FEDERAL COURT OF AUSTRALIA

Knight v Defence Force Ombudsman [2024] FCA 474

File number(s):	VID 364 of 2023
Judgment of:	**BUTTON J**
Date of judgment:	9 May 2024
Catchwords:	**ADMINISTRATIVE LAW** – judicial review – where *Ombudsman Regulations 2017* (Cth) (**Regulations**) excluded Respondent from taking specific action with respect to "excluded complaints" – where "excluded complaint" one previously "dealt with" by the Defence Abuse Response Taskforce (the **DART**) – where Applicant previously made complaint to the DART – whether previous complaint "dealt with" by the DART, such that renewed complaint is an "excluded complaint" – whether Regulations direct that Respondent has function of investigating complaints about handling of complaints previously made to the DART – application dismissed
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5 *Federal Court of Australia Act 1976* (Cth) s 21 *Judiciary Act 1903* (Cth) ss 39B, 78B *Ombudsman Act 1976* (Cth) ss 4, 6, 8D, 19C, 19F, 19X, 19ZS, 19ZX, 20P, 24, 25, 33, 38 *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016* (Cth) (repealed) *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* (Cth) (repealed) *Ombudsman Regulations 2017* (Cth) ss 13, 14, 14B *Corrections Act 1986* (Vic) s 74AA
Cases cited:	*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Cabell v Markham* (1945) 148 F 2d 737 *ENT19 v Minister for Home Affairs* (2023) 410 ALR 1; [2023] HCA 18 *Fitzwarryne v Commonwealth Ombudsman* [2023] FCA 175 *Griffith University v Tang* (2005) 221 CLR 99 *Polo/Lauren Company L.P. v Ziliani Holdings Pty Ltd* (2008) 173 FCR 266; [2008] FCAFC 195

	SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34 *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; [2004] HCA 50
Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	119
Date of last submission/s:	19 April 2024
Date of hearing:	4 March 2024
Counsel for the Applicant:	The Applicant appeared in person
Counsel for the Respondent:	Mr T Begbie KC with Ms J Lucas
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 364 of 2023

BETWEEN:	**JULIAN KNIGHT** Applicant
AND:	**DEFENCE FORCE OMBUDSMAN** Respondent

ORDER MADE BY:	**BUTTON J**
DATE OF ORDER:	**9 MAY 2024**

THE COURT ORDERS THAT:

1. The amended originating application is dismissed.
2. The Respondent is to advise the Court and the Applicant by 14 May 2024 if he seeks a costs order.
3. If the Respondent seeks a costs order, the parties are to file written submissions limited to two pages by 21 May 2024 following which costs will be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BUTTON J:

Overview of Mr Knight's application

1 The Applicant (**Mr Knight**) commenced this proceeding against the Defence Force Ombudsman by originating application dated 20 April 2023 and filed on 24 May 2023. The application was advanced under s 39B(1) of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) and s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**).

2 Mr Knight sought the issue of a writ of mandamus compelling the Respondent to assess Mr Knight's application for a reparation payment pursuant to the Defence Abuse Reparation Scheme (the **Scheme**). The Scheme is administered by the Respondent pursuant to the *Ombudsman Regulations 2017* (Cth) (the **Regulations**), made under the *Ombudsman Act 1976* (Cth) (the **Act**). In the alternative, Mr Knight sought declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth).

3 The focus of Mr Knight's application is a decision of the Respondent dated 21 March 2023, which was conveyed to Mr Knight by letter dated 21 March 2023 (the **Decision**). The gravamen of the Decision was that the detail and substance of Mr Knight's report dated 16 March 2023 (the **2023 complaint**) was substantially the same as the report he made to the Defence Abuse Response Taskforce (the **DART**) dated 26 November 2013 (the **2013 complaint**). The Respondent stated in the letter dated 21 March 2023 that "[u]nder the *Ombudsman Regulations 2017* … a report which is the same [in] substance as a report made under the DART is considered an excluded complaint" and, on that basis, told Mr Knight that his 2023 complaint could not be assessed.

4 Mr Knight takes a different view and contended that the term "dealt with" is to be construed in a particular manner (addressed further below) and that his 2013 complaint had not been "dealt with", and his 2023 complaint was therefore not an "excluded complaint". That contention was advanced principally on the basis that the DART had not considered and determined whether outcomes other than a reparation payment should be made available to Mr Knight. As I will explain, Mr Knight was rendered ineligible for a reparation payment due to a decision taken at the Ministerial level to exclude (ultimately) Mr Knight and two other complainants who had been convicted of a serious crime. Mr Knight fell into that category because, in 1988, he

pleaded guilty to seven counts of murder and 46 counts of attempted murder, and was later sentenced to life imprisonment in respect of each count of murder.

5 The DART was a taskforce established on 26 November 2012 by the then Attorney-General and Minister for Defence to respond to complaints of sexual and other forms of abuse by Defence personnel prior to 11 April 2011. The DART was established as an executive body as part of the Government's response to an independent review into allegations of abuse in Defence.

6 The Scheme was governed by guidelines issued by the Government on 10 April 2013 (the **Guidelines**). The Guidelines addressed the making of reparation payments. They stated that the purpose of the Scheme was to "establish a mechanism by which a monetary payment may be made by the Department of Defence to persons who in the opinion of the Reparation Payments Assessor may have, plausibly, suffered abuse whilst employed in Defence" (cl 1.5.1).

7 As a matter of practice, where a complaint was within the DART's Terms of Reference, and met the evidentiary threshold of "plausibility", the available outcomes were not confined to the making of a reparation payment, but included one or more of: a one-off reparation payment of up to $50,000; referral for free counselling; participation in the restorative engagement program; referral of matters to civilian police; and referral to the Chief of the Defence Force (**CDF**) for administrative and/or disciplinary sanction or management action. Outcomes other than the making of a reparation payment were referred to by the parties, and are referred to in these reasons, as **other outcomes**.

8 The DART concluded on 30 June 2016, following which time the Respondent was given similar functions, but on a statutory basis, by amendments to the Regulations made in 2016 by the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016* (Cth).

9 In 2017, the Regulations were amended by the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* (Cth). Those amendments provided (inter alia) for the Respondent to recommend to the Defence Secretary that a reparation payment be made, where the Respondent was satisfied of various matters in respect of a "new complaint" or an "old complaint".

10 The amendments made in 2017 also introduced, as a defined term, "excluded complaint", which term was defined to mean a complaint that was "made to, and dealt with by" the DART, or that "is the same in substance as a complaint that was previously made to, and dealt with by" the DART. A complaint that is an "excluded complaint" is not a "new complaint" or an "old complaint" in respect of which the Respondent may make recommendations to the Defence Secretary: s 14(1A)(c) and s 14B(2)(d) of the Regulations.

11 The Regulations also provide for other actions in respect of a "new complaint", including facilitating counselling and engaging in alternative dispute resolution processes or a "restorative engagement conference": s 14(1)(a).

12 As may be seen, whether or not a previous complaint was "dealt with" by the DART is central to whether the complaint is an "excluded complaint", in respect of which the Respondent has no capacity to make a recommendation to the Defence Secretary that reparations be paid in connection with "abuse engaged in by a member of Defence", or to take any of the other actions identified in s 14(1)(a) or s 14B(3)–(5).

13 I will return in due course to the detail concerning the 2013 complaint, but the short point behind Mr Knight's contention that that complaint had not been "dealt with" by the DART was that it was put on hold at some point, and then the responsible Ministers directed the DART not to make reparation payments to certain persons, including persons convicted of a "serious crime", being one with a maximum sentence of over 10 years. Mr Knight was then advised by the DART that he was therefore ineligible for a reparation payment under the Scheme. Mr Knight contended that the Decision constituted an improper exercise of the power conferred on the Respondent, and/or involved an error of law for the purposes of s 5(1)(e) and (f) of the ADJR Act.

Facts

14 Mr Knight was a junior staff cadet at the Royal Military College, Duntroon, between 13 January 1987 and 10 July 1987. Mr Knight was subjected to what he described as "various and constant acts of 'bastardization' by senior staff cadets" and was physically injured on three occasions by senior staff cadets, while he was a junior staff cadet at Duntroon.

15 After an altercation with his cadet Company Sergeant Major in a Canberra nightclub on 31 May 1987, Mr Knight was issued a "show cause" notice by the Duntroon Board of Study on 3 June 1987. Mr Knight tendered his resignation on 18 June 1987.

16 On 9 August 1987, Mr Knight was arrested in Melbourne following his commission of a mass shooting, known as the "Hoddle Street shootings". Mr Knight pleaded guilty to seven counts of murder and 46 counts of attempted murder. On 10 November 1988, Mr Knight was sentenced to life imprisonment, with a minimum non-parole term of 27 years. However, s 74AA of the *Corrections Act 1986* (Vic) has the effect of preventing the Adult Parole Board from ordering that Mr Knight be released other than in limited circumstances, effectively removing the possibility of parole.

17 On 26 November 2013, Mr Knight made the 2013 complaint. In making that complaint, he submitted a detailed — 94 page — narrative detailing his experiences at Duntroon, and applied for a reparation payment. The form Mr Knight filled out included, as question 68, "What, if anything, would you like from the Taskforce?". Nothing was noted by Mr Knight in answer to that question. Mr Knight provided additional information by several further letters. Mr Knight also completed a one page "Application for Reparation Payment Form", a copy of which was provided to the Court following the hearing of this matter. The Respondent confirmed he did not object to this document being admitted into evidence.

18 In a letter dated 1 September 2014, Mr Knight asked for an update as to the stage the DART was at in processing his "Personal Account and [his] Application for Reparation Payment". From these materials, it is not apparent that Mr Knight sought, or expressed any interest in, responses other than a reparation payment (such as counselling or a restorative engagement conference).

19 The Guidelines contemplated that persons in prison may apply for reparation payments. It provided, by cl 5.8, for payments to be held until the release of the prisoner, or for payments to be forwarded to named office-holders. Clause 5.8.1(a) was in the following terms:

> 5.8.1 Certain Reparation Payments may be held on trust for:
>
> (a) a person who is a prisoner incarcerated in any State or Territory of Australia or in a foreign jurisdiction (in which case a payment may be held until a prisoner is released, or may be forwarded to the Department of Corrective Services, or equivalent department in the relevant jurisdiction, to be held for the benefit of the person and paid subject to the responsible department's operational procedures), or

20 On 28 May 2014, the DART (by its Chair) wrote to the Attorney-General and the Minister for Defence, and raised the receipt of complaints that the Chair said "raise unusual issues which may not previously have been contemplated by Government". The letter went on to refer to complaints received from three incarcerated individuals, including Mr Knight. While

Mr Knight noted that the potential that incarcerated individuals might make complaints had in fact been contemplated, and addressed by provisions included in the Guidelines for holding reparation payments on trust, the Chair nonetheless brought the matter to the attention of the Ministers. The Chair also indicated in his letter that, absent any formal direction from them, the DART would act in accordance with its Terms of Reference, which did not impose a restriction on the categories of complainants to whom reparation payments may be made.

21 A subsequent letter, dated 5 March 2015, referred to additional correspondence in September and October 2014 in which the Ministers said they did not, at that stage, want reparation payments made to incarcerated complainants. That issue was picked up again in 2015, as referred to below.

22 In the meantime, the DART was in contact with ACT Policing and advised ACT Policing, by letter dated 1 October 2014, that, as Mr Knight had independently contacted ACT Policing to request his complaint be investigated, the DART would not be creating a referral package as that would be duplicative. Instead, it would assist by providing information concerning Mr Knight.

23 On 13 January 2015, a taskforce Assessor drafted an Assessment Note which found that Mr Knight's complaint contained an account of abuse that was plausible and raised plausible mismanagement by Defence of a plausible report of abuse. Based on the Scheme as it stood, findings of that kind would have rendered Mr Knight eligible for a reparation payment of $10,000, $20,000, $35,000 or $50,000, depending on the seriousness of the abuse. The Assessor's report noted, against "Outcome requested": "N/A", but did check a box concerning the complainant being contacted for consent to refer the matter to the "Crime Group" for action. The Assessor also checked a box stating that consideration by the Administrative Action Officer was required because certain of the alleged abusers were still serving in Defence, and because the person to whom the alleged abuse was reported mismanaged that report and was still serving in Defence.

24 On 5 March 2015, the Chair of the DART wrote a letter to the Minister for Justice. After recapping some earlier correspondence (referred to above), the letter set out observations in respect of incarcerated complainants. The letter noted that, before the issue of incarceration attracted attention, reparation payments had been made to a small number of incarcerated, or recently incarcerated, complainants. While Mr Knight made much of this and his reply

submissions asked what was being done to recoup payments from such complainants, those issues are irrelevant to the matters arising for determination on Mr Knight's application.

25 The Chair's letter of 5 March 2015 then referred to three cases that required individual attention, one of which was Mr Knight's case. In relation to Mr Knight, the letter recommended that no reparation payment be made, but then went on to say:

> The remaining question is how the Taskforce should deal with the balance of Mr Knight's complaint.
>
> Even if his complaint establishes a plausible case of abuse in Defence, I am of the view that the other outcomes are likely to be inappropriate for the following reasons:
>
> - As a long term prisoner, prison authorities are responsible for Mr Knight's required medical treatment (including counselling)
> - Allegations of bastardisation perpetrated 17 [sic] years ago by an unknown number of senior cadets would not give rise to consideration of a criminal investigation or referral to the Chief of the Defence Force for consideration of disciplinary or administrative sanction, and
> - In all the circumstances, I doubt Defence would be prepared to engage in a restorative engagement conference.
>
> I would be pleased to discuss these issues with you in more detail if that would be of assistance. Otherwise, I look forward to your response at your convenience.
>
> In the interim, the Taskforce has advised [redacted] that their applications for a reparation payment are on hold pending your decision on the issues raised in this letter.
>
> At this stage, the Taskforce has not had any communication with Mr Knight.

26 On 14 April 2015, Mr Knight wrote to the DART asking that the DART advise whether the Reparation Payments Assessor had made a determination with respect to his application. No mention was made of any other outcome sought by Mr Knight.

27 On 24 June 2015, the Minister for Justice and the Minister for Defence sent a letter to the Chair of the DART, responding to his letter of 5 March 2015. In that letter, they said:

> We remain of the view that the Taskforce should not make repatriation [sic] payments to any incarcerated complainants. We are also of the view that payments should not be made to persons currently on parole following their incarceration.

28 On 26 June 2015, the Chair of the DART advised Mr Knight that it had been "awaiting directions from the [relevant Ministers] in relation to applications from complainants who are incarcerated or on parole following their incarceration". The Chair further advised that the DART had "recently received advice from the Ministers that the Taskforce should not make reparation payments to incarcerated complainants or persons currently on parole. As a result of

that decision, you are not eligible to receive a reparation payment from the Taskforce". The letter concluded: "In these circumstances, the Taskforce is not able to assist you further."

29 Mr Knight asked whether the Ministers' decision precluded him from receiving "other outcomes" in a fax to the Chair of the DART dated 14 July 2015.

30 An internal document of the DART records that the Chair accepted a recommendation (dated 7 and 16 July 2015) that the matter *not* be referred to the CDF. The document recorded reasons for the recommendation being made, and accepted (which included that the abuse took place 28 years prior).

31 Mr Knight's 2013 complaint was not referred to Ms Robyn Kruk AM, the Reparation Payments Assessor. After Mr Knight commenced proceedings in September 2015, on 1 February 2016, the Australian Government Solicitor (**AGS**) wrote to Mr Knight indicating that the Commonwealth proposed to "reconsider the policy decision that the Taskforce should not make reparation payments to complainants who are incarcerated or on parole". That was characterised as reviewing the eligibility requirements (as distinct from making a decision about Mr Knight's application specifically).

32 Mr Knight then received a letter from an official in the Attorney-General's Department dated 16 February 2016. The letter explained the background to, and ambit of, the reconsideration of the policy position as follows:

> Following applications from a number of people (including you) the Minister for Justice and Minister for Defence, being Ministers responsible for the Taskforce, considered the policy question whether the Scheme should be open to persons who were incarcerated or on parole. They decided that it should not. They then advised the Taskforce that such persons were no longer eligible to be considered as applicants for reparation payments.
>
> This decision as to the parameters for eligibility to apply under the Scheme will now be reconsidered afresh and a new decision will be made. The result of the reconsideration may be that a different, or similar, policy position is settled upon.

After explaining various matters that the Government considered relevant to the policy position, Mr Knight was invited to make submissions on the proposed decision.

33 Mr Knight took up that opportunity by letter dated 1 March 2016. Mr Knight was subsequently advised, by letter dated 20 May 2016, that the relevant Ministers had considered the policy question of whether the Scheme should be open to persons who were incarcerated or on parole, and decided that it should not. The letter stated: "The Ministers advised the Taskforce that such persons were no longer eligible to be considered as applicants for reparation payments."

Mr Knight was advised of the application of the "new decision" with respect to him in the following terms:

> Following the Ministers' decisions, the Taskforce is required to consider your application for a reparation payment in light of the directions given to the Taskforce. I have made a preliminary decision that you are a person who has been convicted of a serious crime, and that you are therefore not eligible for a reparation payment.

34 Mr Knight was invited to make submissions if he disagreed with the assessment. This he did (by letter on 3 June 2016), but the response (by letter dated 8 June 2016) was that, as Mr Knight was a person who had been convicted of a serious crime (within the meaning of the Ministers' decision) the final decision was that Mr Knight was not eligible for a reparation payment.

35 The communications Mr Knight received from the DART referred to his ineligibility to receive a reparation payment. No mention was made of other options such as counselling, restorative engagement, referral to police agencies and referral to the CDF for disciplinary, administrative or other action. While these options were referred to in the DART's Report on abuse in Defence dated 26 November 2014 (the **DART Report**), these avenues are not mentioned in the Guidelines. However, Amended Terms of Reference for the DART, governing its operation between 1 July 2015 and 31 December 2015, referred to the DART determining "appropriate actions" in response to complaints, as well as the potential for referrals to police or military justice authorities and referrals to the CDF for possible administrative or disciplinary action. Referrals to police or military justice authorities, and referrals to the CDF, were, save for a class of irrelevant complaints, to be concluded by 30 September 2015. The provision of counselling was to be concluded "as soon as possible".

36 While options other than a reparation payment were not mentioned in communications with Mr Knight, it is apparent from the DART's letter of 1 October 2014 that consideration was given to referring the matter to ACT Policing, but this was considered unnecessary on the basis that Mr Knight had already lodged a complaint. It is also apparent from the Chair of the DART's letter of 5 March 2015 that a decision was made not to make an administrative referral to the CDF, that medical treatment (including counselling) was the responsibility of prison authorities (and so would not be offered by the DART), and that consideration had also been given to the utility of a restorative engagement conference.

The issues

37 The present case raises three issues of substance. First, what is the meaning of "dealt with" in the definition of "excluded complaint"? Secondly, and relatedly, was the DART's handling of

the 2013 complaint such that it was "dealt with" by the DART, meaning that his 2023 complaint was an "excluded complaint"? Thirdly, whether the Court should make a declaration concerning the ambit and effect of s 14(1)(d) of the Regulations. I will explain the terms of the declaration sought in addressing this issue below.

38 I will address the first two issues together, and deal separately with the third issue.

The parties' submissions on the "dealt with" issues

39 Mr Knight's principal submissions were that:

(a) the constructional choice made in giving meaning to the words "dealt with" is an issue of law, and making the wrong choice constitutes an error or law;

(b) in the context of a complaint to the DART, the phrase "dealt with" refers to "the completion of the process whereby the DART determined which of the various outcomes the complainant should receive"; and

(c) the DART "abandoned" the process of considering Mr Knight's complaint after receiving the Ministers' directions and there is no evidence the DART considered any other outcomes that Mr Knight may have been entitled to, such as an apology, counselling, etc.

40 Mr Knight submitted that, had he sought to challenge the earlier decision by way of judicial review, he would have failed on the basis that there was no "reviewable decision", citing Mason CJ's description of a "reviewable decision" in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 as generally entailing a "decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration".

41 Mr Knight sought to emphasise, in his written and oral submissions, that the phrase "dealt with" must be construed by the reference in the DART's Terms of Reference, and at various points throughout the DART Report, to its work involving the determination of the most appropriate outcomes "in close consultation with complainants".

42 Mr Knight also sought to buttress his argument by noting that the Government had, as is clear from the Guidelines, turned its mind to the issue of incarcerated claimants. It was said that the Ministers' policy decision was not made as a result of "public outcry" and was instead made at the instigation of the then-Chair of the DART.

43 In his submissions, Mr Knight indicated that he agreed that the issue of referral to the civilian policing authorities (as an other outcome) was moot given his self-referral, and that, had he been asked (which he was not), he would have agreed that there would not have been much point referring the matter to the CDF as most individuals concerned had left active service. Mr Knight said that, had the DART engaged with him regarding other outcomes, he still would have raised that not all of his abusers had been identified by the DART and were not referred to in its recommendations report. Mr Knight recognised, however, that for the purposes of his application, the relevant point was that he was not consulted (not that he would have taken issue with the omission of particular names from the DART's list of persons concerned).

44 In focusing on the DART's failure to consult with him, as mentioned above, Mr Knight stressed that the Terms of Reference (both the original and amended versions) referred to outcomes being determined in close consultation with the complainant. He emphasised that:

(a) no Case Coordinator had been appointed to his complaint (as was the DART's usual practice once initial assessment had been undertaken);

(b) his complaint had not been referred to the Reparation Payments Assessor; and

(c) while there had been engagement with him regarding the Ministers' direction to exclude prisoners from receipt of reparation payments, he was still disqualified on the basis of a historical fact that he could not change (being his conviction of serious crimes, namely the Hoddle Street shootings in 1987).

45 Mr Knight considered that these (alleged) procedural deficiencies in how his complaint was addressed were relevant to the factual question of whether it had been "dealt with" for the purposes of the definition of "excluded complaint".

46 The Respondent submitted that the meaning of "dealt with" does not have the prescriptive meaning ascribed to it by Mr Knight (according to which a complaint will only have been "dealt with" when the DART determined which of the outcomes the complainant should receive). Rather, the Respondent submitted the expression is concerned with whether the DART can be seen to have considered or handled the complaint.

47 The Respondent developed his submissions on the basis that the text, context and purpose of s 14 of the Regulations deny the construction contended for by Mr Knight. The Respondent relied on the ordinary meaning of "dealt with" and the use of other expressions in the Act that are "more obviously directive and fixed" expressions (such as "determined by" in ss 24(1)

and 25, and "decided" under a particular section in s 19X(6)(e) and other identified provisions). In contrast with those expressions, the Respondent observed that the Act itself uses "dealt with" in a non-prescriptive and general manner, eg when referring to whether a matter can be "more conveniently or effectively dealt with by" (inter alia) another body (as to which the Respondent referred to s 6(4D)(b) and various other sections) and s 8D, which refers to an arrangement whereby investigations are to be "dealt with jointly" by the Respondent and the Australian Federal Police.

48 In relation to the language used in the Regulations, the Respondent contrasted the use of "dealt with" in the definition of excluded complaints with the use of the expression "finally dealt with" at some other points in the Regulations (ss 14(1A)(b)(ii) and 14B(2)(b)). The Respondent further relied on the use of the same expression in s 14(1)(d) of the Regulations, which confers on the Respondent the broad function of "dealing with" any matter relating to complaints previously made to and "dealt with" by the DART (and which is the subject of the claim for declaratory relief, dealt with below).

49 In relation to context and purpose, the Respondent referred to the context arising from the DART itself recommending that functions be transferred to the Respondent so that any remaining issues could still be dealt with, following the end of the DART itself. It was not, the Respondent submitted, intended that the conferral of functions on the Respondent would enable complainants to agitate the same complaint again, or obtain different outcomes in respect of a prior complaint. Here, the Respondent referred to the careful and detailed definitions of "new complaint", "old complaint" and "excluded complaint" in the Regulations.

50 The Respondent also drew attention to the nature of the DART itself. He submitted:

> Moreover, it is important to recall the nature and context of how the DART handled complaints. As an executive body operating under broad terms of reference, it did not have some prescriptive or defined standard against which to assess whether it had 'completed' its handling of a complaint. By design it was a flexible and informal body, and the (non-exhaustive) outcomes available to it were, themselves, generally informal and flexible. In some cases, it may be expected to have considered and progressed, or partially progressed, a range of options, but in ways that were adapted to the complaint and the complainant. There was also an established internal reconsideration process in respect of most decisions to allow the opportunity for a complainant to provide DART with additional information that could lead to reconsideration of a decision: CB 238. Accordingly, it was inherently a body that might 'deal with' complaints in a wide variety of ways, and to a wide variety of end points. It is unsurprising that the Regulations did not adopt a prescriptive conception of a process that had been completed or finally dealt with.

51 The Respondent also submitted that Mr Knight's 2013 complaint was "dealt with" by the DART (even if Mr Knight's more prescriptive construction was adopted) as it was considered and processed by the DART. To that end, the Respondent set out the factual narrative. In the course of that account, the Respondent stressed that, after the initial Ministerial decision — that payments should not be made to incarcerated complainants — had been reviewed, and replaced with a decision that complainants convicted of a serious crime would not be entitled to a reparation payment, the DART advised Mr Knight by letter dated 8 June 2016 that it had made a "final decision" that he was not eligible for a reparation payment.

52 The Respondent submitted that there was no substance to Mr Knight's contention that the DART had not completed its consideration of other available outcomes. Mr Knight only referred to outcomes other than reparations in his correspondence of 14 July 2015. That correspondence was prompted by Mr Knight having been informed, in the context of the original decision, that he was not entitled to compensation and all Mr Knight did was ask whether he was, by that decision, also precluded from receiving other outcomes.

53 The Respondent made a number submissions in relation to the significance of that enquiry by Mr Knight.

(1) It did not call for a direct response, because the query was "made in the context of the original decision that he was not entitled to reparation", that decision was reconsidered, and "as such, the query was clearly answered by the terms of the new decision".

(2) It was clear from Mr Knight's application and correspondence and court proceedings that his central concern throughout was obtaining a reparation payment, rather than other outcomes.

(3) In any event, the DART did consider other outcomes, actioning some (communications with ACT Policing) and not others.

(4) It is noteworthy that Mr Knight did not raise any concern with the DART regarding lack of finality, nor did he utilise the DART's internal reconsideration processes, and did not bring any proceedings (such as a proceeding seeking mandamus).

54 In response, Mr Knight took issue with the Respondent's submissions that the enquiry did not call for a direct response and was answered by the terms of the new decision. He said further that:

(a) his correspondence and litigation were directed to reparation because that was the only outcome in respect of which he had received a determination;

(b) again, while there may have been some internal consideration of other outcomes, he was not consulted about them; and

(c) the DART's internal reconsideration processes were directed towards whether the complaint was accepted or the range and extent of the outcomes provided, and that he did complain about the one outcome he was informed of (being reparation).

Consideration of the "dealt with" issues

55 In my view, the expression "dealt with", as it is used in the definition of "excluded complaint" in the Regulations, does not bear the meaning contended for by Mr Knight. In particular, it does not, properly construed, require that the DART have made a specific determination about each of the full range of potential outcomes that may be offered to a complainant whose complaint meets the thresholds established under the Scheme.

56 That conclusion arises from the ordinary and natural meaning of the expression and the relevant historical and legislative context.

57 The principles of construction applicable here are well settled and not controversial. They do not need extensive repetition here. The key principles to be applied to the present application are as follows:

(a) The starting point in construing a statutory provision is the text of the statute itself. At the same time, however, regard must be had to its context and purpose: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14] (Kiefel CJ, Nettle and Gordon JJ); see also at [37]–[39] (Gageler J).

(b) Where a term is not defined in the legislation, its ordinary and natural meaning, understood in context, must be considered: *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 190; [2004] HCA 50 at [37] (Gleeson CJ, McHugh, Gummow and Heydon JJ). In determining that meaning, it can be helpful to have recourse to dictionary definitions of the undefined phrase, but they are not conclusive: *Polo/Lauren Company L.P. v Ziliani Holdings Pty Ltd* (2008) 173 FCR 266; [2008] FCAFC 195 at [24] (Black CJ, Jacobson and Perram JJ). In other words, a fortress must not be made out of the dictionary: *Cabell v Markham* (1945) 148 F 2d 737 at 739 (Judge Learned Hand), endorsed in *Thiess v Collector of Customs*

(2014) 250 CLR 664; [2014] HCA 12 at [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

(c) The settled principles of statutory construction apply equally to the construction of regulations. In this regard, Gordon, Edelman, Steward and Gleeson JJ held in *ENT19 v Minister for Home Affairs* (2023) 410 ALR 1; [2023] HCA 18 at [86] that (citations omitted):

> Regulations are to be construed according to the ordinary principles of statutory construction. The starting point for the ascertainment of the meaning of a provision is its text, while at the same time regard is to be had to its context and purpose. Of course, the statutory context of regulations includes the Act under which the regulations were made and are sustained. Context should be regarded at the first stage and not at some later stage and it should be regarded in its widest sense, including by reference to legislative history and extrinsic material.

58 As the authorities above confirm, the starting point is the language used in the legislative provision. The expression selected by the framers of the Regulations was a broad, non-technical expression. The framers did not define or include provisions setting out when a complaint will have been "dealt with". Accordingly, the ordinary meaning of the term is the appropriate starting point.

59 As a matter of ordinary language, when the expression "dealt with" is used in respect of an item, it means that item has been addressed or handled by the body charged with dealing with it. While dictionary definitions of terms used, but not defined, in legislative instruments are not determinative, they expose the range of ordinary meanings of a term. The Respondent located and relied on the following dictionary definitions, which, in my view, support the ordinary meaning of the term "dealt with" not carrying the technical and prescriptive meaning ascribed to it by Mr Knight (references omitted):

> Deal/dealt means: – '*To conduct oneself towards persons*'; '*To take part in, have to do with, occupy oneself, do business, act*'; '*To have to do with (a thing) in any way; to busy or occupy oneself, to concern oneself with*'; '*(a) to deal with: to act in regard to, administer, handle, dispose in any way of (a thing). (b) to handle effectively; to grapple with; to take successful action in regard to.*'
>
> Deal with/dealt with means: – '*to occupy oneself or itself with*'; '*to take action with respect to; handle*'; '*to take effective action with respect to; handle successfully*'; '*to deal with: to act towards (a person), to treat (in some specified way).*'

60 There are additional textual indications that do not support the construction contended for by Mr Knight, but support the Respondent's construction.

61 The choice of the expression "dealt with" stands in contrast to other terms that might have been chosen, had the framers of the Regulations intended to adopt a more technical or prescriptive understanding of when a complaint will have been "dealt with". They could, for example, have used terms such as "determine" (or "determined") or even "decided". The Respondent's submissions pointed to various other provisions in the Act using language of that kind (ss 24(1), 25, 19X(6)(e), 19ZS(7)(a), 20ZX(8)(a) and 20P(a)). The framers also chose not to include any words which would have qualified or further described the kind, or extent, of "dealing with" required (cf the use of the qualifying adverb "finally" in ss 14(1A)(b)(ii) and 14B(2)(b) of the Regulations, which refer to a matter being "finally dealt with").

62 The definition of "excluded complaint" refers to a "complaint" that was "previously made to, and dealt with by" the DART. That which must have been "dealt with" is the "complaint". There is no textual indication that a "complaint" will not have been "dealt with" unless the DART made a determination as to each of the outcomes, other than reparation payments, that may have been offered to a complainant under the Scheme.

63 The term "Defence Abuse Response Taskforce" is defined in the Regulations as:

> the taskforce established by the then Attorney-General and Minister for Defence to respond to complaints of sexual and other forms of abuse by Defence personnel alleged to have occurred before 11 April 2011.

64 Not only do the Regulations make no mention of the other outcomes, but those other outcomes were not referred to in the Terms of Reference by which the DART was first constituted or the Guidelines governing the Scheme.

65 While the initial Terms of Reference stated that the DART was to "determine, in close consultation with those who have made complaints, appropriate actions in response to those complaints", it did not identify what the "appropriate actions" might be. Amended Terms of Reference dated June 2015 referred also to the conclusion by stipulated dates of outstanding referrals to police or military justice authorities or to the CDF, counselling, and outstanding restorative engagement conferences. This reflects that, at a practical level, the Scheme was operated on the basis that other outcomes may be offered to complainants. Those other outcomes are referred to (non-exhaustively) in the DART Report, issued by the DART as it was winding up its work. The DART Report is dated 26 November 2014 and makes extensive reference to those other outcomes.

66 The absence of set lists of outcomes in the constituent documents also reflects the historical, contextual fact that the DART was a purely executive body. It had no formal fact-finding, or adjudicative function. It was not established with prescribed procedures. While the processes of the DART developed, in practice, so that complainants were invited to fill in a form if seeking a reparation payment, but other outcomes would be discussed with a Case Coordinator (usually appointed once a complaint passed the relevant thresholds), the procedures adopted by the DART in practice do not establish an inflexible or rigid set of procedures that had to be followed, or outcomes that had to be assessed, lest any divergence result in a complaint being deemed not to have been "dealt with".

67 The short point is that the Regulations stipulate that that which must be dealt with is the *complaint*. There is simply no textual hook in the Regulations that brings in the other options which were developed as the Scheme was implemented, let alone one that would suggest a construction of "excluded complaint" that requires that each such other outcome to have been considered and determined before a complaint was "dealt with".

68 As the Respondent submitted, other contextual matters also suggest that the term "dealt with" was not intended to carry the exhaustive or prescriptive meaning suggested by Mr Knight. The Act itself (which forms part of the context for construction of the Regulations) uses the expression "dealt with" in an informal sense when referring to whether complaints could be "more conveniently or effectively dealt with by" another body, authority or part of the Act (ss 6(4D)(b), 6(6)(b) and 6(9)(b) are among many such examples identified by the Respondent in his submissions).

69 Adopting the exhaustive and prescriptive understanding of "dealt with" urged by Mr Knight would also undermine the sensible operation of other aspects of the Regulations. Section 14(1)(d) of the Regulations states that one of the functions of the Respondent is "dealing with" any matter relating to complaints that had been "dealt with by" the DART. The ambit of that function would be limited if a complaint was only "dealt with" when every facet and potential action has been examined and determined by the DART.

70 In addition, the construction preferred by Mr Knight would be impractical as it would require the Respondent, in order to determine whether a complaint was an "excluded complaint", to engage in an in-depth review of the DART's handling of an earlier complaint to assess whether each and every potential outcome had been addressed by the DART.

71 Further, and in any event, as documents that only emerged as Mr Knight pursued his case showed, in fact all of the other outcomes were considered by the DART, even if it had not notified him of its view.

72 The documents included a letter containing the consideration given personally by the Chair of the DART to Mr Knight's complaint. That letter, and records concerning civilian police referral, established that counselling was considered, but thought not necessary or appropriate in Mr Knight's case given he was in prison and his welfare (including any need for counselling) was the responsibility of the prison system. Restorative engagement was also considered, but thought inappropriate in relation to Mr Knight. Referral to civilian police was also considered but, as it was known that Mr Knight had already self-referred to the civilian police, it was thought that a further referral would be duplicative. Instead, information sharing was pursued to facilitate the police's handling of Mr Knight's complaint. Referral to the CDF was also considered and rejected.

73 Accordingly, at the factual level, outcomes other than a reparation payment *were* considered and rejected by the DART. It might have been desirable to inform Mr Knight accordingly (particularly given he had raised the question of whether he was eligible for other outcomes notwithstanding the Ministerial direction that meant he was ineligible for a reparation payment), but the fact that the DART did not write to advise him that no other outcomes were to be actioned in his case does not mean that the DART had not considered and made decisions on all possible outcomes. If, contrary to what I consider to be the proper construction of "dealt with", it was necessary that the DART have addressed all possible outcomes in relation to Mr Knight's complaint, in order for it to have been "dealt with", it did so.

74 Consequently, on either view, Mr Knight's 2013 complaint had been "dealt with" and the Respondent correctly reached that conclusion and rejected Mr Knight's 2023 complaint as an "excluded complaint" for the purposes of the Regulations. Mr Knight is not entitled to the relief sought by paragraphs 1 or 2 of his originating application.

Section 14(1)(d) of the Regulations

Background

75 Mr Knight's reply submissions were filed somewhat late (Mr Knight said that his USBs containing materials relating to this proceeding had been confiscated for a time by prison authorities). In his reply submissions, Mr Knight sought leave to amend his originating

application to seek declaratory relief in respect of the operation of s 14(1)(d) of the Regulations. Due to the late receipt of the reply submissions, the Respondent did not have adequate notice of the proposed amendment. The Respondent did not oppose leave being granted to Mr Knight to amend his originating application, and counsel for the Respondent was able to deal with the new ground — to a point — in oral submissions. However, as it emerged during the hearing that Mr Knight sought to refine the terms of the declaration he sought, I determined that it was preferable that Mr Knight finalise the form of relief he was seeking and that the parties then put on their submissions on the ground, as finalised, in writing. Both parties were content to proceed in this manner, and orders were made accordingly (allowing sufficient time given what the Court was told about constraints on access to computers in Port Philip Prison). Neither party sought a further oral hearing.

76 The additional declaration sought by Mr Knight by his amended originating application was as follows:

> [T]hat s.14(1)(d) of the *Ombudsman Regulations 2017* (Cth) directs that the Defence Force Ombudsman has the statutory function of investigating the complaint made by the Applicant under cover letter dated 16 March 2023 regarding the way his complaint previously made to, and dealt with by, the Defence Abuse Response Taskforce was handled.

77 Section 14(1)(d) of the Regulations is in the following terms:

> **14 Conferral of functions on Defence Force Ombudsman—new complaints etc.**
>
> (1) For the purposes of paragraph 19C(1)(a) of the Act, the Defence Force Ombudsman has:
>
> …
>
> (d) the function of dealing with any matter relating to complaints previously made to, and dealt with by, the Defence Abuse Response Taskforce.

78 Mr Knight's 2023 complaint included a personal statement running to 121 pages (without attachments). In addition to extensively detailing his early background and experiences in his time with Defence, Mr Knight included a section headed "Submission to the DART". In this section, which was just over two pages long, Mr Knight set out some facts concerning his 2013 complaint, referred to the range of outcomes that the DART Report listed as outcomes provided by the DART, and referred to the January 2015 Assessment Note finding his complaint contained an account of abuse that was plausible and which raised plausible mismanagement by Defence of a plausible report of abuse. After pointing out additional features of the 2015 Assessment Note, Mr Knight then referred to the Guidelines and the provision concerning

certain reparation payments being held on trust for, among others, prisoners. Mr Knight continued:

> Despite this provision and the fact that my complaints were found by DART to be plausible, I was not given a reparation payment after the Minister for Defence and the Minister for Justice issued a direction in mid-2015 that the DART should 'not make reparation payments to incarcerated complainants or persons currently on parole.' Of over 2,400 complainants to the DART, this direction only affected me and two other complainants.
>
> On 15 September 2016, my application for a judicial review of the Ministers' direction was dismissed by the Federal Court of Australia (*Knight v Commonwealth of Australia* [2016] FCA 1160 (15 September 2016) Bromberg J).
>
> A referral from the DART to the ACT Police in 2014 did not result in any charges being brought against any person involved in the injuries I received at RMC Duntroon as a result of criminal assaults. ACT Police declined to prosecute in spite of a signed statement by me in which I identified some of my assailants. I received no other outcome from the DART (e.g. an apology or counselling).

79 Earlier on his personal statement, Mr Knight detailed a belief that the Director of Army Legal Services provided advice to the Victorian Office of Public Prosecutions concerning allegations of "bastardization" that Mr Knight was likely to make in Court in connection with the Hoddle Street shootings.

80 In responding to the 2023 complaint by a letter dated 21 March 2023, the Respondent's liaison officer referred to the contents of the 2023 complaint, and said that it was the same, in substance, as the 2013 complaint. After referring to the definition of "excluded complaint", the letter dated 21 March 2023 stated as follows (emphasis added):

> This means we cannot re-assess your report under this Scheme.
>
> **We have no authority to consider** the Involvement of the Director of Army Legal Services in the prosecution of *R- v-Knight* in the Supreme Court of Victoria, **nor to consider the management of your submission to the DART.** We can only consider those incidents which occurred whilst you were a serving member of the Australian Defence Force and the alleged perpetrators of the abuse, were also serving members of the Australian Defence Force. As you ceased to be a serving member of the Australian Defence Force on 10 July 1987, all incidents after this date are outside this Scheme.

81 As is clear, the Respondent took the view that, under the Regulations, he did not have authority to consider the management of Mr Knight's submission to the DART. Mr Knight contends that the Respondent did in fact have authority to do that, pursuant to s 14(1)(d) of the Regulations.

The parties' submissions

82 Mr Knight contended that s 19C(1)(a) of the Act directs that the Respondent have the functions detailed in s 14(1) of the Regulations and that, pursuant to s 19C(2)(a), the Respondent was under a statutory obligation to investigate his complaint made under s 14(1)(d). Mr Knight further contended that s 19C(3) empowers the Respondent to investigate his complaints both with respect to the involvement of the Director of Army Legal Services in his criminal prosecution, and the management of his submission to DART, contrary to the Respondent's claims in his 21 March 2023 letter.

83 Mr Knight submitted that the expression "dealing with" was broad and, contrary to the Respondent's submission, allowed for the investigation of the matters the Respondent said were beyond its authority to consider. He also submitted that, in "dealing with" a matter pursuant to s 14(1)(d) of the Regulations, the Ombudsman would be able to recommend that Mr Knight receive one or more of the outcomes specified by s 14(1)(a) (in respect of "new complaints").

84 The Respondent submitted that s 14(1)(d) is not a "complaint investigation" function for two principal reasons. First, the provision does not refer either to the making of complaints, or the conduct of investigations. Secondly, the scheme of the Act shows that the function of investigating complaints is conferred by s 19C(1) and is directed to matters that the Respondent is authorised to investigate *by the Act.* The submission was that the "complaint investigation function is confined to, and controlled by, the Act itself".

85 The Respondent contrasted the "investigation" of complaints under the Act, with "other" — non-investigatory — functions and submitted that the distinction was deliberate and reinforced by the terms and structure of the Act, which:

(a) limit matters which the Respondent was authorised to investigate to matters so authorised *by the Act*; and

(b) thereby tie in with the scheme of a number of other provisions of the Act which apply by virtue of s 19F(1), including provisions that:

(i) confer a discretion *not* to investigate complaints;

(ii) govern the manner in which complaints are to be made;

(iii) authorise the Respondent to conduct "preliminary inquiries" into a complaint;

(iv) regulate the manner in which an "investigation" is to be conducted (eg by requiring giving notice of potential adverse opinions);

(v) authorise the compulsory production of documents and information, and the examination of persons on oath or affirmation and powers of entry; and

(vi) govern the making and giving of reports at the completion of an "investigation".

86 The Respondent submitted that, against this formal, structured set of provisions in the Act for the conduct of "investigations", the drafters of the Regulations cannot have intended, by the general language of s 14(1)(d), that the Respondent would have an additional or separate complaint investigation function that was not authorised by the Act and was divorced from the specific statutory regime for such investigations established by the Act.

87 The Respondent's submissions focused on the suggestion that, pursuant to s 14(1)(d) he had any investigatory functions. The Respondent contended that the Act contained a detailed and careful set of provisions that establish a function of investigating complaints. He relied here on the terms of s 19C of the Act, and other provisions of the Act which govern the Respondent's investigations. He submitted that, whatever s 14(1)(d) of the Regulations was intended to achieve, it does not confer any function of investigating complaints.

88 The Respondent also submitted that, although Mr Knight's proposed declaration referred to the investigation of "the complaint" [singular], Mr Knight's 2023 complaint in fact made three complaints: a renewed complaint about his abuse in the military; a complaint about how the DART handled his 2013 complaint; and a complaint about the conduct of the Director of Army Legal Services during Mr Knight's prosecution. The Respondent submitted that s 14(1)(d) of the Regulations does not give him any complaint investigation function in respect of any of those three complaints, much less "direct" that he investigate those matters.

89 Finally, the Respondent submitted that the outcomes referred to in s 14(1)(a) are only available in respect of a "new complaint" and the limits on s 14(1)(a) cannot be side-stepped by those outcomes being available by the Respondent "dealing with" a complaint pursuant to s 14(1)(d).

90 He also noted that Mr Knight had not relied on s 14(1)(d) in his 2023 complaint.

Consideration: the declaration sought in respect of s 14(1)(d) of the Regulations

91 The declaratory relief sought by Mr Knight by his amended originating application concerns the way in which the DART handled his 2013 complaint. It does not concern the actions of the

Director of Army Legal Services during Mr Knight's criminal prosecution. Inasmuch as Mr Knight's submissions raised that matter as one that should be "dealt with" by the Respondent pursuant to s 14(1)(d), it was outside Mr Knight's amended originating application and it is not necessary to address it further.

92 The substantive issue concerns the functions of the Respondent in relation to Mr Knight's complaint to the Respondent regarding how the DART handled his 2013 complaint. It is clear that the Respondent took the view, as his letter of 21 March 2023 stated explicitly, that the Respondent had no "authority to consider" the way in which Mr Knight's earlier complaint had been managed by the DART as that was a matter that post-dated his service in the Australian Defence Force. By his amended originating application, Mr Knight has taken issue with the Respondent's view that that matter was outside his authority and could not be considered by him.

93 In his submissions on the present application, the Respondent did not seek to justify or support the position taken in the 21 March 2023 letter that he had "no authority to consider" the matter. Rather, his submissions contended that s 14(1)(d) does not extend to his having any function of "investigating" a complaint about how Mr Knight's 2013 complaint was handled by the DART.

94 Mr Knight's amended originating application sought a declaration that the Respondent "has the statutory function of investigating" the handling of his earlier complaint by the DART.

95 The starting point is s 19C(1)–(2) of the Act, which provide as follows:

> **19C Functions of Defence Force Ombudsman**
>
> (1) The functions of the Defence Force Ombudsman are to investigate complaints made to him or her under this Act and to perform such other functions as are conferred on him or her by:
>
> (a) this Act or the regulations; or
>
> (b) another Act or regulations made under another Act.
>
> (2) Subject to this Act, the Defence Force Ombudsman:
>
> (a) shall investigate action that he or she is authorized by this Act to investigate and in respect of which a complaint has been made to him or her; and
>
> (b) may, of his or her own motion, investigate action that he or she is authorized by this Act to investigate.

96 Section 19C is in Pt IIA of the Act, which concerns the establishment, functions, powers and duties of the Defence Force Ombudsman. Part II of the Act concerns the establishment, functions, powers and duties of "the Ombudsman". Part IIA of the Act is self-contained in that it establishes the office of the Respondent, which is an office that is distinct from the office of the "Commonwealth Ombudsman" simpliciter (ss 19B(2) and 4). Nevertheless, Pt IIA incorporates, by express provision, the machinery and other provisions found in Pt II of the Act (other than specific provisions, which are carved out) (s 19F).

97 As the Respondent submitted, Pt II of the Act contains a comprehensive scheme of provisions, concerning the conduct of, and reports arising from, "investigations". The concept and conduct of an "investigation" is central to the operation of this set of provisions, which are, as noted, mostly incorporated in relation to the Respondent's activities. This is important because it exposes that the central function of the concept of an "investigation" and the closely prescribed set of provisions concerning the conduct of investigations (including matters such as the conferral of powers to compel the production of documents, take evidence on oath, enter premises, and the requirement to make reports) is part of the context in which s 19C(1)–(2) of the Act, and s 14(1)(d) of the Regulations, must be construed.

98 The Act confers on the Respondent the function of investigating complaints made "under this Act" and the function of performing "such other functions as are conferred … by: (a) this Act or the regulations …" (s 19C(1)).

99 The use of the words "other functions" refers, in my view, to functions other than the function of investigating "complaints made … *under this Act*" (emphasis added). Section 19C(1) anticipates that *other* Acts, or the regulations made under *the Act* may confer functions on the Respondent. There is nothing to suggest that those functions cannot include the function of investigating. Rather, the statutory conferral of such functions as are conferred by other Acts or the Regulations allows for the possibility that a function of investigating something may be conferred by that other Act, or by the Regulations.

100 The next question, then, is whether s 14(1)(d) does confer a function of "investigating" matters that would include the handling of Mr Knight's 2013 complaint. When the word "investigating" is used to refer to the concept as it appears in the Act, the answer must be "no".

101 I accept that, as the Respondent submitted, the Regulations must be construed in a manner that is consistent with, and operates harmoniously with, the Act. The Regulations are made under

s 38 of the Act, which provides that regulations may be made that are "not inconsistent with this Act" and which prescribe matters that are "required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act".

102 The Regulations are structured in terms that lock in with the principal Act. Section 13 of the Regulations provides for the payment of expenses of witnesses appearing to answer questions "relevant to an investigation" in accordance with a notice served under specified provisions of the Act. Other than in that instance, the word "investigation" is not used in the substantive provisions of the Regulations. The word "investigate" is not used at all.

103 In describing the conferral of functions on the Respondent, ss 14(1)(a)–(d) use language that describes the functions conferred in specific terms, which stand in contrast to the central function — being to "investigate" — in the Act itself. For example, s 14(1)(a) refers to the "function of taking appropriate action" to respond to a "new complaint", and s 14(c) refers to the "function of inquiring into" matters relating to complaints of abuse. The avoidance of the language of "investigate" and "investigation" in conferring these additional functions mean that they do not lock in with the provisions of the Act that confer powers, but also impose obligations, where the Respondent (or the Commonwealth Ombudsman) conducts an "investigation".

104 In that context, when s 14(1)(d) confers the "function of dealing with" any matter relating to complaints previously made to, and dealt with by, the DART, it does not confer the function of "investigating", or conducting an "investigation" into, such matters, as the words "investigate" and "investigation" are used in the Act.

105 Given that Mr Knight's submissions contend that s 19C(2)(a) "directs that the Respondent is under a statutory obligation to investigate" his complaint under s 14(1)(d), and s 19C(2)(a) states that the Respondent "shall investigate action that he or she is authorized by this Act to investigate…", it is clear that the declaratory relief sought by Mr Knight uses the word "investigating" to pick up the statutory concept of "investigate" under the Act and not some looser concept akin to "considering" or "looking into".

106 Accordingly, I decline to make the declaration in the terms sought by Mr Knight.

107 I have referred, deliberately, to the concept of "investigate" and "investigation" as those words are used in the Act. That is because these reasons should not be construed as endorsing the

position taken by the Respondent in his letter of dated 21 March 2023 that he had "no authority to consider" Mr Knight's complaint about the handling of his 2013 complaint. In my view, considering the handling of that complaint, in some way (and on the assumption that it had been "dealt with" by the DART) falls within the "function of dealing with any matter relating to complaints previously made to, and dealt with by, the [DART]" under s 14(1)(d) of the Regulations. Section 14(1)(d) does not limit how the Respondent may "deal with" such a matter. In his letter of 21 March 2023, the Respondent did not say that he had no function to "investigate" a complaint about the handling of Mr Knight's 2013 complaint. Rather, as noted, his response was that he had "no authority to consider" that matter at all. I do not consider that he had no authority, as stated.

The Respondent's notice under s 78B of the Judiciary Act and objection to competency

108 The Respondent gave notice of a constitutional matter under s 78B of the Judiciary Act. That matter was framed in the following terms:

> There is a question of construction about whether s 33(1) of the *Ombudsman Act 1976* (Cth) (Ombudsman Act), properly construed, is a privative clause that purports to oust the jurisdiction of the Federal Court under s 39B of the Judiciary Act to conduct judicial review for jurisdictional error.
>
> That question of construction gives rise to the further question of whether s 33 of the Ombudsman Act should, in order to conform with the requirements of s 75(v) of the Constitution and so preserve the constitutional validity of s 33, be construed as not applying to applications for relief (on the grounds of jurisdictional error) brought in reliance on s 39B(1) of the *Judiciary Act*.

109 Section 33(1) of the Act provides as follows:

> Subject to section 35, neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by this Act or Division 7 of Part V of the *Australian Federal Police Act 1979*.

110 No Attorney-General intervened. For his part, the Respondent did not contend that s 33 operates as a privative clause, and accepted that judicial review of the Decision is available under s 39B of the Judiciary Act. Accordingly, it is not necessary to say any more about this issue, and I proceed on the basis that judicial review is available.

111 The Respondent also served a Notice of Objection to Competency dated 22 September 2023. That notice stated that Mr Knight's application was incompetent on the following basis:

> To the extent that the application purports to be an application made under the [ADJR Act], the Court does not have jurisdiction to determine the application because,

> pursuant to s 3, the decision referred to in the application is not a "decision to which [the ADJR Act] applies". Specifically, there is no decision the Respondent could make which would confer, alter or otherwise affect legal rights or obligations, by virtue of its character as a non-binding and non-enforceable recommendation: *Griffith University v Tang* (2005) 221 CLR 99 at [80], [89].

112 The Respondent's submissions also referred to *Fitzwarryne v Commonwealth Ombudsman* [2023] FCA 175 (***Fitzwarryne***) at [39]–[40].

113 Section 5 of the ADJR Act provides that a "person who is aggrieved by a decision to which this Act applies" may apply for an order of review on one or more of the grounds set out in ss 5(1)(a)–(j).

114 Section 3 of the ADJR Act defines "decision to which this Act applies" as follows:

> ***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
>
> (a) under an enactment referred to in paragraph (a), (b), (c), (d) or (e) of the definition of ***enactment***; or
>
> (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca), (cb) or (f) of the definition of ***enactment***;
>
> other than: [certain irrelevant decisions]

115 As may be seen, no application will be available in respect of a decision unless it was made "under an enactment" of the requisite character. The meaning of the expression "under an enactment" was explained by the plurality in *Griffith University v Tang* (2005) 221 CLR 99 as follows (***Tang***) (at [89] (Gummow, Callinan and Heydon JJ)):

> The determination of whether a decision is "made . . . under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; **and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must derive from the enactment. A decision will only be "made . . . under an enactment" if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice.
>
> (**Emphasis** added.)

116 In this matter, it is the second criterion with which the Respondent had taken issue.

117 The point raised by the Respondent was that, because s 14(1)(a) of the Regulations states that one of the functions of the Respondent is "deciding not to take, or to continue to take, action in response to [a] complaint", any decision made by the Respondent in relation to Mr Knight's 2023 complaint was not one that satisfied the second limb of *Tang* (namely that the decision be one that would confer, alter or otherwise affect legal rights or obligations). The Respondent drew an analogy between s 14(1)(a) of the Regulations, and s 6(1)(b)(iii) of the Act, considered by Rares J in *Fitzwarryne*. That section confers a discretion on the Ombudsman to decide not to investigate or to stop investigating a complaint, where the investigation is not warranted having regard to all the circumstances.

118 In oral submissions, it emerged that the Respondent's objection to competency promised more than it delivered and that the Respondent did not in fact contend that Mr Knight's application was incompetent. Rather, the Respondent accepted that Mr Knight's application was not incompetent as it was advanced under s 39B of the Judiciary Act, whereas the point raised by the notice of objection to competency only had any purchase to the extent that Mr Knight's action depended on establishing causes of action under the ADJR Act. Mr Knight's application did not depend on establishing that the Respondent had made a decision to which the ADJR Act applied. Rather, his application for mandamus referred to provisions of the ADJR Act by way of illustrative particulars, and his application otherwise sought declaratory relief. Accordingly, it is not necessary to say anything more about the notice of objection to competency.

Conclusion

119 The amended originating application will be dismissed. The Respondent is to advise Mr Knight by 14 May 2024 whether, in view of Mr Knight's status as a prisoner, he seeks a costs order.

I certify that the preceding one hundred and nineteen (119) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Button.

Associate:

Dated: 9 May 2024