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TABLE OF CONTENTS

FEDERAL COURT v MINISTER FOR IMMIGRATION

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Administrative law — immigration decision-making — judicial review — ongoing conflict between parties — unsuccessful attempts to defuse conflict — intervention by Parliament and High Court — conflict continues — options for reducing conflict — implications for administrative law — future uncertain.

The modern history of Australian administrative law has been dominated by judicial review of immigration decision-making. Each year the immigration caseload of the Federal Court continues to grow, far exceeding the caseload in any other area of Commonwealth or State government decision-making.[1] A beneficial feature of the immigration litigation - from an academic perspective at least - has been the exposition of legal principle in many landmark cases. The tableau includes *Kioa*, dealing with the scope of natural justice; *Haoucher*, and legitimate expectation; *Teoh*, and the status of international conventions; *Prasad*, and the duty of inquiry; *Drake*, and the status of executive policy in administrative review; *Pochi*, and the evidentiary basis for administrative review; *Conyngham*, and the limits of the supervisory role of courts; *Wu Shan Liang*, and judicial deference; *Eshetu*, and the scope of *Wednesbury* unreasonableness; *Lim*, and the constitutional limitations on immigration control; and *Abebe*, and the constitutional impediments to the restriction of judicial review.[2]

Over the same period, judicial review of immigration decision-making has also been dominated by a more controversial theme, of ongoing conflict between ministers for immigration and the Federal Court. Political criticism of courts for usurping the province of the executive has been periodic, coming from both sides of politics.[3] Courts, for their part, have expressed reciprocal concerns, both in the subtle tone of their judgments, but sometimes more directly in criticism of ministers for failing to implement the impartial adjudication of tribunals.[4]

A manifestation of the tension in this area was the commencement of operation in September 1994 of Part 8 of the *Migration Act 1958* (Cth), which gave extended rights to

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1 The number of migration cases filed in the Federal Court as a percentage of the number of administrative law cases in the Court is: 1987/88, 84 (28%); 1990/92, 132 (36%); 1993/94, 320 (55%); 1996/97, 673 (68%); 1998/99, 871. See Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999) at 271.

2 *Kioa v West* (1985) 159 CLR 550; *Haoucher v Minister for Immigration and Ethnic Affairs (MIEA)* (1990) 169 CLR 648; *MIEA v Teoh* (1995) 183 CLR 273; *Prasad v MIEA* (1985) 65 ALR 549; *Re Drake and MIEA (No 2)* (1979) 2 ALD 634; *MIEA v Pochi* (1980) 4 ALD 139; *MIEA v Conyngham* (1986) 68 ALR 441; *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *Minister for Immigration and Multicultural Affairs (MIMA) v Eshetu* (1999) 162 ALR 577; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (MILGEA)* (1992) 176 CLR 1; *Abebe v Commonwealth* (1999) 162 ALR 1. Generally, see M Crock, *Immigration and Refugee Law* (1998, Federation Press) Chs 2-3. The significance of *Drake* and *Pochi* is also examined in J McMillan, "Merit Review and the AAT - A Concept Develops" in J McMillan (ed), *The AAT - Twenty Years Forward* (1998, AIAL) 32.

3 For examples of similar criticisms made by Ministers Hand (Labor) and Ruddock (Liberal), see Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999) Ch 1. See also E Willheim, "Ten Years of the ADJR Act: From a Government Perspective" (1990) 20 *Fed L Rev* 111 at 117; and P Ruddock, speech by Minister to National Press Club, "Immigration Reform: The Unfinished Agenda", reported in "Ruddock Slams Courts for Ignoring Will of Parliament", *Australian Current Law News*, 19 March 1998.

4 Eg *Nikac v MIEA* (1988) 92 ALR 167 (Wilcox J).

merit review of immigration decision-making, but imposed a restricted scheme for judicial review of those decisions.[5] The subsequent failure of Part 8 to curtail immigration litigation in the Federal Court - indeed, the contradictory effect of Part 8 in becoming a major focus of that litigation - has given rise to a new proposal currently before the Parliament to enact a broadly-expressed privative clause designed to preclude judicial review of immigration decisions by the Federal Court.[6] The legislative proposals, together with other aspects of immigration decision-making and adjudication, have also been the subject of numerous parliamentary inquiries.[7]

How best to explain the relentless increase in judicial review applications is itself an issue in dispute.[8] The minister, on the one hand, has argued that the litigation is an end in itself, a means by which those facing deportation forestall that result, with a possible chance that deportation will ultimately be prevented either by the intervention of a court or by the passage of time. On the other side of the debate is the view, commonly heard from within the legal community, that the increase in judicial review is a self-justifying trend, a sign that defective decision-making is rampant and in need of correction.

Whatever the truth in that debate - if truth there be[9] - a question remains as to the continuing role of the Federal Court in the review of immigration decision-making. It is that issue which is taken up in this article. The theme of the article is that external review of administrative decision-making is essential, but should principally be undertaken by administrative tribunals rather than by courts. The argument is developed in two stages. First, it is argued that the current direction and tone of judicial review of immigration decision-making by the Federal Court is inappropriate. The case study for this argument consists for the most part of recent decisions of the Federal Court decided during a six month period in 1999.[10] Secondly, it is argued that the present dynamic between the Court and immigration decision-makers will not change unless there is structural change to establish a more comprehensive tribunal framework.

At the outset it should be acknowledged that this article does not present an inclusive survey of all immigration issues arising in the Federal Court during 1999. Many of the cases not mentioned in this article dealt with complex issues that trouble courts and tribunals around

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5 The main two features of the restrictions were, first, that an application for judicial review could not be made in most instances until merit review of the decision by a tribunal had first occurred; and secondly, the grounds for judicial review of the decisions of the tribunals were limited by the exclusion of grounds such as breach of natural justice, *Wednesbury* unreasonableness, relevant and irrelevant considerations, and inflexible application of policy. See Crock, above n 2 at Ch 13.

6 See *Migration Legislation Amendment (Judicial Review) Bill 1998*. A similar Bill introduced but not enacted in 1997 is the subject of articles by P Ruddock, "Narrowing of Judicial Review in the Migration Context" (1997) 15 *AIAL Forum* 13; R Creyke, "Restricting Judicial Review" (1997) 15 *AIAL Forum* 22; and M Crock, "Privative Clauses and the Rule of Law" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999, AIAL) 57.

7 See, eg, three reports of the Senate Legal and Constitutional Committee - in 1997 into the Administrative Decisions (Effect of International Instruments) Bill 1997; in 1997 into the Migration Legislation Amendment Bill (No 4) 1997; and in 1999 into the Migration Legislation Amendment (Judicial Review) Bill 1998. A further report is to be tabled early in 2000 into the refugee determination system.

8 The competing arguments, and the protagonists in the debate, are examined in the 1999 Senate Report, above n 3, at Ch 1. See also S Kneebone, "The RRT and the Assessment of Credibility: An Inquisitorial Role?" (1998) 5 *AJAL* 78

9 I have argued elsewhere that in many cases a declaration of invalidity by a court is a reflection not of bad decision-making, but of a disparity between the legal and administrative perspectives on decision-making: J McMillan, "Conflicting Values in Administrative Law and Public Administration: A Marriage Strained" in S Argument (ed), *Administrative Law & Public Administration: Happily Married or Living Apart under the Same Roof?* (1994, AIAL) 1.

10 The selection of cases is hampered by the fact that not all Federal Court decisions are published on Austlii, and fewer are published in the law reports.

the world, on matters such as the definition of "particular social group", and the evaluation (in difficult circumstances) of whether a person has a "well-founded fear" of persecution. The important contribution that the Federal Court has made on those and many other migration issues has to be acknowledged, albeit - on this occasion - without elaboration. The main focus of this article is, instead, a smaller group of cases that bear upon the question of whether, from the perspective of public policy, the judicial review role of the Federal Court is free of difficulty. This selective approach can, in a sense, be justified also as an administrative law approach, since it is focusing attention (in the same manner as courts do) on the disputable features of a process and not on the incidental benefits. To the extent that that selectivity presents a distorted picture, it is customarily accepted in the pursuit of higher quality decision-making.

Evaluating the Federal Court's Role

Recent criticism of judicial merits review

The starting point for an evaluation of the role of the Federal Court is that both the High Court and the Federal Court have acknowledged that there is a recurring problem of judicial merits review. In a string of recent decisions there has been criticism of judges of the Federal Court for engaging in merit review of immigration decision-making.

The recent trend of criticism in immigration cases commenced with the decision of the High Court in *Minister for Immigration and Ethnic Affairs (MIEA) v Wu Shan Liang*,[11] which concerned a decision by a delegate of the minister to refuse the applicant's application for refugee status. In reversing a decision of the Full Federal Court (Sheppard, Lee and Carr JJ), the High Court held unanimously that the reasons of the delegate should have been taken at face value, and that a plain reading of those reasons did not reveal any error - "There is no reason to assume that the delegates of the Minister engage in some artificial and fallacious manner of reasoning".[12] A warning was sounded against "over-zealous judicial review" and against "combing through the words of the decision-maker with a fine appellate tooth comb";[13] attention was also drawn to two other Full Federal Court decisions which the High Court felt could be criticised along similar lines.[14]

It was not long before the High Court granted leave to appeal in two other immigration decisions in which the Full Federal Court had struck down a decision of the Refugee Review Tribunal (RRT) - *MIEA v Guo*[15] (Beaumont, Einfeld and Foster JJ), and *Minister for Immigration and Multicultural Affairs (MIMA) v Eshetu*[16] (Davies and Burchett JJ, Whitlam J dissenting). In both cases the High Court held that the RRT had not made an error of law. Once again there was barely concealed criticism of the approach taken by the Full Federal Court.

In *Guo* the Court said of the approach adopted by Einfeld J (Foster J concurring) that it was "ingenious", but could not be supported by the terms of the Migration Act, the Geneva Convention Relating to the Status of Refugees, the principles of administrative law, or the

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11 (1996) 185 CLR 259. There have been other recent immigration cases in the High Court that have dealt with issues of law not examined in this article - see, eg, *MIEA v Teoh* (1995) 183 CLR 273; *"Applicant A" v MIEA* (1997) 190 CLR 225.

12 *Ibid* at 281 per Brennan CJ, Toohey, McHugh and Gummow JJ; see also Kirby J at 295.

13 *Ibid*, respectively at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ; and 291 per Kirby J.

14 *MILGEA v Mok Gek Bouy* (1994) 127 ALR 223 (Black CJ, Lockhart and Sheppard JJ), and *Chen Ru Mei v MIEA* (1995) 130 ALR 405 (Northrop, Spender and Lee JJ).

15 (1997) 191 CLR 559.

16 (1999) 162 ALR 577.

proper approach to administrative decision-making.[17] The High Court observed further that "To some extent, the judgments suggest that their Honours .... were influenced by their own views of the state of affairs in the People's Republic of China, [which] is to trespass into the forbidden field of review on the merits".[18] The Court went on to hold that the form of the order made by Einfeld and Foster JJ - a declaration that the applicants were refugees and entitled to an entry visa - usurped the role of the executive branch in administering the Migration Act.[19]

The litigation in *Eshetu* brought to a head a controversial disagreement that had caused an equal division of opinion among judges of the Federal Court in a dozen or more cases.[20] It concerned the ramifications of the direction in section 420 of the Migration Act that the RRT "must act according to substantial justice". In the view of some Federal Court judges, including Davies and Burchett JJ in *Eshetu*, section 420 imposed an obligation on the RRT to comply with legal standards that had earlier been excluded by Part 8 of the Act as grounds on which decisions of the Tribunal could be reviewed by the Court. The High Court held, unanimously, that to construe section 420 in this way was to negate the clear intention of the Act, and to give substantive meaning to a provision that was designed to be facultative and exhortatory. The High Court was also unanimous[21] in rejecting the finding of the majority of the Federal Court that the RRT's decision was erroneous on the ground of *Wednesbury* unreasonableness. As Gleeson CJ and McHugh J concluded, "What emerged was nothing more than a number of reasons for disagreeing with the Tribunal's view of the merits of the case. The merits were for the Tribunal to determine, not for the Federal Court".[22]

The criticisms levelled by the High Court about inappropriate merit review by the Federal Court have also been repeated by the Full Federal Court itself. In 1999 alone the Full Court reiterated that message on at least five occasions. In *MIMA v Rajalingam*,[23] the Full Court, in allowing an appeal against three judgments of Ryan J, restated at length the principles enunciated by the High Court, and concluded that they had been infringed by reason that Ryan J had required of the RRT that it adopt a "what if I am wrong?" test. In other respects too it was held that Ryan J had "intrude[d] impermissibly into the merits of the RRT's decision",[24] and had undertaken an analysis that was "essentially a criticism of the RRT's findings of fact, of the weight that it attributed to the different items of information before it, and of the reasoning process adopted by it in reaching its factual conclusions".[25]

Similar views were expressed by the Full Court in four other cases. In *MIMA v Bethkoshabeh*[26] the Full Court, reversing a decision of Marshall J, observed that his Honour "clearly exceeded his supervisory role", made "a determination of the merits of the claim",

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17 (1997) 191 CLR 559 at 574 (per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

18 *Ibid* at 577. The Federal Court was criticised in the same terms by Mason CJ in *Chan v MIEA* (1989) 169 CLR 379 at 391-392.

19 See particularly Kirby J at 599-600; see also the joint judgment at 579.

20 A selection of the cases is referred to in *Eshetu* (1999) 162 ALR 577 in footnote 36 of the judgment of Gaudron and Kirby JJ; in Crock, above n 2 at 284-288; and in *Calado v MIMA* (1998) 51 ALD 502.

21 Gaudron and Kirby JJ dissented on a different issue, concerning the test to be applied in deciding whether a person is a refugee by reason of an actual or imputed political opinion.

22 (1999) 162 ALR 577 at para 56. See also the dissenting judgment of Whitlam J in the Full Federal Court in *Eshetu*, in which his Honour described the contrary interpretation of the reasons of the RRT (which had been favoured by the other judges in the case) as "bordering on the perverse": (1997) 71 FCR 300 at 369.

23 [1999] FCA 719 (Sackville, North and Kenny JJ).

24 *Ibid* at para 69 per Sackville J (North J concurring; Kenny J agreeing at para 146).

25 *Ibid* at para 147 per Kenny J.

26 [1999] FCA 980 per O'Connor, Sundberg and North JJ at paras 11, 13.

and "erred in concluding that *Wednesbury* unreasonableness infected the Tribunal's conclusion, and in going on to make his own finding[s] of fact". In *MIMA v SRT*[27] the Full Court, hearing an appeal against a decision of Einfeld J, was critical of the judge for expressing his view of the merits of the case, and directed that on reconsideration "the Tribunal should have no regard to the observations made by his Honour concerning the merits of the original decision". In *MIMA v Cho*[28] the Full Court, in reversing a decision of Madgwick J which had held that the RRT had drawn an evidentiary inference that was not reasonably open to it, concluded that "there was sufficient material before the RRT to enable it to draw the inference". Finally, in *MIMA v Epeabaka*[29] the Full Court disagreed with the ruling of Finkelstein J that the reasoning of the RRT in that case was illogical and self-contradictory, and rejected his Honour's view that lack of probative evidence could be classified as a reviewable error of law.

A deeper problem

It would be superficially attractive to regard those decisions as an illustration of the appellate process at work in the correction of legal error at the trial level. However, there is reason for thinking that the problem is deeper. During the last decade of judicial review by the Federal Court, there appears at any time in that period to be a principle or theme that predominates in the explanations given by the Court as to why immigration decisions are invalid. As each such theme is, in turn, annulled either by legislative action or by appellate court review, it is replaced by another theme that delivers the similar result of invalidity. That is not to say that all decisions fit the same mould,[30] or that there is collusion to defeat the directions of Parliament and the High Court, merely that the impact of judicial review seems to have altered little despite their intervention, albeit it may have changed focus.

In the late 1980s there were two common bases for the frequent invalidation of immigration decisions. The first was the principle that the obligation of a decision-maker to give consideration to relevant matters is an obligation to give "proper, genuine and realistic consideration to the merits of the case".[31] A review body, faced with an individual decision that appears harsh in the result, can often be persuaded that the merits of the decision had not been considered in a genuine or realistic way. And so it was held in many cases. Two illustrative decisions that were the high-water mark of this approach were *Hindi v MIEA*[32] (Sheppard J), and *MILGEA v Pashmforoosh*[33] (Davies, Burchett and Lee JJ). In both cases, an agency decision had been made to deport to a war-torn homeland a family that had overstayed their visitors' entry permit. Although the reasons of the decision-maker in each case set out all the relevant considerations, including the policy principle that sympathy alone was not a reason for granting migrant entry to Australia, the Court concluded that the gravity of the situation facing each family had not been properly presented and considered. As Sheppard J concluded in *Hindi*, "the use by the [decision-maker] of such phrases as 'has been read', 'has been made aware of', and 'have been noted' do not necessarily reflect that

27 [1999] FCA 1197 per Branson, Lindgren and Emmett JJ at para 57.

28 (1999) 164 ALR 339 per Tamberlin, Sackville and Katz JJ at para 49.

29 (1999) 160 ALR 543 (Black CJ, von Doussa and Carr JJ).

30 The success rate of plaintiffs in migration litigation has hovered just below 10% of cases throughout the last decade. Consequently, if there is a problem of judicial overreach it has not led to an increase in the success rate of plaintiffs. However, judicial merits review has arguably been a factor in the increase in other elements of the litigation process - specifically, the significant increase in the number of applications filed each year in the Federal Court (see above n 1), the increase in the delay in resolving cases (cf 107 days for refugee cases in 1993/94 to 337 days in 1997), and the increase in the Departmental litigation budget (cf $6M per year in 1997 to an estimated $13M in 1999): see Ruddock, above n 5; and P Ruddock, "Taxpayer foots rising asylum-seeker litigation costs", Ministerial Press Release - MPS 42/99, 7 March 1999.

31 *Khan v MIEA* (1987) 14 ALD 291 at 292 per Gummow J.

32 (1988) 20 FCR 1.

33 (1989) 18 ALD 77.

genuine and proper consideration of the matter which Mr Hindi was entitled to have brought to bear on the matter".[34]

The second common basis for invalidating decisions in the late 1980s was the approach taken by the Federal Court to the construction of a residual discretion conferred by paragraph 6A(1)(e) of the Migration Act, to grant a resident visa where there were "strong compassionate or humanitarian grounds". The view of the Department was that the discretion should not provide a simple alternative to normal migrant entry criteria, but should be used in exceptional cases, for example, where there was an occurrence of natural disaster, war, political turbulence, or gross and discriminatory violation of rights in a person's country of origin. A succession of Federal Court decisions took a different view, emphasising that the discretion could apply where a person who was forced to leave Australia would face a situation that would evoke strong feelings of pity or compassion in an ordinary member of the Australian public.[35] A consequence of the liberal judicial approach (and of other events such as Tiananmen Square) was that the Department, rather than handling the 100 or so applications per year it expected to receive, by 1989 had over 8,000 applications on hand.[36]

Both those approaches to judicial review were closed down by legislative amendment - paragraph 6A(1)(e), by its deletion from the Migration Act; and the "proper, genuine and realistic" standard, by the omission from Part 8 of the Act of failure to consider relevant matters as a ground for judicial review. Around the same time the invalidation of immigration decisions by the Federal Court moved to a different footing. In a number of refugee cases[37] the Full Court concluded that the decision-maker had not applied the correct test, viz, whether there was a "real chance" of persecution on political grounds if the applicant was removed to his or her country of citizenship. Instead, the Full Court held, a close analysis of the reasons for decision showed that decision-makers had surreptitiously applied a "balance of probabilities" test. As noted, in *MIEA v Wu Shan Liang*, the High Court reversed the Federal Court and held that the decision-makers had correctly applied the "real chance" test and should be taken to mean what they had said.

It was soon after the decision in *Wu* that a new basis emerged for the invalidation of RRT decisions, namely, that the RRT had contravened the "substantial justice" provision of the Migration Act. Many RRT decisions were declared invalid on that ground, up until the grant of special leave by the High Court to hear an appeal against that reasoning in *Eshetu*. As noted, the High Court in *Eshetu* rejected that approach to the interpretation of the Act.

Review of tribunal reasons — a new growth trend

Throughout 1999 there has arisen a new growth area in the invalidation of tribunal decisions, and those of the RRT in particular. A frequent ruling in recent decisions has been that the RRT has failed to comply with the requirement in subsection 430(1) of the Act that the Tribunal shall provide a statement of reasons that "sets out the findings on any material questions of fact" and "refers to the evidence or any other material on which the findings of fact were based". The failure to comply with subsection 430(1) is classified, in turn, as a breach by the Tribunal of paragraph 476(1)(a) of the Act, which permits judicial review of Tribunal decisions where "procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed".

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34 (1988) 20 FCR 1 at 15.

35 Eg, *Damouni v MILGEA* (1989) 87 ALR 97 (French J), *Dahlan v MILGEA* (unrep, 12 Dec 1989) (Hill J) and *Surinakova v MILGEA* (1991) 26 ALD 203 (Hill J)

36 The impact of the Federal Court approach is analysed in E Arthur, "The Impact of Administrative Law on Humanitarian Decision-Making" (1991) 66 *CBPA* 90.

37 Eg, *Wu Shan Liang* and other cases referred to in n 14 above.

In *Eshetu*, Gummow J cautioned that section 430 "does not provide the foundation for a merits review of the fact-finding processes of the Tribunal".[38] It is doubtful, however, whether that caution is being fully heeded. The recent jurisprudence largely builds on three decisions of the Full Federal Court in December 1998 - *Paramananthan v MIMA*[39] (Wilcox, Lindgren and Merkel JJ), *Logenthiran v MIMA*[40] (Wilcox, Lindgren and Merkel JJ), and *Calado v MIMA*[41] (Moore, Mansfield and Emmett JJ). A similar conclusion was reached in each that the RRT had erred by not preparing a statement of reasons that complied with section 430.

In *Paramananthan* the RRT, in rejecting a refugee claim by two young Tamil males, accepted that they had suffered interrogation and torture by Sri Lankan security forces, but concluded that they had suffered indiscriminate cruelty rather than (as required in accordance with the Refugee Convention) mistreatment that was directed in a discriminatory way towards a particular social group. The Full Federal Court, in holding that the RRT had erred, pointed to a number of items of evidence not discussed by the RRT that were inconsistent with its findings (including country reports from the British Refugee Council, Amnesty and the Danish Immigration Service).[42]

There was, however, an element of ambiguity in the judgments of the Full Court in *Paramananthan*. On a narrow view, the Full Court was simply applying an established principle that a statement of reasons must make explicit findings on the *statutory criteria* to be applied, and address any inconsistency between the findings of the Tribunal on those criteria and the legal and factual *claims* of an applicant. As Lindgren J held, "the Tribunal has failed to answer the essential question before it, that is, whether the treatment which young Tamil male detainees in particular receive is motivated by a Convention reason".[43] This, too, was the crux of the joint judgment in *Calado*, which concluded that "The central question going to the merits of the case [viz, whether the applicant belonged to a particular race that was being persecuted] is one which the tribunal did not answer".[44]

On the other hand, there are aspects of the judgments in *Paramananthan* and *Logenthiran* that support a more demanding principle concerning the obligation of a tribunal in preparing the reasons for decision. For example, in *Paramananthan* there are many passages in the judgments that contain a close analysis of the factual reasoning of the RRT, leading to a disagreement by the Court with the factual findings of the Tribunal, particularly concerning the political situation in Sri Lanka.[45] While the Court acknowledged that fact-finding is the province of the Tribunal, mention is made of numerous contradictory points of evidence that should have been the subject of an explicit finding or discussion by the Tribunal. As Merkel J held, "The RRT made no findings in respect of the large body of credible material pointing in favour of a 'well-founded' fear on the part of the applicants".[46] Similarly, in *Logenthiran* the

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38 (1999) 162 ALR 577 at para 117; similar comments were made by the High Court in *Wu Shan Liang*.

39 (1998) 160 ALR 24. See also *Muralidharan v MIEA* (1996) 62 FCR 402; and *Kandiah v MIMA* [1998] FCA 1145.

40 [1998] FCA 1691.

41 (1998) 51 ALD 502.

42 The error on the part of the RRT was variously categorised as an incorrect application of the law to the facts, an incorrect interpretation of the law, a constructive failure to exercise jurisdiction, and a failure to comply with the statutory requirement to provide a statement of reasons complying with s 430 of the Act.

43 *Ibid* at 37; see also Merkel J at 60: "The RRT left unanswered the crucial question, against whom was mistreatment directed and for what reason".

44 (1998) 51 ALD 502 at 517 per Moore, Mansfield and Emmett JJ.

45 See particularly Wilcox J at 29-32, and Merkel J at 60-63. Merkel J's approach (with which Wilcox J was in general agreement) was premised in part on a definition of the supervisory role of the Federal Court (*ibid* at 56-57) that was rejected by the High Court in *Eshetu*. So, too, was the decision of the Full Court in *Calado*.

46 *Ibid* at 61 per Merkel J.

Full Court concluded that "While it was open to the RRT, as a tribunal of fact, to reject the claims made in [a report of the British Refugee Council], it was not open to it do so without setting out its own findings in respect of the situation claimed by the report and the evidence or other material on which those findings were based".[47]

There is a fine distinction between requiring (narrowly) that a statement of reasons shall contain findings on the statutory criteria and the essential claims made by a party, and requiring (broadly) that the statement contain findings on significant individual items of evidence that support each such claim.[48] However, to disregard that distinction, and to display rigour and zeal in the analysis of reasons can, as the High Court has cautioned, threaten the overriding distinction between the supervisory role of a court and the merit review function of a tribunal. The cases that have built upon *Paramananthan*, *Logenthiran* and *Calado* illustrate the danger.

The RRT, in a decision reviewed in *Thevandram v MIMA*,[49] had rejected an applicant's claim for refugee status after concluding that his claims about his arrest and detention in Sri Lanka were "far-fetched and implausible". The Tribunal pointed in its reasons to ten or more findings of fact and inferences relating to the applicant's life in Sri Lanka and to the political situation in the country that contradicted the refugee claim. However, the Full Federal Court (Spender, North and Merkel JJ) noted that the Tribunal did not specifically refer in its reasons to three letters that were among the material before the Tribunal, even though no issue as to those letters had been raised in the oral and written submissions made by the applicant's solicitors to both the Tribunal and the trial judge. The three letters were from Sri Lanka, two from the applicant's wife and the other from an attorney, referring to recent incidents of police and military harassment. The Full Court concluded that the claims made in the wife's letters, if accepted as credible, would provide support for the applicant's claim that he was in fear of political persecution. It was open to the Tribunal to reject or to give little weight to the wife's statements about harassment, but either way the Tribunal had to set out its own findings on the issue. The obligation to do so was imposed by subsection 430(1) which, in the view of the Court, was to be treated as "a fundamental incident of the statutory function of the RRT".[50]

The implications of requiring a tribunal to make a separate ruling on each significant item of evidence or opinion presented by a party, particularly evidence of unknown authenticity that is self-serving in character, will be apparent. A tribunal such as the RRT, without the benefit of adversarial presentation of evidence and cross-examination by opposing sides to a dispute, is not in a position to disprove each evidentiary claim made by a party - more so when the RRT receives over 7,000 appeals each year.[51] While some may regard that as second-class justice, the harsh reality is that justice is - and always has been - a relative and not an absolute concept. A great many decisions affecting the lives and fortunes of people fall to be made within the executive branch of government. The ramification is that a tribunal or decision-maker with a large caseload and without the benefit of adversarial presentation of opposing argument cannot be expected, as a criterion of validity, to explain how its

47 [1998] FCA 1691 at p 9 per Wilcox and Lindgren JJ, Merkel J concurring.

48 The difficulty of applying the distinction is heightened by the ambiguous, even confusing, language of s 430. Along with similar reasons provisions in other statutes, s 430 requires a decision-maker to set out the findings on material questions of fact and to refer to the evidence or other material on which those findings of fact are based.

49 [1999] FCA 182.

50 *Ibid* at 37. For a similar case, concerning failure of the RRT to deal with letters sent to an applicant, see *Meadows v MIMA* [1998] FCA 1706 (Einfeld, von Doussa and Merkel JJ).

51 The appeal figures for 1997-98 are 7398 for the RRT, 4172 for the IRT, 11628 for the SSAT, and 7330 for the AAT: see ALRC Discussion Paper No 62, above n 1 at 393.

decisions prevail over all other inconsistent bits of evidence or to make defensible findings on each disputed factual claim.[52]

Thevandram is not an isolated example of the approach taken by the Federal Court. There have been a host of similar decisions in 1999, all marked by a close analysis by the Court of the evidence before the Tribunal, culminating in a disagreement by the Court with the inferences on which the decision of the Tribunal is based.[53] In many of the decisions the Tribunal is required to make a finding on issues which, realistically, it is not in a position to do. Some examples will illustrate this point.

In *De Silva v MIMA*,[54] Sackville J held that the RRT was required to make a ruling on the identity or motivation of the perpetrators of a bombing of the applicant's house, even though the police had not been able to identify who was the perpetrator. In *Hettige v MIMA*,[55] Moore J held that it was not enough for the RRT to express substantial doubt that the applicant had been tortured 16 years previously: the obligation to state findings on material questions of fact imposed an obligation on the Tribunal to make a formal ruling on the issue. In *Singh v MIMA*,[56] Mansfield J held that the RRT should have adverted in its reasons to the weight (if any) that it attached to unofficial reports about political conditions in the Punjab, downloaded from the internet by a witness for the applicant, that were at variance with the independent country reports accepted by and relied upon by the Tribunal. In *Zheng v MIMA*,[57] Tamberlin J held that the RRT was obliged to make "clear findings" on the applicant's claim that he was punished on three occasions between 1984-1989 in China; it was not enough for the RRT to observe that these claims were neither confirmed nor uncontroverted by any direct evidence - "The applicant is entitled to more than this. He is entitled to a finding if the evidence so requires".[58] Finally, in *Yue v MIMA*,[59] the declaration of invalidity by Moore J was based on a simple error of fact by the RRT in its statement of reasons. The Tribunal had noted in passing that the applicant had contradicted herself in two documents, referring in one to her date of cessation of employment in China as "1995", and in the other giving the date as "1997": in fact the two accounts were identical, but the Tribunal had misread the applicant's handwriting.

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52 The problem is also illustrated in *Eshetu*. The RRT in that case had rejected the main factual claim that lay behind Mr Eshetu's refugee application. He claimed that he and other members of a university student council in Ethiopia had been detained and tortured after planning a student demonstration. The RRT's rejection of that claim came after two oral hearings, the collection of a substantial amount of independent information about the state of affairs in Ethiopia (none of which mentioned or confirmed the incident), the disclosure of that information to Mr Eshetu's lawyers, and the presentation of the findings of the Tribunal in a lengthy set of reasons. Nevertheless, Davies and Burchett JJ held that the Tribunal had failed to address some critical issues in its reasons, including whether Mr Eshetu was a student at the university, whether his foot had been injured, and whether he had gone into hiding. As noted, the High Court held that the approach of the Tribunal was not misconceived, and that the decision it reached was open to it on the facts - "different minds could form different views about the reasonableness of [their] approach": (1999) 162 ALR 577 at para 55 per Gleeson CJ and McHugh J.

53 In addition to the cases referred to in the text of the article, see also *Sellamathu v MIMA* [1999] FCA 247 (Wilcox, Hill and Madgwick JJ); *Alijagic v MIMA* [1999] FCA 280 (Hely J); *Alphonsus v MIMA* [1999] FCA 289 (Lehane J); *Borsa v MIMA* [1999] FCA 348 (Lee, Carr and Merkel JJ); *Ahmed v MIMA* [1999] FCA 359 (Hely J); *Mohamed v MIMA* [1999] FCA 371 (Carr J); *Voitenko v MIMA* [1999] FCA 428 (Wilcox, Hill and Whitlam JJ); *Mahesparam v MIMA* [1999] FCA 459 (Madgwick J); *Mookiah v MIMA* [1999] FCA 720 (Einfeld J); *Devarajan v MIMA* [1999] FCA 796 (Moore J); *Applicant P v MIMA* [1999] FCA 920 (Tamberlin J); *Kandasamy v MIMA* [1999] FCA 1085 (Moore J).

54 [1999] FCA 1074 at para 47.

55 [1999] FCA 1084 at para 14.

56 [1999] FCA 1234 at paras 32 and 46.

57 [1999] FCA 731.

58 *Ibid* at para 21.

59 [1999] FCA 1404.

The recent phase in the Federal Court is in marked contrast to the distinction that is traditionally drawn in administrative law between errors of law and errors of fact. In situations where that distinction arises,[60] the principle which is applied is that the absence of any evidence to support a finding of fact is an error of law, but not so where the finding is based on some, though insufficient or inadequate, evidence.[61] The firmness with which that principle is often applied is reflected in the following formulation in *Mahony v Industrial Registrar of NSW*: "A dominant rule is that a decision of fact which is wrong, or even unreasonable or perverse does not on that account involve an error of law".[62] That statement, although confronting, rests on the premise that judicial intervention in executive adjudication should be exceptional.[63] In short, it is within the province of the executive branch of government to administer the law and to make decisions, including harsh, unpopular and controversial decisions.

The Federal Court has recently maintained that the obligation of the immigration tribunals to give reasons has overtaken the error of law/error of fact distinction - a surprising outcome, given the purpose of Part 8 of the Act to limit the scope of judicial review by removing the grounds that are used ordinarily to review factual issues. In *Baljit Kaur Singh v MIMA*[64] (a decision since affirmed in three other cases[65]), Drummond J concluded after a comprehensive analysis of recent Federal Court decisions that the requirement in section 430 to provide a statement of reasons "imposes a more stringent fetter on the Tribunal's freedom of decision-making than does the existence of error of law constituted by a want of evidence to support the decision". The more stringent fetter, his Honour held, is that the Tribunal is required "to explain why it has rejected apparently probative material relevant to a material issue even though there may be sufficient *or indeed even an abundance of material the other way* to support the conclusion on that issue" (emphasis added).

The standard of exactness and comprehensiveness that is now required of the immigration tribunals is not applied in other areas, not even to courts. It is common in judgments for judges to observe that they have not found it necessary to deal with all the evidence and arguments presented in the case in order to reach a decision.[66] Even, for example, in

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60 The distinction usually arises in two situations: when there is a right to appeal to a court in relation to an "error of law" or "question of law" arising in the decision of a tribunal (eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 44); or when judicial review is sought by means of the writ of certiorari, which issues for error of law on the face of the record (see *Craig v South Australia* (1995) 184 CLR 163).

61 *Collins v MIEA* (1981) 36 ALR 598; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 per Mason CJ; and *Waterford v Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J: "There is no error of law simply in making a wrong finding of fact". There are conflicting themes in decisions of the Full Federal Court in immigration cases. For example, in *Epeabaka*, above n 29, Black CJ, von Doussa and Carr JJ held that illogical and self-contradictory reasoning does not necessarily constitute legal error. By contrast, in *Calado v MIMA* (1998) 51 ALD 502, Moore, Mansfield and Emmett JJ approved an unreported decision of Weinberg J in *Inderjit Singh v MIMA* (29 Oct 1998), to the effect that mistaken findings of fact can often constitute a reviewable error. See also the discussion in the text accompanying nn 135 and 136 below.

62 (1987) 8 NSWLR 1 at 2 per Hope JA. Cf the legal standard applied in some immigration cases - eg, Burchett J in *Sun Zhan Qui v MIEA* (1997) 151 ALR 505 at 562, holding that: "A decision may sometimes, by virtue of extreme disparity between it and the material on which it is based, or for some other reason, give a clear indication that it is based on some error or errors of law, even though no particular error is identifiable in the reasons of the decision-maker". See also the finding of von Doussa J in *Bin v MIMA* [1999] FCA 1323, that "the view was clearly open, if not dictated by the facts" that the applicant satisfied the statutory criterion.

63 See *Blackwood Hodge (Aust) Pty Ltd v Collector of Customs (NSW)* (1980) 47 FLR 131 at 145 per Fisher J.

64 [1999] FCA 1126.

65 *Gebeyu v MIMA* [1999] FCA 1274 (Weinberg J); *El Hejjar v MIMA* [1999] FCA 1331 (Emmett J); *Yue v MIMA* [1999] FCA 1404 (Moore J).

66 See *Steed v MIEA* (1981) 37 ALR 620 at 621 per Fox J: "It is a mistake to conclude simply from the fact that a judge or Tribunal does not refer, or does not refer in detail, to some particular aspect of the case that it has escaped his attention".

refugee cases there have been recent judgments of the Federal Court (admittedly dismissing arguments on points of law) that are as brief as 3 paragraphs long, that is, a statement of conclusions rather than reasoning.[67] It is noteworthy too that the new Federal Magistrates Bill 1999 provides (clause 76) that a magistrate may choose to give "reasons in short form" or orally, and that the administrative law requirement to set out the evidence and findings of fact does not apply.

Another issue that arises in relation to the host of recent decisions in which tribunal reasons have been found wanting[68] has to do with the constant ruling by the Court that the matter should be reconsidered by a tribunal differently constituted. This ruling, which was explained by the Court in *Muralidharan v MIEA*,[69] and *Vaitaki v MIMA*,[70] is usually justified on the natural justice footing that justice will be better seen to be done if there is a new decision-maker. Doubtless the perception of the public and the parties in the fairness and objectivity of the tribunal proceedings is an important consideration, but it is not the only consideration. The public interest in the efficiency, economy and coherency of administrative review is important also, as the review by the Australian Law Reform Commission into the adversarial system of justice has emphasised.[71] Where the only defect in the proceedings of an administrative tribunal is an omission of some issues from the final statement of reasons, it is not self-apparent that the entire decision-making process of evidence, submissions and hearings should be undertaken afresh. An opposing (but minority) view is that the error should be remedied by a court directing the decision-maker to prepare a new statement of reasons, a view preferred by Brennan J in *Repatriation Commission v O'Brien*.[72] Another option would be for a court to remit the matter to the tribunal, leaving it to the principal member of the tribunal to decide how and by whom the matter should be re-heard.[73] To adopt that practice would be to recognise that administrative justice gives rise to administrative and managerial, as well as legal, considerations.

Questionable legal principles

The argument that has been developed to this point is that at any time in the last decade there has been a doctrine or approach that has held sway within the Federal Court and which is inimical to the validity of immigration decision-making. In addition, there have been other individual rulings by the Court that are problematic in terms either of the principle of

67 Eg, see *Holani v MIMA* [1999] FCA 707 (a 5 paragraph judgment of Einfeld, Finn and Emmett JJ); *Hui Quin Li v MIMA* [1999] FCA 751 (a 3 paragraph judgment of Dowsett J); *Ezisi v MIMA* [1999] FCA 589 (a 4 paragraph judgment of Wilcox J); and *Das v MIMA* [1999] FCA 1017 (a 6 paragraph judgment of Wilcox J).

68 Immigration cases aside, there are also many recent decisions in which the Federal Court has held that the AAT has erred by not providing reasons that conform to the statutory requirement – eg, *De Domenico v Marshall* [1999] FCA 1305 (Spender, Madgwick and Dowsett JJ); *Moorcroft v Repatriation Commission* [1999] FCA 862 (Dowsett J); *Kermanioun v Comcare* [1998] FCA (Finn J); and *Dixon v Repatriation Commission* [1999] FCA 582 (holding that the AAT should express its findings of fact in its own language rather than adopt those made by the VRB).

69 (1996) 62 FCR 402.

70 (1998) 50 ALD 690.

71 ALRC, Discussion Paper No 62, above n 1.

72 (1985) 155 CLR 422 at 445-446. See also *Lidono Pty Ltd v Commissioner of Taxation* [1999] FCA 1152 (20 Aug 1999) per Finn J at para 28; and *MIMA v Gutierrez* [1999] FCA 990 per North J at para 21. See also the discussion by the Full Court in *Morales v MIMA* (1998) 51 ALD 519 as to whether a full reconsideration is required; and *Nguyen v MIMA* (1998) 53 ALD 596.

73 A view espoused by Deputy President McMahon of the AAT, in "The Impact of Federal Court Appeals on the AAT: A View from the Tribunal" in J McMillan (ed), *The AAT - Twenty Years Forward* (1998, AIAL) at 127-129.

law developed by the Court or the approach to judicial review reflected in the decision. A couple of examples from 1999 will be given by way of illustration.[74]

Rokobatini v MIMA[75] was an appeal to the Court against a decision of the AAT to affirm a deportation order against a person with criminal convictions. A policy on criminal deportation had been issued by the Minister in December 1998, under section 499 of the *Migration Act 1958*, which provides that a person exercising powers under the Act shall do so "in accordance with such general directions" as are given by the Minister. The AAT, which conducted its hearing three weeks after the new policy was issued, was unaware of the policy and instead applied an old policy. The policies though were substantially similar: the old policy stipulated that "unreasonable hardship" caused by deportation shall be taken into account, whereas the new policy required that "the degree of hardship" be considered. The Full Court concluded that the AAT had erred by not considering the new policy. This conclusion - while unexceptional - was placed on a footing which is questionable, inasmuch as the Court arguably overstated the legal status of the Minister's new policy direction. The problem before the Court gave rise to a complex and unresolved legal issue to do with the legal effect of administrative policies - as relevant, permissive or mandatory considerations.[76] However, those issues were not addressed at any length by the Full Federal Court, and instead the judgments contain an undertone of criticism of the Minister for not bringing the new policy to the notice of the AAT.[77]

Whitlam and Gyles JJ, in emphasising that it was the duty of the Minister to notify the new policy to the Tribunal, observed that the new statutory direction "must be followed by reason of section 499 of the Act". This was in contrast to the earlier policy (which did not have statutory backing) which needed only to "be taken into account in the manner discussed in various decisions of the Court" - "this is a radical difference".[78] This interpretation by their Honours of section 499 contradicts a long line of authority in the Federal Court which holds that ordinarily a statutory direction is not binding, particularly where it is given (as in section 499) as a "general direction".[79] This opposing line of authority is premised on the importance of safeguarding administrative discretion from being overborne by ministerial direction. Has *Rokobatini*, a Full Federal Court decision, reversed that line of authority? The difficulties are compounded by a further observation of Katz J that a "general direction" is of significant importance because it is "legislative in character".[80] If that is so, no longer would it be possible to seek review under the ADJR Act of "general directions" issued under any one of 26 different Commonwealth Acts, because the ADJR Act applies only to decisions "of an administrative character" (subsection 3(1)).

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74 See also *Jia La Geng v MIMA* [1999] FCA 951 (Spender and R D Nicholson JJ; Cooper J dissenting) making a finding of actual bias against the Minister; and *Singh v MIMA* [1999] FCA 762 (Madgwick J), expressing a strict view (at para 23) about the application of natural justice to internal agency deliberations.

75 [1999] FCA 1238.

76 See eg *Nikac v MIEA* (1988) 92 ALR 167; and J McMillan, "Developments under the ADJR Act - the Grounds of Review" (1991) 20 *Federal L Rev* 50 at 74-79. At first instance in *Rokobatini*, Emmett J held that the mere fact of the failure of the Tribunal to advert to the Minister's s 499 direction was not an error of law.

77 The judgment of Whitlam and Gyles JJ opens with the remark that "The decision of the AAT under challenge in this appeal involved an error of law for which the respondent Minister is entirely responsible": [1999] FCA 1238 at para 1.

78 *Ibid* at para 17.

79 The power to issue "general directions" is discussed in *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 139 ALR 577. Cases, dealing with statutory directions, that appear to be inconsistent with *Rokobatini* include *Riddell v Secretary, Department of Social Security* (1993) 114 ALR 340, *Perder Investments Pty Ltd v Lightowler* (1990) 101 ALR 151, and *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 ALD 351. There are other contradictory rulings, discussed in J McMillan, "Review of Government Policy by Administrative Tribunals" (1998) *Law and Policy Papers*, No 9 at 48-52 (published also in (1998) 10 *National Law Review* (www.nlr.com.au) at paras 51-50).

80 [1999] FCA 1238 at para 42.

The second example of a problematic decision in 1999 is *Hui v MIMA*.[81] The Federal Court (Carr J) was hearing an appeal against a decision of the AAT to confirm a deportation order that had been made against Mr Hui on the basis of his criminal record, which included four periods of imprisonment for malicious wounding, domestic violence, repeated breaches of a domestic violence order, and assault occasioning actual bodily harm. The AAT noted that the only positive factor that could militate against deportation was that Mr Hui had two infant children aged 4 and 6. However, there was no evidence before the Tribunal to indicate how the welfare of the children might be harmed, as Mr Hui had not seen them for two years, he was unaware of their whereabouts, and his counsel informed the Tribunal that the children's mother would not be called to give evidence. Carr J held, applying *Teoh*, that the AAT had erred in two respects. First, the AAT had an inquisitorial duty to ascertain the best interests of the children, and it had ample statutory powers which could have been exercised to obtain further information as to where the best interests of the children lay. Secondly, the failure of the Tribunal to take that course of action meant that it should have notified Mr Hui that his legitimate expectation that the Convention on the Rights of the Child would be honoured was not being observed.

To apply *Teoh* in that way seems rather surprising, even to one who was already sceptical of its workability.[82] For the AAT, the ramification of Carr J's ruling is that its role has undergone a fundamental change. Even though it was Mr Hui's legitimate expectation that was in issue, the AAT was under a separate legal duty to the children - a duty, moreover, that required it to act in the role of a social welfare body, and to initiate an inquiry into the best interests of young children whose welfare was, at worst, unknown. Established authorities such as *Sullivan v Department of Transport*,[83] which held that the AAT is an adversarial tribunal that should allow the parties to conduct their own case, have seemingly been overtaken. The AAT is also placed in an invidious position: even though it may think it has conducted an adjudication on the footing that the best interests of a child have been treated as a primary consideration, the Tribunal should remain alert to the contrary possibility, be prepared to make a declaration to that effect and, having done so, permit a *Teoh* hearing to be held thereafter. At what stage such a declaration should be made (after draft reasons have been prepared?) raises another order of difficulty.

Judicial attitudes

The stress laid in *Hui* on the inquisitorial duty of the AAT is in contrast to the ardent defence of adversarialism and the criticism of inquisitorial proceedings made by Einfeld and North JJ in *Selliah v MIMA*.[84] In explaining why, reluctantly, they concluded that the RRT had not committed any legal error, their Honours condemned the RRT model of administrative review:

> [H]earings before the Tribunal are virtually unique in Australian legal procedures and in the common law system generally. ... The Tribunal is both judge and interrogator, is at liberty to conduct the interview any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the

81 [1999] FCA 985.

82 The difficulties in applying *Teoh* are explored at greater length in J McMillan and N Williams, "Administrative Law and Human Rights" in D Kinley (ed), *Human Rights in Australian Law* (1998, Federation Press) at 83-88; and M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996, LBC) at 418-424. Note also that in a prior action by Mr Hui in the Federal Court, in which he sought release from detention, O'Connor J simply accepted that Mr Hui did not know the whereabouts of his children and did not direct that further evidence be obtained: Hui v MIMA [1998] FCA 1563.For another difficult decision applying *Teoh*, see *Tien v MIMA* (1998) 53 ALD 32 (Goldberg J), which imposed a demanding *Teoh* hearing obligation upon the immigration border control officers at an airport.

83 (1978) 20 ALR 323.

84 [1999] FCA 615.

> opportunity of reading and understanding the material before being questioned about it. Moreover, the Tribunal has been known to rely on supposed inconsistencies in the factual account being given without stating the alleged contradictions to the interviewee and giving the person an opportunity to explain them. These methods contravene every basic safeguard established by our inherited system of law for 400 years.[85]

The observation by their Honours does not acknowledge adequately that the current scheme of immigration determination and review was adopted by the Parliament to provide a measure of fair process in a controversial area of administration, involving over 11,000 appeals each year, and adverse primary decisions numbering far more. It is, moreover, a scheme based on the recommendations of three independent committees: the Administrative Review Council in 1985, the Committee to Advise on Australia's Immigration Policies in 1988, and the Committee for Review of the System of Review of Migration Decisions in 1992.[86] As Stephen Skehill, then a Deputy-Secretary of the Attorney-General's Department pointed out, it is necessary to see all elements of the new system as a package that involved subjecting primary decision-making to greater procedural prescription and creating significant new rights of merit review.[87]

There are instances too in which the Federal Court has been scornful of the way in which immigration decision-making is undertaken. *Wang v MIMA*[88] is a case in point. The IRT had dismissed an appeal by Mr Wang on the basis that it had been lodged 16 days too late. The IRT, as required by statute, took steps to notify Mr Wang of its decision. While the letter of notification of the decision was correctly sent to Mr Wang's address, it was incorrectly addressed to "Mr Jun Wang" rather than "Mr Chun Wang". Mr Wang claimed that he did not open the letter and, six weeks later, approached the IRT to inquire as to the progress of his appeal. He was then informed by a junior staff member that the 28 day period for appealing to the Federal Court against the IRT decision had also lapsed. Merkel J held otherwise, finding that the incorrect naming meant that Mr Wang had never been notified of the IRT decision. Rather surprisingly, his Honour's judgment opens with a two-paragraph castigation of the IRT for plunging Mr Wang into a Kafkaesque fantasy - "Occasionally a case arises which makes the word *Kafkaesque* appear to be a description of fact rather than fiction. The present is such a case".[89]

Even accepting that the IRT junior officer made a mistake in the advice given to Mr Wang, judicial castigation of the officer seems unnecessary. The reality, for better or worse, is that mistakes occur in administration. The role of administrative law is to design legal principles that provide an appropriate remedy.

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85 *Ibid* at paras 3-4. See also the judgment of Einfeld J in *Meadows v MIMA* [1998] FCA 1706 commenting, in reference to the RRT, that "determinations made in the comparative informality of a process that does not have any of the accepted safeguards for fairness must be critically scrutinised". For a different analysis of the RRT's role, see the decision of the Full Court in *MIMA v Rajalingam* [1999] FCA 719.

86 *Review of Migration Decisions* (ARC Report No 25, 1985, AGPS); *Report of the Committee to Advise on Australia's Immigration Policies* (CAAIP: 1998, AGPS); *Non-Adversarial Review of Immigration Decisions: the Way Forward* (CROSROMD: 1992, AGPS). See also Human Rights Committee, *Human Rights and the Migration Act 1958* (HRC Report No 13, 1985, AGPS).

87 S Skehill, "Codification of Judicial Review under the Migration Act 1958 and the New Migration Merits Review Scheme" in S Argument (ed), *Administrative Law & Public Administration: Happily Married or Living Apart under the Same Roof?* (1994, AIAL) 51. See also C Conybeare, "Administrative Law - the State of Play: Commentary", in *Fair and Open Decision-Making* (1991) 66 *CBPA* 69.

88 (1997) 45 ALD 104.

89 *Ibid* at 105. See also the comment of Merkel J in *Paramananthan v MIMA* (1999) 160 ALR 24 at 60 (agreeing with a conclusion of the trial judge, Burchett J) that the failure of the RRT to address the central question in its statement of reasons "was deliberate". Query whether that is an allegation of conscious dereliction of duty by the RRT.

Sun Zhan Qui v MIEA[90] contains another example of judicial censure. The case concerned a refugee application that had been the subject of hearing three times by the Tribunal, and twice by the Federal Court, between 1994-1997. A core finding of the Tribunal on the third occasion was that the applicant had fabricated a claim that he had been an active participant in the 1989 pro-democracy movement in China. Mr Sun had chosen on medical grounds not to give evidence to the Tribunal, and so the Tribunal had set out to test the veracity of his account of his activities in China. The Full Federal Court concluded that the inquiries and findings of the Tribunal constituted "actual bias" ("ostensible bias" not being a ground of challenge available under Part 8 of the Migration Act). Burchett J's judgment accused the Tribunal of "drawing extremely adverse conclusions ... on what ... turn out to be the flimsiest of grounds"; of ignoring evidence; of making "dubious use" of some other evidence; of failing to draw an "obvious conclusion"; of drawing an adverse inference that was "impossible" to understand; of accepting evidence that "reveals nothing that comes anywhere near a justification of the tribunal's conclusions"; of accepting evidence that was "really quite absurd"; of drawing an inference that "was nothing less than extraordinary"; of drawing an "extreme conclusion" that was "astonishing"; of "seizing upon a relatively minor detail"; and - perhaps surprisingly - of using "highly coloured language".

The comments of Burchett J are in interesting contrast to the evaluation undertaken by the trial judge.[91] In a careful judgment of 184 pages, Lindgren J analysed and dismissed each allegation of bias, concluding that the Tribunal had acted according to substantial justice, and had not acted unfairly or unjustly in any respect. The problem facing the RRT stemmed, his Honour observed, from the fact that it had sought to test the claims of Mr Sun, in the absence of any explanation, elaboration or clarification of those claims by him. For the Tribunal to have acted otherwise, Lindgren J noted, would be to abdicate its legal responsibility and instead to make a refugee decision on the basis of sympathy. Lindgren J's analysis in this case of what constitutes "substantial justice" by a tribunal was singled out by five of the seven justices of the High Court in *Eshetu* as the correct approach to adopt.

A further aspect of *Sun Zhan Qui* is that all three judges concluded their judgments by expressing a view on the merits of the case, and urging the Minister to allow Mr Sun to stay in Australia - as "an act of simple humanity", as Wilcox J put it.[92] There are similar observations in other judgments. For example, in *Karras v MIMA*,[93] Merkel J dismissed a challenge to the validity of a decision by the Principal Member of the IRT, in which she had decided that the applicants must remain in detention pending determination of their applications for protection visas. However, after observing that the Tribunal had construed the law correctly and had given weight to all relevant considerations, Merkel J concluded that he felt "some disquiet" with the decision, because of the weight given by the Principal Member to certain evidence and to government policy, and because the applicants would remain in detention. Merkel J's judgment concluded with the following observation: "I am far from satisfied that [the IRT's decision] resulted in a just outcome. ... In the result, it is only the legality, rather than the justice, of the IRT's decisions that have been upheld by the Court".

In a related fashion judges will, in the same breath, advert both to the merits of the case before them and to the truncated opportunity available to the Court to provide relief. This has been a trademark of some recent judgments of Madgwick J, as comments in four recent cases illustrate: *NNN v MIMA*: "This is, nevertheless, a somewhat sad case, but regrettably there is nothing this Court can do about it". *Dhiman v MIMA*: "[T]he applicant might possibly

90 (1997) 151 ALR 505.

91 *Sun Zhan Qui v MIEA* (unrep, Fed Ct, 6 May 1997).

92 (1997) 151 ALR 505 at 554 per Wilcox J; see also Burchett J at 562, and North J at 565-566.

93 [1998] FCA 1705 (23 Dec 1998).

have a justified sense of grievance about the way the Tribunal dealt with the death of his father. However, there is no way, in my opinion, that this can be fitted within the limited categories of error that amount to a ground of judicial review by this court". *Singh v MIMA*: "To describe this case as unfortunate is to understate the matter. ... [N]o legal error is apparent in the approach of the RRT. It follows, regrettably, that this application must be dismissed. ... I cannot leave this case without commending it for the personal attention of the Minister under s 417". Finally, in *Jama v MIMA*, after referring to "the markedly illiberal form of judicial review" provided for in immigration matters, Madgwick J observed that the task of the Court "is not made easier by the baying of merely populist critics of reasoned judicial decisions", that such criticism should be "resolutely treated as the dross that it is", and that judges should "resist what may appear to be either the bully-boy tactics or the siren call of populist sentiment".[94]

It is commonplace for judges to comment on the law and to draw attention in judgments to issues that warrant legislative consideration. However, the comments in some of the immigration cases go a step further, and disapprove of the merits of the legislative scheme and the decisions made under it. Is it appropriate for judges to canvass those issues, even in circumstances where they perceive that it is humane or sympathetic to do so?[95] The opposed view is that a judge will not be in a position fully to appreciate the merits, having not observed the demeanour of witnesses, nor being immersed fully in the issues of administrative policy and horizontal equity that go to the merits of administrative decision-making. An expression of view by the judge will also excite suspicion of disguised merits review. But an even more substantial objection is that it places the other administrative review authorities in an odious and unfair position. If the case is referred back for rehearing to a tribunal, this is likely to be undertaken in a highly-charged atmosphere. A subsequent adverse decision by the tribunal is unlikely ever to be accepted by the applicant, however impeccable the proceedings. Equally, when the court observes that a decision is legally correct but otherwise questionable, it is predictable that the unsuccessful applicant will walk away with a deep sense of injustice about the failings of the Australian system of administrative review or, at least, of the role that tribunals play in that system.

The foundation principle of the justice system is "justice *according to law*". It is difficult to maintain public confidence in that system, particularly by litigants who seek "justice *according to subjective expectation*", unless there is mutual respect among the review authorities for the role that each must play. The magnitude of difficulty is heightened by a comment of the following kind by Hill J at first instance in *Eshetu*, which slighted both the Parliament and the immigration tribunals:

> So zealously does the Australian Parliament desire to implement its United Nations Treaty obligations to assist refugees, that it has enacted legislation specifically to ensure that it is acceptable for a decision on refugee status to be made by the tribunal which not merely denies natural justice to an applicant but is also so unreasonable that no reasonable decision-maker could ever make it.[96]

Procedural issues

The Migration Act and Regulations reflect the government's concern that delay is the principal objective of many litigants in this area, by specifying a detailed code concerning the time limits for appeals and the procedures for notification of decisions and tribunal

94 *NNN* [1999] FCA 1290 at para 13; *Dhiman* [1999] FCA 1291 at para 11; *Singh* [1999] FCA 762 at paras 1, 40-41; *Jama* [1999] FCA 977 at paras 2-3.

95 In *MIMA v SRT* [1999] FCA 1197 the Full Federal Court (Branson, Lindgren and Emmett JJ) observed that it was inappropriate for a judge to comment on the merits of a case, as this could influence a tribunal undertaking a reconsideration of the case.

96 *Eshetu v MIEA* (1997) 46 ALD 203 at 204.

proceedings to applicants. Predictably perhaps, those provisions have themselves been the subject of litigation. The conclusions reached in some cases are rather surprising.[97]

Subsection 426(1) of the Act provides that the Tribunal "must notify the applicant" of a proposed Tribunal hearing. Subection 504(1) of the Act provides that regulations may be made relating to "the service of documents" on a person, including a regulation "providing that a document given to, or served on, a person in a specified way shall be taken for all purposes of this Act and the regulations to have been received by the person at a specified or ascertainable time". Regulation 4.41 provides that a document may be posted to a person at a nominated address for service. Regulation 5.03 further provides that a document is taken to have been received by a person 7 days after being posted to their nominated address. In *Sook Rye Son v MIMA*,[98] Burchett J (in a decision followed in two other cases[99]) held that regulation 5.03 is not relevant to the operation of section 426. Consequently, the section 426 requirement that the Tribunal "must notify" a person can only be satisfied by actual notification, not deemed notification. The result, in the two cases applying *Sook*, was a decision that a person was not notified of a hearing, notwithstanding that (in one case) the notification was sent by registered letter but was not collected by the applicant, and that (in the other) the notification was sent to an immigration agent nominated by the applicant but was not forwarded to the applicant.

Other difficulties in using those deemed methods of notification have also been unearthed in later cases. In *Li v MIMA*,[100] Gyles J held that a statutory provision to the effect that a notice of hearing could be sent to a "person" nominated by an applicant did not apply if the applicant had provided the name of a law firm; the notice therefore had to be sent to the applicant personally. In *Singh v MIMA*,[101] Einfeld J held that a registered letter which has been sent to a post office, pending collection by the addressee, is to be regarded as having been "sent to" the post office rather than to the address on the letter.

Another case, *MIMA v Capitly*,[102] illustrates that the obligations of a tribunal are strikingly different to those of an applicant. The RRT in that case dismissed the applicant's refugee claim, after the applicant had failed to attend the appointed hearing date. During subsequent review proceedings in the Federal Court, the applicant explained for the first time that he had been ill on the hearing date, and had spoken by phone to "an unknown person" at the Tribunal on that day to say that he was too ill too attend. He was told to ring back ten minutes later, whereupon the unknown person advised him that it was too late to seek a postponement of the hearing. Burchett J concluded, in the absence of evidence from anyone at the Tribunal to the contrary, that the presiding member had been consulted and had refused to grant an adjournment. The subsequent failure of the presiding member, in the reasons for decision, to explain why the adjournment was refused constituted a failure to provide a statement of reasons complying with section 430 of the Act. Burchett J's decision was upheld on appeal by Wilcox, Hill and Madgwick JJ, on the different ground that the Tribunal had failed to comply with the requirement in section 425 to "give the applicant an opportunity to appear before it to give evidence".

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97 For other examples in which a narrow application has been given to the procedural provisions, see *"A" v Pelekanakis* [1999] FCA 236 (Weinberg J); *De Silva v MIMA* [1999] FCA 1074 (Sackville J).

98 (1999) 161 ALR 612; the other two members of the Federal Court, Moore and Katz JJ, reached the same decision on another ground and did not deal with the validity of reg 5.03.

99 *Uddin v MIMA* [1999] FCA 1041 (Hely J); *Haddara v MIMA* [1999] FCA 1319 (Lehane J). See also *Wang v MIMA* (1997) 71 FCR 386 (Merkel J); contra *Susiatin v MIMA* (1998) 83 FCR 574 (Beaumont J).

100 [1999] FCA 1147

101 [1999] FCA 613.

102 [1999] FCA 193.

Another problem which permeates immigration litigation when new grounds of invalidity are periodically developed or extended is that an incentive thereby develops for exploratory litigation.[103] A major criticism of the present system of judicial review which has been aired by the Minister for Immigration is that the prolongation of the review process works to the advantage of an unsuccessful applicant for refugee status. This problem will be compounded if there are delays in the determination of cases, as there sometimes are. An example in point are five recent decisions of Einfeld J in which there was an appreciable delay in reaching a decision that an RRT decision was invalid and that the matter should be reheard: *Rahman v MIMA*, involving a 12 month delay for a 10 page judgment which held that the applicant had lodged his application to the RRT within the statutory time limit; *Singh v MIMA*, involving a 12 month delay for a 4 page judgment to the same effect; *Qadir v MIMA*, involving an 8 month delay for a judgment of 4 pages of reasoning (plus extracts) which held that the applicant should have been given an adjournment by the RRT; *Mookiah v MIMA*, involving an 11 month delay for a 5 page judgment; and *Chokov v MIMA*, involving a 13 month delay for an 8 page judgment.[104] In the same position is the decision of Moore J in *Devarajan v MIMA*, involving a 9 month delay for a 6 page judgment.[105]

Finally, in the procedural zone, there have been some unconventional costs rulings. For example, in *Borkumah v MIMA*,[106] Burchett J held that costs should not be awarded against a plaintiff who discontinued an action the day before the listed hearing date, as the plaintiff had thereby saved the Minister the incurring of further costs. Further, in *Nouredine v MIMA*,[107] his Honour held that an award of costs against unsuccessful refugee applicants would discourage them from claiming rights that are traceable to an international convention solemnly entered into by Australia.

A Different Approach

What, if anything, should be done? The thrust of this article is that the present system of administrative review of refugee determinations is inappropriate. The distortions that are caused by judicial overreach are inimical not only to immigration adjudication, but to administrative law generally and, no doubt in the mind of some, to public policy in the operation of government and the relationships between the branches of government.[108]
Nor is there any reason for assuming that change will come from self-correction within the system without structural change to the framework of review. The pattern of judicial overreach has been continuous, changing only to shift ground from one legal principle to another. Nor is there any finite limit on the discovery of new principles; developments post-*Eshetu* are already underway,[109] and more can be expected.[110] This pattern has continued,

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103 For instance, the ground on which the plaintiff was ultimately successful was raised for the first time in the appeal to the Full Court in *Thevandram v MIMA* [1997] FCA 182, and in *MIEA v Teoh* (1995) 183 CLR 273.

104 *Rahman v MIMA* (1998) 51 ALD 316; *Singh* [1999] FCA 613; *Qadir* [1999] FCA 620; *Mookiah* [1999] FCA 720; *Chokov* [1999] FCA 823. Cf the *ex tempore* decision of Einfeld J in *MIMA v SRT* [1999] FCA 389 (reversed: [1999] FCA 1197), explaining that the decision would not be reserved as it was "a particularly difficult case ... [and the] Full Court and perhaps the High Court are likely to be asked to consider the legal principles in some detail and nothing a first instance judge can add in this connection is likely to be helpful".

105 [1999] FCA 796.

106 [1999] FCA 1282.

107 [1999] FCA 1130.

108 Eg, see the statistics in nn 1 and 30 above.

109 Eg, see the cases referred to in nn 64 and 65 above, and accompanying text.

110 Eg, see the post-*Eshetu* judgment of Lee J in *Mr A v MIMA* [1999] FCA 1086 (12 Aug 1999), espousing a new principle that it is inherent in the obligation to provide reasons for a decision that the decision not be illogical or irrational in terms of what is decided, of the procedure by which the decision is made, and of the process of reasoning. Moore and Katz JJ noted but did not decide whether RRT decisions could be reviewed on this ground (*ibid* at para 66). See also the decision of Madgwick J in *Jama v MIMA* [1999] FCA

despite the contrary directions of the High Court and the Parliament. Indeed, it was the purpose of Part 8 of the Migration Act to establish a much-restricted framework for judicial review of tribunal decisions,[111] yet immigration review has become far and away the engine room for the growth and extension of administrative law principles.

In defence of active and strict judicial review, the argument is sometimes put that there are systemic problems with the standard of decision-making in the RRT that justify judicial vigilance and penetration.[112] The Federal Court itself has never made that claim - and, of course, it would be quite improper for a judge to proceed on that footing. The irregular pattern by which individual judges hear individual cases does not enable them to reach any empirical or considered opinion about the professionalism of the RRT generally. Moreover, for a judge to give weight to a private but undisclosed personal belief about the quality of executive decision-making would be a profound breach of the principles of administrative law which the judiciary is charged to uphold. Consequently, if there are systemic problems in RRT decision-making they fall mostly to be corrected by executive reforms, to do with member selection, training and support.

A privative clause?

The solution proposed by the Government to the present difficulties is the enactment of a privative clause to preclude judicial review by the Federal Court of decisions of the Refugee Review Tribunal and the Migration Review Tribunal. This option bristles with problems.

In the first place, a privative clause is sure to encounter a constitutional challenge, which may well be successful, either in the privative clause being declared invalid or in it being read down.[113] Here it is important to recall that the High Court, whilst unanimous in *Wu*, *Guo* and *Eshetu* in disapproving the approach of the Federal Court to administrative review, was split 4:3 in *Abebe* when the challenge to Part 8 of the *Migration Act* was framed in constitutional terms. There will be an even greater order of constitutional difficulty facing the proposed privative clause, which seeks to prevent judicial review by all except the High Court of a sphere of executive activity that each year regulates the movement of 2.7 million people into Australia, that involves the grant of nearly 100,000 immigration and refugee places, and that gives rise to over 11,000 tribunal appeals. The effect of a privative clause in re-routing judicial challenges to the High Court's original jurisdiction conferred by Constitution s 75 would also be likely to play strongly on the mind of the Court. Either way, a privative clause will provoke a chain of litigation - the very objective it is designed to avoid.

A second problem with a privative clause is that it will provoke antagonism between the executive and the judiciary. The message underlying a privative clause is that courts cannot be trusted to perform their constitutional role. The executive-court conflict that results has an intense academic interest, but causes collateral damage to administrative law and

977 (16 July 1999), holding (at para 35) that there was a constructive failure by the RRT to exercise its jurisdiction, in that it had addressed in general terms whether it was safe for refugees to return to Somalia, rather than whether it would be safe for the applicant to do. There is also a seed for luxuriant growth sown by Gummow J in *Eshetu*. His Honour held that the determination by the RRT of whether a person was a refugee was a jurisdictional fact, not the exercise of a discretionary power by the Tribunal. His Honour noted (at para 154) that a court, in reviewing whether a jurisdictional fact had been satisfied, would be unaffected by the exclusion of grounds such as "*Wednesbury* unreasonableness" in Part 8 of the *Migration Act.* Cf *Abdi v MIMA* [1999] FCA 1253 (10 Sept 1999) at para 34. I have argued elsewhere that, by classifying an issue as a jurisdictional fact, a court is often able to undertake disguised merits review: see McMillan, above n 76 at 382-385. See also Aronson and Dyer, above n 82 at 68-71.

111 See Skehill, above n 87.

112 The conflicting claims are summarised in the 1999 Senate Committee Report, above n 7 at 10-14. See also Kneebone, above n 8. Cf G Fleming, "Review of Migration Decision-Making - Rival Goals and Values" (1999) 10 *Pub L Rev* 131..

113 The legal, constitutional and other considerations surrounding a privative clause are examined in articles by Creyke, Ruddock, and Crock, above n 6; and in the 1999 Senate Committee report, above n 7.

undermines government support for independent review.[114] As Sue Tongue, the Principal Member of the Migration Review Tribunal has observed, when conflict develops between government and the courts "tribunals are sometimes unfairly caught up in the atmospherics".[115]

A final line of objection is that privative clauses, while admittedly necessary in some situations, should be the final option in a system based on the separation of powers. Independent judicial review is one of the cornerstones of the constitutional system of accountability in Australia. This is not simply a belief in theory, but an insight of experience and wisdom. Immigration determination is not free of problems, either at the primary or at the tribunal level, and an independent system of judicial review is essential to administrative justice. This article has concentrated on the problems in judicial review, but an equal list of problems in executive determination could as easily be constructed.

Restoring the role of tribunals in administrative law

A belief in the constitutional and practical importance of judicial review does not lead inexorably to an acceptance of the present framework for review. The main value of judicial review lies not so much in the trappings and procedures of a court, nor in the level of wisdom of the particular judge. It lies in the benefits derived from independent, external review of executive decision-making. In an institutional sense, this principle means that there must be a separation of powers - that those who design, enact and administer the laws do not have final control over the interpretation of those laws and the adjudication of disputes. In a practical sense, the principle means that those who are making executive decisions are more careful and objective, in the knowledge that they may be called upon in a different forum to defend and justify their decisions.

The Kerr Committee, in its proposals in 1971 that provided the foundation for the Australian system of administrative law,[116] envisaged that administrative tribunals would play the central role in review of administrative action. One reason for that premise was the Committee's belief that the development of merit review by tribunals was the key to achieving administrative justice. But another reason had to do with the view of the Committee that review of administrative action should be an expert function, undertaken by people with appropriate expertise. In the Committee's view, the appointment of people with expertise, and the development of their understanding of the complexity of administrative decision-making, could occur more suitably in a tribunal setting. Indeed, the Committee hinted that the main reason why judges should be part-time members of tribunals was not to instil judicial wisdom in the tribunals, but to give judges an exposure to a review jurisdiction that was focused on administrative practice.[117] All in all, the Committee thought that the role of courts in administrative review should be complementary to that of the tribunals.

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114 Note, eg, that legal aid in immigration appeals was removed in 1998; and that the application fee for appealing to the MRT was increased in 1999 from $850 to $1400. See also the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth), which imposes a very tight procedural framework on the AAT for handling criminal deportation appeals, including a time limit of 84 days for deciding appeals. The Executive antipathy to administrative law that has developed in recent years is summarised in the papers in J McMillan (ed), *Administrative Law under the Coalition Government* (1997, AIAL) - see particularly the articles by R Creyke, "Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government" at 20; and M Sassella, "Commentary" at 65.

115 S Tongue, "Writing Reasons for Decisions" in Kneebone, above n 6 at 400.

116 *Commonwealth Administrative Committee Review Report*, Parl Paper No 144 of 1971. The report, together with the companion reports by the Bland and Ellicott Committees, has been republished in R Creyke and J McMillan (eds), *The Making of Commonwealth Administrative Law* (1996, CIPL).

117 Kerr Committee Report at paras 243, 246, 249. It was also foreseen that the appointment of judges to the tribunals would raise their status.

I have claimed elsewhere with a colleague that those assumptions underlying the Kerr Committee Report have been overtaken by events, one of which has been the rise in activity of judicial review.[118] The courts, moreover, have no special expertise for administrative review, with nearly all judges being drawn narrowly from the Bar, and most judges having specialised formerly in commercial or industrial law. There appears also to be an antipathy by at least some members of the Federal Court to the current model of tribunal review chosen by the Parliament, as remarks quoted earlier in this paper would indicate. It is time to re-set the balance, at least in relation to immigration review.

The measures that are required to secure the independence, integrity and expertise of the tribunal system have been examined in detail elsewhere, notably by the Administrative Review Council in the *Better Decisions* report.[119] The report made recommendations for reform on a full range of issues, including the selection, appointment and training of tribunal members; tribunal structure, procedure, and management; and the relationship of tribunals to government. Many of the recommendations of the Council either have been or are in the process of being implemented.[120]

It is the total package of reforms that is important, but in the context of the present discussion I would isolate two reforms that are imperative to implementing the objective of ensuring that tribunals and not courts play the central role in administrative review of immigration decision-making. The first reform has to do with creating a two-tier tribunal structure; and the second has to do with controlling the right of appeal from the tribunals to the Federal Court.

A two-tier tribunal structure

Over the last two decades of Commonwealth administrative law there has been a growing appreciation that a two-tier tribunal structure is effective, efficient and economical - and not just the deluxe option in a lawyer's dream.[121] Under a two-tier model, the first tier can concentrate on providing speedy and informal review in the large majority of cases, especially in cases that turn on clarifying the facts or communicating to an applicant the legal realities of the contested decision. The second tier, an appeal tier with a "by leave only" jurisdiction, can undertake more formal and reflective analysis of complex issues of law, policy and procedure. The costs of a two-tier structure are likely to be less than for one tier, because of the informality possible at the first tier, when all parties are aware that a further opportunity exists to ventilate unresolved problems at the second tier. This has been the experience of the SSAT, from which a right of appeal exists to the AAT.[122]

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118 R Creyke and J McMillan, "Administrative Law Assumptions ... Then and Now" in Creyke and McMillan (eds), *The Kerr Vision of Australian Administrative Law - At the Twenty-Five Year Mark* (1998, CIPL) 1.

119 ARC, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995). The proposals of the report are fully analysed in two articles published in J McMillan (ed), *The AAT - Twenty Years Forward* (1998, AIAL): Justice Nicholson, "*Better Decisions:* Commonwealth Administrative Review at the Crossroads"; and J Disney, "Reforming the Administrative Review System: for Better or for Worse? for Richer or for Poorer?".

120 Eg, see R Leon, "Tribunal Reform: The Government's Position" in Kneebone, above n 6 at 350; R Creyke, "Tribunal Reform: A Commentary" in Kneebone, *ibid*, at 359; and the annual reports of the various Commonwealth tribunals.

121 Eg D F O'Connor, "Effective Administrative Review: An Analysis of Two-tier Review" (1993) 1 *AJAL* 4; S Lloyd, "The Administrative Review System: An Integrated Model for the Future" in J Disney (ed), *Current Issues in Social Security Law* (1994, CIPL) 199; J McMillan and R Todd, "The Administrative Tribunals System: where to from here?" in S Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (1996, AIAL) 116.

122 See R Creyke, "Whither the Review System" in R Creyke and M Sassella (eds), *Targeting Accountability and Review: Current Issues in Social Security Law* (1998, CIPL) 127.

A two-tier model was recommended by the ARC in the *Better Decisions* report. The Government has foreshadowed that it will partially implement that recommendation, by creating an Administrative Review Tribunal, with first tier trial divisions (for example, social security, migration, commercial) and a second tier appeal division.[123] However, it has been foreshadowed that there will be no right of appeal in immigration matters, that is, it will be single-tier review only. The reason, reportedly, is a Government fear that there would be prolongation of appeals in immigration matters. I deal later with how to control abuse of the system, and will deal for the moment with the advantages of a two-tier review system in immigration matters.

Experience to date in immigration review illustrates that two tier review is essential. In the 11,000 or so immigration appeals lodged each year with the RRT and MRT, common themes continually arise that cannot adequately be resolved by individual members whose experience lies principally in factual inquiry and analysis rather than in legal exposition. Issues that have been prominent in recent litigation and that touch a high proportion of immigration appeals include the definition of "social group" for refugee claims, whether indiscriminate cruelty or social violence in a country can ground a refugee application, the extent of the duty of inquiry of a non-adversarial tribunal, the legal efficacy of requiring a tribunal to apply a "what if I am wrong?" test, the method for calculating the time periods in immigration appeals, whether proceedings should be adjourned (and prolonged) when an applicant claims to be ill, and the validity of Migration Regulations that imposed a cut-off date for certain appeal categories.

The integrity of the system of immigration regulation and administrative review depends upon satisfactory answers with precedential value being given to issues of that kind. It is mistaken to expect that complex legal issues can be resolved adequately and finally by individual tribunal members. Disputes about the correct answers will percolate upwards, especially when - as inevitably there will be - inconsistent answers are given in individual cases. Unless there is an appeal tier in the tribunal system, the Federal Court (or, if it is removed from the system by an effective privative clause, the High Court) will by default become the second tier for immigration review.

The Federal Court was criticised in the earlier part of this article for intrusive judicial review, yet it has to be conceded that the Court is placed in the invidious position of having to deal with general issues that cannot be resolved adequately within the tribunal system as it is presently structured. In the process, the Court also attracts an unsuitable caseload centered on factual disputes. The importance of having a mechanism by which difficult cases can be fast-tracked from the trial level of a tribunal to another body that is able to give authoritative legal guidance has been highlighted by the Principal Member of the former IRT, Sue Tongue. She instanced one issue that was common to over 80 applications then before the Tribunal.[124]

Finally, the existence of an appellate structure within the administrative tribunal system is essential if tribunals are to reclaim the leadership role in Australian administrative law that was envisaged by the Kerr Committee. The statutory responsibility of most tribunals is to provide "a mechanism of review that is fair, just, economical, informal and quick".[125] The elaboration of that responsibility should rest primarily with the tribunals, something that will occur only within a two-tier framework that enables the development of consistent principle in a considered fashion. The alternative, a one tier structure, is likely to give rise to a repeat

123 See Leon, above n 120.

124 S Tongue, "Writing Reasons for Decisions" in Kneebone, above n 6 at 400-401.

125 Eg *Migration Act 1958* (Cth) s 353(1); *Social Security Act 1991* (Cth) s 1246.

history of the wholly unsatisfactory phase of *Eshetu* litigation, that dealt with the elaboration of the phrase "substantial justice" in the Migration Act.

The relationship of tribunals to the Federal Court

The Government's main concern is to stem the flow of appeals from the RRT and MRT to the Federal Court. How can this be done, short of a privative clause? The answer to that question would be all the more important in a two-tier tribunal structure.

The option most commonly suggested, which I would support, is the enactment of a "by leave only" control.[126] The Government has objected to this option, speculating that leave would be granted by the Federal Court in most cases, thus providing litigants with a further procedural opportunity to delay the implementation of an adverse tribunal decision. In reply, it could be said that the Government's objection is grounded in the present system, in which there is judicial scepticism of and hostility to the integrity of RRT rulings. One can only speculate, but it is foreseeable that there would be greater judicial acceptance of tribunal rulings that had been subjected to two-tier review in a reformed tribunal structure. If not, then certainly the Government would be on stronger ground in arguing that a privative clause is the only workable option for containing judicial overreach by the Federal Court.

It is worth noting too that leave provisions appear to work acceptably in other jurisdictions, and received tentative support from the Senate Legal and Constitutional Committee in 1999.[127] In the High Court 80% of cases are screened out by the special leave process; and over 70% of Canadian immigration appeals are screened out by a similar process.[128] Moreover, if - as the Government expects - a leave provision will operate successfully in the generality of cases to be heard by the proposed ART, there is no reason in principle why it could not operate as successfully in relation to immigration appeals.

A leave provision could be successful too in filtering out the high proportion of hopeless appeals that are instituted either to prolong the immigration determination process or as an interim precaution to comply with the strict 28 day appeal period. At present close to 40% of immigration appeals to the Federal Court are withdrawn before the date of hearing,[129] and many of those which go to hearing are brought by unrepresented applicants and are swiftly dismissed by the Court as involving no discernible error of law. The effectiveness of a leave provision would be strengthened in a two-tier system of tribunal review, in which a process of filtering and clarifying issues had already been undertaken.

A second reform that should be considered is to the criteria defining the right to appeal from the RRT and MRT to the Federal Court. At present, Part 8 of the Migration Act adopts a modified judicial review model, that is, the Act lists the grounds for judicial review of an RRT or MRT decision. The list is far shorter than the comparable list in section 5 of the ADJR Act, but that does not seem to have led to a narrowing of the scope of judicial review. There is elasticity in each of the grounds in Part 8 - for example, "that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed" (paragraph 476(1)(a)), or that the decision involved "an incorrect application of the law to the facts as found" (paragraph 476(1)(e)). It has not taken much imagination on the part of the Federal Court, as the earlier discussion in this paper

126 A necessary supplement to a two-tier system with a "by leave" right of appeal to the Federal Court from the second tier would be a privative clause that prevented judicial review under the *ADJR Act* of first tier decisions of the ART.

127 1999 Senate Committee Report, above n 7 at 51.

128 *Ibid* at 44.

129 ALRC, Discussion Paper 62, above n 1 at 272 (the figure was 36% in 1997/98).

illustrated, to adapt those grounds as the host for new legal principles. In fact, even a confined concept such as "actual bias" (paragraph 476(1)(f)) has undergone expansion.[130]

The alternative approach is to confer a right of appeal from the RRT and MRT to the Federal Court on a "question of law". This alternative, which applies to appeals from the AAT to the Federal Court,[131] is commonly used in defining a court/tribunal relationship. At an academic level it is uncertain as to how far the concept of "error of law" extends; some authorities assert that the concept is equivalent in scope to the grounds for judicial review defined in section 5 of the ADJR Act.[132] There is, however, reason for doubting that view. For example, it is widely accepted that misinterpretation of legislation should in some situations be characterised as an error of fact, not law;[133] and yet that same error can constitute a breach of paragraph 5(1)(d) of the ADJR Act, applying to a decision that was "not authorised by the enactment in pursuance of which it was purported to be made". Equally, there are instances in which taking an irrelevant consideration into account or failing to take a relevant consideration into account should more properly be characterised as factual errors, even though (paradoxically) those errors give rise to an unlawful exercise of power under ADJR paragraphs 5(2)(a) and 5(2)(b).

What is more important, however, is the practical reality. As a general rule (and, no doubt, exceptions exist), the error of law/error of fact dichotomy has been more successful in restraining judicial overreach than the ADJR section 5 or the Migration Act Part 8 grounds for judicial review. An example was given earlier in this paper, comparing the definition of error of law in cases such as *Mahony* to the more expansive principles applied in the context of judicial review of RRT decisions.[134]

Why does the law/fact dichotomy give rise to a narrower jurisprudence? The explanation probably lies in the point that the reviewing court is being pressured by the law/fact distinction to develop a jurisprudence that is premised on differentiating the role of the court from the province of the executive, that is, to exhibit restraint or deference in review of administrative action. By contrast, the elaboration of 18 grounds of error in section 5 of the ADJR Act instigates a different process of checking whether any of the decisional elements are captured by one or more of the 18 grounds (or, in the worst case, of probing for evidence that a breach has occurred). The point is illustrated by the judgment of Weinberg J in *Inderjit Singh v MIMA*[135] (approved by the Full Court in *Calado v MIMA*[136]), explaining that there are many ways "where certain types of mistaken findings of fact can give rise to reviewable error. Such cases must, of course, fit properly within one or more of the legislatively mandated grounds for review set out in section 476(1) of the Act".

In summary, the proposition put forward in this paper is that a new approach should be adopted, of conferring a right to appeal from the RRT or MRT to the Federal Court, with the leave of the Court for error of law. History suggests that this approach could hardly be less successful than the present approach defined in Part 8 for controlling inappropriate judicial

130 Cf the broad interpretation of the phrase "actual bias" by the Full Federal Court in *Sun Zhan Qui v MIMA* (1997) 151 ALR 505, to the narrower interpretation at first instance by Lindgren J (unrep, 6 May 1997).

131 *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

132 See the discussion in ARC, *Appeals from the AAT to the Federal Court*, Report No 41 (1997).

133 *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137 per Jordan J.

134 Compare, in the judicial review context, the oft-cited decision of the Full Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77, where the distinction between legal and factual errors was all but abandoned.

135 29 Oct 1998, unreported, but quoted at length with approval by the Full Court in *Calado v MIMA, infra*.

136 (1998) 51 ALD 502 (Moore, Mansfield and Emmett JJ).

review and giving primacy to the role of merit review tribunals in refugee determination. In short, Part 8 has failed.

Conclusion

Decision-making in a complex and troubled area such as immigration regulation will never be easy. Sensible and well-informed minds will differ frequently as to the decisions that should be made and as to the procedures for decision-making. Tension and controversy are inherently part of the process of balancing the sharp and conflicting interests, of both a personal and an institutional kind, that predominate in immigration regulation. Those who administer the system, and those whose lives are touched by it, nevertheless have a common interest in ensuring that the system operates in a humane and sensible way.

For that to occur, steps need to be taken by both the parliament and the courts. Parliamentary reform is need to establish a tribunal framework that provides room for complex and changing issues to be thought through and resolved. Courts, for their part, must show greater willingness to accept that the prime responsibility for immigration determination lies with the executive and tribunals; both must be allowed to move within the room that parliament and the law provide.

Two core principles should underpin the system for immigration determination - as, likewise, they should underpin other areas of government regulation and welfare determination. The first is that there must be an effective system of external review of administrative decision-making. The second is that that external review role should principally be undertaken by tribunals, with the authority to undertake merit review of administrative action. Those are the principles that have guided the development of Commonwealth administrative law for the last twenty-five years: they should continue to be the cornerstone.

CROSS-VESTING: WHY NOT AND WHAT NEXT?

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On 17 June, the High Court, by a 6:1 majority, found invalid provisions in the *Corporations Act 1989* and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* that provide for the cross-vesting of State jurisdiction in Federal Courts. The successful cross-vesting of State jurisdiction in federal courts which had existed for over a decade came to an end. In this talk today, I would like to briefly discuss the decision of the High Court and then consider some of the ramifications that arise as a result of the decision.

The validity of the cross-vesting schemes was first directly attacked in November 1995. At that time, the Full Federal Court considered the issue and in June of 1996 upheld the co-operative schemes. At that time, argument focussed on whether or not there was a *prohibition* in Chapter III of the *Constitution*. The Full Federal Court said there was not. Attention also focussed on the *source of the Commonwealth power* to allow its courts to be used for the exercise of State jurisdiction. The Federal Court found that source in the High Court decision in *re Duncan*, and the notion of co-operative federalism under which similar and complementary state powers and functions could properly be invested in federal bodies.

This sensible approach to what was universally regarded as a successful theme was to be short lived. In February 1998, the High Court in *Gould v Brown* split 3:3 on the validity of the cross-vesting scheme. That even balance in June this year became a flood with Kirby J as the sole dissenter upholding validity.

What led to this overwhelming outcome? What constitutional principle required the result? What unstated premise was behind the decision of the majority? It is necessary to examine the reasoning of the majority in order to understand the answer to some of these questions.

The leading judgment was given by Gummow and Hayne JJ which Gaudron J and Gleeson CJ endorsed. They rejected an argument that the incidental power in some way supported legislation. This was because they did not see that the conferral of state jurisdiction in any way was necessary to the effective exercise of federal judicial power. Rather, what was being sought to be done was to supplement the power the Commonwealth is given with respect to the federal judicial power not to complement it (para 152).

Those judges also agreed that Chapter III was exhaustive of the definition of the jurisdiction of federal courts. They took the view that ultimately it was the legislature of the polity in question that needed to authorise the exercise of jurisdiction by its courts. There was no relevant Commonwealth power and this could not be avoided whereby, with consent, the jurisdiction was in fact conferred by some other polity.

What the cross-vesting schemes attempted was to confer by state law jurisdiction outside the Chapter III system. This was to misconceive the true source of a court's jurisdiction which must derive from the polity which set it up.

Gleeson CJ also rejected the view that Chapter III allowed conferral of state jurisdiction. To him, Chapter III contained an exhaustive definition of the original jurisdiction that may be conferred on the federal courts which cannot be supplemented through some co-operative legislation. This had been determined in *Re Judiciary and Navigation Acts* in 1921. That

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case was not simply about whether advisory opinions were judicial, but about Chapter III being an exhaustive statement of the matters that a federal court could determine.

Similarly, he rejected the argument based on the incidental power as had Gummow and Hayne JJ. He said what was being done was not an execution of the federal judicial power but a substantial addition to the power and an attempt to circumvent limitations imposed on the power by the Constitution. So the Duncan principle cannot overcome a prohibition which was found to exist in Chapter III.

McHugh J repeated his views as expressed in the earlier decision of *Gould v Brown* and Callinan J agreed with him. The decision provided McHugh J with an excuse to engage in a bit of an excursus on constitutional interpretation in which he made it quite clear that for him the aim is to search for the intention of the makers of the Constitution deduced from the words used in a historical context.

> No current conceptions of the Constitution and no propositions, inferences or implications that can be drawn from the Constitution support the cross-vesting legislation. Not only does the Constitution contain no express powers supporting the legislation, it contains negative implications prohibiting such legislation. (para 48)

Parliament can only invest jurisdiction in federal courts to decide the matters specified in ss 75 and 76. The negative implications in Chapter III are a complete answer to reliance on the incidental power.

> It would be an extraordinary constitutional result if the power to create a federal court … extended to creating a court that other polities could invest with non-federal jurisdiction … they would be curial vessels into which could be poured unlimited jurisdiction by any polity except their creator. (para 60)

McHugh J also argues that if a state can confer jurisdiction on federal courts, it must be able to confer non-judicial power not incompatible with the exercise of federal judicial power. Both McHugh J, Gleeson CJ and other judges had images of the federal court providing advisory opinions under state law. This seems to have been an image that caused them considerable disquiet. They saw no basis for confining the state jurisdiction that could be conferred to matters that fall within federal judicial power; for them the only logical limit they could conceive was an inability to confer non compatible functions through a reverse *Kable* approach. This confirmed for them the danger of the cross-vesting schemes.

The approach of the majority looks for some positive or affirmative provision in the Constitution in order to support the particular legislative scheme. There is no such provision, so the scheme must fail.

Accrued Jurisdiction

By contrast to the rejection of any Commonwealth power to confer state jurisdiction as such, the Court affirmed a broad view of accrued jurisdiction - so as to allow state matters to be disposed of as part of the exercise of federal jurisdiction. Not only will accrued jurisdiction exist where there is one proceeding involving a single justiciable controversy - it may also exist where there are separate proceedings arising out of one set of facts. Thus, in *Wakim* three separate claims were brought against the Official Trustee, solicitors and a barrister alleging negligence. The High Court considered there was sufficient connection between the claims for them to be regarded as within the accrued federal jurisdiction as a result of the claim against the Official Trustee arising in federal jurisdiction.

Territory Jurisdiction

In *Spinks v Prentice* heard at the same time as *Re Wakim*, the High Court held that it was possible to vest jurisdiction arising under the Corporations Law of the ACT in the Federal Court. There is no prohibition on a federal court being given jurisdiction under a law made by the Commonwealth parliament, including a law made under section 122 of the Constitution: *Northern Territory of Australia v GPAO* was applied. What is left undecided is whether a territory legislature can itself confer jurisdiction on a federal court.

Let me contrast the approach of the majority with the approach of Kirby J. He rejected the drawing of negative implications and saw no prohibition in Chapter III to federal courts exercising state jurisdiction. As to power, while there was not power for the Commonwealth itself to confer state jurisdiction, the incidental power allowed it to consent to the conferral by the states of jurisdiction on federal courts. He also invoked the implied nationhood power to uphold the scheme.

If I can read a couple of short passages from his judgment, you will see the outspoken way in which he criticises the approach of the majority. In particular he attacks the resort to accrued jurisdiction to overcome the problem. He says:

> If there is a danger to the continued existence of the state judiciary, it lies in the persistent expansion of the accrued jurisdiction. This expansion may depend, as the proceedings involving Mr Wakim illustrate, upon considerations much more disputable, contentious and uncertain than the provisions of the cross vesting legislation (para 226).

He goes on further:

> In my view, the cross vesting legislation is more in keeping with the operation of Chapter III properly understood than the rigid construction of the Constitution which would strike down the legislation as impermissible and turn to judicial invention and sophistry to overcome the problems which are thereby created.

That is a very brief analysis of the judgement, but I think what emerges quite clearly is that the approach of the majority requires positive conferral of a power, finds that power in the form of an exhaustive definition of what federal jurisdiction consists of and what matters can be determined by the federal court, and then once they have reached the conclusion that it is an exhaustive list, that is the end of the matter.

They can overcome that in terms of accrued jurisdiction by relying on the incidental power by saying that ultimately what the courts there are principally adjudicating is a federal matter, and as part of that they can pick up state jurisdiction or matters arising under state law, but which still form a part of the same controversy. So they do not see a conflict between their relaxed approach to accrued jurisdiction and their narrow approach to cross-vested jurisdiction. Clearly it illustrates that the approach of the majority is much more a black-letter law approach, much less willing to allow pragmatic considerations or doctrines like cooperative federalism to overcome what they see as words in a constitution.

Immediate Implications

Let me turn then to the implications of the decision.

As a result of the decision, there is a need to validate the various past decisions made by the Federal Court where there was no basis for the jurisdiction, and to deal with cases commenced but not yet finalised in the Federal Court where there is no longer a basis for jurisdiction.

Clearly, there will be some work to be done by legal advisers perhaps in identifying which cases are ones where there would no longer be a basis for jurisdiction, where there is no alternative basis of jurisdiction or accrued jurisdiction. But no doubt, in some instances it will be fairly clear.

The solution to these immediate problems is state legislation. And model state legislation was prepared by the Solicitors-General. To date, it has been passed by NSW and WA, and it has been introduced in all the other states except Victoria. And what this state legislation is intended to do is the following:

(1) validate all past orders, decisions, judgments of federal courts made in the exercise of state jurisdiction by giving them substantive effect as if they were decisions of State Supreme Courts; and

(2) with respect to matters filed in the Federal Court, the state legislation will provide that once a federal court makes an order (either before or after the state legislation is enacted) to the effect that the federal court has no jurisdiction, a party can apply to the state supreme court to have the matter treated as a proceeding in the state court. Any interlocutory orders made in the Federal Court will have effect by virtue of point (1) above. The matter will be treated as if it had been filed in the state court at the time it was filed in the federal court, to avoid limitation problems. It will be treated, for all purposes, as if it had proceeded in the state court. The state court will be able to make any necessary ancillary orders to deal with any anomalies (of which there are bound to be some).

So if the states get their act together and pass this legislation, there should be mechanisms that ensure that there is no basis for parties to rush off to court to try and have judgments set aside and there will be no basis on which to take unmeritorious jurisdictional points in terms of existing cases.

Other Issues

There is a whole host of other issues thrown up by the cross-vesting decision. Let me just mention some of them.

Apart from the corporations scheme and the general cross-vesting scheme, there is a host of cooperative federal-state arrangements which have provided for the conferral of jurisdiction on the Federal Court under state law. These include the Competition Code, which gave the Federal Court exclusive jurisdiction so all the state competition codes will need to be amended to restore the jurisdiction of their own courts.

There are other cooperative schemes such as the Agriculture and Veterinary Chemicals Scheme, the Gas Pipelines Access Code, and a number of others. The major cooperative scheme, of course, and the one that, perhaps, attracts the most public comment is the Corporations Law Scheme.

Now, in these schemes, not only are there provisions for conferring jurisdiction on the Federal Court, but there are also mechanisms whereby the states have picked up various Commonwealth administrative laws and applied them as state law. For instance, under the Corporations Law there are mechanisms whereby, review of decisions can be made under the Administrative Decisions (Judicial Review) Act (ADJR Act), jurisdiction conferred on the Administrative Appeals Tribunal (AAT) to review decisions of the various corporate regulators, and these Commonwealth administrative laws essentially apply as a result of

provisions in the state corporations laws. As I said, there is a number of provisions like this in other schemes.

When the Federal Court no longer has jurisdiction, it seems very difficult to see how the ADJR Act, for instance, can continue to operate in any meaningful way. For the AAT and some of the other administrative laws there may be less difficult issues.

The Commonwealth has indicated that it is considering legislation to ensure the Federal Court can continue to exercise judicial review jurisdiction in respect of decisions made by relevant Commonwealth officers or authorities when exercising functions and powers in relation to state matters. So, there may be Commonwealth legislation that will restore the ability, for instance, to seek judicial review of decisions of the Australian Securities and Investment Commission.

But, clearly, there is a whole complex area there of associated matters that may completely or in part be affected by the cross-vesting decision. What, in fact, strikes me is how many cooperative schemes have crept up with little public scrutiny, adopting the cross-vesting mechanism, relying on a broad view of the *Duncan* decision to confer all sorts of powers on Commonwealth officers under state law, and to provide for those Commonwealth officers to be reviewed and so on.

It is interesting that there has been very little study of all these schemes, but I suspect there is a whole host of undiscovered legal difficulties out there. And one issue, in particular, that I think the cross-vesting decision leaves very much unanswered is precisely what does the *Duncan* principle stand for if it doesn't enable the conferral of state jurisdiction on federal courts? Does it still enable the conferral of a whole host of state powers and functions on other Commonwealth bodies, or are there some other limitations?

Long-term Implications

In terms of long-term implications, let me briefly mention what might be required. You will have seen from the public debate there are those who think the previous situation needs to be restored as a matter of some urgency. There are others, like the Attorney-General of WA, who think the solution is to abolish the Federal Court. There are others like Santow and Austin JJ in today's *Financial Review* who think the NSW Supreme Court can adequately cope with the new corporations jurisdiction and that there is no particular problem.

But there are many out there who think the old cross-vesting scheme was important and did work very satisfactorily and ought to be restored. The problem is finding a way in which to do that.

References of power have been thought about, but if Chapter III is a barrier by being an exhaustive statement of federal jurisdiction, then references of power in terms of simply referring some form of state jurisdiction and no substantive subject matter to the Commonwealth, do not seem likely to provide any solution, whether it be under section 51(37) or 51(38). Unless the states wish to refer their corporations power or some of their other substantive powers, references of powers seem unlikely to provide a solution.

A referendum has been canvassed. I think it unlikely that if there is to be a referendum that it will come about this year, but it is certainly a long term option. It may be seen as non-controversial and in that sense it may have prospects of getting up. On the other hand the interchange of powers proposal a few years ago, you might recall, was seen as non-controversial and then failed dismally. But certainly a referendum may be one mechanism.

Then the third main option is for the Commonwealth to actually assert and rely on some of the powers it already has which it has chosen not to use. This, in particular, is the suggestion in the corporations area where the Commonwealth simply relies on section 122 of the Territories power and otherwise relies on the states to enact the corporations law. While the Commonwealth may not have power over all aspects of corporations, it clearly could draw on its section 51(20) corporations power to enact much more corporations law as substantive Commonwealth law, and with that would go federal jurisdiction. Whether that is desirable or not may be something you could talk about. Certainly, from where I sit, there seems to be little inclination at present within the Commonwealth to fundamentally redraw the constitutional basis of the corporations law, and I must say, I have not yet seen too much pressure from the business community for that to be done. But who knows?

I have briefly touched, in this presentation, on the decision and the short and long term implications. It seems to me that it is too early to assess fully the impact of the High Court decision. It is also too early to assess the impact on the work of the Federal Court, whether there will be lots of Federal Court judges with far fewer cases to deal with than they have at present, and I think it is far too early to expect any restoration of a fully fledged cross-vesting scheme.

CROSS-VESTING: WHY NOT AND WHAT NEXT?

Anne Trimmer*

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The recent cross-vesting decision has been interesting from the Law Council's perspective. Of all the policy issues we have been dealing with in the past year, this issue has had the most media attention, and that is even in comparison with the legal aid debate running before the election. Whether it is because the media does not properly understand cross-vesting (and there has been a lot of comment about what cross-vesting might mean from the media point of view), it certainly has attracted attention. The decision raises a lot of policy issues. The problems created by these issues have not really been brought home. It is going to be some time before we see the full impact of the decision.

I think what was interesting about the judgments, and Henry Burmester certainly brought this out in his analysis of them, is that the High Court took such a technical approach to a problem that had been resolved with input from all the states and the federal government. In the late 80s, Governments became more cooperative in the way they approached regulation and business to some extent. Governments devised a scheme that would enable people who were using those regulations to have some kind of order in the way business was managed. That now has been demolished to some extent.

I note that the day after judgment was handed down, Professor Bob Baxt was quoted in the media as saying that the decision was a lawyer's dream and a business person's nightmare. It is the sort of comment that makes lawyers cringe, because I think most of us seek the best outcome for our clients and not the best way to line our pockets. But what we do now have is the possibility of very expensive jurisdictional disputes and while lawyers, no doubt, will make money from that, I don't think that is the initial aim of the exercise. The result of the decision, certainly in the view of the Law Council, is that it will give rise to uncertainty. We are really not sure how certain pieces of legislation will be affected. It is dependent to a large extent on the approaches that the state governments take to the remedial legislation that is required. Henry has referred to that in passing. Obviously, the best short term solution (one that the Law Council has been endorsing) is to have some emergency or remedial legislation that will put out of doubt those cases that have been decided under the cross-vesting regime over the last few years.

The problem is that at the moment we have only had New South Wales and Western Australia put the legislation into effect. It is before the Parliament in all other jurisdictions with the exception of Victoria, and we have a Victorian Premier who says that he is not prepared to recall Parliament. It is now a likely prospect that Victoria will go to an election later this year which means that we will not have the situation rectified in Victoria possibly until next year.

I note that Henry said that if the states get their acts together we will not have litigants racing up to the courts. Well, it seems to me that that is quite likely not to happen, at least on a uniform basis across all jurisdictions if we cannot get Victoria to the party.

One of the medium term solutions the Law Council has been supporting, is to look at the corporations power and see whether it can be extended out and applied more broadly to pick up the bulk of the corporations matters that are before the courts now or are likely to come

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before the courts. It is not a straightforward issue, and it will not be done easily. Henry says that there has not been much pressure from business yet for this to happen, but I suspect that this is because business, like most of us, is still analysing the effect of the decision. It is really going to have to be done on a case by case basis to see what the costs are of running the regime in the split way that it is at the moment. I would not be surprised if there is not more pressure put on by business to use that power, at least as a fix to get us part of the way there until some longer term fix can be put forward.

The long term solution is obviously a referendum and the Law Council supported moving to a referendum at its Council meeting in June. I suspect, like Henry, that it will not happen this year, partly because of the complications of trying to run a referendum on cross-vesting with a referendum on a republic. The two do not seem to fit together, and I think one will divert from the other. Those of us who would like to see some order in it would probably prefer that it did not happen with the referendum on the republic.

So what are some of the issues that come out of this? Over the past 2 or 3 weeks during his visit to the US, the Prime Minister has been trying to promote Australia as a centre for international financial interest and trying to lure major companies to shift their corporate headquarters here. The cross-vesting decision is anathema to that type of policy push. I think the jurisdictional uncertainty that flows from this cross-vesting decision is going to have an impact on decisions that companies might make in relocating. It may, in fact, be that policy aspect that gives the push to the Commonwealth Government to review the way in which it might resolve the problem in the shorter term.

One thing which we all know the Federal Court has been able to provide is uniformity of interpretation and uniformity of approach to corporations law issues. Our concern as a body representing Australia's lawyers is that there continue to be uniformity in the decision making in respect of all uniform national legislation while seeking benefits of having uniform approaches and consistency in interpretation. In my view, this will not be achieved by the patchwork approach that Justices Santow and Austin put forward in today's *Australian Financial Review*. No-one would question their ability as corporate lawyers, or corporate judges for that matter, but we have no sense that there will be the same kind of level of ability or of commitment in the corporations divisions of all State Supreme Courts. If you read the article this morning you will recollect that the judges talk about an informal meeting of the corporations judges around the country, obviously trying to develop some kind of continuity, but it seems to us that this will not provide anywhere near the same kind of certainty that the Federal Court has been able to provide.

We fear that once again we will return to the days when jurisdictional disputes diverted from the core legal issues that needed to be resolved on federal matters. Litigants will have to satisfy themselves with whether or not claims instituted are sufficiently federal in nature to attract the jurisdiction of the Federal Court. For litigants in the family law area, the possibility of running two cases before two separate courts on related and intertwined issues must be intimidating to say the least. I think it also raises issues for our legal aid system, because as you know, at present legal aid is split between Commonwealth matters and state matters, and they are funded separately which is disastrous for our legal aid system.

I think there is also concern that the expertise that has been built up in the Federal Court, particularly in the corporations law area, is going to be lost as those cases disperse back to the state Supreme Courts, and as I said before, there may or may not be that same level of expertise and commitment to uniformity that we have been able to enjoy with the Federal Court.

Finally, the other comment that was made by Santow and Austin JJ was that the removal of cases from the Federal Court to the Supreme Court will not add considerably to the workload

of the court, since the New South Wales Supreme Court, in anticipating this decision, has prepared itself and organised its workload accordingly. Well, it is commendable if the NSW Supreme Court has done that, but I do not think that is the case in all state supreme courts. We are aware of the backlog that exists in Victoria and that is going to get worse, I suspect, if the Victorian Government is unable to introduce some sort of interim remedy for the cases that are before its courts.

For practitioners who work in this area, the sooner there is some certainty, the better. For our clients and the business community as a whole, the sooner there is certainty, the better. As to what approach the Government will take, it is a bit unclear. I take it from Henry's comments that he has not detected strong pushes in particular directions either. The Opposition came out on Friday, with the Shadow Attorney, Rob McClelland, basically putting forward the three layered fix - the short term, the medium term and the long term. More are now in agreement that there does need to be some kind of longer term resolution with a referendum.

EGAN v CHADWICK

Stephen Gageler[*]

Edited text of an address to an AIAL seminar, Egan v Chadwick, Canberra, 10 August 1999.

Introduction

I will assume that you have had a chance to at least glance at the judgment of Egan and Chadwick, and I do not propose to deliver an oral headnote, but I will say one or two things by way of summary.

The central issue in the case was whether the Legislative Council had power to require the production of two sorts of documents. They were documents attracting legal professional privilege and documents which were, in one way or another, properly described as cabinet documents. The decision of the Court of Appeal was a majority decision. Chief Justice Spiegelman delivered the leading judgment, Justice Marr agreed with Chief Justice Spiegelman, and Justice Priestly dissented. The majority drew a distinction between the two types of documents in issue. The majority said that the Legislative Council could require a minister to produce documents attracting legal professional privilege at common law, but the majority went on to say that the Legislative Council had no power to compel a minister to produce cabinet documents. Justice Priestly, in his dissenting judgment, would have upheld the power of the Legislative Council to require production of both types of documents.

As you read the judgment, you doubtless start with the reasons for decision of the Chief Justice. They come first, they extend over very many pages, they are abstract, they are erudite, they are rich in political history. They tell us, for example, that the convention that the monarch does not sit in cabinet, dates from the reigns of George I and George II of England, who did not attend cabinet meetings simply because they did not speak English.

The reasons of the Chief Justice go on to tell us about the evolution of responsible government in the Australasian colonies, and they identify two essential features of responsible government. One is cabinet and government and collective cabinet government, and the second is the collective responsibility of cabinet to parliament, and including, in New South Wales at least, the collective cabinet responsibility to the upper house as well as to the lower house. They say, in substance, that the power of the upper house to require the production of documents does not extend to requiring the production of documents that reveal the deliberations of cabinet, because that would be to allow one feature of responsible government to swallow up the other.

They say, finally, that legal professional privilege has no role to play because it is a doctrine that applies between strangers. It simply has no application to the very peculiar intramural relationship between a government and a legislative chamber.

And you probably next skimmed the dissenting reasons of Justice Priestly. They come next. They were, however, obviously written first, because they go to the trouble of trying to set out the facts. They note that a considerable number of substantial matters were put in issue by the defendants, but that as the course of the trial developed, those matters largely fell away.

You then, no doubt, turned to the pithy concurrence of Justice Marr. The beauty of that concurrence is that it sums up in three paragraphs what it takes the Chief Justice 30 pages

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to expound. Having read those three paragraphs, you can test your comprehension of the Chief Justice's reasons and feel fairly comfortable that you have understood the case.

What is less easy to pick up, and perhaps more interesting, is the way in which the issues came to be litigated and the course of events during the conduct of the case that led many of the issues to fall away, and that is the picture that I want to paint for you tonight.

Let me lay it out as best I can, briefly and chronologically, and in doing so, I will tell the story in the present tense.

The date is 13 October last year. The place is Parliament House, Sydney. The Treasurer, Mr Egan, is a member of the Legislative Council, and Leader of the Government in the Upper House. The Legislative Council passes a resolution calling upon the Treasurer to table documents relating to Sydney's water crisis. The resolution specifically asks for documents for which claims to legal professional privilege and public interest immunity are made. They are to be produced by five o'clock the next day. The Treasurer refuses to produce the documents and the deadline passes. There are threats to suspend him. The effect of suspension for the Government would be significant. The Legislative Council is made up of 42 members, 16 at that time are Government members, 17 are Opposition members, 9 sit on the cross benches. The Government needs the support of 5 of those 9 to pass legislation. With the Treasurer gone, the Government needs the support of 6. It is nearing the end of the parliamentary term, the Government has a very full legislative agenda.

The whole question of the power of the Legislative Council to require the production of documents is still under consideration by the High Court in Egan and Willis. The case has been argued before the High Court in Canberra for 2 days in June and another day in September. Judgment is still reserved, and remember we are only in mid-October. The Treasurer takes the initiative. He takes out a summons in the Administrative Law Division of the Supreme Court of New South Wales. He names as the defendants, the President of the Legislative Council, the Clerk and the Usher of the Black Rod. He seeks a declaration that the resolution of the 13th of October is invalid, and an injunction restraining its enforcement.

Before anything can happen in those proceedings, the Legislative Council strikes back. The date is 20 October last year. The Legislative Council passes another resolution. It finds the Treasurer guilty of contempt for failing to comply with the resolution of 13 October and suspends him for 5 sitting days. The Treasurer gets up and leaves the Chamber. The Treasurer immediately amends his summons to seek a declaration that the resolution of 20 October is also invalid. The Administrative Law Division transfers the matter to the Court of Appeal, to be heard in its original jurisdiction. There the matter is given expedition. Points of claim and points of defence are ordered to be given, and unlike the rather consensual litigation in Egan and Willis, it emerges that every conceivable legal and factual point is put in issue. Nothing is common ground. Amongst other things, the defendants take issue with the jurisdiction of the court, not only to grant the relief sought, but to entertain the proceedings at all.

The hearing is due to commence before the Court of Appeal on Tuesday the 24th of November. On Thursday the 19th of November, the High Court hands down its judgment in Egan and Willis. Relevantly, that judgment does four things. First, it affirms the earlier decision of the Court of Appeal in Egan and Willis that the Legislative Council does have power to require the production of documents by the executive.

Secondly, it expressly leaves open whether that power extends to the production of documents the subject of legal professional privilege and public interest immunity.

Thirdly, it addresses an issue of justiciability, raised for the first time in the High Court, not by the parties, but by an intervener. It finds, in relation to that issue that whatever the general position may be, in that case there was a justiciable legal issue because the plaintiff in that case, Mr Egan, had alleged that he had been the victim of a common law assault, as he had been escorted from the Chamber. It was, of course, a put up job. He had been escorted by a prior arrangement. Nevertheless, that was the pleading.

Finally, the judgment confirms that the traditional test for determining the scope of the powers of the Legislative Council was to apply. That is, one of reasonable necessity. It adds, however, and somewhat surprisingly, that what is reasonably necessary is "to be understood by reference to what, at the time in question, has come to be conventional practices established and maintained by the Legislative Council". So one looks to contemporary practice.

Consideration of the judgment in Egan and Willis over the weekend leads to some reformulation of the Treasurer's case to be presented on the Tuesday. When the case opens at 10.15 on Tuesday, the Treasurer seeks, and is granted, leave to file a further amended summons. In an attempt to deal with the question of justiciability, the further amended summons seeks a declaration that the Treasurer is entitled to refuse to produce two specific types of documents. One is a couple of letters containing legal advice, the other is a cabinet submission. There is a traditional, public interest immunity affidavit from the Director-General of the Cabinet Office saying that the maintenance of cabinet confidentiality is vital to the development of public policy in New South Wales.

There is also another affidavit inspired by the High Court's reference in Egan and Willis to contemporary conventional practices. That affidavit is from an officer in the Premier's Department who has worked at the senior level in that Department for nearly 20 years, and he says, to the best of his recollection, although no Government had commanded a majority in the Legislative Council during that period, it had never been maintained by the Legislative Council that it could press for the production of documents after there had been a refusal by the Government to produce them.

The evidence is complete, and I commence my submissions. Brett Walker SC, who appears for the defendants takes an objection. He says I cannot put the argument, because to do so would be to breach Article 9 of the Bill of Rights. We spend the whole day arguing about justiciability. My argument is simple enough. I say that legal professional privilege and public interest immunity are common law doctrines. I say they apply for the benefit of the Crown, just as they apply for the benefit of the citizen. And I say that the Legislative Council is wrongly purporting to use a coercive power to interfere with the Government's common law rights. We spend the whole day arguing about whether or not I can put my case, and the Court reserves its decision on that preliminary issue.

Meanwhile, back at Parliament House, other developments are taking place. The Court of Appeal began sitting at 10.15. The Legislative Council began sitting at 11.00 am. By early afternoon it has passed another resolution. The resolution notes the decision in Egan and Willis. The resolution also notes the continued failure of the Government to produce the documents in issue in that case, as well as the documents sought in a number of subsequent resolutions. This resolution requires the Treasurer to produce the documents - all of them - by 11 o'clock on Thursday the 26th of November. In answer to that resolution, the Treasurer, on 26th November, produces some documents. He refuses to produce privileged documents. He tables a report from Sir Laurence Street, who certifies that the documents that are being withheld are all cabinet documents or legally professionally privileged.

Needless to say, that is not good enough for the Legislative Council. The Legislative Council decides to give the Treasurer one last chance. On the same day, 26th November 1998, it passes a resolution calling on the Treasurer to produce all documents for which privilege is claimed as listed in Sir Laurence Street's report, and all documents for which privilege is claimed in relation to the water crisis. It wants the documents delivered to the Clerk, it authorises the Clerk, then, to release to members, all of the documents except those claimed to be cabinet documents. But in relation to the documents claimed to be cabinet documents, it says that any member can notify the Clerk that he or she disputes the claim that they are cabinet documents, and if such a notification is given, then the status of the document is determined by none other than Sir Laurence Street, who is now to be appointed, by the President, as an independent arbiter. The deadline for production is 11.00 am on Friday the 27th of November, and in default of production the Treasurer is to be automatically suspended indefinitely. The suspension order is expressed to be self-executing.

Now, let me read at this point, from the affidavit of Kate McKenzie, Deputy Director-General to the Cabinet Office, sworn 27 November 1998.

> This morning I was present in the Legislative Council at 11.00 am by which time the plaintiff had been required to table privileged documents in accordance with the resolution of the Legislative Council on 26 November 1998. Soon after 11.00 am, the first defendant [that is Virginia Chadwick] said words to the following effect:. "I note the presence of the Treasurer in the House. According to resolution of the House of the 26th of November 1998, the Leader of the Government was required to deliver to the Clerk of the House by 11.00 am today, certain privileged documents. I have been advised by the Clerk that he has received no papers according to the resolution of the House. Does the Treasurer intend to comply with the order of the House?". I then saw the plaintiff rise from his seat and heard him say words to the following effect. "Madam President, I have been advised that the question of whether the House has the power to require the tabling of privileged documents has not been determined by the Courts, and indeed, my advice from the Crown Law Offices is that the House has no valid power in that respect. I then saw the plaintiff resume his seat and heard the first defendant say words to the following effect. "As the Treasurer clearly has not complied with the order of the House according to paragraph 5 of the resolution of 26th November 1998, if the Leader of the Government fails to comply with the order of the House, he is suspended from the service of the House for the remainder of the session, or until he fully complies with this order, whichever occurs first. As the Leader of the Government has failed to comply with the order, according to the resolution, he is suspended from the service of the House for the remainder of the session, or until he fully complies with the order. I direct that the Usher of the Black Rod escort Mr Egan from the Chamber". I then saw the plaintiff remain seated whilst the third defendant stood up, picked up his black rod, put it over his shoulder and approached the plaintiff who was still seated. I then saw the third defendant lean over the plaintiff and move his arm in a manner to indicate to the plaintiff he must leave the House. I then saw the plaintiff rise from his seat and be escorted from the House by the third defendant.

The stakes are now raised, the gloves are off, the issue of principle is crisply exposed. What is more, the problem of justiciability has fallen away. A technical assault has been committed - this time a real one.

At 5.00 pm the same day, we are back in the Court of Appeal. The summons is again amended to challenge, now, the two new resolutions to seek a declaration that the Treasurer is entitled to withhold production of the specific documents, certified by Sir Laurence Street, and to claim damages for assault. The hearing is scheduled for the first available date, that date is the 14th of December.

In the time between the 26th of November and the 14th of December, the proceedings of the House are adjourned until the 16th of February. Under section 24A of the Constitution Act (NSW) a general election must be held before the fourth Saturday in March of 1999, and the Parliament must, in proper course, be prorogued at least three weeks before the date of the election. Well, 14 December arrives, we have the argument, we hear no more from Brett

Walker about justiciability, he admits that the assault is subject only to a defence of justification. The main question is whether the Legislative Council acted within power in authorising the Usher of the Black Rod to escort the Treasurer from the Chamber. But that is not the only way in which the case was put. In fact, I put the case that the Treasurer's legal rights are affected in three ways. I say that the Legislative Council had purported to use coercive powers to require the production of documents that the Treasurer has a common law right to withhold. I say secondly, that it has purported to authorise an assault and I say thirdly, that it has purported by the indefinite suspension to prevent the Treasurer from performing his constitutional duties as a member of the House.

At the conclusion of the hearing, the following exchange takes place. Chief Justice Spiegelman:

> If, for whatever reason, you lose the challenge to the resolution suspending your client, do you still persist in seeking the declaration that a specific list of documents cannot be called on?

Me:

> Yes.

Chief Justice Spiegelman:

> Why should we deal with that if it appears that the House demand is spent in the resolution?

Me:

> It won't go away. There is a history that Your Honours have lived through in the course of the hearing. To say that the controversy is moot or somehow spent is to deny reality.

Chief Justice Spiegelman:

> The Court will reserve its decision.

Well, the judges leave the bench. An eerie silence envelops us. Nothing happens. A couple of months later, Parliament is prorogued. The suspension order therefore lapses. A month or so later, there is a general election in New South Wales. The Government gets returned, and we are still waiting for the judgment.

The judgment is then delivered on the 10th of June this year. It says nothing about the assault, and nothing about the specific documents. But it does clear up a point of principle.