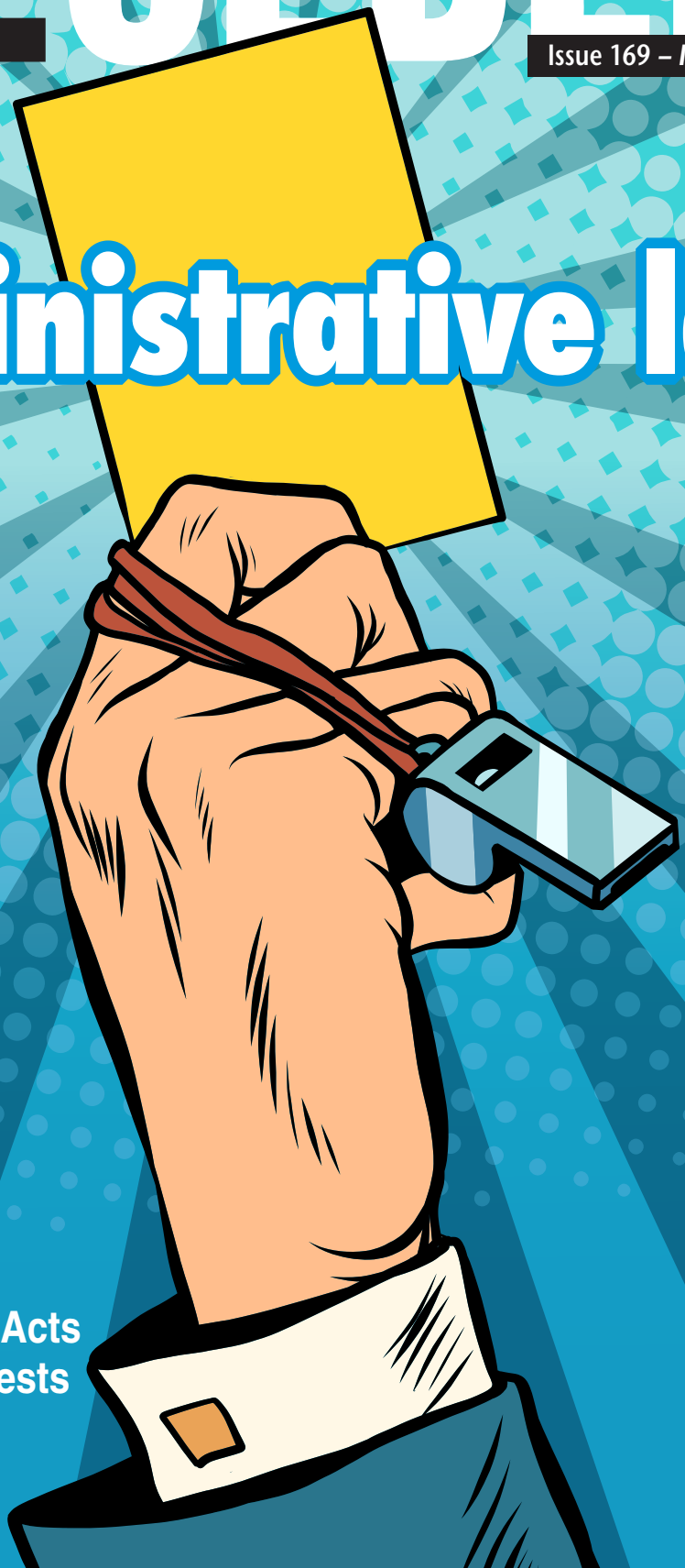
PRECEDENT

Issue 169 – *March / April 2022*

Administrative law



- Visa refusals
- Prisoner rights
- Judicial review
- The Interpretation Acts
- Legitimacy of protests
- Resolving financial disputes

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

NOT A MEMBER?

JOIN NOW!

The ALA now has a range of new membership categories, tailored to the circumstances of our increasingly diverse membership base.

Whether you're at the start of your legal career, working in a specific area of practice, are a First Nations practitioner, or are an employee of a Community Legal Centre, Aboriginal Legal Service or registered charity, we have a membership category to suit you!

We also have a membership category for our sponsors, exhibitors and other supporters.

MEMBERSHIP TYPES

Full Member
Full Member (special area of practice)
Aboriginal and Torres Strait Islander Justice
CLC/ATSILS/Registered Charity
Associate Member
Junior Professional
Business Partner
Student

For further information visit

https://www.lawyersalliance.com.au/getinvolved/apply-for-membership
or email Membership@lawyersalliance.com.au

PRECEDENT

CONTENTS

Issue 169 – *March / April 2022*

FEATURES

REGULARS

At the intersection of law and politics

By The Hon Justice Darryl Rangiah

Flicking through the pages of any newspaper reveals that news is generally dominated by two areas: law and politics. As administrative law stands at the intersection of law and politics, it is often concerned with the most topical and controversial subjects in our society.

Administrative law cases tend to reflect the areas of great political and societal division, including migration, the environment, industrial disputation, imprisonment, terrorism and social security. A recent example is the challenge by Novak Djokovic to his visa being cancelled on the basis that his presence in Australia might foster anti-vaccination sentiment.

The application of administrative law has become increasingly imperialistic, and covers almost every area where there are dealings between government and citizens. It is now common to see applications for administrative law remedies in areas of law as diverse as intellectual property, personal injury, tax, native title, mining, telecommunications and commissions of inquiry.

This issue of *Precedent* focuses on administrative law. Just as the scope of administrative law ranges widely, so do the areas covered in this edition.

Three articles explore the role of administrative law principles and remedies as an important check and balance upon the conduct of public officials. Greg Barns SC considers the use of administrative remedies in the context of correctional services regimes. Amanda Do and Dr Jason Donnelly provide practical guidance for practitioners concerning the related and burgeoning area of cancellation of visas on character grounds. Anna Talbot examines the right to protest, a controversial area in the wake of the pandemic.

Alanna Mitchell, Steve Tamburro and Catherine Dent examine another pandemic-related issue, the implications of *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719, which granted an application for access to the minutes of the National Cabinet.

Emeritus Professor Dennis Pearce provides a valuable reminder of the important, but underappreciated, role of Interpretation Acts in the construction of statutory provisions.

Adjunct Professor Allan Anforth AM contributes an overview of provisions concerning recovery of social security payments in claims for compensation for injury.

Mark Holden of the Financial Rights Legal Centre offers guidance for supporting First Nations clients who apply for financial dispute resolution through the Australian Financial Complaints Authority.

Mark Robinson SC and Jnana Gumbert provide a practical overview of the role of administrative law in personal injury cases in New South Wales, including a discussion of practice and procedure and grounds for judicial review of administrative action. The principles discussed in the article also have relevance for practitioners in other states and territories.

The imperialistic march of administrative law makes an understanding of the principles of administrative law an essential tool for every competent litigation lawyer. We are fortunate in this edition to have some of the foremost experts in their areas provide valuable insights into topical aspects of administrative law. ■

The Hon Justice Darryl Rangiah was appointed as a judge of the Federal Court of Australia in 2013. His Honour has also been appointed as an additional judge of the ACT Supreme Court and is a National Coordinating Judge for the Federal Court in the practice areas of native title and employment and industrial law. Prior to his appointment, Justice Rangiah practised as a barrister at the Queensland Bar, taking silk in 2008. His Honour was also chair of the Queensland Fisheries Tribunal for 9 years and a member of the Queensland Anti-Discrimination Tribunal for 5 years.

Justice delayed is justice denied

By Graham Droppert SC

I acknowledge that the land we live on is and always has been the land of First Nations peoples. I pay my respects to the Elders – past, present and emerging – throughout Australia. First Nations people know well that justice delayed is justice denied, whether in relation to resolving land rights or land use agreements, compensating those who suffered abuse while under State control or in private institutions, or adequately addressing issues such as high incarceration rates and poor prison conditions.

Administrative law is an important aspect of our justice and legal systems. In jurisdictions where governments can be held to account for decisions that have wide-ranging impacts on the lives of individuals and the community, administrative appeals tribunals are often the primary source of oversight and redress.

However, the latest reports for many of these tribunals show that caseloads are increasing, as is the waiting time for hearings and even mediations. Delays can also result from decisions by governments to deny or restrict access to administrative review. And a failure to adequately staff compensation recovery services via Medicare, the NDIA or Centrelink can delay by many months the payment of agreed compensation to those who have been injured or abused.

In the civil and criminal courts, the position is generally no better. Certainly the COVID-19 pandemic has caused the cancellation or deferral of many trials, especially in 2020, but the underlying stress on the courts has been building for many years. For example, Sleight CJ noted in his 2019 report as Chief Judge of the District Court of WA that the median time to trial had increased by almost 13 per cent. In that same year the number of writs issued in the civil jurisdiction jumped a staggering 190 per cent; in the five years to 2019, bail applications had also increased almost threefold.[1]

This is not occurring in Australia alone. In 2021, criminal justice watchdogs for England and Wales revealed that 54,000 unheard cases were awaiting trial in the crown courts.[2] And the US-based Aspen Institute recently noted that '[t]he new pressures of the current pandemic have heightened the reality of inequality and injustice', and identified gender disparity, income inequality and racial inequity as factors contributing to the denial of justice through delay.[3]

There are no simple solutions. Lessons can, however, be learned from some jurisdictions. Improvements to courtroom technology by the Victorian Supreme Court enabled the Court to quickly 'adapt to remote hearings with minimal disruption to listings'.[4] As noted by Ferguson CJ, in 2020–21 'around 94 per cent of hearings and mediations had some kind of digital litigation input or assistance'.[5]

Nonetheless, inadequacies in resourcing the courts and enabling access to legal aid and fair costs scales remain a barrier to justice. This situation requires constant evaluation by the profession, the courts and tribunals, and governments.

This edition of *Precedent* again provides quality articles from highly regarded colleagues. I acknowledge and thank each of the contributors.

While we cannot solve the problem of delays to accessing justice, we can arm ourselves to ensure that by our conduct and knowledge we contribute to having matters properly ventilated, in a focused manner. The Australian Lawyers Alliance (ALA) continues to strive to assist members in such endeavours.

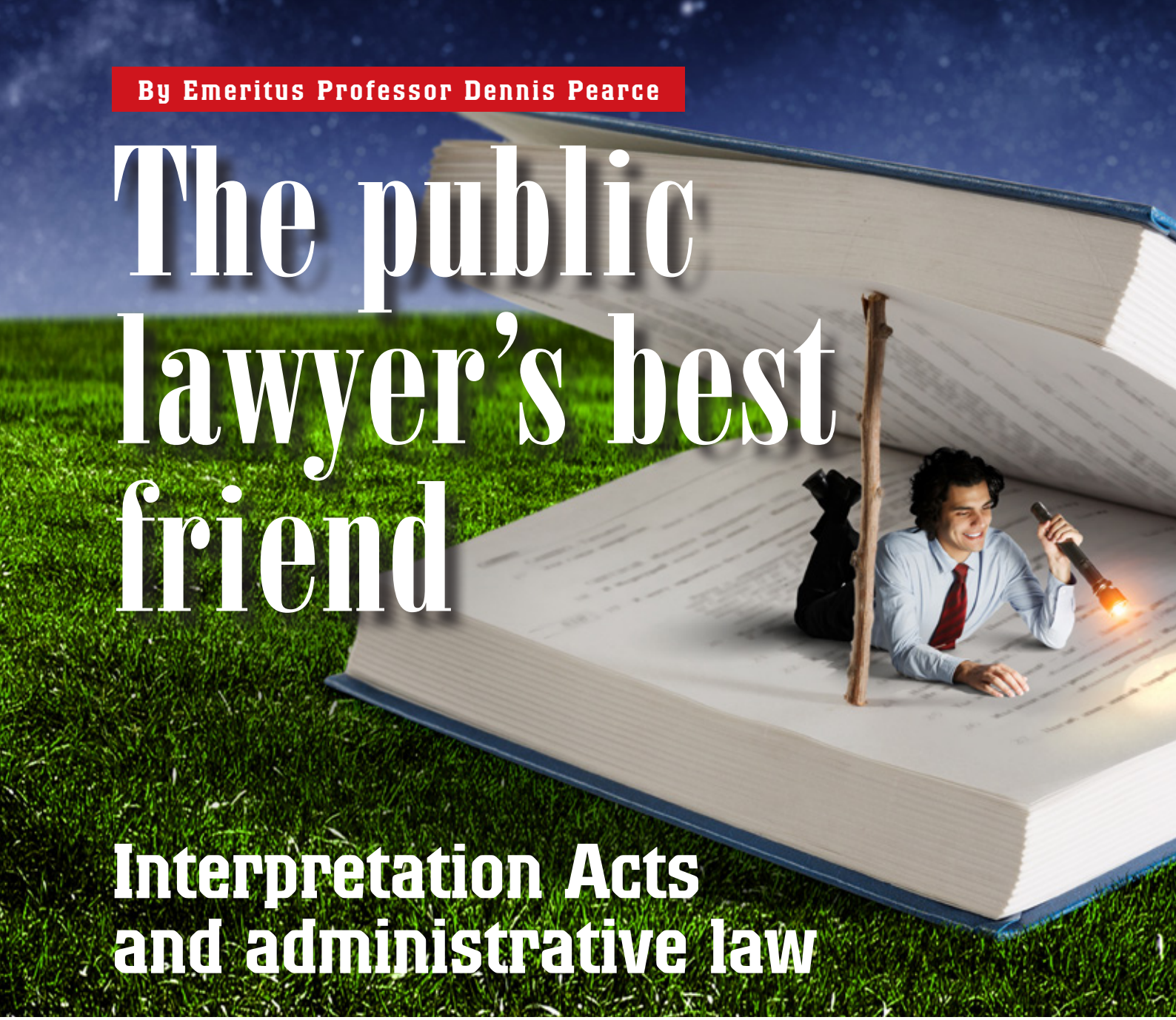
I am delighted to congratulate Genevieve Henderson on her appointment as the ALA President-Elect. Her role as President will commence on 1 July 2022. Genevieve is an outstanding personal injury lawyer who has also had management responsibilities at Slater and Gordon, and her involvement as an ALA National Council member provides a very good basis for this leadership role. I speak for all ALA members in wishing Genevieve well for the year ahead. ■

Notes: **1** District Court of Western Australia, '2019 Annual Review, 2020', 1–2 <https://www.districtcourt.wa.gov.au/_files/2019_WADC_Annual%20Review.pdf>. **2** D Casciani, 'Covid and the courts: "Grave concerns" for justice, warn watchdogs', *BBC News*, 19 January 2021 <https://www.bbc.com/news/uk-55712106>. **3** Aspen Global Leadership Network, 'Justice Delayed is Justice Denied', *Aspen Institute*, 28 August 2020 <https://www.aspeninstitute.org/blog-posts/justice-delayed-is-justice-denied/>. **4** Supreme Court of Victoria, 'Annual Report 2020–21', 10 <https://www.supremecourt.vic.gov.au/sites/default/files/2021-11/Supreme%20Court%20of%20Victoria%20-%20Annual%20Report%202020-21.pdf>. **5** Ibid.

Graham Droppert SC is a barrister practising from Albert Wolff Chambers, Perth, specialising in personal injury.
PHONE (08) 9221 1544. EMAIL g.droppert@bigpond.com.

By Emeritus Professor Dennis Pearce

The public lawyer's best friend



Interpretation Acts and administrative law

When I first joined the Commonwealth Public Service nearly 60 years ago, my boss told me that I should read the *Acts Interpretation Act 1901* (Cth) (*Cth Act*) at least once a year. Being young and therefore knowing all that there was to know, I ignored the advice. This was foolish. Everyone who has any involvement in government decision-making, whether it be as a maker, a recipient or a challenger, needs to be conversant with the provisions of the Interpretation Act relevant to the jurisdiction in which they are working.[1]

Interpretation Acts contain many matters germane to the content and mechanics of making decisions and their implementation, the knowledge of which makes understanding very much easier. And the absence of this knowledge is likely to lead to egregious errors.

The following are some of the more significant administrative law issues that arise in relation to a government decision:

- the identification of the designated decision-maker;
- the appointment or suspension of a person and removal of that person from office;
- whether a person acting in an office can make a decision;
- whether the making of a decision can be delegated;
- the measurement of periods of time within which a decision can be made and reviewed; and
- the manner of service of decisions on a person affected.

These issues are all significant to the validity of a decision and its effect on a citizen. They are all dealt with in the Interpretation Acts.[2]

This article examines what might seem an esoteric issue relating to decision-making but is nevertheless of major importance both to decision-makers and to persons affected: whether a decision once made can be revisited. The Interpretation Acts of all jurisdictions contain detailed provisions on this issue.

CONTRARY INTENTION

It is important to remember that the provisions of all Interpretation Acts apply unless the contrary intention appears in the legislation to which they are to be applied. Identification of a contrary intention is not always easy. The most frequently cited comment is that of McHugh J in *Pfeiffer v Stevens*:[3]

> 'An intention contrary to the *Acts Interpretation Act* may appear not only from the express terms or necessary implication of a legislative provision but from the general character of the legislation itself.'

However, a contrary intention should not be too readily assumed. As Palmer J said in *Hunter Support Services Pty Ltd v The Children's Guardian*[4]:

> '[O]ne must not be too ready to find that a word or phrase defined in the *Interpretation Act* does not have the meaning ascribed to it in an Act or instrument to which the *Interpretation Act* applies … the question is not *"does the section or regulation still make sense if the word has a different meaning"*, but is, rather, "*does the context and purpose of the section or regulation clearly require a departure from the definition of the word in the Interpretation Act*". That is a fairly high hurdle to jump.'[5]

REVISITING DECISIONS

The Interpretation Acts of all jurisdictions include significant provisions relating to the exercise of powers and the performance of functions that are vested in a person or authority by legislation.[6] The provisions in the Acts of the various jurisdictions vary in their expression and scope, and it is essential to have regard to the provisions applying in the particular jurisdiction. However, provisions relating to revisiting decisions have fairly similar content and it is possible to speak about them in general terms.

At common law, the general rule was that, once a statutory power had been exercised, it could not be exercised again, nor could the decision be revisited. It was said that the person authorised to exercise the power was *functus officio*. This most inconvenient doctrine has been negated by the Interpretation Act of each jurisdiction.[7]

The *Cth Act* exemplifies the relevant provision:

> 'Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.'[8]

The common law limitation of a once-only action is thus negated. The crucial words are 'from time to time as occasion requires'. So a decision may be revisited whenever the decision-maker determines that it should be.

It may be observed that the section says that a power *may* be exercised and a duty *must* be performed. The use of this language on its face indicates that the exercise of a power on a from-time-to-time basis is discretionary: there is no obligation on the decision-maker to return to the issue once a decision has been made to exercise a power. In contrast, where a duty is involved, the decision-maker is obliged to revisit a decision that has been made and reconsider whether the decision should be revised.

However, this gives a false impression. First, the courts have not been willing to adopt a rule of thumb approach to the use of discretionary, in contrast with obligatory, language. The approach is to consider the legislation in question and determine the intended purpose of the relevant provisions.[9] This position has not been affected by the inclusion in Interpretation Acts of a provision spelling out that 'may' implies a discretion and 'must' or 'shall' an obligation.

Second, if circumstances have arisen whereby a power should be exercised in compliance with the legislation

creating the power even though there has been a previous exercise of the power, a refusal by a decision-maker to act will not be able to be resisted solely on the ground that the Interpretation Act provision is couched in discretionary terms. Conversely, if a duty has been performed, the decision-maker cannot be required to consider exercising it afresh in the absence of circumstances that differ from those that prompted the first exercise of the duty.

It must be stressed that the Interpretation Acts are applicable only to decisions made under legislation and are not relevant to decisions under contracts, etc. Further, the provisions do not apply to decisions of courts or tribunals where the need for finality is paramount.

It is only necessary and indeed possible to invoke the relevant Interpretation Act sections if it is the same power, etc, that is being sought to be revisited. See, for example, *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission*,[10] where it was held that it was not necessary to consider the applicability of s33 of the *Cth Act* as either of two separate powers could be used to support a decision. A decision taken under one power was not being revisited if it was another power that was later being exercised even though their practical effect was the same.

An issue that is alluded to by French CJ in *CPCF v Minister for Immigration and Border Protection*[11] is whether there is any limit on the number of times that a decision may be revisited in reliance upon the *Cth Act* provision. That case was concerned with the detention of persons outside Australia pursuant to the *Migration Act 1958* (Cth). His Honour thought that the better view was that the person could be moved as occasion required. The other members of the Court did not consider the question. There is no limit inherent in the relevant *Cth Act* provisions. Any limit must flow from the power in question not being able to be exercised more than a certain number of times, or from the application of general administrative law principles that might deem repeated re-exercise to be an abuse of the power.

It is apparent from the cases referred to below that the application of the *Cth Act* sections is dependent on the court's perception of the intended effect of the relevant provision in the legislation to which the sections are being applied. The following are circumstances and examples of cases where the courts have held that decisions may be revisited:

- The decision was based on facts found to be incorrect, as in *Powerlift (Nissan) Pty Ltd v Minister for Small Business, Construction and Customs*.[12] Factual errors leading to the miscalculation of the export price of goods could be corrected by remaking the decision.
- The decision involved continuing circumstances requiring oversight, as in *Orthotech Pty Ltd v Minister for Health*.[13] The inclusion of a prosthesis on a list of approved devices did not prevent the Minister from revisiting the list and omitting the prosthesis. To hold that a device once listed could not be removed would require the list to include superseded devices.
- The decision involved public interest and/or policy issues, as per *Pfeiffer v Stevens*, above.[14] Section 23 of the *Local Government Act 1993* (Qld) permitted the Minister to extend the operation of an interim local law. It was held that this power could be exercised by the Minister more than once. There was nothing in the Act to show a contrary intention. The power was exercisable as occasion required.
- The nature of the decision was such that it should have been possible to exercise it from time to time as circumstances required, as in *Clark v Honourable Amanda Vanstone*.[15] The power to suspend a member of an advisory body was not exercisable on a once-only basis. The scheme of the section suggested that multiple exercises of the suspension power may be at the least very desirable, if not necessary.

The following are some of the circumstances where it has been held that the *Cth Act* provisions cannot be invoked to revisit a decision (examples of relevant cases are included):

- Express provisions in the Act under which the decision is made displace the right to rely on the *Cth Act*, that is, a contrary intention is shown, as per *Collins v Military Rehabilitation and Compensation Commission*.[16] Under the *Administrative Appeals Tribunal Act 1975* (Cth) an order of the Tribunal entered by consent could only be altered in the case of obvious error. The *Cth Act* could not be called in aid to alter a costs order entered by consent where there was no obvious error.
- It is apparent that the power can only be exercised once, having regard to consequences flowing from the decision, as per *Dunstan v R*.[17] Section 180 of the *Legislation Act 2001* (ACT) does not permit a judge to reconsider a sentence once it has been imposed. Once a sentence is pronounced, the judge is *functus officio.*
- The decision generates rights or liabilities and persons have acted on them, as per RE *Export Development Grants Board v EMI (Australia) Limited and Thorn EMI Electronics Pty Limited*.[18] A grant once made created a right to the money paid pursuant to the grant. It could not be revisited, reassessed and set off against a later grant.
- Review rights permitting the decision to be revisited are included in the legislation, as per *Museums Board of Victoria v Carter*.[19] A power to make an emergency order could not be exercised on a from-time-to-time basis as there was provision made in the legislation to seek a substantive order after the emergency order had preserved the status quo. This substantive order was subject to review. The existence of a hierarchy of orders indicated a contrary intention to the emergency order being able to be remade.
- There are time limits provided for the decision-making, as per *Scarfe v Federal Commissioner of Taxation* (Cth).[20] Section 33(1) of the *Cth Act* could not be invoked to alter an assessment to tax more than one year after the assessment had been made and communicated to the taxpayer. Under s20 of the *Estate Duty Assessment Act 1914* (Cth), errors of any kind whatsoever could be corrected up to one year after the last payment on account of duty and, if necessary, adjusted, whether they operated in favour of the Crown or of the taxpayer. After that time, the conclusive effect of the assessment was not to be disturbed and s33 could not be invoked.

These circumstances and further cases relating to them are set out in detail in *Interpretation Acts in Australia*.[21]

REVISITING INSTRUMENTS

A provision supplementing the from-time-to-time provision referred to above is found in all Interpretation Acts.[22] The purpose of the provision is to negate any argument that an instrument, once made, cannot be revisited. It responds to the limitation that was imposed by the common law (to which the from-time-to-time provision is also directed) – that a power once exercised could not be exercised again. The provision makes it clear that the exercise of the power to make an instrument does not prevent the instrument from subsequently being amended or revoked.

However, the scope of the provisions adopted in the various jurisdictions varies widely. In some cases, it is applicable only to legislative instruments in the form of subordinate legislation. In others, it covers all government action, both legislative and administrative, taken by means of an 'instrument'. The terms of the relevant provisions of the Interpretation Acts must be carefully examined before action is taken to amend or repeal an instrument or decision made in reliance upon the provision. It may be that the from-time-to-time provision can be called in aid in those jurisdictions whose revisiting power is more limited. However, the provisions do cover different grounds. The from-time-to-time provision contemplates action in the future and can only be invoked where there is a power or function conferred or duty imposed on a person. The process of revisiting to amend or repeal an instrument provision looks back with an eye to undoing action that has occurred.

It should be noted that the Interpretation Act provisions are available only to an authority empowered to take action under legislation; they do not apply to an instrument made by a citizen.

Where legislation empowers a decision-maker to call in aid an Interpretation Act revisiting provision to amend or repeal an instrument, that power passes to a delegate if the original power has been properly delegated.

To take advantage of the Interpretation Act provision there must be an 'instrument'. This has provoked identity problems, but the position now seems to be settled. A distinction has been drawn between a document the making of which is the decision in question and without which there would be no decision, and a document that merely provides evidence of the decision. It is unusual for government decisions not to be recorded in writing. However, legislation may not require that to occur. If the decision is complete in itself, and does not require writing for its validity, the written record of the decision will not be an instrument such as to attract the operation of the provisions referred to above. It is only if the power in question is to make an instrument that itself brings about a certain result that the provision can be invoked. This distinction may be illustrated by reference to two cases.

Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd[23] concerned the revocation of a warehouse licence. The Court said that the power to grant the licence could be exercised without the need for a written document. While customarily the licensor would issue a written document evidencing the licence, this was not in itself required by the legislation authorising the grant of the licence. The licence could be revoked independently of its written version. Accordingly, the provisions of the Interpretation Acts could not be invoked as the action did not constitute the revocation of an instrument.

In contrast, *X v Australian Crime Commission*[24] involved a power of the Commission 'to determine in writing … whether an investigation [was] a special investigation'. The decision here was the making of the written determination. This was an instrument, and the power of the relevant Interpretation Act to revoke an instrument could be called in aid.

Provisions in the Interpretation Acts of all jurisdictions provide for a person acting as a decision-maker to exercise the powers set out above. Provisions in all jurisdictions except SA and WA require the Interpretation Act powers to be exercised subject to the same constraints as those applied to the original exercise of the power. So if notice had to be given of an intention to make an instrument, revocation or amendment of it would require like notice.

CONCLUSION

These are but two instances of the way in which an Interpretation Act can affect a decision-making power. The Act can be a valuable aid to any lawyer. The good advice that I was given all those years ago is as relevant today. ■

Notes: **1** Commonwealth: *Acts Interpretation Act 1901* (Cth) (*Cth Act*). States and territories: *Legislation Act 2001* (ACT) (*ACT Act*); *Interpretation Act 1987* (NSW) (*NSW Act*); *Interpretation Act 1978* (NT) (*NT Act*); *Acts Interpretation Act 1954* (Qld) (*Qld Act*); *Legislation Interpretation Act 2021* (SA) (*SA Act*) (replacing *Acts Interpretation Act 1915*); *Acts Interpretation Act 1931* (Tas) (*Tas Act*); *Interpretation of Legislation Act 1984* (Vic) (*Vic Act*); *Interpretation Act 1984* (WA) (*WA Act*). **2** For more details on the issue of whether a decision once made can be revisited, see DC Pearce, *Interpretation Acts in Australia*, LexisNexis Butterworths, 2018. **3** [2001] HCA 71, [56]. **4** [2005] NSWSC 616. **5** Ibid, [16]. A passage recently approved by Garling J in *Genesian Theatre Company Inc v State of New South Wales* [2021] NSWSC 1089, [23]. **6** *Cth Act*, s33(1); *ACT Act*, s180; *NSW Act*, ss43, 48; *NT Act*, ss40–44A; *Qld Act*, ss23, 24AA; *SA Act*, s37; *Tas Act*, ss20, 22, 22A; *Vic Act*, ss40, 41A; *WA Act*, ss43, 48, 55. **7** Ibid. **8** *Cth Act*, above note 1, s33(1). **9** DC Pearce, 'Chapter 11: Obligatory and Discretionary Provisions', *Statutory Interpretation in Australia*, 9th ed, LexisNexis Butterworths, 2019, 387. **10** [2000] FCA 589, [178]–[182]. **11** [2015] HCA 1, [94]. **12** [1993] FCA 37. **13** [2013] FCA 230. **14** [2001] HCA 71. **15** [2004] FCA 1105, [60]. **16** [2005] FCA 1862, [31]. **17** [2003] ACTCA 22. **18** [1985] FCA 284, [40]. **19** [2005] FCA 645, [25]. **20** (1920) 28 CLR 271, 275–6; [1920] HCA 61. **21** Pearce, above note 2, ch 8. **22** *Cth Act*, s33(3); *ACT Act*, s46; *NSW Act*, s43; *NT Act*, s43; *Qld Act*, s24AA; *SA Act*, s40; *Tas Act*, ss22, 22A; *Vic Act*, s41A; *WA Act*, s43(4). See above note 1. **23** [1979] FCA 21. **24** [2004] FCA 1475.

Emeritus Professor Dennis Pearce AO FAAL is Emeritus Professor of Law at the ANU College of Law. He is the author of a number of books, including *Statutory Interpretation in Australia*, now in its 9th edition (LexisNexis Butterworths, 2019) and *Interpretation Acts in Australia* (LexisNexis Butterworths, 2018).

By Greg Barns SC

Prisoners' rights and judicial protection

Reducing deference?

The nature of imprisonment in Australia, as is the case in most common law jurisdictions, is that prisoners have little decision-making capacity. They are subject to a myriad of rules concerning, for example, classification, discipline and parole. But this is not to say prisoners are unable to challenge administrative decisions made by correctional authorities.

While prisoners' capacity to challenge decisions that are adverse to them is limited, largely because the traditional view of the courts has been that prison management is a matter for executive government, corrections authorities do not have an effective carte blanche to do as they please to individual prisoners.

This article explores the capacity for administrative law principles and remedies, coupled with human rights protections, to ensure there are some checks and balances on correctional regimes around Australia.

Initially we look at the reluctance of courts to involve themselves in decisions taken by prison and correctional management. This is what we term 'judicial deference'. We then examine the scenarios where that deference is less relevant *or* simply misplaced, and finally look at some options for reform. Before doing this we examine the regulatory framework for prisoners in Australia.

PRISON REGULATION

Each Australian state and territory has enacted legislation governing the prison system in that jurisdiction.[1] In addition, subordinate legislation and policies govern every aspect of daily life in the prison. For example, in Queensland what a prisoner does with his or her artwork is specifically governed in that jurisdiction's legislation. Sections 28A–D of the *Corrective Services Act 2006 (Qld)* regulate the circumstances in which a prisoner can sell or give away an artwork. In Victoria the *Corrections Regulations 2019* (Vic) heavily restrict the way a prisoner can spend the money in his or her account.

The intense and all-encompassing nature of the regulation of prison life, and then of parole, inevitably leads to some capricious and arbitrary decision-making by authorities. Last year the Victorian Ombudsman concluded that:

> 'while we found improvements in some areas since 2011, disciplinary hearings in Victorian prisons are still carried out "in the dark" with insufficient scrutiny, oversight or transparency. And while we observed some good practices and decisions, the potential for unfairness is still rife.'[2]

We have experience, as Chair of the Prisoners Legal Service in Tasmania, of a similar culture. The capricious nature of regulation of the life of prisoners is often a case of 'out of sight, out of mind'.

JUDICIAL DEFERENCE

As noted above, the courts have traditionally been reluctant to interfere in the running of prisons, or the decisions of prison management. In 2013, in the Supreme Court of Western Australia, McKechnie J set out with clarity the reasoning behind this approach. His Honour observed:

> 'Courts do not manage prisons. This court should not intervene to grant prerogative or declaratory relief unless the actions of the respondent are unlawful or beyond power. The extent to which the rules of natural justice might apply in respect of management decisions is an open question. The nature of the legitimate expectations of a prisoner is also an open question. Neither question can be answered in the abstract. The facts must give context to the answers.

> Management decisions or orders are within the authority of the superintendent under the *Prisons Act,* s36. They are not of their nature easily susceptible of judicial review. Absent bad faith, a prison superintendent has broad and encompassing power over discipline and management of a prison. A superintendent must maintain order and security. A superintendent must take steps to reasonably protect both prisoners and prison officers or other staff in an environment which may at times be charged. Sometimes a superintendent will have to act on less than complete information, including information that may be later shown to be in error.
>
> … Carrying out the statutory or contractual responsibility requires a prison superintendent from time to time to make decisions and give orders which may be unfair in an individual case but are required for the overall good governance of that prison. Many prison orders will in fact be given when there is no practical possibility of judicial review.'[3]

The aversion of the courts to interfering in prison management decisions is also explained by the lack of legitimate expectations (in the *Kioa v West* sense[4]) which a prisoner enjoys when detained. In the 1993 Queensland decision of *Walker v The Queen,*[5] Williams J surveyed authorities and concluded that:

> '[t]hose judgments stress the necessity for legitimate expectations to be adversely affected before a managerial decision taken by prison authorities will be reviewed by the courts. Here, neither decision to transfer affected in any way the applicant's status. He had no entitlement or legitimate expectation, for example, to spend the rest of his incarceration at Maconochie Lodge. It must not be forgotten that the applicant effectively had his right to liberty taken away by the sentence imposed upon him; if liberty is partially granted by prison officials in making a managerial decision as to where and how the inmate should be kept in custody, it cannot be asserted that the right to liberty has been taken away by a subsequent managerial decision, made in good faith, to the effect that in the interests of prison discipline and security, the inmate should be detained elsewhere in the system.'[6]

Judge of Appeal Nettle in *Anderson v Pavic*[7] pithily summarised the policy behind judicial reluctance to interfere with the powers exercised by prison authorities when he observed:

> '[p]rison legislation should ordinarily be interpreted so as to give full scope to the power of correctional authorities to carry out tasks of prison administration and management without undue influence from the courts.'[8]

SOME LIMITS ON DEFERENCE

While it is fair to say that the vast bulk of administrative law challenges by prisoners against decisions are not successful, there are cases where the courts will intervene and provide relief.

In *Pickett v Tasmania*,[9] a 2011 decision in which we were involved as junior counsel for the applicant, Wood J declared that the detaining of Mr Pickett in maximum security for extensive periods of time, and failing to inform him and apply consistently the rules of a behavioral management program, breached the common law duty of care owed to prisoners and the *Corrections Act 1997* (Tas), which provides at s29(p) 'the right to be provided with information about the rules and conditions which will govern the prisoner's or detainee's behaviour in custody'.

In the past 12 years there have also been some successful challenges in Victoria to prison decision-making.[10] These cases are of significance in that they demonstrate some erosion of the traditional 'hands off' approach we note above. In part, it can be argued that the availability of a charter of human rights – the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Charter*) – is a potentially powerful tool for prisoners to utilise when challenging prison decisions.

In *Castles v Secretary to the Department of Justice*[11] the applicant was denied a request to undertake IVF treatment while incarcerated. Justice Emerton held that, pursuant to s47(1)(f) of the *Corrections Act 1986* (Vic) (*Corrections Act*), which provides 'the right to have access to reasonable medical care and treatment necessary for the preservation of health',[12] the respondent's decision should be set aside. Her Honour, as Mackay notes, used the *Charter* to 'confirm the interpretation that had been arrived at in any event'.[13]

Justice Emerton also, albeit in an obiter context, noted that prisoners retain rights. The loss of liberty does not mean prisoners lose rights such as 'a right to enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person'.[14]

Such a proposition, though, was couched in the context of the loss of liberty: 'although prisoners do not forgo their human rights, their enjoyment of many rights and freedoms enjoyed by other citizens will necessarily be compromised by the fact that they have been deprived of their liberty', her Honour said.[15]

Two of the other recent Victorian decisions concerning challenges to prison decision-making involve Dr Craig Minogue. Dr Minogue, convicted and sentenced in respect of the 1986 Russell Street bombing, has successfully argued against decisions concerning the right of a prisoner to access mail and the subjection of prisoners to urine testing.

The 2017 mail case[16] concerned a number of interferences, by means of the interception of and a failure to deliver mail to Dr Minogue. Only one of the claims was successful. This related to a prison officer returning to the sender a book[17] addressed to Dr Minogue. The applicant's argument was that this decision breached his right to privacy (s13 of the *Charter*) and the right to freedom of expression (s15(2) of the *Charter*).

The evidence from the prison officer was that she failed to take account of Dr Minogue's *Charter* rights, which led Dixon J to declare that a letter addressed to the plaintiff was stopped in breach of the plaintiff's right under s47(1)(n) of the *Corrections Act* to receive letters addressed to him.[18] His Honour also declared that in 'deciding to return to sender, the letter and accompanying book … the prison mail officer failed to give proper consideration to the plaintiff's human right of privacy as it is defined in s13(a) of the *Charter* and of

"freedom of expression" as it is defined in s15(2)(b) and (c) of the *Charter*.'[19]

More recently, in 2021, Dr Minogue challenged three occasions where he had to have a random alcohol and drug test and be strip searched.[20]

The first two instances were in September 2019 and February 2020, when Dr Minogue was required to provide a urine sample after being strip searched. When Dr Minogue challenged prison authorities, he was told this was a 'random general test', to which 5 per cent of prisoners are required to submit each month.

The third instance was also in February 2020, before Dr Minogue was visited by his lawyer. He was told to submit to a strip search, which is standard procedure when prisoners receive outside visitors. He refused because he objected to the blanket nature of the policy.

The strip searching procedure is humiliating and invasive of dignity and privacy. In Victoria, the prisoner is forced take off all their clothes, and their mouths, ears and arms are inspected. The genital area is searched, and the prisoner is forced to bend over and part the cheeks of their buttocks.

If prisoners refuse to provide a urine sample, according to the Victorian procedures tendered in the Minogue case, they are 'secured in a sterile, secure area'[21] for 3 hours. The idea is that the prisoner might decide to comply in order to be released from that area.

Doctor Minogue argued that his human rights under the *Charter* were not properly considered by prison authorities when they made the rules and directions allowing for random drug and alcohol testing and strip searching. In particular, he argued that the right to privacy and the right to be treated with dignity while deprived of liberty were not mentioned in the Corrections Victoria documents which describe the regime for strip searching and drug and alcohol testing.[22]

Justice Richards found that the directions that Dr Minogue submit to a urine test on 4 September 2019 and on 1 February 2020 were authorised by s29A of the *Corrections Act*, but proper consideration was not given to relevant human rights in making the directions, in breach of s38(1) of the *Charter*. In particular, the directions were incompatible with Dr Minogue's right to privacy, as contained in s13(a) of the *Charter*, and his right to be treated humanely and with respect for the inherent dignity of the human person, as contained in s22(1) of the *Charter*, was in breach of s38(1) of the *Charter*.

The strip searches of Dr Minogue before his urine tests on 4 September 2019 and 1 February 2020, and before and after a visit from his lawyer on 18 February 2020, were not authorised by reg 87(1)(d) of the *Corrections Regulations 2019* (Vic), because there were not reasonable grounds to believe that they were necessary for the security and good order of the prison. However, her Honour found that the strip searches of Dr Minogue on 18 February were authorised by the *Corrections Regulations*. Her Honour also found that, as was the case for the other procedures, Dr Minogue's *Charter* rights had been breached.

We noted, in a commentary on the decision,[23] that this case is important because 'it represents a rare win for prisoners in challenging corrections regimes. Generally speaking, the courts see prison rules as matters for governments to change. But Dr Minogue's case shows that human rights principles can be applied to prison practices and rules.'[24]

In *Haigh v Ryan*[25] Ginnane J set aside a decision by prison authorities to deny the applicant access to a pack of tarot cards. His Honour observed that prisoners do not lose rights, except the right to liberty:

> 'A dispute about Tarot cards might hardly seem worth a Supreme Court case. But it is the underlying issues that are important. The Parliament has given prisoners, even those convicted of the most terrible crimes, rights they can seek to exercise while in prison, one of which is the right to practise their religion. Section 47 of the Corrections Act contains 15 paragraphs listing prisoners' rights and s 47(2) states that those rights are additional to, and do not affect, any other rights which a prisoner has under another Act or at common law. The rights in the Charter also apply to prisoners. The Court must resolve this dispute as no other Court or Tribunal in Victoria has jurisdiction to do so.'[26]

In Queensland a recent decision by Martin J involved a challenge to a prisoner serving his sentence in isolation, or what is rightly termed 'solitary confinement'. In

Owen-D'Arcy v Chief Executive, Queensland Corrective Services[27] the respondent made a decision which placed the applicant on a no-association order. As Martin J described it, 'The No Association Decision … works to prevent the applicant from engaging in any meaningful conversations or exchanges. It places him in a cocoon of isolation from all but the slightest interaction with other human beings.'[28]

One of the grounds of review argued by the applicant was that the respondent had failed to take into account relevant considerations, including the impact of the decision on his human rights. Justice Martin agreed, observing that the *Human Rights Act 2019* (Qld), s58 'requires, among other things, that a decision-maker … must identify "the human rights that may be affected by the decision" and consider "whether the decision would be compatible with human rights".' His Honour concluded that '[t]he consideration which was given to the rights identified by Ms Newman [an Executive Director within the Department of Corrective Services] was superficial at best'.[29]

His Honour found that 'Ms Newman failed to take into account a relevant consideration, namely, the effect of the No Association Decision on the applicant's human rights.'[30]

We noted above that, in relation to the regulation and administration of parole, prisoners also have some capacity to challenge decisions. In these cases this capacity is generally on the usual administrative law grounds such as unreasonableness, failure to take into account relevant considerations and other grounds.

A recent example of this type of challenge is found in *Burridge v Parole Board Queensland*,[31] where Bradley J set aside a decision of the respondent where it failed to take into account relevant considerations because it made factual errors about the applicant's criminal history. Justice Bradley found that 'the Board's errors meant that it made its decision without considering Mr Burridge's actual criminal history. It follows that the Board failed to take a relevant consideration into account in the exercise of its power under the [*Corrective Services Act 2006* (Qld)].'[32]

The issue of the parole authority's obligation to accord a right to be heard was considered by Hulme J in *Boatswain v State Parole Authority*.[33] There, the respondent erroneously found that the applicant lacked motivation for undertaking therapy or rehabilitation at hearing, and this error was influential in its decision to refuse parole. It did not put this finding to the applicant at the parole hearing. His Honour set aside the decision on the basis that, in accordance with what the High Court said in *Annetts v McCann*,[34] 'One of the rules of natural justice is that the person has an opportunity to be heard.' His Honour added: 'The contention that the plaintiff lacked motivation in relation to treatment was never put to him during the hearing and accordingly the Parole Authority denied the plaintiff an opportunity to be heard on that point. I accept that there was a denial of procedural fairness.'[35]

CONCLUSION: REDUCING DEFERENCE

Prisoners are among some of the most legally vulnerable individuals in our community. The deprivation of liberty is enlarged by prison authorities, and the courts traditionally have implicitly given their imprimatur to this view, applying the punitive, capricious and arbitrary micro-management of lives. This is done in the name of the 'good order' of the prison, but it does not make sense when one considers this is counterintuitive to goals such as rehabilitation.

Academic Lisa Kerr has written that some measure of judicial deference is appropriate in the prison law context, as courts are 'far removed from the "hothouse of a carceral environment"'.[36] However, she argues:

> '[p]risoner claims might be properly interpreted in light of the endemic administrative difficulties of operating resource-limited facilities filled with individuals who often bring complex personal histories to the facility and who are coping with significant deprivations. Yet, just as due deference is called for, there is also a clear imperative for careful external review and putting government to the burden of justification, given the pervasive risk of hidden abuse and neglect exercised on a powerless population.'[37]

There is much to recommend this view. ■

Notes: **1** *Crimes (Administration of Sentences) Act 1999* (NSW); *Corrections Act 1986* (Vic); *Corrective Services Act 2006* (Qld); *Prisons Act 1981* (WA); *Correctional Services Act 1982* (SA); *Corrections Act 1997* (Tas); *Correctional Services Act 2014* (NT); *Corrections Management Act 2007* (ACT). **2** Victorian Ombudsman, 'Foreward', *Investigation into good practice when conducting prison disciplinary hearings,* 6 July 2021 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-good-practice-when-conducting-prison-disciplinary-hearings/>. **3** *Barreto v McMullan* [2013] WASC 26, [37]–[39]. See also *McEvoy v Lobban* [1990] 2 Qd R 235. **4** In *Kioa v West* (1985) 159 CLR 550, 582, Mason J said: 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.' **5** Walker, Re [1992] QSC 182. **6** Ibid, 9–10. **7** [2005] VSCA 244. **8** Ibid, [32]. **9** Unreported, 20 April 2011. **10** A helpful summary of the decisions is set out in A Mackay, *Towards Human Rights Compliance in Australian Prisons*, ANU Press, 2020, ch 3. **11** [2010] VSC 310; (2010) 28 VR 141 (*Castles*). **12** Ibid, [35]. **13** Mackay, above note 10, 86. **14** *Castles*, above note 11, [108]. **15** Ibid, [109]. **16** *Minogue v Doherty* [2017] VSC 724 (*Minogue*). **17** The returned book was René Descartes' *Meditations on First Philosophy*, first published in 1641. **18** *Minogue,* above note 16, [83]. **19** Ibid, [96]. **20** *Minogue v Thompson* [2021] VSC 56. **21** Ibid, [28]. **22** Corrections Victoria Commissioner, 'Commissioner's Requirement, Strip Searches in Prisons – Section 1, Security and Control', CR Number 1.2.3, current issue date November 2017. **23** The discussion on the Minogue strip search and drug testing case is drawn from G Barns, 'A rare and significant win for prisoners – new limits around drug tests and strip searches', *The Conversation*, 1 March 2021 <https://theconversation.com/a-rare-and-significant-win-for-prisoners-new-limits-around-drug-tests-and-strip-searches-155737>. **24** Ibid. **25** [2018] VSC 474. **26** Ibid, [4]. **27** [2021] QSC 273. **28** Ibid, [264]. **29** Ibid, [79]–[80]. **30** Ibid, [81]. **31** [2021] QSC 244. **32** Ibid, [63]. **33** [2014] NSWSC 501 (*Boatswain*). **34** [1990] HCA 57. **35** *Boatswain,* above note 33, [59]. **36** L Kerr, 'Contesting Expertise in Prison Law', *McGill Law Journal*, Vol. 60, No. 1, 43–94, 92. **37** Ibid.

Greg Barns SC works from Republic Chambers in Hobart, Douglas Menzies Chambers in Melbourne, and Higgins Chambers in Brisbane, and is Chair of the Prisoners Legal Service in Tasmania.
EMAIL republicone@ozemail.com.au.
WEBSITE https://republicchambers.com.au.

By Mark Robinson SC and Jnana Gumbert

Judicial review of administrative decisions

A guide for personal injury lawyers

This article outlines the scope of administrative law, and covers the conduct of a judicial review case in NSW for personal injury lawyers. It also outlines the scope and operation of pt 59 of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*). This part of the *UCPR* is examined in detail, as it dictates the practice and procedure of judicial review cases in the Supreme Court of NSW.

This article also deals with:

- administrative law processes and remedies in NSW;
- the primary tenets of administrative law;
- merits review and judicial review in NSW (the legality/merits distinction); and
- an overview of jurisdictional error and the grounds of judicial review.

Part 59 of the *UCPR* covers wide ranging matters, such as the time for commencement of judicial review proceedings, the evidence permitted and limited discovery. It also permits the

court to order a statement of reasons to be produced from a public authority decision-maker. In addition, it contains machinery provisions for submissions and the production of a court book before the final hearing in any judicial review matter.

THE SCOPE OF ADMINISTRATIVE LAW

Administrative law did not develop in a vacuum; it was developed by the courts in England and Australia over 500 years. Its original purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as executive decision-makers, to ensure they all acted lawfully and within the meaning, scope and purpose of their legal powers.

Most state and territory supreme courts in Australia have an inherent or common law jurisdiction to control government action through the issue of prerogative relief (now usually orders in the nature of prerogative writs) and equitable remedies, with some statutory modification to simplify procedural requirements.[1] There are a number of statutory schemes that work with or replace the common law remedies.[2]

The primary tenets of administrative law have developed over time. Overall, these are to ensure that in the making of administrative decisions (which are decisions made by government, usually under statutory power), there is:

- legality (judicial review and merits);
- fairness (judicial review and merits);
- participation (merits);
- accountability (merits);
- consistency (merits);
- rationality (judicial review and merits);
- proportionality (judicial review and merits); and
- impartiality (judicial review and merits).

The usual aim of an external merits review process in a tribunal is to provide the review applicant with a correct or preferable administrative decision, while at the same time improving quality and consistency in relation to the making of decisions of that kind. The independent review process is an aid to good public administration.

The primary aim of judicial review in the court is to ensure (and, to some extent, enforce) legality – namely, the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the legality/merits distinction. Merits review is usually undertaken in a tribunal. Judicial review is done in a court.

ADMINISTRATIVE LAW IN NSW

The full range and scope of administrative law processes and remedies are identified in this section. Broadly speaking, they apply to the Commonwealth and the states and territories. At its broadest, administrative law in NSW relates to the following:

1. *Self-help remedies or processes*. These may be invoked by aggrieved persons or entities from time to time (whether the issue is personal or political, fair or unfair, lawful or not). The remedy can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision, or creating a letter-writing campaign.
2. *Internal review*. This may be invoked where there is provision (usually, but not necessarily, in the enabling Act) for a superior to the original administrative decision-maker to look at and remake the subject decision. Sometimes this can be done without a statutory provision, as a matter of practice or policy.
3. *The need to access documents.* This relates to freedom of information (FOI) requests under the *Government Information (Public Access) Act 2009* (NSW) (*GIPAA*). The relevant agency's decisions on FOI requests under the *GIPAA* are subject to merits appeals to the Information Commissioner and then to the NSW Civil and Administrative Tribunal (NCAT).
4. *Breach of privacy.* This area includes the role of the Privacy Commissioner, and of NCAT in administering the *Privacy and Personal Information Protection Act* 1998 (NSW) – in terms of breach of privacy by a state government agency only.
5. *Maladministration.* Remedies can be sought through the Ombudsman, whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the NSW Government).
6. *Corrupt conduct.* As determined by the Independent Commission Against Corruption (ICAC).
7. *Ex gratia or act of grace payments.* Payment of this type can be made when someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature that cannot be remedied or compensated through recourse to legal proceedings. Such payments are discretionary in nature, and it is for ministers to determine individual applications.[3]
8. *External independent merits review*. This is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision *de novo* (anew). This type of review has also been referred to as 'standing in the shoes of the decision-maker' and concerns a 'remaking' of the decision under review in order to come to the correct or preferable decision based on evidence currently presented. The jurisdiction of the Administrative and Equal Opportunity Division of NCAT is a leading example of an independent external merits review body. The leading case on the nature of external merits review is *Shi v Migration Agents Registration Authority*.[4]
9. *Judicial reviews.* These are proceedings concerning the legality of administrative decisions, including those of ministers, governments and tribunals, that affect rights, interests or legitimate expectations of persons or entities. Judicial reviews are usually dealt with by the Supreme Court of NSW. This is usually the option of last resort for an applicant, and is undertaken when all other options for challenge are not available.[5]

FRAMEWORK AND PROCEDURE

The jurisdiction of superior courts in the judicial review of administrative action was developed by the courts in accordance with the common law. The review process involves a court assessing or examining a decision or purported decision of an executive or governmental body or a tribunal for legal error (and not on the merits of the particular case).

Relief is discretionary and may include: quashing or setting aside the decision; declaring the decision invalid or void; and, in some cases, remitting the decision to the original or primary decision-maker for reconsideration according to law, sometimes with a direction that the matter be decided by a different decision-maker or differently constituted tribunal.

While judicial review in NSW lies largely in the realm of the common law, its existence is constitutionally entrenched and protected in all states by s73 of the *Australian Constitution* (*Constitution*).[6] Because judicial review is protected by the *Constitution*, it cannot be taken away by any state legislation (at least for correction for jurisdictional error).

The grounds of judicial review are still evolving through decisions of various courts, and many of these grounds overlap. Early identification of the most appropriate ground or grounds of judicial review is the key to success in personal injury matters, providing you have also sought the appropriate remedy and the discretionary factors do not work against you. Also, proof is needed of the materiality of the alleged breach – see *Minister for Immigration and Border Protection v SZMTA*.[7] A plaintiff must now establish that there is a realistic possibility that the challenged decision could have been different had the alleged breach not occurred.

In judicial review, a remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the NCAT);
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay;
- there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made;[8] or
- an applicant acquiesced in the conduct of proceedings known to be defective. An applicant cannot 'sleep on their rights' – they should make an election to challenge or no longer participate in the executive or tribunal process below.

Ordinarily, then, the grounds of judicial review are:

- an error of law amounting to identification of the wrong question;
- ignoring relevant material;
- relying on material that is, at least in some circumstances, irrelevant; or
- making an erroneous finding or reaching a mistaken conclusion leading to an excess of power or authority, which will give rise to the availability of relief against the decision of that administrative body for what has come to be known nowadays as a 'jurisdictional' error of law.

PRACTICE AND PROCEDURE IN NSW

In NSW, an aggrieved party hoping to seek relief by way of judicial review must apply to the Supreme Court of NSW – usually in the Administrative Law List of the Common Law Division.

To this end, personal injury practitioners need to be aware of Supreme Court Practice Note No. SC CL 3, dated 21 May 2020,[9] which explains the practical operation of the Administrative Law List and some of the provisions of the *UCPR*.

The Supreme Court's judicial review jurisdiction (by way of the filing of a summons) is primarily invoked by the following sections of the *Supreme Court Act 1970* (NSW) (*SCA*):

- s69 – proceedings by summons in lieu of the prerogative writs;
- s65 – an order to fulfil a public duty;
- s66 – an injunction; and
- ss63 and 75 – declarations.

Under the *UCPR*, a practitioner must first check the list of legislation in sch 8 – Assignment of business in the Supreme Court. If an Act is listed there, any proceedings in the Supreme Court regarding any section of that Act are thereby assigned to be heard in the Administrative Law List of the Common Law Division. By reason of r 45.3, judicial review proceedings should all be assigned or transferred to the Administrative Law List. Other *UCPR* rules that must be checked are:

- r 1.18(b), (c) (assignment of business);
- r 6.11 (submitting appearances);
- pt 49 (internal appeals);
- pt 50 (external appeals);
- pt 51 (Court of Appeal); and
- pt 59 (judicial review).

Section 48 of the *SCA* sets out which matters are assigned to be heard in the Court of Appeal.

Once proceedings are commenced, in the ordinary course, a directions hearing will be convened before the Registrar of the Supreme Court (sometimes before a judge). At that hearing, orders are made for the orderly preparation of the matter for trial.

The principal concerns are then obtaining any available documents and affidavits for tender and obtaining an early hearing date.

If the nature of the error alleged is error of law on the face of the record then usually only the record need be tendered. This includes the reasons for decision, at least in cases where the statute requires reasons to be given.[10] If jurisdictional error is alleged, usually all that is required in evidence is the tender of the documentary material that was before the original decision-maker (see *Allianz Australia Insurance Ltd v Kerr*).[11] In some cases, depending on the ground of judicial review relied upon, more evidence than just the exhibits is required, such as an affidavit or a transcript of the hearing of the proceedings below (if a procedural fairness point is taken, or a no evidence point). Oral evidence and cross-examination are almost never required in judicial review matters. If evidence is put on that is voluminous and is not required, one can expect significant criticism from the bench and maybe an adverse costs order. There will also be repercussions in the Court of Appeal – see for example *Insurance Australia Ltd t/a NRMA*

Insurance v Milton (No 2),[12] where a solicitor was ordered to personally pay the costs of some of the appeal books.

At the first return of the summons, under the practice direction (*UCPR*, r 59.9(3)), an application may be made seeking a direction that the person or body whose decision has been challenged furnish to the plaintiff a statement of reasons for the impugned decision. The statement must not only set out the decision-maker's reasons for the decision but must also include that person's findings on material questions of fact, referring to the evidence or other material on which those findings were based, together with the person's understanding of the applicable law and the reasoning processes leading to the decision.

It can readily be seen that, in a number of circumstances, an order of the Court requiring a decision-maker to provide their 'understanding of the applicable law and the reasoning processes leading to the decision' may be an extremely useful forensic tool or weapon for a plaintiff.

Obtaining reasons by order of the Court may well be the only option available to aggrieved applicants in NSW, as reasons are not ordinarily required to be given by an executive decision-maker unless there are special circumstances; see for example *Public Service Board of NSW v Osmond* (*Osmond*).[13]

The general law requires that, in the ordinary case, where an administrative decision-maker exercises discretionary statutory power to make a decision, there is no common law duty to provide reasons for that decision. However, the High Court also held in *Osmond* that where there were 'special circumstances', either in the relevant Act or as required by the principles of natural justice, the general rule did not apply and reasons were required to be provided.[14] This proviso was explained and applied in NSW in relation to a ruling that costs assessors must provide reasons for their decision (the Act was silent on the question), otherwise the appeal rights given by the Act would be close to useless.[15]

The importance of fully stated reasons as an essential legal requirement for a quasi-judicial tribunal (the NSW workers compensation Medical Appeal Panel) was discussed in *Campbelltown City Council v Vegan* (*Vegan*), where the NSW Court of Appeal held that the appeal panel members in workers compensation had a duty to give full and proper reasons[16] even though this was not expressly stated in the relevant legislation. The reasons were held to be inadequate and the panel's decision was set aside. The Court indicated that the authorities that underpinned *Osmond's* case might 'no longer be as definitive as they once were'.[17] In *Vegan*, the Court of Appeal further held that, as a matter of statutory construction and as a matter of principle, the Medical Appeal Panel was a quasi-judicial entity and it should be required to provide reasons for that reason alone.

JURISDICTIONAL ERROR AND THE GROUNDS OF JUDICIAL REVIEW

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari,[18] prohibition and mandamus and injunctions and declarations) are available under the *SCA* in the Court's exercise of its supervisory jurisdiction over state statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases, except possibly for denials of natural justice – see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[19]).

Examples of jurisdictional errors of state tribunals and executive decision-makers include:[20]

- identifying an incorrect issue;
- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; and
- making an incorrect interpretation and/or application to the facts of the applicable law, *in a way* that affects the exercise of power.

The words 'in a way', above, are in italics for good reason – the alleged error must be something that moves the court to find for legal error.

The following can also be noted about jurisdictional errors that may be committed by a tribunal or executive body (post *Craig v State of South Australia* (*Craig's case*))[21] and that will always be corrected by a superior court (as extended by the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf*):[22]

- The definition of 'jurisdictional error' in *Craig's case* is not exhaustive (*Kirk v Industrial Relations Commission of New South Wales* (*Kirk's case*) also held this).[23]
- Those different kinds of jurisdictional error may well overlap.
- The circumstances of a particular case may permit more than one characterisation of the error identified – for example, as the decision-maker both asking the wrong question and ignoring relevant material.

An error of this kind arises where the decision-maker did not have the authority – the jurisdiction – to make the decision that was made (see *Minister for Immigration and Multicultural Affairs v Bhardwaj*[24]).

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error: see *Plaintiff S157/2002 v Commonwealth of Australia*;[25]

Re Refugee Review Tribunal; Ex parte Aala;[26] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.[27] This is subject to the issue of materiality discussed above.

The remaining grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness, which include bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1. errors of law (including identifying a wrong issue, making an erroneous finding and reaching a mistaken conclusion);
2. improper purpose;
3. bad faith;
4. irrelevant/relevant considerations;
5. duty to inquire (in very limited circumstances);
6. acting under dictation;
7. legal unreasonableness;[28]
8. proportionality (not currently available, except via legal unreasonableness);
9. no evidence;
10. uncertainty;
11. inflexible application of a policy (without regard to the individual merits of the application);
12. manifest irrationality or illogicality (possibly now a sub-branch of legal unreasonableness);
13. failure to afford a 'proper, genuine and realistic consideration' of material; and
14. failure to provide reasons or adequate reasons, where reasons are required to be provided as part of the decision-maker's power.

THE RECORD

It should be borne in mind that as an alternative to proving jurisdictional error one need only prove that there was an error of law on the face of the record on any of these grounds in order to obtain relief in the nature of certiorari. Accordingly, attention should be drawn to errors such as these, as they go to legality as well in the sense that, once they are found, a decision is usually set aside by the court.

Any of the above grounds of judicial review is capable of establishing error of law on the face of the record, which, if serious enough, might also constitute jurisdictional error, including a constructive failure of the decision-maker to exercise their jurisdiction. By ss69(3) and 69(4) of the *SCA*, the 'record' of a tribunal includes the written reasons expressed for its 'ultimate determination'.

CONCLUSION

Part 59 of the *UCPR* brought enormous and far-reaching changes to the conduct of judicial review proceedings in NSW. It has codified many difficult to find practices and procedures and it serves as a stable process for such matters. ■

This article is based on, and updates, the article 'Conducting an administrative law case in NSW' by Mark Robinson SC, published in *Precedent* 136, September/October 2016, pp 4–9.

Notes: **1** *Supreme Court Act 1933* (ACT), s20; *Court Procedures Rules 2006* (ACT), pt 3.10; *Supreme Court Act 1970* (NSW), ss65, 66, 69, 69B, 69C, 70, 71; *Uniform Civil Procedural Rules 2005* (NSW), r 6.4, pt 59; *Supreme Court Act 1979* (NT), s20; *Supreme Court Rules 1987* (NT), O 56; *Judicial Review Act 1991* (Qld), s10, pt 5; *Supreme Court Act 1935* (SA), s17; *Supreme Court Civil Rules 2006* (SA), ch 8, pt 3; *Judicial Review Act 2000* (Tas), s43; *Supreme Court Act 1986* (Vic), s3(6); *Supreme Court (General Civil Procedure) Rules 2005* (Vic), O 56; *Supreme Court Act 1935* (WA), s16. Note: other judicial bodies in the states and territories may have a judicial review jurisdiction, for example Classes 4 and 8 of the NSW Land and Environment Court (*Land and Environment Court Act 1979* (NSW), ss20, 21C). **2** *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Law Act 1978* (Vic). **3** See NSW Treasury, 'Treasury Circular NSW TC 11-02', 1 February 2011. For the Commonwealth, see Commonwealth of Australia, 'Finance Circular No. 2006/05 To all agencies under the *Financial Management and Accountability Act 1997*' <http://asutax.asn.au/docs/financewaiver.pdf>. **4** (2008) 235 CLR 286. **5** The leading academic text on judicial review of administrative action in NSW is M Aronson and M Groves (eds), *Judicial Review of Administrative Action and Government Liability*, 7th ed, Law Book Company, Sydney, 2021. See also M Robinson (ed), *Judicial Review – The Laws of Australia*, Thomson Reuters, 2015. **6** *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; [2010] HCA 1 (*Kirk's case*). See also J Spigelman, 'The Centrality of Jurisdictional Error', *Public Law Review*, Vol. 21, No. 2, 2010, 77–91. **7** (2019) 264 CLR 421; [2019] HCA 3. **8** See the discussion by Kirby J of the discretion and the relevant cases in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146; [2008] HCA 32. **9** See Chief Justice of NSW, 'Practice Note SC CL 3, Supreme Court Common Law Division – Industrial and Administrative Law List' <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fa642c44a4865bf4ca258083001c7a7f?OpenDocument>. **10** *Pham v NRMA Insurance Ltd* (2014) 66 MVR 152, [27] (per Leeming JA, with Tobias AJA agreeing) in relation to claim assessment decisions under the CTP scheme, *Insurance Commission of Western Australia v Gargoura* (2020) 94 MVR 488, [44] in relation to medical assessment decisions under the same scheme. **11** (2012) 83 NSWLR 302; [2012] NSWCA 13 (McColl, Basten and Macfarlan JJA). **12** [2016] NSWCA 173. **13** (1986) 159 CLR 656; [1986] HCA 7. **14** (1986) 159 CLR 656, 670 (Gibbs CJ), (Deane J); [1986] HCA 7, [2] (Deane J), [14] (Gibbs CJ). **15** See *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, 734C–735C (Priestley JA; Handley and Powell JJA agreeing), adopting in part Sperling J's decision in *Kennedy Miller Television Pty Limited v Lancken* (Unreported, Supreme Court of New South Wales, 1 August 1997 (BC9703385)). **16** (2006) 67 NSWLR 372, [24]; [2006] NSWCA 284, [24] (Handley JA; McColl JA agreeing). **17** [2006] NSWCA 284, [106] (Basten JA; McColl JA agreeing). **18** Quashing, or setting aside. **19** (2005) 228 CLR 294, [80] (McHugh J; Kirby J agreeing). **20** For examples see *Craig v State of South Australia* (1995) 184 CLR 163 (*Craig's case*), 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (*Yusuf*), [82]; and *Kirk's case,* above note 7, [60]–[70]. **21** *Craig's case*, above note 20. **22** *Yusuf*, above note 20, [61]–[63]. **23** (2010) 239 CLR 531, [60]–[70]. **24** (2002) 209 CLR 597, [51]–[53]. **25** (2003) 211 CLR 476, 508; [2003] HCA 2, [83]. **26** (2000) 204 CLR 82. **27** (2001) 206 CLR 57; [2001] HCA 22. **28** *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

Mark Robinson SC practises administrative and general law at Maurice Byers Chambers, Sydney. PHONE (02) 9221 5701. EMAIL mark@robinson.com.au.

Jnana Gumbert is a barrister at Jack Shand Chambers in Sydney. PHONE (02) 9233 7711. EMAIL gumbert@jackshand.com.au.

By Anna Talbot

The right to protest

Challenges during the pandemic

The COVID-19 pandemic has altered all of our lives – our rights and responsibilities – in previously unimaginable ways. One of the starkest impacts has been on the right to protest, which is recognised as a fundamental precept underpinning our democracy.

Governments have a reputation for disliking protest (also referred to as public or peaceful assembly in this article). Protests can challenge government policy or rhetoric or expose uncomfortable truths. But across Australia governments generally appreciate the importance of accommodating dissent: ultimately, flexibility strengthens governments.

The pandemic, however, has presented an unexpected challenge: having humans in proximity to one another has itself become the risk. Whether gatherings have the purpose, among others, of expressing a political opinion, celebrating a wedding or mourning a death, they have been regulated to protect the health of participants and the broader public. This was particularly the case throughout 2020 and 2021, when governments around Australia effectively pursued zero-COVID policies, seeking to eliminate COVID-19 infection and transmission entirely.

THE RIGHT TO PROTEST UNDER DOMESTIC AND INTERNATIONAL LAW

The right to freedom of peaceful assembly is recognised in the *International Covenant on Civil and Political Rights* (*ICCPR*),[1] in Article 21. The right to freedom of expression is recognised

in Article 19 of the *ICCPR*. Together, these rights comprise the right to protest.

The Human Rights Committee (the UN body that oversees the implementation of the *ICCPR*) makes it clear that spontaneous demonstrations, as 'direct responses to current events', are protected by the right to peaceful assembly.[2] Generally, however, governments are expected to facilitate a means by which protesters can work with them to ensure protests happen in an orderly fashion and risks are minimised.[3] Restrictions are permitted only to the extent that they are necessary and proportionate and are the least restrictive means of achieving a legitimate aim.[4] Risk to public health is expressly identified as an exceptional reason for limiting public assemblies, including in cases of infectious diseases.[5]

The rights to peaceful assembly and freedom of expression are not absolute rights: it is well-recognised that they must be balanced against other rights found in the *ICCPR* and other human rights instruments. Among these are the right to the highest attainable standard of physical and mental health, which can be found in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*.[6]

Australian courts have consistently recognised the importance of the right to peaceful assembly.[7] The implied freedom of political communication is also one of the few constitutional protections found in the *Australian Constitution* (*Constitution*), acting as a bar on legislation that impermissibly burdens political communication (as distinct from an individual right, which it is not). This implied freedom requires assessment of whether legislation burdens political communication and, if it does, whether the purpose of the law is legitimate and compatible with the system of government proscribed in the *Constitution*. If it does burden political communication but is legitimate, the court will assess whether the law is 'reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[8]

NOTIFICATION REQUIREMENTS

Queensland and NSW operate notification systems for protesters, whereby protest organisers are asked to notify the police of their planned assembly.[9] While a protest is not deemed illegal if the requisite notification has not been made, ensuring that adequate notification is provided offers protection to the protesters, so that they are immune from prosecution for participating in the protest in line with what has been notified. Without the authorisation, participants in a protest are liable to be charged, for example, for obstruction or breach of COVID-19 safety regulations. Most of the litigation examined below has arisen in NSW after a notification has been provided to the police, who have subsequently sought to ban the protest in the courts.

In Victoria there is no state-wide permit system that operates to authorise protests. Rather, protest organisers are encouraged to contact the local council in which they plan to hold their protest, to ensure adequate provision can be made for the protest, including, if necessary, adequate law enforcement support.

Other jurisdictions have different permit requirements, relating to whether the protest is likely to block a public street, the nature of the land that the protest will be held on and the rules that prevail in the local municipality.[10] During the pandemic, these rules have been complicated by public health orders seeking to limit the spread of COVID-19.

This article examines litigation that has taken place in NSW, Queensland and Victoria in defence of the right to protest throughout the pandemic. The vast majority of the litigation has taken place in NSW, due to the combination

of the rules around protests and the public health orders that have been introduced to assist with managing the pandemic. Queensland and Victoria have both also seen a small amount of litigation. It is clear from a review of this litigation that courts continue to recognise the fundamental importance of the right to protest. Ultimately, however, they have considered that, given the risk to public health that the protest was said to represent, the balance weighed in favour of banning the protest.

LITIGATION ON PROTESTS IN NSW

Part 4 of the *Summary Offences Act 1988* (NSW) (*Summary Offences Act*) details a regime of authorising public assemblies in NSW. If organisers provide at least 7 days' notice of a protest, the default position is that the protest may go ahead unless the Commissioner of Police successfully applies to a court for a prohibition order under s25(1) of that Act. Before such an application can be made, the Commissioner must ensure that the organisers have the opportunity to confer with a member of the police force.

Since the commencement of the pandemic, a series of public health orders have been adopted under s7 of the *Public Health Act 2010* (NSW), with the first such order being made on 15 March 2020.[11] These orders have been pivotal to the litigation that has taken place in relation to planned protests. In the litigation, factors that have emerged as decisive include the adequacy of any alternative means for communicating the themes of the protest (in particular, social media); the relevance of the timing of the proposed assembly; and the prevailing public health risk at the time of the proposed assembly.

Response to Black Lives Matter protests

There has been significant support in Australia for the Black Lives Matter movement, which saw protests around the world following the tragic murder of George Floyd on 25 May 2020 by a police officer in Minnesota, USA. The movement in Australia focused on ongoing deaths of First Nations people in prisons and police custody, including the death of a young Aboriginal man who died in Sydney's Long Bay Gaol in 2015 in circumstances similar to Mr Floyd's death: he was held prone by prison officers in a position that inhibited his ability to breathe and ultimately suffocated at the hands of the officers.

Due to the timing of the protests, the *Summary Offences Act* emerged as the potential barrier to the ability of the people of NSW to add their voices to the global chorus. The NSW Police Commissioner (Commissioner) commenced a series of litigation seeking to prohibit protests in support of this movement. One matter succeeded on a technicality (see *Commissioner of Police v Bassi* [2020] NSWSC 710, outlined below in 'The Bassi protest'); in another, *Commissioner of Police v Gray* (*Gray*),[12] Adamson J considered that the prevailing public health risk did not justify the making of the prohibition order sought by the Commissioner. Other protests, however, were prohibited.

Arguments by protest organisers that the Supreme Court of NSW lacked jurisdiction to grant prohibition orders – or that the orders themselves constituted an impermissible impediment on the implied constitutional freedom of political communication – failed, with judges repeatedly finding that they were obliged to favour the restrictions imposed to prevent the spread of COVID-19 over the freedoms of expression and assembly. It was perhaps the inclusion of a rigorous COVID-19 safety plan that supported the Court's finding that one assembly should be permitted (see *Gray,* outlined below in 'The Gray protest').

The prohibitions did not stop the protests, and may ultimately have increased the public health risk, with the protesters gathering without the protections of police support and COVID-19 safety plans. A number of protesters were arrested and fined.

The Bassi protest

On 1 June 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (Public Health Order No. 3) came into force, with cl 10 restricting public gatherings to 10 people unless an exemption applied. There was no exemption for public assemblies, although cl 8 permitted gatherings of up to 500 people in outdoor premises and up to 100 people indoors (with certain exclusions applying).

Raul Bassi planned a protest in Sydney to take place on 6 June 2020 against ongoing First Nations deaths in custody, seeking to harness the momentum of the movement to remember the deaths of George Floyd and of the young Aboriginal man who had died in 2015, and other First Nations people who had died in custody.[13] On 29 May 2020 Bassi notified the Commissioner of the intention to protest in accordance with s23 of the *Summary Offences Act*, estimating an attendance of 50 people.

On 3 June 2020, Bassi contacted the police to let them know that it was likely the number of attendees would be higher than had been previously notified, based on the social media engagement he had received. Bassi met with the police on 4 June 2020, advising that the number of attendees was

likely to be around 5,000 and there was to be some change to the plans in light of the higher number. It was agreed that the police would prepare a revised notice reflecting the proposed changes, and the revised notice was emailed to Bassi on 4 June, noting that he should bring a signed version of the notice with him to the demonstration on 6 June 2020.

On 4 June 2020, four cases of COVID-19 had been reported in NSW in the 24 hours to 8:00pm, all of whom were in hotel quarantine. There were no COVID-19 patients in intensive care in NSW.[14] *Nationally, on 5 June 2020, an average of nine cases were reported per day, most in Victoria.*[15] *These would have been the most recent statistics available to the Court at the time of the hearing.*

On 5 June 2020, the matter was in the Supreme Court of NSW, with the Commissioner seeking a prohibition order under the *Summary Offences Act* and Bassi seeking a declaration that the Commissioner had notified him that the Commissioner did not oppose the public assembly.[16] Justice Fagan declined to make the declaration, instead finding that the changes to the notice meant that a new notice had been provided on 4 June 2020, which had not been authorised as required by s26 of the Act.

During the course of the hearing, the Commissioner appeared to concede that the notice had been provided more than 7 days prior to the planned assembly by seeking the prohibition order under s25 of the *Summary Offences Act* (which permits the Commissioner to seek such an order if the notice has been provided '7 days or more' before the proposed assembly). This application was ultimately not proceeded upon, allowing Fagan J to find that the original notice had become defunct due to the changes discussed on 4 June 2020. While acknowledging the importance of the rights of freedom of assembly and expression, ultimately Fagan J found that the public health risk outweighed these rights on this occasion, despite the safety planning Bassi had engaged in:

> 'A gathering of 5,000 people who are interested in this particular cause, at a time when the entire community is under direction not to gather in groups of more than ten, is an unreasonable proposition.'[17]

Justice Fagan did not accept Bassi's argument that refusing to grant the authorisation would put the community at greater risk, as the assembly would still proceed, but without the safeguards of blocked streets, thereby forcing a great number of people into the smaller spaces available, such as footpaths.[18]

Bassi appealed the following day, in advance of the assembly planned for 3:00pm that afternoon. This appeal was successful on a technicality, namely, that Fagan J erred in finding that the amended notice was in fact a new notice: the notice provided on 29 May 2020 had simply been amended

on 4 June. Accordingly, the first instance decision was found to have been made in error and no order to prohibit the assembly had in fact been made.[19] The assembly proceeded, and no instances of COVID-19 transmission were known to have been contracted at it.

The Kumar protest

A further prohibition order was sought by the Commissioner on 19 June 2020, this time in relation to a protest proposed by the National Union of Students.[20] The purpose of the proposed assembly was 'to show solidarity with the black lives matter movement and raise awareness about aboriginal deaths in custody'.[21]

On 18 June 2020, two new COVID-19 infections were reported in NSW, both in travellers in hotel quarantine.[22] The national average remained at 16 diagnoses per day over the previous 7 days, with Victoria remaining responsible for the majority of reported infections.[23] Public Health Order No. 3 remained in force, although it had been amended on 13 June 2020 to allow for public gatherings of 20 people, increased from the previous limit of 10, and increasing maximum capacity at various venues.

Vinil Kumar's primary arguments on behalf of the National Union of Students were, first, that the Court did not possess jurisdiction to make the proposed orders, as the Commissioner had failed to comply with s23(2)(c) of the *Summary Offences Act*. He also argued that other gatherings under Public Health Order No. 3 presented a comparable level of risk, and accordingly the proposed assembly should be considered an essential gathering due to the importance of both the subject of the protest and the right to protest more broadly.[24]

During the hearing of evidence, Kumar conceded that he would not be in a position to control the number of attendees, who might attend, how attendees might conduct themselves or congregate, or whether they would wear a mask or be socially distant. He also conceded that he could not know whether someone at the event was sick. Assistant Commissioner Moore noted that a similar assembly held two weeks prior had attracted 1,500 attendees, three times the number that Kumar anticipated (500).[25]

Justice Lonergan ultimately determined that, despite the low incidence of COVID-19 in the community at that time and the low risk of transmission at the assembly, the fact that a single case could lead to significant risk meant that the health risk was considered to outweigh the burden to the important democratic rights of freedom of assembly and expression. Her Honour noted the offer of the police to reschedule the assembly to a time when the public health risk had passed, which was rejected by Mr Kumar. Accordingly, in her Honour's view, this decision should more accurately be viewed as a deferral of the right to assembly, rather than as an extinguishment of that right.[26]

The Gray protest

A few weeks later, the Supreme Court was again balancing the right to protest against the public health risk of assembling in groups. On 3 July 2020, the Commissioner filed proceedings seeking an order under s25 of the *Summary Offences Act* prohibiting a public assembly planned by Taylah Gray for 5 July 2020. The sole reason for seeking the prohibition order was the risk to public health.[27]

New South Wales had recorded eight infections on 2 July 2020.[28] Nationally, the weekly average was 63 cases being reported per day, the majority of these in Victoria.[29] The Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 *(NSW) (Public Health Order No. 4), which had come into force on 1 July 2020, continued to limit public gatherings, but increased limits to a maximum of 20 people outdoors and allowed additional exemptions for casinos and sporting events (although no specific exemption referred to public assemblies).*

Gray had provided notice of a protest in support of the Black Lives Matter movement in solidarity with First Nations people who had died in custody and against racism, this time on behalf of an organisation called Fighting in Solidarity Towards Treaties. The protest was to take place in Newcastle, with an estimated attendance of 100, later revised up to 500.[30] A COVID-safe plan was included in Gray's evidence, demonstrating how the organisers would seek to minimise the risk of COVID-19 transmission and manage any transmission that might arise.

In her judgment, Adamson J considered the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). She also noted that there was no regulation of social distancing in Public Health Order No. 4, this being a recommendation only and therefore not giving rise to any risk of criminal liability.[31] Her Honour went on to consider the exceptions included in Public Health Order No. 4 that allowed gatherings at community sporting venues and in casinos and football stadiums as relevant to balancing to her decision-making.[32]

In terms of freedom of expression, Adamson J did not consider that social media was an adequate substitute for gathering in person, in part relying on the fact that Gray had gone to the trouble of organising the assembly which, Adamson J reasoned, would not have been necessary if social media had been an adequate replacement.[33]

The changes that were apparent in Public Health Order No. 4, in which greater freedoms were permitted than in Public Health Order No. 3, were relevant to Adamson J's decision. While the outbreak in Victoria was also relevant (at that point there were localised lockdowns in that jurisdiction), ultimately the evidence provided by NSW Chief Health Officer Dr Kerry Chant that the risk of transmission was low was considered to be persuasive. Justice Adamson refused to grant the orders sought by the Commissioner, finding that 'the public interest in free speech and freedom of association outweigh [sic] the public health concerns'.[34]

The Gibson protest

On 26 July 2020, the Supreme Court of NSW heard the matter of *Commissioner of Police (NSW) v Gibson*.[35]

Public Health Order No. 4, as amended, remained in force at the time of this decision. On 22 July 2020, 16 new cases of COVID-19 had been recorded in NSW, with community transmission emerging.[36] Nationally, the seven-day average of new infections was 345, with Victoria continuing to report the highest numbers of cases. The border between NSW and Victoria had closed on 8 July 2020.[37]

Two main arguments were posited by Padraic Gibson in arguing that the Commissioner's application for a prohibition order under s25 of the *Summary Offences Act* should not be granted. First, it was argued that the Court was required to exercise its power to issue a prohibition order in accordance with the implied freedom of political communication as outlined above. Justice Ierace considered that:

> 'Assuming … that s 25 of the Act does impose a burden on the implied freedom, the purpose of the law is legitimate, and is also suitable, in the sense that it is rationally connected to the purpose of allowing certain public assemblies to take place without sanction and prohibit[ing] others from taking place, on grounds that may include public order.'[38]

Ultimately, however, Ierace J considered that the law was necessary and proportionate, and there was no viable alternative to achieving the purpose of the section. The Constitutional argument was therefore unsuccessful.

In terms of the risk of COVID-19 transmission, the risk was assessed by Dr Jeremy McAnulty, Executive Director of Health Protection for the NSW Department of Health, as having risen from 'low' to 'medium'.[39] On this basis, Ierace J was persuaded that:

> 'the balancing of the competing concerns of the right to free speech and to demonstrate, as against the safety of the community at large, at this particular phase of the pandemic, necessitates the granting of the order prohibiting the holding of the public assembly.'[40]

More time was spent considering whether the prohibition order had been validly made. Prior to the conference between Gibson and the police, and to discussing Gibson's application, evidence was provided that the Commissioner had made media statements indicating the assembly would be prohibited.[41] While the prohibition decision was made by Acting Assistant Commissioner Stacey Maloney as a delegate of the Commissioner, Gibson argued that the Acting Assistant Commissioner could not have been free from the influence of the Commissioner's statements to the media,[42] her decision was infected with 'apprehended bias',[43] and the decision was not adequately considered.[44] Justice Ierace was not persuaded by any of these arguments, finding that the Acting Assistant Commissioner made an adequately considered decision independent of influence by the Commissioner.[45]

Gibson's appeal against this decision was dismissed.[46] The protest proceeded and a number of participants were arrested or fined.[47]

Other protests in NSW

Attempts by the Commissioner to prohibit protests on other topics were similarly successful, with only one other proposed assembly being permitted during 2020: see *Commissioner of Police v Thomson* [2020] NSWSC 1424, where it was acknowledged that Thomson's planned protest included a highly detailed COVID-19 safety plan. Justice Cavanagh's refusal to grant the prohibition order was also supported by the nature of the organisation planning the protest (a union), the limits on the number of attendees, and the way those attendees would be organised during the demonstration. The organiser was also the only protest organiser of this nature to present his own expert evidence, and this is likely to have supported the refusal to grant the prohibition order.[48]

LITIGATION ON PROTESTS IN QUEENSLAND

There has been far less litigation in Queensland, likely due to the lower case numbers in that jurisdiction, combined with the different legislative regime (including the absence of the Public Health Orders). Queensland also has human rights legislation, which differs from the situation in NSW.

Specifically, the *Human Rights Act 2019* (Qld) (*Human Rights Act*) protects the right to freedom of movement (s19) and freedom of expression (s21), the right of peaceful assembly (s22) and the right to take part in public life (s23). As seen below, however, the Queensland Supreme Court did not consider the existence of the *Human Rights Act* an impediment to prohibiting a protest.

Queensland protests

The Sri protest

On 8 August 2020, the Queensland Attorney General sought an order to block Jonathan Sri and others from demonstrating in Brisbane.[49]

The most recently available data at the time, from 2 August 2020, indicated that one new case of COVID-19 had been recorded in Queensland on that day, in an individual who was in hotel quarantine after returning from abroad via NSW.[50] Nationally, the Victorian situation had worsened significantly, with a seven-day average of 491 cases being reported daily in the week prior to 7 August 2020.[51]

The proposed protest was to constitute a 'sit-in' on the Story Bridge of between 1,000 and 3,000 people, protesting in support of refugee rights.[52] No application was made under the *Peaceful Assembly Act 1992* (Qld) in relation to the protest, but this did not render their intended plans unlawful; it merely meant that they would not benefit from any immunity that might be available if the assembly were authorised under that Act.[53]

Ultimately, Applegarth J considered the nature of the proposed assembly would give rise to unacceptable risks, both as a function of the nature of the assembly and in terms of the prevailing public health situation. Specifically, the proposal to occupy one of Brisbane's main road thoroughfares was held to constitute an obvious 'risk to life and limb'.[54] The fact that the proposed assembly would impose 'a significant burden upon the rights of other citizens and upon the public more generally' by blocking a main road compounded concerns.[55] As a result of this finding, Applegarth J did not think it necessary to consider whether there were any further grounds to prohibit the assembly under the *Public Health Act 2005* (Qld), which at that point provided for a maximum of 100 people to gather publicly, although this was likely to offer an additional ground weighing strongly in favour of prohibition.[56]

The Queensland Human Rights Commission offered two sets of submissions in relation to this matter, balancing the rights of the protesters to assemble and express their opinion against the rights of the population to go about their business and move freely around the city of Brisbane.[57]

LITIGATION IN VICTORIA

Due to the different legislative regime in Victoria, the litigation that has emerged there has been focused on individuals rather than on protest organisers seeking judicial permission to hold their assemblies.

Victorian protests

The Cotterill protest

On 13 September 2020, during the Melbourne lockdown, Ms Cotterill was fined for breaching the stay-at-home orders. She argued that 'at the time, she was both exercising (which was a permitted reason to leave the home) and demonstrating against the lockdown (which was not)'.[58] She argued that the Directions under which she was fined were invalid as they 'impermissibly burdened' the constitutional freedom of political communication.[59]

On the day she was fined, Victoria had recorded 473 new COVID-19 infections, all of which were locally acquired.[60] *Nationally the seven-day average was 54 per day, most of which were recorded in Victoria.*[61] *The Victorian Minister for Health also declared a state of emergency on 16 March 2020 under s198 of the* Public Health and Wellbeing Act 2008 *(Vic) which extended until 6 November 2020.*

Cotterill's fine was withdrawn, but she continued the case to gain clarity in relation to the right to protest during the pandemic. Appeal Judge Niall agreed with the Victorian Government defendants that the freedom of political communication applies to legislation only, not to the regulations that are made under it.[62] Ms Cotterill did not argue that the legislation under which the Directions were made infringed the implied freedom, so in practice her claim failed on a technicality.

Had she argued that the legislation infringed the implied freedom, however, it is likely she would have been unsuccessful in view of the NSW litigation discussed above.

The Gerner protest

Gerner lived in Melbourne, and owned a business that was affected by the Melbourne lockdown. He was unsuccessful in proceedings in the High Court of Australia to seek declarations that ss200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) infringed on an implied guarantee of freedom of movement in the Constitution.[63] The High Court categorically rejected his arguments, referring to debates during the 1897 Sydney Convention in which an assurance was given that what became protections of free trade between jurisdictions would not remove the states' '"police powers" to "interfere with … freedom of commerce and of human intercourse" for the purpose of "prohibiting both persons and animals, when labouring under contagious diseases … entering their territory".'[64]

CONCLUSION

Courts are emphatic in their support for the right to protest, although in practice they have tended to favour limiting that right in favour of restrictions to protect public health. Attempts by protesters to develop new legal protections of protest rights have generally not been successful, suggesting this is not a period in which courts are inclined to stretch existing implied freedoms which may compromise governments' public health strategies. ■

Notes: 1 UN Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights: Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into*

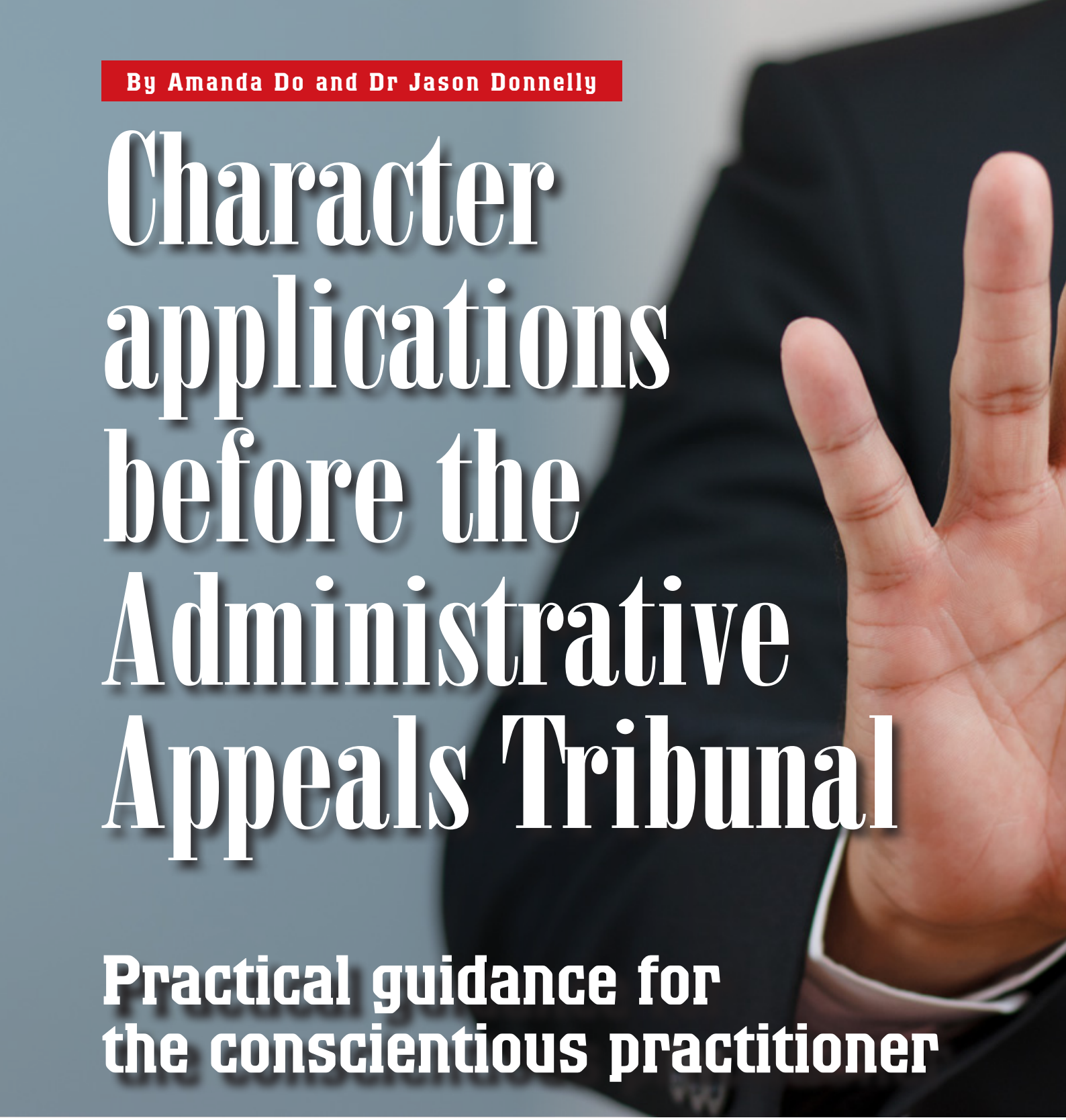
force 23 March 1976, in accordance with Article 49. Ratified by Australia in 1980. **2** Human Rights Committee, *General Comment No. 37 (2020) on the right of peaceful assembly (article 21)*, CCPR/C/GC/37, [14], [16]. **3** Ibid, [14], [70]–[73]. **4** Ibid, [40]. **5** Ibid, [45] (see also [43]). **6** UN Human Rights Office of the High Commissioner, *International Covenant on Economic, Social and Cultural Rights: Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27*. Ratified by Australia in 1980. **7** See for example *Commissioner of Police v Jackson* [2015] NSWSC 96; *Commissioner of Police v Allen* (1984) 14 A Crim R 244; *South Australia v Totani* [2010] HCA 39; *Melbourne Corporation v Barry* (1922) 31 CLR 174; [1922] HCA 56; *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015; *Commissioner of Police v Rintoul* [2003] NSWSC 662, as referenced in T Gotsis, *Protests and the law in NSW*, NSW Parliamentary Research Service Briefing Paper No 7, 2015, 6. **8** This is commonly referred to as the *McCloy* test – established in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34 – referred to with approval in *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448; [2019] HCA 11, [5]. **9** *Summary Offences Act 1988* (NSW); *Peaceful Assembly Act 1992* (Qld). **10** For example Environmental Defenders Office, *Protests, demonstrations, rallies and marches in the NT*, 11 December 2019 <https://www.edo.org.au/publication/protests-demonstrations-rallies-and-marches/>; *Public Order in Streets Act 1984* (WA). Local council requirements will be found in the relevant by-laws. **11** *Public Health (COVID-19 Public Events) Order 2020*, which came into force on 16 March 2020, banning public events where more than 500 people were in attendance. **12** [2020] NSWSC 867 (*Gray*). **13** *Commissioner of Police v Bassi* [2020] NSWSC 710 (*Bassi*), [2]. **14** NSW Health, *COVID-19 (Coronavirus) statistics*, 5 June 2020 <https://www.health.nsw.gov.au/news/Pages/20200605_00.aspx>. **15** Australian Government Department of Health (Health), 'Coronavirus (COVID-19) at a glance – 5 June 2020' <health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-5-june-2021>. **16** In line with the *Summary Offences Act 1988* (NSW), s23(1)(f). **17** *Bassi*, above note 13, [30]. **18** Ibid, [32]–[33]. **19** *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109. **20** *Commissioner of Police, New South Wales Police Force v Kumar (OBO National Union of Students)* [2020] NSWSC 804 (*Kumar*). **21** Ibid, [13]. **22** NSW Health, *COVID-19 (Coronavirus) statistics*, 18 June 2020 <https://www.health.nsw.gov.au/news/Pages/20200618_00.aspx>. **23** Health, 'Coronavirus (COVID-19) at a glance – 18 June 2020' <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-18-june-2020>. **24** *Kumar*, above note 20, [19]–[20]. **25** Ibid, [47], [48]. **26** Ibid, [57]. **27** As distinct from other concerns such as obstructing the public or causing a public disturbance. See *Gray*, above note 12, [46]. **28** NSW Health, *COVID-19 (Coronavirus) statistics*, 2 July 2020 <https://www.health.nsw.gov.au/news/Pages/20200702_00.aspx>. **29** Health, 'Coronavirus (COVID-19) at a glance – 2 July 2020' <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-2-july-2020>. **30** *Gray*, above note 12, [9]. **31** Ibid, [28]. **32** Gatherings in these locations are exempted from Public Health Order No. 4 under cl 17 and sch 1 respectively (see definitions in cl 2 for a definition of recreation facility (major), which includes sports stadiums). **33** *Gray*, above note 12, [59]. **34** Ibid, [70]. **35** [2020] NSWSC 953 (*Gibson*). **36** NSW Health, *COVID-19 (Coronavirus) statistics* 22 July 2020 <https://www.health.nsw.gov.au/news/Pages/20200722_00.aspx>. **37** NSW Government, *Public Health (COVID-19 Border Control) Order 2020* (NSW). **38** *Gibson*, above note 35, [21]. **39** Ibid, [73]. **40** Ibid, [84]. **41** Ibid, [32]–[34]. **42** Ibid, [38]. **43** Ibid, [44]. **44** Ibid, [58]. **45** Ibid, [43], [57], [59]. **46** *Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force)* [2020] NSWCA 160. **47** J Dorsett and E Elsworthy, 'Six protesters arrested at Sydney Black Lives Matter march', *ABC News* (Media release, 28 July 2020) <https://www.abc.net.au/news/2020-07-28/sydney-black-lives-matter-protesters-detained/12498034>. **48** The unsuccessful cases were: *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727; and *Commissioner of Police v Holcombe (on behalf of Community Action for Rainbow Rights)* [2020] NSWSC 1428. **49** *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246 (*Sri*). **50** Queensland Health, *Queensland novel coronavirus (COVID-19) update*, 2 August 2020 <https://www.health.qld.gov.au/news-events/doh-media-releases/releases/queensland-novel-coronavirus-covid-19-update-2020-08-02>. **51** Health, 'Coronavirus (COVID-19) at a glance – 7 August 2020' <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-7-august-2020>. **52** *Sri,* above note 49, [9]. **53** Ibid, [25]. **54** Ibid, [33]. **55** Ibid, [36]. **56** Ibid, [37], [40], [42]. **57** Queensland Human Rights Commission (QHRC), 'Outline of Submissions for the Queensland Human Rights Commission (Intervening)', Submission in *Attorney-General (Qld) v McKinnon & Ors* (8 August 2020) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0015/28050/2020.08.08-AG-v-McKinnon-QHRC-Submissions.pdf>; QHRC, 'Outline of Submissions for the Queensland Human Rights Commission (Intervening)' Submission in *Attorney-General (Qld) v McKinnon & Ors* (12 August 2020) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0016/28051/2020.08.12-QHRC-Further-Submissions.pdf>. **58** *Cotterill v Romanes* [2021] VSC 498 (*Cotterill*), [7]. **59** Ibid. **60** Victoria State Government Health and Human Services, *Coronavirus update for Victoria – 13 September 2020* <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-13-september-2021>. **61** Health, 'Coronavirus (COVID-19) at a glance – 13 September 2020' <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-13-september-2020>. **62** *Cotterill*, above note 58, [9]. **63** *Gerner & Anor v State of Victoria* [2020] HCA 48, [4]. **64** Ibid, [31].

Anna Talbot is an academic teaching litigation and international law at the University of NSW and the University of Technology, Sydney. She previously worked as a solicitor and acted in protest litigation.
TWITTER @annactalbot.

By Amanda Do and Dr Jason Donnelly

Character applications before the Administrative Appeals Tribunal

Practical guidance for the conscientious practitioner



Non-citizens who seek residence of any kind in Australia are subject to strict statutory regulation under the *Migration Act 1958* (Cth) (the Act). One aspect of that statutory regulation is that non-citizens who have engaged in criminal or other adverse conduct can be the subject of visa cancellation and refusal decisions under pt 9 of the Act.[1] This article offers practical guidance for the conscientious practitioner acting in character-related matters before the Administrative Appeals Tribunal (AAT).

AN INCREASINGLY HOSTILE REGIME

Australia's statutory regime concerning character matters has become increasingly hostile to non-citizens. The statutory and practical consequence has been the expansion of migration decisions made by delegates of the Minister for Home Affairs, the AAT, and the Minister, acting personally.

Figure 1 shows the increasing number of review applications lodged with the AAT by non-citizens in relation to appealing adverse character decisions made at first instance by the Minister. This has led to an increased demand for legal services in this area of the law.[2]

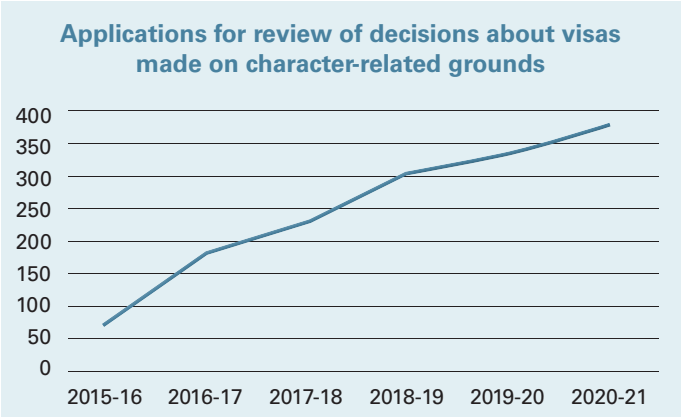


Figure 1: Increase in applications for review: a sign of waning tolerance for non-citizens' presence in Australia.

Acting for non-citizens before the AAT in character-related matters can be a trap for the unwary – this area of the law has become increasingly complex. Given this context, this article seeks to do two things:

- firstly, to logically explain the procedure in acting in character-related matters before the AAT under pt 9 of the Act; and
- secondly, and inextricably linked to the first purpose, to provide practical guidance and direction to legal practitioners acting in such matters.

STATUTORY REGIME

The power for a decision-maker to refuse or cancel a non-citizen's visa on character grounds is provided in ss500A–501CA of the Act.[3]

The character test

The character test is defined in ss501(6)–(7) of the Act. A non-citizen can be taken to fail the character test if:

- they have a substantial criminal record;[4]
- they have been convicted of an offence related to immigration detention;[5]
- they have an association with criminal organisations;[6]
- they have committed deemed criminal offences;[7]
- having regard to their past and present criminal and general conduct,[8] they would risk engaging in criminal conduct or engage in other undesirable conduct in Australia;[9]
- they have been charged with certain deemed offences;[10]
- they have been assessed as a risk to security by the Australian Security Intelligence Organisation;[11] or
- it is reasonable to infer that they would present a risk to the Australian community on account of having been issued with an Interpol notice.[12]

A more recent addition to the character test is the mandatory cancellation regime under s501(3A). Here a non-citizen is objectively taken to fail the character test if they have been

sentenced to a term of imprisonment of 12 months or more and are otherwise serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against the law of the Commonwealth, a state or a territory.

The initial steps of the review process

When a delegate within the Department of Home Affairs makes an adverse character decision concerning a non-citizen under pt 9 of the Act, the non-citizen can have the decision reviewed with the AAT.[13] Critically, the non-citizen has only 9 days to lodge an appeal with the AAT against the delegate's decision.[14] Accordingly, practitioners should make sure that they are aware of this strict statutory time limit. There is no possibility of an extension of time to appeal.

Generally, the AAT will hold a telephone directions hearing within 7 seven business days after the appeal was lodged. There are several important factors that practitioners should keep in mind at this stage.

First, when providing a client with a costs disclosure[15] and costs agreement,[16] practitioners should keep in mind that the full scope of running a character matter before the AAT requires an extensive amount of work. For example, the true extent of work involved in the appeal will often not be readily appreciated until the summons material (frequently requested by the respondent) is produced to the AAT. Generally, the amount of summons material required to be produced to this tribunal ranges from a few hundred to a few thousand pages. As such, a considerable amount of material produced in answer to an AAT summons will not have been before the delegate. Accordingly, practitioners should consider the level of work involved when entering into legal relations with the relevant client.

A second trap for the unwary is the statutory effect of s500(6L)(c) of the Act. Under this section, the AAT has 84 days from the date on which the non-citizen was notified of the original decision to make a decision on review. If a decision is not made within 84 days, the original decision of the delegate is taken to have been affirmed.[17] The statutory consequence of this regime is that this tribunal has a very limited period to decide on review. In practical terms, this means that when the AAT conducts the original telephone directions, a very strict timetable is put in place for the steady progression of the matter. There is limited scope for this tribunal to act with broad discretion in setting dates: it must mandatorily decide within 84 days of the relevant date or otherwise risk the appeal process becoming a futile exercise. Again, practitioners should keep this in mind when accepting instructions concerning a character matter before the AAT. Before the telephone directions hearing, given the strict time limits in this area, when acting for non-citizens in the AAT practitioners should consider filing summons documents with this tribunal. This will help speed up the process.

The two most helpful entities to request to issue a summons are International Health and Medical Services and the equivalent Department of Justice in the relevant Australian jurisdiction. The former entity will provide relevant health documents associated with the non-citizen in immigration detention, and the latter will often produce comprehensive material related to most aspects of the non-citizen's time in custody. These documents can often prove helpful in building a case for the non-citizen before the AAT.

Further, in general terms, practitioners can expect the following orders and notifications to be made at the telephone directions hearing:

1. The applicant and respondent will be required to file and serve a copy of their respective statement of facts, issues and contentions by a certain date.
2. The parties will be required to file with the AAT by a certain date any requests for a summons.
3. Immediate access to documents produced under summonses issued will be required for both parties.
4. The applicant will be required to file and serve any reply evidence by a certain date.
5. The matter will be given a hearing date for X number of days on certain dates.
6. Given the COVID-19 pandemic, leave will be granted to the parties to appear by video link at the hearing and, if the non-citizen is in immigration detention at the time of the hearing, the respondent will be required to undertake to make these arrangements for the non-citizen.

At the telephone directions hearing, practitioners will generally also be required to confirm with the presiding member of the AAT which is the 84th day in terms of s500(6J) of the Act. This date will be added as a notation when the AAT publishes its directions. Practitioners should also inform this tribunal whether an interpreter will be required for the final hearing. Fortunately, where this is necessary the AAT will organise the interpreter for the full final hearing without cost to the parties.

PREPARING FOR TRIAL

Part of a continuum

Although the AAT will undertake a fresh merits review of the non-citizen's application, practitioners should not lose sight of the fact that it forms part of an administrative decision-making continuum.[18] As Logan J made plain in *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:[19]

> 'While the Tribunal stands in place of the decision-maker whose decision is under review, it does not do so in a vacuum. Rather, as Davies J's observation pithily reveals, it does so as part of a continuum. That it does so has many ramifications, but one which is material for the present purposes is that the issues which the Tribunal must confront in terms of discharging its statutory function can be revealed by, indeed dictated by, the continuum of administrative decision-making'.[20]

In practical terms, this means that the practitioner should forensically seek to respond directly to the adverse findings made by the original decision-maker. Doing so generally requires getting further instructions from the non-citizen client, seeking out further information from potential witnesses, and undertaking further research.

Guidance for practitioners

When preparing witness statements to be relied upon in the AAT, there is no need to adduce evidence that is already

reflected in the G Docs: these include all the documents in the Minister's possession or under the Minister's control that were relevant to the making of the original decision.[21] Often, in character-related matters before this tribunal, various written statements and character references were submitted by the non-citizen to the Department of Home Affairs at first instance. Accordingly, to the extent that it is necessary to produce witness statements before the AAT, the applicant (via their legal representative) should generally provide an update of evidence already given by relevant witnesses of the non-citizen, and accommodate new witnesses who did not give evidence for the non-citizen at first instance.

Also, when drafting the applicant's statement of facts, issues and contentions, it is critical that the practitioner closely follow the relevant mandatory considerations reflected in Direction no. 90 (Direction 90).[22] At the time of writing, Direction 90 is the current ministerial policy made under s499 of the Act, which the AAT is bound to apply.

Direction 90 provides what is known as 'primary' and 'other' considerations. It mandates that, generally, primary considerations should be given greater weight than the 'other' considerations. However, practitioners should note the very useful authority of Colvin J in *Suleiman v Minister for Immigration and Border Protection*:[23]

> 'Direction [90] does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are "normally" given greater weight. Rather, Direction [90] concerns the appropriate weight to be given to both "primary" and "other considerations". In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply'.[24]

Practitioners should also note the important effect of para 9(1) of Direction 90. That aspect of the ministerial direction makes plain that the list of 'other' considerations is not exhaustive. As such, practitioners should duly consider whether a consideration not reflected in Direction 90 is relevant and supportive of an applicant's case before the AAT. If it is, it should be included.[25]

Finally, witnesses proposed to be called at the trial should be conferenced and properly prepared. Witnesses should generally be made aware of the non-citizen's criminal record, advised about the process of cross-examination, and given sufficient notice of the hearing date for the trial.

THE CONTESTED TRIAL

Generally, the practitioner representing the applicant non-citizen does not have the burden of cross-examination – largely since the respondent does not generally call witnesses.

Accordingly, the practitioner should take concise and forensic notes of evidence adduced orally during the examination-in-chief and cross-examination process. Those notes will form the foundation for the oral closing addresses given by the parties at the end of the trial.

A further trap for the unwary is the statutory effect of ss500(6H) and 500(6J) of the Act.[26] These provisions make it plain that the AAT must not consider any information presented orally, or any document submitted, in support of a non-citizen's case unless a copy of the document or record of the evidence presented orally is set out in a document given to the respondent Minister at least two business days before this tribunal holds a hearing concerning the decision under review. As such, when asking questions in examination-in-chief in support of the applicant's case, the practitioner must keep this statutory limitation in mind.

Given the statutory discrimination and limitations placed upon an applicant's case before the AAT, the judgment of Katzmann J in *SZRTN v Minister for Immigration and Border Protection*[27] provides a useful summary of what a practitioner can seek to achieve in examination-in-chief:

> 'If the oral evidence does not change the nature of the case and merely puts flesh on the bones, so to speak, it may be doubted whether it can be excluded. There seems to me to be no reason why a witness could not be called to speak to his or her statement, to correct any inaccuracies, to explain any ambiguities, or to elaborate upon certain matters as long as in so doing the witness does not stray outside the subject matter of the material covered in the statement.'[28]

When the respondent's legal representative is cross-examining an applicant's witnesses, the practitioner should be on guard to take objection to questions that seek an answer that may self-incriminate the relevant witness. No adverse inference can be drawn from the witness exercising their privilege against self-incrimination.[29] Often the respondent's legal representative will pose questions related to a document alleging criminality or wrongdoing where the witness has not been charged. In advance of the trial, the practitioner should explain the rule against self-incrimination to the applicant and their witnesses.

The practitioner should also give some thought to the order in which witnesses will give evidence in the applicant's case. Generally, the AAT will wish to hear from the applicant first. What follows in terms of the order in which witnesses are called is at the practitioner's discretion. One possibility is to start and finish with a strong witness. This may well be a balanced approach to adducing evidence in the applicant's case.

FINAL REFLECTIONS

Working in character-related reviews before the AAT is a great privilege for legal practitioners. The human consequences of appeals such as these are far-reaching.[30] A non-citizen removed from Australia due to failing the character test is generally prohibited from ever returning to the country.[31] There is a lot on the line.

The work a practitioner undertakes in this area of the law can change the course of a non-citizen's life, and the lives of their family and friends. Adverse decisions before the AAT can also possibly lead to further work for legal practitioners in the context of judicial review applications before the Federal Court of Australia. Of course, legal practitioners would need to be satisfied that there are reasonable prospects in demonstrating that the adverse tribunal decision is affected by jurisdictional error.

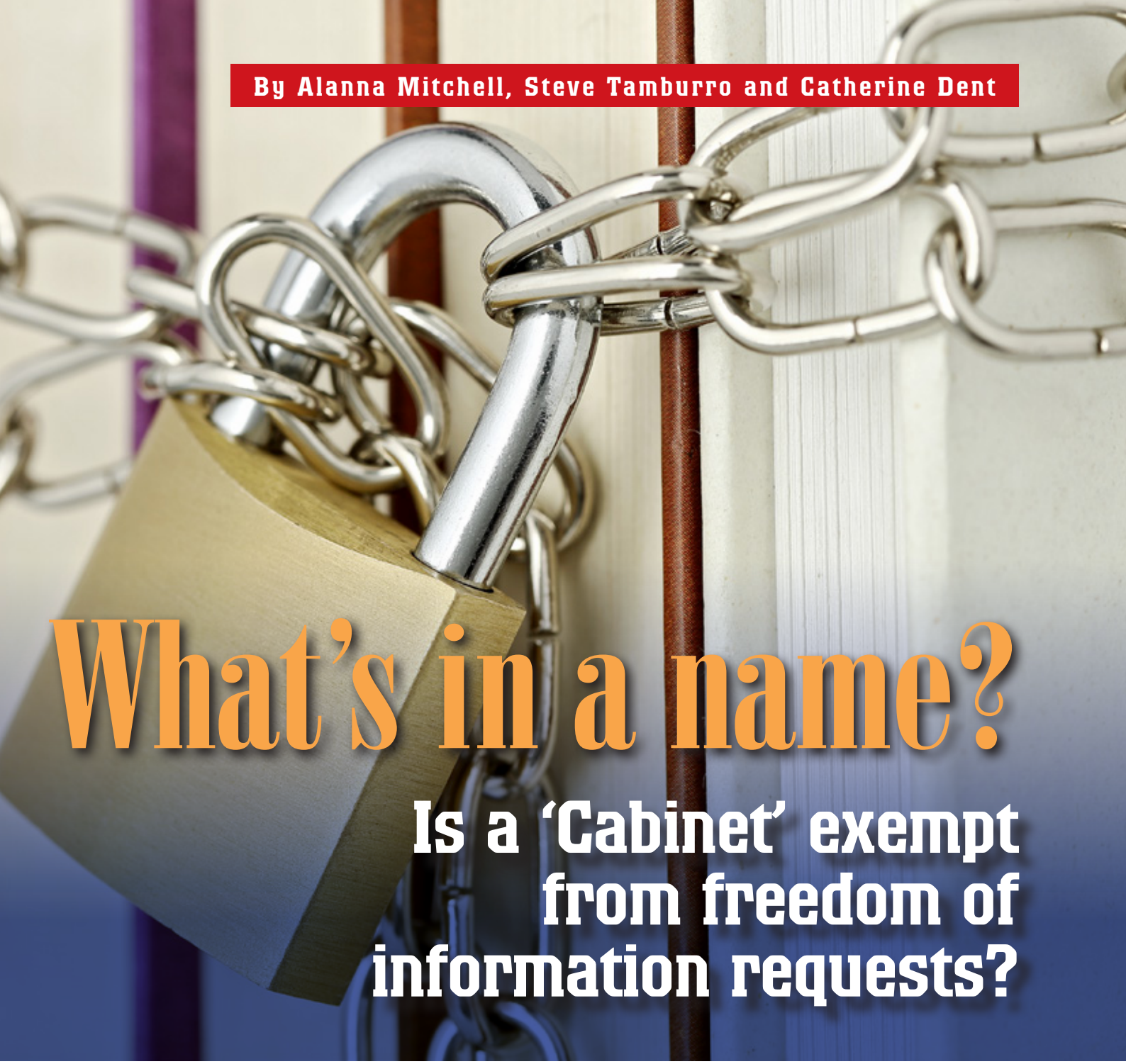
In summary, character-related reviews before the AAT have increasingly become an important area of work, not just for the tribunal itself but also for the legal professional more broadly.[32] ■

Notes: **1** *Migration Act 1958* (Cth) (*Migration Act*), ss496–505. **2** Administrative Appeals Tribunal, *2015–16 Annual Report*, *2016–17 Annual Report*, *2017–18 Annual Report*, *2018–19 Annual Report*, *2019–20 Annual Report*, *2020–21 Annual Report* <https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports>. **3** A Moss, 'Risk of Harm, Relevant Considerations and Section 501: Wrangling the Minister's Discretion', *Australian Law Journal*, Vol. 91, no. 4, 2017, 268–75. **4** A person has a substantial criminal record if, inter alia, that person has been sentenced to a term of imprisonment of 12 months or more. See further *Migration Act*, s501(7). **5** Ibid, s501(6)(aa)–(ab). **6** Ibid, s501(6)(b). See further J Donnelly, 'Failure to Give Proper, Genuine and Realistic Consideration to the Merits of a Case: A Critique of Carrascalao', *University of New South Wales Journal Forum*, Vol. 2, 2018, 1–10. **7** *Migration Act*, ss501(6)(ba), 501(6)(e) and 501(6)(f). **8** Ibid, s501(6)(c). **9** Ibid, s501(6)(d). **10** Ibid, s501(6)(e)–(f). **11** Ibid, s501(6)(g). **12** Ibid, s501(6)(h). **13** Ibid, s500(1). **14** Ibid, s500(6B). **15** See for example the *Legal Profession Uniform Law* (NSW), pt 4.3. **16** Ibid. **17** *Migration Act*, s500(6L). **18** See *Jebb v Repatriation Commission* [1988] FC8 105; *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 (*Kelekci*), [24]. **19** *Kelekci*, above note 18. **20** Ibid, [24]. **21** *Migration Act*, s500(6F). **22** Ibid, s499(1). **23** [2018] FCA 594. **24** Ibid, [23]. **25** See for example *Joshua Steven Clegg and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*Migration*) [2020] AATA 3383, [98]. **26** The purpose of the scheme in s500 is to prevent an applicant from changing the nature of the case, catching the Minister by surprise and forcing the AAT into adjourning the proceedings: see *Goldie v Minister for Immigration and Multicultural Affairs* [2001] FCA 1318, [25]; *Uelese v Minister for Immigration and Citizenship* [2013] FCAFC 86, [31]. **27** [2014] FCA 303. **28** Ibid, [70]. **29** See *Dolan v the Australian and Overseas Telecommunications Corporations* [1993] FCA 206; *Katherine Anne Victoria Pearson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*Migration*) [2020] AATA 3527, [42]. **30** See *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225, [3]. **31** C Bostock, 'The Administrative Appeals Tribunal and Character Assessments for Non-Citizens', PhD thesis, University of New South Wales, 2015, 49. **32** M Grewcock, 'Punishment, deportation and parole: The detention and removal of former prisoners under section 501 Migration Act 1958', *Australian and New Zealand Journal of Criminology*, Vol. 44, No. 1, 2011, 56–73.

Amanda Do is a solicitor with Maurice Blackburn Lawyers.
EMAIL ADo@mauriceblackburn.com.au.

Dr Jason Donnelly is a barrister, and the course convenor of the Graduate Diploma in Australian Migration Law and a senior lecturer at Western Sydney University. Dr Donnelly is also a co-author and editor of the *Federal Administrative Law* publication (Thomson Reuters, 2021). EMAIL donnelly@lathamchambers.com.au.
WEBSITE https://www.jdbarrister.com.au/.

By Alanna Mitchell, Steve Tamburro and Catherine Dent



What's in a name?

Is a 'Cabinet' exempt from freedom of information requests?

This article explores the freedom of information (FOI) implications of the Commonwealth's attempt to classify National Cabinet documents as exempt from FOI requests. On 5 August 2021, the Administrative Appeals Tribunal (AAT) granted an application by Senator Rex Patrick (Senator Patrick) for access to National Cabinet minutes, determining that certain National Cabinet documents were not Federal Cabinet documents for the purposes of s34 of the *Freedom of Information Act 1982* (Cth) (*FOI Act*) and that the Commonwealth could not apply the Commonwealth–state relations exemption generally to those documents in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)*.[1] At the time of writing, the Commonwealth is seeking to legislate to overcome this decision and has indicated its intention to appeal.

This article examines the history, purpose and function of the National Cabinet and Commonwealth–state relations exemptions, the nature of the public interest test and the implications of both the AAT's decision and the Commonwealth's legislative response. It suggests a pathway for decision-makers to consider exemptions and apply or distinguish the AAT's reasoning.

The *FOI Act* is a cornerstone of Australian democracy in that it enshrines the principles of transparency of government. It provides the community with the right to access certain government documents. However, it also establishes categories of exemption from disclosure, including for certain Cabinet documents.[2]

There are also conditional exemptions from disclosure available under the *FOI Act*, including where 'disclosure would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State' and where disclosure would 'be contrary to the public interest' – the Commonwealth–state relations exemption.[3] A 'conditionally exempt' document is one to which access must ordinarily be granted, unless it would be contrary to the public interest to do so.[4]

BACKGROUND

In March 2020, in response to the emerging COVID-19 pandemic, the Council of Australian Governments (COAG) set up the 'National Cabinet', comprising the Prime Minister, the premiers of the states, and the chief ministers of the territories. The National Cabinet held meetings on 15 March and 29 May 2020. By 29 May 2020, COAG ceased to exist.

In July 2020, Senator Rex Patrick (Senator Patrick) made two applications to the Department of the Prime Minister and Cabinet (Department) under the *FOI Act* for access to documents in relation to the National Cabinet. The first application sought all meeting notes of and minutes at the meeting of the National Cabinet on 29 May 2020. The second application sought a range of documents about the National Cabinet's formation and functions.

The Department refused the first request, relying on the exemption for official records of Cabinet under s34(1)(b) of the *FOI Act*, on the basis that the National Cabinet was a committee of Cabinet (Cabinet Exemption).[5] Access to some documents falling within the second request was granted, but was refused for other documents, again under the Cabinet Exemption.[6] Senator Patrick (the applicant) later appealed to the AAT for review of the decision to refuse him access.

A key issue for the AAT was whether or not the National Cabinet constituted Cabinet for the purposes of the *FOI Act*. In examining this issue, the AAT explored the history, purpose and function of the *FOI Act*, and the Cabinet and Commonwealth–state relations exemptions.

Legislative scheme

Section 11 of the *FOI Act* provides 'every person a legally enforceable right to obtain access' to a document of an agency or an official document of a minister, other than a document exempt under Part IV.

A person may request a document of the agency or an official document of the Minister.[7] The person making the request (the applicant) can be a legal or natural person.[8] The applicant does not have to be an Australian incorporated company or citizen, nor would they be excluded because of a conviction.[9]

The general rule is that the agency or Minister must give the person access to the document requested. The agency or Minister is not required to do this if the document is an 'exempt document' such as a Cabinet document.[10] The general rule is further qualified by conditional exemptions.[11] A conditionally exempt document is considered so where 'access to the document at that time would, on balance, be contrary to the public interest.'[12]

The Cabinet Exemption under the *FOI Act* protects a document (or any copy or any part of a document) from disclosure if any of the following apply:

1. the document has
   (a) been, or is proposed to be, submitted to the Cabinet for its consideration; and
   (b) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
2. the document is an official record of Cabinet; or
3. the document was brought into existence for the purpose of briefing a minister on a document to which 1. above applies; or
4. the document is a draft of any of the above-described documents;[13] or
5. the document contains information the disclosure of which would reveal a Cabinet deliberation or decision, except to the extent the deliberation or decision has been officially disclosed.[14]

The following are the exceptions to the Cabinet Exemption:

- a document is not exempt because it is attached to a Cabinet document;[15] or
- a document by which a decision of the Cabinet is officially published is not an exempt document;[16] or
- information in a Cabinet document is not exempt if the information consists of purely factual material, unless the disclosure of the information would reveal a Cabinet deliberation or decision and the existence of such has not been officially disclosed.[17]

The word 'Cabinet', for the purpose of the Cabinet Exemption, 'includes a committee of the Cabinet'.[18]

THE CABINET EXEMPTION

Was the National Cabinet a 'committee of the Cabinet'?

The Department relied on the Cabinet Exemption to the effect that the documents sought were 'an official record of the Cabinet' based on the extended meaning of the term 'Cabinet', 'including a committee of the Cabinet'.[19]

The AAT, after inspecting the documents, confirmed that the documents are formal minutes of the National Cabinet. As such, if the National Cabinet was a committee of the Cabinet, the documents sought would be 'an official record' of the Cabinet. However, the AAT explained:

> 'The mere use of the name "National Cabinet" does not, of itself, have the effect of making a group of persons using

the name a "committee of the Cabinet". Nor does the mere labelling of a committee as a "Cabinet committee" have that effect. That term has the meaning with which it is used in the FOI Act and, in order for s 34(1)(b) of that Act to be applicable in the present case, the National Cabinet must come within that statutory meaning.'[20]

To determine whether the documents were an official record of Cabinet, the AAT looked to the purpose of the *FOI Act*.

Purpose of the *FOI Act*

The key purpose of the *FOI Act* is to promote representative democracy by giving the Australian community a mechanism to access publicly held documents. This general entitlement is qualified. In some circumstances it precludes access to documents that are of an identified class or whose disclosure would be contrary to the public interest.

The exemptions to disclosure enable Cabinet to deliberate and perform its functions. It has long been held that Cabinet documents should be kept confidential even though they are in the public interest. The High Court of Australia in *The Commonwealth of Australia v Northern Land Council and Another*[21] stated that the purpose is so 'members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made … collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential'.[22]

In the Second Reading Speech on the Freedom of Information Bill 1981, Minister Viner stated, 'It is of the essence of Cabinet government that the deliberations of Cabinet and Executive Council should be protected from mandatory disclosure'.[23]

We turn to look at the reasons underlying these positions.

Function of the Cabinet

The federal Cabinet is a committee of ministers from the party in government. The Prime Minister described the Cabinet, in the 13th and 14th editions of the *Cabinet Handbooks*, as 'the primary decision-making body of government' and as 'the council of senior minister who are empowered by the Government to take binding decisions on its behalf'.[24]

An ordinary reading of the term 'committee of the Cabinet' is that it refers to a subgroup of the Cabinet, as distinct from an outside group.

The Department provided evidence to the AAT that there have previously been committees of the Cabinet, including the National Security Committee, the Expenditure Review Committee and the Productivity Committee.

The *Cabinet Handbook* describes Cabinet committees as 'usually established around either a subject area, such as national security, or around a general function of government, such as expenditure.'[25] It notes, further, that '[t]emporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.'[26]

The AAT found that the term 'committee of the Cabinet' encompassed:

> 'a group of persons *derived from* the Cabinet and performing a function for, or on behalf of, the Cabinet or a group having such a connection or association with the Cabinet that the group can be said to *belong to* the Cabinet. A group which is not "of" the Cabinet will not be a committee of the Cabinet.'[27]

> "Collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential."

Establishment of the National Cabinet

The AAT addressed the absence of primary evidence from the Department on the establishment of the National Cabinet. The AAT noted the pandemic was the impetus for the establishment and that it appeared the decision to establish it was made at the COAG meeting on 13 March 2020.[28]

The AAT found that the Department's evidence on this issue did not meet the standard suggested by the cases involving claims of public interest immunity, which the AAT considered analogous to a claim for exemption from the *FOI Act*, quoting, by way of example, *State of Victoria v Brazel*:[29]

> 'The claim for immunity must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute a compelling case for secrecy. Anything less will be unlikely to suffice.'[30]

Although the Prime Minister was the chair of COAG, neither the Prime Minister nor the Federal Cabinet established the National Cabinet. The AAT found that 'a collective decision of COAG on 13 March 2020' established the National Cabinet.[31]

Composition of the National Cabinet

The National Cabinet comprises the Prime Minister, the premiers of each state and the two chief ministers of the territories. Of the nine persons who make up the National Cabinet, only one is also a member of the Cabinet: the Prime Minister. The Prime Minister acts as the convenor of the National Cabinet. Save for the Prime Minister, the premiers and chief ministers are not members of the federal government.

There was said to be no evidence that the Prime Minister appointed persons to be members of the National Cabinet; rather, they were members by virtue of the positions they held. There was no discretion as to who could be appointed. This key characteristic differentiated the National Cabinet from committees of the Cabinet.

Relationship between the Cabinet and National Cabinet

The relationship between the Cabinet and the National Cabinet was an important consideration for the AAT. The AAT held that there was no evidence to suggest the National Cabinet's role was to assist the Cabinet during the period when National Cabinet meetings were being held.

The AAT pointed to the Prime Minister's statements that emphasised the publicly announced decisions of the National Cabinet were not decisions of the Cabinet. For example, at a press conference after a meeting of the National Cabinet, the Prime Minister said:

> 'I want to stress, these are decisions that are being taken by the State and Territory Premiers and Chief Ministers with myself as the Prime Minister who convenes the National Cabinet, these are not decisions being made by the Federal Cabinet'.[32]

Given the decisions were made independently, this implied that the Cabinet was not responsible for the National Cabinet's decisions.[33]

Comparing the two Cabinets

The AAT made the following observations based on the evidence before it:

1. The Prime Minister 'does not determine the shape, structure and operation'[34] of the National Cabinet, nor delegate or entrust any particular function to it.
2. The National Cabinet does not draw power from the Cabinet.
3. The National Cabinet's decisions:
   (a) are not decisions of the Cabinet;
   (b) do not have effect as being decisions of the Cabinet; and
   (c) cannot be altered by the Cabinet.
4. The Cabinet does not have the ultimate power over the National Cabinet.
5. Even without endorsement by the Cabinet, decisions of the National Cabinet can be acted upon by the states and territories.
6. The Cabinet did not appear to be briefed on National Cabinet decisions.
7. Membership of the National Cabinet is not the responsibility of the Prime Minister.
8. The National Cabinet addressed matters that the federal Government had no responsibility or legislative authority over.
9. A focus of the National Cabinet was co-ordinating an approach to addressing COVID-19.[35]

The AAT accepted the applicant's submission that the National Cabinet was not guided by the principles of collective responsibility and solidarity because the premiers and chief ministers were not accountable to the Australian Parliament. The AAT asserted that the National Cabinet was likely to have agreed its deliberations should be confidential; however, the AAT did not consider this a strong indicator of the National Cabinet being a committee of the Cabinet.

Ultimately, the AAT found that the National Cabinet was not a committee of the Cabinet.

We turn now to conditionally exempt documents under the public interest, including the Commonwealth–state relations exemptions.

PUBLIC INTEREST CONDITIONAL EXEMPTIONS

The *FOI Act* prescribes that an agency must give a person access to a conditionally exempt document, unless access to the document at that time would, on balance, be contrary to the public interest under s47B. Specifically, s47B(a) provides for an exemption in circumstances where the disclosure of the document 'would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State'. The Department relied on this subsection as an additional basis for exemption of the documents.

The Department did not rely upon s47B as a basis to refuse access to the documents in its original decision. The s47B exemption was raised for the first time in affidavits filed in the proceeding.

In determining this issue, the AAT had to place itself in the position of the primary decision-maker and, in its reasoning, contemplate whether granting access to documents would be contrary to the public interest, as assessed at the time that access would occur. The AAT also considered whether a class claim was available to the National Cabinet documents, finding the statutory criterion to be whether it 'would have, or be reasonably expected to have, the relevant adverse effect.'[36]

The AAT conducted its assessment of the effect of disclosure of the minutes of National Cabinet meetings that were held on 15 March 2020 and 29 May 2020.

The 29 May 2020 minutes were said not to follow the style and form of minutes of meetings typically seen. That is, the minutes did not have headings, record participants or apologies, adopt previous minutes, record motions and consideration, or contain reference to proposals raised and discussed. At most, they recorded some outcomes in short form. Further, the Prime Minister made public statements disclosing the formal agreements and resolutions reached by the National Cabinet in that meeting.

As the AAT explained in its reasons, it took into account that the minutes did not disclose the contributions of individual participants, or the debates or considerations behind the agreements or resolutions. It found that:

> 'there is no reason to suppose that any participant in the National Cabinet, acting rationally, would feel some inhibition in his or her contributions to the debate at the National Cabinet by reason of the formal disclosure of the minutes of 29 May 2020'.[37]

In respect of the 15 March 2020 minutes, the AAT stated, '[t]he same conclusion may be reached even more confidently'.[38] This was due to the minutes not disclosing the participants, or any motions, proposals, individual contributions, objections or discussion of the Terms of Reference.[39]

THE DECISION AND ITS IMPLICATIONS

The AAT concluded that the minutes were not conditionally exempt documents nor, as discussed above, exempt documents, on the basis that the respondent failed to

discharge the onus of establishing that the decision-maker was justified. The AAT ordered Senator Patrick be granted access to the documents sought.

The Department sought a stay of the decision pending an appeal to the Federal Court of Australia. However, the reasons provided by the AAT do not disclose whether this was granted, as the AAT indicated parties had not made submissions with respect to the application, though afforded an opportunity to do so.[40]

The key findings of the AAT are that:

- the National Cabinet was not a committee of the Cabinet, and its documents are therefore not protected by the same exemption provisions as are Cabinet documents; and
- reliance on the public interest conditional exemption for Commonwealth–state relations is applied sparingly.

COMMONWEALTH LEGISLATIVE RESPONSE

One of the federal Government's responses to this case was to propose the COAG Legislation Amendment Bill 2021. The Explanatory Memorandum to the Bill clearly indicates that a purpose of the Bill is to:

> 'make clear that where Commonwealth legislation makes provisions to protect from disclosure the deliberations and decisions of the Cabinet and its committees, these provisions apply to the deliberations and decisions of the committee of cabinet known as the National Cabinet (Schedule 3).'[41]

In conceptualising how the National Cabinet will operate and how it is deserving of the stringent protections applicable to Cabinet documents, COAG provides some reference point. In this regard, Minister Tudge in his Second Reading of the Bill stated that the National Cabinet:

> '… is working as a true federated decision-making body leading the national response to the pandemic. Many crucial decisions have been collectively made through the National Cabinet to both control the spread of COVID-19 and keep essential services operational …
>
> In contrast to the National Cabinet's agility and decisiveness, COAG and its related bodies were burdened by red tape and bureaucracy which made them inefficient in taking decisions and slow to advance reform.'[42]

Senator Patrick has opposed the proposed National Cabinet confidentiality provisions in the Bill.

To answer the first question, 'what's in a name?', it appears there is not very much. The National Cabinet was found by the AAT not to be a Cabinet, notwithstanding its name. ■

Notes: **1** [2021] AATA 2719 (*Patrick and DPMC*). **2** *Freedom of Information Act 1982* (Cth) (*FOI Act*), s34. **3** Ibid, s47B. **4** Ibid. **5** *Patrick and DPMC*, above note 1, [6]. **6** Ibid, [7]. **7** Ibid, ss11A(1)(a)–(b), 15(2). **8** *Re Morris and Australian Federal Police*, AAT, 7 April 1995, unreported. **9** See, respectively, *Re Lordsvale Finance Ltd and Department of Treasury* [1985] AATA 174, *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257; *Re Ward and Secretary, Department of Industry and Commerce* (1983) 8 ALD 324. **10** *FOI Act*, above note 2, ss11A(4), 34. **11** Ibid, s11A(4)–(6). **12** Ibid, s11A(5). **13** Ibid, s34(1)(a)–(d). **14** Ibid, s34(3). **15** Ibid, s34(4). **16** Ibid, s34(5). **17** Ibid, s34(6). **18** Ibid, s4(1). **19** *Patrick and DPMC*, above note 1, [36]. **20** *Patrick and DPMC*, above note 1, [41]. **21** *The Commonwealth of Australia v Northern Land Council and Another* [1993] HCA 24. **22** *Patrick and DPMC*, above note 1, [45], quoting *The Commonwealth of Australia v Northern Land Council and Another* [1993] HCA 24, [6]. **23** *Patrick and DPMC*, [46], quoting Minister Viner Second Reading Speech on 18 August 1981. **24** Ibid, [57], quoting the 13th and 14th editions of Department of the Prime Minister and Cabinet, *Cabinet Handbook,* issued on 28 August 2019 and 16 October 2020 (collectively referred to as *Cabinet Handbooks*). **25** Ibid, [61], quoting *Cabinet Handbooks*, [4]. **26** *Cabinet Handbooks*, [4]. **27** *Patrick and DPMC*, above note 1, [64]. **28** Ibid, [71]. **29** (2008) VSCA 37. **30** Ibid, [68], cited in *Patrick and DPMC*, [84]–[86], also quoting *Jaffarie v Director-General of Security* (2014) FCAFC 102, [26]. **31** *Patrick and DPMC*, [87]. **32** Ibid, [134]–[135], quoting the Prime Minister's statement given at a press conference on 24 March 2020. **33** Ibid, [135]. **34** Ibid, [149(a)]. **35** Ibid, [149(k)]. **36** Ibid, [239]. **37** Ibid, [267]. **38** Ibid, [269]. **39** Ibid, [270]. **40** Ibid, [278]. **41** Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 2021, 9214 (Minister Alan Tudge). **42** Parliament of Australia, COAG Legislation Amendment Bill 2021, Explanatory Memorandum, 1.

Alanna Mitchell, Steve Tamburro and Catherine Dent are colleagues at the Victorian Government Solicitor's Office.

By Mark Holden

The Australian Financial Complaints Authority

Impact on First Nations people

This article offers guidance on supporting First Nations clients to apply for financial dispute resolution through the Australian Financial Complaints Authority (AFCA). It introduces the purpose and operations of AFCA, and highlights the challenges First Nations clients may face when dealing with the complaints process and with financial service providers (FSPs).

I write in my capacity as a solicitor at the Financial Rights Legal Centre (FRLC), and this article has as its background the organisation's experience with supporting clients in financial disputes.

ABOUT THE FINANCIAL RIGHTS LEGAL CENTRE

The FRLC has operated for more than 30 years as a Community Legal Centre specialising in consumer financial matters. It runs four consumer facing phone and email programs:

- the National Debt Helpline (NSW only) on 1800 007 007;
- the Credit and Debt Legal advice line (NSW only) on 1800 844 949;

- the Insurance Law Service (national) on 1300 663 464; and
- the Mob Strong Debt Help (national for Aboriginal and Torres Strait Islander people) on 1800 808 488.

The FRLC offers a range of programs and resources, and our work covers a variety of topics.[1] The Centre provides clients and callers with financial counselling, legal advice, legal assistance and representation in consumer financial matters, in particular representation at AFCA.

THE NEED FOR A FINANCIAL DISPUTE RESOLUTION SERVICE

There is a very large power imbalance between financial service providers (FSPs) and vulnerable First Nations consumers. Traditional methods of dispute resolution, such as litigation, generally favour FSPs, which have more expertise and resources. Such traditional methods pose insurmountable barriers for First Nations consumers, and have left them with no faith in Australia's judicial system.[2]

The federal Government has embraced the concept of a free financial dispute resolution service by amending the *Corporations Act 2001* (Cth) to establish AFCA, an amalgamation of past financial ombudsman dispute resolution services. AFCA has stated its aim to work to reduce systemic barriers in order to allow First Nations consumers to access its service.[3]

However, AFCA has the further potential not only of reducing more of the systemic barriers, but also of creating greater public confidence – particularly for First Nations consumers considering lodging a dispute against an FSP.

Financial disadvantages of First Nations consumers

The First Nations Foundation conducted a research study on First Nations consumers' financial resilience in 2019, and made the following findings:

- Only 1 in 10 First Nations consumers are financially secure.
- Fewer than 2 in 5 First Nations consumers have access to an amount of $2,000, compared to 4 in 5 Australia wide.
- Nearly 50 per cent of the First Nations participants in the study were experiencing severe financial stress, compared to 11 per cent of participants in the broader population.
- First Nations participants were 10 times more likely than non-First Nations participants to have very little access to financial services.
- First Nations participants were more likely than non-First Nations participants to use fringe credit services.[4]

In this regard, some of the primary instigators of the disadvantage of First Nations people are intergenerational trauma and disenfranchisement resulting from past policies, poor education programs, lack of access to capital and equity resulting from colonial land dispossession, cultural erosion caused by assimilation and protection policies, and distrust of institutions. The disproportionate levels of financial stress and lack of access to financial services can leave First Nations consumers reliant on high-risk credit products, such as payday loans and unregulated credit. First Nations consumers also have a higher risk of experiencing financial hardship through undertaking loans or being targeted by predatory lending or unconscionable practices.[5]

Traditional dispute resolution a barrier to First Nations people

The traditional Western method for handling disputes has been through the litigation process. From the perspective of a lay person, Australia's litigation system is complex, exceedingly expensive and daunting. Both parties are assumed to be on equal footing and are required to provide evidence and submissions to the judge in a court of law. As the judge then hands down the finding of law and fact, and determines which party is correct and will win, any party wishing to appeal will need to file their appeal and prove the judge made an error (often limited to an error of law). The entire process requires substantial legal resources, in the form of legal experts' time and fees for advice, representation, drafting legal documents (including motions, submissions, appeals and correspondence) and for arranging payment of court fees. The party with the most legal resources and sound legal preparation holds a stronger position of power, which can be intimidating for more vulnerable parties.

Naturally the power disparity between First Nations consumers and FSPs is stark. First Nations consumers are more likely to live with a low socioeconomic background, limited education[6] and a lack of knowledge about financial products.[7] Our experience shows that they know when they have been wronged by FSPs, but lack the power and knowledge to fight against this, and end up more marginalised and disenfranchised. The FSPs, in contrast, have an intimate knowledge of financial laws and products and are likely to be supported by expert staff. The First Nations consumers the FRLC has supported often end up believing there is no point in complaining as they are going to lose anyway, and will develop a deep distrust of the legal system. This distrust is passed around the community, and can last for generations.

Legal Aid, community legal resources and pro bono programs have stepped in to help improve access to justice through legal education, advice and representation services. However, as litigation is extremely resource intensive, it is often reserved for special matters, such as 'advanc[ing] the public interest'.[8]

Even alternative dispute resolution programs which are less resource intensive, such as mediation and conciliation, can be prejudicial to First Nations consumers who have no representation or, at the least, legal advice. The FSPs are better equipped, given their greater knowledge and resources in relation to consumer finance law, to potentially 'stonewall' First Nations consumers.[9] The mediator in the dispute resolution program may not be aware of any cultural issues affecting, or understand the perspective of, the First Nations consumer, and may not involve the extended family or greater community if they are also affected. If an agreement is made with an FSP, our clients report that the FSP may press the consumer into a confidentiality agreement.

When cultural and power disparity issues are not addressed during mediation, First Nations consumers may feel they

have been forced into the predetermined arrangements, because they perceive the mediator to be on the FSP's side.

These experiences of some First Nations consumers have left others in the community with no idea of whether they might be able to raise a similar dispute, no guidelines for doing so, and no way of knowing what the outcome might be if they did commence such a dispute.[10]

About the Australian Financial Complaints Authority

AFCA was established under the *Treasury Laws Amendment (Putting Consumers First –Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) (Act) as a means to create a one-stop shop for disputes with FSPs. Its stated purpose is: 'to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints'.[11]

This means complainants can take their complaint to an alternative forum that can be cost friendly, can have their concerns heard and dealt with in a more relaxed method than litigation, and can have certainty about what the FSP will do if an agreement is reached or the ombudsman makes a determination – including for declaratory, injunctive and compensatory relief.

AFCA describes itself as 'a free and independent ombudsman service that resolves complaints by consumers and small businesses about financial firms.'[12] These financial firms include:

- banks;
- insurers;
- life insurers;
- small business lenders;
- superannuation funds;
- consumer lease providers; and
- small-amount credit providers.

FSPs must be members of AFCA in order to keep their Australian Financial Services Licence.

If a complaint is escalated to AFCA, the FSP must stay any enforcement proceedings until the matter is closed. A case manager will be appointed and will try to gather more information about the dispute from both sides. If necessary, a conciliation conference will be set up for the parties to try to resolve their dispute.

If no settlement is reached, the matter will be referred to the ombudsman, who will make a determination that is binding on the FSP but not on the consumer; if not satisfied, the latter can escalate the matter to litigation. As stated in AFCA's *Complaint Resolution Scheme Rules (Rules)*:

> 'If a Complainant does not accept a Determination, the Complainant is not bound by the Determination and may bring an action in the courts or take any other available action against the Financial Firm'.[13]

Support for vulnerable consumers

The Act requires AFCA to be 'appropriately accessible' and 'fair, efficient, timely and independent',[14] as well as accountable and effective.[15] This is reflected in its *Rules*.[16] This ongoing requirement is especially important for vulnerable consumers, including First Nations consumers, as AFCA may be the only practical legal option they can exercise.

> Given disproportionate levels of financial stress and lack of access to financial services, First Nations consumers may rely on high-risk credit products.

AFCA's rules and processes appear to have the purpose of supporting vulnerable and disadvantaged consumers. The *Rules* contain the principle that AFCA should 'have appropriate expertise and resources to consider complaints submitted to it'.[17] This could be interpreted as a requirement for AFCA to have culturally appropriate practices for considering complaints.

Benefits of AFCA

Here are some of the benefits to First Nations consumers of using AFCA as their complaints mechanism:

- There is no cost to the complainant.
- The ombudsman has specialised knowledge of financial issues.
- There are incentives for FSPs to negotiate to prevent further AFCA dispute costs.
- AFCA publishes its approaches to legal and financial issues to give the public a better idea of their prospects.
- This is a simpler and shorter decision-making process than litigation.
- Determinations are shorter and easier to understand than judgments.
- Determinations are public, and name the relevant FSP.[18]
- AFCA has a 'fairness and reasonableness' jurisdiction, which gives it greater flexibility.
- There are no formal rules of evidence.
- AFCA has published its approaches to a number of different FSP issues to help guide complainants in simple terms on how it will make its decision.[19]

Limitations of ACFA's services

However, there are constraints on the services AFCA can provide. Clients need to be guided on the following limitations of AFCA as a complaint mechanism:

- AFCA is not a court or a tribunal, and its jurisdiction is restricted by the rules governing what it can and cannot hear.[20]
- There are limits on how much can be recovered from a claim.[21]
- AFCA cannot take evidence on oath – there is reliance on documents and call recordings of the FSP.
- AFCA decides matters on an individual basis, and does not make class settlements (although it does identify and report systemic issues).
- Proposed settlements are not reviewed by AFCA.
- There are no appeals – the only avenue if the consumer is unhappy with AFCA's decision is litigation.
- The online complaint intake process is inflexible and requires emails to be inputted, though the complainant may not have access to email.
- AFCA can choose not to hear a complaint owing to its complexity, so you may need to be prepared to escalate the matter to court (see below).
- Enforcement powers are limited if the FSP does not comply with the determination.
- The dispute process is conducted via telecommunications, which is disadvantageous for First Nations consumers who have limited telecommunications technology and/or may be living remotely (no email, lost phone, etc.).
- Time limits can be strictly applied (though AFCA can choose to be flexible), which does not work well for First Nations consumers with other priorities, such as other legal issues, traditional activities and the need to support family.
- AFCA is a more efficient way of resolving disputes than litigation, but self-represented First Nations complainants can still find AFCA challenging, particularly in the area of having their cultural needs responded to appropriately. The examples below are some of the cases the FRLC has seen that highlight the need for support by a legal practitioner.
- Cultural issues such as sorry business may not be taken into consideration. Clients may not be contactable for some time owing to this, and the complaint may therefore be closed. AFCA can re-open a complaint, but usually only within six months of closure.
- AFCA's statement-of-financial-position calculator[22] requires the complainant to input their income against living expenses for themselves and their family; however, the expenses categories are designed for the essential living expenses of immediate dependants and do not include expenses for the extended kinship structure. First Nations consumers are more inclined than non-First Nations consumers to financially support people in their kinship structure if they have the means to do so. This support is not based on purchasing items (which can be recorded on the statement), but just on simple cash transfers.

Some examples

The following example highlights the importance of exercising caution in recommending that vulnerable First Nations clients use AFCA if they cannot access ongoing legal advice.

One of the FRLC's clients was a First Nations Elder who took out an egregious car loan through a used car dealer. The FRLC lodged a complaint on the Elder's behalf, but the lender kept contacting the Elder to force him into a settlement without our knowledge. Our client did not understand the agreement offered, but ultimately relented and told AFCA to close the complaint. This example highlights the danger of gratuitous concurrence, where a First Nations consumer will agree to something they may not understand, just to wrap up the matter or out of fear or shame.[23]

As this example shows, First Nations clients could be pressured into a prejudicial agreement with FSPs without AFCA knowing. Matters with complex legal issues and potential precedential impact may be best suited to litigation and not to individual AFCA determination.

In another case, the client was an Aboriginal Elder who lived remotely and had very little knowledge of English. He was sold an unsuitable consumer lease and the FRLC represented him against the lessor and escalated the complaint to AFCA. The complaint was in danger of being closed because the lessor approached our client directly and convinced him to sign a very disadvantageous settlement, which included removing the FRLC as his legal representative. When the FRLC explained in detail the client's disadvantage and the inappropriateness of the settlement, AFCA reviewed it and continued the complaint.

WORKING WITH AFCA

Supporting clients' cultural needs

First Nations people may need cultural support beyond that which AFCA can provide. Its website and publications do not specifically mention support for Aboriginal and Torres Strait Islander people, or explain how AFCA has processes in place to manage First Nations complainants in a culturally safe manner. However, AFCA does check whether a complainant is a First Nations person through the initial intake process; the practitioner providing support could follow up to ascertain whether the client has been matched with a First Nations-identified claims manager.

In the experience of the FRLC, First Nations complainants may lack confidence in AFCA's processes and therefore feel they would have a better chance of success if they dealt with the FSP on their own.

Working with First Nations clients and lodging complaints in AFCA

Here are some practical tips:

- Make sure you and your staff have had cultural awareness training when taking on First Nations clients.
- Take your time with the client to explain the complaint procedure through AFCA in plain language. Your client will have no knowledge about AFCA and what it can do.
- Read the AFCA approaches[24] and industry codes.[25] The AFCA approaches outline what the AFCA ombudsman can determine, and the industry codes are enforceable in AFCA.
- The FSP will be made aware of the complaint and may attempt to contact your client. Prepare your client for this possibility and get them to refer the FSP to you.
- Though AFCA does not hear evidence on oath, and relies on documents for reaching its decision, it can consider the

circumstances of the client and their recollection of events in order to assess their capacity to understand financial documents and other contexts. This can be handy when arguing unconscionability or unjust contract cases.
- Case managers assigned to the matter may have not have adequate legal expertise to understand your matter. Try to avoid jargon, and use plain language when putting your case. Also feel free to call the case manager to explain your matter and answer any of their questions.
- If the case manager is making any errors and this is impacting on your client's outcome, escalate your complaint.
- Note that the FSP, not your client, has to pay for the complaint. The FSP may prefer to negotiate a settlement with you and your client if the amount you are seeking is lower than the AFCA complaint costs.
- Note that the ombudsman will not change their determination once it is made. If the determination is not in your favour, your client has 30 days to decide whether or not to accept it. Use this time to assess whether the client has prospects in litigation or further negotiation. You will need this time to fully explain the client's prospects in litigation.
- Even if your client does not accept the determination and the complaint is closed, you can still raise the matter again with the FSP and have the last option of litigation. You can raise another, different dispute about the same issue, and AFCA can still consider whether to hear it.
- If your client has accepted the determination, this is binding on the FSP, so you can raise the matter with AFCA again if the FSP is not complying. The FSP is allowed to require your client to sign an agreement to confirm only that the dispute is resolved and the FSP is released from liability.[26] The FSP is not allowed to require your client to sign a confidentiality agreement unless this has been negotiated.

CONCLUSION

The ability of a financial dispute resolution service to match its clients' cultural needs is important. Such a service does not just provide support for the community with resolving disputes that have already arisen, but can also have a preventative function, empowering community members to identify and respond to issues such as exploitation by FSPs. As experience has taught us at the FRLC, a service will have no relevance in First Nations communities if it is tone-deaf to them.

We conclude by offering some strategies centred on cultural understanding for practitioners representing vulnerable First Nations clients; these have proved effective in the past for our organisation and in general:
- creating awareness of the importance of the kinship structure and what this means for clients' perceived financial obligations;
- requesting interpreters where needed;
- addressing issues such as clients being required to complete online forms where the client has no online access;
- where an organisation requires an email address, advocating for clients who have phone numbers only, and requesting that a postal address be acceptable;
- requesting that wherever possible clients be matched with First Nations staff;
- requesting access, where possible, to videos explaining processes where the client may have difficulties with the available print or online publications;
- requesting access to audio and visual information about services and operations in different First Nations languages;
- requesting links to First Nations-focused resources on the organisation's website or available in print; and
- requesting information on partnerships the organisation may have with Aboriginal services that could support your client. ■

Notes: **1** See Financial Rights Legal Centre <https://financialrights.org.au/>. **2** This view has been gained through my experience as a solicitor working with Aboriginal and Torres Strait Islander people for 10 years. **3** AFCA, 'Fact Sheet: Systemic Issues, serious contraventions and other breaches' <https://www.afca.org.au/media/616/download>. **4** M Weier, K Dolan, A Powell, K Muir and A Young, *Money Stories: Financial Resilience Among Aboriginal and Torres Strait Islander Australians*, Centre for Social Impact, First Nations Foundation and NAB, 2019 <https://firstnationsfoundation.org.au/wp-content/uploads/2020/01/full_report_2019.pdf>. **5** Ibid, 2. **6** Ibid. **7** Ibid, 26. **8** See for example Legal Aid NSW Policy Online, *Civil Law Matters – when legal aid is available,* 2019, [6.5.4] <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available?SQ_DESIGN_NAME=print-chapter>. **9** L Behrendt and L Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond,* The Federation Press, 2008, 59–67. **10** Ibid. **11** AFCA, *About AFCA* <https://www.afca.org.au/about-afca>. **12** AFCA, *What is an ombudsman?* <https://www.afca.org.au/about-afca/corporate-information/what-is-an-ombudsman>. **13** AFCA, *Complaint Resolution Scheme Rules, 13 January 2021* (*Rules*), r A.15.4 <https://www.afca.org.au/about-afca/rules-and-guidelines/rules>. **14** *Treasury Laws Amendment (Putting Consumers First – Establishment Of The Australian Financial Complaints Authority) Act 2018* (Cth), ss1051(4)(a), (b). **15** Ibid, s1051A. For an assessment of AFCA's accountability, see AFCA, *Public Report: Independent Assessor July-December 2021* <https://www.afca.org.au/about-afca/accountability/independent-assessor/public-report-independent-assessor-july-december-2021>. **16** *Rules*, above note 13. **17** Ibid, r A.2.1(e). **18** For AFCA determinations see <https://www.afca.org.au/what-to-expect/search-published-decisions>. **19** AFCA, *AFCA Approaches* <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>. **20** *Rules*, above note 13, r C.1, 'Mandatory exclusions', 31–4. **21** Ibid, r D.4, 'Monetary limits for complaints other than Superannuation Complaints', 39–41. **22** AFCA, *Statement of financial position*, 2022 <https://sofp.afca.org.au/>. **23** D Eades, 'Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations', *Precedent*, No. 126, 2015, 44–8 <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2015/12.html>. **24** AFCA, above note 19. **25** AFCA, *Codes of practice* <https://www.afca.org.au/about-afca/codes-of-practice>. **26** *Rules*, above note 13, r A.15.3.

Mark Holden is a Dunghutti man and solicitor with the Financial Rights Legal Centre. Mark is one of the leaders of Financial Rights Legal Centre's Mob Strong Debt Help service, a national legal phone service which specialises in consumer financial issues.
PHONE 1800 808 488.
WEBSITE https://financialrights.org.au/mob-strong-debt-help.

By Adjunct Professor Allan Anforth AM

The law on recovery

Compensation recovery under the *Social Security Act*

The application of compensation recovery provisions to social security payments has been the subject of a large volume of case law for actions in debt in the common law courts, administrative review in the Administrative Appeals Tribunal (AAT) and judicial review in the Federal Court.

and preclusion

This article is an overview only: it is not practicable to review all of this case law in an article of this length, and the reader should consult other sources for more details.[1] However, it provides guidance for legal practitioners on applying compensation recovery provisions, alerting them of the need to:

- be aware of the compensation preclusion periods;
- ensure clients are made aware that they will not be allowed to resort to social security for the duration of the preclusion period;

- ensure clients are warned against the danger of dissipating the compensation funds rather than managing them;
- challenge the inclusion of legal costs and medical treatment costs in the preclusion lump sum;
- make 'special circumstances' hardship claims and not just accept the Secretary's decision; and
- make those claims within the statutory time frames.

THE COMPENSATION RECOVERY PROVISIONS

The compensation recovery provisions apply to all social security payments that are defined to be 'compensation affected payments' in the *Social Security Act 1991* (Cth) (*SSA*), s17.

These provisions bind state/territory and federal government agencies, and all companies, insurers or persons that pay compensation for personal injuries under common law or statutory schemes.[2] The substantive provisions are located in pt 3.14 of the *SSA*, ss1160–1185, and the relevant definitions are located in s17.

The compensation recovery provisions are an alternative to the ordinary income test in pt 3.10 of the *SSA*. Compensation payments that fall within pt 3.14 are assessed under that part and not under the ordinary income test. Some forms of payment are excluded from both pt 3.14 and from the ordinary income test, being those excluded incomes under s8(8) or s8(11) of the *SSA*. Generally, the compensation recovery test operates more harshly than does the income test. This is partly because there are allowances in the income test that do not exist in the compensation recovery test and the reduction rate in the income test is only 50c in the dollar, whereas the reduction rate for the compensation recovery provisions is $1 for $1. The income test has an income test-free amount that a person can earn before the income test applies. There is no allowance in the compensation recovery provisions.

Once compensation monies are received, they constitute an asset for asset test purposes, and any income from those monies constitutes income for the income test.

DEFINING COMPENSATION

'Compensation' is defined in s17(2) to be:

- any payment or damages;
- made either in lump sum or in periodic form;
- made wholly or partly for lost earnings or lost earning capacity (past and future economic loss); and
- made for personal injuries (physical or mental).

All four criteria must be satisfied before the payment is treated as 'compensation' for the purposes of pt 3.14.

The above definition is subject to the caveat that s17(2A) excludes from the operation of pt 3.14 any insurance or other payment made under an arrangement for which the applicant has contributed (that is, paid premiums). This exclusion is subject to the further caveat that the insurance payment will not be exempt from pt 3.14 if the terms of the payment include a claw back under which the insurance payment is reduced by the amount of any social security payment made. This kind of claw-back clause is seen to be an attempt to cost shift onto the Commonwealth. The claw-back clause is not invalidated, that is, it is still legal; however, the insurance payment as a whole is then caught by pt 3.14 – that is, it loses its exempt status.

The definition of compensation is widely drawn. The term 'payment' is wide enough to catch all manner of payments irrespective of the name or title given to the payment. It is the substance of the payment that is critical and not the nomenclature used. The Secretary has power to go behind any award to examine its true nature, including looking to the pleadings and other correspondence passing between an applicant and the third-party defendant. For details of the Secretary's role, see s23(1).

APPLICATION OF COURT DECISIONS

If an award is made by a court after hearing the evidence and the court provides a dissection of the award into economic and non-economic loss, s17(3) provides that the Secretary must accept and apply this dissection. If an award by a court is by consent or does not provide the relevant dissection, the Secretary is empowered to look behind the award to ascertain its true content.

The Secretary also has the power to compel an applicant/recipient of social security to take reasonable steps to pursue a claim for compensation against any third party (s1166), although the Secretary rarely exercises this power.

Not all awards of damages or insurance payments are for personal injuries (physical or mental). This issue is particularly acute in various forms of human rights claims for embarrassment and other psychological reactions that fall short of a recognised psychiatric condition – for example, discrimination claims. The distinction is also relevant to payments for loss of career prospects for unfair or unlawful dismissals. There is a growing body of case law on these issues arising from the various state and territory equivalents of the *Civil Law (Wrongs) Act 2002* (ACT) or the *Civil Liability Act 2002* (NSW). There is no Commonwealth legislative equivalent and the relevant law for Commonwealth purposes is that of the state/territory in which the cause of action arises. Death claims and compensation to relatives claims are not claims for personal injuries to the social security recipient.

Not all awards for personal injuries include claims for lost earnings or lost earning capacity. It is often the case that tort or insurance claims for people who are already receiving social security payments will not contain any element of past or future economic loss.

It is important to note that, even if only a small part of the award is for economic loss, the whole of the award, including all the non-economic loss components and costs, is caught in the 50 per cent deeming rule of pt 3.14 discussed below.

Some legal practitioners do, however, think it useful to make a claim for nominal past and future economic loss as a means of obtaining a small increase in payments. These practitioners will need to ensure that the small nominal payment for economic loss at least covers the consequential loss of social security payments that will follow from the inclusion of the whole of the award in the 50 per cent deeming rule described below.

The *SSA* requires an applicant to notify the Secretary of the existence of a compensation claim. The Secretary then has the power to serve a notice on the defendant to those proceedings or the insurer, which prevents the defendant or insurer from paying out any compensation until the Secretary's prior claim for recovery of social security payments is satisfied.[3]

Once the Secretary has determined that a recovery is due from the compensation payment, an applicant can seek internal review of that decision. If not satisfied with the internal review, the applicant can seek first-tier review in the AAT. If still not satisfied, the applicant or the Secretary can seek second-tier review in the General Division of the AAT.

TYPES OF PAYMENT

Part 3.14 of the *SSA* contains a range of provisions that deal with the various permutations of periodic and lump sum payments, including:

1. lump sum redemptions of periodic payments;[4]
2. multiple lump sum payments, including separate awards for damages and for costs; and
3. lump sums superimposed on periodic payments.

Again, it is not practicable in an article of this size to address the various permutations. Other publications supply more details.[5]

Periodic payments

Periodic payments do not have to be temporally periodic. 'Periodic' means that the payment concerned is not a final lump sum payment.

The compensation preclusion period for periodic payments begins on the day of the first periodic payment. During the period of the payments, the applicant's fortnightly entitlement to social security payments is reduced dollar for dollar against the fortnightly compensation payment received.[6]

Lump sum payments

In the case of a lump sum award in which the court did not provide any relevant dissection of the components, the whole of the award, inclusive of costs and past and future medical costs, is included. The legislation then deems that 50 per cent of this total amount is for economic loss. That 50 per cent sum is then divided by a prescribed figure called the 'income cut-out amount' to arrive at a fixed number of weeks. The income cut-out amount is the amount above which no pension is payable to a single person under the ordinary income test in the Pension Rate Calculator in s1064 of the *SSA*, currently at about $1000 per week. This is an indexed amount and so changes over time. For example, if an applicant received a total of $1 million in compensation, then the 50 per cent amount is $500,000. This is divided by $1000 to 500 weeks.

Services Australia has a website which provides a calculator for the above purposes.[7]

The lump sum compensation preclusion period starts from the date of loss of earning capacity that is being compensated (that is, usually the date of the injury) and continues for the duration of the weeks determined under the 50 per cent rule. In this period no social security payments are made.[8]

Special circumstances – hardship

The 50 per cent deeming rule can often operate unfairly for applicants. For this reason, the legislation contains a power for the Secretary to disregard some parts of the compensation payment so as to produce a reduction in the preclusion period.[9]

There is a large volume of cases on these special circumstances that recognise all kinds of special circumstances which are neither a defined nor a closed class.[10]

For example, one common issue arises when the recipient of the compensation uses that money to buy a house or pay off an existing mortgage, to alleviate the burden of payment of rent while living on social security payments. Some AAT members have taken the view that this is profligate behaviour and have denied special circumstances. Other members have found special circumstances. They have taken the view that to buy a modest house was prudent behaviour and that it is not the purpose of the legislation to drive social security recipients further into poverty by forcing them to exhaust their compensation on rent.

These are the main grounds for a finding of special circumstances:

(a) The inclusion in the lump sum of disproportionate legal costs awards.
(b) The inclusion in the lump sum of medical treatment costs.
(c) The failure of legal practitioners to advise applicants of the existence of the preclusion period and the need to deal conservatively with their compensation money, including not wasting it, making large gifts to family members, or buying expensive cars or houses.
(d) Unanticipated medical or social costs.
(e) Loss of the compensation funds for reasons beyond the applicant's control.

The main grounds for denying special circumstances involve the unreasonable or even reckless expenditure of the compensation money by the applicant, family and friends. But even then there are differences of opinion reflected by different AAT members on this issue.

The AAT has jurisdiction to hear and determine special circumstances claims and often does so favourably for applicants. There are statutory time limits for lodging appeals to the AAT, but there is no lodgement fee and no legal costs are awarded either way irrespective of the outcome. ■

Notes: **1** For a detailed review of the legislative provisions and case law, see P Sutherland and A Anforth, 4th ed, *Social Security and Family Assistance Law*, The Federation Press, 2022. **2** *Social Security Act 1991* (Cth) (*SSA*), s1162. **3** Ibid, s1184. **4** Ibid, s1164. **5** See for example Sutherland and Anforth, above note 1. **6** *SSA*, s1173. **7** See Services Australia, *Online estimators*, 2021 <https://www.servicesaustralia.gov.au/online-estimators#a2>. **8** *SSA*, ss1169–1170. **9** Ibid, s1184K. **10** Cases of this kind are reviewed at some length in Sutherland and Anforth, above note 1.

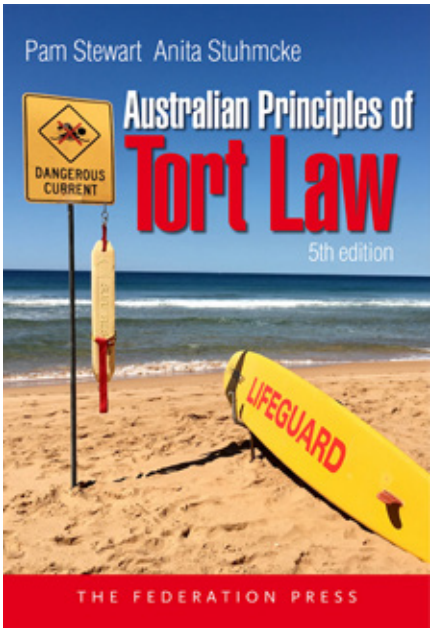
Adjunct Professor Allan Anforth AM is a barrister and Adjunct Professor of Law at the University of Canberra.

By Bill Madden

Australian Principles of Tort Law

5th edition

By Pam Stewart and Anita Stuhmcke



Publisher: The Federation Press, 2022

ISBN: Paperback 9781760023355 eBook 9781760023362

Extent: 871pp

Many of us have forgotten more law than we remember, including some important tort law issues. Adjunct Fellow Pam Stewart and Professor Anita Stuhmcke of the Faculty of Law, University of Technology Sydney have produced a fifth edition of their book *Australian Principles of Tort Law*. Their book may well help us overcome gaps in our memories and assist with some new insights.

The first edition of this book was released in 2005 and the authors have done well to update the book so frequently. The content of the fifth edition, with 24 chapters (listed below) running to over 800 pages, as to be expected includes 'intentional' torts to the person, trespass to land, nuisance and of course negligence.

However, the authors have not confined themselves to what might be called a 'traditional' chapter structure; rather, they have divided the book based on areas of particular or developing legal interest. There is not one chapter on negligence – there are ten. For example, 'atypical plaintiffs and specific duty categories' are allocated a separate chapter, to discuss claims concerning negligence before conception/wrongful birth claims, psychiatric injury (mental harm) and other topics.

Causation in negligence is addressed in two chapters. Unsurprisingly the first looks at common law causation and the legislatively necessary condition and scope of liability provisions. Helpfully that chapter includes a succinct review of material cause and increase in risk caselaw, along with lost chances. The second causation chapter discusses remoteness of damage, including eggshell skull principles.

The book also picks up important topics such as negligently caused pure economic loss and the topical area, particularly in abuse claims, of vicarious liability and non-delegable duties. The vicarious liability discussion by the authors includes the 'akin to employment' debate, but unfortunately this predates the recent first instance decisions in NSW and Victoria which suggest a broader gateway than the authors perceive to be permitted by *Prince Alfred College v ADC* [2016] HCA 37. No doubt the boundaries of vicarious liability will gain more attention in the next edition. Indeed, the publisher's website already includes an addendum on the recent High Court decision in *CFMEU v Personnel Contracting* [2022] HCA 1.

Moving on from negligence, there is a chapter on the rarely discussed tort of breach of statutory duty, and in that context I was pleased to see the discussion going beyond work safety cases such as *Pask v Owen* [1987] 2 Qd R 421 regarding a breach of firearms legislation in the supply of a weapon to a minor. Another chapter includes a thorough discussion of the more recent developments in claims of the *Wilkinson v Downton* [1897] 2 QB 57 type – intentional statements calculated to inflict harm – noting the continuing importance of that tort given civil liability legislative constraints.

Although the text is easy to read, there is a lot of detail; this review does not even mention all of the chapters. Lawyers in private practice may not have the luxury of the time needed

to sit down to read the book from cover to cover, but even to spend some time skimming the topics covered is worthwhile as a reminder of issues not dealt with on a daily basis.

Here is the chapter list for this edition:

1. Introduction to the Law of Torts
2. The Nature of Intentional Torts
3. Intentional Torts to the Person
4. Actions on the Case for Intentionally Caused Mental or Physical Harm
5. Trespass to Land
6. Intentional Torts Relating to Goods
7. Defences to Intentional Torts
8. Introduction to Negligence
9. Breach of Duty
10. Scope of Liability: Causation
11. Scope of Liability: Remoteness of Damage
12. Proof
13. Defences to Negligence: Contributory Negligence, Voluntary Assumption of Risk and Statutory Defences
14. The Framework of the *Civil Liability Act 2002* (NSW)
15. The Defence of Illegality and Protection of Volunteers, Good Samaritans and the Apologetic
16. Atypical Plaintiffs and Specific Duty Categories
17. Negligently Caused Pure Economic Loss
18. Liability of Statutory Authorities in Negligence
19. The Tort of Breach of Statutory Duty
20. Vicarious Liability and Non-delegable Duties
21. Nuisance
22. Remedies
23. Death
24. Contribution Among Tortfeasors

The 5th edition of *Australian Principles of Tort Law* would certainly be a valuable addition to a tort lawyer's bookshelf, for reference when difficult or uncommon issues arise. ■

Bill Madden is Special Counsel, Carroll & O'Dea Lawyers.
EMAIL bmadden@codea.com.au.

By Romaine Abraham

Case study: A percentage award of costs

The decision of *Davey v Costanzo Lawyers Ltd*[1] is instructive for many reasons. In this matter, a plaintiff in a judicial review proceeding was successful in setting aside a default judgment made against them, on the basis of irregularity. It was determined that the judgment, entered irregularly in favour of the plaintiff's former lawyers, could not remain on the record, and the review application was allowed. However, the unsuccessful first defendant was ordered to pay only 80 per cent of the successful plaintiff's legal costs.

BACKGROUND

The first defendant, a law practice, had been retained by the plaintiff between February 2018 and August 2018 approximately, to act on the plaintiff's behalf in family law proceedings. The plaintiff had initially engaged a different law practice to act on her behalf in the proceedings but had become dissatisfied with that practice.

The plaintiff, in transferring carriage of the matter to the first defendant, had intended to retain counsel to be briefed by her former solicitors throughout the proceedings, up to that point. However, counsel to be briefed was unavailable and was not willing to accept payment of fees at the conclusion of proceedings from the proceeds of the sale of shared property, as had been requested by the plaintiff. Alternate counsel was ultimately briefed, albeit at a much higher rate than had been anticipated by the plaintiff.

Final orders made by the Family Court were appealed against by the other party and at first the plaintiff was reticent to engage representation for the hearing of the appeal. Nevertheless, the plaintiff decided to retain the first defendant and obtained counsel for the appeal. In the end, the plaintiff succeeded in the appeal.

THE DEBT PROCEEDINGS AND SUBSEQUENT REVIEWS

The first defendant claimed it had rendered to the plaintiff on 28 August 2018 a memorandum of professional fees and disbursements

for work performed under the scope of the retainer. A judgment of $40,351.87 plus interest and costs was entered against the plaintiff on 17 June 2019 in favour of the first defendant, and in default of the plaintiff filing a defence in the Magistrates' Court of Victoria. The plaintiff would later claim she had never received any material regarding the debt proceedings and, unrepresented at the time, made an application to set aside the default judgment. However, on 30 July 2019 a judicial registrar refused the application. On 19 August 2019 a magistrate upheld this decision on review.

The plaintiff retained counsel and applied to set aside the default judgment again; however, on 15 May 2020 this application was also refused. The plaintiff then sought judicial review in the Supreme Court of Victoria.

Justice Quigley of the Supreme Court accepted the plaintiff's argument that performance of the contract between the plaintiff and defendant had not been sufficiently pleaded. Justice Quigley was also not satisfied that the contract terms had been sufficiently identified in order to establish the calculation of the debt owed by the plaintiff to the first defendant; her Honour further accepted that the magistrate, in denying the plaintiff's application, had formed an adverse view of the plaintiff's 'credit, candour and motivation'[2] and had therefore gone beyond the scope of the required task. Accordingly, it was determined that the default judgment should be set aside on the basis that it was entered irregularly.

COSTS OF THE REVIEW APPLICATION

Placing reliance on the general rule that costs should follow the event, the plaintiff sought her costs of the proceeding on the standard basis. The first defendant countered that a substantial reduction should be applied to the costs payable to the plaintiff in an exercise of the Court's unfettered discretion as to costs, notwithstanding the plaintiff's success. Only two of the 21 grounds contained in the amended Originating Motion were pursued and argued by the plaintiff. As such, the first defendant submitted that the plaintiff had caused the proceeding to be conducted in such a manner that costs were needlessly expended. The first defendant further argued that it was apparent the plaintiff was responsible for the Court Book, which was described by the Court as 'voluminous, repetitive and difficult to follow', hence requiring the first defendant to undertake unnecessary work to defend the application for review.[3]

Although it was conceded that it is not uncommon for a smaller number of grounds to be maintained at the hearing of a matter, and Quigley J commended counsel for both parties for narrowing the matters to be determined at hearing, the renunciation of 19 grounds of appeal resulted in a 'substantial amount' of wasted work for the first defendant.[4] Accordingly, her Honour determined that it was 'not fair and just in the circumstances for all of the plaintiff's costs to be paid by the first defendant',[5] and made an order that 80 per cent of the plaintiff's costs be paid by the first defendant.[6] This was despite the Court acknowledging 'the obvious effort that counsel for the plaintiff made in the preparation of the matter for hearing and the expeditious way in which the proceeding was argued at the trial'.[7]

Even where a party is successful, it is important to remember that there are costs implications where the conduct of the successful party results in a substantial amount of wasted costs for the unsuccessful party. ■

Notes: **1** (ACN 158 282 163) [2021] VSC 449. **2** Ibid, [84]. **3** *Davey v Costanzo Lawyers Ltd* (ACN 158 282 163) (Costs) [2021] VSC 474, [12]. **4** Ibid. **5** Ibid. **6** Ibid, [14]. **7** Ibid, [11].

Romaine Abraham is a costs lawyer based in Melbourne, Victoria.

ONLINE CPD

The ALA is offering two options to enable you to continue your CPD learning.

Log on to watch a webinar live or join a webcast (a webinar recording).

View our online library at
https://www.lawyersalliance.com.au/events/category/online-cpd

This issue of ***PRECEDENT*** is cited as (2022) 169 PRECEDENT. ISSN 1449-7719

ADVICE FOR CONTRIBUTORS TO *PRECEDENT*: While contributing authors retain copyright of their material, the Australian Lawyers Alliance (ALA) reserves 'first rights' to publication of commissioned works. After initial publication by the ALA, authors may publish articles elsewhere, provided the ALA is appropriately acknowledged as first publisher. Any compensation or fees that fall due (ie, royalty payments) in relation to articles' initial publication in ***PRECEDENT*** accrue to the ALA. The ALA can arrange for articles to be peer reviewed on request from contributors at the time of commissioning.

PRECEDENT is printed on Monza Recycled paper.

VICTORIA CONFERENCE

26-28 MAY 2022

PROGRAM HIGHLIGHTS

Keynote address
Fiona Patten MP, Parliament of Victoria

Gender equality in the law
Kathleen Foley SC, Barrister, Dever's List

Treaty process
Marcus Stewart, Co-Chair,
First Peoples' Assembly of Victoria

Plus the annual case review, TAC panel and Workers Compensation panel.

Further information

https://www.lawyersalliance.com.au/events/event/vicconf22

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

8 CPD POINTS
26-28 MAY 2022
RACV CAPE SCHANCK