IS THERE TOO MUCH ACCESS TO ADMINISTRATIVE JUSTICE: A PROJECT FOR THE REVIVED ADMINISTRATIVE REVIEW COUNCIL?[1]

The welcome return of the ARC

1 Unsurprisingly, there has been wide acclaim for the re-establishment of the ARC. As some have pointed out, the ARC was never formally abolished. Rather, it was de-funded and its function of providing advice to the Commonwealth on Australia's system of administrative law was brought in-house into the Attorney-General's Department.[2]

2 There are some differences between the new ARC, which has risen phoenix-like from the ashes, and the original ARC. The President of the Australian Law Reform Commission is no longer an ex officio member and the total membership is now capped at 10. Interestingly, there is a new requirement that the membership include at least one member "who has direct experience and knowledge of the needs of people, or groups of people, significantly affected by government decisions" (*Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) s 254).

3 The ARC now has a broad discretion to inquire into, report on and make recommendations to the Attorney on any of its functions. Importantly, it can now do so either of its own initiative or at the Attorney's request (see s 249(2)). This should enhance its independence and autonomy.

4 The ARC's functions and powers have also been widened. They include to monitor the integrity and operation of the Commonwealth "administrative law

[1] John Griffiths (Acting Justice of the New South Wales Court of Appeal). This paper was presented to the Australian Institute of Administrative Law on 13 November 2024. The author expresses his gratitude to his tipstaff, Jasmine Robertson, for her helpful research assistance.

[2] Calls for the re-establishment of the ARC were made by: the Callinan Report (see the Report on the Statutory Review on the Tribunal's Amalgamation Act 2015, 23 July 2019); the 31 March 2022 Interim Report by the Senate Standing Committee on Legal and Constitutional Affairs on "The Performance and Integrity of Australia's Administrative Review System" (see Chapter 6); the April 2023 Issues Paper published by the Administrative Review Taskforce; and the Report of the Royal Commission into the Robodebt Scheme published on 7 July 2023.

system", which arguably goes beyond those parts of the system which relate to judicial review, ART review and the Commonwealth Ombudsman (s 249(1)(a)). It is notable that the functions also include providing guidance in the making of administrative decisions and exercise of administrative discretions, as well as supporting education and training for Commonwealth officials in relation to such matters. Thus the ARC's work will more strongly be directed not only to review and complaint processes, but to primary decision making which underlies those processes. Those are welcome developments.

5 As I understand matters, although the ART commenced operations on 14 October 2024, the ARC is not yet operating. Thus the final new membership is not known. There is some uncertainty concerning ARC staff arrangements. ARC staff are to be APS employees in the Attorney-General's Department whose services are made available to the ARC by the Secretary of that Department. There is a specific provision in s 263(3) that, when performing services for the ARC, the staff are subject to the directions of the Council (and not the Secretary of the Department). Hopefully, these provisions will ensure the independence of the ARC from the Department.

Is there too much access to administrative justice?

6 In mid-July 2017 I gave a paper at the AIAL National Conference on the topic of "Access to administrative justice". The focus was on how greater use could be made of online and digital technology in enhancing access to administrative justice.

7 Perhaps more controversially I now wish to raise for discussion and debate whether, at an appropriate time, the ARC should undertake a project directed to the complex question whether there are adequate controls in the existing administrative justice system to address abuse of processes.

8 My comments will be directed primarily to the Commonwealth system of administrative law (and the possible need for reform), with a particular focus on the Federal Court exercising judicial review and administrative appeals jurisdictions (space limitations prevent consideration of the position concerning

the Federal Circuit and Family Court), the ART and the Commonwealth Ombudsman to control unreasonably persistent applicants. It must be acknowledged, of course, that the ARC's functions do not extend to the Federal Court generally, but are confined to its judicial review and administrative appeal jurisdictions.

9 This is not a new topic. In May 2014 the former NSW Deputy Ombudsman, the late Mr Chris Wheeler, gave a paper entitled "Responding to Unreasonably Persistent Litigants". He described the work of nine Australasian Parliamentary Ombudsmen who developed strategies for managing the unreasonable conduct of some complainants. He examined how these strategies might also assist courts in responding to unreasonably persistent litigants. Mr Wheeler noted that there was an overlap between persons who were on the Supreme Court's vexatious litigant register and who were also complainants to bodies such as the NSW Ombudsman, the Judicial Commission of NSW, the Office of the Legal Services Commissioner and ICAC. Mr Wheeler noted that while the *Vexatious Proceedings Act 2008* (NSW) had been amended in 2018 there was still the need for reform of this particular process for managing unreasonable litigant behaviour.

10 The problem (if there is one) should not be exaggerated. Let me acknowledge at the outset that there is a surprising lack of accessible information and data to assess the nature and extent of the issue. Much of the material is anecdotal or is only gleaned by detailed analysis of individual reported cases or outcomes which reveal instances of abuse of process. This includes, for example, an analysis of individual cases where the Federal Court has summarily dismissed proceedings under s 31A of the *Federal Court of Australia Act 1976* (Cth) in judicial review applications or administrative law appeals.

11 If there is a problem, it is not confined to administrative law remedies, it can affect all civil proceedings. This is so notwithstanding that, as Chief Justice Gageler recently highlighted in his address titled "The State of the Australian Judicature in 2024", the overall civil workload of Federal, State and Territory Courts has fallen steadily over the 20 years to 2022 by a total of almost 35%.

Presumably alternative dispute resolution, the costs of litigation and the availability of alternative relief in Tribunals partly explain such a dramatic decline.

12 Statistics published by the Federal Court suggest that judicial review and administrative law appeals have not declined to the same extent during that period, underpinned in large part I suspect by the Court's migration caseload (see at [21] below). The overall caseload of the previous AAT has increased, rather than decreased, over that period (see, for example the AAT Annual Report 2022-2023, ch 3 figure 3.8).

13 The conduct of litigation by both litigants in person and legal representatives is affected by the "overarching" purpose of procedural rules set out in the Federal Court Rules. But the potential for abuse of administrative justice remedies and procedures is heightened with self represented litigants (**SRLs**)/complainants. The ethical constraints which operate to check unreasonable conduct by a legal representative do not apply to SRLs and adverse costs orders do not deter many persistent or obdurate SRLs.

14 As the Full Court of the Federal Court recently observed (emphasis added):

> Most self-represented litigants behave courteously and are often forced to do so because of circumstances outside their control and sometimes, of course, they present valid claims and defences. But a few self-represented litigants, unrestrained by the norms regulating the professional conduct of lawyers and aggrieved by a perceived wrong, become serial litigants obsessed with seeking vindication of their position and in doing so mount, often repeatedly, arguments which would never be advanced by a responsible practitioner. **This phenomenon has occasioned significant problems for this Court in the efficient exercise of its original and appellate jurisdiction.**

(***Storry*** *v Parkyn (Vexatious Proceedings Order)* (2024) 304 FCR 318; [2024] FCAFC 100 at [3]).

15 Of course, I do not suggest that the difficulties are systemic and apply to all SRLs/complainants. It is a minority of SRLs/complainants who create a disproportionate number of difficulties and challenges. My impression is that

where legal representatives are not involved there is a greater risk that the following behaviours may occur with some SRLs:

- agitating substantially the same grievance in multiple places, either together or consecutively;

- pursuing cases or complaints which are entirely without merit or substance;

- commencing substantive proceedings but then making multiple and sometimes repetitive interlocutory applications which are time consuming, resource intensive and delay a final determination of the substantive matter;

- repeatedly re-agitating a grievance even after it has been heard and conclusively determined, including by way of appeal;

- making extravagant or scandalous allegations (not only against decision-makers, but also against legal representatives personally) with no prospect of them being substantiated or justified and sometimes increasingly drawing in a range of defendants into a widening circle of litigation where, for example, there is an association with a respondent against whom a prior proceeding has failed;

- not complying with procedural rules and case management directions which are designed to have cases heard and determined expeditiously; and

- acting querulously in both courts and tribunals and in dealings with staff working in administrative review bodies.

16 As Mr Wheeler stated, it is the conduct of a small percentage of complainants and litigants which unacceptably affects:

- the health and safety of the staff of an organisation;

- the limited resources of the institutions in which the grievances and complaints are raised; and

- perhaps most importantly of all, the equitable distribution of the resources of the organisation between all users, both current and potential.

17 I suspect that the problems have become even more acute during and after the pandemic, which has also coincided with increasing cost of living pressures. The issues are more likely to present where the people concerned are suffering from mental health challenges.

18 Legal advice and assistance services provided by bodies such as Justice Connect (funded by the Attorney-General's Department) and pro bono schemes run by bodies like the Law Society and Bar Association are helpful, but the demand seems to far outweigh the supply. Additionally, some persistent litigants won't accept independent legal advice where it doesn't suit their personal agendas.

19 Helpful assistance may also be provided by non-legally qualified people, known as a "McKenzie Friend". McKenzie Friends may play a greater role in administrative justice in Britain than is the case here. There is a Practice Note there with the title "McKenzie Friends: Civil and Family Courts". A McKenzie Friend may provide moral support to a litigant in person, take notes, help with case papers and quietly give advice to the litigant in person on the conduct of their case.

20 I turn now briefly to describe the powers of the Federal Court, the ART and the Commonwealth Ombudsman to control unreasonably persistent SRLs/complainants, and how those powers might be strengthened, drawing on British experience.

Federal Court

21 In 2022-2023, 83% of all original proceedings commenced in the Federal Court by SRLs related to causes of action in administrative law, appeals and related actions and first instance migration decisions. 72% of all appeals commenced by SRLs in that year were migration appeals. Interestingly, however, migration appeals as a proportion of all appellate proceedings (including cross appeals and interlocutory applications) have gradually fallen over the last five years, decreasing from 80.6% of all appellate proceedings in 2019 to 53.4% in 2022-23 (see Federal Court of Australia, Annual Report, 2022-2023, p 26).

22 The conduct of migration applications and appeals is subject not only to the Court's ordinary powers, including summary dismissal, but by other customised procedures designed to streamline the preparation and conduct of such proceedings. There is, for example, an internal procedure which involves one or two Judges reviewing all migration matters with a view to identifying cases raising similar issues or where there is a history of previous litigation. The process allows for similar cases to be managed together and for the Chief Justice to make a decision whether, for example, a migration appeal from the Federal Circuit and Family Court of Australia (Div 2) should be heard by a Full Court constituted by one or three Judges.

23 I am not aware of published statistics which reveal the extent to which the Court uses its powers of summary dismissal under s 31A of the *Federal Court of Australia Act* in administrative law matters. The s 31A power stands apart from the Court's powers to strike out a deficient pleading. The Court is empowered to dismiss a proceeding (or a part of it) summarily if the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting all or part of it. A proceeding need not be "hopeless" or "bound to fail" for it to have no reasonable prospect of success, as is made clear in s 31A(3).

24 The extrinsic materials leave no doubt that the legislative intention was to strengthen the Federal Court's power to deal with unmeritorious matters "by

broadening the grounds on which federal courts can summarily dispose of unsustainable cases" (Second Reading Speech, 10 March 2005, p 3).

25 In ***Spencer*** *v The Commonwealth* (2010) 241 CLR 118 the High Court adopted a restrictive view of s 31A. French CJ and Gummow J said at [24] that the "exercise of powers to summarily terminate proceedings must always be attended with caution", including where it is claimed that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous, vexatious or an abuse of process.

26 A close reading of the decision suggests that the Court was particularly concerned not to have Mr Spencer's proceedings summarily dismissed where the pleadings left open the possibility (even if not fully formulated or adequately particularised) that there was an informal arrangement between the Commonwealth and NSW which was designed to avoid the just terms constraint under s 51(xxxi) of the Constitution (see in particular at [31]).

27 By virtue of s 31A(3) of the *Federal Court of Australia Act,* it is no longer necessary for a party seeking summary dismissal to demonstrate that a claim is certain to fail, or hopeless or bound to fail. But before making an order under that provision, the Court needs to be satisfied that the applicant has "no reasonable prospect of prosecuting the proceeding". Cases post *Spencer* have emphasised that summary dismissal under this statutory power "is a serious step taken only with great care and if it is possible to conclude with confidence that there is no reasonable prospect of success" (*Danthanarayana v Commonwealth of Australia* [2016] FCAFC 114 at [4]).

28 The Federal Court also has the power under s 37AO of the *Federal Court of Australia Act* to prohibit vexatious litigants from instituting proceedings generally or of a particular type in the Court or to make some other order which the Court considers appropriate. The powers are only engaged if the Court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian Courts or Tribunals. The expression "vexatious proceeding" is defined to include proceedings that are an abuse of process,

proceedings instituted to harass or annoy or for some other wrongful purpose and proceedings instituted or pursued without reasonable ground (s 37AM). The Court may make a vexatious proceedings order on its own initiative or on application by a party or a person who has a sufficient interest in the matter.

29 The power was exercised in *Rana v Department of Defence* [2018] FCA 1642 so as to prevent a SRL from commencing or continuing in the Federal Court proceedings against the Commonwealth in connection with his past employment with the Department of Defence. Mr Rana had brought more than 20 separate proceedings over a 30-year period stemming from his dissatisfaction with the outcome of his claim for employees' compensation. They include unsuccessful proceedings he brought in the AAT (in 1988, 2004, 2005 and 2008), in the Federal Court (in 2005, 2007, 2008, 2009 and 2013) as well as appellate-related proceedings in the Full Court (in 2005, 2006, 2008, 2010 and 2011). All the proceedings were dismissed.

30 At [99], Charlesworth J said:

> I take into account that some of the proceedings commenced by Mr Rana are instances in which he sought to exercise rights of appeal from a judgment of the Court or rights to merits review of an administrative decision. Care should be taken before concluding that such proceedings are commenced for a wrongful purpose. An appellate proceeding may nonetheless bear the character of a "vexatious" proceeding if it is unmeritorious and so pursued "without reasonable ground". Similarly, an application for merits review of an administrative decision may be vexatious if the claimed right subject to the application is one that has previously been agitated unsuccessfully and previously subject to an unsuccessful merits review application. Mr Rana's litigation history has these features.

31 Her Honour added the following concluding remarks at [106]:

> I place substantial weight on the imposition and inconvenience the order will place upon Mr Rana, particularly having regard to his status as a self-represented litigant and the nature of the personal injuries upon which his claims are based. I nonetheless consider those interests to be outweighed by the need to prevent Mr Rana from again becoming an unreasonable imposition upon the respondent and upon the finite judicial and administrative resources of this Court in respect of this particular type of proceeding against this particular respondent.

32 A vexatious proceedings order was also recently made by the Full Court in *Storry.* Ms Storry had brought 26 individual proceedings against various respondents over a period of seven years. Many of them involved judicial review or administrative review proceedings. After concluding that some of those proceedings were vexatious, the Full Court made a vexatious proceedings order and observed at [74] that:

> … most importantly, the present circumstances represent a clear example of where the Court must act to protect itself from the expense, burden, and inconvenience of baseless and repetitious proceedings instituted by Ms Storry. Ms Storry has had plenty of days in Court, but she is not entitled to another person's day in Court to pursue quixotic and misconceived complaints. We are amply satisfied a vexatious proceedings order in this case is reasonably necessary to protect Court resources so that they are available to other litigants.

33 Vexatious litigant declarations or orders are viewed by some as a blunt instrument. It has been said, for example, that applications under the *Vexatious Proceedings Act 2008* (NSW) "often do no more than absorb further resources of the Court and of aggrieved parties, who find themselves engaged upon contestable issues to which the Act gives rise" (see ***Kitoko*** *v Sydney Local Health District* [2023] NSWSC 898 at [73] per Fagan J). In that case, notwithstanding that the litigant in person had brought at least 11 separate matters over roughly a ten-year period, the Judge saw "no utility" in taking any step under that legislation, largely because a vexatious litigant order applies only **after** unfounded or harassing claims have occurred. The Judge said that such an order engages too late to attend the mischief caused by a litigant such as the plaintiff there, whom the Judge described at [80] as "unrepresented, unreasonable, heedless of facts and unconcerned by failure".

34 Earlier, in *Kitoko* at [72] the Judge described the effects of the plaintiff's litigation history:

> The overall effect of the plaintiff's litigious activity has been to inflict significant loss on public institutions – the University, the hospitals and the courts – to the detriment of the community, in whose interests the people of those institutions endeavour to provide their services efficiently, conserving public funds and resources for their proper objects. Individual judges can do no more than determine the specific proceedings brought before them. Despite feeling a responsibility to address the cumulative effect of this barrage of misconceived,

> futile and publicly damaging litigation, the only course available to a judge would be to invoke the unsatisfactory provisions of the *Vexatious Proceedings Act 2008* (NSW).

35 The Judge proposed that, in the case of **any** unrepresented litigant, there should be a requirement that any new claim must be approved for filing by a Judge in Chambers, who could assess on the papers whether the claim has a reasonably arguable foundation.

36 This proposed requirement mirrors aspects of the requirement in England and Wales that applicants for judicial review (not only SRLs) must obtain the Administrative Court's permission to proceed with any such application (see further below).

37 The limitations of legislation concerning vexatious litigants may partly explain why the NSW Supreme Court has developed a procedure known as a *Teoh* direction (see ***Teoh*** *v Hunters Hill Council (No 4)* (2011) 81 NSWLR 771). In *Teoh,* the applicant (an SRL), having failed to obtain leave to appeal against a decision of the Land and Environment Court, sought to have that decision set aside or varied on the basis that the decision was irregular, illegal or against good faith. Her application failed but she applied twice again under the same rule, with the objective of obtaining leave to appeal as initially sought. Both further applications failed. The Court of Appeal acknowledged that because an order refusing leave to appeal was interlocutory, a renewed application for leave to appeal was technically competent. But the Court said that if the applicant were to make a fourth application seeking the same relief based on the same grounds and relying on the same materials, that would be vexatious and an abuse of process.

38 The Court noted that, even in the absence of an application to have Ms Teoh declared a vexatious litigant, it had a duty to conserve its resources and ensure as far as possible that they were available to other litigants. In order to protect against abuse, the Court acted of its own motion to exercise its inherent power to direct that, if Mrs Teoh applied again for the same relief the application would promptly be referred to a Judge for a review on the papers to determine whether

there is a case for hearing that application. If the Judge concluded that a fourth hearing was not warranted, the applicant would be invited to show cause in writing why the Court should not, in Chambers, summarily dismiss the proceedings as vexatious and an abuse of process.

39 The limitations of vexatious litigant orders and summary dismissal powers in controlling some persistent litigants was recognised last year when amendments were made to the *Family Law Act 1975* (Cth). In addition to the Court's powers in family law proceedings (which mirror those of the Federal Court) to make vexatious proceedings orders or give summary decrees (see Pt XIB, Div 2 and Div 1A respectively), the Court is now empowered to make "harmful proceedings orders" (s 102QAC). Such an order may be made where the Court is satisfied that there are reasonable grounds to believe that another party would suffer harm if a party instituted further proceedings against them. Harm is defined to include psychological harm or oppression, major mental distress, the other party's capacity to care for a child and financial harm. A harmful proceeding order prohibits a party from instituting proceedings under the *Family Law Act* against another party to the proceedings without the Court's leave under s 102QAG.

40 The 2023 amendments are an appropriate and creative legislative response aimed at arming courts in the family law jurisdiction with a range of powers to control particular kinds of unreasonably persistent litigants.

Should there be a leave requirement for judicial review proceedings?

41 The issue of whether or not there should be a requirement to obtain leave before commencing judicial review proceedings was considered by the ARC in its 2012 report styled "Federal Judicial Review in Australia". The requirement to obtain permission to apply for judicial review in England and Wales was noted but the ARC did not support the introduction of a leave requirement in Australia, at least at that time. It concluded that leave requirements were unlikely to have much of an effect. It added that if there was an oral hearing on a leave application, that would defeat its purpose of saving time and resources.

It also was concerned that dissatisfied applicants for leave would appeal adverse decisions and simply create more appeal work.

42 The ARC noted that experience in the migration jurisdiction suggested that judges were likely to give leave to proceed even if no error was demonstrated in the original application on the basis that a real issue may subsequently emerge. This was said to reflect the British experience where one (possibly dated) study revealed that 37% of judicial review applications were refused permission but of those that were re-filed, 40% subsequently obtained permission.

43 The ARC also commented that, if there was a requirement of leave, it would be necessary to have clear criteria specified in order to add certainty and guidance to the process. Another stated concern was that a requirement to obtain leave may simply prompt unsuccessful applicants to bring proceedings under s 75(v) of the Constitution in the High Court.

44 The ARC concluded that, given the small number of judicial review applications and the availability of alternative paths of review in the High Court, there was no merit in requiring leave to proceed under the *ADJR Act*.

45 Some of the ARC's concerns may still have some force but it may be appropriate and timely to revisit the issue with particular reference to more up to date material regarding the effectiveness of the leave requirement in England and Wales, to which I now turn.

The requirement for permission to proceed in England and Wales

46 Claims for judicial review are brought in the Administrative Court, which is a division of the High Court. An applicant for judicial review must obtain permission from the Court to proceed (see Pt 54 of the Civil Procedure Rules 1998 (**CPR**)). Permission will only be granted where the Court is satisfied that there is an arguable case. (A similar procedure has more recently been adopted in Scotland under the *Courts Reform (Scotland) Act 2014*).

47 The decision whether or not to grant permission is usually decided on the papers and without an oral hearing. Where permission is refused the applicant may, within seven days, request a renewal hearing. The right to request a renewal is not available if the Judge has certified the application to be "totally without merit" (see CPR r 54.12(7)). A request for a renewal must be made within 7 days. The renewal is conducted on the papers only.

48 Where an application has been certified as "totally without merit", the aggrieved applicant may appeal to the Court of Appeal where, again, the matter is determined on the papers only. There is no right to apply for an oral hearing (CPR rr 54.2 and 52.8-10).

49 Even if the Judge considers that there are arguable grounds for judicial review, permission may still be refused on one or more discretionary grounds. They include delay, the availability of an adequate alternative remedy, the claimant has suffered no injustice or the impugned error is not material (see s 84 of the *Criminal Justice and Courts Act 2015* (UK)).

50 Where permission is refused, the Judge is required to give reasons (CPR r 54.12(2)).

51 In Australia, Constitutional requirements would require the provision of reasons for judgment in refusing leave (see *Wainohu v State of NSW* (2011) 243 CLR 181 at [56]). But the reasons need not be extensive, bearing in mind the interlocutory nature of an application for leave and the need to avoid defeating the very purpose of having a leave gateway (see *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at [26] and *Mohareb v Local Court of NSW* [2024] NSWCA 235 at [34]-[36]).

52 The Administrative Court also has a discretion to conduct a concurrent hearing of an application for permission and the substantive hearing (see *R. (on the application of Lunn) v Revenue and Customs Commissioners* [2011] EWHC 240 (Admin)).

53 Where permission is refused, costs will usually be granted to the respondent (see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346).

54 In 2022, approximately 40% of applications for permission were granted and of the 60% which did not proceed to a judicial review, 11% were certified to be totally without merit. Case law has established that the concept of “totally without merit” encompasses cases which are bound to fail. It is not necessary that the application be abusive or vexatious (see *R. (on the application of Grace) v Secretary of State for the Home Department* [2014] 1 WLR 3432).

55 The material outlined above (including at [51]) suggests that there may be a case for the ARC to revisit the views it expressed in its 2012 Report concerning the appropriateness of introducing a leave requirement for judicial review proceedings (both whether brought under the *ADJR Act* or the *Judiciary Act 1903* (Cth)).

Additional powers to address abuse in judicial review proceedings in England and Wales

56 One leading English commentator recently stated that the Administrative Court has “powerful weapons to deter vexatious litigants” (Paul Craig, *Administrative Law,* 8th edition at 27-057).

57 It appears that there are available broader powers in England and Wales to deal with vexatious litigants than is the case with the Federal Court. In particular, there are powers to make a civil restraint order (CRO). These powers are more flexible than making a vexatious litigant order (known in England and Wales as a civil protection order (CPO)).

58 A CRO may be made where a person has brought claims or made applications which are considered to be "totally without merit". A CRO can take one of three forms. First, a limited CRO may be made where a party has made two or more applications which are totally without merit - the order remains in force for the duration of the proceedings and restrains the party from bringing any further

applications in those proceedings without obtaining permission from a specified. An aggrieved party may apply to amend or discharge such an order but only with the permission of the Judge. Permission is also required if the aggrieved party wishes to appeal against the order.

59 Secondly, an extended CRO restrains a party from issuing claims or applications in specified courts which are related to the proceedings in which the order is made. If the aggrieved party wishes to challenge an extended CRO, similar restrictions apply as to limited CROs.

60 Thirdly, a general CRO restrains a person from issuing any claim or making any application in specified courts without obtaining the permission of a particular Judge specified in the order. Such an order may be made where a person has persistently issued claims or applications which are totally without merit and where an extended CRO would not be sufficient or appropriate. That is the case, for example, where the litigant adopts a scattergun approach and makes multiple different applications relating to different grievances (see *Re Glass Slipper Live Events-Event 1 Ltd* [2022] EWHC 519 (Ch)). A general CRO may be made where the litigant has repeatedly breached an extended CRO. A general CRO remains in force for a specified period not exceeding three years but is capable of being extended for further periods of up to three years at a time.

61 The Administrative Court is empowered to make a CRO, which is a separate process from the requirement to seek permission to apply for judicial review.

62 The power to make a CRO is not confined to judicial review proceedings. It appears to be a valuable tool in controlling meritless litigation.

63 A CPO is substantially similar to a vexatious litigant declaration or order in Australia (see s 42 of the *Senior Courts Act 1981* (UK)), save that such an order can only be made on application by the Attorney General.

64 If a person who is subject to a CRO or CPO files a judicial review claim or makes an application to the Administrative Court without first making an application for permission to start proceedings and obtains such permission, the claim or application will not be issued.

65 Before seeking permission to start judicial review proceedings, a person who is subject to a CRO must set out the nature and grounds of the application and give the other party at least 7 days to respond. The application for permission to start proceedings is determined without an oral hearing. There is a right of appeal unless the Court has ordered that the decision to dismiss the application will be final. Where a person is subject to a CPO and wishes to bring a judicial review action, the person is required to identify themselves, give the title and reference number of the proceedings in which the CPO was made, identify the subject matter of the permission and why the person is seeking to bring a claim, as well as disclose previous occasions on which the person has made a previous application for permission.

66 An application by a person who is the subject to a CPO is determined by a Judge in Chambers who is empowered to:

- make an order giving the permission sought;
- give directions for further written evidence to be supplied by the litigant before an order is made on the application;
- make an order dismissing the application without a hearing; and
- give directions for the hearing of the application.

67 For the application not to be dismissed the Court must be satisfied that it is not an abuse of process and that there are reasonable grounds for bringing it (s 42(3) of the *Senior Courts Act*).

68 Where the application is dismissed, the Judge's decision is final and may not be subject to reconsideration or appeal (s 42(4) of the *Senior Courts Act*).

The ART's powers to address abuse of process

69 The ART's powers to dismiss an application appear to be broadly similar to those of the AAT. They are set out in Div 8 of the *ART Act.* I set out below a comparative table:

ART Act 2024	*AAT Act 1975*
97 Tribunal must dismiss application if decision is not reviewable decision The Tribunal must dismiss an application if: (a) the application is made for review of a decision; and (b) the Tribunal is satisfied that the decision is not reviewable by the Tribunal.	**42A(4):** *Dismissal if decision is not reviewable* (4) The Tribunal may dismiss an application without proceeding to review the decision if the Tribunal is satisfied that the decision is not reviewable by the Tribunal.
99 Tribunal may dismiss application if applicant does not appear If: (a) the applicant fails to appear at a Tribunal case event that relates to a proceeding in relation to an application; and (b) the Tribunal is satisfied that the applicant received appropriate notice of the date, time and place of the Tribunal case event; the Tribunal may dismiss the application. Note 1: Tribunal case events include hearings, directions hearings and dispute resolution processes (see the definition of Tribunal case event in section 4). Note 2: For how to appear at a Tribunal case event, see section 73.	**42A(2):** *Dismissal if party fails to appear* (2) If a party to a proceeding before the Tribunal in respect of an application for the review of a decision (not being the person who made the decision) fails either to appear in person or to appear by a representative at a directions hearing, or an alternative dispute resolution process under Division 3, held in relation to the application, or at the hearing of the proceeding, the Tribunal may: (a) if the person who failed to appear is the applicant—dismiss the application without proceeding to review the decision; or (b) in any other case—direct that the person who failed to appear shall cease to be a party to the proceeding.

100 Tribunal may dismiss application if applicant fails to comply with order etc. The Tribunal may dismiss an application made to the Tribunal if the applicant fails to do either of the following within a reasonable time: (a) proceed with the application; (b) comply with this Act or an order of the Tribunal in relation to the proceeding in relation to the application.	**42A(5):** *Dismissal if applicant fails to proceed or fails to comply with Tribunal's direction* (5) If an applicant for a review of a decision fails within a reasonable time: (a) to proceed with the application; or (b) to comply with a direction by the Tribunal in relation to the application; the Tribunal may dismiss the application without proceeding to review the decision.
101 Tribunal may dismiss application if frivolous, vexatious etc. (1) The Tribunal may, at any time, dismiss an application made to the Tribunal if the Tribunal is satisfied that the application: (a) is frivolous, vexatious, misconceived or lacking in substance; or (b) has no reasonable prospects of success; or (c) is otherwise an abuse of the process of the Tribunal. (2) If the Tribunal dismisses an application (the substantive application) under subsection (1), the Tribunal may, on application by a party to the proceeding in relation to the substantive application or on its own initiative, order that the applicant for the substantive application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a specified kind or kinds. (3) The order has effect despite any other provision of this Act or any other Act.	**42B Power of Tribunal if a proceeding is frivolous, vexatious etc.** (1) The Tribunal may dismiss an application for the review of a decision, at any stage of the proceeding, if the Tribunal is satisfied that the application: (a) is frivolous, vexatious, misconceived or lacking in substance; or (b) has no reasonable prospect of success; or (c) is otherwise an abuse of the process of the Tribunal. (2) If the Tribunal dismisses an application under subsection (1), it may, on application by a party to the proceeding, give a written direction that the person who made the application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a kind or kinds specified in the direction. (3) The direction has effect despite any other provision of this Act or any other Act.

70 Section 42B was inserted in the AAT Act by the *Tribunals Amalgamation Act 2015* (Cth). Previously, the AAT's power of summary dismissal was limited to

where the AAT was satisfied that an application was frivolous or vexatious. There is a helpful discussion of s 42B by Senior Member Linda Kirk in *Whitlock and Comcare* [2019] AATA 1911. The applicant's proceedings there were dismissed summarily under s 42B(1)(c) as an abuse of process where the applicant provided to the Tribunal material in support of her application knowing that it was misleading and then failed to correct the misinformation after it was brought to her attention. Senior Member Kirk noted at [26] that the applicant was obliged by s 33(1AB) of the AAT Act to use best endeavours to assist the Tribunal to fulfill its statutory objective of undertaking a review that is fair, just, economical, informal and quick, and which promotes public trust and confidence in its decision-making. The applicant's failure to carry out this obligation underpinned the decision summarily to dismiss her application.

71 The AAT's power to dismiss an application summarily as an abuse of process has also been used where an applicant engaged in harassing and abusing behaviour towards AAT staff which caused unnecessary delays and costs, and also displayed an unwillingness on the applicant's part to participate as required in the proceedings (see *Bringolf and Secretary, Department of Human Services (Freedom of information)* [2018] AATA 2004).

72 In *Novosel v Comcare* (2017) 72 AAR 269 at [107], it was stated that there was an evident intention underlying s 42B that the AAT protect its own processes against analogous forms of abuse to those in judicial proceedings. There is no reason to doubt that a similar intention applies to the new ART.

73 It is notable that the ART has the power under s 101(2) to make what is in effect a *Teoh* order in respect of specified kinds of subsequent applications.

74 The AAT's power under s 42B(1)(a) to dismiss an application at any stage of the proceeding if it is satisfied it is frivolous or vexatious has been discussed in cases such as *Re Williams and Australian Electoral Commission* (1995) 38 ALD 366; *Fearnley v Australian Fisheries Management Authority* [2006] FCAFC 3 and ***Singh*** *v Secretary, Department of Employment and Workplace Relations* [2007] FCAFC 174; (2007) AAR 447.

75 *Singh* involved multiple proceedings brought by Mr Singh over a ten-year period concerning an order by the County Court of Victoria that Centrelink should be refunded an amount of approximately $90,000 in respect of social security payments received by Mr Singh and his wife. He brought proceedings in the Social Security Appeals Tribunal, the AAT, the Federal Court and the Full Federal Court. In 2006, Mr Singh brought another appeal in the AAT against a further decision of the SSAT. His appeal substantially repeated his previous unsuccessful claims but he also raised a new claim of fraud.

76 The AAT dismissed his appeal under s 42B and made an order preventing Mr Singh from making any further application without the AAT's leave in respect of the Centrelink debt. After Mr Singh failed in an appeal to the Federal Court under s 44 of the AAT Act, he appealed to the Full Court.

77 The Full Court held that the AAT was entitled to dismiss the application under s 42B(1)(a) on the basis that Mr Singh's application was vexatious in that its purpose was to annoy and irritate. In addition, and significantly, the Full Court held that although the allegation of fraud had not previously been raised by Mr Singh, an *Anshun* estoppel applied to prevent him from seeking to raise a matter which ought to have been raised in his earlier proceedings. The case illustrates the potential for the *Anshun* principle to be used in judicial review and appeal proceedings so as to avoid an abuse of process (see *Singh* at [32]).

78 The AAT's Annual Report for 2022-2023 contains statistics concerning the number of applications dismissed by the Tribunal in that year. The figures relate to only four of the AAT's Divisions but, when consolidated, they indicate that approximately 3% of applications for review of decision in those Divisions were disposed of by dismissals relating to non-appearance (s 42A(2)), failure to proceed with an application or comply with a Tribunal direction (s42A(5)) or under s 42B(1). It is unclear how many of these cases were dismissed under s 42B(1) above.

79 A more detailed study is needed to ascertain whether the existing powers of the ART are adequate to deal with the different kinds of conduct by unreasonably

persistent applicants, including the effectiveness of the Administrative Review Tribunal (Common Procedures) Practice Direction 2024 and whether it might be expanded to address some of the issues highlighted above.

80 More time is needed to see whether there are shortcomings in the ART's powers, with particular reference to its capacity to handle its voluminous migration jurisdiction. Subject to any Constitutional law constraints, there may be a case for the ART to be able to use powers such as those available to the Administrative Court in respect of CROs, limited to proceedings in the ART itself.

Commonwealth Ombudsman

81 The Ombudsman has a discretion not to investigate certain complaints or to terminate an existing investigation where the Ombudsman is of the opinion that the complaint is frivolous or vexatious, or not made in good faith, the complainant does not have a sufficient interest in the subject matter of the complaint or an investigation, or further investigation is not warranted having regard to all the circumstances (s 6(1) of the *Ombudsman Act 1976* (Cth)).

82 If a person complains to the Ombudsman without first having complained to the Department or authority concerned, the Ombudsman has a discretion not to investigate the action until a complaint has been made to the responsible agency (s 6(1)(a)).

83 The Ombudsman also has a discretion not to investigate, or continue to investigate, a complaint where the complainant has a right to bring proceedings in a Court or Tribunal, unless the Ombudsman is of the opinion that there are "special reasons" justifying an investigation (s 6(2)).

84 Section 6 also empowers the Ombudsman to decline to investigate or further investigate particular complaints in some specific contexts, including complaints that could be investigated by the Australian Communications and Media Authority, the Australian Public Service Commissioner, or the Australian Federal Police Commissioner.

85 It is unclear whether these statutory discretions provide an adequate basis for the Ombudsman to deal with unreasonable conduct by some persistent complainants. As noted in the Ombudsman's Annual Report for 2020-2021 the Office experienced an increase in complainants who presented with vulnerable circumstances and engaged in what was described as "unreasonable conduct" including aggression towards staff, threats of self-harm, threats of harm against others and unreasonable expectations in relation to the timeliness or influence of the Ombudsman's office. The emotional effects of the pandemic on the broad community were said to provide context for the problem.

86 As a result of a joint project by the Australian Parliamentary Ombudsmen, led by the NSW Ombudsman, a manual was developed for use by frontline staff, supervisors and senior managers of Government agencies for handling unreasonable conduct by a complainant. The latest manual is dated April 2021. It builds on earlier versions dated 2009 and 2012.

87 Page 6 of the manual states that the feedback received indicated that for most organisations "unreasonable conduct by complainants is only an issue in about 3-5% of cases…However, such unreasonable conduct can take up approximately 25-30% of an organisation's resources". Those figures are alarming, and highlight the significant drain on resources created by a relatively small number of people.

88 Other impacts of unreasonable conduct include "significant equity problems for organisations that are forced to substantially and unreasonably divert resources away from other complaints and functions to manage it" and "negative consequences for external review agencies and regulatory bodies that have to dedicate time and resources to dealing with review requests/applications that have little or no merit and have been escalated by people who cannot 'let go' of their issue".

89 The Commonwealth Ombudsman released two fact sheets in 2021 which are based on the manual: *Unreasonable complainant conduct* and *Managing*

unreasonable persistence. “Unreasonable complainant conduct” is defined to include:

> **unreasonable persistence**—refusing to accept that a complaint is closed, reframing an old complaint, persevering obstinately with an argument, continuing to phone or contact an agency after a matter is closed.
>
> If a person is unreasonably persistent, the agency should be ready to say ‘no’—for example, to advise that a complaint issue will not be investigated further, an unproductive telephone call will be terminated, only one internal review will be undertaken, or no further correspondence on the complaint will be answered. The complainant may need to be told that they have reached the end of the line.
>
> **unreasonable demands**—raising issues beyond an agency’s responsibility, asking for a remedy that is impractical or disproportionate, insisting that more time be spent on a complaint than is warranted, insisting on speaking to the head of an agency, directing an agency on how to handle the complaint.
>
> If a person makes unreasonable demands, limits should be set on what the agency will do—for example, which issues will be investigated, who will investigate the complaint, how it will be investigated, the possible outcomes, and how communication should occur between the complainant and the agency.
>
> **unreasonable lack of cooperation**—poor or confused definition of a complaint, unnecessary presentation of a large quantity of material, failing to provide key documents, constantly re-defining a complaint, dishonestly presenting the facts.
>
> If there is an unreasonable lack of cooperation from a complainant, the agency should set conditions—for example, the complainant should be required to define the complaint issue, identify the supporting evidence, provide key correspondence or documents, be truthful in dealing with the agency, or explore some other avenue before the complaint will be investigated.
>
> **unreasonable arguments**—exaggerating issues, holding irrational beliefs, being obsessed with irrelevancies or trivialities, refusing to consider counter-arguments, being guided by conspiracy theories.
>
> Unreasonable arguments should be identified and set aside. Limits should be placed on what the agency will examine and the style of communication that is expected. If it becomes clear the complaint is groundless, it should be declined.
>
> **unreasonable behaviour**—threatening violence, abusing investigation staff, being rude or aggressive, threatening self-harm.
>
> Unreasonable behaviour should not be tolerated: a complainant can be told that a telephone call will be terminated unless more moderate language is used, that threats are unacceptable and may be reported to the police, that rude and intemperate correspondence may not be answered or may be returned, or that special contact arrangements with the complainant will be implemented.

90 The Fact Sheet styled “Managing unreasonable persistence” includes a case study involving a persistent complainant. Although the complainant had had many complaints investigated and had been told that no more assistance could be provided, the complainant continued to contact the Ombudsman’s Office by phone, wanting to lodge another complaint about the same issue. The complainant called the office multiple times in a short timeframe asking to speak to different people with a view to obtaining a different answer and then became aggressive and threatening towards staff. The Office assigned two complaint resolution officers as primary contacts for this complainant. The complainant was permitted to maintain access to the Office while ensuring that messaging and decisions were consistent.

Conclusion

91 The Commonwealth administrative law reforms which have been copied in many jurisdictions both within Australia and overseas, are now more than 50 years old. Unsurprisingly, their practical operation has led to some variations and modifications. Probably the most notable is the recent replacement of the AAT with the ART.

92 In this paper, I have raised for discussion whether there is a case for the ARC to undertake a project directed to the question whether the Federal Court, the ART and the Ombudsman have adequate powers to control abuse of process. In the particular case of the Federal Court, some valuable lessons might be learned from the power of the Administrative Court in England and Wales to make civil restraint orders. It may also be timely for the ARC to revisit the question whether there should be a requirement to obtain leave prior to commencing judicial review proceedings.

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