report presented within 12 months of the date of the letters patent.¹⁵⁶ Further, the conduct of a Royal Commission may require the judicial officer to withdraw completely from performance of judicial tasks. However, it seems that questions of practical incompatibility alone may not provide a sufficient basis for a conclusion that the incompatibility condition has been breached.¹⁵⁷ Much is to be said for an assessment of the *actual* practical incompatibility associated with a particular activity, in conjunction with other relevant factors, before reaching a conclusion that incompatibility exists.¹⁵⁸

Significant questions remain as to the compatibility of extra-judicial investigative activities with judicial office. It is not clear that judicial officers would retain decisional independence, and the significant practical effects of such activities cannot be overlooked. While past practice might be considered as a source of guidance, the conduct of Royal Commissions has proven so controversial that no uniform historical practice can be identified in the Australian context.¹⁵⁹ However, those judicial officers who have accepted and conducted Royal Commissions have done so in their individual capacity.¹⁶⁰ It is difficult to reach a confident conclusion as to the validity of legislation purporting to confer these integrity functions on judicial officers in their individual capacity.

Supervision of executive activity

It is clear that the power to supervise administrative activity may be conferred upon judges in their individual capacity; the example of the warrant issuing function under s 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth), conferred upon eligible judges under s 6D of that Act, has been addressed by the High Court in *Grollo*.¹⁶¹ Despite concluding (in *Grollo*) that the warrant issuing function was not incompatible with an eligible Judge's judicial office,¹⁶² the High Court has not been required to apply the more detailed public confidence incompatibility test developed in *Wilson* in this particular context.¹⁶³

The compatibility of the warrant issuing function with the retention of judicial office is uncertain. Judicial officers performing that function as designated persons may retain decisional independence; although judicial officers may receive information from the executive government,¹⁶⁴ and can even seek further information if required,¹⁶⁵ such material is received in accordance with law. The relevant legislation also identifies the standard an application must meet, reducing the appearance of subjective or politically motivated decision-making.¹⁶⁶ However, the warrant issuing process can be sharply contrasted with the regular manner of judicial activity. The warrant is (of necessity) issued *ex parte*, and the eligible Judge neither retains detailed records nor produces reasons for a decision.¹⁶⁷ As with the AAT, the absence of a fair hearing (when compared with the contested adversarial hearing that judges generally oversee) immediately generates concern. However, the integrity process would not, in this instance, involve any hearing (excepting the limited hearing available in the context of the AAT discussed above). This would seem even more likely to suggest an absence of decisional independence, and casts doubt on the compatibility of the warrant issuing process with the retention of judicial office.

It is not clear that the process of issuing warrants creates practical incompatibility. While Ch III judges remain available to issue warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) s 46, it does not appear that participation in that process compromises performance of judicial activities. If the assessment above is accurate, and the commitment of judicial officers to participation in the warrant issuing process can in fact be measured in minutes,¹⁶⁸ it does not seem likely that practical considerations will influence greatly a determination of compatibility in this instance.

The better conclusion may be that the warrant issuing function is *prima facie* incompatible, as a consequence of significant questions as to the decisional independence of the judicial officer engaged in the activity.¹⁶⁹ Historical practice may, however, allow the warrant issuing function to be performed by judges despite the appearance of incompatibility. Of particular relevance are the observations of Gaudron J in *Wilson*, which suggest that participation of judicial officers as individuals in the warrant issuing process might be constitutionally permissible; the weight of historical practice is said to ensure that judicial participation in the warrant issuing process does not generate incompatibility by jeopardising public confidence in the judiciary.¹⁷⁰

The potential application of the incompatibility condition in these three contexts reinforces essential features and elements of the established legal principles. These examples demonstrate the capacity of the incompatibility condition to produce varied results in what might, at least superficially, appear to be similar circumstances. The significance of decisional independence is again highlighted; it seems that any measure which permits interference with the process in which a judicial officer participates as a designated person (or in an individual capacity) immediately generates doubt as to the decisional independence of a judicial officer. It seems that decisional independence is most effectively maintained where the judicial officer (as designated person) participates in the operation of an established body, and engages in an established procedure which shares a range of features with the judicial process.¹⁷¹ Although *Wilson* suggests that directions made under law do not interfere with decisional independence, doubts must still exist where those directions permit (or require) a departure from the rules of procedural fairness.

The link between the focus on process when identifying integrity activities and the emphasis on an unimpaired process when assessing the potential validity of extra-judicial performance of those functions (in this Part) merits further exploration. The similarity may be purely coincidental. It may be that participation in a 'proper' process provides some reassurance that extra-judicial activity is 'safe' in the sense that judges are, and appear to be, free from interference which might compromise the neutrality of their activities. Concern with the

appearance of independence is central, not only to the validity of extra-judicial activity but also to the desirability of judicial participation in those functions and processes.

Part IV Judicial officers and integrity functions: the merits

The prudence of extra-judicial activity (in general terms, extending beyond integrity functions and processes) has proven a divisive topic in the Australian context. It is clear that maintenance of the independence and impartiality of the judiciary is the most critical factor in any assessment of the merits of extra-judicial activity.¹⁷² Almost all contributions to discourse regarding the merits of extra-judicial activity cite the independence and impartiality of the judiciary as a critical factor influencing identification of the extra-judicial functions (if any) which should be undertaken by judicial officers. Those who support extra-judicial activity argue that judicial participation ensures the independence and integrity of functions conferred upon judges.¹⁷³ However, those who regard extra-judicial activity (or particular forms of extra-judicial activity) as inappropriate assert that judicial participation in functions associated with the executive or legislative arms of government potentially compromises the reputation of the judiciary for independence and impartiality,¹⁷⁴ particularly where those functions provide the potential for political controversy.¹⁷⁵ The ultimate extension of this argument is that judicial officers must avoid all extra-judicial activity, lest the reputation of the judiciary be compromised. The two positions generate a paradox; the reputation of the judiciary for independence and impartiality becomes the primary argument both in support of and against the conferral of extra-judicial functions.¹⁷⁶

Attempts have been made to identify a compromise, which would allow allocation of a wider range of tasks to judges without generating the perception that the reputation of the judiciary has been sacrificed. Writing extra-judicially, Sir Gerard Brennan suggested that the conferral of a function upon a judge is defensible where 'indifference' as to outcome is the reason for selecting a judicial officer as the repository of power.¹⁷⁷ It is submitted that the integrity functions require dispassionate assessment of the manner and purpose of the exercise of power, with the result that extra-judicial performance of those functions might be more readily regarded as appropriate. Further, many of the integrity activities addressed above share a range of characteristics with the judicial method; this may enhance the appearance of neutrality. Further still, some integrity activities do not substantially affect the capacity of a judicial officer to perform judicial duties. It is submitted that the independence and impartiality of the judiciary is not necessarily compromised by extra-judicial performance of integrity functions.

The significance of judicial skill and experience is often cited as a factor motivating the conferral of extra-judicial functions on judicial officers. Judicial officers are skilled in conducting open public hearings, are readily able to interpret and apply relevant legal principles, are practised in the collection and analysis of large bodies of evidence¹⁷⁸ and are experienced in the production of written reasons explaining decisions.¹⁷⁹ Judicial experience in the conduct of a fair and unbiased hearing will also assist bodies in ensuring that the requirements of procedural fairness are observed. Each of these attributes is essential to the effective operation of the integrity branch. While neither the AAT nor a Royal Commissioner can resolve conclusively questions of law, any examination of the exercise of public power will of necessity require consideration of the nature and extent of that power. The activities of the AAT and Royal Commissions are generally conducted in public, and will often require attention to significant bodies of evidence and law. It would seem that judicial officers are particularly well-suited to these tasks.

Extra-judicial performance of integrity activities legitimises fourth arm institutions and practices. The participation of judicial officers can confer legitimacy upon institutions, functions and processes; the significance of judicial participation in the formative years of the AAT provides a notable example.¹⁸⁰ The involvement of judicial officers might also add

authority to the output of an integrity institution or process.¹⁸¹ However, the capacity of the legitimising effect of judicial participation to threaten the reputation of judicial officers as neutral and nonpartisan arbiters of disputes must be recognised. This concern becomes particularly significant where a judicial officer is appointed for what appears to be a political purpose, in order to legitimise the substantive outcome of an activity. While it is appropriate to be wary of such developments, it is submitted that concern is limited when the legitimising effect of judicial participation is confined to an institution or process. Where a judicial officer is appointed to an institution or process independently of the subject-matter of integrity activity (an appointment to the AAT, for example), any legitimising effect of the appointment of a judicial officer is confined to that institution or process itself. Such a legitimising effect does not represent a threat to the reputation of the judiciary for independence and impartiality.

It could be argued that retired judges might more appropriately undertake integrity activities and functions.¹⁸² Many retired judges have undertaken investigative tasks in the nature of a Royal Commission,¹⁸³ with some retired judges also accepting statutory office.¹⁸⁴ The contribution of retired judges to the operation and maintenance of the integrity system should certainly not be underestimated. There may be integrity functions which demand judicial skills and expertise but which are not compatible with the retention of judicial office; it is in relation to those activities and processes that retired judges may play an essential role in the operation of the integrity system. However, the availability of retired judges alone does not mean that 'active' judicial officers should be excluded entirely from participation in the integrity branch where the conferral of integrity functions is constitutionally permissible.

It is submitted that analysis of the merits of judicial participation in the integrity branch might best be focused on the nature and demands of particular integrity functions and processes. It seems inconceivable that any attempt would now be made to justify the participation of judicial officers at high levels of executive government.¹⁸⁵ It also seems unlikely that any superior court would now allow one in four of its members to become involved in extensive extra-judicial activities at any given time.¹⁸⁶ Although historical practices should not be forgotten or ignored, it is submitted that debate as to the merits of extra-judicial participation in the integrity branch might best be informed by contemporary attitudes. Not all integrity functions are performed in a manner averse to the judicial function; in many instances, the decisional independence of a judicial officer acting as a designated person is carefully protected. Not all the integrity activities in which judicial officers might participate require substantial commitments of time (and perhaps other resources). Each integrity function, activity or process is best examined on its own terms, in order to determine whether extra-judicial participation in the operation of the integrity branch is appropriate or desirable.

In 2007, the Australian Institute of Judicial Administration set out guidelines for decision-making in relation to the participation of judicial officers in extra-judicial activities:

Principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of the jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and approval to approach the judge in question. The head of the jurisdiction will consider the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court. The head of the jurisdiction will consult with other members of the jurisdiction as may seem appropriate. If there is no objection in principle, the head of the jurisdiction will consider whether the judge can be made available, and whether the first approach to the judge in question should be from the head of the jurisdiction or from a representative of the executive.¹⁸⁷

This approach is particularly apposite in the context of integrity activities and functions. While there may be occasions where extra-judicial participation in the integrity branch is clearly inappropriate, this is not always the case. However, any decision as to the suitability of

judicial participation in the integrity branch ultimately remains a matter for the judicial branch, the head of jurisdiction and the individual judicial officer in question.

Conclusion

Members of the judicial branch of government contribute to the operation of the integrity branch. Judicial participation in the fourth arm extends beyond the core public law function of judicial review of governmental action to incorporate a wider range of integrity activities and processes. In an extra-judicial capacity, members of the judiciary participate in quasi-judicial merits review bodies such as the Administrative Appeals Tribunal, in quasi-judicial investigations such as Royal Commissions, and in supervisory administrative processes such as the issue of warrants. Each of these functions retains an integrity dimension. Although the scale of judicial participation in these activities is not immediately overwhelming, there is evidence which suggests that extra-judicial performance of these integrity functions is likely to continue.

A range of integrity functions may be validly conferred upon judges as designated persons or in their individual capacity, as those functions are compatible with judicial office. A detailed review of the incompatibility condition highlighted the increasing significance of decisional independence in the operation of the incompatibility condition. Even the slightest interference with the decisional independence of a judicial officer performing an extra-judicial function potentially compromises the constitutionality of that activity.

While it is recognised that arguments both for and against extra-judicial activity have merit, this paper suggests that, on balance, extra-judicial participation in the integrity branch is acceptable. The assessment of the merits of extra-judicial activity on a narrower basis (in the context of integrity functions) provided an opportunity to review traditional arguments both supporting and rejecting extra-judicial activity. Any re-examination of the merits of extra-judicial activity should consider both the context in which extra-judicial activity is contemplated, and the nature of the specific function in question. This conclusion is broadly consistent with the direction provided by the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* in relation to extra-judicial activity.

Chapter III of the *Constitution* has continuing influence on the development of Australia's institutions of government. While the strict separation of judicial power prevents the conferral of non-judicial functions upon Ch III courts, non-judicial functions may be validly conferred upon judges in their personal capacity, where these are not incompatible with judicial office. The judges of State courts are similarly able to undertake integrity functions which do not impair the institutional integrity of a State court. Although restricted, the range of extra-judicial activities undertaken by judicial officers in their personal capacity represents a significant check on the exercise of public power. In their individual capacity, judges make a significant contribution to the operation of the integrity branch. They do so in a manner, and for a purpose, which should be recognised and maintained.

Endnotes

- 1 Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 123.
- 2 James J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 725.
- 3 Spigelman, above n 2, 726. The concept of 'integrity' itself requires little explanation; see AJ Brown, Brian Head and Carmel Connors, 'Introduction: Integrity Systems and Democratic Accountability' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 4-5 for a comprehensive review of the meaning of the term. Spigelman uses the phrase 'institutional integrity' to demonstrate that the integrity branch is directly concerned with the manner in which the institutions of government perform their allotted functions, rather than the character of behaviour of the individuals that comprise those institutions; see Spigelman, above n 2, 725.
- 4 See AJ Brown, 'What is a National Integrity System? From Temple Blueprint to Hip-Pocket Guide' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 26-27, 42.

- 5 AJ Brown, 'Putting Administrative Law back into Integrity and Putting the Integrity back into Administrative Law' (2006) 53 *Australian Institute of Administrative Law Forum* 32, 34-35. Such a characterisation has been endorsed by Spigelman; see James J Spigelman, 'The Significance of the Integrity System' (2008) 4 *Original Law Review* 39, 41. The recognition of a 'fourth arm' of government is not inimical to core principles informing Australia's constitutional structure. The concept of the integrity branch is an extension of the political theory of the separation of powers, which suggests that the major functions of government should be divided and distributed amongst the range of institutions that comprise the system of government so as to preserve the liberty of the individual citizen: see Jeremy Pope, 'National Integrity Systems: The Key to Building Sustainable, Just and Honest Government' in Brian Head, AJ Brown and Carmel Connors (eds) *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008) 21. This generates a 'mutual accountability' amongst the institutions of government, which (in theory) reduces the opportunity for corruption or inappropriate performance of public functions: see Charles Sampford, Rodney Smith and AJ Brown, 'From Greek Temple to Bird's Nest: Towards A Theory of Coherence and Mutual Accountability for National Integrity Systems' (2005) 64 *Australian Journal of Public Administration* 96, 98.
- 6 AJ Brown and Brian Head, 'Assessing Integrity Systems: Introduction to the Symposium' (2005) 67 *Australian Journal of Public Administration* 42, 42. It is not universally agreed that the integrity branch should be treated in this fashion; see Cheryl Saunders, *The Constitution of Australia – A Contextual Analysis* (Hart Publishing, 2011) 175, where it is suggested that the fourth arm is 'not yet sufficiently coherent to enable the intellectual construct of a 'system' to be used to develop and protect it'.
- 7 Brown, above n 5, 35.
- 8 The 'bird's nest' metaphor is said to imply a more open and flexible system that can function effectively where few of the individual components are 'independently strong'; see Sampford et al, above n 5, 104-106.
- 9 Brown, above n 4, 41. Ultimately, it may be that Frank Costigan QC's 'integrity family' metaphor is the best and most accurate way to group those institutions that perform integrity functions; see Frank Costigan, 'Australia's National Integrity Systems: Introducing a New Blueprint' (2005) 64 *Australian Journal of Public Administration* 40.
- 10 See Spigelman, above n 2, 730-737.
- 11 See Spigelman, above n 2, 730.
- 12 The decision of the New South Wales Court of Appeal in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 is a useful example, highlighting the capacity of superior courts to ensure that integrity institutions operate within the limits of their powers. See also James Wood, 'Ensuring Integrity Agencies have Integrity' (2007) 53 *Australian Institute of Administrative Law Forum* 11.
- 13 This term is used simply to indicate the exercise of power that is 'not, strictly speaking, judicial in character': see Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 166.
- 14 These examples are treated in some detail in the literature relating to extra-judicial activities. See also Connor, 'The Use of Judges in Non-Judicial Roles' (1978) 52 *Australian Law Journal* 482, 482, where a similar characterisation is identified.
- 15 For a useful analysis of the manner in which the term 'quasi-judicial' is used in the Australia federal context, see Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2010) 84-86.
- 16 See, for example, Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd edition, 2009) 155. Care must be taken in extending this analysis of the AAT to the various State Administrative Tribunals, which are not affected by the constitutional separation of judicial power to the same extent as federal administrative tribunals.
- 17 See *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943 (Hall SM).
- 18 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).
- 19 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
- 20 See Spigelman, above n 2, 730, where merits review does not seem to be treated as an integrity function; contrast John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 440 where administrative tribunals are included in the integrity branch.
- 21 See, for example, Allan Hall, 'Judicial Power, The Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13, 38-48; Peter Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 215, 224-225, 227.
- 22 See Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 333, who suggests that the process of merits review and judicial review (review of legality) overlap, but are not co-extensive.
- 23 *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1).
- 24 The term Ch III judges is used in this paper to refer compendiously to Judges of the Federal Court, Judges of the Family Court and Federal Magistrates.
- 25 *Administrative Appeals Tribunal Act 1975* (Cth) s 6(1).
- 26 See Part III below.
- 27 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161 (Brennan J (President)). The limitations of the judicial model of decision-making have always been understood by those who first implemented them; see, for example, Sir Gerard Brennan, 'Twentieth Anniversary of the AAT: Opening Address' in John McMillan (ed) *The AAT: Twenty Years Forward* (Australian Institute of Administrative Law, 1998) 5.
- 28 See Administrative Appeals Tribunal, *Annual Report 2010-2011*, 9.
- 29 Brennan, above n 27, 13; see also Rosemary Balmford, 'Administrative Tribunals and Sir Gerard Brennan – Some Specific Topics' in Robin Creyke and Patrick Keyzer (eds), *The Brennan Legacy – Blowing the Winds of Legal Orthodoxy* (Federation Press, 2002) 107-108.
- 30 The Administrative Appeals Tribunal's *Annual Report 2010-2011* indicates that judicial involvement occurs in between 0.5% and 1% of the hearings conducted by the Tribunal, and has occurred at a similar rate over the previous two years; see Administrative Appeals Tribunal, *Annual Report 2010-2011*, 136.
- 31 Leonard Hallett, *Royal Commissions and Boards of Inquiry* (Law Book Co, 1982) 1.

- 32 Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 22-29; note that the Australian Law Reform Commission recently adopted Prasser's framework in Australian Law Reform Commission, *Making Inquiries – A New Statutory Framework*, Report No 111 (2009) 57.
- 33 Prasser, above n 32, 23.
- 34 Prasser, above n 32, 23; see also *Royal Commissions Act 1902* (Cth), ss 2, 6B, 6F.
- 35 For a detailed review of the history of judicial involvement in Royal Commissions, see Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities' (1978) 52 *Australian Law Journal* 540; Sir Murray McInerney, Garrie Moloney and Douglas McGregor in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Australian Institute of Judicial Administration Inc, 1986); Tom Sherman, 'Should Judges Conduct Royal Commissions' (1997) 8 *Public Law Review* 5; George Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108.
- 36 Hallett, above n 31, 10; Sherman, above n 35, 6.
- 37 Prasser, above n 32, 27.
- 38 See Spigelman, above n 2, 729.
- 39 The obvious example in the New South Wales context is the 'Wood' Royal Commission (New South Wales, Royal Commission into the New South Wales Police Service (1997)).
- 40 Prasser, above n 32, 49.
- 41 See Prasser, above n 32, 49, who refers to the 1974 Royal Commission into Human Relationships, which (at first glance) does not seem to be concerned with matters of propriety in the exercise of public power.
- 42 Sherman, above n 35, 6; contrast Spigelman, above n 2, 729, which addresses Royal Commissions as an aspect of executive government.
- 43 This power has been augmented by statute in the Commonwealth jurisdiction; see Australian Law Reform Commission, *Making Inquiries – A New Statutory Framework*, Report No 111 (2009) 65-67, and the authorities cited therein.
- 44 It is notoriously difficult to draw a broad conclusion regarding the conduct of Royal Commissions in the Australian context; see discussion of the Irvine Memorandum at n 159 below.
- 45 Prasser, above n 32, Appendix 1.
- 46 Ibid.
- 47 *Kuru v New South Wales* (2008) 236 CLR 1, 15 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (emphasis added).
- 48 See Part II below.
- 49 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181, 200 n 95 and 96 [26] (French CJ and Kiefel J) (*Wainohu*).
- 50 This particular enactment has been used as an example as it was (in earlier incarnations) the source of the disputes in *Hilton v Wells* (1985) 157 CLR 57 (*Hilton*) and *Grollo v Palmer* (1995) 184 CLR 348 (*Grollo*), discussed below.
- 51 The inclusion of nominated AAT members as authorising officers was effected by the *Telecommunications (Interception) and Listening Device Amendment Act 1997* (Cth); see now *Telecommunications (Interception and Access) Act 1979* (Cth), s 6DA. Nominated AAT members involved in this activity would also be characterised as performing an integrity function.
- 52 'Issuing authority' is the term used to refer compendiously to both eligible Judges and nominated AAT members for the purposes of the *Telecommunications (Interception and Access) Act 1979* (Cth).
- 53 See *Telecommunications (Interception and Access) Act 1979* (Cth) s 103(ab).
- 54 Figure 1 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the *Telecommunications (Interception and Access) Act 1979* (Cth). The raw data contained in these reports has been tabulated and the proportion of issuing authorities presented in graphical form. These reports (prepared annually) identify the number of Ch III judges and the number of nominated AAT members available to issue warrants under s 46 *Telecommunications (Interception and Access) Act 1979* (Cth) in the reporting period (the reporting period extends from 1 July to 30 June). The data utilised in the preparation of Figure 1 was first published in Attorney-General (Commonwealth), *Telecommunications (Interception) Act 1979 (Cth) – Report for the year ending 30 June 1998* (1998). Reports for the reporting periods ending 30 June 1996 to 30 June 1999 do not appear to be available in electronic form. Reports presented for the reporting periods ending 30 June 2000 to 30 June 2011 are available at <http://www.ag.gov.au/Publications/Pages/PublicationsbyAtoZ.aspx#T>. Note that the reports appears as Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2006* (2006) in the years 2006 to 2011. Note that the range of agencies eligible to apply for telecommunications interception warrants under Part 2-5 *Telecommunications (Interception and Access) Act 1979* (Cth) has changed on several occasions throughout the period in which this data has been collected.
- 55 Table 1 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the requirements of the *Telecommunications (Interception and Access) Act 1979* (Cth) in the years 1997-1998 to 2010-2011. The availability of that data is as outlined in n 54 above.
- 56 Figure 2 is generated from data obtained from Reports prepared by the Attorney-General's Department in accordance with the requirements of the *Telecommunications (Interception and Access) Act 1979* (Cth) in the years 1997-1998 to 2010-2011. The availability of that data is as outlined in n 54 above; the qualifications expressed therein also apply. The relatively sharp increase in judicial participation in the warrant issuing function in the 2003-2004 reporting period is difficult to explain. A brief investigation reveals that applications of the New South Wales Police were directed almost exclusively to Federal Magistrates in the 2003-2004 reporting period, in stark contrast to the 2002-2003 and 2004-2005 reporting periods, where applications were directed almost exclusively to nominated AAT members. The relevant report (Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2004* (2004) 44) contains no direct analysis or explanation of the seemingly anomalous result.

- 57 Attorney-General (Commonwealth), *Telecommunications (Interception and Access) Act 1979 (Cth) – Report for the year ending 30 June 2011* (2011) 51.
- 58 Note that it would seem inappropriate (in this author's view) to translate a conclusion relating to this particular example across judicial participation in the warrant issuing function more broadly. The information addressed in this paper relates *only* to the issuing of telecommunications service warrants. It is not clear that this data supports any conclusion beyond the context of this particular type of warrant under this particular statutory scheme.
- 59 Fiona Wheeler, 'Federal Judges as Holders of Non-judicial Office' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, 2000) 451.
- 60 *Constitution*, s 71.
- 61 The difficulties encountered in classifying governmental powers are reflected in the recognition of a category of innominate powers. Innominate powers are those which might be classified as being of either a 'judicial' or 'non-judicial' nature. The related concept of the 'chameleon principle' dictates that innominate powers take their character from the body in which they are reposed by the legislature; for discussion of the relationship between the concepts of 'innominate powers' and the 'chameleon doctrine' see James Stellios, *The Federal Judicature: Chapter III of the Constitution – Commentary and Cases* (LexisNexis Butterworths, 2010) 146.
- 62 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).
- 63 *Ibid.*
- 64 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J) (*Tasmanian Breweries*).
- 65 *Ibid.*
- 66 *Tasmanian Breweries* (1970) 123 CLR 361, 394 (Windeyer J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).
- 67 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 67 (McHugh J).
- 68 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 271-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*Boilermakers*).
- 69 *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, 89-90 (Isaacs J).
- 70 *Boilermakers*' (1956) 94 CLR 254, 271-272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ)
- 71 See James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 114.
- 72 See, for example, Stellios, above n 71.
- 73 Some functions have been historically reposed in courts, and their continued exercise is justified on that basis; see, for example, Chief Justice Robert French, 'Executive Toys: Judges and Non-judicial Functions' (2009) 19 *Journal of Judicial Administration* 5, 14-16. The 'chameleon principle' might also be characterised as an exception to the second element of the separation of federal judicial power.
- 74 An examination of the 'formalist' and 'functionalist' approaches to the separation of judicial power is beyond the scope of this paper. For discussion of formalism and functionalism, see Sir Anthony Mason, 'A New Perspective on the Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; Walker, below n 75; Campbell, below n 99; Meyerson, below n 93.
- 75 Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 154.
- 76 As a principle of statutory interpretation, the persona designata concept has application in a range of contexts that do not involve judicial officers. Nevertheless, one of the most common contexts in which the doctrine was encountered was the 'conferring of judicial jurisdiction'; see D M Gordon, 'Persona Designata' (1927) 11 *Canadian Bar Review* 174, 174.
- 77 Gordon, above n 76, 174.
- 78 In dissent in *Boilermakers*', Webb J observed that the majority position might be overcome by legislation which empowered judges to exercise arbitral powers as designated persons; see *Boilermakers*' (1956) 94 CLR 254, 329-330 (Webb J).
- 79 *Grollo* (1995) 184 CLR 348, 363 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 80 *Boilermakers*' (1956) 94 CLR 254, 330 (Webb J). See also Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 180-182.
- 81 This may have more to do with a decline in the use of the concept as a drafting mechanism, and a more widespread failure to accept the second limb of *Boilermakers*' (which was the 'target' of the exception) than acceptance of the concept.
- 82 *Hilton* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ); cf 86 (Mason and Deane JJ).
- 83 Both the non-judicial nature of the warrant issuing power, and the fact that the warrant issuing power took effect as a result of the statutory scheme (rather than the inherent or implied powers of the Court of which the Judge was a member) were influential factors in the majority decision. Gibbs CJ, Wilson and Dawson JJ also noted that s 20 *Telecommunications (Interception) Act 1979 (Cth)* required specific authorisation in relation to individual judges in the States and Territories; this inconsistency was said to suggest that the functions were conferred on all judges in their individual non-judicial capacity: *Hilton* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ).
- 84 *Hilton* (1985) 157 CLR 57, 80 (Mason and Deane JJ).
- 85 *Hilton* (1985) 157 CLR 57, 81 (Mason and Deane JJ).
- 86 Mason and Deane JJ regarded the conferral of functions on some judges in an individual extra-judicial capacity as an indication that Parliament intended to confer functions on judges otherwise treated in the statute in their judicial capacity: see *Hilton* (1985) 157 CLR 57, 85-86 (Mason and Deane JJ).
- 87 *Grollo* (1995) 184 CLR 348, 361-362 (Brennan CJ, Deane, Dawson and Toohey JJ)
- 88 *Hilton* (1985) 157 CLR 57, 84 (Mason and Deane JJ).
- 89 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 41 (Kirby J) ('*Wilson*'). See Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7

- Public Law Review* 96, 100-102 for analysis of the failed attempt to prohibit judicial officers from holding executive office.
- 90 See, for example, *Crimes (Criminal Organisation Control) Act 2012* (NSW) s 5; *Inspector of Transport Security Act 2006* (Cth) s 78.
- 91 The majority were concerned that the independence of individual judges might be compromised or that extra-judicial activities might compromise the capacity of individual judges to perform their judicial functions: see *Hilton* (1985) 157 CLR 57, 73-74 (Gibbs CJ, Wilson and Dawson JJ). Mason and Deane JJ seem to be more concerned with the relationship between the function conferred *persona designata* and the performance of the judicial function more broadly; see *Hilton* (1985) 157 CLR 57, 83 (Mason and Deane JJ). These differences reflect the alternate views of the judges as to the appropriate construction of the statute in question.
- 92 This term is adapted from the joint judgment in *Grollo*; see *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 93 Denise Meyerson, 'Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa' (2003) 3 *Oxford Commonwealth University Law Journal* 181, 188.
- 94 *Wilson* (1996) 189 CLR 1.
- 95 *Grollo* (1995) 184 CLR 348, 368-369 (Brennan CJ, Deane, Dawson and Toohey JJ), 398 (Gummow J); compare 378-384 (McHugh J).
- 96 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 97 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 98 The shorthand references to the 'species' of incompatibility are adapted from Walker, above n 75, 159.
- 99 Although the limitations of the concept of 'public confidence' in this area are recognised (see Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183), this label is retained for the sake of consistency with earlier analyses of the decisions in *Grollo* and *Wilson*. The public confidence referred to in this instance might be characterised as 'deemed' public confidence; see HP Lee and Patrick Emerton, 'Judges and non-judicial functions in Australia' in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 411-412, citing Colin Campbell, 'An Examination of the Doctrine of *Persona Designata* in Australian Law' (2000) 7 *Australian Journal of Administrative Law* 109, 114, 120.
- 100 *Wilson* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J); compare 47, 39-47 (Kirby J).
- 101 This label reflects the language employed by French CJ in *South Australia v Totani* (2010) 242 CLR 1, 43 [62], 48 [70], 51 [78], 52 [82] (French CJ) and in the joint judgment of French CJ and Kiefel J in *Wainohu v New South Wales* (2011) 243 CLR 181, 216 [61], 216 [62], 217 [64] (French CJ and Kiefel J). The term has been defined by Martin Redish as indicating 'free[dom] from external or extraneous influences and pressures that might reasonably be thought to affect a decision'; see Martin Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46 *Mercer Law Review* 697, 707. See also Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, 2009) 1.
- 102 For the genesis of this passage (and the quotations within), see *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 103 See, for example, Walker, above n 75, 163-164.
- 104 Wheeler, above n 59, 463-464.
- 105 Fiona Wheeler, 'The Use of Federal Judges to Discharge Executive Functions: The Justice Matthews Case' (1996) 11 *Australian Institute of Administrative Law Forum* 1, 5-6.
- 106 *Wilson* (1996) 189 CLR 1, 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 107 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).
- 108 See Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 398 n 8 for relevant authorities.
- 109 *Kable* (1996) 189 CLR 51, 96, 98 (Toohey J), 102-103 (Gaudron J), 116-119 (McHugh J), 127-128 (Gummow J); see also *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ).
- 110 *Constitution*, s 73(ii); see *Kirk v Industrial Court (New South Wales)* (2010) 239 CLR 531, 580-581 [96]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 111 The High Court has found that State legislation infringed the *Kable* principle on more than one occasion; see *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181. See also the decision in *Kirk v Industrial Court (New South Wales)* (2010) 239 CLR 531, which bears some relation to the *Kable* principle. See Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2001) 35 *University of Western Australia Law Review* 227, Ayowande McCunn, 'The Search for a Single Standard for the *Kable* Principle' (2012) 19 *Australian Journal of Administrative Law* 93 for further analysis of the development of the *Kable* principle. Will Bateman's observations regarding the accuracy of the '*Kable* principle' label are noted; see Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 434.
- 112 See *Kable* (1996) 189 CLR 51, 117-118 (McHugh J).
- 113 These principles would also presumably apply to the Territories in equal measure.
- 114 See Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22 *Public Law Review* 259.
- 115 *Wainohu* (2011) 243 CLR 181, 219 [68], 220 [70] (French CJ and Kiefel J), 229-230 [109] (Gummow, Hayne, Crennan and Bell JJ).
- 116 *Wainohu* (2011) 243 CLR 181, 211 [49] (French CJ and Kiefel J).
- 117 *Wainohu* (2011) 243 CLR 181, 212 [50] (French CJ and Kiefel J).
- 118 *Wainohu* (2011) 243 CLR 181, 229 [106]-[107] (Gummow, Hayne, Crennan and Bell JJ). By way of contrast, Heydon J in his dissenting opinion expressed no doubt as to the operation and relevance of the
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- persona designata concept in determining that the relevant functions were conferred upon State judges as designated persons: see *Wainohu* (2011) 243 CLR 181, 245 [168] (Heydon J).
- 119 *Wainohu* (2011) 243 CLR 181, 225-226 [94] (Gummow, Hayne, Crennan and Kiefel JJ).
- 120 See *Wainohu* (2011) 243 CLR 181, 207 [41] (French CJ and Kiefel J) where their Honours discuss factors affecting the conclusion in *Wilson*.
- 121 See *Wainohu* (2011) 243 CLR 181, 201-202 [30] (French CJ and Kiefel J), where it is noted that 'questions of compatibility which require evaluative judgments are unlikely to be answered by the application of precisely stated verbal tests'.
- 122 *Wilson* (1996) 189 CLR 1, 25-26 (Gaudron J).
- 123 See footnotes 104 and 105 and accompanying text.
- 124 The 'close connection question' in particular would seem to be of reduced significance in the absence of a strict separation of judicial power in the States. The 'political grounds question' may also be of decreased significance in the State sphere, but does not appear to have been in issue in *Wainohu*.
- 125 *Wainohu* (2011) 243 CLR 181, 200 [27] (French CJ and Kiefel J). In argument, the plaintiff noted not only the demands placed upon the time of individual judges, but also stressed the reliance of a designated judge on court staff and court facilities (including a court room) in the performance of extra-judicial functions; see Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-574 (Kiefel J and M A Robinson), 1604-1606 (M A Robinson).
- 126 See s 5(6)(b) *Crimes (Criminal Organisations Control) Act 2009* (NSW).
- 127 *Wainohu* (2011) 243 CLR 181, 225 [93] (Gummow, Hayne, Crennan and Kiefel JJ).
- 128 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-574 (Kiefel J and M A Robinson), 3146-3154 (R J Meadows QC).
- 129 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCA Trans 319 (2 December 2010), 533-538 (M A Robinson).
- 130 *Grollo* (1995) 184 CLR 348, 365, 368-369 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 131 *Wainohu* (2011) 243 CLR 181, 225 [94] (Gummow, Hayne, Crennan and Kiefel JJ).
- 132 *Wainohu* (2011) 243 CLR 181, 200-201 [27], 201-202 [30] (French CJ and Kiefel J).
- 133 Walker, above n 75, 162.
- 134 *Wilson* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 135 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 413 (Bowen CJ and Deane J), 423 (Smithers J) (*Drake*).
- 136 The question is discussed in *Hilton* (1985) 157 CLR 57, 69 (Gibbs CJ, Wilson and Dawson JJ) and *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J). See also *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 260-261 [64]-[67] (Weinberg, Bennett and Edmonds JJ) (*Hussain*). Nevertheless, it is submitted that the legislative intention informing the *Administrative Appeals Tribunal Act 1975* (Cth) is not unequivocal. The descriptor 'Judges' is used to identify persons eligible for appointment as members of the Tribunal: *Administrative Appeals Tribunal Act 1975* (Cth), ss 6(2), 7(1). The term 'Judges', in the statutory scheme, refers to 'a Judge of a court created by the [federal] Parliament' (see *Administrative Appeals Tribunal Act 1975* (Cth), s 3), without any express indication that the term refers simply to Judges as a class of person eligible for appointment to the Tribunal. A similar formulation had posed difficulties for the High Court in *Hilton*: see *Hilton* (1985) 157 CLR 57, 84 (Mason and Deane JJ).
- However, several features of the *Administrative Appeals Tribunal Act 1975* (Cth) indicate a legislative intention to confer membership of the AAT on 'Judges' as designated persons. The AAT does not have power to enforce its decisions, which are treated as decisions of the person or office whose activities are under review: *Administrative Appeals Tribunal Act 1975* (Cth), s 43(6). In performing functions, members of the Tribunal receive the same protections and immunities as a judge of the High Court: *Administrative Appeals Tribunal Act 1975* (Cth), s 60. All members of the AAT may resign their commission at any time, effectively ensuring that participation in the Tribunal is consensual: *Administrative Appeals Tribunal Act 1975* (Cth), s 15. Further, and despite the AAT retaining some characteristics indicating that it exercises judicial power, the powers of the Tribunal are best classified as executive in nature: see Hall, above n 21, 54-55. These factors, absent in *Hilton*, support the prevailing assumption that membership of the AAT is conferred validly upon judicial officers as designated persons.
- 137 *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 138 *Wilson* (1996) 189 CLR 1, 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 139 See *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636-646 (Brennan J).
- 140 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).
- 141 The Security Appeals Division is one of the divisions of the AAT; see *Administrative Appeals Tribunal Act 1975* (Cth), s 19(2)(baa). A presidential member must preside over a hearing in the Security Appeals Division of the Tribunal: see *Administrative Appeals Tribunal Act 1975* (Cth), s 21AA(2). Section 39A *Administrative Appeals Tribunal Act 1975* (Cth) empowers the relevant minister (the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979* (Cth)) to issue a security/defence certificate indicating that particular evidence affecting a security assessment is not to be disclosed to the person subject to the security assessment in the process of merits review; see *Administrative Appeals Tribunal Act 1975* (Cth), s 39A(8)-(9). Section 39B *Administrative Appeals Tribunal Act 1975* (Cth) empowers the Attorney-General to issue a certificate which effectively prevents the disclosure of the contents of particular documents in proceedings before the Security Appeals Division; see *Administrative Appeals Tribunal Act 1975* (Cth), s 39B(2).
- 142 *Hussain* (2008) 169 FCR 241, 277 [151], 280 [171] (Weinberg, Bennett and Edmonds JJ).
- 143 *Hussain* (2008) 169 FCR 241, 279-280 [166] (Weinberg, Bennett and Edmonds JJ).
- 144 See ss 39A(3), (5), (9), (10), (17) and ss 39B(3), (7) *Administrative Appeals Tribunal Act 1975* (Cth), which demonstrate that the provisions in question focus on the protection of information provided to the Tribunal in the course of a hearing, rather than authorising the withholding of information from the Tribunal.

- 145 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 146 The majority judgments in *Wilson* were particularly careful to emphasise judicial manner of performance as an indicator of decisional independence. See *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).
- 147 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 [50] (Gaudron, Gummow and Hayne JJ). Although this observation is made in a case concerned with the apprehension of bias, there seems to be no reason why the observation cannot be transferred to the 'hearing rule'. See also *Hussain* (2008) 169 FCR 241, 279 [163] (Weinberg, Bennett and Edmonds JJ).
- 148 The Federal Court's Annual Report notes as much, reporting that three judges undertake work 'as members of other courts or tribunals [which occupies] all, or most, of their time'. However, the relevant judges and tribunals are not identified in the report; see Federal Court of Australia, *Annual Report 2010-2011* (2011) 3.
- 149 See n 29-30 and accompanying text above.
- 150 *Royal Commissions Act 1902* (Cth), s 1A.
- 151 In the sense that there is no indication of an intention to confer non-judicial power on a judicial officer by reference to the judicial officer in their individual or private capacity; see also *Wainohu* (2011) 243 CLR 181, 207 [40] (French CJ and Kiefel J).
- 152 The term *persona designata* would, in this context, be used as a shorthand expression of the exception to the second limb of the separation of federal judicial power which permits the conferral of non-judicial functions on judicial officers in their individual capacity. In particular, a 'person' conducting a Royal Commission receives the same protection and immunity as a Judge of the High Court,¹⁵² and a judicial officer holding a Royal Commission is empowered to punish for contempt: *Royal Commissions Act 1902* (Cth), s 6O(2). These provisions suggest an awareness that a 'judicial' Royal Commissioner does not retain inherent powers or protections when conducting the Commission, which is a task undertaken in an extra-judicial capacity.
- 153 This phrase is used to refer to the narrow subset of Royal Commissions identified as integrity functions in Part I of this paper.
- 154 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- 155 Prasser, above n 32, 26; AJ Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54-55.
- 156 Prasser, above n 32, Appendix 1.
- 157 See Part II above.
- 158 See Part IV below.
- 159 Judges of the Supreme Court of Victoria have been reluctant to conduct Royal Commissions, a position that can be traced to the Irvine Memorandum of 1923. On the other hand, Justices of the New South Wales Supreme Court have not (generally speaking) displayed a similar lack of enthusiasm for the task; see Winterton, above n 35, 110. For detailed analysis of historical (judicial) attitudes to Royal Commissions in the various Australian jurisdictions, see JD Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, McInerney, above n 35, Hallett, above n 31, and McInerney et al, above n 35.
- 160 French, above n 73, 16.
- 161 *Grollo* (1995) 184 CLR 348, 361-362 (Brennan CJ, Deane, Dawson and Toohey JJ), 374-375 (McHugh J).
- 162 *Grollo* (1995) 184 CLR 348, 366-367 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 163 It is not immediately clear that the warrant issuing function addressed in *Grollo* would necessarily 'pass' the *Wilson* inquiry with respect to public confidence incompatibility; see, for example, *Wilson* (1996) 189 CLR 1, 26 (Gaudron J) where her Honour suggests that extra-judicial participation in the warrant issuing process is valid as a result of historical practice, rather than the absence of incompatibility.
- 164 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 42(2), 46(1).
- 165 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 44, 46(1).
- 166 *Telecommunications (Interception and Access) Act 1979* (Cth), ss 46(2).
- 167 *Grollo* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ).
- 168 See n 129 above.
- 169 Such a conclusion would, of course, be contrary to the majority position in *Grollo*. The argument would, however, find support in the dissenting opinion of McHugh J in *Grollo* and the dissenting judgment of Kirby J in *Wilson*. See n 95 and 100 above respectively.
- 170 *Wilson* (1996) 189 CLR 1, 26 (Gaudron J).
- 171 Compare *Grollo* (1995) 184 CLR 348, 383 (McHugh J).
- 172 Jack Beatson, 'Should Judges Conduct Public Inquiries' (2005) 121 *Law Quarterly Review* 221, 222.
- 173 *Ibid*, 234-235.
- 174 See, for example, Winterton, above n 35, 118.
- 175 This seems to have been the primary concern of the Judges of Victorian Supreme Court in determining that it would be inappropriate for one of their number to conduct a Royal Commission in 1923. See n 159 above and the sources cited therein (particularly McInerney, above n 35, which contains a full reproduction of the Irvine Memorandum; see 541-542).
- 176 Beatson, above n 172, 234-235.
- 177 Justice Gerard Brennan, 'Limits on the Use of Judges' (1978) 9 *Federal Law Review* 1, 12. Although it is not clear that the comments of Brennan J (as he then was) were specifically directed to extra-judicial activities, the range of tasks considered in his analysis suggests that the analysis relates to those activities; see 11.
- 178 Beatson, above n 172, 230.
- 179 Murray Gleeson, 'The Judicial Method: Essentials and Inessentials' (2010) 9 *The Judicial Review* 377, 382. See also *Wilson* (1996) 189 CLR 1, 25-26 (Gaudron J).
- 180 Brennan, above n 27, 13. See also Justice Michael Barker, 'On Being a Ch III Judge' (2010) 35 *University of Western Australia Law Review* 1, 28.
- 181 Beatson, above n 172, 243.
- 182 See, for example, Walker, above n 75, 164; Winterton, above n 35, 113.
- 183 See Part I above.

- 184 See, for example, *Commonwealth Electoral Act 1918* (Cth) ss 5, 6 which permits either an active judge or a retired judge to serve as chairperson of the Australian Electoral Commission.
- 185 Beyond the historically entrenched practice of the Chief Justice serving as Lieutenant-Governor in some of the Australian States, including New South Wales: see *Wainohu* (2011) 243 CLR 181, 197 n 78 [22] (French CJ and Kiefel J).
- 186 See, for example, Winterton, above n 35, 110.
- 187 Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 21.

INTEGRITY AND LOCAL GOVERNMENT LAWS AND LAW-MAKING

*Dennis Pearce**

In his AIAL National Lecture Series, Chief Justice James Spigelman defined 'integrity' in the following way:

...institutional integrity goes beyond matters of legality. However, it is not so wide as to encompass any misuse of power. Beyond issues of legality, the integrity of a governmental institution is determined by two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which the institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected to obey.¹

I shall endeavour to show that the review undertaken by the courts of the legality of local government laws has an effect in requiring local authorities to meet these integrity requirements. While the courts state that their review is limited to issues of power, ie the standard test of unlawfulness, the practical result of judicial intervention has been to require fidelity to the public purposes for which local authorities are established and adherence, particularly to the procedural requirements, that are required for the making of local laws.

Oversight of local laws is also undertaken by some parliaments. This too has the effect of requiring local authorities to comply with a certain level of integrity.

Colouring the attitude of the courts and the parliaments in their consideration of local government laws is the representative nature of the law-maker. Local government authorities are elected. They are answerable to their electorate for the laws that they pass. They can be taken also to be influenced by their knowledge of the local situation with which a law has to deal when considering its content. The courts take this into account in determining issues where the application of a law impinges on its validity. However, the courts have not allowed a 'we know best what is good for our community' argument to prevail over wider rule of law considerations.

The position with parliaments is less clear. Political assessments are likely to impinge on decisions as to the desirability of the laws.

Judicial review

Unreasonableness

Until the latter part of the nineteenth century, courts adopted a robust approach to the validity of local laws. Using the 'unreasonableness' ground of review, they demonstrated a willingness to second guess councils as to what were appropriate laws for their local government area. While disguised as judicial review, it was merits review that was really being followed.²

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The position changed with the judgment of the Privy Council on appeal from the Supreme Court of New South Wales in *Slattery v Naylor*.³ The Privy Council noted that 'in determining whether or not a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned'. Further it noted:

Every precaution has been taken by the legislature to ensure, first, that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and, fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of Law, unless it be in some very extreme case, such as has been indicated.

In *Kruse v Johnson*⁴ the Divisional Court of the Court of Queens Bench said: 'in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges'.

This approach was endorsed soon after in Australia by the High Court in *Widgee Shire Council v Bonney*⁵.

Despite their assertion that the validity of the actions of local authorities should be approached with a light touch, the English courts had reserved the right to intervene should a by-law be such that no reasonable person could have made it. An element of merits review was thus retained.

Griffith CJ in the *Widgee Shire Council* case followed this approach in acknowledging that there was some basis for judicial oversight:

In my opinion, the legislature has deliberately and intentionally made the local authority, subject to the approval of the Governor in Council, the sole judge of such matters, subject only to this qualification, that, if a by-law is such that no reasonable man, exercising in good faith the powers conferred by the Statute, could under any circumstances pass such a by-law, it might be held invalid on that ground as being an abuse of the power, and therefore not within it.⁶

The approach was reiterated in *Williams v Melbourne Corporation*⁷ in what has come to be regarded as the foundation case on intervention by a court with local laws.

The approach endorsed in these cases seems to be an acknowledgment of an integrity standard. The status of the authority empowered to make laws is recognised. However, it is also said that there can be occasions when that authority has acted in a way that is unacceptable -- but unacceptable to whom? The court does not assert that it is to be unacceptable to it. That is the view that was abandoned with *Slattery v Naylor*. So it applies a 'reasonable person' touchstone, which is of course the judge by another name. But to stay within its constitutional/judicial power, it is necessary to dress up the conclusion as one that is based on rule of law grounds, namely, that the local law exceeds the power to make it.

However, the courts have seldom declared delegated legislation, including by-laws, to be invalid on the basis of unreasonableness. There was a period of over 50 years in Australia in which there was no reported case of a law being declared invalid on this ground.⁸ There has been some revival of use of the ground in more recent times but it is unlikely that it will ever be a basis for invalidity that will be adopted frequently. Courts do not want to become general merits reviewers. Nor, for the reasons set out in *Slattery v Naylor*, above, should they. Review for unreasonableness is akin to a reserve power for dealing with incidents of outrageous action or egregious error on the part of the law-maker – but this is another way

of saying that the court will intervene where there has been a failure to observe appropriate standards of integrity.

There is one group of cases that cuts across this approach to requiring a level of integrity in law-making. They suggest that, if more than one interpretation of a local law is available, it should be assumed that the local law will be reasonably enforced.⁹ This is not a justifiable assumption. Instances of petty enforcement of laws are all too well-known to those who have to deal with low level bureaucrats. A law that is capable of more than one interpretation should not be given the imprimatur of integrity if one of those interpretations would offend the integrity test. As was said by Thomas J in *Re Gold Coast City Council By-laws*,¹⁰ 'I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement "Trust us"'.¹¹

It can be seen that the approach of the courts to the review of the validity of local laws based on the ground of unreasonableness parallels that adopted in regard to administrative decisions. Courts will be slow to find that an administrative decision is bad on its merits. It must be of such a kind that no reasonable person could have made the decision. The existence of such a decision indicates that the power to make the decision must have been misunderstood and the decision is thus beyond power.¹¹

Improper purpose

Another way in which it can be suggested that the courts adopt an approach to review of local laws that serves an integrity function is in regard to review on the basis of improper purpose – that a power to make laws for a specific purpose cannot be used to achieve another purpose. Most cases involving an allegation of improper purpose are concerned with administrative decisions. However, Dixon J in *Arthur Yates & Co v Vegetable Seeds Committee*,¹² the principal case applying the improper purpose test to delegated legislation, said that no difference in principle existed between legislative and administrative decisions. There have been a number of cases where the courts have considered the improper purpose test as a basis for holding local laws invalid.¹³ The problem for those making such an assertion is, of course, to identify what the purpose of the local authority was in making the law – an issue exacerbated by the fact that the law was made by a multi-member decision-maker. However, the more recent of the cases noted have not seemed to be as troubled with this issue as was apparent in earlier days.¹⁴

There can be no doubt that integrity, however defined, requires that a power to make local laws must be used for the purpose designated. Use to achieve another purpose, no matter that such action is taken with the best of intent and achieves a valuable end, cannot be regarded as acting with integrity. The willingness of the courts to review local laws on the improper purpose ground thus enforces an integrity criterion.

Interpretation of power

The courts have also been very attentive in their interpretation of the power that is being exercised to make local laws. This is exemplified by the scope ascribed to the commonly found power to regulate an activity. 'Regulation' has been said not to permit the prohibition of the relevant activity.¹⁵ And this has been extended to declaring invalid a by-law made under a power to regulate that requires approval from a local authority before it may be undertaken.¹⁶ This is because a court cannot effectively review a refusal to approve the activity if the local authority complies with the general administrative law decision-making criteria.¹⁷ The local law in practical terms therefore prohibits the activity.

This analytical approach to the interpretation of power has been reaffirmed in somewhat more recent times in *Foley v Padley*.¹⁸

The oversight exercised by the courts of the use of law making powers can also be seen in the refusal to uphold the validity of local laws that impose a penalty unless the power to do so is expressly provided: *Re Port Adelaide Corporation; Ex parte Groom*.¹⁹ There a power to impose a monetary penalty was held not to permit a law requiring the forfeiture of the goods, the improper branding of which attracted the penalty. Similar thinking has led to it being held that the power to create an offence does not carry with it the power to provide for the avoidance of civil liability for the conduct penalised.²⁰

Likewise the control of activities through a licensing system is only permissible if power is given so to act.²¹ Where licensing is permitted, any licence fee must reflect the cost to the local authority of the activity being regulated and not be a revenue raising device.²²

It can be seen that these cases, while being directed to confining the law-making function of the local councils concerned to the power given to them by the empowering legislation, have also had the effect of imposing integrity standards on the councils.

Compliance with making procedures

The cases referred to above have been concerned with the substantive law-making power vested in the local authority. The courts have also rigorously enforced compliance with the procedures specified for the exercise of the power to make local laws.

It is usual for detailed provisions relating to the formalities for making laws to be set out in the empowering legislation. Requirements relating to the form of council resolutions, notice of intention to consider such resolutions, confirmation of their passing, notification to the affected public and so on are commonly specified. In cases from the nineteenth century to the present day such provisions have been interpreted to be mandatory.²³

Failure to comply with requirements relating to the publication of local laws has resulted in the laws being unenforceable.²⁴

These various cases pick up the second part of Spigelman CJ's definition of integrity relating to procedural values. Presumably the procedure has been specified to serve a public purpose. The courts have recognised this by requiring mandatory compliance.

General empowering provisions

There are a number of other more general matters where the approach of the courts will have a significant impact on the integrity of local authority law-making.

In the past, local government legislation commonly conferred law-making powers on local authorities by enumerating a list of matters upon which laws could be made. This was often coupled with a general power, but it was the exercise of the specific powers that usually attracted the attention of the courts. In recent years the method of vesting law-making power in local authorities has changed dramatically. The practice now is for power to be vested in very general terms and for no specific powers to be included.²⁵ On the face of it, giving power to local authorities in these terms imposes fewer constraints on their law-making power with a consequent diminution in the oversight role of the courts.

The scope of a general power when it appears with a list of specific powers has been the subject of some difference of view over an extended period. The position is discussed in *Corneloup*. The power there was to make laws 'for the good rule and government of the area and for the convenience, comfort and safety of its inhabitants'. The conclusion reached by Kourakis J after an extensive examination of the competing authorities was that:

The subject matter of a by-law made pursuant to the convenience power need not be strictly analogous to the subject matter of one or more of the specific powers. That approach unduly restricts the naturally wide terms of the convenience power. The question is whether the by-law made pursuant to the convenience power addresses a municipal purpose having regard to the subject matters of the specific powers.²⁶

As to the convenience power:

The convenience power extends to regulating conduct which... is properly a matter of municipal concern and which, if left uncontrolled, will materially interfere with the comfort, convenience and safety of the city's inhabitants.²⁷

In reaching this conclusion, Kourakis J referred to the discussion in *Lynch v Brisbane City Council* by Dixon CJ of the power in the *City of Brisbane Acts 1924* (Qld) to make ordinances for 'good government of the City and the wellbeing of its citizens'. His Honour said:

[the words give] a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.²⁸

It can be seen that the good government formula and its variants vest a much broader discretion in local authorities than the list of enumerated powers is likely to do. As such, it reduces some of the capacity of the courts to oversee the use by a local authority of its law-making power. The power enables an authority to make virtually any laws that have a connection with local government. When this is coupled with the reluctance of the courts to exercise too great a supervisory role over an elected body, it is apparent that there is likely to be a diminution in the role of the court as an overseer of integrity in the authorities' law-making.

The outcome in *Corneloup* reflected this. The Court concluded that a by-law that said 'No person shall without permission... on any road... preach, canvass, harangue, tout for business or conduct any survey or opinion poll' was a valid exercise of the convenience power. The court was not prepared to find that it was unreasonable to protect the convenience of road users in this way.

However, the Court did find that the by-law breached the implied Constitutional guarantee of freedom of communication.²⁹

Human rights issues: principle of legality

There has been an increasing community awareness of human rights issues. In one jurisdiction, human rights legislation applies to the content of local authority legislation.³⁰ Again this impacts on the integrity of local laws.

Apart from the ACT and Victoria, there is no statutory protection in Australian jurisdictions of human rights. However, the courts have laid increasing emphasis for interpretation purposes on what is called the principle of legality.³¹ This has effect independently of any statutory recognition of human rights. Under this principle:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.³²

On the abrogation of the rights:

... [it must be apparent that] the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.³³

This approach impacts in two ways on local laws. First, it will be assumed that the Act giving power to make local laws will not carry with it the right to make laws that abrogate or curtail certain basic rights or freedoms. Secondly, local laws will be interpreted in such a way as not to abrogate or curtail such freedoms.³⁴

The question that next arises is: What is the position in regard to a local law the only possible interpretation of which is that it curtails a basic right?

There are a number of examples of courts holding delegated legislation (not just by-laws) invalid because it was contrary to a basic right. Examples include:

- reversal of onus of proof;³⁵
- obstructing the highway;³⁶
- excluding procedural fairness;³⁷ and
- acquisition of property without compensation.³⁸

Management of streets has been a fruitful source of cases where the invasion of rights by strictures included in by-laws has been considered. For example, laws have been upheld as valid which regulated or prohibited:

- the playing of musical instruments in the street;³⁹
- the driving of cattle through the streets of Melbourne;⁴⁰
- distributing handbills or pamphlets;⁴¹
- erecting signs or fixing advertisements to traffic signs;⁴²
- the giving out or distributing of anything to another person in the Rundle Mall;⁴³
- taking part in any public demonstration or any public address;⁴⁴
- using 'insulting' words;⁴⁵ and
- erecting a tent and displaying signs and banners.⁴⁶

In most of these cases the law permitted the proscribed activity to occur 'with the permission of' the relevant local government authority.

In contrast with these decisions, there have been cases where a prohibition on activity in a street has been held invalid:

- carting night soil where this prevented neighbouring council areas from disposing of the substance;⁴⁷
- taking part in a procession without the Council's approval;⁴⁸
- carrying on any commercial activity adjacent to a street.⁴⁹

The result in these cases turned on the interpretation of the power to make the law and its effect in the specific situation before the court. However, the fact that there was an invasion of a generally recognised right was referred to and the court took it into account in determining whether the by-law fell within the authorizing power.

Constitutional right of freedom of communication

In addition to this common law position in regard to invasion of rights, the implied constitutional right of freedom of communication must be taken into account when determining the validity of local laws that attempt to constrain citizens' activities.

The test for determining whether there has been a breach of the implied right involves two questions: first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.⁵⁰

Dawson J in *Levy v Victoria*⁵¹ noted that the freedom of communication which the *Constitution* requires is a freedom which is commensurate with reasonable regulation in the interests of an ordered society.

It has thus been considered that the constitutional freedom of communication is not an absolute right of the kind provided by, for example, s 92 of the *Constitution*. Reasonable regulation of speech and other elements of communication is permissible.⁵²

Recently, Basten JA in *Sunol v Collier (No 2)* set out the approach to be followed in determining the constitutional validity of a law in the following terms:

- (a) construe the impugned law;
- (b) determine whether, properly construed, it effectively burdens political discourse;
- (c) if so, determine whether it is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the system of representative and responsible government prescribed by the *Constitution*; and
- (d) if it fails the foregoing test, whether it can be severed or read down in a manner which preserves validity of the law in part.⁵³

Applying the High Court cases that have considered and developed the constitutional right, the Full South Australian Supreme Court in *Corneloup* concluded that limiting the ability to speak in the street fell within the first part of the test in that it controlled communication on political and governmental matters. This is fairly obvious. However, it was the consideration of the manner in which that control was achieved that was more interesting. Kourakis J said:

...compatibility with the Australian system of responsible government requires that the legal and administrative burdens of any regulation of political speech fall on government and not the citizens who wish to engage in the political process. Members of a democratic society do not need advance permission to speak on political matters. The prohibition of disseminating a political message, unless permission of an arm of government is first obtained, is antithetical to the democratic principle.⁵⁴

His Honour rejected an argument that it could be expected that the proscription on speaking would be enforced reasonably:

... even if one were to assume that, notwithstanding the wide terms in which the discretion to give permission is expressed by the by-law, the officers of the City with authority to grant or deny permission honestly and diligently respected the constraints of the constitutional freedom on them, there remains a substantial likelihood that it will, from time to time, be infringed. Requiring applicants,

who have wrongly been denied permission, to take proceedings for judicial review would strangle political speech almost as effectively as an absolute prohibition.⁵⁵

This approach to the determination of validity had been rejected in *Meyerhoff v Darwin City Council* and *McClure v The Mayor and Councillors of the City of Stirling (No 2)*.⁵⁶ These decisions were not referred to in *Corneloup*. The two decisions in this respect do not fit altogether comfortably with the approach set out by Dixon J in the *Swan Hill* case⁵⁷ that it was relevant to take into account in determining validity that the need to seek permission from an authority is, in practical terms, a prohibition as the courts have only limited power to review the exercise of the discretion. Kourakis J was also influenced by the fact that having to seek permission to communicate was itself a constraint on the freedom guaranteed by the *Constitution*.

It is interesting to note that Kourakis J found that the by-law was a proportionate exercise of the 'convenience' power but imposed a disproportionate burden on constitutionally protected political communication. It is not immediately apparent why a different standard should apply.

Corneloup sets a clear integrity standard with which local authorities must comply.⁵⁸ However, it is apparent from the other cases referred to above that making out a claim that the control imposed on freedom of communication is not reasonable will not be easy. The circumstances in which the controls are imposed will be examined carefully and the rights of others, for example, to use public places, not to be subjected to offensive conduct by others and not to have to contend with littering, will be taken into account in determining the validity of the local law.

Ousting of judicial review

A further step by the courts in ensuring the integrity of local laws has been their attitude towards the interpretation of clauses that purport to limit review – ouster or privative clauses. As in regard to attempts to limit review of administrative decisions, such clauses have been construed narrowly to limit their effect on the power of the courts. For example, clauses saying that by-laws, once made, are 'to have the full force of law' or that the production of a copy was 'conclusive evidence' of the legality of the by-law have been held not to limit the courts' power to consider validity questions.⁵⁹

The former *City of Brisbane Acts 1924* (Qld) contained a section saying that ordinances made by the council were to be taken to have been duly made and to be within the powers of the council. Despite this apparently clear assertion of deemed validity, in *Lynch v Brisbane City Council* Dixon CJ, with whom the other judges agreed, said:

What the final words of subs (4) of s 38 require after the expiration of the period for the parliamentary disallowance of an ordinance purporting to have been made under the City of Brisbane Acts is that the ordinance should be deemed to have been duly made and to have been within the powers of the Council. It may be that an ordinance the object and operation of which, ascertained from its contents and the known facts to which it would apply, are found to lie altogether outside the province of the Council as a subordinate legislative body could not gain the benefit of the conclusive presumption which sub-section (4) provides. That might be because such a measure ought not to be considered to purport to be made pursuant to the Act or it might be because of the general principles governing the interpretation of an enactment like sub-section (4).⁶⁰

This approach of the courts has prevented the removal of the essential jurisdiction of the courts to require local authorities to justify their exercise of law making powers. The courts check on legality with its consequent requirement of integrity cannot be avoided in this way.

A similar approach has been adopted to suggestions that, because a local law is subject to tabling and review by the parliament, the courts should not review its validity once the tabling period is over. This argument has received short shrift.⁶¹

Charter of Human Rights

It would seem that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has relevance to issues of integrity in relation to local laws. Section 38 provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. It appears that this requirement is applicable to the making of laws by local authorities. However, I have not been able to find any examples of the operation of the Act in this respect.⁶²

Parliamentary review

One of the reasons given in *Slattery v Naylor* for courts to limit their review of local laws was that opportunity was given the parliament to review them.⁶³ However, parliamentary review of local laws is not universal in Australia.

The Northern Territory, South Australian, Tasmanian and Western Australian Parliaments are empowered to review local laws with a view to their possible disallowance. The vigour with which local laws are overseen in the four States varies (as does their oversight of other delegated legislation). However, it is noteworthy that the WA parliament disallowed two local laws in 2011.⁶⁴

In contrast, and rather surprisingly, the Parliaments of the three larger States do not review local laws. The Parliaments of NSW and Victoria have active committees that review other forms of delegated legislation. Why this review does not extend to local laws is not clear, particularly when regard is paid to the extent to which laws are made by local authorities.

Queensland is different in that it does not now have a scrutiny committee but entrusts the task of overseeing both bills and statutory instruments to the subject area committees of the Parliament. However, local laws are not required to be tabled and are therefore not subject to parliamentary review.⁶⁵ There is, however, a requirement that before a local law is made there must be consultation with relevant State government entities and the law cannot be made unless the Minister is satisfied that overall State interests are satisfactorily dealt with.⁶⁶

The absence of a scrutiny role for these parliaments is difficult to understand. It leaves a very considerable gap in the overall oversight of local laws in these jurisdictions.

Strengthening integrity obligations

How might the requirement that local authorities adhere to a standard of integrity in their law-making be strengthened?

(1) *Review for uncertainty*

One step that could be taken is for the courts to modify their approach to review of local law on the ground of uncertainty. While our constitutional theory does not contemplate the possibility of the courts declaring Acts of Parliament to be invalid because they are uncertain, no such constraint applies in regard to legislation made by the executive. If a court is satisfied that delegated legislation does not adequately state the obligations imposed on persons, there is much to be said for its declaring the legislation to be invalid. It seems that little harm would be done if local government authorities were required to state the obligations it imposes upon citizens in clear terms. This is of particular significance in the light of the growing

practice of prescribing obligations by incorporation of other instruments by reference. The courts have endorsed this practice⁶⁷, yet it can make it very difficult for a citizen to ascertain the law.

(2) Access to local laws

Access to local laws is essential if integrity in law-making is to be achieved. A person should simply not be subject to obligations if it is not possible for him or her to ascertain what those obligations might be. With this in mind, it is worth noting s 120(4) of the Victorian *Local Government Act 1989* which reads:

- (4) Even though a local law has come into operation-
 - (a) a person cannot be convicted of an offence against the local law if it is proved that at the time of the alleged offence a copy of the local law could not be purchased or inspected at the Council office during the Council office's office hours; and
 - (b) a person cannot be prejudicially affected or made subject to any liability by the local law if it is proved that at the relevant time a copy of the local law could not be purchased or inspected at the Council office during the Council office's office hours.

The inclusion of such a provision in other jurisdictions would be of value in ensuring the integrity of local laws.

(3) Availability of review action

The matters discussed in this paper are based on the review power of the courts. However, the number of cases that come before the courts is minimal. This is in part because action can usually only be brought by a person who is affected by the legislation. This restriction flowing from the law relating to standing to bring an action is overcome in Victoria and South Australia by provisions in the respective Local Government Acts that allow a 'person' in Victoria and an 'elector' or 'person with a material interest' in South Australia to try the validity of a local law.⁶⁸

The inclusion in the relevant law of a provision of this kind in other jurisdictions would assist in ensuring the accessibility of judicial review as a mechanism for ensuring integrity in local law making.

(4) Legislating for integrity

Is it possible to increase integrity obligations by legislating? In some jurisdictions an attempt has been made to do this.

The *Legislative Standards Act 2001* (Qld) sets out 'fundamental legislative principles' that are to be applied in the drafting of Queensland legislation and that guide the scrutiny of legislation in Queensland. Queensland committees, when examining delegated legislation, are required, under s 93(1)(b) of the *Parliament of Queensland Act 2001* (Qld), to consider the application of the fundamental legislative principles to delegated legislation. These principles apply to local laws. Section 4(3) of the Act requires legislation to have 'sufficient' regard to rights and liberties of individuals.

The section continues:

whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- (b) is consistent with principles of natural justice; and

- (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
- (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
- (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
- (f) provides appropriate protection against self-incrimination; and
- (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
- (h) does not confer immunity from proceeding or prosecution without adequate justification; and
- (i) provides for the compulsory acquisition of property only with fair compensation; and
- (j) has sufficient regard to Aboriginal tradition and Island custom; and
- (k) is unambiguous and drafted in a sufficiently clear and precise way.

It is not apparent what effect these requirements have had on the content of Queensland local laws. As they are not reviewed by the Queensland Parliament, it may well be that, in regard to local laws, they are no more than exhortatory.

A more positive attempt to impose integrity requirements in their law-making on local authorities are provisions to be found in the South Australian and Northern Territory Local Government Acts.

Sections 189-190 of the Northern Territory Act appear to have found their genesis in sections 247-249 of the South Australian *Local Government Act*. However, they impose greater integrity obligations on Northern Territory local authorities. The sections read:

189---Principles applying to by-laws

- (1) A by-law must conform with the following principles:
 - (a) a by-law must not exceed the power under which it is purportedly made;
 - (b) a by-law must not, without clear authority:
 - (i) operate retrospectively; or
 - (ii) impose a tax;
 - (c) a by-law must not shift the onus of proof to the accused in criminal proceedings unless:
 - (i) the offence is a parking offence or other minor traffic infringement; or
 - (ii) the shift of onus concerns only formal matters or matters peripheral to the substance of the offence; or
 - (iii) there is clear authority in the authorising legislation to shift the onus of proof to the accused;
 - (d) a by-law must not infringe personal rights in an unreasonable way or to an unreasonable extent.
- (2) A by-law should reflect the following principles:
 - (a) a by-law should be consistent with other legislation applying in the council's area;
 - (b) a by-law should not impose unreasonable burdens on the community;
 - (c) a by-law should not restrict competition unless the benefits of the restriction clearly outweigh the detriments;
 - (d) a by-law should avoid duplication of, or overlap with, other legislation;
 - (e) a by-law should be consistent with basic principles of justice and fairness;
 - (f) a by-law should be expressed plainly and in gender neutral language.

- (3) If a by-law infringes one or more principles stated in subsection (2) it is not necessarily invalid on that ground, but a court, in considering whether the by-law represents a reasonable exercise of the power under which the by-law was made, must take the infringement into account.
- (4) This section does not affect the validity of a by-law made before the commencement of this Act.

190---Making by-laws

- (1) Before a council makes a by-law:

....

- (c) the council must obtain a certificate from a legal practitioner certifying that, in the legal practitioner's opinion, the by-law may be made consistently with the principles prescribed in this Part.

It can be seen that this provision provides a statutory statement of the integrity principles that should underlie the making of by-laws.⁶⁹ It may be thought to be merely words indicating a desirable end. However, it moves away from mere exhortation by inviting a court to take the principles into account in determining validity. This, together with the requirement for a legal practitioner's certification of consistency with the principles, gives teeth to the operation of the provision. It is a precedent that is well worth other jurisdictions exploring.

Obligations of Parliaments and other review bodies

Finally, it should be said that judicial review is a cumbersome method for securing a level of integrity in local government law making. It is therefore incumbent on bodies which have the power to review local laws, that is, Ministers and Parliaments, to exercise those powers carefully and genuinely. It should not be assumed that local authorities are only answerable to their electorates. They have a responsibility to exercise the significant law-making powers vested in them with integrity and their actions need to be constantly called to account on that basis.

Endnotes

- 1 AIAL National Lecture Series on Administrative Law No 2, Lecture 1, p 2.
- 2 This background is discussed in the judgment of Kourakis J (with which the other members of the Full Court agreed) in *The Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 (*Corneloup*). This decision is referred to throughout this paper. However, it should be borne in mind that leave to appeal against the decision of the Full Court was given by the High Court on 11 May 2012.
- 3 (1888) 13 App Cas 446: prohibition on using cemeteries that are within a specified distance of houses.
- 4 [1898] 2 QB 91: prohibition on singing and playing an instrument in a road after being requested to desist by a constable or a house owner.
- 5 (1907) 4 CLR 977: prohibition on driving a vehicle in a way that will damage a waterway or gutter.
- 6 At 983.
- 7 (1933) 49 CLR 142: prohibition on driving cattle through streets of Melbourne city.
- 8 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 21.5.
- 9 *Proud v City of Box Hill* [1949] VLR 208; *Southorn v Jovanovic* (1987) 63 LGRA 277.
- 10 [1994] 1 Qd R 130, 133: a law forbade the selling of goods or conducting of commercial activities from a road or from a building abutting a road without a licence. The effect of this would have been to require every commercial enterprise on the Gold Coast to obtain a licence. See also *Vanstone v Clarke* (2005) 147 FCR 299, 339.
- 11 Jenkinson J in *Octet Nominees Pty Ltd v Grimes* (1986) 68 ALR 571 at 573 seemed to suggest that a higher degree of unreasonableness would have to be shown to invalidate a regulation that had been tabled and not disallowed. In *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463 at 477; 27 ALD 633 at 645 and *Donohue v Australian Fisheries Management Authority* (2000) 60 ALD 137 at 143 the courts referred to a challenge to the validity of legislation having to meet 'a much sterner onus' than that applicable where an administrative decision is under review.

- 12 (1945) 72 CLR 37, 80.
- 13 *Re the Mayor etc of the City of Hawthorn; Ex parte Co-operative Brick Company Ltd* [1909] VLR 27; *Re a By-Law made by the District Council of Prospect; Ex parte Hill* [1926] SASR 326; *Bailey v Conole* (1931) 34 WALR 18; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291; *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322; *Austral Monsoon Industries Pty Limited v Pittwater Council* (2009) 75 NSWLR 169.
- 14 See particularly the NSW Court of Appeal in *Austral Monsoon Industries Pty Limited v Pittwater Council* (2009) 75 NSWLR 169, 187; [2009] NSWCA 154, [99] where the direction of interrogatories to a decision-maker is mentioned as being among the judicial mechanisms that could be used for the ascertainment of the decision-maker's purpose in making a decision.
- 15 *Melbourne Corporation v Barry* (1922) 31 CLR 174.
- 16 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746.
- 17 That is, relevancy, procedural fairness, etc.
- 18 (1984) 154 CLR 349.
- 19 [1922] SASR 35.
- 20 *Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438.
- 21 *Re Glenelg Corporation By-Law No XXIII; Ex parte Madigan* [1927] SASR 85.
- 22 *Marsh v Shire of Serpentine Jarrahdale* (1989) 120 CLR 572; *Douglas Shire Council v Queensland Ombudsman* (2005) 141 LGERA 237.
- 23 See for example, *Re the Local Government Act 1874; Ex parte Taylor* (1885) 6 ALT 170; *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291.
- 24 *Tucker v Bishop* [1936] SASR 345; *N Simms & Sons v Douglas SC* (1987) 63 LGRA 25.
- 25 NT: *Local Government Act*, s 188: 'good governance'; Qld: *Local Government Act 2009*, s 28: 'necessary or convenient for the good rule and government of [the] local government area'; SA: *Local Government Act 1999*, s246: 'by-laws that are within the contemplation of this or another Act'. However, a number of specific powers set out in the preceding 1934 Act have been continued in force; Vic: *Local Government Act 1989*, s 111: 'local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act'; WA: *Local Government Act 1995*, s 3.5: 'prescribing all matters required or permitted or necessary or convenient for it to perform its functions under this Act'.
- 26 110 SASR 334, 360.
- 27 At 361.
- 28 (1960) 104 CLR 353, 364.
- 29 See below.
- 30 Victoria: *Charter of Human Rights and Responsibilities Act 2006*. The ACT also has Human Rights legislation, the *Human Rights Act 2004*, but there is no local authority in the ACT.
- 31 See generally, DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) ch 5.
- 32 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 per Gleeson CJ.
- 33 *Coco v R* (1994) 179 CLR 427, 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
- 34 It should be noted that the principle of legality is an interpretation principle only and is different from any implied constitutional right.
- 35 *Willoughby Municipal Council v Homer* (1926) 8 LGR 3.
- 36 *Re The Municipal Corporations Act 1890; Ex parte Burford* [1920] SASR 54
- 37 *R v City of Whyalla; Ex parte Kittel* (1979) 20 SASR 386 (where the empowering provision did allow the bias rule of natural justice to be displaced).
- 38 *C J Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400; *Re L H Hoare Pty Ltd's Application* [1976] Tas SR 156.
- 39 *Kruse v Johnson* [1898] 2 QB 91.
- 40 *Williams v Melbourne Corporation* (1933) 49 CLR 142.
- 41 *Samuels v Hall* [1969] SASR 296.
- 42 *Moule v Cambooya Shire Council* [2004] QSC 50; *Meyerhoff v Darwin City Council* (2005) 190 FLR 344; affirmed on appeal [2005] NTCA 8.
- 43 *Foley v Padley* (1984) 154 CLR 349. (Note that this decision was given before the decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 established the implied constitutional right of freedom of communication. It is questionable whether the same conclusion would now be reached. It is interesting to note that Murphy and Brennan JJ dissented from the majority.)
- 44 *Coleman v Sellars* [2001] 2 Qd R 565.
- 45 *Coleman v Power* (2004) 220 CLR 1.
- 46 *McClure v The Mayor and Councillors of the City of Stirling (No 2)* [2008] WASC 286.
- 47 *Ex parte Stafford; Re Shire of Boroondara* (1894) 20 VLR 23 and *Re Shire of Moorabbin; Ex parte McLorinan* (1895) 16 ALT 167.
- 48 *Melbourne Corporation v Barry* (1922) 31 CLR 174; *Barker v Carr* (1957) 59 WALR 7.
- 49 *Re Gold Coast City Council By-laws* [1994] 1 Qd R 130: see footnote 10.
- 50 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 568; 145 ALR 96, 108 as modified in *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182.

- 51 (1997) 189 CLR 579, 608; 146 ALR 248, 262-3. For recent consideration of the tests see *Wotton v Queensland* (2012) 285 ALR 1; *Liu v The Age* (2012) 285 ALR 386, 391.
- 52 *Sunol v Collier (No 2)* (2012) 289 ALR 128; [2012] NSWCA 44 per Bathurst CJ at [47].
- 53 At [75]. See also the recent decision of Griffiths J in *Harbour Radio Pty Limited v Australian Communications and Media Authority* (2012) 202 FCR 525; [2012] FCA 614.
- 54 110 SASR 334, 374.
- 55 Ibid.
- 56 See footnotes 42 and 46.
- 57 See footnote 16.
- 58 However, it was on this issue that the State and the City Council based their successful application for leave to appeal to the High Court.
- 59 *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 985; *Municipal District of Gundagai v Norton* (1894) 15 LR (NSW) 365, respectively.
- 60 (1960) 104 CLR 353, 365.
- 61 *Colman v Miller* [1906] VLR 622; *Costa v Shire of Swan* [1983] WAR 22, 29.
- 62 The operation of the section was discussed at the last AIAL National Conference by Joanna Davidson. Her paper is reproduced at (2012) 68 AIAL Forum 43.
- 63 See p 2.
- 64 See Joint Standing Committee on Delegated Legislation, *Report 46: City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011* (November 2011 (available at [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(ReportsAndEvidence\)/1BCB7CE6149A18E648257952000F8611?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/1BCB7CE6149A18E648257952000F8611?opendocument)), p 18.
- 65 *Statutory Instruments Act 1992* (Qld) s 9.
- 66 *Local Government Act 2009* (Qld) s 29A. See also the requirements of the Legislative Standards Act referred to below.
- 67 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (Lexis Nexis Butterworths, 4th ed, 2012) ch 24.
- 68 *Local Government Act 1989* (Vic) s 124; *Local Government Act 1999* (SA) s 276.
- 69 Cf also the Queensland *Legislative Standards Act 1992*.

ADMINISTRATIVE REVIEW COUNCIL: FEDERAL JUDICIAL REVIEW IN AUSTRALIA

On 24 September 2012 the Administrative Review Council released its Report No. 50, *Federal Judicial Review in Australia*. The Report is available on the Council's website, <http://www.arc.ag.gov.au>.

The Council has previously considered the topic of judicial review in 1986, 1989 and 1991. Since those reports were made, there have been significant changes in Australia's federal judicial review landscape, in particular in the growth of constitutional review under section 75(v) of the *Constitution* and its mirror provision, s39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). In view of these changes, it was considered timely to review the current state of judicial review in Australia, with a view to improving its effectiveness and accessibility.

The Council commenced this project in late 2010, and conducted extensive consultation throughout 2011. In addition to the 23 formal submissions received in response to the consultation paper (released in April 2011), the Council met with a number of academics, lawyers, government officials and experts in the field. It also obtained statistical data from the Federal Court and Federal Magistrates Court to assist in building an accurate picture of litigation trends in judicial review.

A Government response to the Council's report will be prepared in 2013.

Key findings

The Council draws two key conclusions about the current state of judicial review. First, it considers that the divergence between constitutional review and review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) is undesirable. For example, statutory judicial review only applies to 'decisions made under an enactment', whereas constitutional review applies more broadly. Similarly, there are a number of decisions which are specifically exempt from review under the *ADJR Act*, but which are not exempt from constitutional review. This can be confusing for applicants and can also create anomalies, as the procedure, standing and remedial rules depend on whether constitutional or statutory judicial review is sought.

Second, and in light of the above, the Council considers that the *ADJR Act* should be the primary avenue for federal judicial review. The *ADJR Act* offers a clear and simple procedure, effective rights of review and flexible and appropriate remedies, all underpinned by a right to written reasons. These features helped to change the face of judicial review in Australia when the Act was introduced in the 1970s. Over the intervening years they have played a role in improving the overall quality of government decision making and they remain relevant today. The recommendations, therefore, aim to restore the *ADJR Act* to a central place in the judicial review system.

Recommended model for judicial review

To achieve its aim of restoring the primacy of the *ADJR Act*, the Council proposes expanding the ambit of that Act to match the constitutional jurisdiction for review. The central recommendation of the Report is that a new section be included in the *ADJR Act* to allow an

application to be made under that Act whereby a person would otherwise be able to initiate proceedings in the High Court under s75(v) of the *Constitution*.

Following this model, the grounds and reasons provisions in the *ADJR Act* would not be available to a person bringing an application under this section. The right to review would be established by reference to the constitutional jurisdiction, with jurisdictional error as the threshold requirement. However, the simple procedure and flexible remedies in the *ADJR Act* would be available, making this an accessible and convenient alternative to review under s39B(1) of the *Judiciary Act*.

The expanded *ADJR Act* would be subject to some limited exceptions, including decisions about criminal justice matters, decisions under the Scheme for Compensation for Detriment caused by Defective Administrative, and some decisions made by the Governor-General.

Existing separate statutory arrangements for judicial review would also remain, namely the avenue for AAT appeals to the Federal Court in s44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), the separate scheme for taxation decisions, and Part 8 of the *Migration Act 1958* (Cth) (which mirrors the constitutional review jurisdiction for migration decisions).

The Council would ultimately prefer migration decisions to be brought back under the *ADJR Act*. However, it acknowledges that return to this structure would have resourcing implications for the courts and the Government, and the Report makes no formal recommendation about these decisions.

In relation to *AAT Act* appeals and taxation decisions, the Council acknowledges that these schemes are well-established and equally as effective as the *ADJR Act*. Abolishing them at this stage would create uncertainty and would impair, rather than improve, the accessibility of review. However, as the existence of separate statutory schemes implicitly detracts from the central role of the *ADJR Act*, new separate statutory schemes should not be established unless exceptional circumstances exist.

The Council also encourages the Government to reduce and rationalise the existing exemptions from the *ADJR Act*, which are set out in Schedules 1 and 2 to the Act and in the Regulations. Categories of decisions should only be exempted from review under the *ADJR Act* where truly necessary. In this Report, the Council has identified a set of general principles to guide decisions about exemptions, and has also made specific recommendations in relation to each of the existing exemptions from the *ADJR Act*.

Improving accessibility and effectiveness

To support the model outlined above, the Council has made recommendations aimed at improving the accessibility and effectiveness of the *ADJR Act*. The Report considers each aspect of the *ADJR Act* in detail—the ambit of review, the right to seek review, grounds of review, the obligation to give reasons, remedies and court procedures. An outline of our recommendations on these topics is set out below.

To strengthen and clarify the availability of review under the *ADJR Act*, the Council recommends extending review to specified reports and recommendations. This would be accomplished by adding a Schedule to the Act, which could be amended by Regulation, listing the reports and recommendations to which the Act applies. This would both clarify the availability of review in relation to particular reports and recommendations, as well as potentially expanding the availability of review. For example, it would be possible to extend review to reports and recommendations prepared for the Government by a third party, which are currently beyond the reach of judicial review.

It also recommend clarifying the rules on standing to ensure that public interest organisations can bring applications under the *ADJR Act*. This could be modelled on the existing provisions in the *AAT Act*, which provide that an organisation may bring an application for review if the decision relates to a matter included in the objects or purposes of the organisation. Enabling public interest applications under the *ADJR Act* will help to ensure that judicial review remains effective—particularly where people affected by a decision do not have the resources to seek review, or where a decision has an impact on the community as a whole, such as decisions which affect the environment.

While the Council canvassed possible amendments to the list of grounds for review in the *ADJR Act*, and the introduction of ‘general principles’ to assist in interpreting these grounds, the Report ultimately recommends that the existing list be retained (with a minor amendment to clarify the operation of the ‘no evidence’ ground). This list remains a valuable guide for legal practitioners and government decision makers, and there was broad support among the groups consulted for a codified list of grounds.

In this Report the Council reaffirms the importance of the obligation to provide reasons in section 13 of the *ADJR Act*. This provision is a key mechanism underpinning the availability of review under the *ADJR Act*. The right to reasons ensures that a person affected by a government decision can understand how and why that decision was made. This not only facilitates challenge to the legality of the decision, it improves communication and understanding between those making decisions and those affected by them. The Report specifically recommends that, where possible, reasons should be recorded at the time of making the decision. To strengthen the obligation to provide reasons, it was also recommended that, where an agency fails to provide adequate reasons, the court should take this into account in determining costs in an *ADJR Act* proceeding.

The Council’s recommended model would make the existing *ADJR Act* remedies available in most cases where the constitutional writs would otherwise be available. While the Council canvassed the possibility of including damages as an ancillary remedy under the *ADJR Act*, no recommendation was made on the proposal at this stage. However, in relation to costs orders, it was recommended that the *ADJR Act* be amended to specify that parties will bear their own costs, unless the court orders otherwise. Adverse costs can play a big role in discouraging people from pursuing their legal rights, particularly where an individual is considering legal action against a large government agency. This recommendation would go some way to addressing these concerns, while still enabling the court to make costs orders where appropriate.

The future of judicial review

The Council’s recommendations in this Report aim to ensure that the primary avenue for people to seek judicial review is accessible, simple and effective. The recommended model would address the current fragmentation of the system, combining the convenience and flexibility of the *ADJR Act* with the broad availability and well-established principles of review in the constitutional jurisdiction.

Judicial review is a central feature of Australia’s administrative law system, which upholds the lawful limits of executive power. It provides the individual aggrieved by a government decision with the means to challenge the lawfulness of that decision. A minimum guarantee of judicial review is enshrined in Australia’s *Constitution* as a fundamental aspect of our democracy. The Council’s Report aims to ensure that this guarantee is given form in a meaningful and accessible judicial review system.