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2015 National Lecture on Administrative Law  
by The Hon. Robert French AC  
Chief Justice, High Court of Australia

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## STATUTORY INTERPRETATION AND RATIONALITY IN ADMINISTRATIVE LAW: NATIONAL LECTURE ON ADMINISTRATIVE LAW 2015

*Chief Justice Robert French AC\**

800 years have passed since King John met with the Barons at Runnymede to seal a document which has become a part of a constitutional creation myth — the Magna Carta. The promises made in that document by King John, and repudiated within a matter of weeks with Papal authority procured by the King, were progenitors of the rule of law, described by one leading American constitutional law scholar as 'a celebrated historic ideal, the precise meaning of which may be less clear today than ever before.'<sup>1</sup>

The term 'rule of law' seems to have made its first public appearance as the title to Pt II of Dicey's treatise — *Introduction to the Study of the Law of the Constitution*. His concept involved three propositions, the first of which required that no man could be punished or made to suffer in body or goods except by a distinct breach of the law established by ordinary legal means before the ordinary courts of the land. That requirement was contrasted with systems of government based upon the exercise of wide arbitrary discretionary powers. The second proposition required the law and the jurisdiction of the ordinary courts to apply to every person. The third proposition located the rule of law in the decisions of the courts.<sup>2</sup> His was a view of the rule of law whose principal attributes were described by Professor Jeffrey Jowell as 'certainty and formal rationality'.<sup>3</sup> The idea of rationality informed by statutory purpose and meaning as interpreted by courts, as at least a partially unifying concept in administrative law, is the topic of this lecture. In its ordinary meaning one can say of it, as the plurality said of the legal standard of reasonableness in *Minister for Immigration and Citizenship v Li*,<sup>4</sup> it 'must be the standard indicated by the true construction of the statute.'

I use the term 'partially unifying' conscious of the risks attendant upon the construction of all-encompassing theories or expositions of any area of the law and, in particular, administrative law. While clarity and simplicity in discussion is a desirable objective, it should not obscure the sometimes unresolved untidiness of legal history and the coral reef incrementalism of the common law.

The disclaimer having been entered, I think it useful to talk about rationality in a general way in relation to the exercise of statutory powers. It is closely related to the idea of the rule of law in its application to constraints on official power. That leads me to make some observations about the place of judicial review in that context.

The rule of law was defined for the United Kingdom in the 11<sup>th</sup> edition of Wade and Forsythe as the foundation of the British constitution with 'administrative law [as] the area of its most active operation.'<sup>5</sup> The primary meaning given to it in that text is 'that everything must be done according to law'. That is:

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\* *Robert French AC is Chief Justice, High Court of Australia. This Lecture was presented at the National Administrative Law Conference, 23 July 2015. Canberra, ACT.*

Every act of governmental power, ie every act which affects the legal rights, duties or liabilities of any person, must be shown to have a strictly legal pedigree.<sup>6</sup>

Because that proposition, left to itself, would accommodate unrestricted discretionary powers, a secondary meaning is proposed namely, that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Those rules and principles direct attention to statutory interpretation. They are described in Wade and Forsyth as rules which invoke 'parliamentary intention' to construe wide statutory discretions. The courts, according to the authors, 'have performed many notable exploits, reading between the lines of the statutes and developing general doctrines for keeping executive power within proper guidelines, both as to substance and as to procedure'.<sup>7</sup>

The account thus given of the rule of law in administrative law is given for a country without a written constitution which limits legislative power and entrenches judicial review. The premise for its operation is the continuing availability of judicial review which can constrain executive power by the way in which statutes conferring that power are interpreted, including by the limiting implications of procedural fairness.

It is in the process of judicial review that the principle of legality productive of common law freedoms and fundamental human rights is applied. That term, somewhat maligned for its generality, designates an approach by the courts to the interpretation of statutes so as to avoid or minimise their infringement of common law freedoms and fundamental principles of human rights. It is reflected in Lord Hoffmann's statement, sometimes called 'canonical', that:

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>8</sup>

Mark Aronson and Matthew Groves, in the fifth edition of their valuable textbook on *Judicial Review of Administrative Action*, characterise the principle as having two components. The first is the assumption that parliament knows that the powers it grants will be interpreted wherever possible in conformity with fundamental rule of law values. The second is the rationalisation of that interpretive stance as a positive reinforcement of the democratic process whereby the courts force governments to make their intentions plain when introducing Bills into the Parliament which are designed to override those values.<sup>9</sup> There is an argument that the principle may be informed by fundamental human rights and freedoms declared in International Conventions to which Australia is a party. In that application it may converge upon the interpretive principle favouring constructional choices compatible with international obligations in place at the time of the enactment of the relevant statute. Moreover, if it can be said of a fundamental human right or freedom that it has become part of customary international law, then it may arguably inform the development of the common law, including the principle of legality.

The premise of the availability of judicial review is subject, in the United Kingdom, to the sovereignty of parliament which has been described as 'an ever-present threat to the position of the courts; [which] naturally inclines the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive's control'.<sup>10</sup>

Both the United Kingdom and New Zealand can be regarded, for Australian purposes, as thought experiments in which judicial supervision of the legality of executive action is not anchored by a written constitution entrenching judicial review. In New Zealand, s 15(1) of the *Constitution Act 1986* (NZ) provides that the Parliament of New Zealand continues to

have full power to make laws. There is no express limit on that power nor entrenchment of judicial review. Its entrenchment in the Australian setting has been established at Commonwealth and State levels by judicial interpretation of the Commonwealth Constitution and implications flowing from it.

In both the United Kingdom and New Zealand there have from time to time been suggestions of a common law constraint upon the powers of the parliament to unseat deep-seated common law doctrines and, in particular, a constraint on power to dispense with judicial review of administrative action. In 1979, Sir Owen Woodhouse, President of the Court of Appeal of New Zealand, speaking extra-judicially, stated that 'there really are limits of constitutional principle beyond which the Legislature may not go and which do inhibit its scope.'<sup>11</sup> In the 1980s, his successor Sir Robin Cooke, adverted to the possibility of such constraining principles in three cases.<sup>12</sup> He said:

we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.<sup>13</sup>

Baragwanath J, a decade later in 1996, quoted from that passage but added:

constitutional peace and good order are better maintained by adherence to conventions rather than judicial decisions.<sup>14</sup>

In the United Kingdom in 1995, Lord Woolf, writing extra-curially, identified two principles upon which the rule of law depended:

- the supremacy of parliament in its legislative capacity;
- the functions of the courts as final arbiters in the interpretation and application of the law.

Lord Woolf acknowledged that legislation could confer or modify statutory jurisdictions and control how courts exercised their jurisdiction. He drew a line at legislation which would undermine, in a fundamental way, the rule of law upon which the unwritten constitution depended, for example, by removing or substantially impairing the judicial review jurisdiction of the court, a jurisdiction which he described as 'in its origin ... as ancient as the common law, [predating] our present form of parliamentary democracy and the Bill of Rights'.<sup>15</sup>

In 2006, those sentiments were echoed in three of the judgments in the House of Lords in its decision in *Jackson v Attorney General* upholding the legislative ban on fox hunting. Baroness Hale observed that:

The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny ... In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.<sup>16</sup>

Most recently in *AXA General Insurance Ltd v HM Advocate*<sup>17</sup>, Lord Hope referred to the possibility that an executive government enjoying a large majority in the Scottish Parliament, dominating the only Chamber in that Parliament, might seek to use its power to abolish judicial review or diminish the role of the courts in protecting the interests of the individual. He said:

Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.<sup>18</sup>

There has, of course, been pushback against the proposition by those who see parliamentary sovereignty in the United Kingdom and New Zealand as relevantly unqualified. Lord Bingham in his book on the *Rule of Law* was one of them and quoted the Australian scholar, Professor Jeffrey Goldsworthy, in support of his views. Other leading scholars have divided on the question. Professor Jeffrey Jowell has realistically observed that it would take some time, provocative legislation and considerable judicial courage for the Supreme Court of the United Kingdom to concretely assert the primacy of the rule of law over parliamentary sovereignty.<sup>19</sup>

What is striking about the various statements suggesting the existence of some deep-seated common law constraints in the United Kingdom and New Zealand is a core concern about the location of the responsibility to authoritatively interpret statutes conferring powers on the executive. Absent judicial review of such powers, the executive becomes the interpreter of the legality of its own actions and thus for all practical purposes, the legislator — evoking Montesquieu's nightmare of tyranny.

In the United Kingdom and New Zealand those questions are questions about common law constitutionalism. They were touched on by Sir Owen Dixon in 1957 in his well-known paper to the Australian Legal Convention under the title 'The Common Law as an Ultimate Constitutional Foundation'.<sup>20</sup> He spoke of the common law as 'a jurisprudence antecedently existing into which our system came and in which it operates'.<sup>21</sup> He described it as the source of the supremacy of the Parliament at Westminster manifested in the proposition that an English court could not question the validity of a statute. He quoted Salmond's answer to the question 'Whence comes the rule that acts of parliament have the force of law?' The answer was '[i]t is the law because it is the law and for no other reason that it is possible for the law to take notice of'.<sup>22</sup>

On the way in which common law rules are applied, which are protective of common law principles, Sir Owen asked the rhetorical question:

Would it be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?<sup>23</sup>

The question was a little delphic. It was not entirely clear whether Sir Owen was raising a matter of fundamental principle about 'deep-rooted legal doctrines' or addressing the practical difficulty of drafting a statute to displace such principles.

In comments following Sir Owen's paper, Lord Morton of Henryton in effect challenged the correctness of his observation about deep-rooted doctrine.<sup>24</sup> In reply, Sir Owen became less delphic and said it related to his conception of what a draftsman was really capable of doing. He mentioned many attempts in various statutes in Australia over the years to reverse the presumption of innocence and said 'they have not managed it very well in the face of what courts have done'.<sup>25</sup> His observations therefore were about the power of statutory interpretation in the maintenance of deep-rooted doctrines against statutory incursion. They emphasised the centrality in Australia of the judicial interpretation of statutes as protective of such basic principles as the presumption of innocence.

In Australia, unlike the United Kingdom and New Zealand, written Commonwealth and State Constitutions, read together, constrain official power, be it legislative, executive or judicial. The legislative power of the Commonwealth is confined to the subjects upon which the Commonwealth Parliament is authorised to make laws and is subject to guarantees and prohibitions set out in the Constitution or implied from it. The legislative power of the States is conferred, not by reference to enumerated heads of power, but by general grants under their own Constitutions. They are, however, subject to the paramourcy of Commonwealth



legislation and the guarantees and prohibitions, express or implied, to be found in the Commonwealth Constitution and which are applicable to State Parliaments. The executive and judicial powers of the Commonwealth and of the States are also subject to the constraints, express or implied, imposed by the Commonwealth Constitution and in the area of State executive power by the State Constitutions themselves and by statutes made under those Constitutions. No law can confer upon a public official unlimited power. Such a power could travel beyond constitutional constraints.

Importantly in Australia, unlike the United Kingdom and New Zealand, the jurisdiction of the High Court to judicially review the purported exercise of powers of officers of the Commonwealth is entrenched in s 75(v) of the Constitution. The continuing existence of the State Supreme Courts is protected by implication from Ch III of the Constitution, as is their traditional supervisory jurisdiction over official actions and inferior courts. The question of fundamental common law constraints on the legislative powers of the Commonwealth or State parliaments to affect judicial review is unlikely to arise in that context.

In that connection I note in passing that in 1998, the High Court in *Union Steamship Co of Australia Pty Ltd v King*<sup>26</sup> referred to the position of the New South Wales State Parliament authorised by its Constitution to make laws for the peace, order and good government of the State. After observing that the exercise of legislative power by the Parliament of New South Wales is not susceptible to judicial review on the ground that it does not secure the welfare and the public interest, the Court said:

Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board*,<sup>27</sup> is another question which we need not explore.<sup>28</sup>

The question has not been further explored in Australia, although it was mentioned in passing in *South Australia v Totani*.<sup>29</sup>

To accept the centrality of judicial review in our system of government, as in that of the United Kingdom and New Zealand, is to accept the centrality of the judicial function in interpreting the statutes under which official powers are exercised.

The connection between statutory interpretation and a concept of rationality for the purpose of administrative law directs attention to what courts do when they interpret statutes, because what they do defines the logic of the statute which, in turn, under a general rubric of rationality, or reasonableness, defines the area of judicial supervision of the exercise of statutory powers.

In the most recent edition of their well-established book on *Statutory Interpretation in Australia*, Professors Pearce and Geddes have spoken of the duty of the court in statutory interpretation. There are frequent challenges of ambiguity of meaning, vagueness of expression and occasional internal inconsistency. But as the learned authors said:

No matter how obscure an Act or other legislative instrument might be it is the inescapable duty of the courts to give it meaning.<sup>30</sup>

The courts give meaning to statutes in accordance with principles derived from the common law and from interpretive statutes and sometimes from statute specific interpretive provisions. Typically, the courts look to text, context and purpose. They may make implications such as an implied requirement to observe procedural fairness as a condition of the exercise of a power, which might adversely affect the subject. Importantly, the statute is not just a piece of software to be loaded up into the official decision-maker and into the courts on judicial review. Its logic is defined by interpretation.

There has been some debate about the role of legislative intention in relation to statutory interpretation. In the Foreword to the first edition of Pearce and Geddes, Sir Garfield Barwick described the construction process as the search for 'the intended meaning; though the intention is to be sought from the words used'. The role of intention can be seen there as conclusory rather than anterior to construction. So too, in *Project Blue Sky Inc v Australian Broadcasting Authority*,<sup>31</sup> the plurality (McHugh, Gummow, Kirby and Hayne JJ) said:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.<sup>32</sup>

The question of authorial intention in legal texts generally was considered in the context of intention to form a trust in *Byrnes v Kendle*.<sup>33</sup> In their joint judgment, Heydon and Crennan JJ quoted an observation by Charles Fried, a former Solicitor-General of the United States, who dismissed the proposition that there was any point, whether in interpreting poetry or the Constitution, in seeking to discern authorial intent as a mental fact. He said:

we would prefer to take the top off the heads of authors and framers — like soft-boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created.

In a passage quoted by Heydon and Crennan JJ, Fried said:

The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and texts are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers.<sup>34</sup>

The role of legislative intention in statutory construction has been discussed expressly in recent decisions of the High Court. In *Lacey v Attorney-General (Qld)*,<sup>35</sup> six Justices of the Court said:

The legislative intention [referred to in *Project Blue Sky*] is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.<sup>36</sup>

The judgment drew an important distinction between the relevant usages of intention and purpose. The application of the rules of construction will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which has an existence independent of the statute. It resides in its text, structure and context.

The distinction reflects the ordinary usage of purpose in the sense of the object for which a thing exists. One can discern a purpose for a constructed thing such as a tool without having to inquire about the intention of its maker. It is also possible to say that the purpose of the human eye is to enable people to see without having to inquire whether it reflects the intention of its creator. Purpose may be discerned in relation to a statutory provision without conjuring the numinous notion of legislative intention. Purpose in this sense informs the logic of the statute, which is connected to a broad concept of rationality in the exercise of powers conferred by the statute and amenable to judicial review. It is a more useful term in that context in identifying the legal limits of power than that of legislative intention. Where

purpose is not readily discernible, other aspects of a statute — its scope and subject matter may define its logic.

There is a variety of ways in which the word 'logic' can be used. It can refer to the study of the principles of reasoning. It can refer to a mode of reasoning or simply to valid reasoning. A statute conferring powers on an official may possess an internal logic defined as a class of reasons or pathways of reasoning which will support a valid exercise of that power. Logic, as used here, is closely connected to the ordinary meaning of rationality. That ordinary meaning is of a process of decision-making based on, or in accordance with, reason or logic. I do not suggest that it is inappropriate to use the word 'reasonableness' in this setting. My preference for rationality goes back a long way to a judgment I wrote as a Federal Court Judge in 1992, which really encompasses the theme of this lecture in which I said:

There is a pervasive requirement for rationality in the exercise of statutory powers based upon findings of fact and the application of legal principle to those facts ... A serious failure of rationality in the decision-making process may stigmatise the resultant decision as so unreasonable that it is beyond power. Alternatively, lack of rationality may be reflected in a failure to take into account relevant factors or the taking into account of irrelevant. Each of these heads of review seems to collapse into the one requirement, namely that administrative decisions in the exercise of statutory powers should be rationally based.<sup>37</sup>

I must confess that I had forgotten that I had written that until revisiting, in connection with this lecture, Dr Airo-Farulla's article on 'Rationality and Judicial Review of Administrative Action'<sup>38</sup> in which it is quoted. It may be compared with the concept of reasonableness seen in the plurality judgment in *Li*, in which their Honours said:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.<sup>39</sup>

And hopefully not found to be inconsistent with that proposition. To say that rationality, in the sense that I have used it, is a necessary condition of the valid exercise of a statutory power, is to say no more than that a particular exercise of the power must be supported by reasoning which complies with the logic of the statute. It must lie within that class of reasons or reasoning pathways which support a valid exercise of the power. That class may be large for a broad discretion conferred in a statute without a well-defined purpose. It may be more limited in other cases.

The logic of a statute in this sense might be understood as requiring that the reasoning process of a decision-maker in deciding to exercise a power under the statute:

- is a reasoning process — ie a logical process, albeit it may involve the exercise of a value judgment, including the application of normative standards, and the exercise of discretion;
- is consistent with the statutory purpose;
- is not directed to a purpose in conflict with the statutory purpose;
- is based on a correct interpretation of the statute, where that interpretation is necessary for a valid exercise of a power — error of law which does not vitiate a decision is thereby excluded;
- has regard to considerations which the statute, expressly or by implication, requires to be considered;
- disregards considerations which the statute does not permit the decision-maker to take into account;
- involves finding of fact or states of mind which are prescribed by the statute as necessary to the exercise of the relevant power;

- does not depend upon inferences which are not open for findings of fact which are not capable of being supported by the evidence or materials before the decision-maker.

The permitted pathways to the statutory decision may also be limited to those that comply with procedural requirements which may be express or implied. Decision making which complies with the logic of the statute will therefore also:

- result from the application of processes required by the statute or by implication, including the requirements of procedural fairness.

It should also result from a diligent endeavour by the decision-maker to discharge the statutory task.

The matters listed are put on the basis that they all go to power. They reflect various categories of jurisdictional error, a term coined for historical reasons. They are not exhaustive, but reflect the requirement that the exercise of a statutory power should be rational.

A generalised requirement for rationality so understood is not a novel doctrine. It is well-established that every statutory power and discretion is limited by the subject matter, scope and purpose of the statute under which it is conferred.<sup>40</sup> It has also been said that every power must be exercised according to the rules of reason. In 1965, Justice Kitto, paraphrasing *Sharp v Wakefield*, said:

a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.<sup>41</sup>

Mason J, in *FAI Insurances Ltd v Winneke*<sup>42</sup>, quoted that passage and linked it to the general proposition that the extent of discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment.

It follows from the above that the requirement that a power conferred by a statute be exercised rationally, is a requirement not met merely by the avoidance of absurdity. I have referred earlier to the consideration of reasonableness as a constraint upon official power in the decision by the High Court in 2013 in *Li*.<sup>43</sup> In that case the Migration Review Tribunal (the Tribunal) had refused an adjournment to an applicant for an occupationally-based visa. The applicant was awaiting a revised skills assessment from a body called Trade Recognition Australia. The Tribunal proceeded to a decision adverse to the applicant without waiting for that revised assessment which was critical to her success. In holding that the decision of the Tribunal was vitiated by unreasonableness, Hayne, Kiefel and Bell JJ referred to *Wednesbury Corporation*<sup>44</sup> and said:

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it.<sup>45</sup>

Indeed, the Master of the Rolls, Lord Greene in *Wednesbury Corporation*, made the point that bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, and disregard of public policy, were all relevant to whether a statutory discretion was exercised reasonably.<sup>46</sup> As the joint judgment said in *Li*:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or

reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.<sup>47</sup>

I have used the word 'rationality' as a general concept in this setting rather than 'reasonableness'. The term 'reasonable' may describe a decision with which one agrees and 'unreasonable' a decision with which one emphatically disagrees. The ordinary meaning of the term, according to the *Oxford English Dictionary*, includes the idea of having sound judgment and being sensible. That shade of meaning tends to take people into the territory of the legality-merits distinction, which defines the constitutional limits of traditional judicial review. In so saying, I acknowledge that people tend to use whatever terms of abuse come to hand to describe decisions with which they vehemently disagree and 'irrational' is one even though it may not be related to a failure of logic.

It is not necessary in using rationality, as I do, to hold that it has the character of a statutory implication — a condition on the exercise of power. Compliance with the logic of the statute means compliance with its express and implied requirements. Rationality, which describes the kind of reasoning that is essential to that compliance, is hardly an implication. Although reasonableness has been described as an essential condition of the exercise of a power that may in most, if not all cases, be no more than a way of saying that the logic of the statute and the rational processes that comply with it, must be followed.

It may also be possible to draw a distinction between rationality and reasonableness on the basis that not every rational decision is reasonable. That distinction may be seen as a vehicle for a proportionality analysis which I would not want to explore further here.

It is perhaps important to observe by way of qualification at the end of this lecture that rationality can accommodate a variety of decision-making processes. Sometimes decisions have to be made in the face of uncertainty or in the face of alternatives which are within power and where, on the basis of the materials before the decision-maker, no relevant distinction can be drawn between them. In an interesting paper entitled 'Rationally Arbitrary Decisions (in Administrative Law)',<sup>48</sup> Professor Adrian Vermeule of the Harvard Law School, suggested that there are some cases in which decision-makers run out of what he calls first order reasons for a decision. He argues that the law must not adopt a cramped conception of rationality which would require decision-makers to do the impossible by reasoning to a decision where reason has exhausted its powers. His observations are made largely in the context of difficult decisions of regulatory agencies balancing competing considerations. The information is simply not available to enable a clear determination to be made. One case he cites is the Secretary of the Interior having to decide whether to list a particular lizard as a threatened species under the *Endangered Species Act*. The methodology previously used to estimate the number of lizards in a given area had been exposed as worthless. Newer methods were not yet operational. No-one had any rational basis for estimating how many lizards there were. What then should the Secretary do and what should the court say the Secretary may, may not or must do. The relevant federal appellate court in that case decided that if the science on population size and trends was under-developed and unclear, the Secretary could not reasonably infer that the absence of evidence of population decline equated to evidence of its persistence. Professor Vermeule preferred the reasoning of the dissenting Judge Noonan, who said:

It's anybody's guess ... whether the lizards are multiplying or declining. In a guessing contest one might defer to the government umpire.<sup>49</sup>

A simpler example might arise where a decision-maker has to allocate a limited number of licenses to a larger number of equally deserving applicants. Who is to say that allocation by lots, while arbitrary in one sense, would be arbitrary in a legal sense. Vermeule warns against a phenomenon of what he called 'judicial hyperrationalism'. Based on the culture of

the law which celebrates reason giving and the assumption that the rule of law requires first-order reasons for every choice, he observed:

there are seeds, within administrative law itself, of a more capacious and enlightened view, under which the rule of law will rest satisfied with second-order reasons, at least where first-order reasons run out.<sup>50</sup>

To that I would add if rationality requires anything, it is an open mind.

The utility of rationality in the sense I have used it in this lecture is to emphasise the centrality of statutory interpretation to judicial review of administrative action. It is the statute properly construed according to common law and statutory interpretive rules, including the application of the principle of legality, implications as to procedural fairness and characterisation of statutory criteria as jurisdictional facts, that will define the logic of decision-making under it and therefore the minimum requirements for the valid exercise of official power.

#### Endnotes

- 1 R H Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.
- 2 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave MacMillan, 10th ed, 1959) 184, 188-95.
- 3 Jeffrey Jowell, 'The Rule of Law Today' in J Jowell and D Oliver (eds) *The Changing Constitution* (Oxford University Press, 6th ed, 2007) 24.
- 4 (2013) 249 CLR 332, 364 [67].
- 5 H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 15.
- 6 *Ibid.*
- 7 *Ibid.* 16.
- 8 *R v Secretary for the Home Department Ex parte Simms* [2003] 2 AC 131.
- 9 Mark Aronson and Matthews Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [3.380].
- 10 Wade and Forsyth, above n 5, 19.
- 11 Sir Owen Woodhouse, 'Government under the Law', (Price Milburn for the New Zealand Council of Civil Liberties, 1979).
- 12 *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *Fraser v State Services Commission* [1984] 1 NZLR 116; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.
- 13 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390.
- 14 *Cooper v Attorney-General* [1996] 3NZLR 480, 485.
- 15 Lord Woolf MR, 'Droit Public — English Style' (1995) *Public Law* 57, 68.
- 16 *R (Jackson) v Attorney General* [2006] 1 AC 262, 318 [159].
- 17 [2012] 1 AC 868.
- 18 *Ibid.* 913 [51].
- 19 Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 2011) 11, 32.
- 20 (1957) 31 *Australian Law Journal* 240.
- 21 *Ibid.*
- 22 *Ibid.* 242, citing John W Salmond, *Jurisprudence: Or, The Theory of Law* (Steven & Haynes, 2nd ed, 1907) 125.
- 23 *Ibid.* 241.
- 24 *Ibid.* 250.
- 25 *Ibid.* 253.
- 26 (1988) 166 CLR 1.
- 27 [1974] AC 765, 782.
- 28 (1988) 166 CLR 1, 10.
- 29 (2010) 242 CLR 1, 29 [31].
- 30 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Australia, 8th ed, 2014) 6.
- 31 (1998) 194 CLR 355.
- 32 *Ibid.* 384 [78] (footnote omitted).
- 33 (2011) 243 CLR 253.
- 34 *Ibid.* 282–283 [95] citing 'Sonnet LXV and the "Black Ink" of the Framers' Intention', *Harvard Review*, vol 100 (1987) 751, 758–59 (emphasis in original, footnotes omitted).
- 35 (2011) 242 CLR 573.

- 36 Ibid 592 [43] (footnotes omitted).  
37 *TCN Channel Nine Pty Ltd v Australian Broadcasting Tribunal* (1992) 28 ALD 829, 861.  
38 (2000) 24 *Melbourne University Law Review* 543.  
39 (2013) 249 CLR 332, 366 [72].  
40 *R v Secretary for State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.  
41 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189.  
42 (1982) 151 CLR 342, 368.  
43 (2013) 249 CLR 332.  
44 *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.  
45 (2013) 249 CLR 332, 364 [68].  
46 [1948] 1 KB 223, 229.  
47 (2013) 249 CLR 332, 366 [72].  
48 Adrian Vermeule, 'Rationally Arbitrary Decisions (in Administrative Law)', (25 March 2013), *Harvard Public Law Working Paper* No 13-24 <<http://ssrn.com/abstract=2239155>>, 2.  
49 Ibid citing *Tucson Herpetological Society*, 566 F 3d 883.  
50 Ibid.

## RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

*Katherine Cook*

### **Appointment of new Independent Reviewer of Adverse Security Assessments**

On 4 September 2015, the Federal Government announced the appointment of Mr Robert Cornall AO as the new Independent Reviewer of Adverse Security Assessments.

The appointment is for a period of two years commencing on 3 September 2015.

Mr Cornall brings a wealth of experience in legal practice, government administration and public policy to this position.

Mr Cornall is a former Secretary of the Commonwealth Attorney-General's Department. He is currently the Chair of the Defence Abuse Response Taskforce. In January 2006, he was appointed an Officer of the Order of Australia for service to the community in developing public policy.

Since the establishment of the Office of the Independent Reviewer in 2012, the majority of reviews conducted have confirmed ASIO's initial assessment. This fact continues to serve as a testament to the confidence that successive Governments have placed on the professional judgement of ASIO and highlights the integrity of the assessment and internal review processes.

Mr Cornall's appointment fills the vacancy left by the Hon Margaret Stone, who commenced as the new Inspector-General of Intelligence and Security on 24 August 2015.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/4-September-2015-Appointment-of-new-Independent-Reviewer-of-Adverse-Security-Assessments-.aspx>

### **Reappointment of Timothy Pilgrim as Australian Privacy Commissioner**

On 21 August 2015, the Federal Government announced the reappointment of Timothy Pilgrim PSM as the Australian Privacy Commissioner.

The appointment is for a period of twelve months commencing on 19 October 2015.

Mr Pilgrim was appointed acting Australian Information Commissioner for a three month period in July 2015 while the Government considers options for the future of the Information Commissioner position.

Before his current acting position, Mr Pilgrim served as Privacy Commissioner from July 2010 to July 2015, and was Deputy Privacy Commissioner from 1998 to 2010. During that time, he was involved in several major amendments to the *Privacy Act 1988*, including the extension of the Act to private sector organisations in 2001 and widespread amendments to the Act in 2014.

As Privacy Commissioner, Mr Pilgrim has developed good working relationship with the business community, consumer groups and Australian Government agencies in building awareness of privacy rights and obligations. An example is his extensive consultation with



industry and consumer groups before the 2014 amendments to the Privacy Act commenced, and his continued focus afterwards on working with business to implement the changes to the Act.

Mr Pilgrim has also worked at an international level to ensure that Australia is equipped to deal with global privacy challenges, particularly through cross border cooperation on such matters.

In the January 2015 Australia Day Honour's List, Mr Pilgrim was awarded a Public Service Medal for 'outstanding public service in the development and implementation of major reforms to the Privacy Act.'

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/21-August-2015-Reappointment-of-Timothy-Pilgrim-as-Australian-Privacy-Commissioner.aspx>

### **Milestone amalgamation of key Commonwealth Merits Review Tribunals**

On 1 July 2015, a ceremonial sitting of the Administrative Appeals Tribunal was held to welcome the most significant reform to Commonwealth administrative law in 40 years: the amalgamation of the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Migration Review Tribunal and Refugee Review Tribunal into a single body, the Administrative Appeals Tribunal.

The ceremonial sitting was attended by key figures in the history of the Administrative Appeals Tribunal, including the current President, the Honourable Justice Duncan Kerr Chev LH, Sir Gerard Brennan KBE QC and the Honourable Robert Ellicott QC.

The Administrative Appeals Tribunal will provide an accessible, efficient and informal process for review of government decisions.

The amalgamation will strengthen the efficacy of Commonwealth merits review and promote high quality and consistent government decision-making; it will promote accessibility of review by simplifying the merits review system and providing a single point of contact for Tribunal users. Key services of each of the amalgamated tribunals will be retained, while allowing for greater sharing and utilisation of members' specialist expertise.

This year also marks the 40th anniversary of the legislative establishment of the Administrative Appeals Tribunal.

The reform is also consistent with key recommendations of the 2012 Strategic Review of Small and Medium Agencies in the Attorney-General's portfolio and the 2014 National Commission of Audit Report, *Towards Responsible Government*.

Justice Kerr continues as President of the amalgamated Administrative Appeals Tribunal.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/1-July-2015-Milestone-Amalgamation-of-Key-Commonwealth-Merits-Review-Tribunals.aspx>

### ***More complaints can build better public services: Victorian Ombudsman***

The Victorian Ombudsman is helping more people with their complaints about Victorian State government departments, agencies and local councils.

The Ombudsman's annual report for 2014–15 shows that approaches from the public increased to 38,980 in that year, 92 per cent of these were dealt with within 30 days. The office completed 3,256 formal enquiries and investigations, over 500 more than last year.

Victorian Ombudsman Deborah Glass said the ultimate goal of her work was to ensure fairness from the state public sector and improve services.

'Not all complaints require investigation, and many can be resolved quickly and informally. But whether or not they are investigated, all complaints contribute to a picture of dissatisfaction, which can be used to drive improvements in public administration.

'I want to be able to use that data to identify systemic issues that may require investigation, and to feed back to departments and agencies so they can better respond to public concerns,' said Ms Glass.

The report covers Ms Glass' first full year as Ombudsman, during which she has worked to raise awareness of the office.

'Importantly, the proportion of approaches within our jurisdiction rose by 12 per cent last year. That means we're spending more time addressing issues we can assist with and less time directing people to other organisations. We've made a concerted effort to improve understanding of our role, and that's beginning to show in our numbers.

'All too often, those with the greatest need for Ombudsman services are the least likely to use them. Addressing this and making my office much more accessible – including to rural and regional Victoria – is a central aspect of my vision,' she said.

Over the 2014-15 financial year the Ombudsman tabled eight parliamentary reports, including reports on improper conduct in the Office of Living Victoria, excessive force used by authorised officers on public transport, and failings of the Department of Health and Human Services in regulating an aged care facility. Of the 50 recommendations made to government, 96 per cent were accepted.

Looking to the year ahead, Ms Glass urged the Victorian government to deliver promised reforms to legislation governing the work of the office, in order to improve services to the public and government agencies alike.

'I have received an assurance from the government that some of the changes I have requested will be before the Parliament this year, and I wait to see,' Ms Glass said.

Headline data:

- 38,980 approaches to the Victorian Ombudsman;
- 3,256 formal enquiries and investigations completed;
- 34 formal investigations completed;
- eight parliamentary reports tabled;
- 4,269 completed approaches in the Corrections, Justice and Regulation portfolio; (most commonly complained about portfolio);
- 3,410 completed approaches in the local government portfolio.

<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/More-complaints-can-build-better-public-services-O>

## **Removing discrimination in South Australia's legislation**

A report by the South Australian Law Reform Institute at the University of Adelaide has recommended that up to 14 pieces of legislation that discriminate against lesbian, gay, bisexual, transgender, intersex and queer South Australians be removed.

Speaking on the 40th anniversary of the decriminalisation of homosexuality, Premier Jay Weatherill said he would take action to address these elements of discrimination against LGBTIQ people in South Australian law.

'One of the things that makes South Australia such a great place to live is the fact that we have a rich, diverse community,' Mr Weatherill said.

'Unfortunately, though, elements of our laws still discriminate against people who are lesbian, gay, bisexual, transgender, intersex or queer. That's why we asked the South Australian Law Reform Institute at the University of Adelaide to review our laws and identify legislation that discriminates against members of our community who identify as LGBTIQ.'

'The Institute has identified areas where immediate action can be taken, and other areas that require further consideration.

'In all, we will immediately begin preparing omnibus legislation that will either modify or repeal aspects of up to 14 different pieces of legislation to ensure they are contemporary.'

The review of South Australian laws fulfills a commitment made in the Governor's speech at the start of the Parliamentary year.

Mr Weatherill said the new omnibus legislation would remove aspects of existing laws that are outdated and discriminatory.

'For instance, a person who identifies as a woman, but is not legally recorded as such, may be prevented from taking a position on a Government Board, because they are not recognised as a woman under relevant legislation,' he said.

'There are also pieces of legislation –like the Wills Act –that discriminate by treating married couples differently from those couples or individuals who are not or who cannot get married, including LGBTIQ South Australians.'

Mr Weatherill said legislation relating to the Adoption Act was being considered as part of a separate review of that Act. Where the review identified more complex matters, the Law Reform Institute would continue to develop options for reform to address these.

<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/Sept%202015%20media%20releases/20150910-MR-discrimination.pdf>

## **Resignation of Tasmanian Integrity Commission Chief Executive Officer**

The Tasmania Government has received notification from the Chief Executive Officer of the Integrity Commission, Diane Merryfull, that she intends to retire from full-time work and to leave her role on 16 October 2015.

Given the proximity of the independent five year review, the Government and the Chief Commissioner have agreed to appoint an Acting CEO until the review has been concluded.

The Premier is required to consult with the Joint Standing Committee on Integrity in relation to the appointment of an Acting CEO and an announcement will be made as soon as that process is concluded.

Ms Merryfull's retirement continues a period of renewal for the Integrity Commission, with Greg Melick SC recently being appointed as the new Chief Commissioner of the Integrity Commission.

The five year independent review of the Integrity Commission is due to commence early in 2016. Section 106 of the *Integrity Commission Act 2009* provides for an independent review of that Act, which must be commissioned as soon as possible after 31 December 2015. The independent review is to be undertaken by a person appointed by the Governor, and that person must be, or previously have held office as a judge of a court of the Commonwealth or of an Australian State or Territory.

The Government has made it clear that its position reflects that of the Joint Standing Committee on Integrity's recommendation that 'the question of the investigative powers and functions of the Integrity Commission should be considered as part of the five year review, and that until that review, the investigative functions and powers of the Integrity Commission should be retained.'

[http://www.premier.tas.gov.au/releases/resignation\\_of\\_integrity\\_commission\\_chief\\_executive\\_officer](http://www.premier.tas.gov.au/releases/resignation_of_integrity_commission_chief_executive_officer)

## **Recent Cases in Administrative Law**

### ***How serious does serious harm have to be?***

*Minister for Immigration and Border Protection v WZAPN & ANOR; WZARV v Minister for Immigration and Border Protection & ANOR [2015] HCA 22 (17 June 2015)*

WZAPN is a stateless Faili Kurd whose former place of habitual residence is Iran. In 2010, he was refused refugee status by a refugee status assessment (RSA) officer. An Independent Merits Reviewer (IMR) then reviewed that decision. The IMR concluded, among other things, that while there was a real chance of short periods of detention upon WZAPN's return to Iran if he was unable to produce identification, it did not accept that the frequency or length of detention, or the treatment he will receive while in detention would constitute serious harm within the meaning of the s 91R of *Migration Act 1958* (the Act).

The then Federal Magistrates Court of Australia dismissed WZAPN's application for judicial review of the IMR's decision. However, the Federal Court allowed WZAPN's appeal on the basis that the threat of a period of detention constitutes serious harm whatever the severity of the consequences for liberty. The Court came to this conclusion from the language and structure of s 91R(2) and international human rights standards. The Court held that serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty.' A decision-maker must ask 'whether the deprivation [of liberty] was on grounds and in accordance with procedures established by law, whether the detention was arbitrary, and whether the applicant was treated with humanity and respect for the inherent dignity of the person.'

The Minister was granted special leave to appeal to the High Court from the decision of the Federal Court.

WZARV is a Sri Lankan citizen of Tamil ethnicity. He came to Australia by boat and was taken to Christmas Island. In 2011, WZARV was refused refugee status by an RSA officer. An IMR then

reviewed that decision. With respect to the possible detention of WZARV upon return to Sri Lanka, the IMR accepted that it was likely WZARV would be interviewed by Sri Lankan authorities upon arrival at the airport, but that it is usual for such questioning to be completed in a matter of hours.

WZARV's application for judicial review to the Federal Circuit Court of Australia and appeal to the Federal Court were dismissed. By grant of special leave, WZARV appealed to the High Court on the ground that, on the construction of s.91R(2)(a) of the Act adopted by the Federal Court in the *WZAPN* proceedings, the IMR had erroneously concluded that WZARV did not face serious harm upon return to Sri Lanka.

The High Court (French CJ, Kiefel, Bell and Keane JJ with Gageler J agreeing) unanimously allowed the Minister's appeal and unanimously dismissed WZARV's appeal.

The High Court held that it is persecution, involving serious harm inflicted by the violation of fundamental rights and freedoms, from which the Convention and s.91R of the Act are concerned to provide asylum. Both the Convention and s.91R of the Act embody an approach which is concerned with the effects of actions upon persons in terms of harm to them. That approach is not engaged automatically upon the demonstration of any breach, or apprehended breach, of human rights in their country of nationality or former habitual residence.

The High Court held that the likelihood of a period of temporary detention of a person for a reason mentioned in the Refugees Convention is not, of itself and without more, a threat to liberty within the meaning of s.91R(2)(a) of the Act. The question of whether a risk of the loss of liberty constitutes 'serious harm' for the purposes of s 91R requires a qualitative evaluation of the nature and gravity of the apprehended loss of liberty.

### ***Apprehended bias and unrelated hearings from ten years before***

*Frugtniet v Tax Practitioners Board [2015] FCA 1066 (1 October 2015)*

On 28 November 2012, the applicant applied to the Tax Practitioners Board for a renewal of his registration as a Tax Agent. His application was unsuccessful and in January 2013, the Board's Conduct Committee (the Committee) terminated the applicant's registration as a tax agent and precluded the applicant from applying for registration for five years. The Committee found the applicant no longer met the requirement to be a fit and proper person because he had failed to disclose past misdeeds, which amounted to a 'massive bag of dishonest conduct' (*Frugtniet v Board of Examiners [2005] VSC 332 (24 August 2005)*).

The applicant then sought review of the Committee's decisions in the Administrative Appeals Tribunal (AAT). At the start of proceedings the applicant's counsel objected to the AAT as constituted hearing the matter. In 2004, the presiding member had made adverse findings about the applicant in an unrelated social security matter after finding he made false representations to Centrelink. The AAT rejected that objection, and proceeded to hear matter, affirming the two decisions of the Tax Practitioners Board.

The applicant then appealed to the Federal Court.

The Federal Court accepted that the hearing by the AAT, as constituted, amounted to a denial of natural justice and therefore, an error of law.

The Court determined that, in the unrelated social security case some ten years before, the presiding member made adverse findings about the applicant. Accordingly, the Court held that a fair-minded lay observer might reasonably have apprehended that the member might not bring an impartial mind to the question of whether the applicant was a fit and proper

person. While there is a temptation to think that, realistically, the tide of time would have washed from the member's conscious thoughts any adverse disposition towards the applicant, the Court's position was that the fair-minded lay observer is not to be assumed able to speculate on such matters. He or she is a notional person who takes an objective approach. He or she could only go by the record as it stands. It is by reference to that record that justice must be seen to be done.

The court remitted the matter to be heard again before a differently constituted AAT.

***Administrative law and horse racing at the Wagga Wagga Show***

*Michael Christie v Agricultural Societies Council of NSW Ltd (ACN 150 951 670) [2015] NSWSC 1118 (11 August 2015)*

On 3 October 2014, the second day of horse events at the 150th Wagga Wagga Show, Mr Christie rode Royalwood Black Swan to victory in the Galloway Champion Hack event. He was also the horse's trainer. The horse subsequently tested positive for prohibited substances.

On 24 March 2015, a disciplinary hearing against Mr Christie, and the horse's owner, Ms Cullen, was conducted by a Committee established under the auspices of the Agricultural Societies Council of NSW Ltd (the ASC).

During the hearing, Ms Cullen confessed that she alone had given the horse the prohibited substances. It was also clear that Mr Christie knew nothing of the administration of the substances to the horse until Ms Cullen had told him about it immediately after the event as the horse was being led away for testing. The Committee disqualified and fined Ms Cullen and Mr Christie received a 12 month suspension from competition.

On 2 April 2015, Mr Christie commenced proceedings by an urgent ex parte application before the Duty Judge of the NSW Supreme Court. Mr Christie wished to participate in an equestrian event at the Sydney Royal Easter Show on 4 April 2015, but had been informed by the Royal Agricultural Society of NSW that because of this suspension he would not be permitted to compete. The Duty Judge granted an interlocutory injunction, which had the effect of rendering the Committee's decision temporarily inoperative. The matter was heard on 16 July 2015.

The ASC argued, among other things, that the Committee's decision was not justiciable under the common law of administrative review. The Committee's decision was private in character and was legally binding on no one, other than through private arrangements; and that private character was not lost even if Mr Christie demonstrated the decision could adversely affect his livelihood.

The Court found that the Committee is a private or domestic tribunal. It is not established by statute but operates under private law arrangements, which may be contractual or something else.

The Court held that the principle guiding whether or not a court will interfere in a decision of a domestic tribunal demonstrated by cases such as *Mitchell v Royal New South Wales Canine Council Ltd* [2001] NSWCA 162 (*Mitchell*) and *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (*AFL*) requires an examination of the nature or quality of the effect of the decision on someone such as Mr Christie rather than analysing the legal framework for how the decision was made or can be enforced. These cases demonstrate that the effect of a decision will have the necessary quality to enliven the Court's jurisdiction

if, for example, the Court is satisfied that it will have an effect on private legal rights such as rights in property or adverse financial or reputational impact on someone, particularly insofar as their livelihood is concerned.

The Court held that in this case Mr Christie had no contractual relationship with the ASC. He was not a member of either the Wagga Wagga Show Society Inc or the ASC. Furthermore, it was not suggested by anyone that the ASC had a legally enforceable mechanism to ensure that decisions of the Committee were given effect by the ASC's member societies or anyone else. But the fact that the mechanism for enforcing the decision was voluntary does not, having regard to cases like *Mitchell* and *AFL*, take the decision outside the scope of the Court's power to review it. There is no evidence to suggest that the decision would not be enforced; and on the contrary, there was evidence that the decision, again through voluntary arrangements, would have a real impact on Mr Christie. This was because the Royal Agricultural Society of NSW, while not a member of the ASC, had a reciprocal arrangement with the ASC whereby each would enforce the other's disciplinary findings. The adverse effect of that voluntary, reciprocal arrangement on Mr Christie is why the proceedings were first commenced.

The Court held that there was no dispute that the decision had the capacity adversely to affect Mr Christie's ability to earn his livelihood. The adverse effect was potentially both financial and reputational and having been established, and applying the principle in *Mitchell*, the Court concluded that the decision was justiciable.

## CHALLENGES OF A NEW AGE

*Senator Concetta Fierravanti-Wells\**

The conference themes, 'challenges of a new age' and 'balancing fairness with efficiency and national security', raise many contemporary administrative law issues.

Australia's administrative law system is based on a package of reforms that were introduced in the 1970s and 1980s.

These are the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*, and the *Freedom of Information Act 1982*.

The administrative law system has developed significantly since that time. The common law history of administrative review, together with the review mechanisms created by Parliament, form the core of the comprehensive system of administrative law that now exists in Australia.

The administrative law system has two key goals:

- to protect the individual's rights by providing mechanisms to ensure government decisions which affect them are legal and properly based on the merits of their case; and
- a broader goal to provide an appropriate check on the use of Executive power, promoting quality government decision-making.

Fundamental values and principles underpin the administrative law system. Decisions must be fair, lawful and impartial, and the system must be transparent. These values and principles have become well-developed and entrenched. They form part of the everyday fabric of government policy and decision-making in Australia.

Administrative law, like other areas of legal practice, is not immune from the influences of the environment in which it operates. While the key administrative law goals and values remain constant, a changing social and political environment creates new challenges for the administrative law system.

The fundamental principles of administrative law are well accepted, but controversy can arise when these are applied to new challenges. Perhaps no other challenge creates such a wealth of differing and complex perspectives than that of national security.

Responding to threats to national security is a key focus for the Government as we strive to ensure the safety and security of the Australian community. This paper considers some of the Government's key measures in national security, and how they interact with the administrative law system.

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\* Senator Fierravanti-Wells is now Assistant Minister for Multicultural Affairs. This paper was presented at the AIAL National Administrative Law Conference, 24 July 2015. Canberra, ACT.



In 2006, the Security Legislation Review Committee stated that:

an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity, and on the other hand, the maintenance of fundamental human rights and freedoms.

The Committee went on to point out that 'striking this balance is an essential challenge to preserving the cherished traditions of Australian society'.<sup>1</sup>

The Government seeks to ensure that its response is necessary and proportionate to the threats faced and that the mechanisms and powers are limited in appropriate ways. I see administrative law as a dynamic field which must constantly engage with many other subject areas, from national security to privacy and information law. The amalgamation of Commonwealth merits review tribunals is an example of how improving operational efficiency does not have to be at the expense of high quality services; indeed it can lead to benefits for the user.

### **National security**

The nature of threats to national security has changed and heightened as we move from an age of group-planned mass casualty attacks to the autonomous actions of the 'lone wolf'.

Australia, like many other nations, is facing a very real and present threat from terrorist organisations involved in the Syria and Iraq conflicts.

The theatres of conflict in Syria and Iraq represent not just a distant concern. Around 175 Australians have travelled to participate in conflict zones in Syria and Iraq. These Australians, collectively referred to as 'foreign fighters', may have fought alongside listed terrorist organisations, including Daesh and Al-Qaeda. They return to Australia with enhanced terrorist capabilities and ideological commitment, which heighten the level of threat we now face.

Last year, the Government passed a suite of legislative reforms intended to enhance the capability of Australia's law enforcement and intelligence services to respond proactively and effectively to these threats.

The most significant of these reforms were enacted as part of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Foreign Fighters legislation)*. Among other things, this Act introduced a power to suspend the travel documents of an Australian citizen on security grounds.

In crafting such laws, one must always be vigilant that the imperatives of national security are balanced against the hallmarks of a free and democratic society. The Government has sought to provide appropriate avenues for review of Executive decision-making while also ensuring these laws are effective.

### **Preventative detention**

The preventative detention order regime under the *Criminal Code* allows for the detention of a person for up to 48 hours. This applies either where there is a threat of an imminent terrorist attack or immediately after a terrorist act if it is likely that vital evidence will be lost. These decisions are entirely exempt from *ADJR Act* review.

Judicial review in relation to these decisions is not likely to be helpful given their limited duration, but review under section 39B of the *Judiciary Act 1903* remains available.

A detention decision can also be challenged using a merits review process, after the conclusion of the detention period. That process may declare the preventative detention order in relation to the person to be void. It will determine whether compensation should be paid by the Commonwealth.

The merits review process provides an effective forum in which to review the validity of a preventative detention order and it promotes accountability of decision-makers. This appropriately balances the security interests of the broader community with individual rights.

### ***Passport suspension***

Most recently, the *Foreign Fighters legislation* introduced a framework for the suspension of Australian travel documents for 14 days, when the Australian Security Intelligence Organisation (ASIO) suspects, on reasonable grounds, that the person may leave Australia to engage in conduct that might prejudice the national security of Australia or a foreign country and that suspension of their travel documents will prevent the person from engaging in such conduct.

The primary purpose of this initiative was to enhance the Government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to foreign fighters.

This decision is excluded from merits review and judicial review under the *ADJR Act*, on the basis that both forums may compromise the operation of security agencies and defeat the purpose of the passport suspension measure. Merits review and *ADJR Act* review are not appropriate as the suspension is an interim measure until a more permanent decision, on whether or not to cancel the passport, is made.

The exclusion of the decisions from review under the *ADJR Act*, and merits review, is balanced by the fact that the suspension is limited to 14 days. This measure and the limited review avenues are drawn from the recommendations of the former Independent National Security Legislation Monitor, who recognised that review had to be limited in order for the suspension mechanism to be effective. Moreover, the role of the Inspector-General of Intelligence and Security (IGIS), who has oversight of decisions made by ASIO, provides a further accountability measure to ensure the appropriate exercise of ASIO's powers.

### **Administrative law in the intelligence context**

The challenge of balancing accountability and national security has also arisen in the context of security assessments by ASIO. Many of the accountability mechanisms for security assessments sit within the administrative law arena, but in a modified form. Procedural rights are protected, but in a way that recognises the public interest in protecting national security.

### ***Merits review of security assessments***

ASIO's security assessment function provides a mechanism for 'security' to be considered in certain regular government decision-making processes, such as the granting of visas and access to restricted areas, for example, airports. In making a security assessment, ASIO considers whether it would be consistent with, and necessary or desirable for, the requirements of security, for prescribed administrative action to be taken in respect of a person. The assessment can range from a basic check of personal details, to a complex,

in-depth investigation to determine the nature and extent of an identified threat to national security.

Where ASIO provides an Australian Government agency with an adverse or qualified security assessment, an individual has a right to merits review of that assessment in the AAT. Processes for merits review in the Security Division of the AAT are tailored to the sensitive nature of security assessments. Applications are heard by members of the AAT with experience in security matters, and special rules of procedure apply. Reviews are conducted in private.

The review applicant and the applicant's representative may be excluded from the proceedings, when evidence is given or submissions are made, if it is considered that national security interests may be prejudiced.

Unclassified statements of reasons for decisions are published. To the extent that any of the Tribunal's findings do not confirm ASIO's assessment, they are to be treated as superseding it.

### **Getting the balance right**

Despite the enduring threat of terrorism, Australian laws continue to provide a means through which the public may seek redress for Executive excess or error. The judicial and merits review mechanisms available ensure that the exercise of Executive power is lawful and proportionate in all circumstances. The measures discussed are exceptional in nature and are only triggered in particular circumstances. These are extraordinary powers and viewed as such by the agencies responsible for their exercise.

Moreover, the oversight functions of Parliamentary and independent bodies provide a continuous feedback loop through which Government can assess whether the balance between security and civil liberties remains appropriate.

### **Citizenship**

The Parliament is also currently (in July 2015) considering the Australian Citizenship Amendment (Allegiance to Australia) Bill, which provides that a person who has dual nationality and who engages in terrorism or foreign fighting will automatically lose his or her Australian citizenship.

The Bill contains appropriate safeguards, the Minister will have the power to exempt a person from loss of citizenship, if that is in the public interest. In addition, a person who loses his or her Australian citizenship under these provisions will be able to challenge the loss of citizenship and seek judicial review by a court.

The Government has referred this Bill to the Parliamentary Joint Committee on Intelligence and Security.

### ***Citizenship consultations***

I was recently tasked, along with my colleague the Hon. Phillip Ruddock, to lead a national conversation about the role of citizenship in shaping our future. Australian citizenship is a privilege which requires a continuing commitment to this country. Australian citizens enjoy privileges, rights and fundamental responsibilities. Submissions on the Discussion Paper closed on 30 June and we are in the process of analysing the responses. It is clear that

there are some important trends emerging, namely the need to value citizenship; increase an understanding by all Australians of the rights and duties of citizenship; and the importance of learning and speaking English.

### **Countering violent extremism**

It is important to achieve balance between individual and collective interests in keeping Australians safe from home grown terrorism. We cannot afford to wait until people have been radicalised and formed the intent to do harm and we cannot rely on law enforcement responses alone. We need to reduce the risk of violent extremism by taking steps to tackle the problem at its roots; communities play a critical role in this effort.

As Parliamentary Secretary to the Attorney-General and Parliamentary Secretary to the Minister for Social Services, my responsibilities range from community engagement in order to counter violent extremism, to social cohesion. Both roles focus on building on the strengths of our communities.

### **Data retention**

The passage of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Data Retention Act)* through Parliament has highlighted complex competing considerations. Unsurprisingly, there was debate about the protection of individual privacy, and how this relates to protecting the community.

For the Government, data retention represents a necessary, effective and proportionate response to the serious threat to national security. It ensures that law enforcement and national security agencies have the information they need to keep the community safe. It also gives appropriate protection to individual privacy.

This data includes information such as the date, time, duration and location of a communication, as well as its type—such as SMS or email. However, it does not include content, access to which will continue to require a warrant. Telecommunications metadata is important in protecting public safety. It is used in almost every serious criminal and counter-terrorism investigation. Our agencies would struggle to perform their vital duties if these records were no longer available.

For this reason, the *Data Retention Act* ensures that agencies can access the data they need by setting a common industry standard for record-keeping in the telecommunications industry. This record-keeping includes a limited subset of data, which is to be retained for two years.

Appropriate protections are built into the legislation, to promote the balance between effective law enforcement and national security measures, and the protection of individual civil liberties.

This is achieved by:

- substantially reducing the number of agencies which can access telecommunications data;
- requiring authorised officers to be 'satisfied on reasonable grounds' that a proposed disclosure or use of telecommunications data is 'justifiable and proportionate' to the interference with the privacy of any person that may result from the disclosure or use;

- establishing oversight by the Commonwealth Ombudsman and the Inspector General of Intelligence and Security;
- applying the *Privacy Act 1988* to retained data, meaning individuals will be able to request access to their personal retained data, and service providers will be required to protect and handle the data in accordance with the *Act*;
- placing a further obligation on service providers to encrypt retained data;
- requiring annual reporting on the measures; and
- mandating a review by the Parliamentary Joint Committee on Intelligence and Security.

Collectively, these measures are designed to ensure that the regime is fit for purpose, transparent and accountable.

### **Privacy**

The Government is also taking steps to introduce a mechanism for notification of data breaches, such as unauthorised use, loss or disclosure of personal information.

According to a national privacy survey conducted by the Office of the Australian Information Commissioner in 2013, data breaches are among the top privacy concerns of Australians.

Concerns around data breaches have also been raised in the context of the data retention legislation.

Although the *Privacy Act* requires agencies and organisations to take reasonable steps to protect personal information, it does not oblige entities that experience a data breach to notify affected individuals. At present, mandatory data breach notification is only required in relation to specific eHealth information.

However, agencies and organisations are free to participate in the Office of the Information Commissioner's voluntary data breach notification scheme; the Office received 71 notifications in the 2013-14 financial year. The Office encourages entities to notify the Privacy Commissioner and affected individuals in cases where a data breach involves a 'real risk of serious harm'.

By the end of 2015, the Government will introduce a mandatory data breach notification scheme as recommended by the Parliamentary Joint Committee on Intelligence and Security's report on the Data Retention Bill. The Committee considered that the security of retained telecommunications data was a critical issue. In the Committee's view, mandatory data breach notification is one way to encourage telecommunications providers to implement appropriate security standards and create community confidence in the security of stored data.

### **Tribunal amalgamation**

On the 1st of July, the newly amalgamated Administrative Appeals Tribunal (AAT)—incorporating the AAT, Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) and the Social Security Appeals Tribunal (SSAT)—commenced operation, thereby implementing the recommendations of the Kerr Committee in the 1970s, for a single generalist merits review tribunal.

A trigger for the reform was the National Commission of Audit's *Towards Responsible Government* report in 2014. The report identified that merging resources of merits review tribunals could generate significant savings and improve the quality of tribunal services.

The amalgamation of four key commonwealth merits review tribunals is a significant reform in the federal administrative law landscape, which simplifies and modernises processes; builds on existing successful merits review frameworks; and maintains citizens' access to a simple method to challenge government decisions that affect them.

The new Tribunal will deal with about 40,000 matters per year, across a wide range of government decision-making. It is a strong generalist body, but will retain and nurture the key specialist expertise of the migration, refugee and social security tribunals. The jurisdiction of these tribunals will be exercised in the new specialist divisions of the AAT. Practices and procedures adapted to these jurisdictions will be maintained.

A robust governance structure is essential to public confidence in the AAT's review function. The President of the AAT, the Honourable Justice Duncan Kerr Chev LH, is responsible for ensuring the expeditious and efficient discharge of the business of the Tribunal, and for ensuring that the Tribunal pursues its statutory objectives.

The AAT has a Divisional structure, enabling management of the Tribunal's diverse workload and specialisation where appropriate. Similar amalgamations have already occurred in most of Australia's States and Territories. These 'super tribunals' successfully provide a 'one stop shop' dealing with a range of disputes.

Amalgamation will improve the merits review system. It will:

- provide a better and clearer user experience;
- facilitate collegiality and best practice; and
- enhance efficiency.

In the new AAT, structure supports function by fostering an environment where good decision-making occurs. In particular, the size of the tribunal will provide members and staff with greater opportunities for a broader range of work, and enhanced career pathways. The new AAT will comprise experts from varied fields who will be encouraged to share knowledge and expertise across jurisdictions. The end user experience of engaging with the tribunal will be enhanced by the amalgamation.

The new AAT provides an effective framework for fair, just, economical, informal and quick merits review. The new AAT also has the benefit of incorporating technological innovations used in the previous tribunals, assisting people to access services more efficiently.

Amalgamation produces significant efficiencies through consolidation of information technology and staffing in corporate support functions. Property co-location adds further efficiency by providing opportunity for more centralised services. These efficiencies contribute to the amalgamated AAT operating effectively, and support the existing features of informality, flexibility and independence.

## Conclusion

I would like to draw on the words of then-Chief Justice Gibbs in *Church of Scientology v Woodward*:

in a democratic society, it is sometimes difficult to strike the proper balance between the maintenance of national security and the protection of individual liberties.<sup>2</sup>

A Government that gets the balance wrong risks increasing antagonism, encouraging mistrust of the Government and corroding the effectiveness of its national security legislation.

Ultimately, the success of Australia's counter-terrorism strategy rests upon its ability to get the balance right between national security and civil liberties.

The Government's national security measures illustrate some of the ways administrative review mechanisms can be appropriately tailored to support this balance. The means of achieving the fundamental goals of the administrative law system are not limited to the suite of legislation introduced in the 1970s and 1980s.

These goals are also being pursued through a variety of other measures and accountability mechanisms; the reformed Commonwealth tribunal system will assist in the pursuit of these goals.

**Endnotes**

- 1 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), p 3, 40.
- 2 *Church of Scientology v Woodward* (1982) 154 CLR 25, p 55.

## TOO MUCH OF A GOOD THING? BALANCING TRANSPARENCY AND GOVERNMENT EFFECTIVENESS IN FOI PUBLIC INTEREST DECISION MAKING

*Danielle Moon and Carolyn Adams\**

*'A democracy requires accountability, and accountability requires transparency.'*<sup>1</sup>

The 'new age' of transparency heralded a raft of reforms to the *Freedom of Information Act 1982* (Cth) (*FOI Act 1982*) that shifted control of information away from government in a bid to increase transparency and accountability. Conclusive certificates, for example, were abolished in 2009<sup>2</sup> and a number of exemptions, including the exemption for deliberative documents, were made conditional on a single public interest test in 2010.<sup>3</sup> Transparency is not, however, an absolute and cannot be an end in itself; it has value only insofar as it enhances accountability. Even then, the proper balance must be struck between transparency, efficiency and effectiveness.

This paper considers the role and importance of transparency and its relationship to the public interest test in the *FOI Act 1982*. It examines the basis and impact of recent reforms and asks whether they do, in fact, strike the right balance in respect of the deliberative processes of government. Have the reforms resulted in more accountability or less? Is there a danger that we now have 'too much of a good thing', that is, transparency, but that efficiency, effectiveness and even accountability have been inappropriately compromised?

### **A culture of secrecy**

While our public institutions exist to serve the community and should, therefore, be open to public scrutiny, they have their own internal drivers that militate against transparency and public accountability. Early to mid-20th century scholars studying government and bureaucracy, such as Max Weber and Carl J Friedrich, came to the conclusion that one of the defining characteristics of such organisations is a tendency to protect, rather than share, information. Friedrich based his analysis on an empirical examination of the central administrative bodies in a number of countries including England and the United States.<sup>4</sup> He noted that there was a time when *arcana imperii*, or State secrets, was the prevailing characterization of information in the hands of government, which was not routinely shared with those outside government.

Friedrich's empirical studies highlighted the fact that organisations consistently put rules and regulations in place to enforce secrecy, particularly in relation to controversial or competitive matters. This is certainly true at the federal level in Australia. In a 2009 report, the Australian Law Reform Commission identified over 500 provisions in 176 pieces of legislation that imposed some obligation of secrecy.<sup>5</sup> In addition, legal obligations of confidence, both at common law and in equity, will apply to government bureaucrats in some circumstances.

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More recent research into organisational theory considers the informal elements that permeate an organisation such as group dynamics and culture. If one of the cultural values of an organisation is secrecy it is likely that decision makers within the organisation will also place a value on secrecy because compliance with cultural norms and values is rewarded. Florence Heffron notes the difficulty of changing organisational culture because the values of the organisation are often internalized and unconscious.<sup>6</sup> There is evidence that government bureaucrats, like members of any other organized group, tend to identify with their group and because of this:

In making decisions their organizational loyalty leads them to evaluate alternative courses of action in terms of the consequences of their action for the group.<sup>7</sup>

### **The need for and limits of transparency**

Transparency, it seems, does not come naturally to governments and even where disclosure of documents is allowed, or even required, by law it may be that conflicting cultural or organisational factors are at work. This apparent tendency to secrecy has been widely criticised in relation to the approach of the current Australian Government on issues such as border protection,<sup>8</sup> foreign aid,<sup>9</sup> the dismantling of the Office of the Australian Information Commissioner<sup>10</sup> and also more generally.<sup>11</sup> The tendency towards secrecy must always be borne in mind when discussing accountability measures, including transparency.

On the other hand, it is worth considering whether too much transparency might have a downside and whether the 2010 reforms have found the most appropriate balance between too little disclosure and too much. Transparency is often brandished as a value in its own right. Attorney-General Ramsey Clark, in introducing FOI legislation for the first time in the United States in 1967, referred to disclosure under the *Public Information Act* as a 'transcendent goal'.<sup>12</sup> Transparency in liberal democratic theory is seen as one of the pillars supporting integrity in government and public policy and as an antidote to corruption.

Albert Meijer, however, discusses some of the problems with transparency such as the costs, including opportunity costs, of realisation; the avoidance strategies that may evolve in response; and the possible erosion of trust and confidence as a flood of unsorted information is disclosed leading to confusion and uncertainty. He notes the work of Mark Bovens, 'who warns against the dark side of transparency and its potential to drag government through the mud time and time again'.<sup>13</sup> He concludes that transparency has an upside and a downside and that it is necessary to consider both if the debate is to be helpful.

There is a need for a more nuanced and instrumental approach to transparency: transparency is only valuable when it is actually contributing to effective decision-making and accountability. David Heald lists a range of other values that may be traded off with increasing levels of transparency including effectiveness; trust; autonomy and control; confidentiality, privacy and anonymity; fairness; legitimacy; and even accountability itself.<sup>14</sup> He illustrates his point with the apt metaphor that while some sunlight is a good thing, overexposure can be damaging.<sup>15</sup>

This paper focuses on two areas in which the drive for transparency needs to be carefully balanced: effectiveness and accountability. Heald suggests, for example, that too much transparency, or the wrong kind of transparency, can disrupt organisational functioning. He suggests that overexposure of the process of policy making is likely to have the result that 'real policy-making shifts backwards into secret confines, with proposals less subject to challenge ... and poorly documented'.<sup>16</sup> This will result in less effective decision-making and less accountability. Statements by senior federal bureaucrats indicate that this is, indeed, what is happening<sup>17</sup> and in response it is important to consider carefully whether the 2010

amendments to the *FOI Act 1982* found the correct balance between requiring too little disclosure and too much.

### **Freedom of Information legislation as a balancing act**

FOI legislation is often viewed as a tool for promoting transparency. Moira Paterson, for example, writes of freedom of information laws as belonging to the category of 'laws which contribute to the objective of transparency' contrasted with 'laws which operate to detract from transparency'.<sup>18</sup>

Considering, however, that a large part of the *FOI Act 1982* is concerned with establishing exceptions and exemptions from the general right of access to information, a better approach is to consider FOI legislation as a tool for achieving the balance between the disclosure of too much and too little information. On the one hand, there are the overall goals of the legislation, which can broadly be described as enhancing accountability of policy and decision making and encouraging public participation in the democratic process.<sup>19</sup> On the other hand is the recognition, expressed primarily in the form of exemptions to the general right of access to information, that this right is not absolute and is limited by other public interest concerns.

These competing interests have to be balanced when responding to requests for information. In *Harris v Australian Broadcasting Corporation*, Beaumont J said 'in evaluating where the public interest ultimately lies ... it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other.'<sup>20</sup>

Problems arise, however, in relation to how a decision maker ought to decide, in individual cases, whether the interest in confidentiality outweighs the interest in disclosure. In particular, there is a question about the legitimate role of executive government in balancing the public interest in individual cases.<sup>21</sup> Richard Mulgan has suggested that in freedom of information cases 'it is appropriate that the government should not act as judge in its own cause but should refer the decision to an independent body'.<sup>22</sup> The implication is that it is unwise to trust to government the task of balancing public interest arguments, and that self-interest, rather than public interest, might motivate government decisions to withhold information.<sup>23</sup> This perception has problematic consequences; unless there is public confidence in government FOI decisions, it is unlikely that the regime will deliver the promised benefits of enhanced accountability and public participation.

The 2010 amendments to the *FOI Act 1982* attempted to tackle the problem of public interest decision making. This paper examines those changes in the context of internal working documents and concludes that they compromise the ability of the decision maker to balance the various public interest considerations in play and that they are likely to lead to disclosure avoidance behaviour which will reduce, rather than increase, accountability.

### **FOI Act 1982 prior to amendment**

The focus of this paper is the public interest in the disclosure of government's 'internal working documents': documents that relate to the 'deliberative processes' or 'thinking processes' of government.<sup>24</sup> In order to understand the recent amendments, it is first necessary to understand the approach taken to balancing the competing public interests of transparency and effectiveness in the original legislation.

### **Balancing tools**

If the role of FOI legislation is to strike the balance between too much and too little information, then two of the key tools that the *FOI Act 1982* used to strike that balance in relation to internal working documents were the principle of maximum disclosure and a public interest test.

### **Principle of maximum disclosure**

Prior to the amendments, the principle of maximum disclosure was established in the objects clause (s 3) and in s 11 as follows:

3. (1) The object of this Act is to extend **as far as possible** the right of the Australian community to access to information in the possession of the Government of the Commonwealth by—

...

(b) creating a **general right of access** to information in documentary form in the possession of Ministers, departments and public authorities, **limited only by exceptions and exemptions necessary for the protection of essential public interests** and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.

11. Subject to this Act, every person has a **legally enforceable right to obtain access** in accordance with this Act to—

- (a) a document of an agency, other than an exempt document; or
  - (b) an official document of a Minister, other than an exempt document.
- [Emphasis added]

The effect of these provisions was to establish disclosure as the default position unless the government could demonstrate that this would be contrary to the public interest (or private and business interests). Thus, the starting point was that there was an over-arching public interest in disclosure.

### **Public interest test**

At the same time, however, the legislation recognised, through the inclusion of exemptions, the importance of government being able to withhold information where necessary. The onus was on government to show why, in particular cases, an exemption applied such that disclosure would be contrary to the public interest. In relation to internal working documents, the relevant exemption was set out in section 36:

#### **Internal working documents**

36 (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

- (a) would disclose matter in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.<sup>25</sup>

Alongside this was the power to issue conclusive certificates<sup>26</sup>, the effect of which was that the responsible Minister could conclusively certify that internal working documents were

exempt from release under the Act because disclosure would be contrary to the public interest.

Simon Murray has noted that section 36 'is concerned with instances where public disclosure of a document would prejudice the integrity and viability of the decision making process'.<sup>27</sup> The concept of public interest was not defined in the legislation. This lack of definition can be seen either as the legislation's biggest problem, or its greatest advantage. It was a strength because it meant that all relevant factors could be taken into account and given appropriate weight, making it highly adaptable to circumstances and changes over time. But it was a weakness because it left open two questions:

- what public interest concerns might outweigh the interest in disclosure, and
- what weight ought to be given to those public interests?

There was no universal agreement in relation to these issues, and early Administrative Appeal Tribunal (AAT) case law took a relatively cautious approach, finding that a number of factors—including the seniority of those involved, the possible inhibition of frankness and candour in future, and the likelihood of confusion or unnecessary debate—would lead towards a finding that the information in question ought not be disclosed.<sup>28</sup> Academics, including Paterson,<sup>29</sup> Peter Bayne and Kim Rubenstein,<sup>30</sup> and Rick Snell<sup>31</sup> criticised this approach, suggesting that reliance on these factors as a matter of course was inappropriate, and contrary to the objects of the Act. Over time, the approach of the AAT shifted, with the *Re Fewster*<sup>32</sup> line of cases, for example, taking a more restrictive view of the application of these factors, such that by 1995 Snell noted that the AAT had begun to favour a presumption of disclosure.<sup>33</sup> The case law seemed to be moving gradually in the direction of greater transparency, without the need for any legislative action.

In 2006, however, the High Court in *McKinnon v Secretary, Department of Treasury*<sup>34</sup> found that it had limited power to review the Government's assessment of the public interest in cases where a 'conclusive certificate' had been issued. Judith Bannister concluded that the decision in *McKinnon* effectively precluded any real review of government decision-making in this area,<sup>35</sup> a concern that was echoed by mainstream journalists.<sup>36</sup> In the following year, the Australian Labor Party placed FOI reform at the heart of its election platform,<sup>37</sup> a pledge which led, in turn, to a series of legislative amendments.

### 2009/2010 amendments

In 2010, the *Freedom of Information (Reform) Act 2010* (Cth) inserted into the *FOI Act 1982* a new objects clause and public interest test. Whilst several other changes—including the abolition of conclusive certificates<sup>38</sup> and the establishment of the position of Information Commissioner with full powers of merits review<sup>39</sup> amplified the impact of these amendments on internal working documents.

In the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (Hawke Review) Allan Hawke AC stated:

The purpose of exemptions is to balance the objective of providing access to government information against legitimate claims for the protection of sensitive material. The exemptions provide the confidentiality necessary for the proper workings of government.<sup>40</sup>

This suggests that the need for balance is still at the heart of the legislation. A closer look, however, suggests that the legislation has been re-focussed away from balancing competing interests in favour of promoting transparency.

### ***Still a balancing act?***

As noted above, properly conceived, the function of FOI legislation is to strike the balance between too much and too little disclosure. The original objects clause expressly acknowledged that the right of access to information was limited 'by exceptions and exemptions necessary for the protection of essential public interests'. The new objects clause substituted by the *FOI (Reform) Act 2010*, however, removes the express reference to this limitation and provides in part:

#### **3 Objects—general**

- (1) The objects of this Act are to give the Australian community access to information held by the Government...
- (2) The Parliament intends, by these objects, to **promote Australia's representative democracy** by contributing towards the following:
  - (a) **increasing public participation** in Government processes, with a view to promoting **better-informed decision-making**;
  - (b) **increasing scrutiny, discussion, comment and review of the Government's activities** ... [Emphasis added].

The exemptions themselves still exist, although in slightly different form; but the change in the objects clause indicates that the purpose of the legislation is no longer to strike the balance between transparency and the other interests, but to promote transparency.

### ***Blunting the balancing tools?***

In addition to shifting the focus of the legislation away from balance, the amendments have 'blunted' the tools available to decision makers assessing the public interest in order to promote transparency outcomes. As noted above, the tools used to strike the disclosure balance in relation to internal working documents in the original legislation were the principle of maximum disclosure and the public interest test. The amendments strengthened the principle of maximum disclosure through the changes to the objects clause set out above. The real change, however, has been in relation to the public interest test.

The *Freedom of Information (Reform) Act 2010* (Cth) separated exemptions into two categories. In the first category are 'absolute' exemptions, meaning that if the document falls under the definition of the exemption, it is exempt, with no further consideration of public interest.<sup>41</sup>

The second category covers 'conditional' exemptions. Even a document that falls within the exemption will be released unless the government can demonstrate that to do so would be contrary to the public interest. The 'internal working documents' exemption previously found in section 36 was re-cast as a conditional exemption in section 47C, and a single public interest test was applied to all conditional exemptions by section 11A(5):

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

The application of a public interest test in relation to deliberative documents is a longstanding practice; what is striking about the amendments is the attempt, if not quite to define the public interest, then at least to determine which factors must and must not be taken into account when considering the public interest by the insertion of section 11B into the *FOI Act 1982*.

*Relevant factors cannot be taken into account*

New section, 11B, states that it is to be used for the purpose of 'working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest'. It does so by listing factors that may, and may not, be taken into account when conducting the public interest balancing test, dividing them into 'factors favouring access' and 'irrelevant factors'.

As a result of the insertion of section 11B the following factors cannot be taken into account:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

These factors, or variations of them, have in the past been used to support an argument that to disclose internal working documents would compromise effective government decision making. Most notably, the AAT in the *Howard* case, discussed above, found that the likelihood of disclosure causing confusion or unnecessary debate, or the high seniority of the author of the document, were factors which might suggest that disclosure was not in the public interest. Reliance on these factors is now prohibited following the amendments to the legislation. As noted above, the approach of the AAT had begun to shift by the time of the amendments, and it was less routinely accepted that the presence of these factors could lead to compromised government effectiveness if the information was disclosed.

This shift in understanding of the public interest does not necessarily mean, however, that these factors will never, in any circumstance, or at any time in the future, be relevant to a decision on disclosure. Mulgan has noted that judgements about the public interest are essentially political in nature,<sup>42</sup> meaning that what constitutes the public interest shifts with time, circumstances and changing political views. Indeed the 1995 ALRC report on the *FOI Act* recommended against legislative guidelines on the public interest because:

Just as what constitutes the public interest will change over time, so too may the relevant factors. For this reason, the Review considers that administrative guidelines issued pursuant to the Act are generally preferable to legislative guidelines.<sup>43</sup>

It is unclear why the government went against this advice. Whatever the reason, the result is that we can no longer be confident that the *FOI Act* is capable of ensuring that decision makers can take all relevant factors into account in all cases. If, as a result of the inclusion of this list of factors in section 11B, the government is unable to make out a legitimate case that effectiveness will be compromised by disclosure, then an increase in transparency will have come at the price of effectiveness that is compromised, and could result in disclosure of information that is contrary to the public interest.

*The weight attributed to relevant facts*

The original public interest test in section 36 provided complete flexibility in respect of the weight that ought to be given to particular factors in individual cases. The amended

legislation has changed this situation. The change was recognised by the Hawke Review, which stated:

The test is **weighted in favour of giving access** to documents so that the public interest in disclosure remains at the forefront of decision making. It is not enough to withhold access to a document if it meets the criteria for a conditional exemption. Where a document meets the initial threshold of being conditionally exempt, it is then necessary for a decision-maker to apply the public interest test.<sup>44</sup>  
[Emphasis added]

This is essentially a restatement of the principle of maximum disclosure: that disclosure ought to be the default position, unless to disclose is contrary to the public interest. However the legislation goes further than this, promoting disclosure not just through the structure of the Act, but by making it easier to make a case for the public interest in transparency, and more difficult to make a case for competing public interests such as government effectiveness, in individual cases. It does this by including a list of factors that support disclosure, but omitting to include a list of factors which support withholding information.

#### *List of factors supporting disclosure*

In addition to setting out factors that may not be taken into account, section 11B also sets out a list of factors that will support disclosure of information:

##### **Factors favouring access**

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

These factors are so broadly drafted that it is likely that at least one will be present in every case: each case is likely to start with a weight on the scales in favour of disclosure. Further, each of these factors is 'generic' in the sense of not being case-specific. By contrast, government arguments about the harm that might result from disclosure are generally required to be specific and to be accompanied by persuasive evidence in order to be accepted by the Office of the Australian Information Commissioner and AAT.<sup>45</sup> The effect of this amendment is that whilst specific evidence is required in order to make a case for withholding information, generic arguments may be sufficient for a case to disclose information. This results in an in-built imbalance—a 'tilting' towards disclosure.

#### *No list of factors to support withholding*

This 'tilting' effect of the amendments is intensified by the fact that section 11B contains no list of factors that may be used to support non-disclosure. In his second reading speech, Anthony Byrne, Parliamentary Secretary to the Prime Minister, said that this was 'in keeping with the intention of the reforms to promote disclosure'.<sup>46</sup> The Explanatory Memorandum to the 2009 FOI (Reform) Bill<sup>47</sup> and the Hawke Review suggest a slightly different explanation:

Factors favouring non-disclosure are not listed because most conditional exemptions include a harm threshold, for example, that disclosure would, or could be reasonably expected to, cause damage to or have a substantial adverse effect on certain interests. Where a decision-maker is satisfied that an initial harm threshold is met that is in itself a factor against disclosure.<sup>48</sup>

This analysis does not assist in relation to the exemption for deliberative documents: section 47C does not include a harm threshold. It exempts from disclosure any 'deliberative matter', without explaining the harm that the existence of the exemption is designed to prevent. This places those seeking to demonstrate the application of the exemption in a uniquely difficult position; there is no list of factors that may support non-disclosure, and the exemption itself provides no guidance. The Hawke Review acknowledges this and says that the 'absence of a clear indication of the harm that the exemption is designed to protect results in the exemption being subject to differing interpretations and difficult to apply.'<sup>49</sup> The Information Commissioner's published guidance, whilst containing a list of factors that might support an argument that disclosure is contrary to the public interest, makes no specific reference to potential harm to the deliberative process.<sup>50</sup>

In the absence of both a list of factors favouring non-disclosure and a 'harm threshold' in the exemption itself, decisions about the release of internal working documents are likely to be weighted in favour of disclosure.

### ***Greater weight for transparency***

The aim of the amendments was to promote greater transparency in order to combat the culture of secrecy described above. The importance of, and priority given to, transparency is appropriately reflected in the very existence and structure of the Act; in the general right to information and in the principle of maximum disclosure.

However whilst promoting greater transparency was one of the aims of the Act, when making individual decisions the approach must be to:

identify factors favouring disclosure and factors not favouring disclosure in the circumstances and to determine the comparative importance to be given to these factors.<sup>51</sup>

The inclusion of a list of factors in section 11B interferes with this process, making it more difficult for decision makers to determine the relative importance of relevant factors by tipping the scales towards disclosure in individual cases. The amendments make it easier for decision makers to make a case for the public interest in disclosure than to make a case for the public interest in non-disclosure. This does not necessarily mean that the public interest in disclosure is in fact stronger than the public interest in withholding the information; rather the amendments constrain the power of the decision maker to draw conclusions on the relevance and weight of factors, by weighting the scales in favour of disclosure in all circumstances. It blunts the public interest balancing tools available to decision-makers in an attempt to achieve, not the correct balance, but a particular result: transparency. The result, in short, is legislation which gives greater protection to the public interest in transparency than to the public interest in effective government decision-making. If it is accepted that there is a public interest in effectiveness and integrity of government decision-making—as the very existence of the exemption for internal working documents suggests—then it is unclear why, in this context, this interest is not given equal protection. In the context of FOI, it seems, some public interests are 'more equal than others'.

### **Effect of the changes: more transparency but less accountability?**

Part of the problem with the rhetoric surrounding the amendments is that it does not acknowledge that the increase in transparency comes at the price of reduced protection for competing public interests, including the public interest in effective government decision-making. Indeed, it comes at the price of blunting government's public interest decision making tools in ways which might reach beyond the *FOI Act 1982*.<sup>52</sup> Nevertheless, as long as this trade-off is acknowledged, it might still be argued that the amendments achieve a



proper balance if the reduction in effective government decision making results in greater transparency which leads, in turn, to an increase in accountability and public participation.

Questions arise, however, as to the overall impact of the amendments. Whilst the amendments may have made withholding some documents more difficult, it is unlikely that they will have resulted in genuine cultural change—a belief in or commitment to the benefits of transparency. Indeed on one view, these amendments have not only failed to bring about cultural change, but have encouraged government to engage in activity aimed at avoiding disclosure. For example, whilst the Hawke Review did not accept that the *FOI Act 1982* has a negative impact on the provision of ‘frank and fearless advice’,<sup>53</sup> a number of senior bureaucrats have since expressed views consistent with those of the Secretary to the Treasury, John Fraser, that:

Freedom of information is not a bad thing in itself. But open policy debate means people have got to be candid. And at the moment a lot of it is done orally, which is a pity. It’s a pity for history and it’s a pity because I’m not smart enough to think quickly on my feet. And writing something down is a great discipline.<sup>54</sup>

The paradoxical result, then, is that whilst the legislation seeks to promote transparency, it might have resulted in less accountability: if less is written down, then there is less to disclose.

## Conclusion

In the context of the culture of secrecy, it is understandable that people look to the *FOI Act 1982* as a way of promoting greater openness. Certainly robust legislative requirements—including a principle of maximum disclosure—are necessary preconditions to an open, transparent government.

But legislation that aims to promote transparency without an appropriate balance between disclosure and non-disclosure is misguided. Such legislation makes it more difficult for government to withhold information, seemingly on the basis that the government routinely withholds information to protect itself, rather than the public interest. Of course that sometimes happens, and checks and balances need to be put in place to guard against it. Abolishing conclusive certificates and establishing the position of Information Commissioner were steps towards improving that oversight.

But for ‘public interest’ decisions to be meaningful, decision makers must be able to take into account all relevant factors, and must be free to attribute to those factors appropriate weight in the circumstances. If we accept that one of the legitimate roles of executive government is the balancing of the public interest in individual cases, subject to review, then we must ensure that the executive has the tools to do that properly, and then make whatever changes are necessary to culture to ensure that the tools are used correctly. We are unlikely to solve the problem simply by blunting the tools.

## Endnotes

- 1 Barack Obama (US President), *Freedom of Information Act: Memorandum for Heads of Executive Departments and Agencies* (2009).
- 2 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).
- 3 *Freedom of Information (Reform) Act 2010* (Cth) sch 3, cl 30.
- 4 Carl J Friedrich, ‘Some Observations on Weber’s Analysis of Bureaucracy’ in Robert Merton et al (eds), *Reader in Bureaucracy* (The Free Press, 1952) 27, 29.
- 5 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 22.

- 6 Florence Heffron, *Organization Theory and Public Organizations: the Political Connection* (Prentice Hall, 1989) 219.
- 7 Herbert A Simon, 'Decision-Making and Administrative Organisation' in Robert Merton et al (eds), *Reader in Bureaucracy* (The Free Press, 1952) 185, 190.
- 8 Heath Aston, 'Abbott Government Under Fire for Secret Bid to Hand Back Asylum Seekers to Vietnam', *Sydney Morning Herald* (online) 17 April 2015.
- 9 Adam Gartrell, 'Savage Cuts and Secrecy: the Abbott Government's New Aid Paradigm', *Sydney Morning Herald* (online) 14 June 2015.
- 10 Sophie Morris, 'Abbott Government Weakens FOI and Public Service Disclosure', *The Saturday Paper: The Monthly* (online) 20 June 2015.
- 11 Rodney Tiffen, 'The Abbott Government's War on Transparency', *Inside Story* (online) 5 June 2014.
- 12 Ramsey Clark (US Attorney-General), *Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act* (1967).
- 13 Albert Meijer, 'Transparency' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 507, 519.
- 14 David Heald, 'Transparency as an Instrumental Value' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance* (Oxford University Press, 2006) 59, 60.
- 15 *Ibid.*
- 16 *Ibid* 62.
- 17 Stephen Easton, 'FOI Laws: Fixing the Chilling Effect on Frank Advice' *The Mandarin* (online) 18 June 2015.
- 18 Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005), 2.
- 19 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information, Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979) 21-22.
- 20 *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.
- 21 See, for example, Peter Bayne, 'Freedom of Information: Democracy and the Protection of the Processes and Decisions of Government' (1988) 62 *Australian Law Journal* 538 for an early discussion of the different approaches to the factors relevant to the public interest test under *FOI Act 1982*.
- 22 Richard Mulgan, 'Perspectives on the Public Interest' (2000) 95 (March 2000) *Canberra Bulletin of Public Information* 5, 9.
- 23 Rhys Stubbs refers to 'Australia's antagonistic environment of public administration' (Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43(4) *Australian Journal of Political Science* 667, 672). See likewise the reference to a 'longstanding battle between the courts and Ministers and their bureaucracies for control over the release of government information' in Gerard Craddock, 'The *Freedom of Information Act 1982* and Review on the Merits' (1985) 8 *University of New South Wales Law Journal* 313, 314.
- 24 See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984) for a discussion of the types of document covered by this exemption, including both policy and non-policy documents.
- 25 The section goes on to explain that it does not apply to purely factual material and certain reports.
- 26 The power to issue conclusive certificates also applied to *FOI Act 1982* s 33 (documents affecting national security); s 33A (documents affecting relations with the states); s 34 (cabinet documents); and s 35 (executive council documents).
- 27 Simon Murray, 'Freedom of Information Reform: Does the New Public Interest Test for Conditionally Exempt Documents Signal the Death of the *Howard* Factors?' (2012) 31(1) *The University of Tasmania Law Review* 58, 64.
- 28 *Re Howard and the Treasurer* (1985) 7 ALD 626, 634–635.
- 29 Paterson, above n18 at 294–299.
- 30 See Bayne, above n21; see also Peter Bayne and Kim Rubenstein, 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *Australian Journal of Administrative Law* 107.
- 31 See, for example, Rick Snell, 'The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues from the Heart of Government' (1995) (57) *Freedom of Information Review*.
- 32 *Re Fewster and Department of Prime Minister and Cabinet* (1986) 11 ALN 266.
- 33 Rick Snell, 'The Torchlight Starts to Glow a Little Brighter: Interpretation of Freedom of Information Legislation Revisited' (1995) 2 *Australian Journal of Administrative Law* 197.
- 34 (2006) 229 ALR 187.
- 35 Judith Bannister, '*McKinnon v Secretary, Department of Treasury*. The Sir Humphrey Clause - Review of Conclusive Certificates in Freedom of Information Applications' (2006) 30 *Melbourne University Law Review* 691.
- 36 See, for example, Nicola Roxon, 'Freedom of Information Under Attack', *The Advertiser* (Adelaide), 8 September 2006; 'The Failure of FOI', *The Canberra Times* (Canberra) 9 September 2006; 'Calls for Urgent Reform of FOI', *The Canberra Times* (Canberra) 7 September 2006.
- 37 Kevin Rudd and Joe Ludwig, 'Government Information: Restoring Trust and Integrity', Election Policy Document (2007).
- 38 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).
- 39 *Information Commissioner Act 2009* (Cth).

- 40 Allan Hawke, 'Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*' (2013) 39.
- 41 Examples of such exemptions include those which cover documents affecting national security, defence or international relations (*FOI Act 1982* s 33), and Cabinet documents (*FOI Act 1982* s 34).
- 42 Mulgan, above n22, 9.
- 43 Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (1995); Administrative Review Council, Report No 40 (1995) [8.14]. The only exception was a recommendation that the legislation make clear that 'potential (or actual) embarrassment is not a valid criterion.'
- 44 Hawke Review, above n40, 42.
- 45 See, for example, *Re Cleary and Department of the Treasury* (1993) 31 ALD 214 at 221—arguments about the provision of free and frank advice 'will not be accepted 'in the absence of compelling evidence'; likewise in [*Re Fewster and Department of Prime Minister and Cabinet (No 2)*] [1987] AATA 722 at [11]], such arguments will not be accepted 'unless a very particular factual basis is laid for the making of the claim'.
- 46 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2009, 12971–3 (Anthony Byrne, Parliamentary Secretary to the Prime Minister and Parliamentary Secretary for Trade).
- 47 Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009, 13.
- 48 Hawke Review, above n40, 42.
- 49 *Ibid* 48.
- 50 Guidelines issued under section 93A of the *Freedom of Information Act 1982*, Part 6—Conditional Exemptions [6.29] <<http://www.oaic.gov.au/publications/guidelines/Guidelines-s93A-FOI-Act-Part6-Conditional-exemptions.pdf>>.
- 51 Hawke Review, above n40, 42.
- 52 For example, the *FOI Act 1982* approach to the public interest test is already being used as a model for the application of the public interest test in other areas. See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 151 [9.41].
- 53 Hawke Review, above n40, 48.
- 54 John Fraser (Secretary to the Treasury), quoted in Easton, above n17.

## CATs: GAINS OR LOSSES FOR ACCESS TO JUSTICE? SACAT AND PUBLIC HOUSING APPEALS

*Kathleen McEvoy\* and Susannah Sage-Jacobson\*\**

The model of the 'Super' tribunal, the generalist amalgamated civil and administrative tribunal (CAT), has been established in almost all Australian states and territories.<sup>1</sup> In most jurisdictions the aim of access to justice is a feature of the aims of their establishment. CATs are now well established throughout Australia, with the most recent legislation for the establishment of the Northern Territory Civil and Administrative Tribunal (NTCAT) operating since 6 October 2014. State and Territory CATs are largely distinguished from the Commonwealth Administrative Appeals Tribunal in having jurisdiction in relation to certain civil matters, for example residential tenancies disputes, or small claims, in addition to a range of administrative review functions.

The achievements of CATs in improving access to justice lie in the improvements to transparency and consistency in decision-making, as well as improving public awareness concerning the independence and informality of decision making. This paper considers the tension between these proposed and intended gains in access to justice and the potential losses in the ability of the generalist CATs to tailor their processes to the distinctive needs of highly vulnerable applicants. The overall gains of CATs may not account for the specific legal needs of some socially excluded applicants who may require tailored services to enable substantive access to justice before a tribunal.

To illustrate this balance, a case study of the South Australian Civil Administrative Tribunal (SACAT), the most recent of the CATs to be established, is considered. SACAT has strong legislative underpinning in terms of access to justice and has from the outset of its operations subsumed a jurisdiction which addresses applications from highly vulnerable and socially excluded, special needs applicants, in South Australian public housing appeals.

In South Australia, appeals from parties to public and community housing disputes were formerly managed by the Housing Appeal Panel (HAP). The jurisdiction of this Panel was transferred to SACAT from 30 March 2015 and relates to disputes which public housing tenants and former tenants, and applicants for public housing, have with the public housing provider in SA (Housing SA)<sup>2</sup> and disputes arising between tenants of and applicants for community housing in South Australia and community housing organisations.<sup>3</sup> The HAP was a small tribunal with limited jurisdiction, located within and serviced by a Department which also included the government authority (Housing SA), the scrutiny of whose decisions constituted the bulk of the HAP's jurisdiction. It was therefore a tribunal and jurisdiction

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\*\* Susannah Sage-Jacobson is from Flinders University. This paper was presented at the AIAL National Administrative Law Conference, 24 July 2015, Canberra, ACT. It reflects the views of the authors alone except as otherwise noted, and not the views of the Tribunal. Some of the issues raised in this paper are also discussed in Kathleen McEvoy, *Building Secure Communities; Delivering Administrative Justice in Public Housing*, (2011) 65 *AIAL Forum* 1 (pp 1-24) and <http://law.anu.edu/aiial>. This author was also formerly Chairperson of the Housing Appeal Panel.

which would benefit both from the appearance and actuality of independence by being placed in SACAT.

However, this paper focusses on the former HAP applicants and questions whether the distinctive special needs of this particular group of applicants to the new SACAT will be appropriately met. In so doing the most recent available evidence on the extent of the legal needs of public housing tenants is discussed and a comparison is drawn between the specialised and tailored service previously offered by the former HAP in SA and the new streamlined procedures envisaged at SACAT. The paper explains that where the distinctive special needs of applicants to a particular jurisdiction to be subsumed in a CAT are not able to be accommodated by the broad focus of a CAT, it may be that substantive access to justice for a particular vulnerable group or groups is at risk of being lost. If the special needs of socially excluded people are not able to be proactively managed, the right to review of those people may be effectively lost and their access to justice through the exercise of the jurisdiction might be effectively denied. The paper suggests that while the gains of efficiency and transparency are important, ensuring that the special needs of the most vulnerable applicants are met should be a twin goal for the new SACAT.

### **CATs legislation and access to justice**

The CATs legislation in all Australian States and Territories emphasises accessibility and fairness, although with varying degrees of articulation in each of the statutes. There is a variety of means by which accessibility can be promoted and supported by CATs, such as through the availability of information and the procedures adopted by the Tribunal. The manner in which the rights to representation and costs are managed, the availability of informal resolution of disputes and its physical accessibility will all affect whether a tribunal's services and functions are easily recognised and understood by applicants. Many of the measurements of accessibility may develop with the culture and maturity of the Tribunal, however it remains the case that where new CATs are established, the legislative desiderata will set the scene.

The arguments in favour of CAT establishment go beyond administrative and financial efficiency. They extend to the promotion of access to justice in a broad sense, that a CAT will be an easier single place to find most of the review and decision making bodies that may be relevant to members of the public and their disputes. CATs will provide a single way to approach or apply for dispute resolution in relation to a myriad of decisions and to apply a single set of procedures. In addition, access to justice will be supported and promoted from the other side of the bench, that it will provide a centralised system of review and decision making, ensuring both greater accountability and more consistent and higher quality outcomes. Prior to joining a CAT, a small tribunal or board may have heard only few matters over a year, and so its members obtained limited consistent experience in managing decision making. As part of a larger tribunal the jurisdiction is exercised in an environment suffused with experience and decision making best practice. As it becomes easier for an applicant to get his/her matter into the tribunal, the matter will also be more efficiently dealt with, in the same environment and with the same processes, resources and expectations that apply in larger, busier but no more important jurisdictions, by the same experienced decision makers.

The legislation least forthcoming in articulating accessibility is the earliest, namely the Victorian legislation establishing VCAT in 1998.<sup>4</sup> That legislation states that its simple purpose is the establishment of the Tribunal, with no specification of its objects. However, the Three Year Strategic Plan for VCAT issued in 2010<sup>5</sup> identified fair and efficient decision making and improving access to justice as its primary priorities, also referring to 'engaging with the community' and 'an ADR centre of excellence'. The VCAT Strategic Plan for 2014-

2017 includes a Customer Charter, predicated on 'low cost, accessible, efficient and independent' high quality dispute resolution. The plan is subtitled *Building a Sustainable VCAT*, and focuses on modernising service delivery in order to reduce hearing waiting times; improving efficiency; providing better access in a physical sense (hearing locations and hearing room functionality); community involvement and engagement; and ongoing training for Members and staff.

The next legislation, in time, establishing the WA CAT was more explicit.<sup>6</sup> Section 3 included in its objectives the resolution of matters 'fairly, and according to the substantial merits of the case', acting speedily and with as little formality and technicality as practicable and to minimise costs.<sup>7</sup> Section 32 of the *SAT Act* deals with Tribunal procedures, specifying that the Tribunal is bound by the requirements of procedural fairness, is not bound by the rules of evidence but is to act according to equity, good conscience and the substantial merits of the case and may determine its own procedure. In addition, the Tribunal is enjoined to ensure that the parties understand the proceedings, including assertions against them and their legal implications, and upon request the Tribunal is to explain its decisions, procedures and directions to parties.<sup>8</sup> Section 87 provides that unless otherwise directed parties to proceedings before the Tribunal should bear their own costs.

The QCAT legislation<sup>9</sup> addresses the matter of accessibility very directly. One of its objects is to have the Tribunal 'deal with matters in a way that is accessible, fair, just, economical, informal and quick', as well as to promote the quality and consistency of tribunal decisions and decisions made by decision makers.<sup>10</sup> These objects are amplified in section 4, which requires the Tribunal to 'facilitate access to its services throughout Queensland', encouraging 'early and economical resolution of disputes', ensuring proceedings are conducted in an appropriately informal manner and, as well as requiring the maintenance and use of members' specialist knowledge and the encouragement of conduct to promote 'the collegiate nature of the tribunal', an injunction to 'ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal'.<sup>11</sup> Section 28 of the *QCAT Act* enables QCAT to set its own procedures, acting fairly and with regard to the substantial merits of the case, and complying with the requirements of natural justice, not bound by the rules of evidence, and with as little formality and technicality as possible, and with appropriate speed. Section 29 reflects the WA provision, requiring the Tribunal to take reasonable steps to ensure that parties understand the issues before the Tribunal and its proceedings and decisions, but it goes further and provides that the Tribunal must also take all reasonable steps to 'ensure proceedings are conducted in a way that recognises and is responsive to' cultural diversity, and the needs of a party where the party is a child or a person with impaired capacity or physical disability.<sup>12</sup> Section 43 of the *QCAT Act* addresses representation, and specifies that the main purpose is to have parties represent themselves unless the interests of justice require otherwise; it permits representation with leave in specified circumstances. It includes provisions for alternative (or 'additional') dispute resolution (ADR) services to be provided by the Tribunal, including mediation,<sup>13</sup> and provides that unless otherwise directed, parties bear their own costs.<sup>14</sup>

The NSW Act establishing NCAT<sup>15</sup> also identifies accessibility and responsiveness among its primary objects<sup>16</sup>, with familiar injunctions relating to being just, quick, cheap and as informal as possible, producing decisions that are 'timely, consistent and of high quality'. It also prescribes a 'guiding principle to be applied to practice and procedure':<sup>17</sup> the facilitation of just, quick and cheap resolution of 'the real issues in the proceedings'. This guiding principle is required to be implemented in the exercise or interpretation of any power under the *NCAT Act* or Rules. Section 37 of the Act promotes the use of 'resolution processes', including ADR, and section 49 provides that hearings are to be open unless otherwise directed.

In the ACT the CAT legislation<sup>18</sup> provides similar legislative objects for the Tribunal, although focussing more specifically on the quality of the Tribunal's role, but directing that 'access to the tribunal is simple and inexpensive for all people who need to deal with the tribunal'.<sup>19</sup> Section 7 spells this out in 'Principles applying to the Act', in particular specifying that the Tribunal is to ensure as many simple, quick, inexpensive and informal processes as are consistent with achieving justice, and to comply with the requirements of natural justice and procedural fairness. Section 30 provides that representation ('by a lawyer or someone else') is of right; Division 5.3 makes provision for the use of ADR by the Tribunal; section 38 provides that hearings will in general be held in public; and section 48 provides that, again in general (the Tribunal may order otherwise), parties are to bear their own costs.

Finally the Northern Territory legislation is similar to the South Australian enactments concerning accessibility, specifying that the Tribunal must be 'accessible to the public by being easy to find and access', and 'responsive to parties, especially people with special needs'. In addition, it requires the Tribunal to process and resolve proceedings 'as quickly as possible, while achieving a just outcome', including the use of mediation and ADR where appropriate and using straightforward language and procedures and acting with as little formality and technicality as possible, and ensure flexibility in its procedures.<sup>20</sup> Section 54 reflects the provisions in the WA and NSW legislation requiring the Tribunal to ensure that parties understand the matters in the Tribunal and the Tribunal's procedures, decisions and directions. Section 62 requires hearings to be in public unless otherwise directed, and the *NTCAT Act* makes provision for the tribunal to use a variety of ADR processes for dispute resolution.<sup>21</sup> Section 130 deals with representation, permitted of right. Section 131 provides that it is to be expected that parties will bear their own costs.

All these provisions in the relevant CAT statutes are relevant to whether the CAT is focused on accessibility for applicants. The culture of a tribunal is formed around the objectives in the establishing legislation and the purposes articulated at its commencement. However, the reality of access to justice for applicants to the CAT in practical or substantive terms inevitably goes beyond legislative provisions and statements in Objectives clauses.

### ***The SACAT legislation***

South Australia's Civil and Administrative Tribunal (SACAT) was established by legislation passed in 2013, and has been hearing and determining matters since 30 March 2015.<sup>22</sup>

The objectives of the *SACAT Act* are ambitious and impressive: they include the promotion of 'the best principles of public administration' in decision making, including independence in decision making, procedural fairness, high quality and consistent decision making, and transparency and accountability.<sup>23</sup> In addition, the objectives include significant access to justice objectives, such as accessibility 'by being easy to find and easy to access', and responsiveness to parties 'especially people with special needs', that applications are 'processed and resolved as quickly as possible while achieving a just outcome'; keeping costs to a minimum, using straightforward language and procedures, acting with as little formality and technicality as possible, and being flexible in the conduct of matters in terms of procedures.<sup>24</sup> There is clearly commitment and focus in the Act and the intended operations of SACAT, on enhanced access to justice as well as efficiency. Indeed, these were matters emphasised by both the SA Attorney General and the SACAT President at the commencement of SACAT's operations: the Attorney emphasised the 'huge step forward for the justice system in South Australia', and indicated that the 'streamlining' provided by SACAT would 'offer real benefits for the public and the justice system'.<sup>25</sup> The SACAT President, Justice Parker, in referring to the emphasis in the Tribunal on accessibility and efficiency for the public, said that 'SACAT has been provided with the tools to be as flexible

as possible so as to handle matters in the most appropriate way, which will be determined on a case-by-case basis'.<sup>26</sup>

Not articulated, but implicit in the SACAT model, is understanding that the Tribunal will be more accessible and will achieve better and more consistent processes for dispute resolution, including in hearings and as a result, in outcomes, in relation to matters previously managed and determined by the myriad individual tribunals and other previously isolated and self-contained decision-making jurisdictions.<sup>27</sup>

The intention is that SACAT will gradually accrue further jurisdictions over a staged process over time. Its commencement jurisdiction has included residential tenancy disputes and guardianship and mental health, which are both large volume jurisdictions. It also has jurisdiction over the appeals in public and community housing matters, previously within the jurisdiction of the Housing Appeal Panel (HAP).<sup>28</sup> The *SACAT Act* preserves all existing appeal rights arising in the jurisdictions transferred and they are managed within the SACAT structure.

In the SA legislation, 'accessibility' is referred to in an expansive manner, that is it refers to SACAT as 'accessible by being easy to find and easy to access', and is linked in the same provision as also being 'responsive' to parties.<sup>29</sup> The Objectives state that this accessibility is to be achieved in a number of ways, such as timeliness in processing and resolving matters and the use of ADR and mediation. They also cite aims of keeping costs to a minimum, using straightforward language and procedures, acting with as little formality and technicality as possible and being flexible in its procedures 'to best fit the circumstances of a particular case or a particular jurisdiction'.<sup>30</sup> Some of these objectives are expanded upon in section 39 of the *SACAT Act*, 'Principles governing hearings'. The SACAT legislation makes provision for compulsory conferences in certain circumstances,<sup>31</sup> and mediation,<sup>32</sup> which can be required by the Tribunal. Representation is of right,<sup>33</sup> and costs are to be generally borne by the parties.<sup>34</sup>

Regulations, Rules and Directions pursuant to the Act may give a more specific sense of how these provisions might affect substantive access to justice and also suggest the manner of operation of the Tribunal 'on the ground'. The SACAT Regulations provide for an application fee for the commencement of proceedings, with some applicants in select jurisdictions provided with exemption from the payment of the fee.<sup>35</sup> Applicants seeking review of public housing decisions in SA are not exempt from payment of the application fee but the fee can be waived, remitted or refunded by order of the Registrar on the grounds of financial hardship,<sup>36</sup> or by a tribunal member if 'it is fair and appropriate'.<sup>37</sup> Without such a determination otherwise by a Presidential member, a matter cannot proceed without the payment or waiver of the fee.<sup>38</sup> There are provisions in the Rules concerning the necessary documentation and procedure for fee waiver applications and there is room for flexibility in these requirements.

From the outset the SACAT has adopted a number of practices to enable and support its aims of efficient operations. These include providing for online applications, supported by an 1800 phone line, and free public computer access at the Registry assisted by community access officers.<sup>39</sup> The provision of tribunal documents and communication with parties are also done electronically and with reliance on case management software. A cause list of hearings and conferences is published daily on the web site, other than in relation to guardianship, administration, mental health and consent to medical treatment cases, where for privacy reasons parties are notified directly.

Oral hearings are conducted in public<sup>40</sup> and ADR processes, in particular mediation and conciliation, are to be widely used by the Tribunal in all of its jurisdictions with the



expectation that this will significantly reduce the number of matters proceeding to a hearing. SACAT has established its jurisdiction in broad groupings through Streams. These are: Community (incorporating guardianship, administration and mental health); Housing and Civil (including residential tenancies matters) and Administrative and Disciplinary (including review of government decisions, incorporating the review of public housing decisions formerly heard by the HAP). The Streams enable the maximising of tribunal member competencies and experience. The Community Stream currently operates from a satellite location and may conduct hearings as required at other locations, such as hospitals. Otherwise the SACAT is to be a 'one stop shop' in relation to all the other jurisdictions subsumed by SACAT, and this expected to continue to be the case with additional accrued jurisdictions over time. There may also, therefore, be the perception that, in terms of access to justice, it seems that 'one size fits all' across all applicants before the SACAT.

Questions arise concerning how jurisdictional specialities and differences in applicants are to be proactively managed in processes that are inclusive of any previously existing excellence and management of particular needs. Where there has previously been a highly successful small specialist jurisdiction tribunal, easy for vulnerable applicants to find and benefit from tailored registry support, the concern may be that the quality of the previous body may be lost in the generality of the new CAT.

A former CAT President, Justice John Chaney of the WA Supreme Court and former President of SAT, recognises the concerns that arise with the establishment of CATs, including the possible 'loss of specialist expertise, and increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdictions that super-tribunals exercise'.<sup>41</sup> It is noted however, his view is that these concerns are not borne out in practice, and 'the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency and quality have all come to pass'.<sup>42</sup>

### **Access to justice and legal needs in Australia**

The focus on a particular group of applicants is an approach that reflects the method of research into access to justice in Australia and internationally. Access to justice research seeks to measure the legal needs within a community through empirical research and by identifying the groups which experience significant unmet legal needs and barriers to legal services. Due to the persistent absence of comprehensive and reliable data research in Australia, it is difficult to identify an evidenced based picture of the groups in the community experiencing the highest legal needs. There is, however, significant evidence that public housing tenants are amongst the most socially excluded and high legal needs groups in the Australian community.<sup>43</sup>

Legal needs research has always benefited greatly from the perspectives of the community legal sector and the data produced relating to their work within the community. Access to justice relating to users of public and community housing is no exception. Analysis of the information gathered by community legal centres provides important insights into the legal needs of people experiencing housing stress and at risk of homelessness in Australia. The community legal sector has been at the forefront of developing integrated legal service responses for the homeless in direct response to their clients' legal needs. It has also contributed significantly to legal research through data collection and reporting on its complex casework. In addition to the daily work done by most generalist centres, all Australian states and territories have specialist homelessness and housing legal services, which use a multi-disciplinary approach to combining casework with outreach services, advocacy through in-house social workers and delivery of specialist community legal education programs.<sup>44</sup> Some of these specialist centres have also developed mutually

beneficial partnerships with private pro bono law practitioners, key government agencies such as public advocates, trustees and tribunals, and the peak tenancy and homelessness organisations. Many also partner directly with a non-government seniors organisation which provide helplines, manage phone enquiries and facilitate legal, financial and other referrals.<sup>45</sup>

Although these specialist community services produce quality data concerning the access to justice issues faced by people at risk of homelessness, they are generally unable to examine, analyse or investigate this data, and the legal needs research that has been undertaken, while individually usually of high quality, has remained constricted due to resources and methodology. Speaking in August 2010, Justice Ronald Sackville AO lamented the absence of such analyses in Australia:

Australia has had too many ad hoc, repetitive and ineffectual inquiries into access to justice. There have been too few rigorous empirical studies evaluating programs and charting their progress over time. Too few studies have attempted to cross boundaries and derive lessons from studies or experiments on service delivery have been conducted largely in isolation from each other.<sup>46</sup>

The most comprehensive and robust program of legal needs research in the past decade has been produced by the New South Wales Law and Justice Foundation and, more specifically, the Foundation's *Access to Justice and Legal Needs Research Program* (A2JLN).<sup>47</sup> The A2JLN Program seeks to provide a thorough and sustained assessment of the legal needs of the community in NSW, with a focus on access to justice by disadvantaged people. In 2006 the A2JLN Program reported on its first broad-scale quantitative study on legal needs: the NSW Legal Needs Survey (NSW Survey) provided valuable empirical data on legal service provision and law reform in NSW.<sup>48</sup> The NSW Survey confirmed that there is overall no rush to the law by those surveyed, but that one third of individuals in the communities surveyed who face justiciable issues take no action at all. However, the Survey reported a relatively high incidence of legal events over a one-year period, with some individuals, such as those with a chronic illness or disability, experiencing 'clustering' of legal events. These factors are also likely to be particularly pertinent for public housing tenant groups, who have proportionally high rates of ill-health and disability.

The Survey reported that, in general, people rarely sought advice from legal advisers and, in three-quarters of the cases where help was sought, only non-legal advisers were consulted. The type of legal event and socio-demographic factors were significant predictors of whether or not people acted in response and whether they then sought help from others. The most socially excluded, such as public housing tenants, were the least likely to either act in response, or to seek help in response to a legal problem. The most common accompanying belief to inaction was that doing something about the legal issue would make no difference to the outcome. The study also showed that participants were more likely to be satisfied with the outcome of events where they sought help, rather than where they did nothing.

The key results from the NSW Survey were largely confirmed by similar results and findings emerging in the subsequent A2JLN Australia-Wide survey, published in 2012.<sup>49</sup> The Legal Australia-Wide Survey (LAW Survey) was an ambitious and long-awaited quantitative study of legal needs across and throughout the whole of Australia. The aim of the LAW Survey was to:

...deal with key questions that go to the heart of understanding the legal and access to justice needs of the community and how to address these needs. It assesses the prevalence of legal problems across the community and the *vulnerability of different demographic groups* to different types of legal problems. It examines the various adverse consequences that can accompany legal problems as well as the responses people take when faced with legal problems and the outcomes they achieve.<sup>50</sup>

While these results provide a complex picture, they confirm previous findings that disability and either non-English-speaking background or low-English-proficiency, were significant indicators for significant unmet legal needs and barriers to access to justice. These factors are both highly prevalent in public housing tenant groups.

In addition to the insight gained through the legal needs research, multi-disciplinary research into public housing also provides important evidence-based insights into the vulnerabilities of public housing tenants in relation to seeking review of public housing decisions. An Australian study in 2012 found that:

Although public housing tenants have access to secure and affordable housing, they appear to be generally less trusting than private renters or homeowners and exhibit less confidence in government institutions.... Public housing tenants express lower levels of interpersonal trust even controlling for a range of social background factors, suggesting that as a form of tenure, public housing in some ways exacerbates the disadvantage of tenants.<sup>51</sup>

Low levels of trust in public institutions will not only affect the likelihood of seeking out assistance and complaint resolution with public housing authorities and also accessing review of decisions by a Tribunal. Suspicion about the independence of one government agency, such as a tribunal, from another, such as the decision making agency, has been shown to inhibit applications for review of government decisions in the UK.<sup>52</sup>

The Australian Housing and Urban Research Institute's July 2015 *Report into Disadvantaged Places in Urban Australia* also found that:

[T]he public renter group stood out as having a notably low proportion of respondents who had recently attended a local event (29% compared with 44% across all tenures). As well as the relatively high incidence of disability in public housing, this finding might reflect the location of public housing in terms of accessibility to local centres. This latter hypothesis appears consistent with the finding that 23 per cent of public renters had difficulty in getting to places of importance whereas this was true for only 9 per cent of all respondents.<sup>53</sup>

This report identified the difficulty with getting to places as a significant social exclusion factor by measuring how often people living in disadvantaged places used public transport and visited people and other locations. This factor also necessarily affects access to justice by way of access to the physical locations where information and assistance may be sought. Social exclusion has primarily been linked to public and social housing in the international policy discourse, and many analyses as well as state-sponsored initiatives have been targeted at public housing estates.<sup>54</sup>

### **Public housing applicants**

The accessibility of an effective review of public housing decisions is a matter of real significance within the Australian community.<sup>55</sup> Provision of public housing, pursuant to clear rules appropriately applied, is an essential aspect of enabling engagement and participation in a civil society for those who are socially excluded in our community. As part of this, it is important that there be proper scrutiny of the application of these rules to the distribution and management of the limited and valuable public housing

Public housing in Australia is limited almost exclusively to applicants who are social security beneficiaries.<sup>56</sup> Public housing tenants have little or no employment, poor health often with multiple health issues, and are socially excluded by these and other factors.<sup>57</sup> Two thirds of public housing applicants are women and most are single parents.<sup>58</sup> Demand for public housing far outstrips supply and it is only those who are homeless or at risk of homelessness who obtain housing, and often then only following a long wait.<sup>59</sup> Decisions concerning access to public housing and the other related benefits are made through public bodies and

generally by public servants,<sup>60</sup> governed by government policies and legislation. Policies include guidelines on assessing eligibility including complex, difficult and subjective assessments of the impact of an applicant's personal, medical and social circumstances on their capacity to obtain and maintain housing. There is therefore plenty of scope for decision makers to make a 'wrong' decision on the facts of an application concerning public housing. A decision-maker may misinterpret or misapply policy or incorrectly assess or misunderstand the applicant's circumstances. Given the combination of complex of public housing policies, the limited resources for distribution and the significant social needs of the applicants, there is also plenty of scope for dissatisfaction with the outcome of decisions and the likelihood that applicants may desire to have the decision reviewed.<sup>61</sup>

There are numerous implications of 'defective decision making' by public agencies, including 'the human dimension', as well as the cost implications for government in both mispaid benefits and in the resources directed to the resolution of disputes.<sup>62</sup> In addition, in relation to public housing, there are the significant political and social costs which arise in the context of limited resources. There are ever extending waiting lists and the correlative impacts on other aspects of the applicant's lives, including upward pressure on the cost of private rent, as well as visible homelessness and increased pressure on other government and private services.

An adverse decision concerning an application for public housing support is likely to have profound and immediate consequences on individuals. The applicant may face immediate eviction, ongoing homelessness, or continuing exposure to a damaging personal, social or physical environment. Obtaining public housing or housing support has a significant impact on the lives of applicants. It enables them to obtain housing, avoid or end homelessness, establish or live together as a family, have consistent access to medical and education services, and access and maintain employment opportunities.

Access to secure and affordable housing is acknowledged and protected as a fundamental human right in a number of international conventions to which Australia is a party.<sup>63</sup> Secure housing is important as a matter of personal security and place, and also provides a basis to secure employment; a fixed address to receive social security entitlements; a setting for the enjoyment of family and community life and all this entails (including the right to vote); and a basis for the pursuit of education and related activities. The impact in some Australian jurisdictions of specific human rights legislation<sup>64</sup> may require public authorities to act consistently with human rights. Justice Kevin Bell of the Supreme Court of Victoria recently stated, extra judicially, in the context of Victorian and ACT Human Rights legislation:

In human rights terms, the dwelling is not just property but a home. The public housing provider is not just a landlord but a public authority with human rights obligations. The tenant is not just a renter but a person of inherent value and worth, of potential and capability and a bearer of human rights.<sup>65</sup>

The human right to administrative justice, that is, the right to correct and transparent government decision making, a fair hearing and independent review processes, such as is provided by a Tribunal, is also increasingly recognised in international commentary.<sup>66</sup> This human right may also incorporate a right to legal advice and representation as part of facilitating substantive access to justice.

Advice and advocacy services available to provide specific assistance and support for public housing applicants remains limited in Australia. In addition to the generalist community legal services discussed above, each jurisdiction has a specialist service providing tenancy advice and advocacy support to public housing tenants and applicants for housing assistance as well as to tenants and applicants in the private rental market.<sup>67</sup> Some of these services are relatively well funded and provide extensive services ranging from training and advocacy to

publications and research.<sup>68</sup> The advocacy services do not however always extend to appearing at hearings before review bodies such as tribunals.

Tenants in public housing have special needs for advocacy and support as they often face restrictions on their tenancy which do not apply to private renters or to home owners, in particular in relation to their personal conduct or behaviour. Personal conduct such as disruptive and disturbing behaviour or anti-social or unusual activity not easily understood by others may often be associated with mental illness, social isolation and exclusion, cultural difference, or disability. As a result, public housing tenants are often subject to special arrangements relating to conduct that can make their tenancies more fragile or more likely to be terminated. Socially excluded people therefore also face housing decisions that may not apply to other tenants and which can impact disproportionately on their security of tenure or capacity to obtain or maintain housing.<sup>69</sup> A very low income, coupled with disability, mental illness or social exclusion, may place a tenant at a very high risk of breaching a term of a tenancy agreement, and the circumstances of such tenants are that they are most likely to be homeless and at severe risk if their tenancy is terminated. The need for administrative justice, and to access an independent and effective review process, is acute for these applicants; the need of the broader community to be confident that the most vulnerable members of the community are ensured access to fair and proper decisions is similarly acute.

In Australia, formal administrative means for seeking review of decisions concerning public housing were established throughout the 1990s pursuant to a condition of the funding for public housing provided by the Commonwealth. These appeal mechanisms have taken a variety of forms throughout the States and Territories. Only in SA is the right to review decisions of the public housing authority placed on a legislative and determinative basis.<sup>70</sup> This power reposed in the HAP from 2007<sup>71</sup> and was transferred to SACAT at the commencement of its operations. While there are review mechanisms throughout Australia, there is a range of processes and varying degrees of independence.<sup>72</sup> In NSW, although there is a well developed and functioning hearing process for reviews within the Department of Housing, it is not legislatively based and is recommendatory only. In some jurisdictions<sup>73</sup> reviews are conducted within the Department on the papers. In WA and NT there are hearing processes, but these are managed and staffed by the public housing agency. In the ACT there is a review process conducted on papers only by an internal advisory committee established by the housing commissioner, with a right of appeal to the ACT CAT. The most recent figures, however, suggest a very low appeal rate.<sup>74</sup> In none of the other jurisdictions can the review of the public housing decisions proceed to the CAT. Accordingly, there is little guidance or information available from other CATs as to their effectiveness or use in respect of the review of public housing decisions. Prior to the SACAT, the SA system, through the HAP, arguably already provided the best model for applicants in terms of enforceability of outcome for public housing matters. In SA, the HAP has consistently heard between 80 – 120 appeals relating to public housing decisions each year since 1992 when it was first established.<sup>75</sup> Appeals were heard by the HAP following an internal review with approximately 400 requests for internal review each year. About one quarter of these matters then proceeded to a hearing by the HAP following the review, and about 1/3 of matters heard resulted in a changed decision for the applicant.<sup>76</sup>

### **Access to SACAT by parties to public housing disputes in SA**

The SACAT procedures and rules should positively impact on public housing applicants and affect their access to justice by allowing them access to an independent, professional, skilled and resourced decision making body for the consideration and determination of their applications. While they essentially had this before through the HAP, SACAT is independent of the government decision maker, and will be better resourced and known in the wider

community, giving its decisions a greater authority and context. If a matter proceeds to a hearing it will be heard in a proper hearing environment by a skilled and experienced decision maker. While previously HAP applicants had the additional benefit of tribunal members who are expert in the processes and policies of public housing, this expertise will be readily learned at SACAT. Overall, public housing applicants are not disadvantaged in these respects.

At a very practical level however, there may be some less noticeable differences at SACAT. Previously HAP applicants made their applications on a paper form, available from the registry of HAP, Housing SA (the decision making authority) offices and other agencies. Application forms were also sent out to applicants by post on request, or in some cases along with a decision which was likely to be subject to appeal. There was no application fee. Under these circumstances, practical support in lodging the appeal, if not available from a support agency,<sup>77</sup> would be provided by the HAP registry, including providing and filling out the application. Given applicants are required to seek an internal review before the matter can be taken to independent review, an additional step is required if the decision has been affirmed and the applicants want to proceed further. Public housing applicants need proactive practical support to make the decision to proceed to appeal and often require specific information about their right to do so. Importantly they also may require reassurance concerning their safety from any perceived government repercussions. Previously, the HAP registry also made arrangements directly with the applicant for a suitable time and arrangements for the hearing. Applicants may be constrained by illness or other personal circumstances making flexibility around hearing times important. At HAP, all hearings were in private, and written reasons for all decisions made by the HAP were provided to the applicant.

These practical tailored registry supports previously provided by HAP may be lost with the transfer of jurisdiction to SACAT. Applicants are no longer able to use a paper hard copy of an application form. Instead telephone assistance is available through the SACAT Registry, as well as public computer access at the Registry with community access officers to provide on site support. An application fee of \$69 now applies and while this would be likely to be waived for an applicant on Centrelink Benefits, an applicant is still initially confronted with the requirement to pay the fee<sup>78</sup> or to make an application for waiver.<sup>79</sup> An applicant faces a double process at SACAT if the application is referred to a conference or other ADR process to discuss resolution.<sup>80</sup> If the resolution is unsuccessful then the matter will proceed to a hearing. It may be the case that a public housing applicant will not understand the need to re-attend at SACAT, why there are more hearings, or they simply may not have another bus fare, or the physical or mental resources to re-attend.<sup>81</sup>

The applicant may also reasonably decide not to attend if they are concerned about their hearing being in public, or that the decision in their case will be published (SACAT practice). Public housing appeals very frequently involve discussion of highly personal, confidential and often distressing issues, consideration of which might form the basis of the appealed decision. Applicants are often reluctant to reveal and discuss these matters publicly, and it is conceivable that a hearing in public may dissuade them from pursuing an appeal. While hearings can be held in private, this is a matter to be decided on a case by case basis.

The thrust of these concerns is that in the case of public housing appeals, if the type of tailored support previously existing is not provided to applicants to negotiate SACAT, access may be at risk of being diminished rather than preserved or enhanced in the review of public housing appeals. This is not because SACAT's processes or Rules are poor or unconcerned about access, but because applicants in the public housing jurisdiction have specific and distinctive needs. The rules procedures and processes need to be devised and

applied in a discriminating manner to support the review rights of particular groups of specific vulnerable tribunal users.

The concern is that, faced with the requirement for an online application, with no paper form that can be obtained, perused and considered beforehand; the requirement of a fee; reference to Housing SA for advice and support rather than through the Registry; the knowledge that a hearing will be in public, with public discussion of deeply personal and sometimes traumatic matters; and the possibility that there may be more than one attendance for a 'hearing' (a conference as well as a hearing), may well determine an applicant who has limited understanding of court, tribunal and bureaucratic systems, not to pursue an appeal against a government decision which may well have been overturned or varied on appeal.<sup>82</sup> For that applicant, access has not been either preserved or enhanced, rather, their right to appeal has been diminished.<sup>83</sup>

This is not an argument that SACAT should not exercise the former HAP jurisdiction, nor that it should duplicate the processes and practices of the former body. Rather it is an argument for the flexibility available to the Tribunal to proactively plan for systemic supports to be available for public housing decision applicants as a matter of course, rather than requiring them to apply on an individual basis, appreciating that these individuals share many characteristics of vulnerability and social exclusion. It is these characteristics which may mean their right of review of government decisions impacting on their lives is no longer real.

## Conclusion

This paper has highlighted some of the tensions in the proposed and intended gains in access to justice by amalgamating small specialist tribunals into the favoured generalist CAT in Australia. By using the case study of SACAT and the example of public housing appeals in SA, some of the practical details facing applicants and affecting substantive access to review may be described and proactively addressed. If the processes in place for SACAT's operations inhibit applications for the review of public housing decisions, or significantly reduce their numbers, it may be that the goal of enhancing access to justice is not truly being achieved for all.

Enabling access to administrative review is a central aspect of access to justice. Enabling substantive access to review for vulnerable and socially excluded applicants in SA, presenting with special needs, would present a noble outcome for SACAT.

## Endnotes

- 1 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*); *State Administrative Tribunal Act 2004* (WA) (*SAT Act*); *ACT Civil and Administrative Tribunal Act 2008* (ACT) (*ACAT Act*); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*); *Civil and Administrative Tribunal Act 2013* (NSW) (*NCAT Act*); *South Australian Civil and Administrative Tribunal Act 2013* (SA) (*SACAT Act*); and *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (*NTCAT Act*). On 28 April 2015 the Tasmanian Attorney General announced that work had commenced to consider the feasibility of a single amalgamated Civil and Administrative Tribunal for Tasmania, along the same lines as similar tribunals elsewhere in Australia.
- 2 See *South Australian Housing Trust Act 1995* (SA) s 32D.
- 3 See *Community Housing Providers (National Law) (South Australia) Act 2013* cl 3(1)(d) and (2) sch 2 of pt 5 of sch 1; and *South Australian Co-operative and Community Housing Act 1991* s 84(1)(a).
- 4 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*).
- 5 *Transforming VCAT: Three Year Strategic Plan 2010*.
- 6 *State Administrative Tribunal Act 2004* (WA) (*SAT Act*).
- 7 *Ibid* s 9.
- 8 *Ibid* s 32 (a) and (b).
- 9 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*).
- 10 *Ibid* s 3.

- 11 Ibid s 4.
- 12 Ibid s 29(c).
- 13 Ibid s 75 – 83.
- 14 Section 80.
- 15 *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).
- 16 Ibid s 3(c).
- 17 Ibid s 36.
- 18 *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act).
- 19 Ibid s 6(b).
- 20 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (NTCAT Act) s 10.
- 21 Ibid s 107 and following deal with compulsory conferences, and s 117 and following address mediation.
- 22 *South Australian Civil and Administrative Tribunal Act 2013* (SA) (SACAT Act).
- 23 Section 8(a)(i)-(iv) SACAT Act.
- 24 Section 8, SACAT Act.
- 25 See Katherine Cook, *Recent Developments in Administrative Law*, (2015) 80 *AIAL Forum* at 5.
- 26 Ibid at 6.
- 27 For a general overview of the pre-SACAT tribunal system in SA, see Sage-Jacobson, S 'Have you Heard from South Australia' (2012) 68 *AIAL Forum* 61.
- 28 *The Statutes Amendment (South Australian Civil and Administrative Tribunal) Act 2014* (SA) transfers the jurisdictions of the previous tribunals and other bodies to SACAT.
- 29 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(b); this is duplicated in the NT legislation.
- 30 Ibid s 8(g).
- 31 Section 50.
- 32 Section 51.
- 33 Section 56.
- 34 Section 57.
- 35 Regulation 14, with sch 1 cl 1 setting the fee at \$69.00. The Crown in various capacities is exempt, as are public sector employees making an application against a public sector agency pursuant to the *Public Sector Act 2009* (SA) and applications under the jurisdiction of the previous Guardianship Board (SA).
- 36 Regulation 14(7).
- 37 Regulation 14(8).
- 38 Regulation 14(6).
- 39 There is no hard copy or paper application form available for SACAT applications; the application form is to be completed online only.
- 40 SACAT Act s 60, but the Tribunal may direct that that any particular matter or part thereof should be heard in private (s 60(2)).
- 41 Justice John Chaney, 'Australian Super-Tribunals – Similarities and Differences', paper presented at *Best Practice in Tribunals: A Model for South Australia*, Law Society of SA/COAT-SA, 14 June 2013, at 2.
- 42 Ibid, and Justice Chaney notes here that a WA Parliamentary Review of SAT had concluded that the Tribunal was meeting its objectives.
- 43 See for example, C Coumarelos et al, *Law and Justice Foundation of NSW, Legal Australia-Wide Survey: Legal Need in Australia* (2012), which showed that 50.5 per cent of those who identified as homeless and 22.8 per cent of those in basic/public housing had experienced three or more legal issues, compared with only 15.7 per cent in other types of housing generally. See also H Douglas, 'Homelessness and Legal Needs: A South Australia and Western Australian Case Study' (2008) 29 *Adelaide Law Review* 361; and Council to Homeless Persons, 'Homelessness and the Law: Access to Justice' chapter 1: Legal Issues Facing People Experiencing Homelessness (2014) 27(9) *Parity* 6-28.
- 44 Street Law Centre (Western Australia), QPILCH Homeless Persons' Legal Clinic (Queensland), Housing Legal Clinic (South Australia), PIAC Homeless Persons' Legal Service (New South Wales), Canberra Community Law (previously Welfare Rights and Legal Centre & Street Law), Darwin Community Legal Service (Northern Territory), Justice Connect Homeless Law (Victoria).
- 45 See, for example, Justice Connect in NSW and Vic; <https://www.justiceconnect.org.au/our-programs/homeless-law>, accessed 13/8/15.
- 46 Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (2011) 10 *The Judicial Review* 221; 235-256.
- 47 See the many publications and Reports available on the website of the Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs Program at <http://www.lawfoundation.net.au/>, accessed 13/8/15.
- 48 See Christine Coumarelos, Zhigang Wei and Albert Zhou, 'Justice Made to Measure: New South Wales Legal Needs Survey in Disadvantaged Areas' (Law and Justice Foundation of NSW, 2006). This study focused on legal needs in six disadvantaged areas in NSW and was administered during September and October 2003 via telephone interviews with 2,431 residents.
- 49 Christine Coumarelos et al, *Law and Justice Foundation of NSW Legal Australia-Wide Survey: Legal Need in Australia* Volume 7 'Access to Justice and Legal Need' (2012).
- 50 Ibid at 231; emphasis added.



- 51 Jed Donoghue & Bruce Tranter 'Social Capital, Interpersonal Trust, and Public Housing' *Australian Social Work* Vol. 65, No. 3, September 2012, pp. 413-430. This research is based on the analysis of survey data from the 2003 Australian Survey of Social Attitudes (AuSSA), with a large sample of Australian adults aged 18 and above (Gibson, Wilson, Denmark, Meagher, & Western, 2004).
- 52 See D Cowan et al, *The Appeal of Internal Review: Law, Administrative Justice and the (non) Emergence of Disputes* (Oxford, Hart Publishing, 2003). This study examines applications for review of government decisions in the UK including in relation to homelessness.
- 53 Hal Pawson and Shanaka Herath, 'Disadvantaged Places in Urban Australia: Residential Mobility, Place Attachment and Social Exclusion' Australian Housing and Urban Research Institute, July 2015 at p 48; at [http://www.ahuri.edu.au/publications/download/ahuri\\_mypr704\\_fr3#page=3&zoom=auto,-43,300](http://www.ahuri.edu.au/publications/download/ahuri_mypr704_fr3#page=3&zoom=auto,-43,300) accessed 13/8/15.
- 54 Ibid at 52.
- 55 See discussion, Hon Justice Kevin Bell, 'Protecting Public Housing Tenants in Australia from Eviction: the Fundamental Importance of the Human Right to Adequate Housing and Home' (2013) 39 *Melbourne University Law Review* 1.
- 56 See Housing SA Eligibility Guidelines (*Housing SA Policies and Guidelines*, 2015). For example, in SA, basic eligibility includes an income and assets test, which takes into account gross income and size of household.
- 57 Roy Morgan Research, National Housing Survey, Australian Institute of Health and Welfare, 2007 *National Housing Survey: Public Housing*, National Report November 2009 at 137; 78% of applicants for public housing nationally are over 45 years of age; see Australian Institute of Health and Welfare, *Public Rental Housing 2008 – 9* (2010), 2; 65% of applicants for public housing have 'special needs'; *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria*, Parliament of Victoria, 2010 at 11 reported that two thirds of applicants for public housing in Victoria are from the category of 'greatest need'.
- 58 Roy Morgan Research, National Housing Survey, Australian Institute of Health and Welfare, 2007 *National Housing Survey: Public Housing*, National Report November 2009, ibid at 138.
- 59 see Bell, above n 55, 3; since the 1990s all public housing authorities throughout Australia have addressed increased demand and diminishing resources by adjusting allocation, rather than by increasing supply, with the consequence that there is progressive concentration of disadvantaged people in public housing. See also Keith Jacobs et al, 'What Future for Public Housing? A Critical Analysis' Australian Housing and Urban Research Institute, September 2010. In SA, the wait for housing, even after being assessed as 'Category 1', that is, homeless or at risk of homelessness, may be up to 48 months.
- 60 For a discussion of the increasing trend in Australia to provide public housing through community housing organisations, housing associations or cooperative housing organisations: see K McEvoy and C Finn 'Private Rights and Public Responsibilities: the Regulation of Community Housing Providers', (2010) 17 *Australian Journal of Administrative Law* 159.
- 61 Note that in the year 2012-2013 complaints about Housing SA comprised almost 20% of all complaints to the SA Ombudsman; see <http://www.ombudsman.sa.gov.au/complaints/complaint-statistics/>, accessed 13/8/15.
- 62 See R Creyke, 'Tribunals and Access to Justice' [2002] *Queensland University of Technology Law and Justice Journal* 4 at p 6: for Centrelink decisions, according to a 2001 Auditor General's analysis of age pension claims, there was an error rate of over 50%, although Centrelink's own assessment set the error rate at about 3%. Similar analyses are discussed by L Pearson, 'The Impact of External Administrative Law Review: Tribunals' [2007] UNSWLRS 53, 57.
- 63 See for example, the *Universal Declaration of Human Rights* Art.25; *Covenant on Economic, Social and Cultural Rights* (ICESCR) Art 11; and the *Convention on the Rights of the Child* (CRC) Art. 5(e).
- 64 *Human Rights Act 2004* (ACT), and *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 65 The Hon Justice Kevin Bell above n 55 at 36.
- 66 See AW Bradley, 'Administrative Justice: a Developing Human Right?' (1995) 1 *European Public Law* 347, and see also discussion in L Kirk, 'The Constitutionalisation of Administrative Justice', in *Administrative Justice – the Core and the Fringe*, Proceedings of the 1999 AIAL Forum.
- 67 See general discussion on these issues in *A Better Lease on Life – Improving Australian Tenancy Law*, National Shelter Inc, April 2010.
- 68 In Victoria, NSW, Queensland, Tasmania and ACT these are Tenants' Unions. In South Australia the support service is the Tenant Information and Advocacy Service, operated through Anglicare, and in WA and NT, Tenants' Advice Service. Throughout Australia, State and Territory Fair Trading or Consumer Affairs Offices provide advice to private tenants on tenancy matters; however, this advice is not generally available to public tenants.
- 69 For example, if a public housing tenant in SA has his/her tenancy terminated for disruptive behaviour, he/she is excluded from seeking any support from the public housing agency for two years: this includes rehousing, or any other housing assistance. A tenant in the private housing market can seek alternative housing in such circumstances whether in private or public rental; they may not have a good reference, but they are not excluded. A public housing tenant in such circumstances will have extremely limited capacity in any sense to obtain a private tenancy and is most likely to become homeless.
- 70 See s 32D *South Australian Housing Trust Act 1995* (SA). The HAP also had jurisdiction in relation to community housing disputes and this jurisdiction too has transferred to SACAT. See above n 2 and 3.

- 71 Previously, from 1992, the HAP operated pursuant to policy only and was non determinative, making recommendations to the Minister.
- 72 See, K McEvoy, 'Building Secure Communities; Delivering Administrative Justice in Public Housing' (2011) 65 *AIAL Forum* 1 (pp1-24) and <http://law.anu.edu/aial>.
- 73 Victoria, Tasmania and Queensland.
- 74 From 2009 - 31 March 2010, there were 384 first level reviews; 22 second level reviews before the advisory committee; and 2 matters appealed to the ACAT.
- 75 The HAP was initially a recommendatory body but, in 2007, it was legislatively established and took on a determinative function.
- 76 Unpublished figures from the Public and Community Housing Appeals Unit, SA, available from Housing SA. In 2009 there were over 150 appeals heard. In 2014 there were 73 appeals heard and determined by the Panel, and 95 in 2013. In addition, the Panel also heard and determined a number of community housing disputes each year. There were 19 appeals heard and determined by the Panel between January and March 2015, prior to the transfer of the jurisdiction to SACAT.
- 77 Such as the Tenant Information and Advice Service (TIAS).
- 78 Newstart Allowance benefits are presently about \$560 per fortnight for a single person, \$940 per fortnight for a couple; DSP is about \$780 single, \$1,179 for a couple; and the Age Pension is about \$860 per fortnight for a single person and \$1,296 for a couple.
- 79 The SACAT Registry advises that, in practice, holders of a Commonwealth Centrelink concession card will automatically have the filing fee waived; this is specified on the SACAT website and on the online application form.
- 80 There are issues not discussed here concerning the appropriateness of ADR in administrative review, in particular where expenditure of public monies is concerned, as in public housing: in this context an application, for example, for waiver of a small charge for water use where the applicant lives in a complex without separately metered premises, and the water charge is calculated by a formula dictated by legislation or policy, is not appropriately susceptible to resolution by ADR processes as it might be in a private tenancy matter, where the issue is one of litigation, not distribution of public money across (say) 15,000 tenancies which will be subject to the same rule.
- 81 SACAT enables hearings by telephone where the applicant is unable to attend, as did HAP.
- 82 Approximately 1/3 – 1/2 of appeals to HAP were overturned or varied; these figures are contained in the statistics maintained by the Public and Community Housing Appeal Unit, SA, see above n 76. See also R Creyke, above n 62, discussing the error rate at the primary decision level.
- 83 The SACAT Registry advises that, from March 2015 (the SACAT commencement date) to the end of August 2015, SACAT has received a total of 33 applications which would otherwise have been made to HAP: this figure is consistent with the number of applications which were received by HAP in the equivalent period in 2014. As at the end of August 2015, 23 of those applications have been resolved, a number by SACAT alternative dispute resolution officers by telephone, without the applicants being required to attend a hearing. 12 applications have been referred to ADR with 11 resolved in that process. At that date three applications had gone to a hearing.

## REASONS AND THE RECORD – RECONSIDERING *OSMOND* AND CONSTITUTIONAL PERSPECTIVES

*Christopher Ellis\**

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The common law provides that a person subject to a decision by an administrator acting under a statutory power is entitled to fairness in decision-making. The doctrine of procedural fairness has generally been split into two elements: the hearing and bias rules.<sup>1</sup> The case of *Public Service Board of New South Wales v Osmond* held that fairness does not extend to the provision of reasons for an administrative decision.<sup>2</sup> In the decades after the decision there has been extensive growth in the number of statutes granting decision-making power. Some jurisdictions have enacted a statutory right to reasons.<sup>3</sup> However, the common law has retained the *Osmond* position.

The lack of an administrative right to reasons may leave a person subject to a decision without justification. This may potentially lead to a lack of confidence in administrators who appear to be exercising their power arbitrarily. In contrast, the judiciary is generally required to provide reasons.<sup>4</sup>

This article examines whether the principle of a right to reasons at common law should be revisited in light of subsequent legal developments. It is argued that the analysis given by the High Court reflects superseded reasoning and does not withstand a critical analysis. The analogy between the judicial and administrative processes, contained in the reasoning of Kirby P in the New South Wales Court of Appeal,<sup>5</sup> is appropriate. However, the analogy must acknowledge that a threshold distinction exists between the judiciary, which is subject to constitutional considerations, and administrative decision-makers, who are not.

*Osmond* also enunciated the principle that the reasons for a decision are not considered part of the record for the purposes of certiorari unless expressly incorporated.<sup>6</sup> The failure to consider reasons as part of the record limits the capacity of the courts to issue certiorari for a decision tainted by an otherwise reviewable error. I argue that the record should be expanded to include the reasons for a decision. This argument is based on later developments in the judiciary's protection of its supervisory review jurisdiction, entrenched in Ch III of the *Constitution*.<sup>7</sup>

### **The right to reasons at Common Law**

Osmond was a member of the New South Wales public service who unsuccessfully applied for promotion to the position of Chairman of the Local Lands Board. The adverse decision was appealed to the Public Service Board of New South Wales under the *Public Service Act 1979* (NSW). The decision to dismiss the appeal was communicated orally to Osmond. Subsequently, reasons were requested and refused. Osmond sought judicial review before

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the Supreme Court of New South Wales, arguing that his prospects for promotion were important rights giving rise to a legitimate expectation that he would receive the promotion for which he applied.<sup>8</sup> The refusal to provide reasons was arguably a denial of natural justice.<sup>9</sup> Hunt J considered himself bound by precedent in holding that, in the absence of a statutory requirement to do so, the Board was not obliged to provide reasons.<sup>10</sup> This decision was reversed by the Court of Appeal.<sup>11</sup>

### ***The Court of Appeal***

It is often stated that it would be advantageous for administrators to be required to provide reasons.<sup>12</sup> The policy arguments in favour of a right to reasons include: the assurance of a reasoned opinion, the promotion of public confidence, a check on the exercise of discretion through increased transparency, the facilitation of appeal or judicial review and the promotion of consistency in administrative decision-making.<sup>13</sup> The giving of reasons also serves a 'dignitarian' function.<sup>14</sup>

The arguments against a right to reasons include the cost and burden on administrators, the nature of some decisions as unreviewable, the imposition of an obligation on an undefined class of decision-makers and the risk of 'standard statements in stereotype form that express little of the decision maker's true reasoning'.<sup>15</sup> Elliot argued that the burden argument is, 'properly understood, an argument in favour of a *suitably flexible duty* to give reasons – not against the *existence of a general duty* in the first place'.<sup>16</sup> It was also argued in *Osmond CA* that this developing area of law should be addressed by parliament, not the courts.<sup>17</sup>

Kirby P's formulation of the right to reasons suggests that his Honour favoured the pragmatic argument of facilitating either appeal or judicial review:

That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review.<sup>18</sup>

This formulation of the administrative obligation is analogous to the general judicial requirement to give reasons.<sup>19</sup>

Kirby P answered the argument that parliament should address this area by emphasising that this enunciation of the right to reasons was merely an elaboration of the principles of procedural fairness. The extent of the obligation is 'what is fair in the particular case'.<sup>20</sup> The breadth of the phrase, 'what is fair in the particular case', allows exceptions to the general rule. Kirby P noted two general exceptions: where the obligation 'would be otiose' or where it would require the disclosure of confidential information.<sup>21</sup> Groves argued that, '[s]uch exceptions implicitly concede the force of contrary arguments but provide no guiding principle'.<sup>22</sup> However, Groves continued by stating that, '[s]uch concerns can easily be overstated. After all, courts have long moderated general rules with criteria of policy or exceptional circumstances'.<sup>23</sup>

### ***The High Court***

The High Court overturned the decision of the Court of Appeal. Gibbs CJ stated that a right to reasons was, 'a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy, which should be decided by the legislature'.<sup>24</sup> His Honour referred to decisions of the House of Lords and Privy Council as establishing that the rule against reasons was 'so clear as hardly to warrant discussion'.<sup>25</sup> Further reference was made to 'carefully reasoned' decisions of the English Court of

Appeal.<sup>26</sup> With respect, none of these cases justifies the proposition that there is no right to reasons at common law.

In *Sharp v Wakefield*,<sup>27</sup> the renewal of a liquor licence was refused on the grounds of remoteness from police supervision and the character of the neighbourhood. The statute provided that relevant considerations in the grant of a licence included the fitness of the person and the premises to be kept. The appellant argued that these considerations were relevant only to the grant of a licence and not to its renewal. The House of Lords held that these considerations were relevant to both the grant and renewal of a licence. Relevantly, Lord Bramwell stated in the course of his analysis: 'The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned'.<sup>28</sup> However, a failure to state reasons no longer insulates the decision-maker from review.<sup>29</sup>

*Wrights* concerned a Canadian taxation statute which empowered the Minister of National Revenue to disallow expenses which he could determine to be 'in excess of what is reasonable or normal for the business'.<sup>30</sup> The Minister disallowed a certain sum of the respondent after receiving a report from the local Inspector of Income Tax. The content of the report was not communicated to the company or, later, to the reviewing courts. The Privy Council reasoned that there was 'nothing in the language of the Act or in the general law which would compel the Minister to state his reasons'.<sup>31</sup> However, the refusal of reasons would not defeat an appeal as holding otherwise would render the statutory right of appeal 'completely nugatory'.<sup>32</sup> Further, it was held that the court was entitled to examine the facts which were before the Minister.<sup>33</sup> If the facts were insufficient in law to support the decision, the inference is that the exercise of discretion was arbitrary.

In *Padfield*, a statutory scheme created a Board to oversee the marketing and pricing of milk in multiple regions. Complaints concerning the scheme were referred to the Minister who had discretion to establish an investigative committee. The Minister refused to refer a particular complaint to committee on the basis that he would be expected to make a statutory order to give effect to the committee's recommendations, that the complaint 'raises wide issues' and that the matter should be resolved through the scheme.<sup>34</sup> Lords Reid, Hodson and Pearce reasoned that the Minister was obliged under the Act to refer relevant complaints concerning the Board, when it was acting outside of the public interest, to committee.<sup>35</sup> Their Lordships reasoned that the Minister had accounted for irrelevant considerations in the exercise of his discretion.<sup>36</sup> Further, their Lordships reasoned that the absence of evidence justifying the Minister's decision gave rise to an inference that the decision was arbitrary.<sup>37</sup>

The case of *Wrights* focused specifically on the frustration of a right of appeal.<sup>38</sup> In contrast, *Padfield* was concerned with the no evidence ground of review. No authority or argument was provided in any of the three cases for the proposition that the common law does not provide a right to reasons. The principle of no right to reasons appears to offend the need for legitimacy in the exercise of power by an empowered State representative in a democratic society. It should be justified on a stronger principle than that of it is 'clear'.<sup>39</sup> Gibbs CJ attempted to find this justification in 'carefully reasoned' decisions of the English Court of Appeal.<sup>40</sup>

The first of these cases was *Payne*.<sup>41</sup> This case concerned a model prisoner whose application for release on licence was refused. Payne sought review on the ground that he was entitled to the reasons for refusal. The Court of Appeal reasoned that the relevant statute formed a comprehensive code of procedural fairness. In particular, the statutory requirement for reasons when the prisoner is recalled from licence demonstrated that the legislation did not intend for reasons to be provided in the initial grant.<sup>42</sup>

In the Australian context, the High Court has considered the statutory codification of procedural fairness in the case of *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah*.<sup>43</sup> The court reasoned that the common law protects procedural fairness through the principle of legality.<sup>44</sup> The principle of legality is a presumption which provides that express words or necessary intendment are required in a statute in order to displace fundamental common law rights.<sup>45</sup>

In *Miah*, the statute had failed to displace procedural fairness as it was silent on whether it displaced an applicant's rights and did not declare that the 'code' was exhaustive.<sup>46</sup> Further, the statute had expressly excluded natural justice in relation to other provisions, demonstrating an intention to include natural justice in sections where it was not expressly excluded.<sup>47</sup> The statute in *Payne* was similarly silent on displacing common law rights and did not declare the statute an exhaustive code. If *Payne* were reconsidered from this perspective, the words of the statute would be insufficient to codify procedural fairness. Further, *Payne* has later been distinguished, in part because of 'the continuing momentum in administrative law towards openness of decision-making'.<sup>48</sup> This demonstrates a greater willingness on the part of the English courts to impose an obligation to give reasons in fairness, despite the steadfast denial that a general obligation exists.<sup>49</sup>

The second relevant case, *Benaim*,<sup>50</sup> concerned two French nationals who sought a certificate of consent which would entitle them to apply for a gaming licence. The applicants were summoned to an interview. It was clear from the nature of the questions that the Board had acquired information from a confidential external source. The application was later refused. By letter, the Board noted that it was clear from their questioning that they had concerns regarding the applicants' character and activities.<sup>51</sup> The solicitors for the applicants inquired further but were informed that the Board was 'not obliged to give their reasons'.<sup>52</sup>

Lord Denning MR, with whom Lord Wilberforce and Phillimore LJ agreed, reasoned that the Board had acted in fairness by providing the applicant with the necessary information through the interview process while keeping their sources secret.<sup>53</sup> The 'careful reasoning' against a right to reasons was merely the statement that, 'Magistrates are not bound to give reasons for their decisions. Nor should the Gaming Board be bound'.<sup>54</sup> There are two paradoxes in the reliance on this reasoning. First, Australian law binds magistrates and judges to provide reasons in most cases.<sup>55</sup> Gibbs CJ stated in *Osmond*: 'there have been many cases in which it has been held that it is the duty of a judge or magistrate to state his reasons'.<sup>56</sup>

Second, Lord Denning MR relied on an analysis of judicial, not administrative, functions. Gibbs CJ drew a distinction between these functions:

That does not mean that the requirement is an incident of a process which is not judicial but administrative; there is no justification for regarding rules which govern the exercise of judicial functions as necessarily applicable to administrative functions, which are different in kind.<sup>57</sup>

The distinction requires, in his Honour's view, a rejection of the judicial analogy as there is 'no justification' for it.<sup>58</sup> However, in the same reasoning, Gibbs CJ is relying on Lord Denning MR's analogy with a judicial function. This paradox cannot be reconciled within the reasoning of Gibbs CJ.

All of the cases relied upon by Gibbs CJ to reject a right to reasons fail to justify the proposition. They are either without their own authority or reflect superseded reasoning. The net result of this flawed formal reasoning is that the 'basis for the High Court decision was essentially one of policy'.<sup>59</sup> Specifically, whether the imposition of an obligation to give reasons is a decision best left to the legislature.<sup>60</sup> Kirby P and Lacey both reasoned that this

reasoning carries less weight given the increased number of statutory schemes providing an obligation to give reasons.<sup>61</sup> However, there is more than policy in favour of an obligation for administrators to give reasons. There remains an analogy with the judicial requirement to give reasons. The dissonance in reasoning arising from the reliance on *Benaim* by Gibbs CJ can be reconciled through an acceptance of this analogy. The analogy, contrary to *Benaim* and *Osmond*, does not defeat a right to reasons at common law.

### ***The judicial analogy – a constitutional perspective***

As noted above, Gibbs CJ rejected the analogy with the judicial requirement of reasons.<sup>62</sup> The justifications for the judicial requirement of reasons include the facilitation of appeal and as an incident of the judicial process.<sup>63</sup> This appears peculiar. Both the judiciary and administrators may be subject to appeal, review and the principles of procedural fairness.<sup>64</sup> This raises the question as to what distinguishes the judiciary and administrators in the context of providing reasons. The answer lies within the constitutional framework of Ch III. However, the distinction does not defeat the analogy. The distinction merely requires an acknowledgement of the differing thresholds of according procedural fairness and reasons.

#### *Judiciary*

The importance of the judiciary according procedural fairness and reasons cannot be overstated. It is essential to the exercise of judicial power.<sup>65</sup> Ch III protects procedural fairness as a characteristic of the judiciary at both the State and Commonwealth levels in slightly different ways. This protection is a functional requirement of Ch III.<sup>66</sup>

At the State level, the incompatibility doctrine provides that a State legislature may not confer a function on a State court that is incompatible with its role as a repository of federal jurisdiction under Ch III of the *Constitution*.<sup>67</sup> Functions are incompatible if they infringe the institutional integrity, independence, fairness, openness and impartiality of the court.<sup>68</sup> These characteristics remain essential elements of the courts despite the relevant legislature's capacity to alter their constitution.<sup>69</sup> The application of procedural fairness is one of these defining characteristics.<sup>70</sup> It was not considered in *Wainohu* whether reasons were included as an aspect of procedural fairness, but their provision was nevertheless protected as a characteristic of the State courts.<sup>71</sup>

At the Commonwealth level, Ch III provides the framework for a separation of judicial power from non-judicial powers.<sup>72</sup> The general rule is that a non-judicial power may not be granted to a Ch III court unless it is ancillary to the exercise of judicial power or is directed to some judicial purpose.<sup>73</sup> Judicial power is not limited to the functions of the court. It may extend to 'law[s] of general application' which 'apply in the exercise of its function'.<sup>74</sup> A law which abrogates procedural fairness would likely be imposing a non-judicial power on a Ch III court inconsistent with its exercise of judicial power.<sup>75</sup>

This brief summary demonstrates that procedural fairness and the provision of reasons are defining characteristics of a court under Ch III. The threshold of reasons required by the constitutional implication is high, but it is not an 'inflexible rule of universal application'.<sup>76</sup> The content of the threshold was succinctly stated by Gibbs CJ as the 'express[ion of] the reasons for their conclusions by finding the facts and expounding the law',<sup>77</sup> but this may vary with context.<sup>78</sup> For example, some interlocutory decisions may be exempt from the obligation.<sup>79</sup>

*Quasi-judicial decision-makers*

In contrast to the judiciary, quasi-judicial decision-makers such as tribunals and administrators are not constitutionally required to obey the principles of procedural fairness. However, this has not prevented the implication of these principles in the decision-making process.<sup>80</sup>

The content of fairness in any given case is determined by the context in which the decision is made. Similarly, the content of a quasi-judicial obligation to give reasons would also be determined by the context of the decision.<sup>81</sup> Elliot convincingly argues that,

[t]he default position ... is that reasons must be 'intelligible' and 'adequate', enabling the reader to understand how the agency reached its conclusions on the principal issues of controversy. From this starting point, particular features of the case may call for a heavier or lighter duty to give reasons.<sup>82</sup>

This bears similarity to the approach later taken by the High Court in *Wingfoot Australia Partners Ltd v Kocak*.<sup>83</sup> In that case, a statutory scheme governed claims for injuries during the course of employment. Medical questions were referable to a Medical Panel which was statutorily required to provide reasons. The content of this obligation was not expressed by the statute. The High Court reasoned that the two major contextual factors which determined the standard of reasons were the function of the Panel and the legislative history of the scheme.<sup>84</sup> The function of the Panel was not to adjudicate or arbitrate, but to form its own opinion.<sup>85</sup> Its function was not judicial. Nevertheless, the standard of reasons required was to set out, 'the actual path of reasoning by which ... the opinion [was] actually formed'.<sup>86</sup> Further, the legislative history of the scheme demonstrated that the policy behind requiring reasons in this context was to enable a court to see whether the opinion involves an error of law.<sup>87</sup> This standard enables affected individuals to obtain certiorari: 'To require less would be to allow an error of law affecting legal rights to remain unchecked. To require more would be to place a practical burden of cost and time on decision-making ... for no additional legal benefit'.<sup>88</sup> Further, a failure to provide reasons where it is required is an error of law on the face of the record.<sup>89</sup> While legislative context will vary by statute, the policy behind the provision of reasons at common law would include the detection of errors of law. The High Court's comments remain relevant to a common law obligation. Other possible considerations in determining the content of reasons could include the burden in articulating reasons and public policy such as national security.<sup>90</sup>

*'Exceptional Circumstances' Exception*

A note should be made of the possible exception to *Osmond*. Despite his Honour's agreement with Gibbs CJ, Deane J appeared sympathetic to the argument that fairness would, in limited circumstances, require the provision of reasons:

[T]he statutory developments referred to ... in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that *special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected* by it. Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional.<sup>91</sup>

Deane J appears to be contradicting the analysis of the Chief Justice: 'The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see



how the fairness of an administrative decision can be affected by what is done after the decision has been made'.<sup>92</sup> Deane J is expressly stating that exceptional circumstances would allow the fairness of a decision to be affected by the later omission of reasons.

Deane J did not expand on what circumstances would be sufficient to satisfy the exception. Circumstances which did not enliven the exception include: the ease with which reasons could be provided,<sup>93</sup> insufficient provision of information by discovery,<sup>94</sup> a decision not to provide a certificate entitling an injured worker to compensation,<sup>95</sup> and the exercise of a power which may affect a person's liberty.<sup>96</sup> There are few circumstances more adverse to the individual than the deprivation of his or her liberty. Nevertheless, the exception was not enlivened.

This state of affairs demonstrates an unwillingness to depart from the general rule. A reconsideration of the case would be necessary to provide a right to reasons at common law. The right would retain the flexibility of the governing principle of fairness and would be subject to exceptions as necessary. This flexible principle has consistently been applied to the other aspects of procedural fairness – the hearing rule and the bias rule.

Leaving aside the issues concerning the existence and content of a right to reasons, there remains the issue as to the capacity of the court to review errors found within a statement of reasons. The principle remains that reasons do not form part of the record unless incorporated.<sup>97</sup> This principle limits the capacity of the courts to issue certiorari and quash a decision tainted by an otherwise reviewable error.

### **The record – constitutional minimum of supervisory review**

Certiorari will issue in two circumstances: when the decision-maker has made a jurisdictional error,<sup>98</sup> or when the decision-maker has made an error of law patent on the face of the record.<sup>99</sup> In *Osmond*, Gibbs CJ reasoned that a common law right to reasons, 'would undermine the rule, well established at common law ... that reasons do not form part of the record, for the purposes of certiorari, unless ... incorporate[d]'.<sup>100</sup> Incorporation is where the decision-maker expressly provides that the oral or written reasons are to be included in the record.<sup>101</sup>

The principle from *Osmond* was followed by the High Court in *Craig*.<sup>102</sup> The High Court in *Craig* was wary of 'transforming certiorari into a discretionary general appeal for error of law upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error'.<sup>103</sup> The suggestion that the record should be expanded to include both reasons and the transcript of the proceedings was rejected by the High Court on policy grounds: '[an expanded record] would represent a significant increase in the financial hazards to which ... [litigants] are already exposed'.<sup>104</sup> Ordinarily, therefore, the record would comprise only the documentation which initiates the proceedings, pleadings and the actual order or ruling.<sup>105</sup>

Doubt was cast over the *Craig* and *Osmond* principles, in obiter, in the subsequent case of *Kirk*:

But the need for and the desirability of effecting that purpose depend first upon there not being any other process for correction of error of law, and secondly, upon the conclusion that primacy should be given to finality rather than compelling inferior tribunals to observe the law.<sup>106</sup>

The High Court went on to observe that prioritising finality over the court's supervisory jurisdiction, 'cannot be determined without regard to a wider statutory and constitutional context'.<sup>107</sup> Further, the High Court in *Kirk* considered that an increase in the availability of

certiorari was not a significant increase in financial hazards where appeal or review is already available under the statute.<sup>108</sup> Lacey argued that these propositions, 'demonstrate a potential willingness to extend the record to include reasons in certain cases where the 'wider statutory and constitutional context' might require that outcome'.<sup>109</sup>

It is therefore necessary to consider the wider constitutional context, particularly the operation of the legislative mechanism mandating decisional finality: the privative clause. This context, contrary to *Craig*, prioritises observance of the law over finality.

### *The constitutional context*

A convenient starting point for examining this context is *Kirk* itself. The decision has been described as 'one of the most important constitutional and administrative law authorities of recent times'.<sup>110</sup> In 2001, an employee of Kirk Group Holdings Pty Ltd was killed when his vehicle overturned. The company and a director of the company, Kirk, were charged jointly under the *Occupational Health and Safety Act 1983* (NSW) for failing to ensure an employee's health, safety and welfare at work. Both Kirk and the company were convicted and penalised by the Industrial Court of New South Wales. The conviction and sentence were appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales, but the appeal was dismissed.<sup>111</sup> Kirk was granted leave to appeal to the Full Bench of the Industrial Court on limited grounds.<sup>112</sup> This appeal was also unsuccessful.<sup>113</sup> Kirk then sought judicial review in the New South Wales Court of Appeal. The application was dismissed.<sup>114</sup> Special leave was granted to appeal the decision to the High Court.

The High Court held that the Industrial Court had misconstrued the governing statute by reasoning that the prosecution did not have to demonstrate that measures should have been taken to obviate the risk.<sup>115</sup> The prosecution had failed to identify the act or omission by the company that had breached the mandated duty.<sup>116</sup> Further, Kirk was called as a witness against his co-defendant, the company.<sup>117</sup> These were errors of law.<sup>118</sup> However, the court was required to consider the effect of a privative provision on the reviewability of these errors.<sup>119</sup>

The High Court reasoned that Ch III requires that there be a body to answer the constitutional description 'Supreme Court of a State'.<sup>120</sup> The 'constitutional corollary' of this is that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.<sup>121</sup> The jurisdiction to grant certiorari for jurisdictional error 'was, and is' a defining characteristic of the State Supreme Courts at federation.<sup>122</sup> This judicial supervisory role may not be abrogated by the State legislatures.<sup>123</sup> It follows that the State legislatures are unable to abrogate judicial review for jurisdictional error by the State Supreme Courts through a privative clause. However, it remains within their legislative power to restrict the reviewability of intra-jurisdictional errors. The effect of applying these principles is not to invalidate the privative clause, but to read it down to exclude its application to jurisdictional error.

At the Commonwealth level, the conclusion is identical by different reasoning. That reasoning is twofold. First, it is outside the legislative power of the Commonwealth to remove the capacity of the High Court to grant relief under s 75(v) of the *Constitution* where there has been jurisdictional error by an officer of the Commonwealth.<sup>124</sup> As the plurality stated in *Plaintiff S157*, '[t]hat section ... introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of supervisory review'.<sup>125</sup> The removal of review for jurisdictional error would lower the supervisory jurisdiction of the High Court below the minimum provision. The method by which the court brings a privative provision within this constitutional limit is by 'read[ing] down'<sup>126</sup> the provision, where possible, to only apply to intra-jurisdictional error.

The second limb of reasoning is that the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III.<sup>127</sup> A privative provision which excludes judicial review for jurisdictional error by a non-judicial body would, in effect, be conferring 'a non-judicial body [with] the power to conclusively determine the limits of its own jurisdiction'.<sup>128</sup> The conclusive determination of a body's own jurisdictional limits is a judicial power which, as noted, Ch III requires to be separate from the exercise of non-judicial power.

*Privative clauses and the rule of law*

A restricted record has the potential to create 'islands of power immune from supervision and restraint'.<sup>129</sup> Intra-jurisdictional errors contained solely in the decision-makers reasons would be immune to review, even in the absence of a privative provision. A right to reasons, for which I have advocated above, would be frustrated if the contents of a statement of reasons could not be scrutinised by a reviewing court for these errors. These considerations sit uneasily with the concept of the rule of law in Australia, which is 'textually reinforce[d]' by s 75(v) of the *Constitution*.<sup>130</sup> The minimum judicial supervisory jurisdiction granted by the section provides an assurance, 'to all people affected that officers of the Commonwealth [and States] obey the law and neither exceed nor neglect any jurisdiction which the law confers upon them'.<sup>131</sup>

In comparing *Plaintiff S157* and *Kirk*, Bateman argued that they provide three 'stable features':

- (i) the maintenance of parity in respect of federal and State privative clauses; (ii) the use of an interpretative approach to read down privative clauses rather than declaring them unconstitutional; and (iii) a concern to avoid arbitrary, or unlimited, power.<sup>132</sup>

Uniformity between the jurisdictions clearly weighed on the High Court in *Kirk*: 'there is but one common law of Australia'.<sup>133</sup> The desirability of continuity and consistency in the law goes without saying and is one of the tenets of the Diceyan rule of law.<sup>134</sup> However, the most noteworthy of the points raised by Bateman is the concern to avoid arbitrary power. Privative clauses present a paradox as they must be read as part of a whole statutory context. The statute provides a legislative intent that decision-making power is to be exercised in accordance with the statute, but if it is not then there can be no questioning of the decision. Read strictly, this would be an arbitrary power. Bateman argued that this is inconsistent with the rule of law, which 'privileges *legal* over *political* accountability'.<sup>135</sup> The High Court's emphasis on the assumption of the rule of law in the *Constitution*,<sup>136</sup> access to court and avoiding 'islands of power' is evidence, according to Bateman, of the influence of the rule of law and its rejection of non-legal accountability.<sup>137</sup>

The preceding argument suggests a measured progression to a substantive approach to the rule of law in Australia.<sup>138</sup> However, the presence of a written constitution in Australia has underpinned 'the dominance of a formal account of the rule of law in Australia'.<sup>139</sup> It remains to be seen whether approaches to the rule of law will be developed in a more substantive manner in the wake of *Plaintiff S157* and *Kirk*.

*Limitations of an expanded record*

The foregoing analysis is not to imply that an expanded record would apply in all cases. There are two reasons for this. First, the relevant legislature retains the capacity to restrict judicial review for intra-jurisdictional error, irrespective of where the error may appear, through the passing of a privative provision.<sup>140</sup> Second, it will be recalled that the wider statutory context is relevant to whether the record is to be extended in a given case.<sup>141</sup>

Bateman has generally commented on the impact of statutory context:

The *Constitution* entrenches a model of administrative law that preserves Parliament's capacity to formulate the content of, and therefore the limitations on, a delegated statutory power ... Certainly, the judiciary retains a role in imposing implied limitations on statutory powers, via a statute's subject-matter, scope and purpose or the principle of legality, but effect must ultimately be given to Parliament's formulation of the boundaries of legality. The primacy that must be given to statutory text and purpose leads to the conclusion that administrative law cannot always limit plenary provisions and, indeed, that the *Constitution* appears to prevent it from doing so.<sup>142</sup>

On this formulation, it appears that administrative law is being relegated to a merely interpretive role when dealing with an apparently unlimited provision. In some circumstances, the law would be powerless to 'limit plenary provisions'.<sup>143</sup> With respect, administrative law does prevent the exercise of unlimited power. The common law assumes that Parliament intends a jurisdictional limitation on the exercise of power under a statute. Statutes are interpreted in line with this assumption.<sup>144</sup> Decisions extraneous to the limitations are ultra vires. Since *Kirk* and *Plaintiff S157*, even an expressed 'plenary provision' would likely be interpreted as analogous to a privative clause and therefore only protect intra-jurisdictional error from review. The restriction on unlimited power is both constitutional and interpretive.

Bateman is correct in stating that Parliament has the capacity to define the jurisdictional limits on a statutory power. However, this is a different proposition entirely from one that provides the legislature with the capacity to confer truly unlimited powers, free from constitutional restraint, and relegates the courts to mere mouthpieces of Parliamentary will. Lacey has argued that:

[i]f legislatures move away from privative clauses in favour of careful legislative drafting in an attempt to identify or narrow the list of errors which might be classed as 'jurisdictional', the Court may well find other legal bases upon which certiorari may be granted.<sup>145</sup>

Whether other legal bases to issue certiorari are required would depend on the reach of jurisdictional error. At present, it would appear that the constitutional basis of the doctrine, combined with the courts interpretive role, provides an adequate check on legislative power to confine judicial review.

## Conclusion

At its core, administrative law is concerned with the lawful exercise of a statutory decision-making power. This constraint on administrative and judicial power is tempered by deference to legislative intention. It is this legislative intention that should constrain the availability of certiorari, not a common law principle that provides for a restricted record. High Court cases concerning the interpretation of privative clauses have demonstrated that the policy imperative of restraining unlawful decision-making has undermined the policy of finality in decision-making. It follows that the policy central to the reasoning in both *Osmond* and *Craig* is uncertain. The High Court has acknowledged this doubt and hinted at a reconsideration of *Craig*.<sup>146</sup>

The principles of procedural fairness are amongst the most important of administrative law. They act as a safeguard against intrusion on a person's rights, interests or legitimate expectations. A failure to provide reasons after a decision has been made against an ordinary person would foster distrust in the processes of the executive and judiciary. Further, the lack of such a right undermines the role of the judiciary as the overseer of lawful decision-making power. The confinement of reasons and the record appears to be an article of faith in governments which have proven their capacity to over-step their bounds throughout history.<sup>147</sup> This is not a reflection on the democratic system which Australia is

privileged to enjoy, but a comment on the fallibility of human decision-makers. It is time to reconsider the principles of *Osmond* in line with contemporary standards and understanding of constitutional implications.

**Endnotes**

- 1 See generally *Annetts v McCann* (1990) 170 CLR 596; *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337; *Minister for Immigration and Ethnic Affairs v Jia Legeng* (2001) 205 CLR 507. In this article, the phrases 'procedural fairness' and 'natural justice' are used interchangeably: *Kioa v West* (1985) 159 CLR 550, 584-5 (Mason J).
- 2 (1986) 159 CLR 656 (*Osmond*). Gibbs CJ gave the leading judgment, with which Brennan and Dawson JJ agreed. Wilson and Deane JJ assented in separate judgments.
- 3 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447, 465 (Kirby P) (*Osmond CA*). See, eg *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Law Act 1978* (Vic) s 8; *Administrative Appeals Tribunal Act 1975* (Cth) s 28; *Judicial Review Act 1991* (Qld) s 32; *Administrative Decisions Review Act 1997* (NSW) ch 3 pt 2 div 2; *State Administrative Tribunal Act 2004* (WA) s 21.
- 4 *Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); *Wainohu v State of New South Wales* (2011) 243 CLR 181, 213-5 [54]-[58] (French CJ and Kiefel J) (*Wainohu*).
- 5 *Osmond CA* [1984] 3 NSWLR 447.
- 6 (1986) 159 CLR 656, 667; *Craig v South Australia* (1994) 184 CLR 163, 181 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*Craig*).
- 7 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (*Kirk*). A plurality judgment was given by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Heydon J dissented on a costs issue.
- 8 *Osmond v Public Service Board of New South Wales* [1983] 1 NSWLR 691, 693 (Hunt J).
- 9 *Ibid* 693-4.
- 10 *Ibid* 698.
- 11 *Osmond CA* [1984] 3 NSWLR 447. Kirby P and Priestley JA, Glass JA dissenting.
- 12 *Osmond* (1986) 159 CLR 656, 668.
- 13 *Osmond CA* [1984] 3 NSWLR 447, 463; citing Geoffrey Flick, *Natural Justice: Principles and Application* (Butterworths, 1979) 87. See also PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283.
- 14 TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 499-500.
- 15 *Osmond CA* [1984] 3 NSWLR 447, 464.
- 16 Mark Elliot, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] *Public Law* 56, 67 (emphasis in original).
- 17 *Osmond CA* [1984] 3 NSWLR 447, 464-5.
- 18 *Ibid* 467.
- 19 *Ibid* 456; citing *Pettitt v Dunkley* [1971] 1 NSWLR 376.
- 20 *Osmond CA* [1984] 3 NSWLR 447, 467.
- 21 *Ibid* 468.
- 22 Matthew Groves, 'Before the High Court – Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35 *Sydney Law Review* 626, 633.
- 23 *Ibid*. An example in the context of procedural fairness is the necessity exception to the bias rule: *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 359 [65] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
- 24 *Osmond* (1986) 159 CLR 656, 669.
- 25 *Ibid* 662; citing *Sharp v Wakefield* [1891] AC 173; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (*Padfield*); *Minister of National Revenue v Wrights' Canadian Ropes Ltd* [1947] AC 109 (PC) (*Wrights*).
- 26 *Osmond* (1986) 159 CLR 656, 663; citing *R v Gaming Board; Ex Parte Benaim and Khaida* [1970] 2 QB 417 (CA), 430-1 (Lord Denning MR) (*Benaim*); *Payne v Lord Harris* [1981] 1 WLR 754 (CA), 765 (Brightman LJ) (*Payne*).
- 27 [1891] AC 173.
- 28 *Sharp v Wakefield* [1891] AC 173, 183.
- 29 *Wrights* [1947] AC 109, 123 (PC); *Padfield* [1968] AC 997, 1032-3 (Lord Reid), 1049 (Lord Hodson), 1053-4 (Lord Pearce), 1061-2 (Lord Upjohn).
- 30 *Wrights* [1947] AC 109, 117 (PC).
- 31 *Ibid* 123.
- 32 *Ibid*.
- 33 *Ibid*.
- 34 *Padfield* [1968] AC 997, 1000, 1002.
- 35 *Ibid* 1032 (Lord Reid), 1049 (Lord Hodson), 1053 (Lord Pearce).
- 36 *Ibid* 1032 (Lord Reid), 1049 (Lord Hodson), 1054-5 (Lord Pearce), 1059-61 (Lord Upjohn).
- 37 *Ibid* 1032-3 (Lord Reid), 1049 (Lord Hodson), 1053-4 (Lord Pearce), 1061-2 (Lord Upjohn).

- 38 PP Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 290.
- 39 *Osmond* (1986) 159 CLR 656, 662.
- 40 *Ibid* 663; citing *Benaim* [1970] 2 QB 417, 430-1 (CA) (Lord Denning MR); *Payne* [1981] 1 WLR 754, 765 (CA) (Brightman LJ).
- 41 *Payne* [1981] 1 WLR 754 (CA).
- 42 *Ibid* 757, 762-3, 767 (Lord Denning MR).
- 43 (2001) 206 CLR 57 (*Miah*).
- 44 *Ibid* 83-4 [90] (Gaudron J), 93 [126] (McHugh J), 112-3 [181] (Kirby J).
- 45 See generally *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]-[20] (Gleeson CJ); The Hon JJ Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769; Groves, above n 22, 637.
- 46 *Miah* (2001) 206 CLR 57, 88 [104] (Gaudron J), 94-6 [128]-[129], [131], [139] (McHugh J).
- 47 *Ibid* 112 [179]-[180] (Kirby J).
- 48 *R v Secretary for the Home Department; Ex Parte Doody* [1994] 1 AC 531, 566 (Lord Mustill, Lords Keith of Kinkel, Lane, Templeman and Browne-Wilkinson agreeing) (*Doody*).
- 49 *Ibid* 563-6; *R v Civil Service Appeal Board; Ex Parte Cunningham* [1991] 4 All ER 310, 319 (CA) (Lord Donaldson of Lynton MR); *R v Parole Board; Ex Parte Wilson* [1992] QB 740, 750-1 (CA) (Taylor LJ); Craig, above n 38, 296-8; Groves, above n 22, 638-9.
- 50 [1970] 2 QB 417 (CA).
- 51 *Ibid* 427-8 (Lord Denning MR).
- 52 *Ibid* 428.
- 53 *Ibid* 432.
- 54 *Ibid* 431 (citations omitted).
- 55 *Wainohu* (2011) 243 CLR 181, 213-5 [54]-[58] (French CJ and Kiefel J); *Osmond* (1986) 159 CLR 656, 666; *Osmond CA* [1984] 3 NSWLR 447, 454.
- 56 *Osmond* (1986) 159 CLR 656, 666-7 (emphasis added).
- 57 *Ibid* 667.
- 58 *Ibid*.
- 59 Wendy Lacey, 'Administrative Law' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future – Michael Kirby and his Legacy* (Thomson Reuters, 2009) 81, 90.
- 60 *Osmond* (1986) 159 CLR 656, 669.
- 61 *Osmond CA* [1984] 3 NSWLR 447, 465; Lacey, above n 59. See also D St L Kelly, 'The *Osmond* Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513, 513-4.
- 62 *Osmond* (1986) 159 CLR 656, 667.
- 63 *Wainohu* (2011) 243 CLR 181, 214 [54]-[55] (French CJ and Kiefel J); *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382 (Asprey JA), 388 (Moffitt JA).
- 64 *Benaim* [1970] 2 QB 417 (CA), 430 (Lord Denning MR); cited in *Osmond CA* [1984] 3 NSWLR 447, 466.
- 65 See, eg, *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ).
- 66 Groves, above n 22, 637.
- 67 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 68 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ), 595 [32] (McHugh J), 617 [101] (Gummow J), 626 [135] (Kirby J), 655-6 [219] (Callinan and Heydon JJ); *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).
- 69 *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).
- 70 *Wainohu* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).
- 71 *Ibid* 219-220 [68]-[69] (French CJ and Kiefel J), 228-30 [104]-[107], [109] (Gummow, Hayne, Crennan and Bell JJ).
- 72 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA).
- 73 *Ibid* 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
- 74 *Leeth v The Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).
- 75 *Ibid*; citing *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 542; [1957] AC 288, 317 (PC) (*Boilermakers*).
- 76 *Osmond* (1986) 159 CLR 656, 667; quoting *R v Awatere* [1982] 1 NZLR 644, 649 (Woodhouse P).
- 77 *Osmond* (1986) 159 CLR 656, 666.
- 78 *Wainohu* (2011) 243 CLR 181, 215 [56] (French CJ and Kiefel J).
- 79 *Ibid*.
- 80 *Benaim* [1970] 2 QB 417, 430 (CA) (Lord Denning MR); cited in *Osmond CA* [1984] 3 NSWLR 447, 466.
- 81 Elliott, above n 16, 65-8.
- 82 *Ibid* 66.
- 83 (2013) 252 CLR 480 (French CJ, Crennan, Bell, Gageler and Keanne JJ) (*Wingfoot*).
- 84 *Ibid* 498 [46].
- 85 *Ibid* 498-9 [47].
- 86 *Ibid* 499 [48].
- 87 *Ibid* 500-1 [53].
- 88 *Ibid* 501 [54].

- 89 Ibid 501 [55].
- 90 Elliot, above n 16, 67.
- 91 *Osmond* (1986) 159 CLR 656, 676 (Deane J) (emphasis added).
- 92 Ibid 670 (Gibbs CJ).
- 93 *Re Commercial Registrar of the Commercial Tribunal (WA); Ex Parte Perron Investments Pty Ltd* [2003] WASC 198, [22]-[23] (Wheeler J); Groves, above n 22, 636.
- 94 *Western Australian Rural Counselling Association Inc v Minister for Agriculture, Fisheries and Forestry* [2008] FCA 986, [29] (Siopis J); Groves, above n 22, 636.
- 95 *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104, 115-6 (Jerrard JA, McMurdo P and Davies JA agreeing); Groves, above n 22, 636.
- 96 *Watson v South Australia* (2010) 278 ALR 168, 191-3 (Doyle CJ, Anderson J agreeing), 193-8 (Peek J) (SASCFC); Groves, above n 22, 636.
- 97 *Osmond* (1986) 159 CLR 656, 667.
- 98 *Craig* (1994) 184 CLR 163, 175 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kirk* (2010) 239 CLR 531, 567 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 99 *Craig* (1994) 184 CLR 163, 176; *Kirk* (2010) 239 CLR 531, 567; *Wingfoot* (2013) 252 CLR 480, 492 [26].
- 100 (1986) 159 CLR 656, 667.
- 101 *Craig* (1994) 184 CLR 163, 182.
- 102 Ibid 181.
- 103 Ibid; citing *Hockey v Yelland* (1984) 157 CLR 124, 142 (Wilson J).
- 104 *Craig* (1994) 184 CLR 163, 181.
- 105 Ibid.
- 106 (2010) 239 CLR 531, 577 [85].
- 107 Ibid 577-8 [85]-[86].
- 108 Ibid 578 [87].
- 109 Wendy Lacey, '*Kirk v Industrial Court of New South Wales – Breathing Life into Kable*' (2010) 34 *Melbourne University Law Review* 641, 661.
- 110 Alexander Vial, 'The Minimum Entrenched Supervisory Review Jurisdiction of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)*' (2011) 32 *Adelaide Law Review* 145, 145. See also Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 475; Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 201.
- 111 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 (Spigelman CJ, Beazley and Basten JJA).
- 112 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 158 IR 281 (Wright, Boland and Backman JJ).
- 113 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146 (Wright, Boland and Backman JJ).
- 114 *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465 (Spigelman CJ, Hodgson and Handley JJ).
- 115 *Kirk* (2010) 239 CLR 531, 561[34]-[35], [37].
- 116 Ibid.
- 117 Ibid 565 [50]-[53].
- 118 They were also jurisdictional errors, rendering the aforementioned analysis on the nature of the record as obiter.
- 119 *Kirk* (2010) 239 CLR 531, 581 [101]. In effect, the provision provided that 'a decision of the Industrial Court was final and may not be appealed against, reviewed, quashed or called into question by any court'.
- 120 Ibid 580 [96].
- 121 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); cited in *Kirk* (2010) 239 CLR 531, 580 [96].
- 122 *Kirk* (2010) 239 CLR 531, 580 [97]-[98].
- 123 Ibid 581 [98].
- 124 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*Plaintiff S157*); cited in *Kirk* (2010) 239 CLR 531, 579 [95].
- 125 *Plaintiff S157* (2003) 211 CLR 476, 513 [103].
- 126 Ibid 510 [91].
- 127 Ibid 512 [98]. See also *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA); *Boilermakers* (1957) 95 CLR 529; [1957] AC 288 (PC).
- 128 *Plaintiff S157* (2003) 211 CLR 476, 512 [98].
- 129 *Kirk* (2010) 239 CLR 531, 581 [99].
- 130 *Plaintiff S157* (2003) 211 CLR 476, 513 [103]; citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
- 131 *Plaintiff S157* (2003) 211 CLR 476, 514 [104].
- 132 Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463, 476.
- 133 (2010) 239 CLR 531, 581 [99].

- 134 The Hon Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 181; citing AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 185-93.
- 135 Bateman, above n 132, 478 (emphasis in original).
- 136 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
- 137 Bateman, above n 132, 478; citing *Plaintiff S157* (2003) 211 CLR 476, 492 [31] (Gleeson CJ); *Kirk* (2010) 239 CLR 531, 581 [99].
- 138 See generally TRS Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (Oxford University Press, 2001); David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency* (Cambridge University Press, 2006); Wendy Lacey, *Implementing Human Rights Norms – Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 6.
- 139 Wendy Lacey, *Implementing Human Rights Norms – Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 6-7. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 23 [72] (McHugh and Gummow JJ).
- 140 *Kirk* (2010) 239 CLR 531, 581 [100].
- 141 *Ibid* 578 [86].
- 142 Bateman, above n 132, 487.
- 143 *Ibid*.
- 144 See, eg, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 12 (Stephen J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40 (Mason J). These example cases demonstrate that the question of whether a decision-maker has failed to consider material factors or whether irrelevant considerations were taken into account is determined by reference to the governing statute.
- 145 Lacey, above n 109.
- 146 *Kirk* (2010) 239 CLR 531, 577-8 [85]-[86].
- 147 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 646 [190] (Kirby J); citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J).



## **CAN REPRESENTATIONS BY A DECISION MAKER BE THE SOURCE OF A DUTY TO ACCORD PROCEDURAL FAIRNESS: A NEW LIFE FOR LEGITIMATE EXPECTATIONS?**

*Tom Brennan\**

In a recent decision, *SZSSJ v Minister for Immigration and Border Protection*<sup>1</sup> the Full Court of the Federal Court (Rares, Perram and Griffiths JJ) dealt with one of the consequences of the Department of Immigration's publication on the internet of personal details of people in immigration detention. SZSSJ was one of the people in detention whose personal details were published.

By the time of the publication SZSSJ had applied for and been refused a protection visa. His application for review of that decision had been dismissed by the Refugee Review Tribunal and his applications for review of the Tribunal decision had been dismissed by the Federal Circuit Court and the Federal Court. There remained only the resolution of his application for special leave to appeal to the High Court.

Subsequently the Department of Immigration and Border Protection commenced an International Treaties Obligations Assessment (ITOA) in order to assess whether the disclosure of SZSSJ's personal information created a risk to him such that it engaged Australia's *non-refoulement* obligations.

In conducting that assessment the Department disclosed to SZSSJ that the list of persons in detention with their personal information had been accessed from a number of IP addresses but declined to provide the data provided by a consultant to the Department which indicated the likelihood of each of those IP addresses having access to the personal information of the detainees.

The Court found that the conduct of the assessment without providing to SZSSJ information on the full circumstances of the data breach was a denial of procedural fairness.

### **The Court's reasons**

#### ***The decision was unfair***

The Court found that the Department's conduct was unfair; this was unremarkable. The conclusion on that question was in the following terms:

[118] ... The Department is requiring affected individuals to make submissions to it about the consequence of its own wrongful actions in disclosing their information to third parties without revealing to them all that it knows about its own disclosures. Whilst it is certainly true that the obligation of a decision maker is generally only to disclose information which is adverse to a claimant, the requirements of natural justice fluctuate with the circumstances of each case. The particular circumstances of this case take it far outside the realm of the ordinary.

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[120] ... In cases, such as these, involving persons whose claims for protection have failed, the public revelation of their identities that could have been accessed by the very person(s) from whom the failed protection seeker feared harm, conceivably might have some potential to expose him or her, on *refoulement*, to what he or she feared.

***Was there a duty to be fair?***

That the process was unfair could have no legal consequence unless there existed a duty to accord procedural fairness.

On that question the Court considered whether a duty arose by reason of ss 48B, 195A and 417 of the *Migration Act 1958* (Cth). Those were 'dispensing provisions' which were the subject of the High Court's decision in *Plaintiff S10/2011 v Minister for Immigration*<sup>2</sup>. They provided for the Minister personally to exercise a non-compellable power in the national interest to permit consideration of the grant of a visa in circumstances where a visa applicant had exhausted administrative review rights. The Court, in *S10*, had found that the dispensing provisions were not attended by a requirement for the observance of procedural fairness (per Gummow, Hayne, Crennan and Bell JJ) at page 668 [100].

In *SZSSJ* the Court distinguished *Plaintiff S10/2011* on facts concerning the nature of the Departmental consideration. That aspect of the reasons concerns construction of the *Migration Act* alone and is not further considered.

Another aspect of the Court's reasons had potential application beyond the field of migration decision making, namely, that a duty to accord procedural fairness could be found to arise independently of those statutory provisions.

The Court found that in three letters to *SZSSJ*, in the manual which governed the conduct of ITOAs and in a letter to the solicitors for *SZSSJ*, there are statements that the assessment would be conducted fairly.

The Court reasoned:

[90] There is a considerable pedigree for the proposition that decision makers may, in some circumstances, generate an obligation of procedural fairness by [their] own conduct.

Having reviewed the case law on that question the Court found:

[94] This suggests that a departure by an official from a representation about future procedure will be unfair in at least two circumstances:

- (a) where, but for the statement, the claimant for judicial review would have taken a different course, that is to say, situations of actual reliance by the claimant; or
- (b) where if the procedure had been adhered to a different result might have been obtained.

If *SZSSJ* was provided with, among other things, the full list of IP addresses from which the file including his personal information had been accessed, it was possible that he would have had a useful submission to make as to the risks faced by him upon *refoulement*. Consequently the case was one in which a different result might have been obtained if he had been provided with that information, and the conduct of the Department was sufficient in itself to trigger an obligation of procedural fairness.

### The source of the obligation of procedural fairness

The Court particularly relied upon the decision of the Privy Council in *Attorney-General (Hong Kong) v Ng Yuen Shiu*<sup>3</sup> for the proposition that a decision maker may, by its own conduct, generate an obligation of procedural fairness.

The Court acknowledged that the reasoning in *Ng Yuen Shiu* was premised on the concept of legitimate expectation and that the High Court had moved away from that doctrine as a useful tool of analysis in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*<sup>4</sup>. The Court reasoned that *Lam* stood for the proposition that the focus had now shifted to whether the departure from a representation made by a decision maker might render the process unfair. In so reasoning the Court relied in particular upon the well-known passage of Gleeson CJ at [34]:

... What must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation ... In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed.

It is noted that Gleeson CJ was not dealing with the question of when representations by a decision maker would give rise to an obligation to extend procedural fairness but rather with the content of that obligation where 'there is already an obligation to extend procedural fairness'.

The distinction there drawn by Gleeson CJ was consistent with the reasoning of Brennan J in *Attorney-General (NSW) v Quin*<sup>5</sup>:

So long as the notion of legitimate expectation is seen merely as indicating 'the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded' to afford procedural fairness to an applicant for the exercise of administrative power, the notion can, with one important proviso, be useful. If, but only if, the power is so created that the according of natural justice conditions its exercise, the notion of legitimate expectation may usefully focus attention on the content of natural justice in a particular case: that is, on what must be done to give procedural fairness to a person whose interests might be affected by an exercise of the power. But if the according of natural justice does not condition the exercise of the power, the notion of legitimate expectation can have no role to play. If it were otherwise, the notion would become a stalking horse for excesses of judicial power.

The distinction drawn by Gleeson CJ and Brennan J is central to maintaining the coherence of the constitutional writs. Those writs are available to correct purported exercises of administrative power beyond jurisdiction. If a decision maker has jurisdiction to make a decision without according procedural fairness, the mere fact that the decision maker makes a representation that they will act fairly does not operate to limit or restrict the decision maker's jurisdiction. That being so the mere statement by the decision maker cannot be productive of an excess of jurisdiction which would otherwise not have occurred.

The Court in SZSSJ did not identify a source of the obligation to accord procedural fairness other than the Department's own representations. The reasoning that those representations were sufficient to create that obligation is not consistent with that of Gleeson CJ (upon which the Court relied) or Brennan J.

This is not to say the Court was in error.

Rather, the reasoning of the majority (Gummow, Hayne, Crennan and Bell JJ) in *S10/2011* at [64] – [65] and [70] focuses upon whether any exercise of power is apt to affect the rights, interests or privileges of an individual.

The majority reasoned at [65]:

The phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as Brennan J explained in *South Australia v O'Shea*<sup>6</sup>, 'tends to direct attention on the merits of a particular decision rather than on the character of the interests which any exercise of the power is apt to affect'.

Consistent with that distinction where the exercise of a power is apt to affect substantially the interests of an individual there is no diversion of attention onto the merits of the particular decision from a focus on the character of the interest thereby affected. That is so even when the effect on the individual's interests arises only because of the facts of the individual case.

In *S10/2011* the majority reasoned at [97]:

'The common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.

On the facts considered in *S10/2011* the occasion for operation of such a condition did not arise because each plaintiff had had all matters of relevance to their individual circumstances taken into account through the merits review processes and these had been exhausted. Thus the majority held at [100]:

Upon their proper construction, and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness. [emphasis added]

By the underlined words the majority contemplated that those same provisions might be conditioned on the observance of procedural fairness if the facts were different.

Unlike *S10/2011*, in its reasoning in *SZSSJ* at [123], the Court identified the character of the interest of *SZSSJ* which was apt to be affected by a refusal to exercise the power conferred by the dispensing provisions to permit an application for a protection visa. The improper disclosure by the Department of confidential information of *SZSSJ* created a risk that he might suffer significant harm upon *refoulement*. In circumstances where the *Migration Act* operated so that all other review opportunities had been exhausted, any exercise or refusal to exercise the powers conferred by the dispensing provisions would determine whether *SZSSJ* was exposed to any such risk. That was an interest of *SZSSJ* that arose from facts particular to him. However it was an interest apt to be affected by the exercise of the statutory power. Consequently the condition implied by the common law had work to do.

## Conclusion

It was not necessary for the Court in *SZSSJ* to rely upon the representations of the decision maker as the source of an obligation to accord procedural fairness and it is doubtful that the Court's reliance upon those representations as a source of any obligation to accord procedural fairness (as distinct from the content of any such obligation) was soundly based.

Rather, the facts of the case highlight the significant weight to be placed upon the character of the interests of individuals apt to be affected by the exercise of a power conferred by statute as required by the reasoning of the majority in *S10/2011*.

The formulation by the majority in *S10/2011* of the circumstance in which the common law implies a requirement of procedural fairness facilitates a conclusion that a particular statutory provision may be qualified by the obligation to accord procedural fairness in some fact situations, while not being so qualified in others.

The decision in *SZSSJ* stands with the decision in *S10/2011* as an example where facts particular to the individual could properly be taken into account to find that *SZSSJ* was entitled to procedural fairness in the exercise of a power, even though the exercise of that power did not require procedural fairness in the generality of cases.

That leaves much work to be done by the facts of each case – but continues to deny to the doctrine of legitimate expectation any significant role in Australian public law.

**Endnotes**

- 1 [2015] FCAFC 125.
- 2 (2012) 246 CLR 636.
- 3 [1983] 2 AC 629.
- 4 (2003) 214 CLR 1.
- 5 (1990) 170 CLR 1 at 39.
- 6 (1987) 163 CLR 378 at 411.

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