

Enterprises and Tax Administrations (the OECD Guidelines), but the Court rejected this approach.¹³⁰

13.112 Consequently, on 1 November 2011, the Australian Government proposed amendments to confirm that the transfer pricing rules contained in Australia’s tax treaties provide a power, through express incorporation into Australia’s domestic law, to make transfer pricing adjustments independently of div 13. In introducing the legislation, it was explained that this would ‘ensure the Parliament’s view as to the way in which treaty transfer pricing rules operate is effective, that the Australian revenue is not compromised, and that international consistency is maintained with our tax treaty partners’.¹³¹ Further, the Explanatory Memorandum stated:

There are strong arguments ... for concluding that under the current income tax law, treaty transfer pricing rules apply alternatively to Division 13. If this is the case, these amendments constitute a mere rewrite of those rules. To the extent that some deficiency exists in the current law, these amendments ensure the law can operate as the Parliament intended.¹³²

13.113 The amending act commenced on the date of assent, but the provisions apply to income years starting on or after 1 July 2004.¹³³ The Explanatory Memorandum observed that the introduction of retrospective taxation is not done lightly and generally only ‘where there is a significant risk to revenue that is inconsistent with the Parliament’s intention’. The arguments for retrospective operation were set out at length in the Explanatory Memorandum. Emphasis is placed on evidence that, since 1982, Parliament has assumed that treaty pricing rules are available as an alternative to div 13, and the Commissioner has also publicly maintained this view.

13.114 This analysis has been criticised. The Law Council, for example, submitted to the Senate Economics Legislation Committee that the provisions of the Bill cannot be regarded as merely ‘clarifying’ the law:

To the contrary, the Bill introduces a new test for interpretation. This test requires taxpayers and the Court to read relevant provisions of the tax treaties ‘consistently’ with OECD guidance, fundamentally changing the interpretation and application of the law.¹³⁴

13.115 In a submission to this ALRC Inquiry, the Law Council argued that these retrospective laws were not justified for two reasons. First, it could not be said that the amendments merely restored a prior understanding of the law, as differing views and questions had been raised by the courts. Secondly, there was no evidence of avoidance behaviour.¹³⁵

130 Ibid [116]–[118].
131 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.
132 Ibid.
133 *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012* Sch 1.
134 Law Council of Australia, Submission to Senate Economics Legislation Committee, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1)*, 2012.
135 Law Council of Australia, *Submission 75*. Bridie Andriske has also challenged the assertion that taxpayers should have assumed that the law was always intended to operate in the way that the amendments provided: Bridie Andriske, *Are the Retrospective Transfer Pricing Measures Unconstitutional?* (18 October 2012) <www.corrs.com.au/thinking/insights>.

13.116 There may be significant public interest reasons for these laws—for example, to allow the Commissioner to re-examine past transfer pricing transactions, in light of overseas examples of unacceptable abuse of corporate tax arrangements.¹³⁶ Any disadvantage to taxpayers needs to be balanced against concerns about protection of public revenue and the extent to which major multinational companies are contributing tax in Australia—a matter of concern to Australian governments and the current Senate inquiry into corporate tax avoidance.¹³⁷

Concerns about retrospective taxation laws

13.117 Concerns about the scope of retrospective taxation laws have been widely expressed. For example, in 2012, the Tax Institute made a submission to Treasury in which it noted an ‘extremely concerning trend in recent months of the Government announcing retrospective changes to the tax law’. It stated that

[c]hanges to reverse consolidation tax laws were preceded by amendments to the Petroleum Resource Rent Tax backdated to 1990; and an overhaul of transfer pricing laws, with effect from 2004. More recently, amendments to the general anti-avoidance law in Part IVA, were announced to apply from the date of announcement in March 2012, despite the community not knowing the detail of those changes and most likely not being able to know the detail for some months hence.¹³⁸

13.118 The Tax Institute warned that retrospective changes in tax law are likely to ‘interfere with bargains struck between taxpayers who have made every effort to comply with the prevailing law at the time of their agreement’.¹³⁹ Similar concerns were expressed in the Institute’s submission to this ALRC Inquiry.¹⁴⁰

13.119 The Tax Institute accepted that retrospective tax laws are justified in the case of

- (a) concessional announcements, where it is proposed that a person should have a benefit from a given date but the legislative programme does not allow for immediate enactment; and
- (b) strengthening of tax laws, where an issue has come to the attention of the Commissioner requiring prompt attention (subject again to the legislative programme).¹⁴¹

13.120 The Tax Institute stressed that once an announcement has been made, legislation should be introduced promptly.

136 Les Nielson, Department of Parliamentary Services (Cth), *Bills Digest*, No 91 of 2012–13, 15 March 2013 22.
137 Senate Economic References Committee, *Corporate Tax Avoidance*, due to report on 26 February 2016.
138 Tax Institute, *2012–13 Federal Budget Submission*, 2012 covering letter.
139 *Ibid.*
140 The Tax Institute, *Submission 68*.
141 *Ibid.*

Migration laws

13.121 Laws with retrospective operation are not uncommon in migration law. As noted in Chapter 2, the enjoyment of common law rights and freedoms is not confined to Australian citizens, and a non-citizen in Australia is entitled to the same protection of the law as a citizen.¹⁴² It follows that the presumption against retrospective operation of law would apply to laws affecting non-citizens, but of course that presumption can be rebutted by plain words in the statute. Similarly, retrospective laws affecting non-citizens require appropriate justification, as do those affecting citizens. As noted above, the burden of justification for a retrospective civil law is not as high as for criminal laws. In considering whether a retrospective law is justified, the proportionality principle may be relevant—that is, laws should have a legitimate objective, and the means chosen to achieve that objective should be rationally connected with that objective.¹⁴³ Thus, a retrospective law is more likely to be justified if its retrospective nature is necessary to achieve its objective.

13.122 Two retrospective migration laws have been identified by stakeholders as raising concerns.

Migration Act s 45AA: unauthorised maritime arrivals

13.123 *Migration Act s 45AA* allows an application for one type of visa to be considered as an application for a different type of visa, as specified by regulations.¹⁴⁴ It was inserted by sch 6 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). Regulation 2.08F was then inserted into the *Migration Regulations 1994* (Cth) to convert all protection visas into temporary protection visas.¹⁴⁵ The amendment changes rights and obligations retroactively in that an existing application is taken to have never been a valid application for a permanent protection visa, and always to have been an application for a temporary protection visa.¹⁴⁶

13.124 The Explanatory Memorandum to the amending Bill indicated that the measures were intended to ‘make it clear that there will not be permanent protection for those who travel to Australia illegally’. It also said the ‘intention is that those who are found to be in need of protection ... will be eligible only for grant of temporary protection visas’.¹⁴⁷

142 *Bradley v Commonwealth* (1973) 128 CLR 557, 580.

143 See further Ch 2.

144 Section 45AA(8)(b) expressly excludes the operation of s 7(2) of the *Acts Interpretation Act 1901* (Cth).

145 Briefly, a temporary protection visa is valid for up to three years. It allows a person to work and have access to various benefits but unlike a permanent protection visa does not confer any family reunion rights and requires the holder to apply for permission to travel outside of Australia.

146 Melinda Jackson, Clare Hughes, Marina Brizar, Besmellah Rezaee, Submission No 129 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.

147 Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth).

13.125 The Explanatory Statement to the regulation emphasised that it was intended to remove the incentive to undertake a dangerous journey:

The conversion of unfinalised PPV applications made by unauthorised arrivals into TPV applications is one of the many key measures for implementing the government's policy in combating people smuggling. The conversion ensures that applicants who are found to engage Australia's protection obligations will only be granted a TPV instead of a PPV, thereby removing an incentive for asylum seekers to use irregular channels including dangerous journey to Australia by sea to seek protection.¹⁴⁸

13.126 Stakeholders commented critically on the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* on protection visa applications.¹⁴⁹ For example, the Refugee Council of Australia claimed that, as a result of these provisions,

thousands of asylum seekers who arrived in Australia without valid visas and whose protections claims have not yet been finally determined are now no longer eligible for permanent Protection Visas. If they are found to be refugees, they will have far fewer rights than was previously the case ...¹⁵⁰

13.127 The Refugee Council submitted that retrospective reintroduction of temporary protection is unjustified:

The Australian Government maintains that Temporary Protection Visas act as a deterrent to unauthorised arrival. If the Government believes this to be the case, it makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection only should they arrive without a visa and thus could not possibly have been deterred from seeking to arrive in an authorised manner.¹⁵¹

13.128 The Refugee Advice and Casework Service (RACS) also expressed concern about s 45AA of the *Migration Act*. RACS considered that these changes destabilised an administrative framework that should be certain, predictable and impartial.¹⁵² Similarly, the Human Rights Law Centre stated that:

The justification offered by the Government, namely to deter asylum seekers from coming, does not justify retrospectively offering an inferior form of protection to those already here.¹⁵³

13.129 The Australian National University Migration Law Program observed that the provisions converting visa applications are 'an attempt to give effect to the

148 *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015*.
149 ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*.
150 Refugee Council of Australia, *Submission 41*. For example, 'they will not be permitted to sponsor family members for resettlement in Australia, have limited access to support services and can only travel overseas with right of return if there are "compassionate or compelling circumstances" necessitating travel and only with written approval from Minister for Immigration': *Ibid*.
151 Refugee Council of Australia, *Submission 41*. See also Human Rights Law Centre, *Submission 39* regarding the absence of a deterrent effect.
152 Refugee Advice and Casework Service, *Submission 30*.
153 Human Rights Law Centre, *Submission 39*.

government’s policy that no unauthorized maritime arrival will be granted a permanent protection visa’. It submitted that:

This policy position is an inadequate justification for retrospectively removing the accrued rights of those who applied for a permanent protection visa. The retrospective nature of the provision will mean that those found to be genuine refugees [will be] on rolling temporary protection visas, which in our view, may give rise to breaches of fundamental rights, including the right to freedom of movement.¹⁵⁴

Migration Act ss 500A(3)(d), 501(6)(aa): the character test

13.130 These sections were inserted by sch 1 of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth). They provide that the Minister may refuse to grant, or may cancel, a person’s safe haven visa on the grounds that the person committed an offence while in immigration detention, while escaping from immigration detention or when having escaped from immigration detention. They also provide that a person does not pass the character test if the person has been convicted of an offence.

13.131 The amending Act received assent on 25 July 2011, and was stated to commence on 26 April 2011 (the date of the announcement of the intention to make the changes). However the changed powers apply regardless of whether the conviction or immigration detention offence concerned occurred before, on or after 26 April 2011.

13.132 The Explanatory Memorandum explained that, on 26 April 2011, the Minister’s announcement ‘put all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it’.¹⁵⁵

13.133 The Law Council submitted that these measures may not be justified in that they impose a penalty—liability to have one’s visa application refused—for an offence that may have occurred before the legislation commenced.¹⁵⁶ As noted above, there is a question over whether laws that change the present consequences of past acts can be correctly called retrospective.

Other laws

Native title law

13.134 The *Native Title Act 1993* (Cth) includes provisions that validate past acts that extinguished native title. These provisions are retroactive because they provide that certain acts are valid and are ‘taken always to have been valid’.¹⁵⁷

154 ANU Migration Law Program, *Submission 59*.
155 Explanatory Memorandum, *Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011* (Cth).
156 Law Council of Australia, *Submission 75*.
157 *Native Title Act 1993* (Cth) s 14.

13.135 These provisions were a response to *Mabo v Queensland [No 2]*, which is an example of a judicial decision that unsettled existing understandings of the law, with extensive retrospective effect.¹⁵⁸ By making clear that the common law recognises native title, *Mabo [No 2]* cast doubt on land tenures that had been granted since the passage of the *Racial Discrimination Act 1975* (Cth). Grants that purported to extinguish native title may have been invalid because of their inconsistency with the *Racial Discrimination Act*. They may also have been invalid because they were acquisitions of property other than on just terms, as required by s 51(xxxi) of the Constitution. The *Native Title Act* validated, or allowed states and territories to validate, certain acts that took place before the commencement of the Act on 1 January 1994, and would otherwise be invalid because of native title.¹⁵⁹

Validating acts

13.136 Legislation with retroactive operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt. In *Statutory Interpretation in Australia*, Pearce and Geddes note that such statutes ‘clearly must operate retrospectively and from their very nature refute the applicability of the presumption against retrospectivity’.¹⁶⁰

13.137 One example is the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth). Schedule 5 validates access by the Australian Federal Police to certain investigatory powers in designated state airports. The stated aim of the legislation was to ‘ensure continuity in policing services at Australia’s major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time’.¹⁶¹ The Senate Scrutiny of Bills Committee expressed concerns about this amendment. It noted that coercive powers are only available if expressly authorised by statute, and retrospective validation of such powers should only occur in ‘exceptional circumstances where a compelling need can be demonstrated’. The Committee did not consider that such exceptional circumstances had been demonstrated.¹⁶²

13.138 A second example is the *Environment Legislation Amendment Act 2013* (Cth) which retrospectively validated decisions that were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). This amendment followed a Federal Court finding that the Minister’s decision to approve a mine was invalid, because it was made in breach of s 139(2) of the *EPBC Act*, which required the Minister to consider certain conservation advice.¹⁶³ The Explanatory Memorandum

158 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

159 *Native Title Act 1993* (Cth) div 2A. See also Ch 20.

160 Pearce and Geddes, above n 29, [10.14].

161 Explanatory Memorandum, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* (Cth).

162 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *13th Report of 2014* (October 2014) 697–8.

163 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (17 July 2013).

indicated that the amendment was ‘to address the implications arising from the Tarkine case’ and would ‘apply retrospectively and prospectively to provide certainty for past and future decisions’.¹⁶⁴

Powers to make subordinate legislation

13.139 Subordinate legislation with retrospective operation may be more difficult to justify as these instruments are less visible to the public. Unless the enabling Act specifies to the contrary, a legislative instrument has no effect if it has retrospective operation and, as a result, disadvantages or imposes liabilities on a person.¹⁶⁵ A range of statutes specifically allow for legislative instruments to have effect before the date on which they are registered:

- *Customs Tariff Act 1995* (Cth) s 16A(5), concerning special safeguards for goods originating from Thailand;
- *Excise Tariff Act 1921* (Cth) s 6CA(1D), (5), concerning excise duties on condensate;
- *Income Tax Assessment Act 1997* (Cth) s 293-115, concerning defined benefit contributions, and s 293-145, concerning constitutionally protected superannuation funds;
- *Liquid Fuel Emergency Act 1984* (Cth) ss 9(2), 10(5), 11(6), 12(7), 13(4), 14(5), 14A(5), 17(6), 20(6), 21(5), 21(8), 22(8), 23(8), 24(8), concerning Ministerial directions and determinations regarding fuel emergencies;
- *Migration Act 1958* (Cth) s 198AB, concerning the designation of a regional processing country;
- *National Rental Affordability Scheme Act 2008* (Cth) s 12, concerning the operation of the scheme;
- *Petroleum Excise (Prices) Act 1987* (Cth) s 4(1C), concerning excise on condensate;
- *Superannuation Act 1990* (Cth) s 5A, concerning amendments of trust deeds to implement family law interest splitting, and s 45(6), concerning ministerial amendment of trust deed;
- *Taxation Administration Act 1953* (Cth) s 133-130, concerning superannuation end benefits; and
- *Veterans’ Entitlements Act 1986* (Cth) s 29(11), concerning assessment of rates of veterans’ pensions 45TO(1A), concerning members of pension bonus schemes, and s 196B(13) concerning the functions of the Repatriation Medical Authority.

¹⁶⁴ Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth).

¹⁶⁵ *Legislative Instruments Act 2003* (Cth) s 12.

13.140 The ALRC has not sought to establish the extent to which these regulation-making powers have actually been exercised in a retrospective manner.

Judicial clarification of uncertain laws

13.141 Professor Jeremy Gans observed that the requirement that laws be sufficiently clear is breached when the scope of an offence is unclear until it has been interpreted by the courts. He gave the example of the offence of ‘market manipulation’ in the *Corporations Act 2001* (Cth), which prohibits actions that create or maintain an ‘artificial price’ in financial products’.¹⁶⁶ This offence came into effect on 11 March 2002, but its scope was not defined until it was considered by the High Court in 2013.¹⁶⁷ Professor Gans suggested that the ALRC should consider whether ‘current criminal offences are sufficiently certain, precise and accessible to give a reasonably informed lay person fair warning of what conduct is prohibited’.¹⁶⁸

13.142 The Law Council raised a related concern about statutes with key terms that are not defined, so that ‘business is unable to gauge the compliance burden and feasibility until after the legislation has commenced’.¹⁶⁹

13.143 The clarification by the courts of an uncertain law necessarily imports an element of retrospectivity. Indeed, all judicial decisions about common law, constitutional matters or statutory interpretation are essentially retrospective.¹⁷⁰ In *PGA v The Queen*, Heydon J said that to ‘the extent that they may be changed retrospectively, uncertainty is inherent in common law rules’.¹⁷¹ Fuller considers that the argument that judicial decisions should be retrospective is very strong.¹⁷²

13.144 The courts do not state what the law is from the date of a decision, but declare the law as it has always been. Where this declaration is in conflict with the previous understanding, this may be used to justify a statute that reinstates the previous understanding with retrospective effect, as is discussed above with regard to taxation. However there are practical difficulties in reviewing laws on the basis that they are uncertain and require statutory interpretation. This chapter focuses on Commonwealth laws with declared retrospective operation, rather than those that may require clarification.

Conclusion

13.145 Commonwealth laws creating offences with retrospective operation are rare, and when such offences have been created, they have largely concerned conduct with such a high degree of moral culpability that no-one could consider them legitimate.

¹⁶⁶ *Corporations Act 2001* (Cth) s1041A.

¹⁶⁷ *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135.

¹⁶⁸ J Gans, *Submission 2*.

¹⁶⁹ Law Council of Australia, *Submission 75*.

¹⁷⁰ Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 822. See also Enid Campbell, ‘The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts’ (2003) 29 *Monash University Law Review* 49.

¹⁷¹ *PGA v The Queen* (2012) 245 CLR 355, [126].

¹⁷² Fuller, above n 63, 57.

13.146 The ALRC considers that the *Deterring People Smuggling Act 2011* (Cth), which has retroactive operation for 11 years and may have enlarged the scope of the offence of people smuggling, should be further reviewed to determine whether the retroactive operation is justified.

13.147 Commonwealth laws that retrospectively change legal rights and obligations are common. The ALRC considers that the following could be further reviewed to determine whether their retrospective operation is justified:

- taxation laws that provide for lengthy periods of retrospectivity; and
- *Migration Act* s 45AA and *Migration Regulations* 2.08F, which converted applications for permanent protection visas into temporary protection visas.

14. Procedural Fairness

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Summary

14.1 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—before a decision that affects them is made.¹

14.2 Procedural fairness promotes sound decision making:

A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.²

1 *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

2 Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47.

14.3 This chapter considers the duty to afford procedural fairness in administrative decision making. Procedural fairness in judicial proceedings is addressed when considering laws encroaching on the right to a fair trial.

14.4 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances. In particular, it may be justified where urgent action needs to be taken in the public interest.

14.5 Migration laws that encroach on the duty to afford procedural fairness attracted the most comment and criticism in submissions to this Inquiry. Some of these laws would benefit from further review to consider whether the infringement of the duty to afford procedural fairness is proportionate, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the *Migration Act 1958* (Cth) (*Migration Act*) relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

The common law

14.6 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (Lam)*, Callinan J explained that ‘natural justice by giving a right to be heard has long been the law of many civilised societies’. He quoted Stanley de Smith, Harry Woolf and Jeffrey Jowell:

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca’s *Medea*, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.³

14.7 The common law required courts of law to observe the two basic requirements of natural justice: fair hearing and the avoidance of actual or apprehended bias. These rules were extended to administrative tribunals that have a ‘duty to act judicially’ in making decisions affecting vested rights and liberties of persons. Later, judges began to speak of a ‘duty to act fairly’ because the idea of acting judicially was not flexible enough to apply to administrative actions that were not strictly judicial but nevertheless affected vested rights and liberties.⁴

3 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [140], quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–9. See also Chief Justice Robert French, ‘Procedural Fairness—Indispensable to Justice?’ (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students’ Society, 7 October 2010).

4 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 573.

14.8 Procedural fairness traditionally applied to decisions affecting rights and interests related to ‘personal liberty, status, preservation of livelihood and property’.⁵ Over the course of the 20th century, the concept of procedural fairness developed significantly, eventually applying to a diverse range of government decisions affecting property, employment, reputation, immigration and financial and commercial interests.⁶

14.9 In *Annetts v McCann*, a case involving the right of two parents to make submissions at a coronial inquiry into the deaths of their two sons, Mason CJ, Deane and McHugh JJ noted the continued evolution of the concept of procedural fairness. They remarked that ‘many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine’s protection’.⁷ It has more recently been said that the common law doctrine has a ‘wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers’.⁸

14.10 There has been some debate as to whether the duty to afford procedural fairness in the exercise of a statutory power derives from the common law or from construction of the relevant statute.⁹ In *Plaintiff M61/2010E v Commonwealth*, the Full Bench of the High Court thought it ‘unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result’.¹⁰ In 2012, the High Court considered that such a debate was unproductive and proceeded on a false dichotomy. The principles and presumptions of statutory construction are part of the common law, and as such

the ‘common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.¹¹

Procedural fairness: the duty and its content

14.11 ‘Procedural fairness’ means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the

5 Westlaw AU, *The Laws of Australia* (at 1 March 2014) 2 Administrative Law, ‘2.5 Judicial Review of Administrative Action: Procedural Fairness’ [2.5.170].

6 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9].

7 *Annetts v McCann* (1990) 170 CLR 596, 599.

8 Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39 *Monash University Law Review* 285, 285.

9 Cf the judgments of Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550. Mason J considered this to be a ‘fundamental rule of the common law doctrine of natural justice’: 582. Brennan J reasoned that ‘there is no free-standing common law right to be accorded natural justice by the repository of a statutory power’: 610. See further Groves, above n 8.

10 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74].

11 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).

**NOTICE OF SEIZURE OF COLLATERAL/CRYSTALLISATION OF STATUTORY
AND EQUITABLE CHARGES OVER THE RIGHTS, OFFICES, ASSETS &
UNDERTAKINGS OR OTHERWISE THE PROPERTY OF THE
GRANTORS/CHARGORS, PERSONALLY AND AS TRUSTEES AND/OR AGENTS**

TO: Her Majesty The Queen, Queen Elizabeth II and Her Majesty's Agents, Officers, employees, agents, delegates, contractors and licensees of Buckingham Palace, London SW1A 1AA (**"the Grantors/Chargors"**)
C/O the Attorneys General of the Commonwealth, the States and the Territories of Australia, [REDACTED],
Hobart, Tasmania, 7000

FROM; Andrew Morton Garrett, Personally, in all of his capacities including (but not limited to) as Chairman Managing Trustee of the Andrew Garrett Family Trust No 4 and the Australian People Future Fund of Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong C/O [REDACTED] 7000 (**"The Grantee/Chargee"**)

WHEREAS, Magna Carta Libertatum (Medieval Latin for "the Great Charter of the Liberties"), commonly called Magna Carta (also Magna Charta; "Great Charter"), is a charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215 binding his lawful successors to the Crown and creating the Public Trust for the benefit of the beneficiaries being such citizens who exist from time to time within the dominions of the King, and his lawful successors, also thereby creating a registerable equitable and statutory charge/personal property security interest enforceable at law in the hands of the Grantee/Chargee as a beneficiary of the Public Trust and lien holder, (**"the Public Trust"**),

AND WHEREAS, the *Cestui Que Vie Act* 1666 (UK) was enacted by Westminster Parliament as the lawful predecessors of the Grantors/Chargors binding the Grantors/Chargors creating a further Public Trust thereby creating a further registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee as a beneficiary and lien holder, (**"the Cestui Que Vie Public Trust"**),

AND WHEREAS, prior to the 24th – 27th January, 29th April, 20th June, 27th July, 2nd September 1899 & the 31st July 1900 the Public Trust of the Peoples for of the States and Territories of the continent of Australia (**"the Peoples"**) vested in the lawful predecessors of the Grantors/Chargors as Trustees and/or agents of Trustees who bound the Grantors/Chargors when accepting appointment to Public Office by virtue of the constitutions of the States and Territories creating a further registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee, as beneficiary and lien holder, (**"the State & Territory Public Trust"**),

AND WHEREAS, the lawful predecessors of the Grantors/Chargors accepted the authority of the Peoples, and bound the Grantors/Chargors to accept the authority of the Peoples as beneficiaries, variously on the 24th – 27th January, 29th April, 20th June, 27th July, 2nd September 1899 & the 31st July 1900 the Peoples voted for Federation at which time the Trust of the Peoples the Commonwealth, the States and Territories was vested in the lawful predecessors Grantors/Chargors as Trustees and/or agents of Trustees by their conduct and acceptance of Commonwealth Public Office creating a registerable equitable and statutory charge/personal property security interest enforceable in the hands of the Grantee/Chargee as beneficiary and lien holder, (**"the Commonwealth of Australia Public Trust"**),

AND WHEREAS, the Holding of Public Office by the Grantors/Chargors is held pursuant to the aforementioned Public Trusts created on the dates of the relevant enactments including the Constitutions of the Commonwealth, the States and Territories (as amended) and the dates of voting for Federation, and subsequently, which vests Public Office Holders with Judicial and Quasi-Judicial Decision Making Powers which Powers must be exercised in the Public Interest as opposed to the interest of the Grantors/Chargors in the holding of Public Office, (**"the Public Office Public Trust"**),

AND WHEREAS, the Grantors/Chargors were parties to a Treaty/Contract between Nations known as **"the Charter of the United Nations"** that was executed by the lawful predecessors of the Grantors/Chargors and/or the Grantors/Chargors in

Public or Hereditary Public Office on the 26th June 1945 thereby creating a further Public Trust binding the Grantors/Chargors and creating a further Equitable and Contractual Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts including in the hands of the Grantee/Chargee, (“**The United Nations Peoples’ Public Trust**”),

AND WHEREAS, as a consequence of rising issues of Corruption, breaches of Human Rights, Principles of Separation of Powers and collapse of Rule of Law within the Commonwealth of Nations, the Grantors/Chargors and/or their lawful predecessors were parties to a Treaty/Contract between Nations known as “**the Charter of the Commonwealth of Nations**” that was executed by the Grantors/Chargors and/or their the lawful predecessors on the 11th March 2013 thereby restating a further existing Commonwealth of Nations Public Trust further binding the Grantors/Chargors and their lawful successors thereby restating a further Equitable and Contractual Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts including in the hands of the Grantee/Chargee, (“**The Commonwealth of Nations Peoples’ Public Trust**”), relevantly that Charter was executed and highlighted (*amongst other things*) as follows;

CHARTER
of the
COMMONWEALTH



Signed by Her Majesty Queen Elizabeth II, Head of the Commonwealth,
Commonwealth Day 2013

I.
DEMOCRACY

We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard. Parliaments and representative local governments and other forms of local governance are essential elements in the exercise of democratic governance.

We support the role of the Commonwealth Ministerial Action Group to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour.

II.
HUMAN RIGHTS

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

V.
FREEDOM OF EXPRESSION

We are committed to peaceful, open dialogue and the free flow of information, including through a free and responsible media, and to enhancing democratic traditions and strengthening democratic processes.

VI.
SEPARATION OF POWERS

We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.

VII.
RULE OF LAW

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

VIII.
GOOD GOVERNANCE

We reiterate our commitment to promote good governance through the rule of law, to ensure transparency and accountability and to root out, both at national and international levels, systemic and systematic corruption.

AND WHEREAS, the Tax Payer's Charter published by the Grantors/Chargors is a code of conduct enforceable upon the Taxpayer and Public Office Holders appointed under Tax related enactments and regulations that is subject to *the Public Governance Performance and Accountability Act 2013* (Cth) thereby establishing the Commissioner of Taxation Public Trust thereby creating a further equitable and statutory charge/personal property security interest over all of the assets of the Commissioner of Taxation including, but not limited to, the exclusive rights to receive Tax Revenues that is enforceable in the hands of the Peoples as beneficiaries, including the Grantee/Chargee ("**the Commissioner of Taxation Public Trust**"),

AND WHEREAS, a Charter; Economic Diplomacy and Australian Business published by the Grantors/Chargors is a code of conduct enforceable upon Public Office Holders of the Department of Foreign Affairs and Trade ("**DFAT**") that is subject to *the Public Governance Performance and Accountability Act 2013* (Cth) thereby creating a further equitable and statutory charge/personal property security interest enforceable in the hands of the Peoples as beneficiaries, including the Grantee/Chargee ("**the Department of Foreign Affairs and Trade (DFAT) Public Trust**"),

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors to *the Commonwealth of Australia Act 1900* (Cth) ("the Constitution**"),** as enacted by Westminster Parliament pursuant to the Common Law being the Unwritten Constitution of the United Kingdom of Great Britain and Northern Ireland as the source of Power for the Constitution, came into force in the Commonwealth, the States and Territories of Australia on the 1st January 1901 and particularised the details of the Commonwealth of Australia Public Trust restating the charge/personal property security interest created in the hands of the Peoples as beneficiaries and became enforceable in the hands of the Grantee/Chargee,

AND WHEREAS, the Constitutions of the Commonwealth, the States and Territories, cannot be at odds with the Common Law, including Trust Law & Equity as a consequence of the aforementioned Public Trust; as the Source of Power, and any statutory encroachments on Traditional Rights and Freedoms by any legislature are ultravires, invalid and unlawful,

AND WHEREAS, the office of Governor General was established by Letters patent dated 29th October 1900 and the Governor General was appointed pursuant to s61 of the Constitution to act as agent of the Queen and Her Majesty's lawful successors,

AND WHEREAS, the relationships between the Grantors/Chargors and their lawful predecessors is that of Principal and Agent in which regard Notice to Agent is Notice to Principal and Notice to Principal is Notice to Agent,

AND WHEREAS, Sir Owen Dixon, a former Chief Justice of the High Court generally regarded as Australia's greatest jurist, said of the Constitution:

*"It is not a supreme law purporting to obtain its force from the direct expression of a peoples' inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's dominions"*¹

Dixon attached to this characterisation of the Constitution a consequence for interpretation. The organs of government are simply institutions established by law. This contrasted with the position in the United States where they are agents for the Peoples, who are the source of the power,²

AND WHEREAS, Section 1 in Chapter I of the Constitution vests the law making power of the Commonwealth in 'the Queen, a Senate, and a House of Representatives', Section 51 of the Constitution sets out the majority of subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 39 heads of power in that section which specifically exclude any head of power of Public Office Holders to act outside of the aforementioned Public Trusts/ Public Interest,

AND WHEREAS, Chapter II of the Constitution deals with the Executive Government; The key provision of that Chapter is s 61, which provides:

¹ Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

² *Eastlake v Forest City Enterprises Inc* 426 US 668, 672 (1976)

“The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth”.

AND WHEREAS, the existence of the aforementioned Public Trusts in the maintenance of Democracy, Freedom of Expression, Human Rights, Separation of Powers, Rule of Law and Good Governance to protect and enhance the Public Interest emphasises the existence Statutory and Equitable Chargeable Personal Property Security Interest in the hands of the Grantee/Chargee over the Grantors/Chargors, is, was and always must be acknowledged by the Grantors/Chargors and their lawful predecessors in the acceptance of Public Office and passage of relevant law,

AND WHEREAS, the Constitution sets out;

108 Saving of State laws

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

AND WHEREAS, the role of the Grantors/Chargors are as Trustees and/or Agents of Trustees of the aforementioned Public Trusts in which regard the Laws of Australia /15Equity/15.14 Trustees chapter 5 sets out;

Part A - General;

15.14:66[66] Upon acceptance of his or her office, a trustee becomes subject to the duties and acquires the powers of that office. Duties are imperative. They compel actions or prohibit a trustee from acting in a certain way. Powers, on the other hand, are facultative. They enable a trustee to act in a certain way, but leave the trustee with a discretion as to whether she or he should so act

15.14:67[67] The first duty of the trustee is to obtain and acquaint himself or herself with all documents concerning the trust and with the state of the trust property.

15.14:68[68] The trustee must ensure that title to the trust property is vested in him or her,

- *the trustee's duty to preserve the trust property cannot be adequately carried out unless the property is under her or his control,*
- *if a better title to the trust property is obtainable, the trustee is obliged to activate himself or herself concerning it.*

15.14:69[69] It is the duty of the trustees to ensure that trust property is preserved and does not fall into decay from want of repair: As a corollary, trustees may dispose of trust property of a hazardous nature: The trustee is duty bound to preserve the corpus of the trust as well as income.

15.14:83[83] The trustees' duty to act personally is manifested in three principal ways.

- *First, trustees must not allow their discretion to be fettered:*
- *Secondly, trustees must act unanimously:*
- *Thirdly, trustees must not delegate their powers and duties as trustees:*

15.14:84[84] *The duty to act personally requires trustees not to act under dictation or commit themselves in advance as to future conduct as trustees. Trustees must not permit others to dictate to them the manner in which the fiduciary discretion ought be exercised.*

AND WHEREAS, every enactment, authority of the Common Law and/or regulation either enacted, adjudicated or otherwise by the Grantors/Chargors and/or their lawful predecessors, personally, in their roles of Public Office Holders and as Trustees of the aforementioned Public Trusts creates further registerable equitable and statutory charges/personal property security interests enforceable in the hands of the Peoples as beneficiaries of the aforementioned Public Trusts including in the Grantee/Chargee as a beneficiary and lien holder,

AND WHEREAS, while the expression of the separation of legislative and executive from judicial powers as expressed in the Constitution is sharp; the Grantors/Chargors have fraudulently and criminally corrupted Democracy, Freedom of Expression, Human Rights, Separation of Powers, Rule of Law and Good Governance (*amongst other things*) by ongoing admitted breaches which has led to collapse of the aforementioned Public Trusts and Equity,

AND WHEREAS, as a consequence of the aforementioned systemic corruption by the Grantors/Chargors and their lawful predecessors led to a leading decision, the Boilermakers' Case, which re-affirmed that separation expressed in the Constitution, the Privy Council said that:

*"In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive."*³

AND WHEREAS, The High Court said in 1996:

*"The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category – whose character is determined according to traditional British conceptions – are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed."*⁴ (footnotes omitted)

AND WHEREAS, the Grantee/Chargee was issued a Birth Certificate on the 11th April 1957 pursuant to which the Grantors/Chargors entered a contract with the Grantee/Chargee whereby the Grantors/Chargors guaranteed and indemnified the Grantee/Chargee in respect to the operation of Rule of Law and Equity, and the performance of the Grantors/Chargors in respect to the Grantee/Chargee's Human Rights and the aforementioned Public Trusts pursuant to the Charters of the Commonwealth of Nations and the United Nations, Rule of Law, Separation of Powers and the Constitution, and in so doing equitably charged the assets of the Grantors/Chargors to the Grantee/Chargee, whether the Grantors/Chargors are Corporate entities or otherwise, creating a personal property security interest within the meaning of *the Personal Property Security Act 2009 (Cth)* ("PSA"),

AND WHEREAS, the Grantors/Chargors enacted *the Public Interest Disclosure Act 2013 (Cth)* which received Royal Assent on the 15th July 2013 and *the Public Governance Performance and Accountability Act 2013 (Cth)* which received Royal assent on the 29th June 2013 following the execution of the Charter of the Commonwealth of Nations by the Grantors/Chargors thereby binding the Grantors/Chargors and creating a further Equitable and Statutory Charge/Personal Property Security Interest in favour of the Beneficiaries of the aforementioned Public Trusts and subsequently in the hands of the Grantee/Chargee,

AND WHEREAS, at all relevant times the Commonwealth Attorney General as the relevant minister has failed in his duty to publish the Public Interest Disclosure Act Rules and failed in his duty to make available Public Interest Test Case funding in order to facilitate the ventilation of issues in the Public Interest for determination by the Courts and has vacated his role of Champion of the Public Interest (***Annexure 1; Cabinet Paper on Role of Attorney General***)

³ *Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 540.

⁴ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 10-11.

AND WHEREAS, the lawful predecessors of the Grantors/Chargors and the Grantors/Chargors have enacted Law causing statutory encroachments of traditional rights and freedoms (***Annexure 2; Statutory Encroachments on Traditional Rights and Freedoms***) which encroachments are obstructions of the operation of Justice and breaches of s42 & s43 of the *Crimes Act 1914* (Cth) as indictable offences under Informations actionable by;

- the beneficiaries of the aforementioned Trusts including the Grantee/Chargee as private prosecutions,
- the Attorneys General of the Commonwealth, States & Territories of Australia under s69 of the *Judiciary Act 1903* (Cth)
- the Grantors/Chargors who have not brought those

AND WHEREAS, the Commonwealth Ombudsman, the Inspector General of Bankruptcy, ASIC The Inspector General of Taxation, APRA, the Reserve Bank of Australia, and other State and Federal Regulators have weaponised Statute and the Monetary System against the Beneficiaries of the aforementioned Trusts in order to perpetuate Tax Revenues that are Ill Gotten being multiple Indictable Offences some of which have been set out in Indictments and Informations Filed and served in the Court System (***Annexure 3; Informations and Indictments filed and served in NSD 1848 of 2018; Rubis & Ors v Garrett & Ors v Regina & Ors***) and with the Commonwealth Ombudsman as Grantor/Chargor (***Annexure 4; PID Briefing Note & 8 X Annexures and 37 X Addendums & Annexures***)

AND WHEREAS, the judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act 1903* (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters arising under the Constitution, or involving its interpretation.

AND WHEREAS, the following Notices of Constitutional Matters issued under s78B of the *Judiciary Act 1903* (Cth) have been filed and served on the Grantors/Chargors in respect to various proceedings in courts of law and have not been heard by the Grantors/Chargors creating events of default by the Grantors/Chargors under the aforementioned Public Trusts and equitable and Statutory Charges;

- a. SASC 127 of 2004 dated 20th February 2006
- b. SASC 127 of 2004 dated 14th May 2006
- c. SASC 127 of 2004 dated 26th May 2006
- d. SASC 127 of 2004 dated 28th May 2006
- e. SASC 1342 of 2007 dated 24th June 2008
- f. SASC 1499 of 2006 dated 14th December 2015
- g. SASC 248 of 2015 dated 11th November 2015
- h. SASC 1393 of 2014 dated 11th November 2015
- i. SASC 524 of 2006 dated 29th June 2016
- j. VID 158 of 2015 dated 24th July 2015
- k. VID 159 of 2015 dated 24th July 2015
- l. VID 160 of 2015 dated 24th July 2015
- m. VID 161 of 2015 dated 24th July 2015
- n. VID 162 of 2015 dated 24th July 2015
- o. VID 163 of 2015 dated 24th July 2015
- p. VID 164 of 2015 dated 24th July 2015
- q. VID 165 of 2015 dated 24th July 2015
- r. VID 166 of 2015 dated 24th July 2015
- s. VID 129 of 2015 dated 15th December 2015
- t. VID 584 of 2014 dated 18th November 2015
- u. NSW 1848 of 2018 dated 21st October 2018
- v. NSW 1848 of 2018 dated 11th November 2018
- w. NSW 1848 of 2018 dated 14th November 2018
- w. NSW 1848 of 2018 dated 21st November 2018

AND WHEREAS, the Grantors/Chargors have acted ultravires, unlawfully, invalidly, fraudulently and criminally in breach of the Public Interest and the aforementioned Public Trusts being;

- breaches of the aforementioned Public Trusts by the Trustees/Agents of the Trustees, the Grantors/Chargors
- defaults by the Trustees of the aforementioned equitable and statutory charges/personal property security interests that are the properties of the Grantee/Chargee

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors and enacted the *Real Property Act 1888 (SA)* which relevantly applies to real estate owned or controlled by the Grantee/Chargee at all relevant times prior to the 17th July 2003 which enactment sets out the following provisions;

Person to whom certificate or other instrument of title has been issued in error, or who wrongfully retains such instrument, may be summoned

60. In case it shall appear to the satisfaction of the Registrar General that any certificate or other instrument has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate or other instrument, or that any certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom such certificate or instrument has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

Title of registered proprietor indefeasible, except in cases of-

69. The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, be absolute and indefeasible, subject only to the following qualifications:

Fraud

(a) in the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act: Provided that nothing included in this subsection shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or any person bona fide claiming through or under him;

Purchases from registered proprietor not to be affected by notice

186. No person contracting or dealing with, or taking or proposing to take a transfer or other instrument from the registered proprietor of any estate or interest in land shall be required, or in any manner concerned, to inquire into or ascertain the circumstances under, or the consideration for, which such registered proprietor or any previous registered proprietor of such estate or interest is or was registered, or to see to the application of the purchase money, nor be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding.

Except in case of fraud

187. The last preceding section shall not protect any person who has acted fraudulently or been a party to fraud, but the contracting, or dealing, or taking, or proposing to take a transfer or other instrument as aforesaid, with actual knowledge of any trust, charge, or unregistered instrument, shall not of itself be imputed as fraud.

Party deprived of land may sue for compensation

203. Any person deprived of land in consequence of fraud, or through the bringing of such land under the provisions of this Act, or of any Act hereby repealed, or by the registration of any other person as proprietor of such land, or in consequence of any error, omission, or misdescription in any certificate, or in any entry or memorial in the Register Book, may bring and prosecute an action at law for the recovery of compensation against the person upon whose application such land was brought under the provisions of this Act, or of any Act hereby repealed, or such erroneous registration was made, or who acquired title to the land through such fraud, error, omission, or misdescription.

Exoneration of proprietor after transfer for value, except in certain cases

204. Except in the case of fraud, or of error occasioned by any omission, misrepresentation, or misdescription in the application of such person to bring the land under the provisions of this Act, or of any of the Acts hereby repealed, or to be registered as proprietor of such land, or in any instrument executed by him, such person shall, upon a transfer of such land, bona fide for value, cease to be liable for the payment of any compensation which but for such transfer might have been recovered from him under the provisions herein contained.

Proceedings against the Registrar General, as nominal defendant

205. In any such case of cesser of liability, and also in any case where the person against whom such action for compensation is permitted to be brought as aforesaid shall be dead, or shall have become bankrupt or made a statutory assignment, or cannot be found within the jurisdiction of the Court or there is any other reason why compensation cannot be fully recovered from that person, it shall be lawful to take proceedings against the Registrar General, as nominal defendant, as hereinafter provided, for the purpose of recovering the amount of the compensation or costs, or so much of that amount as cannot be recovered from the person referred to above, from the Assurance Fund.

Purchasers etc protected

207. Nothing in this Act contained shall leave subject to action for recovery of compensation as aforesaid, or to action for recovery of possession of land, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any transferee, mortgagee, encumbrancee, or lessee, bona fide for valuable consideration of land on the ground that the proprietor, through or under whom he claims, or any previous proprietor has been registered as proprietor through fraud or error, whether such fraud or error shall consist in wrong description of boundaries, or parcels, or otherwise howsoever.

Part 19-Special powers and duties of Registrar General

Powers of Registrar General

220. The Registrar General may exercise the following powers, that is to say-

To enter caveats

(g) he may, on behalf of His Majesty, His heirs or successors, or for the prevention of any fraud or improper dealing, or in any case in which it shall appear to him that an error has been made by misdescription or otherwise in any instrument, or for the protection of any person absent from the State, or under the disability of infancy, coverture or mental incapacity enter caveats forbidding the registration of any instrument, transmission, or dealing affecting any land;

Indictable offences under this Act

229. If any person is guilty of the following offences, or any of them (that is to say)-

- (a) forges or procures to be forged or assists in forging or fraudulently affixes procures to be affixed or assists in affixing the seal of the Registrar General, or an impression or part of an impression of such seal to any instrument;
- (b) forges or procures to be forged or assists in forging the name, signature, or handwriting of the Registrar General or of any officer in any case where such officer is by this Act expressly or impliedly authorised to affix his signature;
- (c) fraudulently stamps or causes to be stamped any document with the seal of the Registrar-General or with a seal purporting to be the seal of the Registrar-General;
- (d) forges or procures to be forged or assists in forging the name, signature, or handwriting of any person whomsoever, to any instrument which is by this Act, or in pursuance of any power contained in this Act, expressly or impliedly authorised to be signed by such person;
- (e) uses, with an intention to defraud any person whomsoever, any document upon which any impression or part of the impression of any seal of the Registrar General has been forged, or fraudulently affixed knowing the same to be fraudulently affixed, or any document the signature to which has been forged knowing the same to have been forged,

such person shall be guilty of an indictable offence.

Penalty: Imprisonment for 14 years.

Other Offences

233. A person who-

- (a) wilfully and fraudulently makes any false statement in any application to bring land under the provisions of this Act, or in any application to be registered as proprietor, whether in possession, reversion, remainder, or otherwise on a transmission, or in any other application to be registered under this Act as proprietor of any land, or any estate or interest in any land;
- (b) wilfully and fraudulently suppresses, withholds, or conceals, or assists, or joins in, or is privy to the suppressing, withholding, or concealing from the Registrar General, the Acting Registrar General, or any Deputy Registrar General any material document, fact, or matter of information;
- (c) wilfully and fraudulently gives false evidence, or makes a false statement in his examination before the Registrar General, the Acting Registrar General, or any Deputy Registrar General;

- (d) *without lawful authority and knowing that no such authority exists intentionally alters or causes to be altered-*
 - (i) *an original certificate of title filed in the Register Book or the duplicate of such a certificate; or*
 - (ii) *records made by the Registrar-General by an electronic, electromagnetic, optical or photographic process under Division 2 of Part 5 or a certificate of title issued under that Division; or*
 - (iii) *any instrument comprising part of the Register Book; or*
 - (iv) *any instrument or form issued by the Registrar-General;*
- (e) *fraudulently uses, assists in fraudulently using, or is privy to the fraudulent using of any form purporting to be issued or sanctioned by the Registrar General;*
- (f) *knowingly misleads or deceives any person hereinbefore authorised to demand explanation or information in respect of any land, or the title to any land, which is the subject of any application to bring the same under the provisions of this Act, or in respect of which any instrument or dealing is proposed to be registered or recorded,*

is guilty of an indictable offence.

Penalty: \$40 000 or imprisonment for 10 years.

Certificate etc procured by fraud to be void

234. Any certificate, instrument, entry, erasure, or alteration procured, or made by fraud as in the last preceding section mentioned shall, whether there shall be a conviction under such section or not, be void as regards all parties or privies to such fraud.

Equities not abolished

249. (1) Nothing contained in this Act shall affect the jurisdiction of the Courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally.

AND WHEREAS, the lawful predecessors of the Grantors/Chargors bound the Grantors/Chargors and enacted the *Registration of Deeds Act 1935 (SA)* which received Royal Assent on the 21st November 1935 thereby creating a further Equitable & Statutory Charge/Personal Property Security Interest over the assets of the Grantors/Chargors in favour of Peoples of State of South Australia and the Commonwealth of Australia including the Grantee/Chargee which relevantly sets out;

8—Neglect of duty by registrar

If the registrar wilfully neglects his duty in the execution of his office according to the provisions of this Act or wilfully commits or suffers to be committed any undue or fraudulent practice in the execution of his office, he shall pay treble damages with full costs of suit to every person injured thereby, to be recovered by action of debt in the Supreme Court.

25—Effect of certificate of discharge

(1) The entry, on the memorial of a mortgage, that that mortgage is satisfied, shall be sufficient evidence that the estate of the mortgagee in the land comprised in the mortgage is vested in the person entitled to the equity of redemption thereof, as from the day of the date of such entry, freed and discharged from the mortgage, and from the sum of money thereby secured: Provided that it shall nevertheless be lawful to impeach such entry by showing that the certificate to which the same refers has been obtained by fraud

10—Instruments to be registered and the effect of registration

(1) Every deed, conveyance, or contract in writing, other than a lease for a term not exceeding three years, and every will and every judgment (other than a judgment or recognizance entered into in the name and on account of His Majesty) whereby land may be in any way affected in law or equity may be registered under this Act.

(2) Every such deed, conveyance, contract, or judgment shall, if executed, made, or obtained after the first of March, 1842, be fraudulent and void at law and in equity against any subsequent registered purchaser, mortgagee, or party for or upon valuable consideration unless a memorial thereof is registered under this Act before the registration of the memorial of the deed or conveyance, contract, or judgment under which the subsequent purchaser, mortgagee, or party claims.

(3) Every devise by will shall, if the testator died or dies after the first of March, 1842, be fraudulent and void against any subsequent registered purchaser or mortgagee for or upon valuable consideration and

against any bona fide registered party having subsequent judgment unless a memorial of the will is registered in accordance with this Part.

(4) This section applies notwithstanding that before or at the time of the making of the subsequent deed, conveyance, or contract or of the entering or acknowledging of the subsequent judgment, the subsequent purchaser or mortgagee had notice of the prior deed, conveyance, contract, judgment, or devise.

44—Evidentiary effect of registrar's certificate

(2) When any instrument, memorial, or office copy is produced under subsection (1) of this section the party against whom it is produced may give notice by his pleading or otherwise to the satisfaction of the court that he intends to dispute the execution of the instrument or the truth of the memorial, copy, or certificate on the ground of fraud, forgery, or other cause of a like nature, for example, insanity, imbecility, or duress of the person whose execution of or signature to a document is disputed; and the onus of proving such fraud, forgery, or other cause shall in the first instance lie on the party giving the notice

AND WHEREAS, the Registrar of Deeds and the Registrar General have wilfully and fraudulently neglected their public duty to act in the public interest under the aforementioned trusts and are, were and always have been (*as with every person holding Public Office*) indemnified by the Grantors/Chargors in respect to loss, costs and damages to the Peoples arising from the Registrar's conduct which statute and indemnity creates registerable statutory and equitable charges/personal property security interests in the hands of the Grantee/Chargee over the assets of the Grantors/Chargors,

AND WHEREAS, Christopher Kourakis acting in his capacity as;

- (a) Crown Solicitor, did knowingly and wilfully;
 - a. cause false affidavit materials to be sworn and served in SASC-422-2005 & SACS-423-2005 and has at all relevant times breached the principles of Rule of Law and Separation of Powers in order to conceal his corrupt conduct and the corrupt conduct of the Attorney General and Premier of South Australia the Breaches of the First and Second Contracts of Finance and corrupt conduct of National Australia Bank Limited (NAB), Counsel instructed by NAB and by the Grantee/Chargee and the Decision makers listed in an interlocutory application dated 21st October 2018 filed and served in NSD-1848-2018; *Rubis & Ors v Garrett & Ors v Regina & Ors* under the aforementioned Trusts for which the Grantors/Chargors are and always have been criminally and civilly vicariously liable.
 - b. instruct justices of the Adelaide Federal Magistrates Court, Adelaide Magistrates Court, the District Court of South Australia, the Supreme Court of South Australia, the Federal Court of Australia and the High Court of Australia to avoid the evidence and misstate the facts as the ultimate injustice in proceedings in those courts involving the Grantee/Chargee
- (b) Chief Justice of the Supreme Court of South Australia, did knowingly and wilfully instruct justices of the District Court of South Australia and the Supreme Court of South Australia to avoid the evidence and misstate the facts as the ultimate injustice in proceedings in those courts involving the Grantee/Chargee

AND WHEREAS, *the Supreme Court of South Australia Act 1935 (SA)* creates a statutory and equitable charge in favour of the Peoples over the Chief Justice of that Court in which regard the Grantee/Chargee registered the aforementioned charge/ personal property security interest over Chris Kourakis on the Personal Property Security Register ("**PPSR**") which was given PPSR Registration Number; 201610250009815;

The Chief Justice

9A. (1) *The Chief Justice is the principal judicial officer of the court.*

(2) *The Chief Justice is responsible for the administration of the court.*

AND WHEREAS, *the Federal Court of Australia Act 1976 (Cth)* creates a statutory and equitable charge in favour of the Peoples over the Chief Justice of that Court in which regard the Grantee/Chargee registered the aforementioned charge/ personal property security interest over Chief Justice Anthony Baines Alsop on PPSR which was given PPSR Registration Number; 201611200001961;

4A Application of the Criminal Code

Chapter 2 of the Criminal Code applies to all offences against this Act.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

15 Arrangement of business of Court

Responsibility of Chief Justice

- (1) *The Chief Justice is responsible for ensuring the effective, orderly and expeditious discharge of the business of the Court.*
- (1AC) *Despite section 39B of the Judiciary Act 1903, the Court does not have jurisdiction with respect to a matter relating to the exercise by the Chief Justice of the functions or powers mentioned in subsection (1AA), (1AAA) or (1AAB).*

18A Management of administrative affairs of Court

- (1) *The Chief Justice is responsible for managing the administrative affairs of the Court.*
- (2) *For that purpose, the Chief Justice has power to do all things that are necessary or convenient to be done, including, on behalf of the Commonwealth:*
 - (a) *entering into contracts; and*
 - (b) *acquiring or disposing of personal property.*

18BA Arrangements with agencies or organisations

- (1) *The Chief Justice may arrange with the chief executive officer (however described) of:*
 - (a) *an agency of the Commonwealth, a State or a Territory; or*
 - (b) *another organisation;**for an employee or employees of the agency or organisation to:*
 - (c) *receive, on behalf of the Court, documents to be lodged with or filed in the Court; or*
 - (d) *perform, on behalf of the Court, other non judicial functions of the Court.*
- (2) *If an arrangement under subsection (1) is in force in relation to the performance by an employee of an agency or organisation of a function on behalf of the Court, the employee may perform that function despite any other provision of this Act or any other law of the Commonwealth.*
- (3) *A function performed on behalf of the Court in accordance with an arrangement under subsection (1) has effect as if the function had been performed by the Court.*
- (4) *Copies of an arrangement under subsection (1) are to be made available for inspection by members of the public.*

18W Delegation of administrative powers of Chief Justice

The Chief Justice may, in writing, delegate all or any of his or her powers under section 18A to any one or more of the Judges.

18X Proceedings arising out of administration of Court

Any judicial or other proceeding relating to a matter arising out of the management of the administrative affairs of the Court under this Part, including any proceeding relating to anything done by the Registrar under this Part, may be instituted by or against the Commonwealth, as the case requires.

18XA Protection of persons involved in handling etc. complaints

- (1) *In exercising powers or performing functions under paragraph 15(1AA)(c) and subsection 15(1AAA), or assisting in exercising those powers or performing those functions, a complaint handler has the same protection and immunity as a Justice of the High Court.*
- (2) *In authorising a person or body under subsection 15(1AAB), the Chief Justice has the same protection and immunity as a Justice of the High Court.*
- (3) *A witness requested to attend, or appearing, before a complaint handler handling a complaint has the same protection, and is subject to the same liabilities in a proceeding, as a witness in a case tried by the High Court.*
- (4) *A lawyer assisting, or appearing on behalf of a person before, a complaint handler handling a complaint has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.*

AND WHEREAS, the duties of the Grantors/Chargors to cause the operation of an open and transparent system of Responsible Government are in breach being multiple indictable offences under the aforementioned law and breaches/defaults of the aforementioned Public Trusts and the Aforementioned Statutory and Equitable Charges/Personal Property Security Interests held by the Grantee/Chargee and the Peoples including failure to provide access to personal information of the Grantee/Chargee in which regard ALRC 77 sets out as follows;

2. Government information in a democratic society

Introduction

2.1 *Since the development of the system of democratic government, tension has existed between the elected and the electorate as to how much the former should tell the latter.⁵ The enactment of the FOI Act in 1982 brought about a fundamental change in the law in Australia relating to access to government-held information and challenged the boundaries of government secrecy.⁶ It had particular significance because it was the first national FOI legislation in a country with a Westminster style of responsible government. This chapter outlines the objectives of the FOI Act, explains why access to government information is important and identifies a number of deficiencies in the Act and its current administration.*

The importance of government information being accessible

The objectives of the FOI Act

2.2 *The FOI Act provides a right of access to information in the possession of government departments and agencies. The fundamental reason for providing this right is to ensure open and accountable government. In 1979 the Senate Standing Committee on Legal and Constitutional Affairs identified three objectives of FOI legislation: to increase public scrutiny and accountability of government, to increase the level of public participation in the processes of policy making and government and to provide access to personal information.⁷ The objectives cited in the first annual FOI report include*

- *to improve the quality of agency decision making*
- *to enable citizens to be kept informed of the functioning of the decision making process as it affects them and to know the criteria that will be applied in making these decisions and*
- *to develop the quality of political democracy by giving all Australians the opportunity to participate fully in the political process.⁸*

It is clear that access to information is closely related to the notion of a healthy democracy.

Information and representative democracy

2.3 *Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.⁹*

“Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them ... The importance of FOI legislation is that it provides the

⁵ T Riley 'Accountability of government: an international perspective' (1987) 11 FOI Review 54.

⁶ Ch 3 provides a brief history of the events leading to the passage of the Act in 1982.

⁷ Senate Standing Committee on Constitutional and Legal Affairs Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 AGPS Canberra 1979, 21-22. (Senate Standing Committee 1979 Report.)

⁸ Attorney-General's Dept FOI Annual Report 1982-83 AGPS Canberra 1983, xi.

⁹ The demand for accountability often goes beyond the government and beyond Ministers to the bureaucracy. This is due to an increasing perception that the Executive is not sufficiently responsible to Parliament (because the two party political system means that in reality the Executive has significant control over Parliament, or at least the House of Representatives) and from a more general demand for better service stemming from the consumer movement

means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.”¹⁰

Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices.¹¹ Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally.

“Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation.”¹²

Information enhances the accountability of government. It ensures that members of Parliament are aware of the activities of the Executive, which is especially important in light of the imbalance in power between them.¹³ Information is an important defence against corruption.

“Freedom of information is but one important weapon in exposing potentially corrupt activity.”¹⁴

Access to one's own personal information not only promotes government accountability but also enables individuals to protect their privacy.¹⁵ Some commentators regard such access as particularly important in light of developments in information technology, which have significantly increased the volume of information government can collect and the ease with which it can be transferred and manipulated.

The High Court on representative democracy

2.4 The High Court in the 'free speech cases' demonstrated the importance it places on ensuring the proper working of representative democracy.¹⁶ The Court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. Although the High Court did not go so far as to suggest that a right of access to government information is constitutionally guaranteed, the view of the Court indirectly supports FOI objectives and suggests that it is important for Australia that the FOI Act functions properly and is interpreted in a way that promotes the disclosure of information.

“The reasoning in the political speech cases is very relevant for FOI and requires that the democratic rationale of the Act be given more weight than in the past. The AAT must now err more on the side of disclosure to ensure that the important values identified in the political speech cases are complemented by the right conferred by the Act.”¹⁷

The Constitutional implication of free speech identified by the High Court also casts doubt on the appropriateness of those legislative provisions founded on the exaggerated notion that executive secrecy is in the public interest.¹⁸

International covenants and FOI

¹⁰ *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 86. The democratic basis of the FOI Act has been accepted by the AAT: see, eg, *Cleary and Dept of the Treasury* (1993) 31 ALD 214, 217-18.

¹¹ For detailed discussion of the importance of information in enabling Australians to participate fully in society and to access services and entitlements and the need to increase the community's use of information see House of Representatives Standing Committee for Long Term Strategies *Australia as an information society: grasping new paradigms* AGPS Canberra 1991.

¹² Cth Ombudsman Annual Report 1994-95 AGPS Canberra 1995, 33.

¹³ Opposition members usually use the FOI Act but there is no reason in theory why a government backbencher may not also need to rely on the Act to obtain information. L Tsaknis claims that the new managerialism in the public sector demands increased scrutiny for which access to information is essential: 'Commonwealth secrecy provisions: time for reform' (1994) 18 Criminal Law Journal 254.

¹⁴ L Stirling Submission 3.

¹⁵ See further at para 4.10

¹⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. Note also the decisions of the High Court in the 1970s dealing with representative democracy. In what are known as the electoral cases, the High Court acknowledged that the Constitution establishes a system of representative democracy and determined that Parliament must enact laws consistent with the existence of representative democracy as the chosen mode of government: see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

¹⁷ D Murphy Submission 120. See also *Cleary and Dept of the Treasury* (1993) 31 ALD 214, Peter Bayne, now a member of the AAT, argued that the right of access to government documents under the FOI Act is premised on the same considerations of democracy and representative government which underpin the implied constitutional right of free speech. For a discussion of FOI and democracy see *P Bayne & K Rubenstein 'Freedom of information and democracy: a return to the basics?'* (1994) 1 AJAL 107.

¹⁸ See discussion at para 4.22.

2.5 Australia's accession to the International Covenant on Civil and Political Rights (ICCPR) may also be relevant to the interpretation of the FOI Act. Article 17 supports the right to have access to one's own personal information and to have it amended if it is incorrect. Article 19(2) of the ICCPR guarantees a right to freedom of expression, which expressly includes freedom to seek information. It is not clear, however, whether the right to seek information obliges States to guarantee access to State-held information. For jurisdictions like Australia that already have FOI legislation the question whether a right of access is guaranteed by the ICCPR is, as a practical matter, relevant only from the point of view of interpretation. If the right of access provided by the FOI Act were to be recognised as a fundamental human right, it is possible that the content of that right may influence the interpretation of the Act.

AND WHEREAS, between today's date and the 19th January 1994 the Grantors/Chargors have admitted facts, liability and indebtedness to the Grantee/Chargee that have been the subject of numerous Common Law Notices to Admit Facts and Letters of Demand for Payment of admitted Debts and Liabilities including, but not limited to, those shown at annexure 5 (**Annexure 5; Notices of Admissions of Facts, Debts and Liability dated the 30th September 2018, 17th December 2018, 9th January 2019, 21st February 2019, 9th April 2019, 3rd May 2019 and 29th May 2019**)

AND WHEREAS, liquidity is communication and monetisation of value that is the property of the Peoples, including the Grantee/Chargee, by Bankers, domestically and abroad that is subject to Democracy, Freedom of Expression, Human Rights, Right to Remedy, Separation of Powers, Rule of Law and Good Governance (amongst other things) and maintenance of Reputation, Property, Intellectual Property, Right to a Fair Hearing, Rights of Privacy and otherwise (**Annexure 6; Commonwealth Attorney General Webpages relating to the International Covenant of Civil and Political Rights**) in order to cause monetisation of value the property of the Peoples in the hands of Bankers (**which relationship between Customer and Bank is respectively that of Creditor and Debtor**), licensed by the Grantors/Chargors as agents for the Grantors/Chargors or otherwise, which decisions by Bankers to accept Charges/Security Interests over Value belonging to the Peoples, including the value of the Grantee/Chargee as set out in the preceding paragraph, and subsequently to Monetise, must be made in the Public Interest, and not in of the Grantors/Chargors in order to conceal the systemic corruption of the Grantors/Chargors and their Lawful Predecessors that is the subject of the various annexures to this Notice by holding the Peoples and/or the Grantee/Chargee impecunious and unable to engage counsel without Public Interest Test Case Funding Support granted by the Attorney Generals of the Commonwealth, the States and Territories,

AND WHEREAS, Banker licensees authorised by the Grantors/Chargors and/or their lawful predecessors, other licensees/agents of the Grantors/Chargors and their lawful predecessors in the Aged Care Sector, Child Care Sector, Financial Sector, Regulatory Sector, Insurance Sector, Healthcare Sector, Insurance Sector are systemically corrupt and act in their own interests are in breach of their Public Duties to make decisions in the Public Interest as found by various Royal Commissioners and published in reports.

AND WHEREAS, The Royal Commissioner Reports are Reports tailored to ensure that the Grantors/Chargors, and their lawful predecessors, are not held to account and never face the full force of the law including Informations and Indictments that are the Public Duty of the Attorney Generals to bring, but are not brought, in the public interest,

AND WHEREAS, the Grantors/Chargors have attached the reputation of the Grantee/Chargee by bringing Criminal Charges as an abuse of process/breaches of the aforementioned Public Trusts, s39B of the *Judiciary Act* 1903 (Cth), s75(v) of the *Constitution*, treaties and is obstruction of Justice being Criminal Indictable Offences by the Grantors/Chargors pursuant to the principles of Civil and criminal vicarious liability under s42 & s43 of the *Crimes Act* 1914 (Cth) as set out in Annexure 5 to this Notice; Letter of Demand for Payment dated 29th May 2019 and by corrupt manipulation of journalists engaged by News Limited and Media Channels related to Rupert Murdoch,

AND WHEREAS, in order to frustrate the monetisation of secured value, the property of the Grantee/Chargee, by Bankers, Domestically and Abroad the Grantors/Chargors have unlawfully, invalidly, wilfully and criminally neglected their public duty and have;

1. by the actions the Australian Government Solicitors Office/the Commonwealth Attorney General/Department Home Affairs/ Commissioner of Taxation/ASIC/APRA/Financial Ombudsman/ Financial Services Complaints Authority/Inspector General of Taxation/ Inspector General of Bankruptcy/AFSA/Reserve Bank of

Australia/Administrative Appeals Tribunal/Federal Circuit Court of Australia/Federal Court of Australia/High Court of Australia/Supreme Courts of South Australia and Victoria/District Court of South Australia/Parliament of Australia (Senate & House of Representatives) amongst other Grantors/Chargors;

- a. failing to pass resolutions in the House of Representatives and the Senate to establish a Parliamentary Judicial Enquiry Committee pursuant to the provisions of *the Judiciary (Incapacity and Misbehaviour) Act 2012 (Cth)*
- b. failing to enact in the Public Interest as a matter of urgency;
 - i. *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017*
 - ii. *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*
 - iii. *Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018*
 - iv. *the National Integrity Commission Bill 2018*
 - v. *Treasury Laws Amendment (APRA Governance) Bill 2018*
 - vi. *Banking System Reform (Separation of Banks) Bill 2018* not proceeding before the House of Representatives
 - vii. *Banking System Reform (Separation of Banks) Bill 2019* before the Senate
 - viii. *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* [Provisions]
- c. Failing to complete the following inquiries;
 - i. Review of the Four Major Banks
 - ii. Resolution of disputes with financial service providers within the justice system
- d. by the actions of Trevor Coulter, Neville Thomas, other employees of the Commissioner of Taxation and the Commissioner of Taxation;
 - i. criminally, unlawfully, fraudulently and invalidly approaching business associates of the Grantee/Chargee and defaming the Grantee/Chargee alleging the business activities of the Grantee/Chargee were a Fraud thereby damaging the reputation of the Grantee/Chargee and yet failing to bring any such Informations to the attention of the Commonwealth Director of Public Prosecutions/the Attorneys General,
 - ii. Prior to the 24th April 2018 garnishing accounts of entities related to the Grantee/Chargee without any lawful entitlement including \$58,000 removed (stolen) from the account of Island Bio Energy Australia,
 - iii. On the 24th April 2018 telephoning the vendors of the issued capital of Progressive People Australia Pty Ltd and defaming the Grantee/Chargee so that the Vendors withdrew from Heads of Agreement to sell that issued capital dated the same day as the commencement of AMC-18-5575; *Regina v Andrew Garrett*
 - iv. Fraudulently removing of at least \$34,000 (Theft) from the Tax Account of Grain Master Pty Ltd as an entity related to the Grantee/Chargee
 - v. Breaching the Human Rights of the Grantee/Chargee to reputation, privacy, property. intellectual property, freedom of speech, freedom of travel amongst other things
 - vi. Harassing business associates related to the Grantee/Chargee
 - vii. Publishing audits in respect to the Grantee/Chargee and related entities that were false misleading and deceptive and were at all relevant times a Fraud on the Courts and Tribunals of Australia,
 - viii. Frustrating the rights of the Grantee/Chargee to receive payment from the Grantors/Chargors in respect to admitted facts and liabilities ,
 - ix. Frustrating the rights of the Grantee/Chargee to the equitable right of set off,
 - x. Variously failing to exercise their powers and Public Trust to act in the Public Interest,
 - xi. Failing to consent to orders to set aside the default judgment in DCCIV-1666-2003; Deputy Commissioner of Taxation v Andrew Garrett as Trustee for the Andrew Garrett Family Trust
- e. Interfering with the Intellectual Property and other Human Rights the property of the Grantee/Chargee by allowing;
 - i. Treasury Wine Estates Vintners Limited (“TWEV”) to file and serve 24 False affidavits and refusing the Grantee/Chargee permission to cross examine the deponents of the False Affidavits thereby prompting Perjury of officers of the Crown

- ii. Make Wine Pty Ltd to trade with the Reputation and Name of the Grantee/Chargee in circumstances where TWEV was in breach of a Deed of Settlement dated 26th July 2000 between the Grantee/Chargee and TWEV thereby frustrating the Grantee's/Chargee's rights under the resultant equitable/contractual Charge/Personal Property Security Interest over TWEV and the parent entities of TWEV at various times
- iii. The Grantors/Chargors to frustrate interfere and delay the development of 40 years of experience expressed as OenoViva Global, OenoViva Business Systems, OenoViva Artisans, OenoViva Hand Crafting, OenoViva Capital Resources, OenoViva Digital Coin and otherwise.
- f. Avoiding the facts set out in Freedom of Information Act releases from the Australian Taxation Office variously dated June 2014 – March 2015 that has been the subject of affidavits and submissions to courts and tribunal on no less than 32 separate occasions including most recently during the lawful exercise of Search Warrants dated February 2017,
- g. Unlawfully and invalidly cancelling amending activity statements of the Trustee of the Andrew Garrett Family Trust lodged by the Grantee/Chargee in accordance with the instructions of the Commissioner of Taxation in order to avoid paying compensation for a sequestration order that was wrongfully obtained and the trespasses of Peter Ivan Macks and Stephen James Duncan on the Banrupt Estate of the Grantee/Chargee
- h. following, menacing and confronting Amit Shilotri, as agent for the Grantee/ Chargee, in Kuala Lumpur during the period 16th-23rd September 2016 when negotiating valid Financial Instruments/UNCITRAL International Bills of Exchange drawn by the Grantee/Chargee while communicating value in paper format
- i. acting under information obtained unlawfully by the Grantors/Chargors, more particularly officers of the Commissioner of Taxation including Trevor Coulter and Neville Thomas (but not limited to), through criminal/ unlawful/invalid electronic surveillance of the email accounts and telecommunication platforms the property of the Grantee/Chargee in the period 25th June 2012 until today's date,
- j. interfering with Judicial processes in proceedings set out as annexure 1 to Notice of Constitutional Matters filed and served in NSD 1848 of 2018; *Rubis & Ors v Garrett & Ors v Registrar of the SA v Regina & Ors* including making of sequestration orders on the 24th September 2004 and 15th May 2015 against the Grantee/Chargee in respect to alleged debts that could not and did not lawfully exist
- k. Swearing false affidavit materials in respect to the aforementioned alleged debts
- l. Breaching the Tribunal obligations to inquire and act in the Public Interest
- m. interfering with Bankers, domestically and abroad in the monetisation of value arising from;
 - i. Debt Collection processes managed by the Grantee/Chargee arising from a Deed of Assignment of Debt and Security dated 27th June 2017 and subsequent Deed of Variation dated 1st February 2018 and subsequent Notices of Crystallisation of Charges/Seizure of Collateral issued against under Charges and Personal Guarantees,
 - ii. The purchase of Wood Pellet Production equipment and business trading as Island Bio Energy Australia,
 - iii. Land and buildings located at;
 - 1. Duncan Street Montrose,
 - 2. 19 A Rawson Street, Croydon Park, NSW
 - 3. Bothwell,
 - 4. Osterley,
 - 5. Westerway, Tasmania,
 - 6. Relbia, Tasmania,
 - 7. Mount Carey, Adelaide Hills,
 - 8. Leawood Gardens, Adelaide,
 - 9. Yarra Valley,
 - 10. Langhorne Creek,
 - 11. Southwharf, Melbourne
 - 12. Cowper Wharf Road Woolloomooloo
 - 13. 25 Powell Street, East Killara
 - 14. Otherwise related to the Grantee/Chargee

- n. Publishing International Notice and threat against the International Banking Community dated on or about November 2018 – January 2019
 - o. interfering with an executed arm's length commercial contract dated 4th December 2018
 - p. appointing three investigators purportedly representing the International Anti-Money Laundering Authority;
 - i. interfering with Power of Attorney and other agents of the Grantee/Chargee in Riyadh, Saudi Arabia communicating value in respect to Financial Instruments Drawn by the Grantee/Chargee,
 - ii. The aforementioned three agents seeking payment by 4 X Cash Bank Cheques in the amounts of AUD \$250 Million to facilitate the monetisation of the aforementioned
 - iii. Promoting and publishing AMC-18-5575; Regina v Garrett to representatives of the Grantee/Chargee and otherwise
 - q. Passage of *the Telecommunications Amendments (Access & Assistance) Act* 2018 on the 8th December 2018
 - r. Failing to establish and account in the Name of the Australian People Future Fund between the 30th April – 21st May 2018 in the public interest with the Reserve Bank of Australia
 - s. Otherwise the subject of the Model Litigant Obligations to fully disclose all material facts and otherwise comply with the obligations of open and transparent government.
 - t. Failing to obtain certification of Compliance with the Legal Services Directions 2017 and predecessor Directions from the Office of Legal Services Co-Ordination when bring and/or defending court proceedings
 - u. Making Vexatious Litigant orders/findings as a barrier to justice (obstruction) as indictable offences under s42 & s43 of *the Crimes Act* 1914 (Cth) in circumstances where the Grantors/Chargors are hopelessly conflicted as a consequence of pecuniary interests, which orders have been made on no less than 10 separate occasion against the Grantee/Chargee under;
 - i. S39 of *the Supreme Court of South Australia Act* 1935 (SA)
 - ii. S89K of the Freedom of Information Act 1982 (Cth) as a barrier to release of personal information in the possession and control of the Commissioner of Taxation, The Federal Court of Australia and the Federal Circuit Court of Australia
 - iii. S37AO of *the Federal Court of Australia Act* 1976 (Cth)
2. caused the Registrar of the Personal Property Security Act to fraudulently and criminally remove registrations of the aforementioned Statutory and Equitable Charges/ Personal Property Security Interest in order to obstruct the operation of Justice by making alleged decision that are ultravires/invalid & unlawful dated as follows in respect to the registration Numbers set out below (but not limited to);

20th December 2018; Attachment 1 to Decision in respect to **ENQ-1106088-K9B4C2**; 201605190017490, 201605220000515, 201606020050311, 201607030000346, 201608020065495, 201608130013223, 201608130013299, 201608270013008, 201608290078334, 201609080095604, 201609080097303, 201609080121100, 201609120009201, 201611280081228, 201801290020993, 201805140023684, 201808290011555, 201809070096183, 201809170059490, 201812270025300

20th December 2018; Attachment 2 to Decision in respect to **ENQ-1106088-K9B4C2**; 201205250018230, 201205250050290, 201207200074409, 201207220000511, 201207280005469, 201207280005532, 201301240021266, 201301250066875, 201301250067273, 201301250067549, 201301250067679, 201305060012453, 201305060013997, 201305060014918, 201305060015421, 201305060016319, 201305060016927, 201305060022592, 201305060022851, 201305060023531, 201305060024116, 201305060025330, 201305210022141, 201305270023609, 201306100019425, 201306100020827, 201306190081371, 201306190082660, 201306190083168, 201306190083856, 201306190084189, 201306190084947, 201306190085103, 201306190085539, 201306190085732, 201306190086059, 201306190086253, 201306190086658, 201306190086777, 201306190086945, 201306190087013, 201306190087273, 201306190087468, 201306190087633, 201306200017897, 201306200018319, 201306200018678, 201306200019187, 201306200019636, 201306200060683, 201306200063508, 201306200064163, 201306200064775, 201306200065444, 201306200066713, 201306200067226, 201306200067836, 201306200068248, 201307290033368, 201307290041265, 201308040000875,

201308040000881, 201308250000288, 201309060058471, 201309060058812, 201309060059108, 201309060059858, 201309060060282, 201309060060474, 201311040034352, 201311150066898, 201408090007387, 201601190032959, 201605050023442, 201605100065092, 201607030000461, 201608170050697, 201702050001294, 201703240058831, 201808090046607

5th February 2019; Attachment A Statement of Reasons **ENQ-1106088-K9B4C2**; 201310200000960, 201611290014649, 201704160000221, 201707180029034, 201709170000781, 201712240000544, 201804220001047, 201810010034506

5th February 2019; Attachment B Statement of Reasons **ENQ-1106088-K9B4C2**; 201205250018230, 201205250050290, 201207200074409, 201207220000511, 201207280005469, 201207280005532, 201301240021266, 201301250066875, 201301250067273, 201301250067549, 201301250067679, 201305060012453, 201305060013997, 201305060014918, 201305060015421, 201305060016319, 201305060016927, 201305060022592, 201305060022851, 201305060023531, 201305060024116, 201305060025330, 201305210022141, 201305270023609, 201306100019425, 201306100020827, 201306190081371, 201306190082660, 201306190083168, 201306190083856, 201306190084189, 201306190084947, 201306190085103, 201306190085539, 201306190085732, 201306190086059, 201306190086253, 201306190086658, 201306190086777, 201306190086945, 201306190087013, 201306190087273, 201306190087468, 201306190087633, 201306200017897, 201306200018319, 201306200018678, 201306200019187, 201306200019636, 201306200060683, 201306200063508, 201306200064163, 201306200064775, 201306200065444, 201306200066713, 201306200067226, 201306200067836, 201306200068248, 201307290033368, 201307290041265, 201308040000875, 201308040000881, 201308250000288, 201309060058471, 201309060058812, 201309060059108, 201309060059858, 201309060060282, 201309060060474, 201311040034352, 201311150066898, 201408090007387, 201601190032959, 201605050023442, 201605100065092, 201607030000461, 201608170050697, 201702050001294, 201703240058831, 201808090046607, 201804220001047, 201810010034506

15th May 2019; Attachment A Statement of Reasons **ENQ-1106088-K9B4C2**; 201310200000960, 201611290014649, 201704160000221, 201707180029034, 201709170000781, 201712240000544, 201802120022445, 201802200022517, 201804220001047, 201810010034506

AND WHEREAS, the removal of the aforementioned PPSR Registrations by the Registrar was the subject of a further Notice of Indictable Offences dated the 11th February 2019 (**Annexure 7; Letter to Deputy Registrar Peter Edwards dated the 11th February 2019**) amongst others does not affect;

- (1) The Facts admitted by the Grantors/Chargors over an extended period
- (2) The Indebtedness and Liability admitted to be owed
- (3) The Equitable and Statutory Charges/Personal Property Security Interests securing the aforementioned admitted Indebtedness and Liability
- (4) The rate of escalation of the aforementioned Indebtedness and Liability

AND WHEREAS the Grantees/Chargees applied on the 6th September 2018 for a payment under the Act of Grace provisions of the Public Governance Performance & Accountability which was refused by the Department of Finance thereby exhausting the Grantees'/Chargees' Right of Remedy under Australian Treaty Series No 5, 23 and 39 & the *UNCITRAL Convention on Bills of Exchange and Promissory Notes 1988* (UN) which treaties are also contracts executed by the Grantors/Chargors creating equitable and contractual Charges/ Personal Property Security Interests in the hands of the Grantee/Chargee,

AND WHEREAS at all relevant times Chris Jordan, Trevor Coulter, Neville Thomas, Siobhan Unwin, Vincent Tavoraro and Sue-Anne Thomson and others named in Annexure 7 (**Annexure 8; Amended Statement of Claim; VID 600 of 2014; Andrew Garrett v Chris Jordan & Ors.**)

AND WHEREAS the aforementioned Indebtedness and Liabilities have been demanded of the Grantors/Chargors to be paid, remains due, has not been paid and is in default,

AND WHEREAS s123 of PSA allows for the secured party to seize collateral assets including intellectual property and/or anything of value in accordance with this Notice of Seizure of Collateral, the provisions of *the Corporations Act 2001* (Cth) and the Common Law in respect to equity allows for the aforementioned equitable and statutory charges to be crystallised and for the appointment of a Managing Controller and/or Liquidator to the assets of the Grantors/Chargors

AND WHEREAS the Grantee/Chargee hereby appoints himself by the powers vested in him as the Grantee/Chargee to be the Managing Controller of the assets of the Grantors/Chargors as set out in Schedule 1

NOW TAKE NOTICE that the Collateral set out in Schedule 1 and otherwise held for the benefit of the Grantors/Chargors are hereby seized with immediate effect by the Grantee/Chargee such that the Collateral is under the Control of the Grantee/Chargee as Managing Controller appointed which Control is perfected in accordance with the aforementioned applicable law;

Dated Saturday, 1 June 2019; Signed on behalf of the Grantee/Chargee personally and in all of his capacities as Trustee, Managing Controller of Entities and otherwise;



Andrew Morton Garrett, in all his capacities including (but Not Limited to)
Managing Controller of Entities & Grantors/Chargors
Chairman/Managing Trustee of OenoViva Capital Resources
Chairman/Managing Trustee of OenoViva Capital Resources
Grantee/Chargee

SCHEDULE 1

PROPERTY SUBJECT TO FIXED CHARGE.

All of the assets and undertakings belonging to **the Grantors/Chargors and/or to which the Grantors/Chargors holds a beneficial interest and/or to which the Chargors/Grantors hold a lien or charge wither by the aforementioned Public Trusts/ Letters Patent or otherwise** which are not otherwise subject to a fixed charge including ,without limitation;

- ❖ The Grantors'/Chargors' and/or the rights of the Chargors'/Grantors' related entities' entitlement to receive money from accounts held by the Grantors/Chargors and the Grantors'/Chargors' related entities, including Bank Accounts held with any Bank and money of any currency held therein,
- ❖ The Grantors'/Chargors' entitlement to receivables/payable by any person or entity and any loan accounts made to any other entities (*related or unrelated*) by the Grantors'/Chargors' and the Grantors'/Chargors' related entities including Financial Institutions in respect to the Committed Liquidity Facilities provided by the Reserve Bank of Australia,
- ❖ All assets including Plant & Equipment, Customers, Books and Records belonging, or beneficially belonging to the Grantors/Chargors and the Grantors'/Chargors' related entities.
- ❖ the Grantors'/Chargors' and the Grantors'/Chargors' related entities entitlement to be paid money in respect to invoices raised by them including money owed and./or payable under engagement/salary agreements and any other invoices outstanding as owed to the Grantors/Chargors and the Grantors'/Chargors' related entities at the date of this Notice and subsequently
- ❖ Intellectual Property
- ❖ Assets and Undertakings
- ❖ Shares in other Public Companies listed on the Australian Stock Exchange and otherwise, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Shares in Private Companies, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Interests in Real Estate/Real Property, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Stock, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Chattels, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Office Plant & Equipment, Fixtures and Fittings within and without the jurisdiction of the Commonwealth of Australia
- ❖ Choses in Action against any person, within and without the jurisdiction of the Commonwealth of Australia
- ❖ Any other thing of value within and without the jurisdiction of the Commonwealth of Australia owned or beneficially owned by the Grantors/Chargors not referred to in the Schedule
- ❖ Rights and Powers of any kind, whether hereditary or otherwise
- ❖ The Grantors'/Chargors' Public Office/Position of any kind and the right to appoint to persons Public Office
- ❖ The Role of Champion of the Public Interest in the Grantees'/Chargees' capacity as Chairman/Managing Trustee of the Australian People Future Fund
- ❖ Any thing not otherwise covered by the Schedule
- ❖ Any document or thing related to the Grantee
- ❖ Power of Attorney of the Grantors/Chargors
- ❖ Agency of the Grantors/Chargors
- ❖ Rights to determine law in the Public Interest

Annexure 1; Cabinet Paper on Role of Attorney General

Section 2 – Overview of Ministerial Responsibilities

SECTION 2

OVERVIEW OF MINISTERIAL RESPONSIBILITIES

Government Decision Making

Role of the Attorney-General

Role of the Minister for Emergency Management

Machinery of Government Changes

Legal Services to the Commonwealth

Provision of Legal Assistance to Ministers and their Staff

Ministerial Councils

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Section 2 – Overview of Ministerial Responsibilities

GOVERNMENT DECISION MAKING

This sets out briefly the legal context in which Australian Government decision-making takes place.

Sources of Commonwealth power

The Australian Government exercises:

- **Executive power** which is vested in the Queen and is exercisable by the Governor-General (Constitution: s.61), the Ministers responsible for the Departments of State established by the Governor-General in Council (Constitution: s.64) and to a more limited extent by public servants. The Constitution also confers other specific executive powers on the Governor-General or on the Governor-General in Council.
- the traditional and non-statutory **prerogative power** of the Crown, such as the power to conduct foreign affairs (the negotiation, conclusion and ratification of treaties), to make war and peace and to grant mercy. This is now generally seen to be part of the executive power vested by s.61 of the Constitution.
- **Statutory power** which may be conferred by legislation on the Governor-General, a Minister, the Secretary to a Department of State or other persons.

The administrative decisions of the Australian Government, which include the decisions of the Governor-General, Ministers and others who act for the Commonwealth, must:

- be made within the limits of the powers outlined above
- comply with any specific limitations imposed on particular powers, and
- satisfy general administrative law requirements.

Exercise of decision-making powers

In most cases the holder of the office in which the Parliament vests a power, such as the Minister, Attorney-General or Secretary of a Department, may arrange for that power to be exercised by another person through operation of:

- an express statutory power to delegate to another person
- a statutory or implied power to authorise an official to exercise the power on that person's behalf, or
- a statutory or implied power to authorise an official to carry out duties that form part of the process of making a decision.

Generally, a change in office-holder, or the designation of an office, does not affect delegations. As a matter of good practice, delegations are reviewed where there is such a change and remade. Authorisations must be reviewed and remade where there is such a change.

General administrative law requirements

In addition to any specific requirements, general administrative law principles apply to the exercise of decision-making powers by ministers and public servants. The requirements for the exercise of decision-making powers are set out by the courts. In general, Ministers or public servants exercising a decision-making power should:

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Section 2 – Overview of Ministerial Responsibilities

- afford a person affected by a decision procedural fairness. In general, the minimum requirements of procedural fairness are satisfied if the decision-maker is not biased and if the person affected by the decision is given a reasonable opportunity to comment on any relevant material adverse to the person
- exercise their decision in the terms of the decision-making power, for example the terms of the statute conferring a power, and
- make the decision themselves, and not under 'dictation' from another person.

Accountability mechanisms for decision-making

There are a variety of mechanisms for keeping government accountable for its decisions. In addition to judicial review, merits review and the Ombudsman, there are other subject specific agencies such as the Australian Human Rights Commission, the Information Commissioner and the Auditor-General.

Judicial review

Under the Constitution, the High Court can review decisions of Commonwealth officers, including Ministers. The Federal Court has a parallel jurisdiction under s 39B of the *Judiciary Act 1903*. The Federal Court can review decisions of an administrative character made under an enactment (eg legislation, regulations, and legislative instruments) under the *Administrative Decisions (Judicial Review) Act 1977*.

In general, any person whose rights or interests are adversely affected by a government decision, conduct or failure to make a decision can seek judicial review. Judicial review is only available for procedural errors or errors of law. The court does not look at the merits of a particular decision.

The grounds on which an order of review may be sought under the ADJR Act are codified in that Act. These grounds effectively cover failure to comply with the specific requirements of legislation or other decision-making power, and general administrative law principles. Important grounds include failure to afford a person procedural fairness, acting under dictation, failure to follow required procedures, lack of jurisdiction, acting on the basis of a rule or policy without regard to the merits of the case and abuse of power.

Judicial review remedies typically involve either a declaration that a decision was invalid, in which case the government makes the decision again, or an order quashing the decision and remitting the decision to the original decision maker to make again.

Merits Review

Unlike judicial review, merits review involves a reconsideration of the entire decision on the facts. The Administrative Appeals Tribunal's function can review the merits of decisions of Ministers, officers and authorities where there is a law which specifically provides for that review. The AAT can decide that, while a particular decision may be legally correct, it is not the preferable decision, and can substitute its decision for that of the Minister, officer or authority. There are also separate specialised merits review tribunals for social security, migration and veteran's entitlements decisions. The AAT is in the Attorney-General's portfolio, but is an independent agency.

The Ombudsman

The Ombudsman has broad powers to investigate complaints about administrative action and to make recommendations to the department or authority concerned and to the responsible Minister.

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In some circumstances, the Ombudsman may inform the Prime Minister of matters, and make special reports to Parliament. The Ombudsman has considerable powers under the *Ombudsman Act 1976* to obtain information and may investigate administrative action of his/her own motion. The Ombudsman is in the Prime Minister's portfolio, but is an independent agency.

Information Commissioner

The Australian Information Commissioner was established on 1 November 2010. The Information Commissioner has functions relating to Australian Government information policy, freedom of information and privacy and is supported by two statutory officers: the Privacy Commissioner and the FOI Commissioner.

The object of the Commonwealth *Freedom of Information Act 1982* (FOI Act) is to give the Australian community access to information held by the Australian Government. The FOI Act imposes on agencies a legal duty to provide members of the public with access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents. Since 1 November 2010, the Australian Information Commissioner, supported by the FOI Commissioner, has exercised wide ranging functions related to the oversight of the FOI Act. This includes the functions of reviewing FOI decisions and investigating complaints about the handling of FOI applications. A right of review to the AAT lies from a review decision made by the Commissioners.

The *Privacy Act 1988* is the principal legislation governing the protection of personal information in the federal public sector and in the private sector. The Act includes Information Privacy Principles (for the public sector) and National Privacy Principles (for the private sector) addressing the collection, use, disclosure, quality and security of personal information as well as access to personal information. A breach of the privacy principles in relation to an individual's information is taken to be an interference with the privacy of that individual. An individual may complain to the Privacy Commissioner about certain interferences with his or her privacy. Since 1 November 2010, the Australian Information Commissioner, supported by the Privacy Commissioner, has exercised the Commissioner functions under the Privacy Act.

Reasons and Documents

The ADJR Act and AAT Act confer on persons able to seek review of a decision, the right to obtain a written statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision for a decision (subject to certain exceptions).

The *Freedom of Information Act 1982* imposes a legal duty to provide to members of the public access to government information, including official documents of Ministers, unless those documents fall within defined classes of exempt documents.

Further information

The Legislation Handbook requires the Attorney-General's Department to be consulted on legislative proposals for:

- the conferral of new jurisdiction on courts and tribunals
- the conferral of administrative discretions
- the review of administrative decision-making powers, and
- the creation or amendment of criminal offences and penalties.

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Section 2 – Overview of Ministerial Responsibilities

ROLE OF THE ATTORNEY-GENERAL

ROLE OF THE ATTORNEY-GENERAL

Background

The Attorney-General is the First Law Officer of the Commonwealth. The Second Law Officer, under the *Law Officers Act 1964*, is the Solicitor-General.

The Attorney-General has three types of responsibility:

- The Attorney-General, and any other Ministers appointed to administer the Portfolio, are responsible for the administration of the Portfolio policy areas, and Commonwealth Acts, set out in the Administrative Arrangements Order.
- As First Law Officer of the Commonwealth, the Attorney-General also has general legal policy responsibility for all Commonwealth laws. The Attorney-General is the legal adviser to the Commonwealth Government. The Department receives a copy of all Cabinet submissions related to the Department and facilitates input from the Australian Government Solicitor.
- Third, the Attorney-General traditionally has had a special independent responsibility within government to act in the public interest. The principal areas where this responsibility arises are in litigation and prosecution processes.

The Attorney-General's role in the Cabinet and on Cabinet committees

Traditionally, the Attorney-General has been a member of the Cabinet, representing the interests of the whole portfolio. Under successive governments, the Attorney-General has also been a member of the National Security Committee (NSC) and the Parliamentary Business Committee (PBC). Under current arrangements, the Attorney-General can be co-opted to other committees (such as the Expenditure Review Committee) for specific items.

NSC focuses on major international security issues of strategic importance to Australia, national responses to developing situations (either domestic or international) and classified matters relating to aspects of operations and activities of the Australian Intelligence Community. PBC considers priorities for the Australian Government's legislation program.

The Cabinet Handbook requires ministers to take full responsibility for the proposals they bring forward, even where detailed development or drafting may have been done on their behalf by officials. As well as representing your own portfolio interests in Cabinet, the Attorney-General is at times asked to provide legal advice in relation to proposals put forward by other Ministers.

Policy and Legislation

The Attorney-General and the Department provide advice to all Ministers and agencies as part of the development by those Ministers of policy proposals.

The Legislation Handbook requires all Cabinet Submissions proposing legislative action to include a statement whether the Attorney-General's Department considers any proposed legislation necessary.

The Office of Parliamentary Counsel, which drafts all Commonwealth legislation, is also part of the Attorney-General's portfolio. The Office of Parliamentary Counsel prepares the Attorney-General's certificate, in accordance with section 58 of the Constitution, advising the Governor-General

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whether she should recommend any amendments to the Bill or whether it should be reserved for the Queen's pleasure.

Litigation

The Attorney-General is the first representative of the Crown in the courts.

Proceedings may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him for that purpose (*Judiciary Act 1903*: s.61).

Where the Commonwealth is party to proceedings, all process required to be served on the Commonwealth is required to be served on the Attorney-General or a person appointed by the Attorney-General to accept service (*Judiciary Act 1903*: s.63).

Attorneys-General since 1999 have issued Legal Services Directions (Directions) under section 55ZF of the *Judiciary Act 1903*, which set out the requirements for the conduct of legal affairs by the Commonwealth and its agencies (see **Legal Services Directions** for comprehensive brief). The Directions are made as a statutory instrument and have the force of law. They include, amongst other things, obligations in relation to the sharing of advice within the Commonwealth, the Commonwealth's obligation to act as a model litigant, the settlement of claims against the Commonwealth, procurement of legal services including the engagement of counsel on behalf of the Commonwealth. There are also a number of reporting requirements including on significant issues arising in the provision of legal services, legal services expenditure, and annual compliance with the Directions.

Under the Directions, legal work in relation to key strategic areas of the law is tied to certain providers of legal services. This is to ensure a consistent approach by the Commonwealth in these areas of the law; namely, advice to Cabinet, national security, Constitutional law, public international law, and legislative drafting. Generally, this work is tied to the Australian Government Solicitor, the Attorney-General's Department, and in relation to public international law, the Department of Foreign Affairs and Trade.

All cases involving a matter arising under the Constitution or involving its interpretation are required to be brought to the attention of the Attorney-General (*Judiciary Act 1903*: s.78B). The Attorney-General has a right to intervene in any proceedings that relate to a constitutional issue (*Judiciary Act 1903*: s.78A).

The Attorney-General has other specific rights of intervention, and is able to seek to intervene in judicial proceedings in the public interest. The certificate or fiat of the Attorney-General is necessary before proceedings seeking to enforce a public right can be instituted by a private person. This process has generally been overtaken by the use of administrative law procedures, and the relaxed attitude of the courts to standing.

Prosecution Process

Under the *Director of Public Prosecutions Act 1983* (DPP Act) and the *Judiciary Act 1903*, the Attorney-General has the legal authority to:

- initiate or discontinue a prosecution, or
- issue directions to the Commonwealth Director of Public Prosecutions (CDPP) which must be tabled in Parliament, including directions as to the handling of a particular case.

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These powers have rarely been exercised since the DPP Act came into force. It has been a longstanding practice to leave prosecution decisions to the independent judgment of the CDDP and avoid the appearance of political interference.

The Attorney-General does have an active role in determining whether to consent to certain prosecutions. There is a range of offences that require the Attorney-General's consent to prosecute, generally because there is some issue of international relations or national security that must be weighed against the desirability of proceeding with a prosecution. You will be fully briefed on each of these matters, which typically arise once or twice a year.

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Section 2 – Overview of Ministerial Responsibilities

ROLE OF THE MINISTER FOR EMERGENCY MANAGEMENT

Attorney-General Roles and Responsibilities during Crises

The *Australian Government Crisis Management Arrangements – A Guide for Ministers (Attachment A)* provides general guidance to assist ministers and their staff during a crisis by providing a high level overview of the Australian Government's crisis management arrangements.

The framework is owned by the Prime Minister and administered by the Department of Prime Minister and Cabinet and the governance arrangements require the biannual update of the framework. The framework was updated in December 2012 and distributed to Ministerial offices.

The **Attorney-General's** specific ministerial responsibilities during a crisis are outlined below:

1. Natural and other civil disasters within Australia

Key Responsibilities

- Approve the provision of Australian Government physical assistance under COMDISPLAN
 - COMDISPLAN is a set of coordination arrangements and does not contain legal linkages.
 - DGEMA is authorised to activate the Plan. DGEMA can activate COMDISPLAN when satisfied that a request, either received or imminent, from a Jurisdiction meets the required pre-requisites
 - Approval is based on the requesting state or territory not being able to reasonably cope during an emergency
- Be the primary source of media comment from the Australian Government -
 - AGD Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.
- Alone or together with the state or territory, announce assistance available under the Natural Disaster Relief and Recovery Arrangements (NDRRA)
 - Category A (personal hardship assistance) and Category B (restoration of essential public assets, freight subsidies and concessional loans) are activated by the state or territory
 - Category C (clean up and recovery grants) are requested by the state or territory and considered by the Prime Minister
 - Category D (exceptional circumstances assistance for otherwise ineligible measures) is decided by you, in consultation with the Prime Minister or Cabinet.
 - NDRRA payments can be made in advance but are usually by way of reimbursement for state or territory costs. They are administered by AGD but paid by Treasury pursuant to the intergovernmental agreement on federal financial relations given effect to by the *COAG Reform Fund Act*.

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- AGD makes the payments to states and territories relating to the costs of providing Category B loans at a concessional interest rate to small business, primary producers, needy individuals or voluntary not for profit bodies. The annual Appropriation Act to AGD authorises the making of these payments.
- Activate AGDRP by making two Determinations under the *Social Security Act* and seek the Prime Minister's agreement to make an equivalent payment to eligible New Zealand special category visa holders.
- The payment to New Zealand SCV holders is an ex-gratia payment. Following the decision in Williams, the legal authority to make the payment was secured by way of Regulation under the *Financial Management and Accountability Act*.
- The Prime Minister's response to the first request of the disaster season to make the ex-gratia payment has previously been a blanket agreement to you making the ex-gratia payment available for all subsequent activations of AGDRP.

2. Terrorism and other security-related crises within Australia

Key ministerial responsibilities

- Advise the Prime Minister whether to initiate a declaration of a National Terrorist Situation (NTS).
 - An NTS is an administrative arrangement that includes States/Territories having primary operational responsibility but the Commonwealth determining policy and broad strategies.
 - The basis for the advice to the Prime Minister is taken from ASIO's National Threat Assessment Centre in relation to specific people, places, events, sections and interests and jurisdictional situational updates.
 - The information is provided by ASIO through established channels which exist within EMA and the AGO. Jurisdictions are consulted individually by nominated officers or as a group via a NCC.
 - EMA work with ASIO and other AGD divisions to produce a brief for the AG clearly outlining the justification for making a recommendation.
- The Handbook includes a list of likely factors that would impact a recommendation:
 - Scale and nature of incident, including the use of chemical, biological, radiological or nuclear materials;
 - Involvement of multiple jurisdictions;
 - Involvement of Commonwealth Government interests;
 - Significance of the threat;
 - Impact of a threat involving civil aviation or maritime operations;
 - Involvement of national vital infrastructure; and
 - Involvement of foreign or international interests.
- Be the primary source of media comment from the Australian Government - the AGD Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.
- Approve the provision of Australian Government physical assistance under COMDISPLAN.

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- In the event of actual or likely domestic violence, under Part IIIAAA of the *Defence Act 1903* either:
 - Make a recommendation jointly with the other authorising Ministers (the Prime Minister and the Minister for Defence) that the Governor-General make a call out order, or
 - If a sudden or extraordinary emergency arises and it is not possible to follow the normal processes, jointly (with the Minister for Defence), make a call out order of the type the Governor-General is otherwise authorised to make.

3. Off-Shore Requests for Assistance

- The **Attorney-General** may also be asked to approve assistance for off-shore emergency events. In these instances, the **Attorney-General** will be briefed by the DGEMA on a case-by-case basis but the Minister for Foreign Affairs retains overall responsibility.
- Overseas requests are divided into Overseas Development Aid Eligible (ODA) countries and Non-ODA;
 - ODA countries typically have AusAID as the lead agency with EMA managing activities under the auspices of the Australian Government Overseas Assistance Plan (AUSASSISTPLAN). ODA responses are paid for under the Development Budget managed by AusAID.
 - Non-ODA countries typically have DFAT as the lead agency. Non ODA responses require a special appropriation from Treasury to be obtained to fund the response. Depending on which department initiates the response, usually determines who requests the appropriation.

4. Whole-of- Government Coordination Mechanisms

- The Prime Minister may convene one of the following committees: the *National Security Committee of Cabinet* or the *Disaster Response and Recovery Committee of Cabinet*.
- Senior officials support through the *Australian Government Crisis Committee* as the Australian Government coordination mechanism (for a cyber incident this may also include the *Cyber Security Operations Board chaired by Secretary AGD*). The *National Crisis Committee (AGCC plus states and territories)* is the National Coordination mechanism. These are coordinated by AGD.

AGD Support to the Attorney-General:

Emergency Management Australia

- The Crisis Coordination Centre (CCC) stands ready to accept notification of disaster events 24/7 including updates from Geoscience Australia for seismic related disasters; the Bureau of Meteorology for weather related disasters and updates from affected jurisdictions (including damage assessments and response efforts). The CCC monitors open source as well as social media to gain an appreciation of rapidly developing events.

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- Once an emergency is imminent (i.e. fire/cyclone/severe storm) or once a rapid-onset disaster has occurred (i.e. earthquake/tsunami), designated state or territory emergency management personnel will contact the CCC to provide information and discuss possible assistance requirements.

COMDISPLAN

- Where an emergency is likely to result in Australian Government provided or organised assistance being required, DGEMA will activate COMDISPLAN. The activation of COMDISPLAN provides an indication of the serious nature of the event and warns non-affected jurisdictions or Australian Government Agencies that EMA will be starting to plan to provide assistance.

DGEMA will advise the Attorney that COMDISPLAN has been activated

Requests must not detail the specific nature of the assistance, instead must request a capability to achieve an outcome.

- Once there is an indication that a formal request for assistance is forthcoming or has been received by EMA, EMA determine in conjunction with stakeholders the validity of the request (i.e. availability in private sector, availability within state, capability to manage the capability, availability elsewhere or at Australian Government/International level).

If this identifies that the request is valid and can be actioned, then DGEMA will seek approval from the **Attorney-General** to commit Australian Government resources to fulfil the request.

If the Attorney General agrees to commit Australian Government resources, then EMA organises those resources.

The Attorney-General may choose to provide a blanket approval (across a disaster, say a flood), or require a separate authorisation for every separate resource request.

- Finance:
 - Australian Government agencies are expected to cover the cost of COMDISPLAN activities within their own budgets.

The AGCMF refines the process to detail:

- o Spending within budget (existing appropriation) or beyond existing approvals under an existing Regulation 10 approval under the Financial Management and Accountability Act 1997 (FMA Act);
- o Significant financial implications must be considered in consultation with PM&C, Finance and Treasury;
- o Where timing allows additional funding should be sought via the Cabinet process
- o Where regular processes are not feasible, then the relevant Minister may seek a special spending cap directly from the Prime Minister.

- Reimbursement to the Australian Government from the jurisdictions is not usually sought for life/property protection activities. The Australian Government may (but rarely does) seek reimbursement for recovery based activities.

- EMA is not funded to sustain support to a jurisdiction.

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- Basis:
 - COMDISPLAN appears to have originally emerged from the original executive council minutes which formed the Natural Disasters Organisation (NDO) and appointed Maj-Gen Stretton as the first Director General in the 1970's.
 - COMDISPLAN is created as an agreement between participating agencies. Originally, as part of NDO and as Defence, the COMDISPLAN was backed by the resources of the Dept of Defence. At the time the Minister for Defence was possibly the original approving authority.
 - COMDISPLAN's strength is its cooperative nature. Several agencies who previously have tried to establish one-on-one plans and relationships, have indicated a more comprehensive COMDISPLAN would allow them to contribute to a whole of Government response.
- Development of COMDISPLAN
 - COMDISPLAN is currently under a complete review and will be put into effect for the next disaster season. COMDISPLAN is being made more inclusive so as to allow the Australian Government to more fully respond to assist the Australian jurisdictions.

Recovery Responsibilities

Strategic Communications Branch

- During a crisis such as a natural disaster or terrorist attack, Strategic Communications Branch will have overall responsibility for coordination of all Australian Government public information and media activity.
- The Strategic Communications Branch will coordinate public information activities with the Attorney-General's media adviser.

Defence Force Assistance to Civil Authorities (DFACA)

- Part IIIAAA of the *Defence Act 1903* (Cth) sets out the statutory process for calling out the ADF to deal with 'domestic violence' within Australia or with threats in the offshore area that would, or would be likely to, affect Commonwealth interests. Call out can be initiated by the Commonwealth or requested by a State or Territory.
- In the event of actual or likely domestic violence (such as domestic terrorism, which includes politically motivated attacks that kill, injure and damage property, including electronic systems), the **Attorney-General's** role would be either:
 - Making a recommendation jointly with the other authorising Ministers (the Prime Minister and the Minister for Defence) that the Governor-General make a call out order, or
 - If a sudden or extraordinary emergency arises and it is not possible to follow the normal processes, jointly (with the Minister for Defence), making a call out order of the type the Governor-General is otherwise authorised to make.

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Section 2 – Overview of Ministerial Responsibilities

- If there is also a threat of damage or disruption to the operation of infrastructure that would directly or indirectly endanger life or cause serious injury, the **Attorney-General** and the other authorising Ministers can make a declaration in writing that the infrastructure is 'critical infrastructure' for the purposes of Part IIIAAA.
 - Significantly, in conjunction with a call out order, such a declaration authorises the ADF to take measures up to and including lethal force against those attacking the infrastructure, including in cases where the infrastructure is unmanned.

Cyber Security

Following the Machinery of Government changes in December 2011 PM&C now have coordination of cyber security policy. PM&C is currently reviewing the Cyber Incident Management Arrangements. We understand there will be three cyber incident response levels: low - business as usual; medium - cyber security event; and high/crisis - cyber security crisis.

Under the plan, the **Attorney-General** has the following roles and responsibilities:

- The Attorney-General is the Australian Government's primary public spokesperson in the event of a cyber-security incident. This is dependent on the nature and scale of the crisis; the Prime Minister or Minister for Defence may assume this role in some cases.
- The Attorney-General has the authority to activate the provision of assistance to States and Territories as detailed under the COMDISPLAN and NCTC Handbook in the event of a blended cyber security incident with physical impacts. This assistance can include available Commonwealth resources relevant to deal with the crisis.
- In the event of a Level 2 cyber security incident, the Prime Minister may convene Cabinet, the National Security Committee of Cabinet (NSC) or a Prime Ministerial Taskforce to lead the overall Government response. Should this occur the Attorney -General would be involved as a member of the Cabinet and NSC.

The AGD portfolio is responsible for the following functions:

- Depending on the nature of the incident, CERT Australia within AGD, the Australian Security Intelligence Organisation (ASIO), or the Australian Federal Police (AFP) will provide advice, material and assistance to organisations affected by cyber incidents under existing arrangements — mainly for Level 0 - BAU incidents. Level 1 & 2 operational responses required from the portfolio will be coordinated through the Cyber Security Operations Centre (CSOC).
- ASIO will identify and investigate cyber security incidents conducted for the purpose of espionage, foreign interference, sabotage, terrorism or other forms of politically motivated violence, attacks on the defence system and other matters that fall under the head of security.
- The AFP will conduct law enforcement cybercrime investigations to support the identification and prosecution of cyber crime, with the assistance of State or Territory police.
- CERT Australia within AGD will provide a single coordination point within the Australian Government for advice, material and other assistance on matters relevant to a cyber-incident for the community and owners and operators of critical infrastructure and other systems of national interest (SNI).

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- Coordinated by the CSOC, CERT Australia, ASIO and the AFP will also collect operational material for the Situation Reports (SitReps) to assist with shared awareness of cyber incidents across Government.
- through the Australian Government Crisis Committee, the Agency Head or Deputy Secretary will participate in interagency coordination in the event of a Level 2 – cyber security crisis.

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MACHINERY OF GOVERNMENT CHANGES

Section 19B and 19BA Orders under the Acts Interpretations Act

Machinery of government changes (such as the re-naming of the titles of Ministers or Departments, or where responsibility for a specific Act or function is transferred between portfolios) may follow after the ministerial reshuffle and are given effect by changes to the Administrative Arrangements Order (AAO).

Sections 19B and 19BA of the *Acts Interpretation Act 1901* allow the Governor-General to make orders that alter specific references to Departments, Ministers and Secretaries contained in Acts and instruments so that they continue to operate after the changes take effect.

The orders are time-critical (without them certain functions and powers under legislation may not be legitimately exercised), and will need to be prepared in time for the first Executive Council (ExCO) meeting following finalisation of the new AAO (prepared by the Department of the Prime Minister and Cabinet for approval by the Governor-General).

The Legislation administered by the Attorney-General's Portfolio under the current AAO is provided on page 14 of this brief.

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LEGAL SERVICES TO THE COMMONWEALTH

LEGAL SERVICES DIRECTIONS

Background

The *Legal Services Directions 2005* is a statutory instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, about the performance of legal work for the Commonwealth (whether performed in-house, by the Australian Government Solicitor or by other external legal service providers).

The *Legal Services Directions 2005*

The current Directions commenced on 1 March 2006 (an earlier version of the Directions commenced on 1 September 1999) and have been amended a number of times, most recently in October 2012. The Chief Executive Officer of an agency regulated under the *Financial Management and Accountability Act 1997* (essentially Departments of State and other agencies that perform core government functions), is responsible for ensuring that their agency adopts appropriate management strategies and practices so as to achieve compliance with the Directions.

The Directions help to ensure that Commonwealth agencies receive consistent and well-coordinated legal services that are of a high standard, uphold the public interest and are sensitive to their context of Commonwealth interests (which are broader than the interests of any one agency). In turn, this approach protects the Commonwealth's legal and financial position. The Directions were issued after most Australian Government legal work was opened to competition in 1999. Before then, agencies had been required to obtain most legal services from AGS which, until that time, was part of the Attorney-General's Department.

The Directions are largely a statement of those policies that have governed the conduct of Commonwealth litigation for a number of years. In their application to FMA agencies the Directions deal with:

- what constitutes 'tied work'; that is, work that must be performed by Government legal services providers (constitutional, Cabinet, national security, public international law and most drafting work)
- the reporting and appropriate oversight of litigation raising 'significant issues' concerning sensitive legal, political or policy matters, a disagreement between Commonwealth agencies or a Commonwealth and a State or Territory agency, involving a significant level of cooperation between agencies, or the likelihood that a significant precedent will be set (see paragraph 3 of the Directions)
- the manner in which Commonwealth agencies and their legal services providers are to conduct litigation (the model litigant obligation) (see Appendix B to the Directions)
- the principles for settlement of monetary claims by Commonwealth agencies (Appendix C to the Directions)
- the use of in-house legal services by Commonwealth agencies for the conduct of litigation
- the fees for counsel engaged to appear on behalf of an agency
- claims for public interest immunity

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- pleading a defence based on the expiry of, or opposing an application for the extension of, an applicable limitation period
- the manner in which requests by officials employed by Commonwealth agencies for financial assistance in civil and criminal proceedings are to be determined
- the consultation obligation upon a Commonwealth agency obtaining advice on legislation administered by another agency or on areas of significant interest to another agency
- the reporting of legal services expenditure, and on compliance with the Directions, and
- the requirement to use the Legal Services Multi-Use List when procuring legal services from external providers.

Most bodies subject to the *Commonwealth Authorities and Companies Act 1997* are required to comply with a more limited subset of the Directions. Under that limited subset, those bodies are generally obliged to inform the Attorney-General of litigation involving constitutional issues or a disagreement with another Commonwealth agency, conduct themselves as a model litigant, comply with the Directions in relation to the engagement of counsel and claims for public interest immunity, report on legal services expenditure, and to comply with the requirement to use the Legal Services Multi-Use List.

The Directions are enforceable by the Attorney-General who, in exceptional cases, may give a specific instruction in relation to the handling of claims or the conduct of litigation. Compliance with the Directions is not enforceable by any person other than the Attorney-General under subsection 55ZG(2) of the Judiciary Act. While members of the public can, and do, make complaints to OLSC about the Commonwealth's conduct in litigation, it is ultimately a matter for the Attorney-General to decide whether the conduct complained of was or was not appropriate, and whether any sanction should be applied.

The Office of Legal Services Coordination in the Attorney-General's Department:

- oversees administration of and compliance with the Directions, including legal and legal policy advice on the Directions, decision-making on approvals and exemptions under the Directions, outreach and education on the Directions through advice to agencies on specific situations, delivery of training presentations to both agencies and their law firm providers and preparation and dissemination of guidance material, the review of alleged breaches of the Directions found by agencies and investigating any apparent systemic non-compliance, and by assisting agencies to develop compliance strategies
- provides support and advice to the Attorney-General in relation to the Commonwealth legal services market and the Attorney-General's role as one of two Shareholder Ministers in the Australian Government Solicitor (with the Minister for Finance and Deregulation), and
- coordinates the ongoing relationships between the Department and its external legal services providers. AGS is the major provider of legal services to the Department, primarily due to the Department's high tied work profile. The relationship with AGS extends to cooperation with the Department in other areas, including shared use of a legal opinions database.

The Office of Legal Services Coordination is currently implementing reforms to increase the efficiency of administering the Directions, including the implementation of a new compliance framework and a re-write of the Directions.

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