SELF-REPRESENTED, QUERULANT OR VEXATIOUS LITIGANTS: TWO SIDES OF A STORY

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Effective and efficient management of unrepresented litigants has long been a challenge for the Australian legal system. Numerous studies have already been undertaken on this topic by judges, legal practitioners and law academics resulting in various proposals for management strategies to deal with unrepresented litigants. However, those efforts were made in a marked absence of research from unrepresented litigants' viewpoints, in particular, unrepresented litigants' perceptions of the court's conduct and the reasons for unrepresented litigants' reactions to the court's conduct. I argue that this knowledge gap has limited the effective management of unrepresented litigants. In this article, I describe the unrepresented litigant's thoughts and actions in litigation in order to demonstrate that taking them into account will enable better management of unrepresented litigants.

I INTRODUCTION

Unrepresented litigants, more commonly termed self-represented litigants, have long attracted the attention of the courts as being "difficult, time-consuming, unreasonable, and ignorant of processes".[1] Numerous studies have been undertaken on this topic over decades in search of a way to manage unrepresented litigants effectively and efficiently.[2]

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1 J Faulks "Self-represented litigants: tackling the challenge" (October 2021) Judicial Commission of New South Wales Handbook for Judicial Officers <www.judcom.nsw.gov.au>.

2 For a comprehensive literature review, see Liz Richardson, Genevieve Grant and Janina Boughey *The impacts of self-represented litigants on civil and administrative justice: Environmental scan of research, policy and practice* (The Australasian Institute of Judicial Administration, October 2018); and Emma Garrett "The Impact of Self-represented Litigants on the Administration of Justice in the Federal Court of Australia" (2020) 9 J Civ LP 34.

One of the most notable outcomes of these studies might be found in the Handbook for Judicial Officers (the Handbook) published by the Judicial Commission of New South Wales,[3] a statutory authority whose function includes providing judicial education.[4] The Handbook contains one section entitled "Unrepresented, querulant and vexatious litigants".[5] It is a collection of five independent articles that were originally presented or published elsewhere. Three of them were authored by judges,[6] one by a former New South Wales Deputy Ombudsman[7] and one by a forensic psychiatrist.[8] The Handbook (through these articles) repeatedly describes that unrepresented litigants brought irrelevant arguments into the proceedings,[9] do not give up pursuing their cause[10] and are often disrespectful or abusive. Further, although it acknowledges exceptions, the Handbook attributes these acts to "querulous paranoia", a psychological pathology, which the forensic psychiatrist whose article was collected in the Handbook has been advocating in Australia.[11] The Handbook suggests some solutions for managing unrepresented litigants. Broadly, they are limited to: giving a chance for unrepresented litigants to arrange for a legal representative;[12] explaining to unrepresented litigants the law and procedures;[13] making litigation less adversarial;[14] or preventing unrepresented litigants from filing their claims with courts.[15]

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3 Judicial Commission of New South Wales "Handbook for Judicial Officers" (October 2021) <www.judcom.nsw.gov.au> [Handbook].

4 Judicial Officers Act 1986 (NSW), s 9.

5 Judicial Commission of New South Wales Handbook for Judicial Officers "Unrepresented, querulant and vexatious litigants" (October 2021) <www.judcom.nsw.gov.au>.

6 Faulks, above n 1; L Flannery "Dealing with unrepresented litigants in lengthy and complex trials" (October 2021) Judicial Commission of New South Wales Handbook for Judicial Officers <www.judcom.nsw.gov.au>; and E Kyrou "Managing litigants in person" (October 2021) Judicial Commission of New South Wales Handbook for Judicial Officers <www.judcom.nsw.gov.au>.

7 C Wheeler "Responding to unreasonably persistent litigants" (October 2021) Judicial Commission of New South Wales Handbook for Judicial Officers <www.judcom.nsw.gov.au>.

8 G Lester "The querulant litigant" (October 2021) Judicial Commission of New South Wales Handbook for Judicial Officers <www.judcom.nsw.gov.au>.

9 Faulks, above n 1; Kyrou, above n 6; and Wheeler, above n 7.

10 Kyrou, above n 6; Wheeler, above n 7; and Lester, above n 8.

11 Flannery, above n 6; Kyrou, above n 6; Wheeler, above n 7; and Lester, above n 8.

12 Faulks, above n 1; and Flannery, above n 6.

13 Faulks, above n 1; Flannery, above n 6; Kyrou, above n 6; and Wheeler, above n 7.

14 Faulks, above n 1; and Wheeler, above n 7.

15 Wheeler, above n 7; and Lester, above n 8.

Those efforts seeking the effective management of unrepresented litigants were made from the viewpoints of people who deal with (or maybe only observe) unrepresented litigants in some capacity but not from the viewpoints of unrepresented litigants.[16] There are ample studies that have elicited the patterns of conduct of unrepresented litigants and the judges' or legal practitioners' understanding of unrepresented litigants' thoughts behind that conduct but there is little, if any, research on unrepresented litigants' perceptions of the court's conduct and the reasons for unrepresented litigants' reaction to the court's conduct. I argue that this knowledge gap has limited the effective management of unrepresented litigants. In this article, I describe an unrepresented litigant's thoughts and action in litigation in order to demonstrate that taking those into account will enable better management of unrepresented litigants.

II DATA AND METHOD

The litigation which I analyse is *Ogawa v Finance Minister*,[17] an appeal proceeding in a judicial review case brought by an unrepresented litigant against a Federal Minister which was heard by the Full Court of the Federal Court of Australia. I chose this specific case for two reasons. First, as will be seen, the Court, at the hearing, explained to the unrepresented litigant what it considered to be the normal conduct of unrepresented litigants and then provided "guidance" prohibiting the unrepresented litigant from engaging in such conduct and encouraging them to take a specific course of action. Therefore, it is likely that how the Court dealt with the appellant in this case is how this court normally deals with unrepresented litigants. This court was a Full Court comprising three judges hearing an appeal and the judgment was unanimous.

Secondly, I am in possession of a complete set of case data, comprising the Notice of Appeal and all its amended versions, all the documents filed by both parties, all the emails sent or received by the parties and the court, the transcript of the hearing, the judgment and most importantly, the knowledge of the thoughts of the appellant for the entire period during and after this case – along with all the data leading to the first instance decision.

It is because I was the appellant in this case. I have been a litigant in the Federal Court of Australia since 2003. Although, from time to time, I managed to obtain legal representation by legal practitioners either acting for me pro bono or retained by me with some Commonwealth Government grants, I have normally been unrepresented. Some judges found that I was "hardly a typical self-represented litigant" because I hold a PhD in Law from the University of Queensland.[18] However, the topic of my PhD study – that is, the rights of broadcasting organisations – is not relevant to my legal

16 Dr Toy-Cronin's recent article presented an argument which helps us understand why this approach could create problems: Bridgette Toy-Cronin "Vexatious or Vulnerable: Permitted Roles for Litigants in Person in Civil Courts" (2025) 34 Social & Legal Studies 188.

17 *Ogawa v Finance Minister* [2022] FCAFC 145 (Full Court decision).

18 *Ogawa v Finance Minister* [2020] FCAFC 829 at [10] per Logan, Katzmann and Jackson JJ.

action – that is, judicial review of Government decisions; my first law degree and my Master's degree are from universities in Japan, which is not a common law country; and I have never been trained for legal practice nor been a legal practitioner in any country. For those reasons, I am probably no different from those unrepresented litigants whom Dr Robertson and Professor Giddings have categorised as "engagers", as opposed to "avoiders".[19]

This article examines the entire conduct of the Court and my reaction to it. Referring to the documents filed by the parties and the transcript of the hearing, as well as the judgment, I will explain my thoughts about what was happening or happened in the litigation, what I wanted to happen and what I thought I should have done to achieve it, as well as what I did in the end.

III NATURE OF THE CASE

The Full Court case which resulted in *Ogawa v Finance Minister* [2022] FCAFC 145 (Charlesworth, Thawley and Hespe JJ) (the Full Court decision) was an appeal from the judgment in *Ogawa v Finance Minister* [2021] FCA 1666 (the first instance decision) in which a single judge of the Federal Court (Logan J) dismissed my application for judicial review made on 30 May 2022 (my second judicial review application) of the Minister's decision made on 14 April 2022 (the Minister's 2022 decision). The Minister's 2022 decision was made in response to my application made on 28 March 2022 for a waiver of my debts owing to the Commonwealth (my 2022 waiver application).

I made my 2022 waiver application because my application for a waiver of debts owing to the Commonwealth made on 21 June 2019 (my 2019 waiver application) had been refused by the Minister on 2 March 2020 (the Minister's 2020 decision); my application for judicial review of the Minister's 2020 decision had been dismissed by the Federal Court (Rangiah J) in *Ogawa v Finance Minister* [2020] FCA 829 (Rangiah J's decision); my appeal from Rangiah J's decision had been dismissed by the Full Court in *Ogawa v Finance Minister* [2021] FCAFC 17 (Logan, Katzmann and Jackson JJ) (the previous Full Court decision); and I was dissatisfied with the previous Full Court decision.

I was dissatisfied with the previous Full Court decision for a number of reasons. However, the reason I made my 2022 waiver application to the Minister was because the previous Full Court had not considered all the grounds of review which I had argued before the previous Full Court. My goal for my 2022 waiver application was to go back to the Court to get a judgment on the grounds which I had argued but had not been considered by the previous Full Court in respect of the Minister's 2020 decision. I thought that if I referred to my 2019 waiver application, the Minister's 2020 decision, Rangiah J's decision or the previous Full Court decision in respect of my 2019 waiver application, there would be some dispute on estoppel down the track. Therefore, I prepared a brand new justification for a waiver and supporting documents and made my 2022 waiver application without referring to any of them, and waited for the Minister to bring in the previous Full Court decision in

19 Michael Robertson and Jeff Giddings "Self-Advocates in Civil Legal Disputes: How Personal and Other Factors Influence the Handling of Their Cases" (2014) 38 MULR 119 at 133–134.

his decision on my 2022 waiver application even though the Minister could have made a decision without relying upon Rangiah J's decision or the previous Full Court decision on my first judicial review application.

As expected, the Minister's 2022 decision relied on Rangiah J's decision to justify his refusal to waive my Commonwealth debts. Accordingly, the main dispute in the first instance case was whether the Minister's 2020 decision could be said to have been made lawfully, based simply on the fact that the previous Full Court had dismissed my appeal from Rangiah J's decision dismissing my first judicial review application. My argument in the first instance case on this issue was that since the previous Full Court decision had been made after the Court refused to hear all of the review grounds which I had advanced save for one, the previous Full Court decision did not determine conclusively that the Minister's 2020 decision had been made lawfully[20] and that the Minister's 2020 decision, in fact, had been made unlawfully because the review grounds which had not been decided in the previous Full Court decision would have been made out had they been heard and decided.[21] The Minister's response was that res judicata, issue estoppel, *Anshun* estoppel and an abuse of process could prevent administrative review action.[22] Further, since Rangiah J, in respect of my first judicial review application, ruled that the grounds of review save for one had no longer been pursued and the previous Full Court upheld Rangiah J's decision and denied the grant of leave to add those grounds of review, I was precluded from challenging the Minister's 2020 decision on those grounds.[23] Logan J's decision in the first instance case was that since the Minister's 2020 decision had been reviewed by Rangiah J and the previous Full Court, the legality of the Minister's 2020 decision was determined to finality.[24]

I appealed to the Full Court because in my view, Logan J misapplied the finality principle to the grounds for review of the Minister's 2020 decision which had not been decided by the previous Full Court. If the finality principle does not apply to the grounds of review which were not considered or decided upon in the previous Full Court decision, the previous Full Court decision does not stand for

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20 Dr Megumi Ogawa "Appellant's Outline of Submissions" (Federal Court of Australia QUD204/2021, 13 December 2020) at [10].

21 *Ogawa v Finance Minister* Transcript, Federal Court of Australia QUD204/2021, 13 December 2021.

22 In Australia, if one of the parties raising an issue in subsequent litigation could lead to a judgment in conflict with the judgment in the first litigation, the party is estopped from raising the issue even if it does not give rise to a cause of action estoppel: see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

23 Finance Minister "Submissions on Behalf of the Respondent" (Federal Court of Australia QUD204/2021, 9 December 2021).

24 *Ogawa v Finance Minister* [2021] FCA 1666 at [22] (Logan J).

the proposition that the Minister's 2020 decision was made lawfully. Although I also included a few other grounds of appeal, the main one was:[25]

> The primary judge erred in finding that the Respondent had been entitled to consider that the Respondent's decision dated 2 March 2020 [the Minister's 2020 decision] had been made lawfully because the finality principle applied not only to the grounds which had been advanced in the Full Court in [the previous Full Court decision] but also the grounds which could have been advanced but were not in the Full Court in [the previous Full Court decision].

I should clarify that despite Logan J's finding, I, in fact, had argued in the previous Full Court decision those grounds which the previous Full Court decided not to consider. The previous Full Court decision referred to my argument on those grounds as follows:[26]

> The grounds pleaded in Dr Ogawa's notice of appeal go well beyond a challenge to the rejection by the learned primary judge of the unreasonableness case which she had advanced at trial. Instead, Dr Ogawa seeks to advance allegations of a denial of procedural fairness, and that the decision-maker failed to take into account relevant considerations and took into account irrelevant considerations.

IV WRITTEN SUBMISSIONS OF THE APPELLANT

My submissions on the main ground of appeal, which was the first ground of my argument in the Appellant's Outline of Submissions, began as follows:[27]

> 14. If the finality of judgments or orders prevents the grounds which could have been advanced but were not in the previous Full Court from being litigated subsequently under any circumstances, it would be logical for the Respondent to simply rely on the previous Full Court judgment to determine that his 2020 decision was made lawfully. However, if the finality of judgments or orders does not have such effect, the previous Full Court judgment cannot be the sole basis to determine that the 2020 decision was made lawfully because the grounds which could have been advanced but were not in the previous Full Court might be litigated in a court at a later date and might be upheld. It would mean that all the issues determining whether the 2020 decision was made lawfully were not decided by the previous Full Court and hence the previous Full Court judgment on its own does not provide a logical ground to conclude that the 2020 decision was made lawfully.
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> 15. The Appellant submits that the finality of judgments and orders as applied to the previous Full Court does not prevent the grounds which could have been advanced but were not in the previous Full Court

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25 Dr Megumi Ogawa "Further Amended Supplementary Notice of Appeal" (Federal Court of Australia QUD6/2022) at Ground of Appeal 3.

26 *Ogawa v Finance Minister* [2021] FCAFC 17 (previous Full Court decision) at [8] per Logan, Katzmann and Jackson JJ.

27 Dr Megumi Ogawa "Appellant's Outline of Submissions" (Federal Court of Australia QUD6/2022, 4 July 2022).

from being litigated in a later proceeding (and they should be litigated in the present proceeding). This is because neither res judicata, issue estoppel [nor] *Anshun* estoppel creates a bar to the second litigation with no exception[28] and the present case falls within the exception to the bar to re-litigation.

16. In the previous Full Court, the Appellant argued that the 2020 decision had been made unlawfully on the grounds that the 2020 decision was made by failing to take into account relevant considerations, taking into account irrelevant considerations and a denial of procedural fairness occurred when making the 2020 decision in addition to the ground of legal unreasonableness.[29] These grounds except for the ground of legal unreasonableness did not reach final judgment because the previous Full Court, without considering the merits of those grounds, denied the Appellant leave to add those grounds.[30] The order denying the Appellant leave to add those grounds was interlocutory which the finality of judgments and orders does not apply to.

17. Even if the finality of judgments and orders generally prevents those grounds, which the Appellant argued but the previous Full Court refused to consider, from being litigated in subsequent proceedings, the present case falls within the exception to the general application which exception is set out in the Federal Court Rules 2011, r 39.05. It was the Respondent who spontaneously reviewed the 2020 decision, Rangiah J's judgment and other documents. The Appellant did not ask the Respondent to do so.

18. Furthermore, the Respondent before the previous Full Court made submissions on the sum of the Appellant's Commonwealth debts as "$46,461.89 comprising $1,400 owed to the Administrative Appeals Tribunal (AAT) for a hearing fee and $45,271.89 owed to the Department of Home Affairs (and its predecessors) for costs orders made against Dr Ogawa in various Court proceedings",[31] which sum, in the Appellant's submission, was calculated unlawfully and was wrong. The calculation has the effect of preventing the Appellant from having a pro bono lawyer in any proceedings in the Federal Court even when the Appellant is given a pro bono certificate issued by the Court. It also has the effect that the Appellant's legal representatives who acted for her in the matter of QUD116/2018 *Minister for Home Affairs v Ogawa* missed out on their professional fees.

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28 See for example *Collette v Loanne* (1966) 117 CLR 94; *Monroe Schneider Assocs (Inc) v No 1 Rabe-rem Pty Ltd (No 2)* (1992) 37 FCR 234 (FCAFC) at [26]–[27]; *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* [1996] 40 NSWLR 543 (NSWCA); and *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 146 FCR 10 (FCAFC) at [36]–[39] per Emmett, Conti and Selway JJ. See also Federal Court Rules 2011 (Cth), r 39.05.

29 Previous Full Court decision, above n 26, at [8].

30 At [8]–[13].

31 Finance Minister "Outline of Submissions by the Respondent" (Federal Court of Australia QUD208/2020) at [5].

> 19. In addition, the Court can decide the non-application of *Anshun* estoppel when justice requires[32] and, in the Appellant's submission, this is such a case because the previous Full Court conducted the proceeding as an appeal in the strict sense, not as a re-hearing, in a way which established apprehended bias and/or made the decision which was plainly wrong.
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> 20. The Court should also bear in mind that the present proceeding became necessary because the previous Full Court, despite the Federal Court Act 1976, s 22, did not determine all grounds for review of the 2020 decision advanced by the Appellant solely because of the Appellant's title notwithstanding that the Respondent had consented to hear those grounds for review.[33]

I shall briefly explain the authorities I cited.[34] *Collette v Loanne* is a High Court of Australia case in which the Court overturned the Magistrate's decision not to entertain a second judicial review application on the same matter. *Monroe Schneider Assocs (Inc) v No 1 Rabe-rem Pty Ltd (No 2)* is a case where the Full Federal Court confirmed that when new evidence, which had been unavailable at the first proceeding and was likely to have led to a different judgment had it been available, was presented at the second proceeding, estoppel did not apply. *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* is a case of the New South Wales Court of Appeal which found that where leave to raise a matter was refused, *Anshun* estoppel did not apply to the matter. *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* confirmed that *Anshun* estoppel and special circumstances exceptions to it applied to judicial review cases. Rule 39.05 of the Federal Court Rules 2011 (Cth) provides the grounds on which the Court is allowed to re-open a case which has already been finally disposed of. *Bryant v Commonwealth Bank* is a Full Federal Court case where the Court confirmed that *Anshun* estoppel had a "special circumstances" exception.

Regardless of the correctness or otherwise of my argument, since this ground of appeal and the argument for it were presented, I thought that I should receive a response on it from the Respondent and, later, a judgment by the Full Court on this ground; in particular, whether the previous Full Court decision, which did not decide all the grounds of review save for one, brought finality to the dispute on the legality of the Minister's 2020 decision. Of course, even if the previous Full Court decision did not prove the legality of the Minister's 2020 decision, and hence Logan J in the first instance decision made an error, the error would not warrant an order of the Full Court setting aside Logan J's decision unless the grounds of appeal which the previous Full Court had refused to hear were the ones which would have been made out had they been heard. It meant that, at some point in time, I had to prove that there were errors in the Minister's 2020 decision as specified in the grounds of review which I had presented to the previous Full Court but which the previous Full Court had refused to hear.

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32 *Bryant v Commonwealth Bank* (1995) 57 FCR 287 (FCAFC) per Beaumont, Wilcox and Moore JJ at 296 and 298 [which confirmed that *Anshun* estoppel had a "special circumstances' exception"].

33 Appeal Book of QUD450/21 at 27–28 (affidavit of Dr Megumi Ogawa (28 December 2021) at [11] and MO3).

34 Above n 28.

However, I did not write such an argument in my Appellant's Outline of Submissions filed for the Full Court as it would be an issue only after the ground of appeal as to whether the previous Full Court decision could prove the legality of the Minister's 2020 decision was resolved in my favour. Although the Appellant's Outline of Submissions did not include the arguments to establish the errors on the grounds of review which the previous Full Court had refused to hear, such an argument appeared in the Appeal Book as a form of my affidavit and the transcript of the first instance case.[35] I made sure that this argument was included in the Appeal Book.

V WRITTEN SUBMISSIONS OF THE RESPONDENT

The Respondent responded on this main ground in the Outline of Submissions of the Respondent as follows:[36]

> 16. For the following reasons, the Minister submits there was no error in the primary judge's reasoning or approach.
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> 17. ***First,*** at the time the Delegate made the Subject Decision, the Full Court had dismissed Dr Ogawa's appeal from the Federal Court Decision rejecting Dr Ogawa's challenge to the 2020 Decision.[37] No application for leave to appeal the Full Court Decision had been (or has been) made. Further, no other legal challenge in relation to the 2020 Decision had been raised by Dr Ogawa. Accordingly, it was not unreasonable for the Delegate to consider that the 2020 Decision had been lawfully made.[38] The status of the 2020 Decision was (as Dr Ogawa appears to acknowledge[39]) something the Delegate was entitled to take into account as part of the administrative continuum concerning Dr Ogawa's debts owed to the Commonwealth.[40]
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> 18. ***Secondly,*** Dr Ogawa does not appear to challenge the primary judge's finding at [the first instance decision at] [26] that the "various further asserted errors" concerning the 2020 Decision were not articulated by her as part of the Application that the Delegate was called upon to consider.
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> 19. ***Thirdly,*** the Minister is unaware of any authority (and Dr Ogawa has not identified any) that would have required the Delegate to question the legality of the 2020 Decision on the basis of some future

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35 An appeal book is a PDF file which includes all documents filed by the parties which are relevant to the hearing.

36 Finance Minister "Outline of Submissions of the Respondent" (Federal Court of Australia QUD6/2022, 11 July 2022) (emphasis in original).

37 *Ogawa v Finance Minister* [2021] FCA 1666 (first instance decision) at [22].

38 Noting the observations in *Australian Education Union v Lawler* [2008] FCAFC 135, (2008) 169 FCR 327 at [177] per Jessup J (Lander J agreeing) regarding *Anshun* estoppel in the context of challenges to the legality of administrative decisions.

39 Ogawa, above n 27, at [26].

40 First instance decision, above n 37, at [19]–[22] and the authorities cited therein.

> possibility that Dr Ogawa might articulate further jurisdictional errors in future proceedings concerning the 2020 Decision, without Dr Ogawa having articulated those errors.
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> 20. ***Finally,*** the authorities which Dr Ogawa cites at footnote 7 do not support the suggestion that she can collaterally challenge the 2020 Decision and the Federal Court and Full Court Decisions in this proceeding, which concerns a different administrative decision (that is, the Subject Decision). Dr Ogawa does not, in any event, identify any special circumstances or utility to permit such a course to be adopted. The matters referred to at paragraph [15] above tell against that course being adopted.

The part of *Australian Education Union v Lawler* cited by the Respondent is the passage she had cited in the first instance case as follows:[41]

> There is no shortage of authority for the proposition that *Anshun* estoppel is capable of application in forensic settings involving the judicial review of administrative action … Thus it may be taken as established that, prima facie at least, *Anshun* … would prevent a party from making a second challenge to the legality of a particular administrative decision on grounds which were clearly relevant and available on the occasion of the first challenge, but not then taken.

I thought that the Respondent's submissions were crafted in a misleading way. The Respondent's response did not really respond to my main ground of appeal. It did not say that a dismissal of a judicial review in respect of an administrative decision had proved the legality of the administrative decision even though the court had not reviewed all the grounds of review. The Respondent in the first thrust said that it was reasonable for the Respondent to assume that *Anshun* estoppel applied to the previous Full Court but did not say anything about my attack, that is, the previous Full Court decision to refuse to grant leave was not the final decision for which *Anshun* or any other form of estoppel was created. In the second and the third thrusts, the Respondent repeatedly argued that I had not articulated the errors which had formed the grounds of review which the previous Full Court had refused to consider and decide, as if my main ground of appeal was:

> The primary judge erred in finding that the Respondent had been entitled not to consider the errors of the Respondent's decision dated 2 March 2020 which had not been articulated by the Applicant in her 2022 waiver application.

That was not my ground of appeal. My ground of appeal was:[42]

> The primary judge erred in finding that the Respondent had been entitled to consider that the Respondent's decision dated 2 March 2020 had been made lawfully because the finality principle applied not only to the grounds which had been advanced in the Full Court in [the previous Full Court decision] but also the

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41 Finance Minister, above n 23, at [17].

42 Ogawa, above n 25, at Ground of Appeal 3.

> grounds which could have been advanced but were not in the Full Court in [the previous Full Court decision].

Furthermore, the Respondent said that the authorities did not "support the suggestion that [the Appellant] can collaterally challenge the 2020 Decision" in the fourth and final thrust,[43] rather than in the first thrust, reinforcing the false impression that my claim was that the Respondent had failed to consider the errors which I had never articulated in respect of the Minister's 2020 decision. That was not my claim. The Respondent was silent on my claim.

VI HEARING OF THE CASE

The Full Court decision first went to the bench constituted by Thomas, Thawley and Downes JJ. However, when this case was re-listed on a different day, the bench was reconstituted by Charlesworth, Thawley and Goodman JJ. Given that there had not been many cases dealing directly with a question as to whether or not the second action is allowed in respect of a judicial review in the Federal Court and, save for the cases decided by retired judges, the majority of those cases had been decided by Kenny J (who I had always objected to hearing my cases), the fact that Thawley J stayed in the Full Court looked to me to be good news. This was because Thawley J had sat for a recent case with Kenny J in the Full Court in which a question as to whether a second judicial review should be allowed had been considered, and decided that it be allowed.[44] I thought that the judge who had allocated the case to Thawley J had correctly identified the issue of my case and had picked a judge who knew the relevant law for my proceeding.

The hearing started in a very unusual manner. The transcript records the dialogue which took place immediately after taking appearances as follows:[45]

> CHARLESWORTH J: Thank you, Ms O'Brien. Dr Ogawa, basically, I observe that you have filed and sent some correspondence, as well, this morning. We will turn to that in a moment. You have appeared in many court proceedings, and you would be aware that the usual order is for you to make your submissions to the court first. The respondent will then make submissions, and you then have a right to make some submissions in reply. I would like to make it known to you that your submissions in reply will be limited. Your task in making your submissions to the court is to cover everything that you wish to cover. You will hear then the submissions of the respondent.
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> The occasion for making submissions in reply is not an occasion for you to say what ought to have been said in your primary submissions. Very often, with self-represented litigants, we find the reply being used

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43 Finance Minister, above n 36, at [20].

44 *AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 114, (2022) 294 FCR 80.

45 *Ogawa v Finance Minister* Transcript, Federal Court of Australia QUD450/2021 and QUD6/2022, 1 August 2022 (hearing transcript) at 3–4.

really to say what should have been said in the beginning, and that can go on for some time. The reason I'm raising this with you is that you might consider whether or not you would like the Minister to make – sorry, not the Minister, I apologise – the respondent to make submissions first so as to give you as much information as you need to hear what the respondent has to say about your case. The respondent can then help us to navigate the materials that have been included in the appeal book that the respondent has prepared.

And then the remainder of the time can be used by you as you wish to use it, knowing what the respondent has to say about your case. Now, we have quite some time for the – the hearing has been set down for a day. We may not need a day. But it seems to me that if the court were to ask the respondent to go first, then those submissions might take, say, in the order of an hour, or perhaps less, leaving you the rest of the time. What I'm concerned to avoid, as I've said, is to have a situation where you make submissions for about an hour, the respondent makes submissions, and then you're prompted by everything the respondent says to want to say a lot more.

And I can give you guidance now that this court might be impatient about that and might not allow you to proceed in that way. And so it's really a question for you. I'm going to leave this decision for you to make, as to whether or not you would like to address the court first and have the remainder of the time that is left after the respondent makes submissions, or if we proceed in the usual way, with you going first, and then the right of reply, limited in the way that I've suggested to you.

DR OGAWA: I don't know.

CHARLESWORTH J: As I've mentioned to you, sometimes I find that it is of some assistance to a self-represented litigant to hear what their opponent has to say.

DR OGAWA: Yes, sometimes.

CHARLESWORTH J: You won't agree with what they say, of course.

DR OGAWA: Yes. Okay. Yes.

CHARLESWORTH J: But it will allow you to gather your thoughts. It will – and if you take notes, and then we can have a break after that so that you can think about what has been said and prepare your oral submissions.

DR OGAWA: Okay.

CHARLESWORTH J: It could also be that I can deal first with the materials that you've asked the court to receive, overnight and yesterday, so that the –

DR OGAWA: Yes.

CHARLESWORTH J: – respondent knows what status those are going to have.

DR OGAWA: Yes. I sent to –

CHARLESWORTH J: I know – in a moment I can summarise what you've sent, Dr Ogawa. Dr Ogawa.

DR OGAWA: Yes. To –

CHARLESWORTH J: Just a moment, please. Dr Ogawa, I'm not going to ask you now to take me to those materials. I would like you to make a decision about whether you would like to make your submissions to the court first or whether you would like to hear the respondent make submissions first, before you address us on the issues.

DR OGAWA: Yes. Well –

CHARLESWORTH J: Yes. Do you – would you object if I were to ask the –

DR OGAWA: No. No. No.

CHARLESWORTH J: Yes.

DR OGAWA: That's –

CHARLESWORTH J: I think it would assist the court if we were to hear from the respondent first, too.

DR OGAWA: Yes.

CHARLESWORTH J: Because then we will be taken to documents in the appeal book, and we will at least know where they are.

DR OGAWA: Yes.

CHARLESWORTH J: And what they are.

DR OGAWA: Yes.

CHARLESWORTH J: Of course you can make submissions opposing everything that the respondent has said.

DR OGAWA: Yes.

CHARLESWORTH J: And we will grant you a break after the respondent's submissions –

DR OGAWA: Yes.

CHARLESWORTH J: – so that you can prepare for the things that you would like to say.

DR OGAWA: Yes.

When the above dialogue took place, I was thinking that Charlesworth J had not read my submissions so that her Honour had not realised that the Minister had sidestepped my attack. I thought that Charlesworth J noticed neither that my claim was that the previous Full Court decision had not proven the legality in respect of the Minister's 2020 decision nor that the Minister had made an argument as if my claim was that the Respondent had failed to consider the errors of the Minister's

2020 decision which I had never articulated in my 2022 waiver application. What I did not think at that time was the possibility that Charlesworth J was well aware of the Respondent's failure to respond to my attack and by preventing me from presenting my argument on my claim which the Respondent would not be able to defend and confining my argument to replying to what the Respondent could argue, Charlesworth J was trying to dismiss my appeal without embarking on a difficult, if not impossible, task to explain why the previous Full Court decision which had not considered all the grounds of review was a proof of the legality of the Minister's 2020 decision. I thought that, since I had already prepared my script to read out in court as my submissions at the hearing, which party goes first would make no difference in the end because I would read the script regardless of what the Respondent would say.

Accordingly, after checking whether everyone had all the documents and so on, the Respondent's counsel, Ms O'Brien, made her submissions on the substantial issue first:[46]

> MS O'BRIEN: Thank you. Thank you. So if I can address what is in Dr Ogawa's written submissions, which I have done in writing, just to raise a few points. …
>
> In relation to ground 1(c), this is dealt with at paragraphs 13 and onwards in my written submissions. The essence of the submission is that there was no error in the primary judge's conclusion that the delegate was entitled to proceed on the basis that the 2020 decision was lawful. As his Honour noted, the delegate was part of an administrative continuum where Federal Court decisions about that 2 March 2020 decision had been made and judicial review applications of that decision had not been successful. Dr Ogawa then did not articulate the further asserted jurisdictional errors with that decision in her application for reconsideration of the [waiver] of the same debt, that $46,000 debt, for the delegate to even consider and his Honour addresses that, in my submission, properly at 26 of the reasons.
>
> The application before the primary judge was one challenging the 2021 decision … not the 2020 decision. There's not the occasion for Dr Ogawa to collaterally challenge that 2020 decision in those circumstances that I've already discussed, that being that it was not raised with the delegate and there have been proceedings brought to finality in relation to challenge of that 2020 decision. And it's not an error for the primary judge to entertain a challenge to that decision on the basis of the various jurisdictional errors not raised for the delegate to consider. Were it necessary for the primary judge to have considered the operation of *Anshun* estoppel, in my submission, the matters that I've raised at paragraph 15 of my written submissions as to how the Full Federal Court dealt with that question would be decisive in that sense.

From this, it sounds as if the previous Full Court decision explained that *Anshun* estoppel would prevent further review of the Minister's 2020 decision under any circumstances, and the Respondent's counsel cited it in her written submissions. However, the previous Full Court decision made no decision and provided no explanation on *Anshun* estoppel. The Respondent's counsel, at paragraph

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46 At 20–21.

[15] of her written submissions, part of which summarised the previous Full Court decision, cited the previous Full Court decision in the following way:[47]

> In our respectful view, the learned primary judge did all that might reasonably be expected of a judicial officer by granting Dr Ogawa leave to pursue additional grounds of review by amendment if she chose. **As she had exercised a forensic choice not to pursue those grounds, his Honour was neither obliged nor entitled to revisit the wisdom of that choice and to explore for himself whether or not there may be other jurisdictional errors. … the making of that forensic choice by a litigant well read in law also tells against any grant of leave to pursue these same grounds on appeal.** So, too, does the fact that the primary judge had refused the Minister's requests for an adjournment or the opportunity to put on further evidence.

The previous Full Court decision simply explained the reason why it refused to grant leave to add the grounds for review on appeal. I thought that this part of the decision made it plain that the review of the Minister's 2020 decision was not brought to finality, not the other way around.

Then it was my turn to make submissions. Although Charlesworth J proposed a 15 minute break for my preparation, I informed her Honour that I had prepared a script to read out in court and turned down the proposal for a break:[48]

> CHARLESWORTH J: – Dr Ogawa is making her submissions. You proceed, Dr Ogawa, thank you.
>
> DR OGAWA: Can I –
>
> CHARLESWORTH J: Yes, you may.
>
> DR OGAWA: Yes. I have to ask your Honour for a lot of patience at first. I'm from the – I'm not from the English-speaking background, and most judges do not understand what I'm talking, unfortunately, and I'm not legal practitioner. I have never been. I'm from a civil law country. Virtually no knowledge of common law or equity. They are a relevant background – these are the relevant background for the first topic of the day today, but before that, there is one more thing.
>
> I listed [on] the appellant's list of authorities a webpage for a video in which Kenny J appeared. Authority number 17 on page 2, I think. That video is an educational program, which ABC repeatedly broadcast for kids. A famous figure showed up and explained what inquisitorial system is, what adversarial system is and what the differences are. According to Kenny J, as for evidence, judges in adversarial system solely rely on the parties. Judges don't go out and collect evidence by themselves. But as for law, judges do research, because no matter what the parties said, judges can't make a decision contrary to law.

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47 Previous Full Court decision, above n 26, at [11] (emphasis in original).

48 Hearing transcript, above n 45, at 23–24.

> That is what her Honour explained in the video and it formed my understanding of the operation of the adversarial system in the Federal Court of Australia. So, based on this understanding, I want to make a submission on first topic. The first topic of my submission is how the respondent took advantage of his own wrongdoing. I wanted to talk about fraud in equity special circumstances in relation to estoppel, and the previous Full Court's misconstruction of rehearing, as well as justice and fairness generally in one go, but –
>
> CHARLESWORTH J: You will, of course, proceed and do that and we will allow you to spend as much time as you wish on that topic in regard to how long is set down today.
>
> DR OGAWA: Yes.
>
> CHARLESWORTH J: But I do want to bring something – one thing to your attention that seems to me quite important on this appeal. The respondent says that we need to have regard to what you've said to the delegate in respect of this second decision. I know the word "reconsideration" might be a bit loaded. The second decision. The decision that Logan J reviewed. The respondent submits it's very important to have regard to what you said to that decision-maker, because it's not permissible for you to come to this court and raise issues with previous decisions, because the role of Logan J was to review the second decision and he had to have regard to what was before that decision-maker.
>
> DR OGAWA: Yes.
>
> CHARLESWORTH J: That seems to me to be an important issue, and so whilst you may make the submissions on the topics that you wish –
>
> DR OGAWA: Well, yes, but –
>
> CHARLESWORTH J: – don't forget –
>
> DR OGAWA: This – yes.

On the transcript, it looks as if I agreed to Charlesworth J by saying "yes". However, that was not what happened. This was the start of my objection to Charlesworth J because, if Charlesworth J had already decided that it was "not permissible for [me] to come to this court and raise issues with previous decisions" because of *Anshun* estoppel, then there was no need for this proceeding. The Court must have been ready to deliver judgment. Immediately after my "This – yes", the transcript continues as follows:[49]

> CHARLESWORTH J: I'm just giving you a reminder, Dr Ogawa.
>
> DR OGAWA: Here you go.

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49 At 24–25.

CHARLESWORTH J: It's just a reminder, Dr Ogawa. It's some guidance to help you. It's a guidance to help you to not forget when you've finished with these submissions. Don't forget to tie it back, to tie back what you've said to the material that you gave to the decision-maker for the second decision. I'm just reminding you –

DR OGAWA: Well –

CHARLESWORTH J: – not to forget to do that. You proceed.

DR OGAWA: Yes, well, that – well, there is the big misunderstanding on the part of Logan J, as well as the other party. Now, they're saying that I didn't write any complaint about 2020 decision to the respondent this time. Now, if I write it and the respondent make a – consider it, it's a complete new decision. I'm asking this court to relitigate two thousand – previous Full Court subject 2020 decision, and the re-litigation should be allowed. The Thawley J is a specialist for that, so that his Honour is [here] … I assume. Yes.

Now, that goes there, but that's why I wanted to talk about fraud in equity, special circumstances in estoppel and the previous Full Court misconstruction rehearing and justice and fairness in general, and – yes. And for this case, the grounds for review I brought to the previous Full Court was not reviewed. I mean, only one of them was reviewed there, but all others was not reviewed. There is a reason for that, and because of that res judicata or issue estoppel or anything doesn't apply. So if this court doesn't want to rehear, re-review, relitigate, then I can always file a new application based on that grounds for review, which hasn't been heard and determined, and that's waste of time and money.

Now, please allow me to go through it.

After a while, Charlesworth J interrupted my submissions again:[50]

CHARLESWORTH J: Just before you take us there, Dr Ogawa.

DR OGAWA: Yes.

CHARLESWORTH J: I asked you earlier whether you would be – or I reminded you about the point that's taken that the arguments that you wish to raise on this appeal weren't arguments that you agitated, that you put to the decision-maker on the second application for waiver. Now, I –

DR OGAWA: No, if your Honour want to –

CHARLESWORTH J: Will it be your intention – is it your case that you did or you didn't put the submissions that you're making to us now about the problems that you say affect Rangiah [J's] decision and the Full Court's decision?

DR OGAWA: Actually –

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50 At 31–33.

CHARLESWORTH J: Dr Ogawa, please just listen to the question. I simply want a yes or no answer.

DR OGAWA: Well –

CHARLESWORTH J: Just listen to the question, Dr –

DR OGAWA: I have to ask your Honour's patience.

CHARLESWORTH J: Dr Ogawa.

DR OGAWA: Really.

CHARLESWORTH J: Dr Ogawa, I have one question for you only. One question. You wish to make submissions before us about Rangiah [J's] decision and the errors that you say affect that decision and you wish to make submissions about the Full Court's judgment and the errors in that judgment. My only question to you is did you or did you not make submissions of that kind in writing or orally to the decision-maker who refused your second request for waiver?

DR OGAWA: I'm making submission about it.

CHARLESWORTH J: My question is did you make the submission to that decision-maker –

DR OGAWA: Yes, I am doing it.

CHARLESWORTH J: It would help me for you to take us to the appeal book where you say it shows that you made the same submissions that you're making now –

DR OGAWA: No, I'm making this –

CHARLESWORTH J: – to the decision-maker.

DR OGAWA: I'm this – I'm making this submissions for arguing that one. So please be patient. Your Honour obviously made up your mind to dismiss this case, saying that there is no argument presented to that decision-maker.

CHARLESWORTH J: I've only asked you a question.

DR OGAWA: That's actually –

CHARLESWORTH J: Would you like to answer the question? I've simply asked whether you're going to take us to material that shows that you made these submissions to the decision-maker.

DR OGAWA: Everything, I will do that, and once I finish it, your Honour will understand, and Thawley J probably already have a good guess, and that's why I ask the patience. I can tell – may I ask your Honours disqualify yourself?

CHARLESWORTH J: On what basis, Dr Ogawa?

DR OGAWA: Predetermination of the matter.

CHARLESWORTH J: Because I've asked you a question?

DR OGAWA: No, you already don't – decided not to take account of my argument of the –

CHARLESWORTH J: Very well.

DR OGAWA: – relitigation.

On the transcript, it may look like a reasonably orderly application for disqualification having been made. However, the reality was a far cry from that. I was in the middle of a recurrent depressive episode. I was able to cry even for no good reason on that day, but I had a reason to cry in the proceeding. I complained that Charlesworth J did not listen to me and broke down in tears, so long as I can remember, for the first time in court since 2003. Charlesworth J adjourned the court for a short period of time. After the adjournment, Charlesworth J refused to disqualify herself and the proceeding resumed. After the resumption of the proceeding, there was no interruption from the bench at all. I presented all legal arguments I had prepared. Those legal arguments are not relevant for the purpose of this article. The following excerpt is the only relevant part of the transcript:[51]

> At first instance, the respondent complained about res judicata, issue estoppel and *Anshun* estoppel. The respondent also referred to the court's power to prevent an abuse of process, although the respondent did not argue it at that hearing. In this court, respondent complained about collateral challenge. Now, I tried to study those, and the appellant's list of authorities shows the traces of my effort or struggle to learn those laws, before I gave up studying them, because I found, at the end of the day, it seems that it is the court's discretion to allow or disallow relitigation. Your Honours have power to allow me to relitigate 2020 decision review.
>
> I do not know what your Honours consider when deciding whether or not to exercise the discretion, apart from justice and fairness, which the court always considers utmost importance. But I think what Finkelstein J said at the hearing in *Ogawa v Phipps* might be relevant. I list the case in appellant's list of authorities as authority number 37, but the contents of the case itself is not relevant. Now, when the second respondent, which was the University of Melbourne, made a submission that the court should not hear my application for constitutional writ because appeal is available and there is a case which said appeal should go first before the writ should be sought, Finkelstein J replied something like, "Well, that may be so, but the applicant filed application for constitutional writ and everybody is here today, so we will just do it".
>
> Now, I think I read somewhere that there was a second action case when the second action was allowed because appeal for the first action was available, and the applicant didn't go to the appeal, but they filed a second case. So rather than reconvening at the different forum, exercising a discretion to hear the case at the place where the case is might be a consideration. My submission is that since the grounds of failure to take account of a relevant consideration, et cetera, were not heard by Rangiah J or by the previous Full

51 At 35–36.

> Court, this court should hear those grounds, and if possible also legal unreasonableness, rather than leaving a possibility that I may file another application for judicial review of the 2020 decision on the grounds which has not been heard by any court.

VII JUDGMENT OF THE CASE

The judgment of the Full Court was delivered by Goodman J. The main ground of appeal was decided as follows:[52]

> **THE FINALITY ISSUE**
>
> Paragraph 3 of Dr Ogawa's grounds of appeal misstates the effect of the reasoning of the primary judge. The primary judge did not state that the finality principle necessarily precluded the delegate who made the [Minister's 2022 decision] from considering whether the [Minister's 2020 decision] was lawfully made. The primary judge recognised (correctly) that the delegate had in fact asked whether the [Minister's 2020 decision] was affected by serious factual error, and had accepted that the [Minister's 2020 decision] might be reconsidered in light of new information. The primary judge was correct to find that, in the absence of clearly articulated arguments, the delegate was under no obligation to revisit the material provided in support of the First Request in search of vitiating error that had not already been considered in [Rangiah J's decision] and [the previous Full Court decision]. His Honour stated (again correctly) that if arguments concerning the correctness of the [Minister's 2020 decision] had been advanced, the delegate who made the [Minister's 2022 decision] would have been presented with a choice. In that event, it would have been open to the delegate to refuse to waive the debt on the basis that the arguments could have been advanced in the earlier litigation (or were advanced but rejected). There is no error disclosed in that reasoning.

It appears to me that the Full Court, likewise the Respondent, sidestepped the issue. The Full Court did not say whether or not the previous Full Court decision, which had not heard all the grounds for review, was proof that the Minister's 2020 decision had been made lawfully despite that I had argued about it all the way from the Further Amended Supplementary Notice of Appeal to the final hearing. There is no judgment on this ground of appeal. Instead, the Full Court wrote an unusual explanation, that is, I had misstated "the effect" of the reasoning of the primary judge, not that I had misstated the reasoning of the primary judge. It may be the case that the Full Court decided, in layperson's terms, that the primary judge had made an error in finding that the previous Full Court decision, which had not heard all the grounds for review, had proved that the Minister's 2020 decision had been made lawfully, but since the Respondent had reconsidered whether there had been a serious factual error in the Minister's 2020 decision, the primary judge's error should be overlooked. If that is the case, the Full Court should have so stated in its judgment.

I wondered why the Full Court had referred only to "the effect of the reasoning of the primary judge" without explaining "the reasoning of the primary judge". I could only think of two possibilities.

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52 Full Court decision, above n 17, at [41].

The first one is that the Full Court avoided referring to the grounds of review which the previous Full Court had not considered. If so, the only reason I could think of for the Full Court's avoidance of referring to the grounds of review which the previous Full Court had not considered was that the Minister did not reconsider those grounds. The Full Court appeared to me to have been determined to dismiss my appeal even though my ground of appeal and the materiality of it were made out. With due respect, I cannot sense anything fair in the Full Court decision because the Full Court wrote that:[53]

> Dr Ogawa submitted that it would be just and expedient for this Full Court to entertain and resolve those arguments because she could and would in any event make a further waiver request under the [Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act)] and then seek judicial review of any subsequent decision that was unfavourable to her.

I have never said that I would make a further waiver request under the PGPA Act and seek judicial review. The transcript proves that I did not say that. It would be an abuse of process and it is contradictory to what I argued throughout the proceedings. This passage appears under the heading of "New Arguments" which deals with my submissions at paragraph [3] of the grounds of appeal which "The Finality Issue" dealt with.[54] Notwithstanding that "New Arguments" deals with my submissions on the ground of appeal which was dealt with under "The Finality Issue", there are two sections, namely "Citizens" and "Procedural Fairness", between "The Finality Issue" and "New Arguments", making it appear that "New Arguments" were not part of "The Finality Issue". This goes to the other possible reason I could think of why the Full Court referred only to "the *effect* of the reasoning of the primary judge" without explaining the *reasoning* of the primary judge. The "New Arguments" section of the Full Court decision starts as follows:[55]

> **NEW ARGUMENTS**
>
> Dr Ogawa submitted that this Court had the discretionary power to hear and resolve arguments she had not previously raised in her application for judicial review of the [Minister's 2020 decision] or in her unsuccessful appeal to the Full Court culminating in [the previous Full Court decision]. The arguments were wide ranging. Much of Dr Ogawa's submissions on the appeal were devoted to allegations of error and wrongdoing affecting or arising out of her past litigation, including the [Rangiah J's decision]. Dr Ogawa made no attempt to establish that the particular arguments she advanced in oral submissions were arguments she had articulated to the delegate in support of the Second Request. Dr Ogawa submitted that it would be just and expedient for this Full Court to entertain and resolve those arguments because she could and would in any event make a further waiver request under the PGPA Act and then seek judicial

53 At [55].

54 At [55].

55 At [55].

> review of any subsequent decision that was unfavourable to her. She submitted that that would only result in further costly litigation in which the allegations of past error must necessarily be considered.

As explained, the statement that I "could and would in any event make a further waiver request under the PGPA Act and then seek judicial review of any subsequent decision that was unfavourable" to me was incorrect. My argument, which is clearly recorded in the transcript, was that "I may file another application for judicial review of the [Minister's] 2020 decision on the grounds which has [sic] not been heard by any court".[56] Save for this incorrectness, the passage largely described what I said in respect of paragraph [3] of the grounds of appeal, namely the main ground of appeal, which the Full Court had rejected in the section entitled "The Finality Issue".

The next two paragraphs of the Full Court decision, in my view, reveals why the Full Court referred only to "the *effect* of the reasoning of the primary judge" without explaining the reasoning of the primary judge:[57]

> We reject the invitation to consider the array of issues traversed in Dr Ogawa's submissions (other than those properly bearing on the grounds of appeal) for two reasons.
>
> First, the Court's appellate jurisdiction is that conferred under s 25 of the [Federal Court of Australia Act 1976 (Cth)]. In exercising that jurisdiction, the function of the Court is to discern appealable error in the judgment or order appealed from. The new arguments sought to be raised by Dr Ogawa did not inform the question of whether the primary judge committed appealable error nor do they inform the question of whether the delegate committed jurisdictional error. For the reasons given above, it formed no part of the task of the primary judge to entertain arguments that had not been raised before the delegate as the original decision-maker and it forms no part of the task of this Court to entertain them either.

If the Full Court held that the primary judge (Logan J) made an error, namely in finding that the previous Full Court decision proved that the Minister's 2020 decision had been made lawfully, then the Full Court would not have been able to dismiss my appeal without considering the materiality of the error, that is, whether or not the grounds of review which the previous Full Court had refused to hear in respect of the Minister's 2020 decision could be made out. That is the question which the Full Court described as "wide ranging". I think that the Full Court needed the first reason because the Full Court's second reason to reject my argument was merely a circular argument. The Full Court stated:[58]

> Second, whilst it may conceivably be open to Dr Ogawa to put forward arguments concerning the validity of the [Minister's 2020 decision] (or for that matter the [Minister's 2022 decision]) in support of yet further waiver requests ad infinitum, the delegates receiving any such requests would be entitled to proceed on

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56 Hearing transcript, above n 45, at 36.

57 Full Court decision, above n 17, at [56]–[57].

58 At [58].

> the basis that the arguments could and should have been advanced in the litigation following each past decision. In that event, any application for judicial review of any third decision would not present an occasion to review the substantive merits of the kind of arguments Dr Ogawa now seeks to advance before this Full Court.

The Full Court's explanation that "the arguments could and should have been advanced in the [past] litigation" pointed to *Anshun* estoppel, which I had argued did not apply to my case where I had advanced my arguments before the previous Full Court which had refused to consider them, and in any event, there were exceptions to *Anshun* estoppel.

The Full Court did not state anywhere in the judgment whether or not the previous Full Court decision which had not decided all the grounds for review was capable of being proof of the legality of the Minister's 2020 decision. There was no answer to paragraph [3] of my grounds of appeal.

VIII CONSEQUENCES OF THE CASE

Following the judgment of the Full Court, I made a request to Charlesworth J for the court records, including the transcript of the proceeding, to be provided to me, although not for the purpose of writing this article. My request was refused.[59] Then, as I had said to the Full Court at the hearing, I lodged my second application for judicial review of the Minister's 2020 decision on the grounds of review which the previous Full Court had not considered, as well as my interlocutory application seeking an order to reopen my first application for judicial review of the Minister's 2020 decision. The Registrar refused to file both applications. Although I did not like the Registrar's direction to modify my second judicial review application, as I believed that the direction was unlawful interference, I followed it in order to secure the proceedings. As a result, that application was filed. I also applied for review of the Registrar's decisions to refuse to file my original second judicial review application and my interlocutory application for reopening my first judicial review application. All those three applications were allocated to judges who, I believed, should not hear my case, for obvious reasons. The result was creating more disputes. So far, there are four new proceedings after the Full Court decision and I cannot see why the Full Court preferred to avoid resolving the controversy to finality.

XI REFLECTIONS ON THE CASE

All these troubles which the Finance Minister and I will have to endure would have been avoided had the Full Court made a decision on my main ground of appeal. Of course, it may be the case that the Full Court made the decision on the main ground of appeal somewhere but it was not written in a way I could find it.

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59 The transcript I used to write this article was provided to me by the Registrar in relation to another case.

After reading the judgment, I have considered what would have happened if I had simply followed the "guidance to help" which Charlesworth J offered to me as an unrepresented litigant.[60] Charlesworth J pushed me very hard to make my own choice that the Minister would make her submissions first and that I would reply to them. Charlesworth J also tried to stop me from presenting my pre-written argument by interrupting my submissions a number of times until I asked her Honour to disqualify herself. If I had simply followed Charlesworth J's suggestion, the Full Court judgment might have been that I made my forensic choice to abandon paragraph [3] of the grounds of appeal. Given that the Minister in her written submissions cited the previous Full Court's statement that "she had exercised a forensic choice not to pursue those grounds",[61] and that the Full Court judgment in the second to last sentence stated that "she had every opportunity to agitate but chose to abandon",[62] if the Full Court wrote that I had abandoned the ground of appeal, it would have gone down very well with the readers of the judgment and no one would have had any questions about it. If that had happened, I would have been very annoyed.

It helped me that I was in the middle of a depressive episode at the time of the hearing, and that Charlesworth J's repeated interference with my submissions at the hearing reduced me to tears, as this made Charlesworth J stop giving "guidance to help" me. Otherwise, I might have ended up yelling at her Honour in an attempt to have her listen to my submissions, and risked being accused of being disrespectful and abusive.

X CONCLUSION

In this article, I have described how I, an unrepresented litigant, saw my case. All unrepresented litigants know what they wrote in their application to the Court and what they said to the Court at the hearing. If the judgment does not respond to their claim, or if the judgment was not written in a way they can see that the Court heard and made a decision on their claim, it is hardly surprising if they complain. It is also unsurprising that some of those unrepresented litigants bring further action.

The Handbook repeatedly explains that unrepresented litigants do not give up. My finding based on my experience is that a judgment which does not respond to the claim of the unrepresented litigant, or was not written in a way that the unrepresented litigant could locate the court's response to their claim, is the reason for their subsequent further applications to the court. Therefore, writing a judgment in a way in which unrepresented litigants can locate where each of their claims was considered and determined, or otherwise providing such information by some other means, is one way in which unrepresented litigants could be better managed.

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60 See hearing transcript, above n 45, at 24.

61 Previous Full Court decision, above n 26, at [11], cited in Finance Minister, above n 36, at [15].

62 Full Court decision, above n 17, at [61].

The Handbook also repeatedly mentions that unrepresented litigants are or become disrespectful and abusive. I found that the court's interference with my oral submissions, in attempting to exclude from my argument the point which my opponent did not or could not defend, was very distressing and it could have led to the court accusing me of being disrespectful. This issue overlaps another issue repeatedly raised in the Handbook, that is, unrepresented litigants bringing irrelevant arguments into the proceedings.

Leaving aside the question of whether my argument which the court tried to exclude had a hope of succeeding, or whether my opponent's lack of defence to one of my attacks was tactical or unintentional, the Full Court's strategy to rely on the submission of my opponent's counsel to identify the controversy on which to make a judgment was a failure, because my opponent's counsel had no obligation to attempt to defend all the attacks I had advanced. Since it would be impracticable and counterproductive to impose on the opponent of an unrepresented litigant an obligation to defend the indefensible, ways to limit an unpresented litigant's irrelevant argument without eroding the rule of law have to be left for future studies.