Australian National University Public Law Conference 2023: Integrity and Innovation (Public Law in the 2020s)

Introduction

1. Esteemed colleagues and advocates of public law, I extend my gratitude for your attendance at this session, titled ‘A new system of Federal Review: changes to the AAT’. It is an honour to engage with such a distinguished assembly of scholars, lawyers, and professionals.

2. I wish to specifically address the esteemed attendees on two pertinent matters.

Statutory Prerequisites for Submitting an Application

3. The initial matter I intend to address pertains to the jurisdictional prerequisites for submitting a valid application for review to the Administrative Appeals Tribunal (hereinafter referred to as "the **Tribunal**"). These prerequisites are enshrined in s 29 of the Administrative Appeals Tribunal Act 1975 (Cth) (henceforth "the **AAT Act**").

4. I shall not delve into a comprehensive discussion of all jurisdictional prerequisites at this juncture. Nevertheless, I aim to elucidate certain facets of s 29 that may present challenges, along with potential rectifications to be considered upon the inauguration of the forthcoming Administrative Review Tribunal (hereinafter referred to as "the **ART**").

5. Section 29(1)(c) of the AAT Act mandates that an application submitted to the Tribunal for a decision review must encapsulate a clear articulation of the rationale underlying the application. It is imperative to underline that any deviation from this stipulation results in the application being rendered invalid, as elucidated in the judgments of Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 489 and Miller v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 183.

6. The stipulations delineated in s 29(1)(c) are stringent and leave little room for flexibility. Regrettably, the provision does not endow the Tribunal with any discretionary powers to either absolve applicants from adhering to the specified requirement or to proffer an extension for compliance. This rigidity potentially

exhibits an unintended discriminatory bias, particularly affecting applicants who grapple with the nuances of the English language or those constrained by limited access to legal representation due to circumstances such as incarceration or prolonged periods in immigration detention.

7. A salient inconsistency that warrants our attention is the divergence between s 29(1)(c) of the AAT Act and s 347 of the MA. Specifically, s 347 of the MA delineates the statutory criteria required to submit an application for a Part 5 reviewable decision to the Migration and Refugee Division (hereinafter referred to as "the **MRD**") of the Tribunal.

8. In contrast to s 29(1)(c) of the AAT Act, s 347 refrains from enforcing an unequivocal stipulation necessitating the inclusion of the underlying rationale for the application within its contents. It is noteworthy to mention that the MRD adjudicates Part 5 reviewable decisions, distinct from the scope of applications encapsulated under s 29(1) of the AAT. Yet, the disparity in the stipulations between s 29(1)(c) and s 347 raises questions about the coherence and uniformity of requirements across different facets of administrative review.

9. It is imperative to underscore that both the General Division (hereinafter referred to as "the **GD**") and the MRD adjudicate review applications pertinent to diverse dimensions of Australian migration law. Upon a meticulous examination, no cogent rationale emerges that justifies the apparent legislative incongruence between s 29(1)(c) of the AAT Act and s 347 of the MA. This disparity warrants a deeper exploration to ensure uniformity and coherence in the legislative framework governing administrative review processes.

10. There exists a substantial justification for reconsidering and potentially moderating the stipulations under s 29(1)(c) of the AAT Act in the forthcoming legislation aimed at instituting the ART.

11. The AAT's merits review capacity is best conceptualised as a re-evaluation, wherein the AAT assumes the position of the original decision-maker to independently ascertain, based on the evidence at its disposal, the optimal decision under the confines of the delegated authority. This sentiment is encapsulated in the ruling of Frugtniet v Australian Securities and Investments

Commission (2019) 266 CLR 250 at 271 [51]. In light of this, there isn't an inherent obligation to pinpoint discrepancies in the initial decision-maker's determinations.

12. To further elucidate, the AAT's role is fundamentally to re-examine and, if necessary, re-adjudicate matters initially determined by the primary decision-making authority, as illustrated in Shi v Migration Agents Registration Authority (2008) 235 CLR 286 at 315 [100]. In this context, the omission of a stated rationale for the application shouldn't serve as an insurmountable barrier to invoking the Tribunal's jurisdiction. Generally, there isn't a stringent need to highlight errors in the original decision.

13. Furthermore, within the continuum of administrative processes, the underlying motives for an application tend to crystallise as the case unfolds within the Tribunal's purview. Typically, litigants are mandated to present a comprehensive outline detailing facts, central issues, and assertions preceding a contested hearing, as evidenced in LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039 [21].

14. Throughout the Tribunal's proceedings, documents are frequently presented pursuant to official directives, and evidence is solicited in both documentary and oral forms during adversarial hearings. The crux of the matter is straightforward: the substantive reasons underlying an application often become manifest post the exhaustive adjudication by the Tribunal. Even if one were to challenge this premise, it remains conceivable that the Tribunal, based on its evaluation of evidentiary weight and arguments, could arrive at a conclusion distinct from the initial decision-maker's judgment.

15. The stipulation for an obligatory inclusion of a statement elucidating the reasons for the application to the Tribunal ought to be re-evaluated. Upon the Tribunal acquiring jurisdiction, in instances where a party neglects to adhere to a directive issued by the Tribunal pertaining to the submission of a statement delineating facts, pivotal issues, and arguments, the Tribunal should be vested with the discretionary power to terminate the proceedings at that juncture. This approach ensures a more equitable procedural framework.

Statutory Objectives of the Tribunal

16. Section 2A of the AAT Act outlines the objectives the AAT should follow in executing its functions. The AAT's primary function is to offer a review mechanism that is easily accessible, ensures fairness, efficiency, and promptness, aligns its procedures with the significance and intricacy of the case, and fosters public trust in its decision-making process.

17. While the existing objectives, laid down by the Tribunals Amalgamation Act 2015 (Cth), have provided a comprehensive framework, there's scope for them to be fine-tuned to better serve the diversity of matters and maintain public confidence. Let us consider the following.

18. *Accessibility*. It is imperative that the Tribunal maintains its accessibility for all individuals, regardless of their socio-economic status or educational achievements. The forthcoming ART should epitomise a legal framework that underscores effortless access, both in physical proximity and in comprehensibility, drawing parallels with the provisions in the South Australian Civil and Administrative Tribunal Act 2013 (SA). Such an approach should encompass the refinement of procedures, the adoption of lucid language, and the implementation of uniform and standardised forms.

19. *Promotion of Public Trust*. The objectives of the AAT should be expanded to mirror the emphasis other state and territory tribunals place on promoting public trust in broader governmental decision-making, as seen in the Queensland Civil and Administrative Tribunal Act 2009 (Qld) and the ACT Civil and Administrative Tribunal Act 2008 (ACT).

20. Over the course of their tenure, Tribunal members amass substantial expertise in the intricate task of evaluating and critically reviewing various facets of Commonwealth legislation and associated policies. This extensive immersion provides them with a nuanced perspective on the implementation and interpretation of Australian legal provisions.

21. Given their vantage position, they are exceptionally equipped to discern and subsequently relay to the Commonwealth Attorney-General any recurrent or systemic challenges associated with the execution of authorising laws. This

proactive oversight role is not unprecedented; it resonates with the provisions encapsulated in s 6(h) of the ACT Civil and Administrative Tribunal Act 2008 (ACT).

22. The ART objectives should include objectives that emphasise transparency, independence in decision-making, and holding the broader government mechanisms accountable.

23. *Dispute Resolution*. In recent years, there has been a discernible trend towards the adoption and prioritisation of dispute resolution mechanisms. Given this evolving landscape, it would be judicious for the forthcoming legislation that oversees the ART to duly acknowledge this trend and strategically embed provisions that emphasise and prioritise such mechanisms.

24. The new legislation should integrate objectives emphasising mediation and alternative dispute resolution procedures as primary means before resorting to more formal processes, reflecting the emphasis in the South Australian Civil and Administrative Tribunal Act 2013 (SA), s 8(1)(c).

25. *Flexibility*. The forthcoming ART should be designed with adaptability and versatility at its core, ensuring its capability to address the multifaceted and diverse array of cases it will inevitably encounter. The governing legislation must encapsulate objectives that champion procedural adaptability, ensuring that each approach is bespoke and aligned with the distinct intricacies and requirements of individual cases.

26. *Cost-effectiveness*. A fundamental tenet of a just legal system is its affordability, ensuring that access to justice is not a privilege of the few but a right of all. In crafting the new legislation for the ART, it is imperative that the framework underscores the importance of cost-efficiency for all parties involved. This ensures that the legal process remains equitable, preventing financial barriers from impeding individuals' pursuit of justice.

27. By prioritising affordability, the legislation would send a clear message that justice should be universally accessible, irrespective of one's financial standing.

28. *Promotion of Best Principles of Public Administration*. The ART should stand as

a paragon of exemplary public administration, setting a benchmark for others to follow. In formulating the framework for the new ART, it is paramount that the governing objectives underscore a commitment to upholding the highest standards of administrative practice. This includes a dedication to delivering decisions of superior quality and unwavering consistency.

29. Furthermore, an unwavering adherence to procedural fairness is essential, ensuring that every stakeholder is granted an equal and just opportunity within the system. Beyond this, transparency should be woven into the very fabric of the ART's operations, guaranteeing that its processes are clear, comprehensible, and open to scrutiny. Such objectives would not only enhance the efficacy of the tribunal but also bolster public trust and confidence in its decision-making.

30. *General*. While the current objectives of the AAT Act have served its purpose, they could be enhanced to reflect the evolving legal landscape and the increasing emphasis on accessibility, transparency, and alternative dispute resolution. The proposed reforms seek to make the ART more in line with its counterparts in various states and territories, ensuring it remains a paragon of fairness, justice, and public trust.

Conclusion

31. The introduction of the ART signifies the Australian Government's commitment to modernising and streamlining the federal administrative review process, ensuring it is aligned with current needs and future challenges.

32. The establishment of the ART is a monumental step forward in our journey towards administrative excellence. Its core principles of user-focus, efficiency, accessibility, independence, and fairness are not just words, but a commitment to every individual and entity seeking review. As we transition to this new era, we are not just embracing change; we are shaping the future of federal administrative review in Australia.

Dr Jason Donnelly

27 October 2023

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INTEGRITY AND INNOVATION: PUBLIC LAW IN THE 2020S

Dear All,

Welcome to the ANU Public Law Conference for 2023, hosted by the Centre for International and Public Law.

The Public Law Conference is a flagship event for CIPL, and one we are delighted to be continuing after pandemic induced cancellations. We are thrilled to welcome academics, practitioners, and government lawyers to the ANU from across Australia to discuss the important and timely issues of integrity, accountability and corruption.

The Public Law Conference this year is made possible by the very generous support of the Australian Government Solicitor, our major sponsor. We are also indebted to the ANU College of Law and in particular the support of our Dean, Professor Anthony Connolly and our Head of School, Professor James Stellios. Many thanks to them all.

We have had a fantastic response to the Conference this year and look forward to a great day ahead of rich conversations and stimulating presentations, finishing with refreshments and food trucks on the beautiful lawn on the ANU College of Law.

And finally thank you all for attending and making the Conference be the success it is!

Imogen Saunders
Director, Centre for International and Public Law

PROGRAM OF EVENTS

Time	Event
8.30 – 9am	Registration and tea/coffee
9.00 – 9.15am	Welcome and Introduction Professor Tony Connolly, Associate Professor Imogen Saunders
9.15 – 9.45am	Keynote : A resounding 'No' at the Referendum: Some remaining options for Indigenous Peoples? **Professor Asmi Wood**
9.45 – 11am	Panel 1: Integrity, fairness, and accountability: the NACC Professor AJ Brown (Griffith); Rebekah O'Meagher (General Counsel, NACC); Kieran Pender (ANU) Jaala Hinchcliff (Deputy Commissioner NACC)
11 – 11.30am	Morning Tea
11.30am – 12.45pm	Panel 2: A new system of Federal Review: changes to the AAT Dr Lynsey Blayden (USyd); Dr Jason Donnelly (Latham Chambers); Professor Matthew Groves (Deakin)
12.45 - 1.45pm	Lunch
1.45 - 3pm	Panel 3: The rule of law in Government post Robodebt: ethics, advice and the model litigant Professor Gabrielle Appleby (UNSW); Professor Vivien Holmes (ANU); Joshua Thomson SC (Solicitor-General, WA)
3- 3.15pm	Afternoon Tea
3.15 - 4.30pm	Panel 4: Public administration post Robodebt: what role for the automative State? Professor Terry Carney (USyd); Katie Miller (former Deputy Commissioner, IBAC); Professor Jeannie Paterson (UMelb)
4.30 - 5pm	Conclusion
5 – 7pm	Drinks and food trucks on the ANU College of Law lawns

SPEAKERS

KEYNOTE : A RESOUNDING 'NO' AT THE REFERENDUM: SOME REMAINING OPTIONS FOR INDIGENOUS PEOPLES?

ASMI WOOD

Asmi Wood is a Professor of Law at ANU. His current research and publications have centred around two main topics; firstly, Constitutional recognition of Indigenous people in Australia and secondly, Indigenous Participation in Higher Education. His research has included policy papers, law reform submissions and articles or chapters in journals and books. Asmi has presented several keynote addresses to large conferences interested in Indigenous issues including on issues such as 'recognition'.

PANEL 1: INTEGRITY, FAIRNESS, AND ACCOUNTABILITY: THE NACC

AJ BROWN

A J Brown is professor of public policy and law in at Griffith University. He has led seven Australian Research Council projects into public integrity and governance reform since 2005, three projects on public interest whistleblowing, and three ARC projects establishing the Australian Constitutional Values Survey, including a current Discovery project on public trust, mistrust and distrust. He has been President of the Australian Political Studies Association and is a Fellow of the Australian Academy of Law. In 2023, he was made a Member of the Order of Australia for services to the law and public policy, particularly through whistleblower protection.

REBEKAH O'MEAGHER (NACC)

Rebekah O'Meagher is the General Manager of the Legal Branch for the National Anti-Corruption Commission (the Commission). Prior to joining the Commission, Rebekah worked for the Commonwealth Director of Public Prosecutions for approximately 18 years. She worked in many different areas and roles, including as the Assistant Director and Branch Head of Legal Capability and Performance, Assistant Director for the International Assistance and Specialist Agencies Branch, and Principal Federal Prosecutor for the National Business Improvements Branch.

KIERAN PENDER

Kieran Pender is a visiting fellow at the ANU Centre for International and Public Law and senior lawyer at the Human Rights Law Centre. He was previously a senior legal advisor at the International Bar Association's Legal Policy and Research Unit in London. He is a graduate of the ANU, where he was awarded the university medal. Kieran frequently writes, speaks and publishes on public law and employment law issues. Kieran has guest lectured at universities across four continents, and spoken at the United Nations, European Parliament, World Bank and OECD.

PANEL 2: A NEW SYSTEM OF FEDERAL REVIEW: CHANGES TO THE AAT

LYNSEY BLAYDEN

Lynsey Blayden is a lecturer in constitutional and public law at Sydney Law School. Her areas of research interest span constitutional and administrative law and include constitutional theory and Australian constitutional history. Prior to joining Sydney Law School, she was a postdoctoral fellow with the ARC Laureate Program in Comparative Constitutional Law at Melbourne Law School. She has also taught administrative and constitutional law at the University of New South Wales, where she completed her PhD.

JASON DONNELLY

Jason Donnelly currently holds concurrent positions as a Senior University Lecturer at Western Sydney University (for 14 years) and as a Barrister (for 12 years) with a national practice. Throughout his career, Dr Donnelly has provided counsel and representation in approximately 200published legal decisions, primarily in the fields of Australian administrative and migration law. Dr Donnelly has published extensively and made contributions to various Commonwealth parliamentary inquiries. Before his call to the bar, Donnelly worked as a Tipstaff to Justice Peter McClellan AM KC and as a legal researcher for Justice Michael Kirby AC CMG.

MATTHEW GROVES

Matthew Groves is Alfred Deakin Professor of Law in the Deakin University Law School. Matthew's research is primarily about administrative law. He is general editor of the Australian Journal of Administrative Law and co-author of Aronson, Groves and Week Judicial Review of Administrative Action and Government Liability (7th ed ed 2022) and Creyke, Groves, McMillan and Smyth, Control of Government Action (5th ed, 2022). Matthew has edited 10 books on different aspects of public law and is currently editing a comparative volume on tribunals in the common law world.

PANEL 3: THE RULE OF LAW IN GOVERNMENT POST ROBODEBT: ETHICS, ADVICE AND THE MODEL LITIGANT

GABRIELLE APPLEBY

Gabrielle Appleby is a Professor at the Law Faculty of University of New South Wales (Sydney). She researches and teaches in public law, with her areas of expertise including the role, powers and accountability of the Executive; parliamentary law and practice; the role of government lawyers; and the integrity of the judicial branch. She is the Director of The Judiciary Project at the Gilbert + Tobin Centre of Public Law, the constitutional consultant to the Clerk of the Australian House of Representatives and a member of the Indigenous Law Centre.

VIVIEN HOLMES

Vivien Holmes teaches and researches in the fields of legal ethics, legal education and the legal profession at the Australian National University (ANU). Prior to joining ANU, Vivien worked as a litigation solicitor in private and government practice, a government legal policy officer, the Registrar of the NT Supreme Court, the NT Registrar of Probates, the NT Deputy Coroner and a Judicial Registrar of the NT Magistrates' Court.

JOSHUA THOMSON

Joshua Thomson SC was appointed as the Solicitor-General of Western Australia in October 2018. Prior to that he had been an independent barrister since 2001. He was appointed as Senior Counsel in 2012. He is a member of the Legal Practice Board in Western Australia.

PANEL 4: PUBLIC ADMINISTRATION POST ROBODEBT: WHAT ROLE FOR THE AUTOMATIVE STATE?

TERRY CARNEY

Terry Carney AO is Emeritus Professor at the Law School University of Sydney, a Fellow of the Australian Academy of Law and a past President (2005-2007) of the International Academy of Law and Mental Health. The author of nearly a dozen books/monographs and over 250 academic papers, he is currently an Associate Investigator at the ARC Centre of Excellence for Automated Decision-making and Society, writing on issues of automation in social security law (including Robodebt), welfare services and the NDIS.

KATIE MILLER

Katie Miller is a leading government lawyer, advocate and commentator on how technology is changing the ways lawyers and government work. Katie is a former Deputy Commissioner of Victoria's anti-corruption commission, IBAC, and a former President of the Law Institute of Victoria. Katie's works include Disruption, Innovation and Change: The future of the legal profession, a chapter in OVIC's publication Closer to the Machine: Technical, social and legal aspects of AI and The Automated State: Implications, Challenges and Opportunities for Public Law (co-editor), the first Australian book to cover in depth the public law implications of government automation.

JEANNIE PATERSON

Jeannie Paterson is a Professor of Law and Co-Director the Centre for AI and Digital Ethics (CAIDE) at the University of Melbourne. Her research covers consumer protection, consumer credit, product liability law, and data protection law, with a focus on the ethics, law and regulation of new digital technologies. Jeannie holds a current legal practising certificate and regularly consults to not for profits, government and industry.

CONTACT US

ANU Centre for International and Public Law

The Australian National University

Canberra ACT 2600 Australia

cipl@anu.edu.au

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