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# a i a l FORUM

**Australian Institute**
**of**
**Administrative Law Inc.**

**Editors:** Hilary Manson and Dennis Pearce

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# OBITUARY – LINDSAY JAMES CURTIS AM

*Lindsay Curtis was one of the "founding fathers" of administrative law in Australia. While a senior officer in the Commonwealth Attorney-General's Department, he played a significant role in the enactment of the various pieces of legislation that make up the Commonwealth "administrative law package". Lindsay Curtis died on 8 April 2000. The following obituary is reproduced by kind permission of The Canberra Times and Mr Pat Brazil.*

The trajectory of Lindsay Curtis's distinguished career took him to the National Capital, the national and international arena, and to roles in matters of church and state. As a man of law, his commitment was to justice and fairness.

Born in 1928 Lindsay grew up on a diary farm in south-western Victoria, and attended one-teacher primary schools. With intellect and determination he won scholarships first to Geelong High School and then to Melbourne University, where he studied chemical engineering and obtained a science degree.

To Canberra then he came in 1950 to work for the next decade in the Patents Office - and become a lifelong parishioner of the Anglican Parish of St John the Baptist in the suburb of Reid. He met and married Ailsa, a resident of Reid House. He obtained an honours law degree in 1960, by which time he was in the Department of Territories, moving into the Law Reform Section.

In 1963 he began a 26-year career in the Central Office of the Attorney-General's Department, where he was Deputy Secretary from 1983 until 1989.

He was made a member of the Order of Australia in 1986. His role in implementing the great legislative programs that marked these years was immense - they included the Law Reform Commission Act 1973, the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977, and the Freedom of Information Act 1982.

The idea of citizens obtaining access to documents which might reveal how important government decisions are made concerned senior mandarins in the Public Service. To give access to the merely curious (even journalists) was thought to undermine the efficient and proper working of government.

One of Lindsay's many roles was the missionary work of persuading departments that FOI was desirable, or at least acceptable. His achievements in administrative law reform were readily recognised by some, if not all, Ministers, and by members of Parliament before whose committees he appeared often.

With the growth of the federal judicial system, court administration was another large area of activity. How Lindsay managed so effectively to perform these roles and at the same time be so active in other matters such as the Anglican Diocese puzzled some, including Attorney-General Lionel Murphy, who said to him once that now that he had sorted out the wording of the Lord's Prayer would he mind doing some more work on his Trade Practices Bill.

Lindsay's role was not limited to the national scene, and included representation of Australia internationally in the intellectual property area and others. He was Secretary for Law of Papua New Guinea from 1969 to 1971, in the lead-up to self government and then independence.

A much briefer but brilliant international intervention deserved a better ending. This was to

put in place, literally overnight, extradition arrangements for the fugitive Robert Trimbole then in a hospital in Dublin. The Irish Police had no overtime funds to continue surveillance when he was to be discharged, so Trimbole was arrested prematurely under processes held subsequently to be illegal, and a dubious “poison tree” doctrine was held to mean that Trimbole must be given an opportunity to escape, which he did.

Characteristically, Lindsay’s retirement from the Public Service in 1989 did not end his public service. It only changed the way it was delivered: he became Adjunct Professor of Law at the University of Wollongong.

As a fitting crown to his work on administrative law, in 1993 he was appointed President of the ACT Administrative Appeals Tribunal, from which he retired on his 70th birthday. His 200-odd decisions were thorough and clear and he was congratulated many times for their “ease of understanding”. He encouraged people, particularly unrepresented parties, not to feel intimidated or nervous. Many people who came before him thanked him for the fairness that he showed towards them. Still, we have episocopal licence to say that Lindsay could be testy at times.

His great contribution to the Anglican Diocese and St John’s has been acknowledged widely. As Chancellor he saw church law as not an end in itself but as a servant of the Church’s mission. What was most striking was his faith in God, enlivened by a family environment he had shared while studying in Melbourne. Those privileged to speak to him near the end were moved by his calmness and confidence - he was “going home”.

He is survived by his wife Ailsa, children Christopher, Elizabeth, Helen, Lyndal and Alison, and by six grandchildren with a seventh “under construction”.

# WHEN ARE REASONS FOR DECISION CONSIDERED INADEQUATE?

*Justice Alan Goldberg*[*]

*Edited version of an address to a seminar entitled 'Natural Justice Update' held by the Victorian Chapter of the AIAL on 1 October 1999*

## Why the Requirement to Give Reasons?

At common law administrators were not obliged to give reasons.[1] However, now there are a number of statutory requirements similar to s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) which provide that a Tribunal shall give reasons and that the reasons shall include the Tribunal's findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

The rationale for the requirement informs us as to the content and extent of those reasons. That rationale has been expressed in a number of ways. Reasons give an explanation for the matters the Tribunal took into account.[2] Reasons provide the framework from which it can be determined whether the parties were accorded procedural fairness and whether the decision is based on findings of material fact and not on mere speculation or suspicion.[3] Reasons show whether the Tribunal erred in law[4] and whether the Tribunal discharged its functions.[5]

There is a valid justification for reasons in the practical sense. They enable a reviewing court to be satisfied that the Tribunal took into account matters it was required to take into account. Such matters might be, for example, matters of jurisdiction, material facts, relevant evidence and relevant principles of law. McHugh JA put the matter succinctly in *Soulemezis v Dudley (Holdings) Pty Ltd*:[6]

> The giving of reasons for a judicial decision serves at least three purposes. **First**, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment 'is not only to do but to seem to do justice': (*The Writing of Judgments* (1948) 26 Can Bar Rev at 491). Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. **Secondly**, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (*In Defence of Judicial Candor* (1987) 100 *Harv L Rev* 731 at 737):
>
> … A requirement that judges give reasons for the decisions – grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power.
>
> **Thirdly**, under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases: (Taggart 'Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases' (1983) 33 *University of Toronto Law Journal*, 1 at 3-4). Hence the giving of reasons enables practitioners, legislators and members of the public

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[*] *Judge of the Federal Court of Australia*

1 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

2 *Re Palmer and Minister for ACT* (1978) 23 ALR 196, 209.

3 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 67.

4 *Collins v Repatriation Commission* (1980) 48 FLR 198.

5 *Australian Telecommunications Corporation v Davis* (1991) 30 FCR 467, 471.

6 (1987) 10 NSWLR 247, 279.

> to ascertain the basis upon which like cases will probably be decided in the future. *(emphasis added)*

An oft-quoted passage from Sheppard J's judgment in *Commonwealth v Pharmacy Guild of Australia*[7] is instructive:

> The provision of reasons is an important aspect of the tribunal's overall task. Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function which it has.

The rationale was put in a more colloquial way by Woodward J in *Ansett Transport Industries (Operations) Pty Ltd v Wraith:*

> Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.[8]

The giving of reasons imposes an intellectual discipline and rigour which puts the tribunal in a position of reaching a conclusion which is reasoned and internally consistent. But the reasons are not required to be able to withstand detailed and fine critical analysis. In *Wu Shan Liang v Minister for Immigration*[9] the Full Federal Court said that the reasons of the Minister's delegate should be beneficially construed. On appeal, the majority of the High Court commented on this observation:

> When the Full Court referred to 'beneficial construction', it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is *Collector of Customs v Pozzolanic* [(1993) 43 FCR 280]. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be 'concerned with looseness in the language … nor with unhappy phrasing' of the reasons of an administrative decision-maker. The Court continued: 'The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.'
>
> These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[10]

## What are Adequate Reasons?

There is no succinct answer to this question. It is a matter of degree. Judges differ on this issue. In *Soulemezis*, two members of the NSW Court of Appeal disagreed on the level of

7 (1989) 91 ALR 65, 88.

8 (1983) 48 ALR 500, 507.

9 (1995) 57 FCR 432.

10 (1996) 185 CLR 259, 271-272.

findings required. Kirby P (now a member of the High Court) (dissenting) required the grounds which led the judge to a conclusion on disputed factual questions and the findings on the principal contested issues to be set out. Mahony JA did not require this:

> The law does not require that a judge make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact; nor is it necessary that he reason and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion.[11]

This is not to say that a simple statement of an ultimate conclusion bearing the evidence in mind is sufficient. There must be some process of reasoning revealed .

In *Total Marine Services Pty Ltd v Kiely*, Sackville J said:

> The duty [to give reasons] must be sensibly interpreted and applied, with a view to achieving good and effective administration. It is not necessary that reasons address every issue raised in the proceedings; … it is enough that [they] deal with the substantial issues upon which the decision turns.[12]

The requirement that review should be approached 'sensibly and in a balanced way'[13] has lead to a 'restrained approach'[14] by members of the Federal Court when reviewing decisions of administrative tribunals.

The courts have also recognised that often members of tribunals are not lawyers, but trained laypersons, upon whom the relevant statute does not impose a 'standard of perfection'.[15] With this in mind, it is even more apparent that reasons should not be construed minutely and finely with an eye keenly attuned to the perception of error.[16]

Put shortly, regard is had to a tribunal's reasons as a whole[17] but it is necessary that the tribunal's reasons expose its reasoning process in the sense that they enable a proper understanding of the basis on which a decision has been reached.[18]

However care must be taken not simply to recite the evidence or note that certain propositions have been put. Such an approach does not satisfy requirements such as those found in s 43(2B) of the *Administrative Appeals Act 1975* (Cth) to set out findings on material questions of fact and a reference to the evidence or other material on which those findings were based. For example, in *Dornan v Riordan*,[19] a report of 178 pages was held not to disclose the Pharmaceutical Benefits Remuneration Tribunal's reasoning process sufficiently to avoid an error of law. There was, notwithstanding the length of the decision, a substantial failure by the Tribunal to state reasons for its decision. That case involved a determination by the Tribunal which had a function under relevant provisions of the *National Health Act 1953* (Cth) to determine the prices the Commonwealth would pay in respect of pharmaceutical benefits. The legislation is somewhat complex and I do not pretend to have summarised it completely. The point was that the Tribunal held an enquiry for the purpose of

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11 Supra, 271.

12 (1998) 51 ALD 635, 640.

13 *Politis v Federal Commissioner of Taxation* (1988) 2 ATC 5029, 5032, per Lockhart J.

14 *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs (NSW)* (1980) 47 FLR 131, 145 per Fisher J.

15 *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233, 255.

16 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287; *Minister for Immigration & Ethnic Affairs v Wu Shan Liang*, supra 271-272.

17 *Politis v Federal Commissioner of Taxation,* supra, 5032.

18 *Australian Telecommunications Commission v Barker* (1990) 12 AAR 490, 492.

19 (1990) 24 FCR 564.

determining, *inter alia*, the base fee for the remuneration of pharmacists. The Tribunal obtained a report from consultants and it also issued an interim report. The Tribunal decided that there should be a reduction in the base rate from $4.55 for each ready prepared item to $3.50, a net $1.05 per item drop which was rather substantial. Notwithstanding the fact that there was an interim report of 239 pages with many lengthy appendices including a consultant accountants' report and although the report itself was 178 pages long the Court found it impossible to understand from the reasons given by the Tribunal why it had adopted the precise base it had. The Tribunal had said:

> The decisions reached are the result of a considered judgment of the available material, all of which has been given appropriate weight and used with due caution. The result has not been reached by a series of arithmetical calculations without regard to the consequences which are likely to follow. Rather, the final conclusion is the result of balancing the findings of the studies and the available material on the cost of dispensing pharmaceutical drugs under the National Health Scheme on the one hand and a proper consideration of the likely effects of the adoption of these findings on the operation of the current pharmaceutical benefits Scheme on the other.
>
> …
>
> The new base rate determined herein will result in a reduction in pharmacists *[sic]* remuneration of $1.05 per RP [Ready Prepared] item. This rate represents the maximum amount which is justified as a matter of equity and fairness having regard to all of the available evidence.[20]

The Full Court's observation in relation to this line of reasoning was as follows (568):

> These two statements are too general to make it clear what it was the $3.50 was considered to represent. Was the $3.50 thought to be a fair return to pharmacists having regard to their labour and their capital invested, was it thought to be a break-even fee for an average pharmacy, was it thought to be the most that the Commonwealth could reasonably be expected to pay or was it something else? The reasons do not disclose.[21]

This decision is instructive because it demonstrates that a global or general announcement by a tribunal that it has considered all the relevant evidence and reached a conclusion based on that evidence is not an adequate identification of reasons. The trial judge found that all the Tribunal had done was to set out the contentions of the parties before it and to announce its conclusion. There was nothing in its determination which was capable of being described as a reason for preferring the Commonwealth's submissions to those of the Pharmacy Guild.

Although it is not adequate for the decision-maker simply to recite every submission without any analysis, it is not necessary for every submission or consideration to be referred to. As long as the reasons deal with the substantial issues upon which the decision turns they will be adequate. In *Kermanioun v Comcare*, Finn J observed that:

> The obligation to give reasons is not necessarily breached by pointing to matters which might, with advantage have been the subject of further or more detailed discussion or to possible issues which have not been mentioned (C*ommissioner of Taxation v Osborne* (1990) 26 FCR 63 at 65). A Tribunal is not required to deal expressly with every consideration which passes through his mind (*Steed v Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620 at 621).[22]

20 Ibid, 568.

21 Id.

22 [1998] 1529 FCA.

However, Pincus J in *Hoskins v Repatriation Commission* observed that if

> a submission worthy of serious consideration and seriously advanced is not dealt with, one ought to infer that it has been overlooked, giving rise to an error of law.[23]

This means that any significant fact must be recognised in such a way that the reasons themselves provide a sufficient indication that the ultimate facts to be decided have been fully kept in mind and that no significant area of primary fact has been ignored.[24]

For example, where there is conflicting medical evidence it will usually be necessary for the tribunal to find expressly which evidence is accepted and which evidence is not accepted and to provide some reasoned basis for the choice.[25] Similarly, where there are a number of material facts, the tribunal must set out its findings on these facts, particularly where there are statutory provisions requiring reasons.[26]

In short, a tribunal is obliged to make findings on the questions which are key elements to the case or central to the case raised on the material in evidence before it. A recent example of a finding by the Federal Court that this obligation was not observed is found in *Kandiah v Minister for Immigration and Multicultural Affairs*.[27] In order to qualify for refugee status under the Refugee Convention, an applicant has to establish a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Mr Kandiah, a Sri Lankan national and a Tamil, claimed that his fear of persecution for a Convention reason arose from his detention and torture at an army camp. He claimed that he was so badly beaten by army personnel that on his release he went to Colombo General Hospital where he remained for more than a month. Mr Kandiah relied on letters from his treating doctor confirming his treatment. Finn J found that, given the nature of the case put by Mr Kandiah, a vital question of fact for the Tribunal was whether the treating doctor's letters were genuine and truthful. Finn J said:

> It is the case that if the authenticity and credibility of the letters were accepted, they were capable of corroborating in a significant way the factual centrepiece of Mr Kandiah's claim of persecution, and could do so by means untainted by any adverse view that might otherwise be taken of his credibility. They were not, in the circumstances of this particular application to the Tribunal, just another piece of evidence that needed not be dealt with expressly: cf *Steed v Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620 at 621. They were central to Mr Kandiah's application and 'common fairness' to him required they be adverted to: *Ma v Federal Commissioner of Taxation* (1992) 23 ATR 485 at 490.
>
> There is now a considerable body of case law that emphasises variously: (i) the importance to the parties, to the public and to review bodies of adequate reasons for decisions; (ii) the understanding and restraint that courts should demonstrate when reviewing and construing reasons for administrative decisions; and (iii) the content in terms of findings and recitation of evidence that properly and reasonably can be expected of administrative decision makers.[28]

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23 (1991) 32 FCR 443, 448.

24 *Federal Commissioner of Taxation v Cainero* (1988) 15 ALD 368, 370; see also *Kermanioun v Comcare* (supra).

25 *Australian Postal Commission v Wallace* (1996) 41 ALD 455; *Total Marine Services Pty Ltd v Kiely* (supra).

26 See for example, the *Migration Act 1958* (Cth) s 430(1)(c) and the *Administrative Appeals Tribunal Act* s. 43(2B).

27 Finn J [1998] 1145 FCA.

28 Ibid, 11-12.

After referring to authorities on these issues his Honour concluded:

> In the present case where the applicant has, primarily for reasons of credibility, been disbelieved in his claims to have been detained at Slave Island and then hospitalised, but where he has put what purports to be information from his treating doctor before the Tribunal for the purpose of substantiating his claim to hospitalisation, he was entitled to have a finding made as to whether or not that evidence was accepted or rejected. Absent that finding he was not provided with a determination of a matter that, by his own case, he sought to establish independently of his own evidence. It was open to the Tribunal to reject the evidence attributed to Dr Rajakulendran. But if it did so, it was obliged to make this known to Mr Kandiah; it was obliged to inform him why, notwithstanding this new material he put before the Tribunal, his story still was not accepted. His hospitalisation was a 'key element' in his case.
>
> It may well be the case that the Tribunal in fact took a view as to the authenticity and/or credibility of the letters in question. If it did so, it was required to disclose that view because of the significance of the letters to Mr Kandiah's case. If it did not have such a view, then it has not made a finding on what in the circumstances was a material question of fact on which it was required to make a finding because of the case put: cf the possibilities considered in *Casarotto v Australian Postal Commission* (1989) 86 ALR 399 at 402-403.
>
> I am, then, of the view that a breach of the requirements of s 430(1)(c) has been made out. It is clear from *Muralidharan's* case, … that such a breach involves a failure to observe the procedures required by the Act to be observed 'in connection with the making of the decision'.[29]

However, it must be realised that this is not such an onerous burden that every consideration needs to be recorded in the reasons. This is so even when there are no pleadings before the tribunal which formally define the issues to be decided.[30]

## What is Required?

Once again, there is no definitive answer to this question, although as mentioned earlier, where the obligation is imposed by statute, 'substantial compliance' is sufficient.[31] In *Telstra Corporation Ltd v Arden*,[32] Burchett J referred to *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* in which it was acknowledged that '[t]he extent to which a court must go in giving reasons is incapable of precise definition'.[33] Burchett J then referred to his decision in *Dodds v Comcare Australia*[34] where his Honour recognised that:

> … it is the substance of the obligation that matters… Section 43 is not to be construed in a pedantic spirit, but sensibly. If the tribunal's reasons expose the logic of its decision, and contain findings on those matters of fact which are essential to that logic, it will not be easy to demonstrate a failure of compliance with the requirement to include 'findings on material questions of fact'.[35]

If it is impossible to understand from the tribunal's reasons the reasoning process which led to its decision, there will have occurred a substantial failure to state reasons. The reasons should trace all steps in the reasoning process so that an observer can understand how the decision-maker reached his or her conclusion. If certain evidence was relied upon, this, and

29 Ibid, 13.

30 *Commissioner of Taxation v Osborne* (1990) 26 FCR 63, 65,

31 *Bisley Investments Corporation v Australian Broadcasting Tribunal* (supra, 255).

32 (1994) 20 AAR 285, 296.

33 (1983) 3 NSWLR 378, 381.

34 (1993) 31 ALD 690.

35 Ibid, 691.

the reasons why it was so relied upon, must be set out in the reasons. Merely reciting the evidence presented, without more, is not sufficient to disclose reasoning.[36]

When the reasons are drafted so that the reasoning is not discernible, there are grounds for review. Language must be clear and unambiguous and able to be understood by those directly involved in the case.[37] The parties must not be left to speculate 'about the possible course of reasoning which produced the Tribunal's conclusion'.[38]

An error of fact is never sufficient to warrant an appeal, even if the use made of the facts can be regarded as illogical.[39] As Mason CJ said in *Australian Broadcasting Tribunal v Bond*:

> …want of logic is not synonymous with error of law. So long as there is *some* basis for an inference…even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[40]

However, although illogical reasoning is not appellable, a lack of logically probative evidence is. The reasons must demonstrate that a finding of fact was based upon logically probative evidence, otherwise parties are unable to discern if the decision was based on mere speculation.[41]

When a significant fact is rejected by a decision-maker without an explanation as to why, there are grounds for appeal. In *Kermanioun v Comcare*,[42] a key witness was unable to attend but put his evidence in a statement. Although this was the only evidence capable of corroborating the applicant's version of events, the Tribunal questioned the credibility of the statement and ultimately rejected it, without stating why. This was sufficient to found a basis for appeal. The case is instructive. The applicant claimed compensation for a back injury he said he sustained at work when lifting a heavy drum. The Tribunal was not satisfied that the acknowledged back injury was related to the applicant's employment. In other words, the Tribunal did not believe the applicant's evidence as to how his back injury was caused. A depot manager, unable to give oral evidence through ill-health, made a written statement which was tendered in evidence. The depot manager did not see the actual incident but said that the applicant told him that he had hurt his back while unloading a truck shortly after the incident was said by the applicant to have occurred. The manager made a note in the depot diary that the applicant hurt his back 'today in morning'. Parts of the diary entry were underlined with a different ink.

The Tribunal dealt with the depot manager's evidence as follows:

> Then there is the problem relating to the corroboration said to be contained in the diary of the depot where the delivery was made on 28 May 1996. There is a notation said to have been put in by the depot manager, Mr Graham, when Mr Kermanioun mentioned the 'twinge' in his back. Normally, this would be capable of amounting to corroboration of Mr Kermanioun's evidence, but it is clear that the diary entry has been added to at some stage by use of a pen of a lighter colour. We do not know when the original entry was put in. We do not know when it was added to. The problem is that Mr Graham, supposedly the maker of the entry, is unavailable to give evidence, not even by telephone.

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36 *Dornan v Riordan* (supra).

37 *Dornan v Riordan* (supra); *McAuliffe v Secretary, Department of Social Security* (1991) 13 AAR 462

38 *Comcare v Parker* unreported, Federal Court of Australia, Finn J, 2 July 1996.

39 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411.

40 (1990) 170 CLR 321, 356.

41 *Minister for Immigration and Ethnic Affairs v Pochi* (supra).

42 Supra.

Finn J explained why the Tribunal erred in the following way:

> I would note immediately that no reference at all is made in the reasons to Mr Graham's statement nor to his claim to the authorship of the note. At best he is characterised as 'supposedly the maker of the entry'. Why Mr Graham's statement and credibility were so bluntly called into question is left unstated – if, of course, it was even adverted to and, on the fact of the reasons, there can be no reasonable assurance that such occurred. Herein lies the vice of the reasons. If Mr Graham's evidence was to be rejected, Mr Kermanioun was entitled to be informed of this and why it was so. The 28 May incident was the 'key element' in his case. I would emphasise there was no material before the Tribunal that could reasonably suggest that Mr Kermanioun and Mr Graham were acting in concert to deceive Comcare.
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> Mr Graham's evidence was not that of a witness to the 28 May incident. As such it could not of itself constitute proof of the incident. Nonetheless it was capable of corroborating Mr Kermanioun's story – provided, of course, it was accepted that Mr Kermanioun was truthful in his report to Mr Graham. But these were matters that the Tribunal seems not to have entered upon, or if it did it did not betray that in its reasons. One is simply left to speculate as to how Mr Graham's evidence was dealt with, if it was dealt with at all.
>
> Mr Kermanioun was entitled to know whether Mr Graham's evidence was accepted or rejected and, given its significance to the case he advanced (i) the reasons for its rejection if rejected it was; or (ii) the reason he nonetheless failed in his claim, if it was accepted. This lack in the reasons is of so fundamental a character as to necessitate allowing the appeal.

In conclusion, it seems that reasons will be adequate if a tribunal sets out the material facts, the contentions of both sides, the findings of fact, especially when they are contested, and the reasoning relied upon to resolve any disputes, issues of fact or law.

# APPLICATION OF COSTS IN ADMINISTRATIVE LAW PROCEEDINGS

*Judge Tim Wood**

*Edited version of an address to a seminar entitled 'Natural Justice Update' held by the Victorian Chapter of the AIAL on 1 October 1999*

## Introduction

A consideration of this subject should begin by noting the function of administrative law, its growth and the institutions that administer it. Over the past half century, and in particular, the last quarter of a century, both at federal and state levels in this country and elsewhere in the world, there has been an appreciable growth in the power vested in the executive arm of government. Moreover, over this period the executive's accountability to Parliament for its decisions in accordance with the traditional Westminster model has, for a host of reasons, declined in practice. We have seen the use of prerogative writs – certiori, mandamus and prohibition – used as instruments by courts to ensure that executive/administrative decisions are made in accordance with the law. Equally over this period legislation has conferred upon citizens a host of statutory rights which hitherto they did not enjoy. In order to check the exercise of administrative discretions, a host of administrative tribunals, boards, authorities both public and domestic, were established.

The Commonwealth Administrative Review Committee (The Kerr Committee) recommended in 1971 the establishment of an Administrative Appeals Tribunal. This Tribunal was established at the Commonwealth level in 1975. Moreover, at this time, the approach of the courts in 'reviewing' decisions of the executive or of tribunals was to focus not on the merits of the decision itself, but to ask whether there was a 'jurisdictional error' or an exercise of power 'ultra vires'. In short, courts did not attempt to interfere with the merits of the decision. In *Re Toohey; ex parte Northern Land Council,*[1] the High Court upon full examination of the authorities concluded, by majority, that a prerogative writ may issue to prohibit the exercise of statutory powers for ulterior purposes. However, although courts were prepared to check the unauthorized use of power by public bodies, they did not, in doing so, substitute their own decision. The Kerr Committee recognised these defects and recommended that the Commonwealth Administrative Appeals Tribunal (AAT) should undertake merits review.

In 1978 the *Administrative Law Act 1978* came into force in Victoria. Its purpose was:

> To reform the law relating to the review of administrative decisions …. (in the light of) the greatly increased number of administrative tribunals over the years, and the fact that in many ways the activities of citizens are more likely to be regulated by decisions of administrative tribunals than by decisions of the ordinary courts. However, many of these tribunals have been established without provision for appeals from their decisions, and the only procedure for reviewing a decision is by application for a prerogative writ, usually a writ of certiori.
>
> The prerogative writs are writs issued by the Supreme Court as part of the prerogative powers formerly exercised by the Crown. They enable the Court to exercise a supervisory power over inferior courts and other tribunals established by statute. The jurisdiction is not by way of appeal or review. The court is not able to, nor does it, re-hear the matter or substitute its own opinion for that of the inferior court or tribunal. Its control is limited to ensuring that the court or tribunal did not exceed its jurisdiction, and that it observed the law in reaching its decision.[2]

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* *Vice President, Victorian Civil & Administrative Tribunal*

1 (1981) 38 ALR 439.

2 Second Reading Speech, Administrative Law Bill, The Honourable Hadden Storey, Attorney-General.

The purpose of the Act was to enable citizens to seek review of the merits of decisions without recourse to prerogative writ. To have standing a person must be substantially affected by the erroneous decision.

There was obviously little point in providing a procedure for invoking administrative law if the costs of doing so were too great. In an address to an international conference on environmental law in 1989, Toohey J recognized this by stating:

> Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in mitigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a Government instrumentality or wealthy private corporation) with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event it will be a fact that looms large in any consideration to initiate litigation.

This passage expresses the obvious rationale for the various statutory provisions concerning costs and their applicability in administrative tribunals. The report of the Kerr Committee noted that few tribunals were empowered to award costs and those that were rarely did so. It recommended that no general provision should be made in this regard. However, as we know, the Commonwealth AAT does have power to award costs under various enabling enactments. This also applied to the Victorian Administrative Appeals Tribunal and applies to the Victorian Civil & Administrative Tribunal.

## Costs Under the Victorian Administrative Appeals Tribunal Act

Section 50 of the *Administrative Appeals Tribunal Act 1984* (Vic) provided:

> **50.** (1) Subject to and in accordance with the regulations, the Tribunal may make such orders (if any) as to costs in respect of a proceeding relating to a decision under a taxing Act as it thinks fit.
>
> (2) In relation to any other proceeding, if the Tribunal is of the opinion in a particular case that there are circumstances that justify it in doing so, the Tribunal may make such orders as to costs as the Tribunal thinks just.

In 1991 an amendment was made to subsection (2) by inserting the words 'each party is to bear its own costs but' between the word 'proceeding' and 'each'.[3] Clearly, Parliament took the view that, *prima facie*, parties before the Administrative Appeals Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the Tribunal considered otherwise. The effect of the amendment and its significance was considered by the Court of Appeal of Victoria in November 1998.[4] In that case the Court of Appeal considered four decisions, of which *O'Reilly* was one, involving the Transport Accidents Commission. The Court held that the governing power to award costs lay in s.79(2) of the *Transport Accident Act* though it is useful to note the comment of Tadgell, JA.[5] Once this pre-requisite was met, the discretion to award costs was described by his Honour as being 'a wide discretion'.

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3 Act No. 62 1991 s16(1).

4 *Transport Accident Commission v O'Reilly* [1998] VSCA 106.

5 'The distinction between the power conferred by s.50(1) and s.79(2) on the one hand and that conferred by s.50(2) was, it seems to me, substantial. As I understand it, the power conferred by s.50(2) was exercisable only where the circumstances of a particular case justified the making of a costs order whereas s.50(1) and s.79(2) did not contemplate that the very making of a costs order should be justified by circumstances', *O'Reilly*, supra at 111.

## The Awarding of Costs under the VCAT Act

The *Victorian Civil and Administrative Tribunal Act 1998* provides:

> 109. (1) Subject to this Division, each party is to bear their own costs in the proceeding.
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to ---
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
> (iii) asking for an adjournment as a result of (i) or (ii);
> (iv) causing an adjournment;
> (v) attempting to deceive another party or the Tribunal;
> (vi) vexatiously conducting the proceeding;
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
> (d) the nature and complexity of the proceeding;
> (e) any other matter the Tribunal considers relevant.
> (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
> (5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.
> (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

The effect of 109(1), (2) and (3), for practical purposes, is identical. Each of the grounds specified in paragraphs (a)-(d) is capable of constituting 'circumstances' for the purposes of s.50(2) of the AAT Act. Sub-paragraph (e) of s.109(3) equally would fall within s.50(2).

Following the enactment of the legislation establishing the Victorian Civil and Administrative Tribunal, costs provisions in some enabling acts were repealed, for example, s.58 of the *Freedom of Information Act 1982* and s.58 of the *Planning Appeals Act 1980*, whereas others such as s.79(2) of the *Transport Accident Act 1986*, were preserved. Interestingly, s.58 of the Planning Appeals Act is of similar effect to s.109 of the VCAT Act. However, s.58 of the Freedom of Information Act prevented orders for costs being made against applicants. However, s.109 of the VCAT Act does not contain such a provision.

## Circumstances in Which Orders for Costs Can be Made

At common law, courts had no power to make an order for costs.[6] Legislation, be it in the form of the Victorian Supreme Court Act or the County Court Act, provided for such orders. Where courts have a power to award costs, certainly since the decision of the High Court in *Latoudis v Casey* in 1990,[7] successful parties in litigation ought to be awarded their costs and the exercise of discretion to the contrary must be for 'a reason directly connected with

6 *Oshlack v Richmond River Council* (1998) 152 ALR 83, 100, per McHugh.

7 (1990) 170 CLR 534.

the charge or the conduct of the proceedings'[8] or lie in the statute itself. This applies in either summary criminal proceedings or civil proceedings though not in indictable criminal proceedings conducted in superior courts. Factors operating in favour of an unsuccessful party in summary criminal proceedings may be the conduct of the accused in reasonably bringing about the proceeding but 'a successful defendant cannot be deprived of costs because the charge was brought in the public interest or by a public official or because the charge is serious or because the informant acted reasonably in instituting the proceedings'.[9] Thus the principle is a clear one: the exercise of discretion must be based upon factors directly relevant to the conduct of the case or to its merits.

Although in *Latoudis* McHugh J rejected the notion that matters of public interest were capable, of themselves, of constituting a factor operating in favour of an unsuccessful applicant escaping a costs order, the question arose squarely again before the High Court in *Oshlack v Richmond River Council*.[10] Mr Oshlack sought to set aside a planning permit on the ground that some of the land in question was habitat for endangered fauna, in particular the koala. The Land and Environment Court of New South Wales ruled against Mr Oshlack but declined to make an order for costs in favour of the Council. It held that because the litigation was in the nature of public interest, was arguable and resolved significant issues as to the interpretation and future administration of statutory provisions, a proper exercise of discretion was to deny the successful party its costs. The relevant statutory provision as to costs provided:

> (a) costs are in the discretion of the court;
> (b) the court may determine by whom and to what extent costs are to be paid; and
> (c) the court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.

The Court of Appeal in New South Wales unanimously upheld the Council's appeal and followed *Latoudis*, holding that it was not open to the Court to have regard to 'public interest purpose' as a relevant consideration in the exercise of the discretion concerning costs. It followed therefore that the motivation of the unsuccessful claimant was an irrelevant factor. On appeal to the High Court this decision was overturned. The majority of the High Court held:

There is no absolute rule … that in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party.[11]

The majority expressly rejected the argument put by counsel for the Council that it was not in the public interest that they be ordered to meet their costs when successfully defending such claims because it would lessen their ability to meet other demands on the public purse. The Court rejected the broad proposition that public interest considerations of themselves justified no order as to costs but held that the discretion of the trial judge was exercised on proper grounds because His Honour:

- started from the proposition that the successful party was to be awarded costs;
- identified that the rights in question were public as distinct from private rights and in doing so acknowledged that something further was required;

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8 Ibid, 566, per McHugh J.

9 Ibid, 569-580, per McHugh J.

10 (1998) 152 PLR 83. Under environmental legislation in New South Wales the respondent council purported to grant a planning permit notwithstanding that a former impact statement was not obtained.

11 *Latoudis v Casey* (1990) 170 CLR 534, 94 per Gaudron and Gummow JJ.

- emphasised the appellant's desire to ensure obedience to environmental law and to preserve the habitat of the endangered koala; that he had nothing to gain from the litigation; that a significant number of members of the public shared his view; that the preservation of the endangered fauna was in the public interest and finally that the litigation resolved significant issues as to the interpretation and future administration of statutory provisions.[12]

This decision was later considered by the Full Court of the Federal Court in *Friends of Hinchinbrook Society Inc v Minister for the Environment and Others*[13] in which the Court observed that the High Court in *Oshlack* did not decide that the presence of a public interest element in litigation *per se* was sufficient to grant a discretion denying a successful party its costs.[14]

Before the decision in *Oshlack*, Gummow J in *Botany Municipal Council & Others v Secretary Department of the Arts, Sport, The Environment, Tourism and Territories & Others*[15] rejected the applicant's submission that costs ought not to be ordered against them, because their application for judicial review could be characterised as 'public interest litigation'. A number of councils of the municipalities surrounding the Kingsford-Smith Airport sought orders to review the decision of the respondents that the environmental impact study of a proposal for the development and operation of a third runway at that airport met the objects of the *Environment Protection (Impact of Proposals) Act 1974* (Cth). His Honour held that s.43 of the *Federal Court of Australia Act 1976* contained no special categories which controlled a general discretion as to costs. Section 43 of the Act provides that the matter of the award of costs is within the discretion of the Court. As the action had been discontinued by the applicants, Gummow J exercised that discretion to conclude that costs should fall in favour of the successful parties. His Honour referred to the decision of the Supreme Court of the Australian Capital Territory and that of the High Court in *Kent v Cavanagh*[16] and *Johnson v Kent*[17] in which the objectors to the erection of a communications tower on Black Mountain in Canberra sought interlocutory and permanent injunctions against the construction of the tower. Although the applicants did not succeed in obtaining an interlocutory injunction to prevent commencement of the work on the tower, Fox J declined to make an order for costs because:

It is undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.[18]

When the action came on for trial, the objectors (who had obtained the fiat of the Attorney-General and were thereby deemed to be acting in the public interest) were largely successful but, in accordance with their previous agreement with the Attorney, did not ask for costs. The defendants appealed to the High Court but in the meantime a power under legislation was exercised to approve the erection of the tower thereby removing the strongest ground

12 Ibid, 96-97. Kirby J went further and indicated that he would have exercised the discretion, had he had it, in the same manner.

13 (1998) 99 LGERA 140.

14 Ibid, 142.

15 (1999) 76 LGRA 213.

16 (1973) 1 ACTR 43.

17 (1975) 132 CLR 164.

18 *Kent v Cavanagh* (1973) 1 ACTR 43, 55.

available to the objectors in resisting the development. The High Court dismissed both the appeal and the cross appeal with costs. It is to be appreciated that this was a case in which the objectors aligned themselves with the Government. The Government subsequently by order in council authorized the development. That being so, it was not required to argue its appeal. The cross appeal was argued and dismissed with costs.

On the other hand, in *Australian Federation of Consumer Organisations Inc. v Tobacco Institute of Australia*,[19] Morling J ordered the respondent to pay the applicant's cost on an indemnity basis because such costs were incurred in the public interest. Morling J stated: 'I do not think it would be in the public interest for a litigant in the position of the applicant to be heavily out of pocket in consequence of the public spirited action it has taken'.[20]

These authorities raise the issue as to the applicability of orders for costs against persons who bring applications of a public interest nature. Professor Campbell[21] has observed:

> The deterrent effect of an inability to recover costs of litigating, and in particular legal fees, against governmental defendants and respondents was expressly recognised by the United States Congress when in 1980 it enacted the Equal Access to Justice Act, finding
>
> …that certain individuals, partnerships, corporations and labour and other organisations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> The Congress provided, *inter alia*, that in any civil action brought by or against the United States or any agency or any official of the United States acting in an official capacity, costs (including fees and expenses) should, as a matter of course, be awarded to a prevailing party other than the United States subject to certain exceptions.
>
> The details of the United States legislation, which is predicated on prior law on award of costs which differs in some important respects from that applying in England and Australia, need not detain us here. What is more important is the policy which underpins it. The mischiefs the legislation was designed to remedy, and the benefits it was intended to confer, were explained in the report of the House of Representatives' Committee on the Judiciary on the Bill for the Act. The Committee observed:
>
> > While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views.…This kind of truncated justice undermines the integrity of the decision-making process.
>
> The Bill, the Committee went on to say
>
> > …rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and reformulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of law.…The Bill thus recognises that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.
>
> The practices which English and Australian courts have developed in relation to the award of costs against members of tribunals and other public officers who are respondents to successful

19 (1991) 100 ALR 568.
20 Ibid, 571.
21 'Award of Costs on Applications for Judicial Review', (1993) 10 *SLR* 20.

applications for judicial review seem to take no account of the considerations mentioned by the United States congressional committee.'

## Conclusion

The question is therefore posed – whether public interest litigation by reason of its nature is capable of constituting justifiable grounds for VCAT exercising its discretion pursuant to s109(3) in favour of a successful applicant. *Prima facie* costs are not awarded. The test in s109(3) is in stringent terms. Hence only if satisfied that it is fair to do so may the Tribunal exercise its discretion contrary to the *prima facie* position. Moreover, the discretion is somewhat curtailed certainly insofar as sub-paragraphs (a) and (b) are concerned. This probably applies also to sub-paragraph (c) because the thrust of that requirement is that the case has no tenable basis or at best is something short of hopeless. The scope exists for such an order based upon public interest insofar as paragraph (d) and (e) are concerned. However sub-paragraph (e), which refers to 'any other matter the Tribunal considers relevant' must be read in the context of the other criteria in s109(3). It has been held by the Tribunal that disputes *inter partes* (for example in the Retail Tenancies List[22]) of their very nature may justify the making of a costs order in favour of the successful party. In my respectful opinion there is much to be said in favour of this distinction. However, as His Honour Judge Davey pointed out in *Stellridge*,[23] categories cannot be created in the sense of those types of case likely to attract costs orders. To do so would be to reverse the prima facie position. It follows that a decision to award costs under s109 can only be exercised on factors relevant to the conduct and the nature of the case itself, and only to the extent that fairness requires a party be granted costs. There is considerable merit in the observations of Morling J in the Tobacco Industry case referred to above. Public interest litigation should be capable of supporting costs orders in favour of successful applicants.

22 *Re Maltall and Bevondale Pty Ltd Mcnamara DP* 10 November 1998 and *Re Stellridge Pty Ltd and Handbags International Pty Ltd* [1999] VCAT RT8.

23 Supra.

# GOVERNMENT OWNED CORPORATIONS: PUBLIC OWNERSHIP, ACCOUNTABILITY AND THE COURTS

*Richard Jolly**

## Introduction

The hybrid nature of government owned corporations (GOCs), combining public ownership with a 'private' structure, further compounds the already significant conceptual difficulties in distinguishing between 'public' and 'private' matters.[1] Accordingly their nature requires many of the traditional assumptions of public law to be confronted, and poses difficulties in the determination of a proper level of accountability for GOCs, both politically and legally through the imposition of legal remedies by the courts.[2] A common view is that as GOCs are publicly owned, they must act in the public interest, and thus should be subject to the same legal constraints, particularly administrative law remedies, as the rest of government. The alternative argument is that GOCs acting in a 'private' capacity should only be subject to 'private law' remedies. However such bodies do not readily lend themselves to simplistic analysis. More is required than simply asking whether a GOC is publicly owned in determining the appropriate extent of its legal obligations and constraints.

The object of this article is to examine the 'public ownership' of GOCs as the basis for accountability, legal duties and obligations, and amenability to judicial review.[3] The main focus of this examination is the role of the courts in securing public accountability for the conduct of GOCs, particularly in their commercial activities, consistently with the statutory objectives of corporatisation. It is apparent that many of the assumptions regarding public ownership and the activities of GOCs require some reappraisal, if these vexing issues are to achieve some level of resolution.

## Corporatisation and its Objectives

In this discussion, the term 'GOC' refers to corporations owned by government which have been established or restructured to have a private sector or equivalent corporate structure, and which carry on business in the pursuit of commercial objectives. Corporatisation is the process which restructures or transfers existing government business enterprises, and changes the conditions under which they operate, 'so that they are placed, as far as practicable, on a commercial basis and in a competitive environment.'[4] In this narrow

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1 On the public/private distinction, see H Woolf, 'Public Law-Private Law: Why the Divide? A Personal View' (1986) *Public Law Review* 220; C Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185; G Airo-Farulla, ''Public' and 'Private' in Administrative Law' (1992) 3 *Public Law Review* 186.

2 See for example, S Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *Australian Journal of Public Administration* 521; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44; M Taggart, 'State Owned Enterprises and Social Responsibility: A Contradiction in Terms?' (1993) *NZRLR*.

3 The application of other elements of the 'administrative law package', namely freedom of information, administrative appeals, and Ombudsman review, are beyond the scope of this paper, which only examines remedies imposed by the courts.

4 *Government Owned Corporations Act* 1993 (Qld) s. 16; Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992), p 5. This is distinct from 'commercialisation', which does not alter the structure of the enterprise.

sense,[5] corporatisation has occurred since the mid 1980s in New Zealand and some Australian jurisdictions under generic 'umbrella' legislation, which provides mechanisms for establishment of GOCs and governs their conduct.[6] In contrast, the Commonwealth has used an *ad hoc* approach of incorporation under the Corporations Law using its executive powers, or converting existing statutory bodies to that status under specific legislation.[7]

The end result of corporatisation is a company incorporated under the Corporations Law (company GOC), or a corporation incorporated under specific legislation which possesses many of the same characteristics (statutory GOC).[8] The statutory GOC is thus provided with a share capital, board of directors and memorandum and articles of association to mirror the private corporation, but continues to be established under statute. Any government enterprise which produces goods or services that are either sold or capable of being sold in the market place may be a candidate for corporatisation.[9] Thus providers of 'essential' services such as electricity, gas, water and telecommunications, as well as such diverse entities as financial institutions, prisons, port authorities and gambling operators, have been corporatised.

It should be stressed that GOCs governed by GOC legislation are just one particular form of government business enterprise.[10] In addition the process of corporatisation is one of structural reform of existing business enterprises. Accordingly it does not of itself expand the business activities of government, but gives them a more overtly commercial basis. The public ownership of business enterprises is far from new in Australia, which has a long and successful history of public enterprise dating back to the nineteenth century. Such enterprises needed to be established by government in Australia's developing economy, as private capital, labour and resources were insufficient to ensure the delivery of essential services and infrastructure over large areas with a scattered population.[11] Generally speaking, the assumption behind corporatisation is that the GOC remains in public ownership, and it is not merely a step to privatisation.[12] For various political or social reasons, Australia has not privatised its government enterprises to the same extent as other countries such as the United Kingdom and New Zealand,[13] so that there are now a large number of GOCs which constitute a significant proportion of economic activity in Australia.[14]

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5 Corporatisation in a broad sense, namely the use of corporate entities to conduct government business enterprises, began in the nineteenth century: see R Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7.

6 *Government Owned Corporations* Act *1993* (Qld); *State Owned Enterprises Act 1986* (NZ); *State Owned Enterprises Act 1992* (Vic); *State Owned Corporations Act 1989* (NSW). In this Paper reference will be made to the Queensland Act ('GOC Act (Qld)').

7 e.g. *Commonwealth Banks Restructuring Act 1990* (Cth).

8 e.g. the Queensland Investment Corporation is a statutory GOC constituted under the *Queensland Investment Corporation Act 1991* (Qld). In contrast the New Zealand Act only has company GOCs.

9 Corporatised enterprises may have been part of a government department, a statutory authority (incorporated or unincorporated), a government company, or even a statutory GOC (in the case of a company GOC).

10 This article discusses this type of GOC. The conclusions are not necessarily applicable to all GBEs, but will apply to Commonwealth 'GBEs' which are subject to a regime similar to GOC legislation.

11 See R Wettenhall, 'Australia's Daring Experiment with Public Enterprise' in A Kouzmin and N Scott (eds), *Dynamics in Public Sector Management* (1990); R Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7.

12 GOC Act (Qld), s. 16(b). However in some cases it may be appropriate to use the GOC structure as a form suitable for sale, as some form of share capital is required to transfer ownership to private owners, e.g. *TAB Privatisation Act 1997* (NSW).

13 K Wiltshire, 'Corporatisation and Privatisation' in N Scott (ed), *Government and Business Relations in Australia* (1994).

14 In 1994, GOCs contributed directly to 10% of Gross State Product and 6% of capital expenditure in Queensland: E Morton, 'Corporatisation in Queensland: Two Years On' (1995) 4 *Queensland Economic*

The principal objective of corporatisation is to improve both the efficiency and accountability of GOCs.[15] The increased resources flowing to government from improved efficiency is intended to enhance the government's economic performance and can be used to satisfy the social objectives of the government.[16] The objectives of corporatisation are to be achieved through the 'key principles' of clarity of commercial and non-commercial objectives, management autonomy and authority, strict accountability for performance, and competitive neutrality through being subject to the same rules as any other business.[17] GOCs are organised in a form designed to assist in the implementation of these principles and remove as far as possible the disadvantages of government ownership. It should be noted that although the principal objective of a GOC is to be commercially successful,[18] corporatisation is also intended to improve the accountability of GOCs, to its shareholding Ministers and to the public.[19]

Community service obligations (CSOs) are a key element of the corporatisation process. These are obligations which are not in the commercial interests of the GOC to perform, which the government directs it to perform.[20] Instead of GOCs being used as a covert instrument of social policy by the government, any obligations which the government wishes them to perform must be clearly identified, costed and reimbursed, and separated from their purely commercial functions, so that their commercial performance is not impeded. It is in relation to the objective of competitive neutrality, when it is sought to remove the 'disadvantages' of public ownership, that a fundamental clash of values occurs. Many of these 'disadvantages' have been imposed on statutory corporations as measures of political or legal accountability. Administrative law is an example. The extent to which these disadvantages may apply to GOCs without compromising their ability to effectively engage in commercial activity is the central focus of the issues discussed in this article.

## Government-owned Corporations and Accountability

The demand for accountability reflects the requirement that the government is responsible and answerable for its conduct, ultimately to the people which it represents. Although it is doubtful that a GOC is part of the executive in a constitutional sense,[21] the citizens of the State are the ultimate owners of a GOC, as the shares must be held by Ministers on behalf of the State.[22] Accordingly the government needs to be accountable to the public for the conduct and performance of GOCs.[23] The public do not have the same level of direct accountability as that employed by a private sector shareholder, such as the ability to vote at

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*Forecasts and Business Review* 73, 73. Commonwealth GBEs contribute 25% of business and 10% of GDP: S Bottomley, 'Corporatisation and Accountability: The Case of Commonwealth Government Companies (1997) 7 *ACLJ* 156.

15 GOC Act (Qld) s. 17.

16 Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992) at 5.

17 GOC Act (Qld) s. 19. See M Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77.

18 GOC Act (Qld) s. 20. However some GOC legislation also requires GOCs to exhibit 'social responsibility'. These different provisions are discussed below.

19 The accountability regime for GOCs is discussed below.

20 GOC Act (Qld) s. 121(1).

21 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 24 per Finn J; L Zines, *The High Court and the Constitution*, 4th ed (1997), 268*; Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

22 GOC Act (Qld), ss. 73, 79 and 82, 83.

23 As to the requirements of responsible government for GOCs which may be implied in the Constitution, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

company meetings, and appoint directors. In this regard the fact of public ownership of a GOC justifies a greater level of accountability than an equivalent private sector corporation.

The standard regime of accountability imposed by GOC legislation is quite detailed and comprehensive,[24] and should be described to provide the context for the examination of the role of the courts. To briefly summarise, it involves the following features:

- Accountability of management to an independent board of directors for the performance of its commercial functions and CSOs.
- Accountability of the board to the shareholding Ministers who appoint the board.
- Responsibility of the shareholding Ministers, who hold shares on behalf of the State, to Parliament for that performance.
- Preparation and approval by the shareholding Ministers of a statement of corporate intent, which sets out financial and non-financial performance targets, and community service obligations.
- Preparation and approval by the shareholding Ministers of a corporate plan.
- Audit by the Auditor-General and other public reporting obligations.
- Preparation of quarterly and annual reports, which must be laid before Parliament.
- General monitoring of performance by government.
- Answerability to parliamentary committees.[25]

The reliance on Ministerial responsibility is contentious in light of its perceived inadequacy as an accountability mechanism, particularly with the present proliferation of independent government business enterprises.[26] The autonomy provided to GOC management does reduce accountability to some extent, but that is the purpose of corporatisation. The reform process would be ineffective without that autonomy. Be that as it may, it is beyond the scope of this article to consider the adequacy of these mechanisms. However in the areas in which the government retains control, the GOC regime imposes significant accountability obligations upon GOCs in a systematic and transparent manner.

## The Nature of Public Ownership

### Public ownership and legal duties

The 'public trust' model of accountability requires, in addition to Ministerial responsibility, numerous measures of accountability to the public and appropriate agencies, including

24 See GOC Act (Qld) Chapter 3 Parts 3, 5, 6, 7, 8 and 11. For a more comprehensive description of the New Zealand regime, see M Palmer, 'The State-Owned Enterprises Act 1986: Accountability?' (1988) 18 *VUWLR* 169.

25 The Commonwealth has no GOC legislation, but many of these measures do apply to Commonwealth GBEs under various legislative and administrative arrangements: See S Bottomley, 'Corporatisation and Accountability: the Case of Commonwealth Government Companies' (1997) 7 *ACLJ* 156.

26 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), 78.

scrutiny by the courts.[27] This model, suggested in the WA Inc Royal Commission Report, reflects the public trust theory developed by Finn, that because sovereign power rests with the people,[28] and the people have conferred that power upon government, the government is the trustee of the public. Government is therefore required to act for the benefit of the public, and is accountable to the public for the exercise of that trust.[29] This also applies to GOCs, which because of their public ownership, cannot be equated with a private corporation:

> Howsoever much governments may wish GBEs to conduct their affairs commercially and in the fashion of the private sector, they remain public trustees. The illusion of the corporate form cannot be allowed to conceal the true identity of their ultimate owners - the public.[30]

Following his appointment to the Federal Court, Finn J has also recently suggested in his judgment in *Hughes Aircraft Systems International v Airservices Australia*[31] that this may be the basis for the imposition of contractual duties of fair dealing upon public bodies, derived from policies in the law such as ensuring that the powers possessed by a public body, whether conferred by statute or contract, are exercised 'for the public good', and requiring such bodies to act as 'moral exemplars'.[32] Finn J extended these arguments to what he terms 'the fourth arm of government', namely statutory authorities and GOCs, 'whose owners are, ultimately, the Australian community' whom they are established to serve.[33] A public authority, including a GOC, is required to act in the public interest, because it has no legitimate private interest.

The public trust concept has merit as a basis for an enhanced level of political and statutory accountability for bodies within the domain of the public sector to the public as their owners.[34] However there are problems with the fact of public ownership of itself being the basis for the imposition of higher legal obligations upon GOCs in its commercial dealings than upon similar private entities.

In an environment where 'public' functions are increasingly carried out by entities with both private and mixed ownership, it is artificial to base such general law duties upon ownership alone. For example, are there any relevant differences between Telstra and Optus, or for that matter between Optus and a fully privatised Telstra,[35] sufficient to require one of them to act for the public good? The two corporations are largely the same except for the identity of their major shareholder. Such a duty would also seemingly apply to a GOC, but not after it is privatised. In the case of a corporation which is only partially owned by the government, it

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27 *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, (1992) (WA Inc Royal Commission Report). See J Uhr, 'Redesigning Accountability: From Muddles to Maps' (1993) 65 *AQ* 1; S Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *AJPA* 521.

28 *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106, 136 per Mason CJ.

29 P Finn, 'A Sovereign People, A Public Trust' in P Finn (ed), *Essays on Law and Government (Volume 1: Principles and Values)* (1995); P Finn, 'Public Trust and Public Accountability' (1993) 65 AQ 52; P Finn, 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1994) 5 *Public Law Review* 43.

30 P Finn, 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1994) 5 *Public Law Review* 43 at 54.

31 (1997) 146 ALR 1.

32 Ibid, 41-2.

33 Ibid, 40.

34 See *report of the Royal Commission into the Commercial Activities of Government and Other Matters* (1992) (WA Inc Royal Commission Report).

35 For example, Telstra Ltd is a publicly listed corporation, 66% of the shares in which is owned by the Commonwealth.

is not correct to say that the corporation has no interest other than the public interest; there are the significant interests of the private shareholders and creditors to consider, as required by the Corporations Law.

The concept of a public trust surely also includes the proper stewardship of public resources held by government. This is a major reason for imposing strict accountability obligations upon GOCs, to ensure that they are properly accountable to their ultimate shareholders, the public. Certainly any inefficiency and mismanagement of GOCs is a matter of legitimate public interest.[36] Given the significance of GOCs to the economy as a whole, the performance of GOCs may have major ramifications for the health of public finances, and a flow-on effect to other industries. It might therefore be arguable that there is an equal obligation for governments to use public resources and to conduct service delivery as efficiently as possible, and that the public good is served in this way. This is the clear intention of GOC legislation.[37] To subject a GOC to obligations additional to its competitors may impair the ability of the GOC to effectively compete, and thus frustrate the achievement of that objective.

In *Hughes Aircraft Systems*, the public interest which the authority was required to serve was readily determined from the express or implied statutory mandate in its empowering legislation.[38] However in the case of a GOC conducting commercial activity it may be more difficult to identify such a 'public interest' without clear statutory criteria. Unless it has specific CSOs or statutory obligations, the only public interest which a GOC might be required to serve is to conduct its business efficiently and to be commercially successful and maximise its benefit to the economy.[39] Arguably where the only reason for the retention of public ownership is an aversion to selling a profitable public business, the GOC's only public obligation is to act efficiently and earn a satisfactory return, because it is not intended to serve any social objective. Some GOC legislation requires a GOC to act with 'social responsibility' where it is possible to do so consistently with its commercial objectives, but that is unlikely to be sufficiently strong to imply legal duties.[40] Further, a general expectation of 'a standard of fair play' from government[41] does not necessarily translate into legal obligations in commercial dealings.

The argument seems to confuse the focus of accountability. The fact that a GOC is owned by the public is relevant to the broader issue of accountability to the public as its owners, but is a separate issue from the question of its legal obligations in a particular transaction. In seeking to impose duties upon a GOC in its dealings with another party, the relevant issue would seem to be the nature of the power, if any, exercised by the GOC in that situation rather than the nature of the ownership of the GOC.

### Public ownership and judicial review

Similar arguments have also been raised in relation to the controversial issue of whether GOCs should be amenable to judicial review in the conduct of their activities. The role of

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36 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31 per Mason CJ (Dawson and McHugh JJ agreeing); *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168 per Lord Wilberforce, 1185 per Lord Salmon.

37 GOC Act (Qld) s. 17.

38 (1997) 146 ALR 1, 40.

39 In the Victorian legislation, the public benefit which a SOE must serve is based on its efficiency and contribution to the economy: *State Owned Enterprises Act 1992* (Vic), s. 18.

40 e.g. *State Owned Corporations Act 1989* (NSW), s. 8(c); *State Owned Enterprises Act 1986* (NZ) s. 4(C). See *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1993] 1 *NZLR* 551, 558. This conclusion was not disturbed on appeal by the Privy Council in *Mercury Energy v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521.

41 *Melbourne Steamship Co v Moorehead* (1912) 15 CLR 333, 342 per Griffith CJ.

administrative law is to ensure that government acts within its lawful powers, to provide a mechanism for achieving justice in individual cases, to improve the quality of administration, and to contribute to the accountability mechanisms for government decision making.[42] The goal of keeping 'the powers of government within their legal bounds, so as to protect the citizen against their abuse'[43] is particularly applicable to judicial review. That role of the courts has grown in tandem with the growth of the state, and with a growing realisation of the inadequacy of Ministerial responsibility. The potential range of decisions subject to judicial review is now large in scope, extending to any exercise of government or statutory power which affects the rights, interests and legitimate expectations of persons.[44] It is therefore seen as natural that this should extend to GOCs, even though judicial review has not traditionally applied to 'commercial' decisions of government enterprises.

The argument most often advanced is that as GOCs are required to act in the public interest and therefore can never be considered to be performing 'private' functions, they must be subject to judicial review.[45] The reason why this should apply to GOCs and not private corporations is that the former are publicly owned, and 'although both types of bodies take decisions in the interests of their shareholders', the shareholders of GOCs are 'ultimately the public.'[46] A further argument is that judicial review is necessary to safeguard the interests of the consumer in dealing with the GOC.[47] This is exemplified by the reasoning of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*:

> A state enterprise is a public body; its shares are held by Ministers who are responsible to the House of Representatives and accountable to the electorate. The defendant carries on business in the interests of the public. Decisions made in the public interest by the defendant, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the defendant are amenable in principle to judicial review both under the Act of 1972 as amended and under the common law.[48]

The conceptual problems with arguments based on public ownership referred to above also apply in the context of judicial review. Further, the facts that a GOC is publicly owned and that its decisions may affect individual rights are not necessarily linked. The effect on the individual is not caused by the public ownership but by the nature of the transaction with the GOC. It is not open to doubt that the fact of public ownership means that a GOC is required to act in the interests of the public as its *owners*. However in the context of GOCs, judicial review would protect primarily the interests of citizens as individual *consumers*.[49] If the

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42 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995) at paras 3.9-3.13.

43 H Wade and C Forsyth, *Administrative Law*, 7th Ed (1994), p 4.

44 *Kioa v West* (1985) 159 CLR 550; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Annetts v McCann* (1990) 170 CLR 596.

45 The strongest advocate of this view is Professor Michael Taggart: M Taggart, 'State Owned Enterprises and Social Responsibility: A Contradiction in Terms?' (1993) *NZRLR* 343; M Taggart, 'The Impact of Corporatisation and Privatisation on Administrative Law (1992) 51 *AJPA* 368; M Taggart, 'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351. Also see N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44.

46 N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198 at 201.

47 N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198, 201; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44, 68.

48 [1994] 1 WLR 521, 526.

49 The categorisation of citizens as 'consumers' has been criticised, but the term is only used here to indicate the different aspects of accountability: see V Nagarajan, 'Reform of Public Utilities: What About the

interests of the citizen as consumer are the basis for judicial review, then logically it should apply to any corporation in similar circumstances. The mere fact that government owns a GOC is therefore a dubious basis for making its decisions amenable to judicial review.

## Functions and powers exercised by GOCs

Legal duties derived from the 'public trust', and amenability to judicial review, should not automatically extend to all activities of GOCs in all transactions without a critical examination of the nature of GOCs, the diverse roles which they perform, and the objectives of corporatisation. This is particularly so in view of the clear intention of parliaments in GOC legislation to implement principles of competitive neutrality, and to provide a detailed and specific accountability regime. These issues cannot be resolved at a superficial level by stating that 'public ownership' *per se* requires certain measures in all cases, or by simply characterising its decisions as 'public' or 'private'. The type of power or function which a GOC exercises in the particular transaction in which it is sought to impose legal obligations upon the GOC must be considered if those obligations are to have a coherent and rational basis.

The type of power is relevant because it focuses on the relationship between the GOC and the other party to the transaction, and because the role of administrative law is to control the exercise of executive 'power' and protect persons whose rights and interests may be affected by that power.[50] The classification should look at the nature of the power, and the control which it exerts over the other party, as well as its source.[51] *Government* power therefore represents power that only the government (or a statutory delegate) can exercise in a particular transaction or dealing, because it emanates from a legislative or executive source. This includes powers conferred by legislation, but may also be the exercise of prerogative powers by the executive. Clearly a body clothed with powers directly derived from statute exercises such power. Further, where legislation directs a GOC to perform certain obligations, its source of authority for the action is legislative, even if that obligation may be carried out through contract.[52] Commercial transactions could therefore in some circumstances be the exercise of government power. However if a GOC enters contracts in the performance of its commercial functions under powers generally derived from the Corporations Law or from the statute which establishes it, it is not using government power in its dealings with others. The power is one that could be exercised by any legal person, and is derived from the general law.

However even without exercising government power in its commercial dealings, a GOC may still be exercising *market* power, which results from lack of effective competition or its strong bargaining position, which gives the customer no real choice but to use the GOC to obtain a service.[53] This power is often taken to be government power, as government enterprises usually possess it, in industries which have been structured to supply goods or services through a government monopoly provider. The fact that it is usually possessed by a government enterprise leads to the assumption that judicial review should be used to overcome it, when this type of power is really the domain of the *Trade Practices Act 1974* (Cth) and other general law remedies. The GOC is not exercising a power of government in this sense, as it is a power that could be possessed by a public or private body or person in

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Consumer?' (1994) 2 *CCLJ* 155; R Clare, 'Changing Citizens into Customers' (1995) 9 *Directions in Government* 19.

50 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 388; H Wade and C Forsyth, *Administrative Law*, 7th Ed (1994), p 4.

51 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815.

52 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.

53 In this article, the term 'market power' as any 'non-government' power is a broader concept than that defined in Part IV of the *Trade Practices Act 1974* (Cth), although it includes that concept.

a similar position. The difference between government and market power lies at the heart of the debate over the applicability of judicial review to GOCs.

The functions being performed by a GOC are also relevant. Although commercial functions are not within the traditional scope of judicial review, an apparently commercial or contractual decision can be used to implement policy or government objectives. It is therefore said that judicial review should apply to the commercial activities of public bodies, as there is no such thing as a purely commercial government decision.[54] However it is an essential element of corporatisation that any non-commercial objectives be separated from commercial ones and identified as CSOs, and that responsibility for regulatory decisions be removed from any GOC conducting commercial activities.[55] Accordingly, in the case of GOCs, it is possible to separate and identify such functions, and for a decision to be purely commercial.

A 'functional' categorisation of public corporations suggested by Friedmann, and adopted by Bottomley, as a method for determining appropriate regulatory measures for GOCs, may also be used to categorise the functions which the GOC is performing in a particular situation.[56] On that basis the different types of functions are *commercial*, that is, engaging in an enterprise run according to economic and commercial principles; *social service*, that is, the provision of social services on behalf of the government; or *regulatory*, that is, an administrative, supervisory or regulatory function.[57] All functions performed by GOCs can be placed in one of these categories, although it is now unlikely that a GOC will be exercising regulatory functions. The GOC will often have 'social service' functions which reflect the reason for retaining it in government ownership,[58] and these may be defined as CSOs. Where there is no such identifiable reason, the GOC is likely only to be performing commercial functions.

In the remainder of this article, these concepts will be applied to examine the circumstances in which judicial review and general law remedies may apply to GOCs.

## Government-owned Corporations and Judicial Review

Judicial review may be available in relation to the conduct of GOCs under the common law, or under statutory grounds for judicial review in some jurisdictions.[59] However the common law prerogative writs are still available in a modified form in those jurisdictions,[60] although for the Commonwealth the requirement that the decision is made by 'an officer of the Commonwealth' may be difficult to satisfy in the case of a GOC.[61] In other jurisdictions the common law remedies are the only available means of judicial review. Some decisions of GOCs are expressly exempted from judicial review in some statutory jurisdictions. For

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54 See A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363.

55 GOC Act (Qld), s. 19(a).

56 W Friedmann, 'The Legal Status and Organization of the Public Corporation' (1951) 16 *Law and Contemporary Problems* 576, 579-80; S Bottomley, 'Regulating Government-owned Corporations: A Review of the Issues' (1994) 53 *AJPA* 521 at 530.

57 Friedmann used the term 'supervisory' for the third category, but 'regulatory' is preferred as it is more consistent with contemporary terminology.

58 Such as to deal with a natural monopoly, supporting economic development, filling a perceived 'gap' in the market, or achieving a more socially desirable outcome: Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992), p 6.

59 *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Judicial Review Act 1991* (Qld); *Administrative Law Act 1978* (Vic); *Administrative Decisions (Judicial Review) Act 1989* (ACT).

60 e.g *Judicial Review Act 1991* (Qld), Part 5; *Judiciary Act 1903* (Cth), s. 39B.

61 *Judiciary Act 1903* (Cth), s. 39B; Constitution s. 75(v).

example, in Queensland, the decisions of certain GOCs made in carrying on commercial activities or in the delivery of CSOs are exempt from judicial review.[62]

Judicial review has been sought as a remedy for the decisions of statutory authorities and GOCs to enter (or refuse to enter) and terminate contracts in Australia, as 'decisions of an administrative character made under an enactment' under the *Administrative Decisions (Judicial Review)* Act *1977* (Cth),[63] and in New Zealand as the exercise of statutory power' under the *Judicature Act 1972* (NZ). Both statutes essentially require the decision to have its immediate or proximate source in statute or subordinate legislation.

It is clear that the decision to terminate a contract is usually sourced in the contract itself rather than an enactment.[64] However two conflicting lines of authority emerged in both jurisdictions regarding decisions of statutory bodies to enter contracts. Under the first approach, adopted by the Federal Court in *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*[65] and *James Richardson Corporation Pty Ltd v Federal Airports Corporation*,[66] the decision of a statutory body to enter a contract was held to be a decision 'under an enactment', because the source of the decision was the constituting statute which conferred a general power to contract on the body. The same reasoning was applied in New Zealand in *Webster v Auckland Harbour Board*,[67] although there the statutory powers to contract were of a more specific nature. The Court of Appeal in any case found that the fact that the Board was a public body administering assets which it held for the benefit of the public was sufficient to attract judicial review.[68]

The contrary view, adopted by the Federal Court in *General Newspapers Pty Ltd v Telstra Corporation*,[69] requires a decision to be expressly authorised or required by statute if it is to be amenable to judicial review. Where a GOC is only generally empowered to enter contracts, it is a 'mere conferral of capacity to act'.[70] This applies whether it is a company GOC which derives its powers from the Corporations Law, or a statutory GOC which derives its powers from specific legislation. Although ultimately the power to contract may be traced to statute, the statute is not the immediate source of power.[71] The same approach was adopted by the New Zealand Court of Appeal in *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd (AEPB Case)*,[72] where Richardson J said that:

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62 These relate to the decisions of Queensland Rail, ports corporations, Queensland Investment Corporation and electricity entities: *Judicial Review Act 1991* (Qld), s. 18A, Schedule 6. For the Commonwealth, see *Administrative Decisions (Judicial Review) Act 1977* (Cth), Schedule 1.

63 This test is also used in other statutory jurisdictions. This article does not consider the additional situation in s. 4(b) of the *Judicial Review Act 1991* (Qld), regarding a decision under a non-statutory scheme using public funds.

64 *Australian National University v Burns* (1982) 43 ALR 25. See also *Australian Film Commission v Mabey* (1985) 59 ALR 25; *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563; *Federal Airports Corporation v Makucha Developments Pty Ltd* (1993) 115 ALR 679; *Blizzard v O'Sullivan* [1994] 1 Qd R 112.

65 (1985) 60 ALR 284.

66 (1993) 117 ALR 277

67 [1987] 2 NZLR 129.

68 Ibid, 131 per Cooke P; 134 per Casey J.

69 (1993) 117 ALR 629.

70 Ibid, 637 per Davies and Einfeld JJ, Gummow J agreeing.

71 See also *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724; *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 123 ALR 215, 224 per Burchett J.

72 [1993] 1 NZLR 551, per Richardson, McKay and Robertson JJ.

> the commercial operations of an organisation do not become subject to judicial review simply because the organisation is recognised by statute or owes its existence to a specific statute or a general statute such as the Companies Act.[73]

It is submitted that the *General Newspapers* approach, which is the currently accepted view in Australia, is the more coherent and consistent approach for GOCs. It does not single out a GOC for judicial review on the technical basis that its powers are conferred by a specific rather than a general statute. There should there be no difference between the decisions of statutory and company GOCs, which are basically intended to operate in the same way under GOC legislation, when they are entering an identical transaction. The alternative approach creates an artificial distinction between powers conferred by the Corporations Law and by specific legislation, and taken to its logical extent, should therefore also apply to any corporation, as ultimately their powers are all derived from the Corporations Law.

A possible further basis for review is any general obligation of 'social responsibility' in GOC legislation.[74] In the *AEPB Case*, the Court found that s. 4 of the New Zealand Act,[75] which provided that the principal objective of a GOC was to operate as a successful business, but also to exhibit a sense of social responsibility, did not provide grounds for review of the decision of a GOC to terminate a contract for the supply of electricity to a long term customer. Compliance with s. 4 was not a justiciable issue, but a matter for shareholder and political accountability. The commercial success or social responsibility of the GOC would be determined in the course of time, and it was a matter for the GOC to determine the best way to achieve that.[76] In Australia, a similar approach was taken by Burchett J in *Yarmirr v Australian Telecommunications Corporation*[77] in relation to a statutory obligation to supply a standard telephone service which was reasonably accessible to all people in Australia.

The opportunity to settle these issues arose on appeal from the *AEPB Case*, in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*.[78] The Privy Council reversed the Court of Appeal's decision, and held that the decisions of GOCs should in principle be subject to judicial review, largely because of their public ownership and the consequent requirement that they act in the public interest. This conclusion, set out in the passage quoted earlier, was reached with a minimal level of reasoning, other than that judicial review applies to decisions made by 'the executive or by a public body'.[79] No convincing rationale for the application of judicial review of GOCs at common law or under statutory judicial review was provided. Apart from the fact of public ownership, this reasoning could equally apply to many private corporations. The judgment did not explain how the GOC was exercising 'statutory power' for the purposes of the 1972 Act, and in particular whether that occurred because of s. 4. It also seemed to merge the different considerations for statutory and common law review into the same analysis.

However the Privy Council did go on to find that it was for the GOC to determine whether its principal objective would best be served by allowing the contractual arrangements to continue or by terminating them. Thus

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73 Ibid, 560. See also *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699.

74 e.g. *State Owned Corporations Act 1989* (NSW), s. 8(c).

75 *State Owned Enterprises Act* 1986 (NZ).

76 [1993] 1 NZLR 551, 560 per Richardson, McKay and Robertson JJ.

77 (1990) 96 ALR 739.

78 [1994] 1 WLR 521.

79 Ibid, 526.

> it does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods and services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.[80]

The decision therefore seems to reach a compromise between the two approaches by providing for the operation of judicial review in principle, but in an extremely limited form,[81] and without addressing the fundamental issues in question. This may have been an attempt to address the concern that a GOC could potentially have 'all its commercial operations subject to constant judicial review',[82] but it seems an unsatisfactory conceptual basis for deciding the question.

### The limitations of judicial review in commercial contexts

The courts have yet to find a coherent rationale for the application of judicial review to GOCs, and have struggled with the contradiction between the requirement that public bodies be subject to the scrutiny of the courts, and the private and commercial nature of their contractual dealings. The debate over GOCs perhaps reflects the inability of administrative law to modify or adapt its 'red light' approach[83] of restraining the exercise of government power to an altered method of government service delivery. The obvious argument against judicial review for GOCs is one of 'competitive neutrality', that the GOC is unable to compete with private competitors who are not subject to the same obligations. However that argument is valid only if judicial review is not otherwise an appropriate measure for the commercial activities of GOCs. If it is appropriate then perhaps it is a cost which should be met.[84] Accordingly what is important is to look at the suitability of judicial review in the context of commercial transactions.

It is apparent that it is difficult to apply a model used for reviewing regulatory determinations which subject a citizen to legal control to the commercial activities of GOCs, where transactions are, at least in law, voluntarily entered.[85] This is particularly the case for an arms length commercial transaction with other corporations of similar size and power, which arguably have an equal capacity to affect the rights of the GOC as the GOC has to affect their rights. Judicial review requires an identifiable final or operative 'decision' which can be challenged.[86] This reflects the determinative nature of 'administrative' decisions, and is not suitable for the wide variety of commercial conduct which may be engaged in by a GOC, even though the entry or refusal to enter into contracts may be categorised as a decision for the purposes of administrative law.

One objective of judicial review is to improve government decision making generally, but there is a danger that it may have the opposite effect on the quality of commercial decisions made by a GOC, which require some robustness and risk taking.[87] The prospect of judicial review may lead to a timidity in commercial decisions which impairs the efficiency of the GOC, and works against the very purpose of corporatisation. The negative effect therefore

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80 Ibid, 528-529.

81 For criticism of these narrow grounds of review, see M Taggart, 'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351.

82 *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 *NZLR* 699, 707 per Woodhouse P.

83 C Harlow and R Rawlings, *Law and Administration* (1984), Chapters 1 and 2.

84 See Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), para 4.21-4.24.

85 A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363.

86 *Australian Broadcasting Tribunal v Bond* (1990) 190 CLR 321, 336-337 per Mason CJ, Brennan and Deane JJ agreeing.

87 The warning of Mason CJ regarding impairment of the efficient administration of government, in *Australian Broadcasting Tribunal v Bond* (1990) CLR 321, 336-337, also seems applicable in this context.

extends beyond the simple cost of judicial review proceedings. The GOC could not be adequately compensated by the government for this effect on its decision making ability, which would be impossible to quantify.[88]

The decisions reflect a clear reluctance on the part of the courts to involve themselves in commercial decisions, lest that lead to consideration of the merits of the decision or commercial issues which they are ill equipped to judge. As the considerations involved in commercial decisions are not as clearly identifiable as express or implied statutory criteria, by what criteria would the court judge the decision?[89] The paradox is that it is difficult to see how the court could apply the usual grounds of review to a commercial decision, particularly the wide grounds available in statutory judicial review, without intruding into these issues, yet the grounds suggested by the Privy Council in *Mercury Energy* are so narrow they would be rarely invoked.

The impact of competition in controlling the commercial activities of GOCs should also not be underestimated. The Administrative Review Council has concluded that where an enterprise is subject to competition, the use of judicial review should be constrained to allow 'more appropriate' contractual or trade practices remedies to operate.[90] These conclusions have received some criticism,[91] but they are correct. Effective competition acts as a powerful mechanism for customer service and accountability for its decisions, and for efficient behaviour. The individual will have little need for the assistance of administrative law remedies where he has a genuine choice in relation to the delivery of services. The ability to take one's custom elsewhere is a more effective mechanism of individual justice in a commercial context than judicial review could provide, and other remedies will be more appropriate, particularly in their ability to provide monetary compensation.

## The application of judicial review to GOC activities

There are therefore a number of reasons why judicial review may not be suitable as a remedy for commercial decisions. Further, a commercial decision almost always does not involve the exercise of 'government' power (in the sense described above), which is the usual focus of judicial review. The fact that in some circumstances the 'voluntary' nature of the contract may be largely illusory does not detract from the observation. In such a case the compulsion arises from the lack of competition rather than a power conferred by government. If the judicial review regime is to apply to GOCs in this situation, it should also logically apply to the commercial decisions of any body in the same circumstances.

In this sense the *General Newspapers* approach does recognise the distinction between government and non-government power in the particular transaction, for the purposes of statutory judicial review. The statement by Davies and Einfeld JJ in *General Newspapers* that judicial review does not apply to 'acts taken under the general law applicable in the community'[92] refers to the lack of government power in those acts. If the direct or proximate source of power is statute, then the GOC is exercising government power. However if the statute merely provides the GOC with a general capacity to act, it removes the connection with government power, and the power arises from the general law. For this reason the

88 cf N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198 at 203.

89 See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219 per Mason J, regarding the difficulty of applying judicial review to exercises of the prerogative.

90 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995).

91 M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44.

92 (1993) 117 ALR 629 at 633 per Davies and Einfeld JJ, Gummow J agreeing.

*General Newspapers* approach is to be preferred to the broad assumptions inherent in the decision in *Mercury Energy*.

It may be that the requirement that the decision be of 'an administrative character' could also have a role in limiting review of commercial decisions. It is clear that a decision is not deprived of an administrative character merely because it is 'commercial'.[93] In *James Richardson*, Cooper J considered that a decision to accept a tender was administrative, in relation to the decision of an 'administrative body' in the discharge of statutory functions.[94] However it is difficult to see how a purely commercial transaction of a GOC can be so categorised. If this requirement is interpreted to exclude decisions which are clearly 'commercial' and have no regulatory or social service aspect,[95] it is not necessarily inconsistent with the authorities, where the courts have not had to consider a commercial government business transaction.

In cases of common law judicial review, a simple 'public function' or public ownership test, as given in *Mercury Energy*, is not sufficient. Just as it should not automatically be assumed that all actions of GOCs are private and beyond administrative law, it should also not be assumed that public ownership means that all decisions may be challenged. The difference between commercial and other functions, and between government and non-government powers, should be considered in the context of the particular transaction. Admittedly it is sometimes difficult to differentiate between these functions, but it is an explicit objective of corporatisation to clearly separate them. It should be possible to make the distinction with GOCs.

This is not intended to suggest that judicial review has no role in providing remedies for individuals for the unlawful conduct of GOCs. It will still be appropriate in some contexts. The clearest of these is the exercise of regulatory functions conferred by statute. Where a GOC acts under the direct force of legislative enactment to regulate the conduct of persons, it exercises government power. Keeping the exercise of that power within lawful bounds is within the established requirements of both statutory and common law judicial review.[96] Where the regulatory function is not explicitly stated in legislation, the decision in *R v Panel of Take-overs and Mergers; Ex parte Datafin*[97] provides some support for the application of common law judicial review. In that case, because the government had made a conscious decision to withdraw from regulation and allow the Panel to be the regulator, in the circumstances the power the Panel exercised was seen as governmental.[98] However it should be noted that *Datafin* related only to decisions of a regulatory nature which affected the rights of persons under its consensual jurisdiction. Nothing in *Datafin* supports the application of judicial review to purely commercial decisions of GOCs or any other body.

There is also some role for judicial review in the area of social service functions, where the GOC is acting under a direction from the government to achieve a specific 'public' objective.

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93 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284; *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1993) 117 ALR 277.

94 (1993) 117 ALR 277, 280.

95 cf *British Columbia Development Corporation v Freidmann* [1984] 14 DLR (4th) 129, where a decision was seen as both commercial and the implementation of government policy, which made it a 'matter of administration' for the purpose of the Ombudsman's jurisdiction. See A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363 at 368-371.

96 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 388, 408 per Lord Diplock.

97 [1987] 1 QB 815.

98 It has been argued that a connection with government is unnecessary, and that 'de facto monopolistic powers' should be sufficient: D Pannick, 'Comment: Who is Subject to Judicial Review and in Respect of What?' [1992] *Public Law* 1, 4. See also *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 123 ALR 215, 224 per Beaumont J.

This is particularly the case where there is an obligation or specific power to carry out an objective directly imposed by statute. A decision made in pursuance of such an obligation would be a decision 'under an enactment' for the purposes of statutory judicial review, because the statute expressly requires the action. Such a decision would also be amenable to common law judicial review as the exercise of a statutory function.[99] GOC legislation requires CSOs to be imposed by the statement of corporate intent or other agreement, or Ministerial directions. There may arguably be a place for judicial review in the delivery of CSOs, even though CSOs will often be implemented through the vehicle of a commercial transaction.[100] It may be difficult to characterise a decision made by the GOC in performance of CSOs as 'under an enactment' unless it is expressed in legislation,[101] but a GOC could be amenable to common law judicial review in relation to any failure to carry out or comply with those objectives. The CSO is a social objective, the performance of which the government has expressly delegated to the GOC by statutory direction, and there is an identifiable public interest in which the GOC must act, which may create grounds for review.

Admittedly many CSO obligations are expressed as broad, general duties, which the courts have difficulty transforming into enforceable legal obligations.[102] However where an obligation is clearly specified, non-compliance with the obligation may give rise to judicial review.[103] The question of whether a requirement of 'social responsibility' in GOC legislation could be the basis for review for the delivery of CSOs remains open. The broad basis for judicial review of GOCs suggested in *Mercury Energy* made a decision on that issue unnecessary. It is doubtful that the weaker requirements in the Victorian and Queensland Acts would be sufficient,[104] but it is arguable that a statutory requirement to act with social responsibility could be interpreted to require the proper performance of social service functions, if not purely commercial ones. However if a decision of a GOC regarding the delivery of social services is not amenable to judicial review, decisions or directions by the government itself in the governance of the GOC may be subject to such review.[105] It is possible that judicial review could be invoked for decisions by shareholding Ministers to give directions to GOCs, such as the amendment or removal of a particular social program, subject to the reluctance of the courts to review the political or policy decisions of Cabinet.[106]

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99 See *R v British Coal Corporation; Ex parte Vardy* (1994) 6 Admin LR 1, 38 per Glidewell LJ.

100 Lucas argues that commercial decisions should be subject to judicial review where they are used as an instrument of government or social policy: A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363, 368-371.

101 In terms of the GOC Act (Qld), a Statement of Corporate Intent would not satisfy the definition of a 'Statutory instrument', nor could the decision be seen as made under a Ministerial direction made under the Act, for the purposes of s. 4 of the *Judicial Review Act 1991* (Qld).

102 *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

103 Subject to requirements of standing, if a special interest can be shown.

104 Section 20 of the GOC Act (Qld) only requires a GOC to 'be commercially successful in the conduct of its activities and efficient in the delivery of its community service obligations', while s. 18 of the *State Owned Enterprises Act* 1992 (Vic) requires a SOE to act for the public benefit, but only in terms of efficiency and contribution to the economy.

105 *New Zealand Maori Council v Attorney-General* [1993] 1 NZLR 513.

106 *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

## General Law Remedies[107]

It has been argued above that where a GOC is constrained by effective competition and its powers are derived generally from the Corporations Law or another statute, it may not be exercising any government or market power in its commercial dealings, and judicial review is not appropriate in these situations. However where the GOC is providing an 'essential service' such as gas, electricity or water, and is the only supplier, the citizen is placed in a more vulnerable position due to the lack of proper choice. An obligation to act fairly in these cases is more compelling. But this problem still arises as a result of market power, not because the GOC is publicly owned. A key element of National Competition Policy is to reform the structure of industries to introduce competition wherever possible. Where this is done and effective competition exists, these problems will be unlikely to arise. If this cannot be achieved, protection mechanisms need to be put in place, such as prices oversight and access regimes, preferably at the same time as corporatisation. [108] The use of other mechanisms such as an industry Ombudsman or government regulation of the industry may also be appropriate, and trade practices and other general law remedies assume greater importance.

In a case where a GOC is not exercising government power, but only possesses market power, the development of general law remedies would seem to be more appropriate for protecting the interests of the individual, because it is a power that could equally be exercised by public or private bodies. There is already some indication that the general law is being infused with the values of public law, particularly in cases regarding clubs, trade unions, domestic tribunals,[109] and even sporting clubs,[110] where an obligation to provide procedural fairness has been implied because the decision maker occupies a position of power due to a *de facto* monopoly over the regulation of the activity in question, and has the ability to affect the person's livelihood. This seems a better approach for the protection of consumers in a deregulated setting.[111]

This approach was not tested in a number of cases in England following *Datafin*, regarding bodies such as the football association, greyhound association and jockey club,[112] where the aggrieved persons sought remedies by way of judicial review. However it may have been more fruitful to challenge the decisions on a general law basis, perhaps through the law of contract, because that would not have required categorising the power exercised as 'public' power.[113]

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107 The term 'general law' is used rather than 'private law', because it applies equally to government and to other persons, e.g. see *Judiciary Act* 1903 (Cth) s. 64; *Crown Proceedings Act* 1980 (Qld) s. 9(2); *Northern Territory v Mengel* (1995) 185 CLR 307. The term 'private law' perpetuates the artificial distinction between public and private spheres.

108 e.g. *Competition Authority Act 1997* (Qld), Parts 3 and 5.

109 *Dickason v Edwards* (1910) 10 CLR 243; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329; *Australian Football League v Carlton Football Club Inc* (Vic CA, 25 July 1997, unreported).

110 *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242.

111 It has also been suggested that the common law duty upon monopoly providers to supply at a reasonable price be applied: M Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77 at 105-107. However in view of the immense difficulties encountered by the courts in establishing a 'reasonable' price, this seems unrealistic*: Telecom Corp of New Zealand v Clear Communications Ltd* (1994) 5 NZBLC 103, 552.

112 *R v Disciplinary Tribunal of the Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853 and other 'jockey club' cases cited therein; *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; *R v Football Association Ltd; Ex parte Football League Ltd* [1993] 2 All ER 833.

113 See *Mercury Communications v Director General of Telecommunications* [1994] 1 WLR 48, where the House of Lords allowed the challenge of a regulatory decision by a government decision maker on the basis of contract, even though judicial review may arguably have been available.

The way forward for regulating the commercial conduct of GOCs may be shown by the recent decision in *Hughes Aircraft Systems*,[114] where Finn J was prepared to imply a contractual duty to act fairly upon the Civil Aviation Authority, because the Authority was a public body, but also because of the circumstances relating to the particular tender. Although it has been argued that public ownership *per se* is not a sufficient basis to impose such a duty, it may however be appropriate to impose a duty in particular circumstances, such as where the behaviour of the GOC is not constrained by competition. However such a duty would arise not merely because of its public ownership.[115] The same obligation would then be imposed on any person in the same position, whether public or private. Thus in *General Newspapers*, the court seemed to hint that general law remedies might be applicable for the calling of tenders by GOCs in circumstances where rights of fairness could be implied.[116] If these remedies are developed, there is also no need to require GOCs to act as a 'model business', as the values of the market place should be sufficient.[117] Legal obligations which are not imposed on the basis of ownership alone will provide a more coherent means of securing justice for individuals.

## Conclusion

It is said that 'behind any theory of administrative law there lies a theory of the state',[118] and the arguments in this article are perhaps an example of this. However it also means that that courts need to recognise the changing nature of the state,[119] and the nature of the power it exercises in the context of the relevant transaction. The fact is that governments do engage in commercial activity, and now choose to do so through the vehicle of GOCs with a hybrid nature and varied functions and powers. The recognition by the courts that public ownership is not of itself an adequate criterion for the application of public or private law remedies will be a considerable start in ensuring that the objectives of corporatisation are not frustrated.

114 (1997) 146 ALR 1.

115 See also *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 *NSWLR* 234, 270-271 per Priestley JA; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181; J McLean, 'Contracting in the Corporatised and Privatised Environment' (1996) 7 *Public Law Review* 223.

116 (1993) 117 ALR 629, 637 per Davies and Einfeld JJ, Gummow J agreeing.

117 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), para 4.17.

118 C Harlow and R Rawlings, *Law and Administration* (1984), p. 1.

119 See Sir Ivor Richardson, 'Changing Needs for Judicial Decision Making' (1991) 1 *Journal of Judicial Administration* 61, 63.

# PART 8 OF THE *MIGRATION ACT 1958* (Cth) AND THE DECISIONS IN ABEBE AND ESHETU

*Robert Beech-Jones**

*Edited version of an address to an AIAL seminar in Canberra, 4 June 1999*

## Introduction

On 14 April 1999 and 13 May 1999 the High Court published its decisions in *Abebe*[1] and *Eshetu*[2] respectively. Their immediate effect was to resolve questions that arose concerning the constitutional validity of the judicial review scheme created by Part 8 of the *Migration Act 1958* (Cth) ('Part 8' and the 'Act' respectively)[3] and the reliance by the Federal Court on s.420 of that Act as a means of interfering with factual findings of the Refugee Review Tribunal (the 'RRT') and the Immigration Review Tribunal (the 'IRT').[4] However the decisions also raise, but do not necessarily resolve, a number of further issues concerning the power of the Parliament to confer a restricted jurisdiction upon the Federal Court, the operation of s.75(v) of the Constitution and the scope of the ground of judicial review commonly referred to as 'Wednesbury unreasonableness.'[5]

Before considering those issues, it is first necessary to consider the operation of Part 8.

## Part 8 and Section 75(v) of the Constitution

Prior to 1 September 1994, decisions, and conduct engaged in for the purpose of making such decisions,[6] made under or pursuant to the Act were reviewable by the Federal Court exercising jurisdiction under the *Administrative Decision (Judicial Review) Act 1977* (Cth) ('the ADJR Act') and s.39B of the *Judiciary Act 1903* (Cth) (the 'JA'). However, on that day the new Part 8 of the Act came into force.[7]

First, Part 8 provides an exclusive code for judicial review by the Federal Court of migration decisions. The Federal Court's jurisdiction under the ADJR Act and s.39B of the JA is specifically excluded.[8]

Second, the jurisdiction conferred on the Federal Court is further confined to reviewing only 'judicially reviewable decisions' which, subject to the operation of s.475(2), are IRT decisions, RRT decisions and 'decisions relating to visas'. Section 475(2), in effect, excludes judicial

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1 *Abebe v The Commonwealth*; *Re The Minister for Immigration and Multicultural Affairs and Another; ex parte Abebe* (1999) 73 ALJR 584.

2 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 73 ALJR 746.

3 In the case of *Abebe.*

4 In the case of *Eshetu.*

5 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

6 For ease of reference these will be referred to as 'migration decisions'.

7 It was the final stage in the staggered reform introduced by the *Migration Reform Act 1992* (Cth): see the discussion in *Minister for Immigration and Multicultural Affairs v Ozmanian* (1997) 71 FCR 1; Part 8 applies to those 'judicially reviewable decisions' made on or after 1 September 1994: *Yaou* v *MIEA* (1996) 69 FCR 583.

8 S.485(1); however the Federal Court's jurisdiction to hear appeals from the AAT under s.44(l) of the *Administrative Appeals Tribunal Act 1975* (Cth) is not affected: s.485(2).

review by the Federal Court of decisions for which internal review is available and any aspect of the Minister's non-compellable powers.[9] Moreover, s.485(1) also operates to exclude the Federal Court's jurisdiction to review what could be described as 'conduct' (in the ADJR sense) engaged in for the purpose of making decisions under the Act.[10] The overall effect of these provisions is to restrict access to judicial review in the Federal Court until merits review is exhausted by the making of a 'final' decision.

Third, the grounds of review available under Part 8 are significantly narrower than those available under s.5 of the ADJR Act and s.39B of the JA.[11] Natural justice, unreasonableness, taking into account irrelevant considerations, failing to take into account relevant considerations, exercising a power in bad faith and otherwise exercising a power in such a way that it represents an abuse of power are specifically excluded. While 'actual bias' is a ground of review,[12] the exclusion of 'natural justice' results in 'apprehended bias' on the part of a decision maker not being a ground of review.[13] Moreover the error of law ground of review in s.476(1)(e) is more restrictive than the equivalent ADJR provision.[14] Whereas the latter simply refers to 'an error of law' the former only provides for 'an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found'. It seems that, at the very least, this formulation does not extend to allowing for review where there is a finding of fact in respect of which there is no evidence (which does fall within s.5(1)(f) of the ADJR Act).[15] These restrictions are discussed further below.

Fourth, s.478 of the Act imposes a strict 28 day time limit for making applications for judicial review. This cannot be extended.

As noted above, Part 8 only operates to inhibit the Federal Court's jurisdiction. An obvious tension arises between those provisions and s.75(v) of the Constitution which invests the High Court with original jurisdiction 'in all matters...in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. Unlike the jurisdiction conferred by the ADJR Act, the jurisdiction conferred on the Federal Court by Part 8 is, at least in some respects, significantly narrower than that conferred by section 75(v).[16] The writs referred to in s.75(v) can be granted at the very least where there is a breach of the rules of natural justice.[17] Section 75(v) can, on sufficient cause being shown, be invoked at any stage of the decision making process.[18] Further, there is no time limit upon the grant of remedies specified in s.75(v).[19] Prohibition can be granted at any time that reliance is sought to be placed on the legality of administrative action.[20]

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9 See ss.48B, 341, 345 and 417 and *MIMA v. Ozmanian*, supra.

10 *MIMA v Ozmanian*, supra.

11 See s.476(2), 476(3)(d) to (g).

12 s.476(1)(f).

13 *Bilgin v MIMA* (unreported, Federal Court of Australia, Finkelstein J, 6 October 1997). Unless otherwise stated all references to 'unreported' are Federal Court decisions.

14 s.5(1)(f).

15 See *ABT v Bond* (1990) 170 CLR 323, p.355-357 per Mason CJ.

16 Although still in some respects arguably wider: see *Abebe*, 590, per Gleeson CJ and McHugh J.

17 *Abebe*, 607, per Gaudron

18 For example, prohibition can be sought restraining a decision maker from apprehended bias prior to the making of a decision.

19 Order 55 rule 30 of the High Court Rules specify that application for order nisi for a writ of mandamus should be brought within two months of the 'refused to hear' but this period may be extended on sufficient cause being shown.

20 See Aronson & Dyer, *Judicial Review of Administrative Action* (Law Book Co), p.760

Until the enactment of Part 8, this jurisdiction was rarely invoked, other than in relation to Federal Courts and industrial tribunals, as the High Court's jurisdiction under s.75(v) of the Constitution was no wider[21] than the Federal Court's jurisdiction under the ADJR Act and s.39B of the JA. If an application for prerogative relief was filed in the original jurisdiction then, unless relief was sought against a member of a Federal Court or industrial tribunal, it could be remitted to the Federal Court pursuant to s.44 of the JA, without any loss of the grounds of review available.[22] Part 8 deals with this by expressly modifying the remittal power as follows:

> (3) If a matter relating to a judicially reviewable decision is remitted to the Federal Court under section 44 of the Judiciary Act 1903, the Federal Court does not have any powers in relation to the matter other than the powers it would have had if the matter had been as a result of an application made under this Part.[23]

Thus, if a person seeks to demonstrate the invalidity of a migration decision because, for example, it involves a breach of the rules of natural justice, they are forced to initiate proceedings in the High Court and remain there.[24] In the author's experience, to date very few cases have actually proceeded to a final hearing on the merits before a Full Bench.[25] The majority of cases appear to have either resulted in the application for an order being dismissed by a single Justice,[26] or the splitting of the proceedings, with the High Court remitting to the Federal Court that part of the proceeding which raises grounds of review it can determine consistent with Part 8 and retaining the remainder to be determined later if necessary.[27]

It was against this legislative background that *Abebe* and *Eshetu* came to be determined.

## Abebe

Ms Abebe is an Ethiopian citizen who arrived in Australia in March 1997. She subsequently applied for a protection visa.[28] This was refused by a delegate of the Minister and she sought review in the RRT. On 30 September 1997 it rejected her application and affirmed the delegate's decision. She subsequently filed an application for judicial review in the Federal Court. That application sought to rely on some of the grounds specified in s.475(1) as well as the grounds excluded by s.475(2), namely that the decision involved a breach of the rules of natural justice and was manifestly unreasonable in the Wednesbury sense (the 'excluded grounds'). Davies J dismissed the application and declined to consider the excluded grounds.

Ms Abebe then commenced two sets of proceedings in the original jurisdiction of the High Court. One was by way of an application for prerogative relief pursuant to s.75(v) of the Constitution relying on the excluded grounds. The other was by way of statement of claim,

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21 And probably narrower.

22 Unless the proceedings raised a constitutional issue such a writ would almost invariably be remitted to the Federal Court.

23 S.485(3). Curiously, no restriction is placed on the remittal power in relation to the review of migration decisions which are not judicially reviewable decisions.

24 It is unclear whether an application initiated in the High Court 28 days after notification of the decision can be remitted to the Federal Court. It will depend upon whether the words 'had been as a result of an application made under this Part' in s.485(3) are meant to suggest that such an application is to be treated as though it were validly made under Part 8, i.e. within time.

25 However, *Eshetu* and *Abebe* did.

26 See, for example Re The Minister for Immigration and Multicultural Affairs; ex parte Singh M88/1997 (unreported, Hayne J, 2 June 1998) (transcript).

27 See, for example, *Bedlington v Chong* (1998) 157 ALR 436, 438.

28 It is a criterion for the grant of a protection visa that the Minister or his/her delegate be *satisfied* that the relevant applicant is a person to whom Australia owes protection obligations under the Refugees Convention: see ss.36 and 65 of the Act.

which in its final form raised the issue whether any or all of the provisions of Part 8 were invalid insofar as it related to judicial review by the Federal Court of RRT decisions.[29] Both matters were referred to the Full Court.

The basis of Ms Abebe's constitutional challenge to Part 8 was as follows. Unlike a *Hickman* clause,[30] Part 8 did not purport to expand the lawfulness of the RRT's decision - that is, it did not attempt to free the RRT from the obligation to afford natural justice or authorise it to make what may be otherwise termed unreasonable decisions.[31] Part 8 simply restricted the grounds upon which the Federal Court could intervene such that it could not determine conclusively the lawfulness or otherwise of the impugned decision. The vesting of such a limited jurisdiction in a Federal Court was, so it was argued, not authorised by s.77 of the Constitution and/or was generally inconsistent with Chapter III of the Constitution. Sections 76 and 77 of the Constitution relevantly provide:

> 76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter -
> (i) arising under this Constitution, involving its interpretation;
> (ii) arising under any laws made by the Parliament;
> (iii) of Admiralty and maritime jurisdiction;
> (iv) relating to the same subject matter claimed under the laws of different States.
> 77. With respect to any of the matters mentioned in the last two sections, the Parliament may make laws:
> (i) defining the jurisdiction of any Federal Court other than the High Court;
> (ii) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the court of the states;
> (iii) investing any court of a state with federal jurisdiction.

At the core of Ms Abebe's argument and the disagreement between the Justices was the meaning of the word 'matter' in ss.75, 76 and especially s.77 of the Constitution. Ms Abebe argued that a 'matter' existed independently of a Court and its powers and procedures and involved the whole of the legal controversy arising out of a particular substratum of facts. According to this argument, what is conferred upon the Federal Court by Part 8 of the Act was not jurisdiction to decide a 'matter' but, at its highest, only jurisdiction to determine an aspect of the lawfulness of an RRT decision. A separate but related question was whether s.481(1)(a) was invalid insofar as it purported to confer on the Federal Court power to 'affirm' a decision of the RRT, but did not expressly confer power to dismiss an application. Arguably, this required the Federal Court to declare a decision lawful in circumstances where it could not be completely satisfied that that was the case.

The constitutional challenge was rejected by a majority of 4 to 3.[32]

Gleeson CJ and McHugh J upheld the validity of Part 8. Their Honours considered that, as s.77(ii) expressly authorised the making of laws defining the jurisdiction of the Federal Court 'with respect to any of the matters' listed in ss.75 and 76, even if what was conferred by Part 8 was jurisdiction over 'part' of a matter it was nevertheless valid.[33] Moreover, their Honours rejected the proposition that a matter existed independently of a court's powers and procedures concerning the rights and remedies that arise out of its determination. Thus one substratum of

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29 Although no issue was raised as to Ms Abebe's standing it seems that the only advantage to her in having Part 8 held invalid was that it would have enabled her application for prerogative relief to be remitted to the Federal Court. Given that it was dealt with anyway, it seems that she lost little by the failure of her constitutional challenge to Part 8.

30 See *R v. Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598.

31 See *Abebe*, p.606 per Gaudron J, and generally the discussion in *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168, esp 205 (per Deane and Gaudron JJ)

32 Gleeson CJ, McHugh, Kirby and Callinan JJ; contra Gaudron, Gummow and Hayne JJ.

33 Abebe, 591-592.

facts may give rise to a number of different 'matters' in different courts.[34] It followed that Part 8 answered the description required by s.77(ii), in that it was a law defining the jurisdiction of the Federal Court with respect to a 'matter' and not **part** of a matter.[35]

In relation to the issue raised concerning the use of the word 'affirm' in s.481(1), Gleeson CJ and McHugh J considered that the powers conferred by s.481 'are to be understood and exercised in the light of the context in which they appear'.[36] While not expressly stated, it appears that their Honours considered that a Federal Court order 'affirming' an RRT decision should not be taken as anything more than a statement that none of the grounds specified in s.476(1)[37] were made out.

Gaudron J held that Part 8 was wholly invalid. Her Honour considered that a 'matter' required a final and binding determination as to legal rights or duties which in this case was not the right to have the RRT decision set aside but the right of an officer of the Commonwealth to 'act or give effect to the RRT decision' i.e. to assume the legality of the decision.[38] In Her Honour's view it followed that a determination of the issues raised by Part 8 did not involve the exercise of judicial power and was thereby invalid and also that Part 8 was not authorised by s.77(ii) of the Constitution.[39] While, in view of that conclusion, it was not necessary for Gaudron J to determine whether s.77(ii) authorised the conferral of jurisdiction in relation to part of a 'matter', in Her Honour's view it did not.[40]

Gummow and Hayne JJ also held Part 8 invalid. They agreed with Gaudron J that Part 8 does not purport to confer jurisdiction to decide a 'matter'. Like Gaudron J, they considered that the RRT had a duty to decide Ms Abebe's application according to law and that she had a 'right' to enforce that obligation.[41] Such a right did not have its origin in Part 8.[42] Their Honours also considered that the drafting of s.481, particularly the reference to 'affirming a decision', illustrated that the Part 8 was intended to operate as a complete code of judicial review when, properly construed, it did not. In their Honours' view, as only some of the aspects affecting the final determination on Ms Abebe's rights and the RRT's duties could be decided by the Federal Court, the Court was not being conferred with jurisdiction over a 'matter' within the meaning of ss.77(i) and 76(ii) of the Constitution and therefore Part 8 was invalid.[43]

Kirby J, in effect, agreed with Gleeson CJ and McHugh J's analysis of what constituted a 'matter' in the context of Part 8.[44] As nothing in Part 8 directed the Court as to the manner in which it should exercise the jurisdiction conferred on it, it did not offend Chapter III.[45] Otherwise

34 Ibid, 592-594.

35 Ibid, 594.

36 Ibid, 598.

37 Or perhaps those relied on by the relevant applicant.

38 Ibid, 609.

39 Id.

40 Id.

41 Ibid, 618-619.

42 Id.

43 *Abebe*, *620*. Their Honours did not expressly deal with the question as to whether jurisdiction over part of a 'matter' could be conferred on the Federal Court. However, it appears from their Honours' comments at p.612 to 613, paragraphs 140 to 143 that they considered the conferral of such a jurisdiction to not be the conferral of judicial power.

44 Ibid, 628-631.

45 Ibid, 631.

Kirby J considered that an order 'affirming' a decision was no different to a dismissal, i.e. a rejection of the grounds of challenge.[46]

Callinan J upheld the validity of Part 8. His Honour's conclusions were to the same effect as those of Gleeson CJ, McHugh and Kirby JJ.

The application for prerogative relief was dismissed by all seven Justices. The substance of Ms Abebe's complaint was that the RRT committed a jurisdictional error and/or constructively failed to exercise its jurisdiction[47] by its failure to specifically address a claim that she was raped and physically abused while being detained for reasons of her political affiliation and racial background. Due to various inconsistencies in her evidence and the claims she made over time, the RRT rejected her assertion that she was detained. Gleeson CJ, McHugh and Callinan JJ found that, as the RRT expressly rejected her detention claim, it was not necessary to deal separately with the rape claim.[48] The rejection of the former carried with it an implicit rejection of the latter. Gummow and Hayne JJ[49] dealt with the remaining arguments put on behalf of Ms Abebe.[50]

Most of the justices deferred any detailed consideration of Wednesbury unreasonableness until their respective decisions in *Eshetu*. However in the context of construing Part 8 for the purpose of determining its constitutional validity, Gaudron J stated:[51]

> Although 'Wednesbury unreasonableness' owes its legal significance in this country to statutory provisions concerned with judicial review of administrative actions, this does not mean that it is wholly irrelevant to the grant of relief under s.75(v) of the Constitution.
>
> A decision that is so unreasonable that no reasonable person could have arrived at it will often also be a decision involving a denial of procedural fairness. And there may be situations in which a decision of that kind cannot be related either to the matter to be decided or to the relevant head of legislative power. Moreover, reasonableness may have a further significance.
>
> As with the rules of procedural fairness, it is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it. However, as already indicated, that is not a matter that need now be decided.

## Eshetu

Section 420 of Act provides:

> (1) The [Refugee Review] Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
> (2) The Tribunal, in reviewing a decision:
> (a) is not bound by technicalities, legal forms or rules of evidence; and
> (b) must act according to substantial justice and the merits of the case.

46 Ibid, 632.

47 It was also said that the RRT failed to afford Ms Abebe procedural fairness by its failure to specifically put to her that it did not accept the 'rape claim', failed to take into account a relevant consideration by failing to consider whether Ms Abebe was raped and that the RRT's failure to inquire into that matter rendered the decision so unreasonable that no reasonable decision maker could so exercise the power.

48 *Abebe*, 603, per Gleeson CJ and McHugh J.

49 With whom Gaudron and Kirby JJ agreed.

50 *Abebe*, 620-624.

51 Ibid, 608-609.

Provisions such as s.420 are often included in enabling legislation for both Federal and State tribunals.[52] One issue raised by *Eshetu* was the relationship between ss.420 and 476(1), especially 476(1)(a) and 476(1)(c). In particular could a 'breach' of s.420 give rise to a ground of review specified in s.476(1)? Could that become a means of avoiding the provisions of ss.476(2) and 476(3)(d) to (g)?

Mr Eshetu is also a citizen of Ethiopia. He left Ethiopia in June 1992 and arrived in Australia in September 1993. He subsequently made an application for refugee status. As a result of various legislative changes this became an application for a 'protection visa'. His application was refused by the Minister and he sought review in the RRT. In November 1995 the RRT refused his application.

Mr Eshetu claimed that he had a well founded fear of persecution (should he be forced to return to Ethiopia) on the grounds of his (anti-government) political opinion and his race.[53] A critical part of his application was a claim that in December 1991 he was a member of the Student Council at the University of Addis Ababa. Mr Eshetu claimed that on the day before a demonstration organised by the Council was due to occur, he and other members of the Council were detained and tortured. The RRT conducted a search of the various sources of information concerning human rights abuses in Ethiopia. This material did not confirm that such an event occurred.[54] Without making any express finding concerning Mr Eshetu's credibility the RRT found that the event did not occur as he claimed. It then considered the remainder of his application, based on the facts it did accept, but found that it was not satisfied that he had a well founded fear of persecution for the purposes of the refugee definition.[55]

Mr Eshetu sought review in the Federal Court under Part 8. Hill J considered that the RRT's conclusion in relation to the December 1991 incident 'totally lacked logic' and that the decision was 'so unreasonable that no reasonable tribunal could reach it.[56] Nevertheless because of s.476(2)(b), Hill J held that he was precluded from interfering and Mr Eshetu's application was dismissed.

Mr Eshetu appealed to the Full Court which allowed his appeal.[57] Davies J based his decision upon two grounds. First, accepting Hill J's conclusion as to the unreasonableness of the factual decision of the Tribunal, Davies J held that this meant there had been a failure to comply with s.420 of the Act. His Honour considered that s.420 had both procedural and substantive aspects. The procedural aspect required it to provide a mechanism of review that was 'fair', ie the procedures adopted by the RRT must be 'fair'.[58] If they were not, the ground of review specified in s.476(1)(a) was made out. Moreover, the substantive aspect s.420 formed part of the 'applicable law'. Accordingly if the RRT did not act 'in accordance with the substantial justice and merits of the case' the ground of review specified in s.476(1)(e) would be made out.[59]

The second ground upon which Davies J based his conclusion was that there had been an error of law on the part of the RRT, in that its reasoning disclosed a misunderstanding of the

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52 See for example, s.108(1)(b) *Anti Discrimination Act 1977* (NSW), s.138 *Veterans Entitlement Act 1986* (Cth)

53 Mr Eshetu is of Amahran ethnicity and it was claimed that the new government in Ethiopia is dominated by members of a rival racial/ethnic group.

54 Nor did it 'prove' that it had not occurred.

55 See *Chan v. Minister for Immigration* (1989) 169 CLR 369.

56 (1997) 142 ALR 474, 486-487.

57 (1997) 71 FCR 300; Davies and Burchett JJ allowed the appeal, Whitlam J dissented.

58 Ibid, 304.

59 Ibid, 304-305.

concept of 'well-founded fear of persecution'.[60] This error was said to be manifested by the RRT's failure to make findings in relation to parts of Mr Eshetu's claims, which, if proved, could have supported the existence of a well founded fear of persecution on Mr Eshetu's part. The matters the RRT failed to address included whether Mr Eshetu was a member of the Student Council, whether he suffered an injury to his leg, as he claimed, when he was detained and whether he had left Ethiopia because of persecution by government forces.[61]

In a separate judgment Burchett J agreed with Davies J. Whitlam J dissented both as to the proper construction of ss.420 and 476 and the finding that the RRT's approach to Mr Eshetu's application was unreasonable.[62]

Whether or not Davies J intended it, the consequence of *Eshetu* was that the restrictions in s.476(2) and 467(3)(d) to (g) were easily overcome in the numerous cases that were heard under Part 8 in the Federal Court following the Full Court's decision. An allegation of a breach of the rules of natural justice was effortlessly converted into an allegation of a breach of s.420 and the relevant decision set aside.[63] What was held to be manifest unreasonableness or a failure to consider a relevant consideration were automatically considered breaches of s.420 reviewable under s.476(1).[64] This jurisprudence grew to the point where Part 8 was held to have given the Federal Court a general jurisdiction to review 'certain types of *mistaken* findings of fact',[65] thereby threatening to undermine the warnings in *Bond*[66] concerning interference with factual findings of administrative bodies.

The Minister was granted special leave to appeal from the Full Court's decision in *Eshetu*. As a defensive measure,[67] Mr Eshetu brought an application under s.75(v) seeking relief for Wednesbury unreasonableness on the part of the RRT. Both the appeal and the application were heard together.[68]

All seven justices agreed that a breach of s.420 did not give rise to any ground of review specified in s.476(1).[69] Gleeson CJ and McHugh J considered that such provisions were made to free tribunals from procedural constraints otherwise applicable to courts of law but noted:

> The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.[70]

Gleeson CJ and McHugh JJ also rejected Davies J's conclusion that the RRT's failure to make findings concerning certain aspects of Mr Eshetu's claims disclosed an error of law. In their

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60 Ibid, 313.

61 Ibid, 313.

62 Ibid, 369.

63 See for example *Gilson v. MIMA* (unreported, Lehane J, 21 July 1997); *Meadows v MIMA* (unreported, Einfield, Von Doussa and Merkel JJ, 23 December 1998).

64 See *Sun Zhan Qui v MIEA* (1997) 151 ALR 505, at 548-549 (per Wilcox J).

65 See *Inderjit Singh v. MIMA* (unreported, Weinberg J, 29 October 1998) followed by a Full Court in *Calado v. MIMA* (unreported, Moore, Mansfield and Emmett JJ, 2 December 1998).

66 *ABT v Bond* (1990) 170 CLR 321, 355-358 per Mason CJ.

67 That is, in the event that the appeal was successful.

68 And immediately after *Abebe*.

69 *Eshetu*, 754 to 755, per Gleeson CJ and McHugh J; 759, per Gaudron and Kirby JJ; 762, 763, per Gummow J; 773, per Hayne J, 775-778, per Callinan J. In so finding their Honours expressly agreed with the analysis of those provisions undertaken by Lindgren J in *Sun Zhan Qui v. MIMA* (unreported, 6 May 1997). Gaudron & Kirby JJ did state that s.420 'informs' the grounds in s.476(1) and 'described' the general nature of the review: *Eshetu*, 759.

70 *Eshetu*, 754-755.

Honours' view, this was just a means of disagreeing with the RRT's view of the merits of Mr Eshetu's case.[71] Gaudron and Kirby JJ agreed but their Honours found a different error of law had occurred in the RRT decision.[72]

This disposed of the appeal in the Minister's favour. However there remained for consideration Mr Eshetu's writ which, as noted above, sought to rely on there being Wednesbury unreasonableness on the part of the RRT.

Gleeson CJ and McHugh JJ held that, as the RRT had simply expressed its lack of satisfaction with Mr Eshetu's claim, and was only being criticised for giving weight to certain considerations and undue weight to others, it was not a case of 'Wednesbury unreasonableness'.[73] Their Honours appeared to confine Wednesbury unreasonableness to cases involving an unreasonable exercise of a discretion or an 'abuse of power'.[74] They left little, if any, room for it to operate in relation to factual findings.

In view of the fact that they would have allowed the appeal, Gaudron and Kirby JJ did not consider the writ in any detail. They did comment that 'In essence, an unreasonable decision is one from which no logical basis can be discerned'.[75]

Their Honours considered there was a 'logical basis' for the RRT's decision in Mr Eshetu's case namely that it did not accept Mr Eshetu's factual claims.[76]

Gummow J noted that the legislative context in which the RRT's decision was made provided that eligibility for the visa was conditional upon the Minister's delegate, and the RRT on review, being *satisfied* as to the relevant applicant fulfilling the Convention definition.[77] According to Gummow J and leaving aside the ADJR Act, Wednesbury unreasonableness was usually associated with abuses of discretionary powers and not fact finding by administrative bodies as to the existence of their jurisdiction.[78] In His Honour's view, it was logically inconsistent to assert, as Mr Eshetu's writ had asserted, that the RRT had acted unreasonably but within jurisdiction because unreasonableness with jurisdiction can only arise in relation to the exercise of discretionary powers.[79] According to Gummow J, a determination that a decision maker is not satisfied that a statutory criterion has been met and which is necessary to enliven a power 'goes to the jurisdiction of the matter and is reviewable under s.75(v)'.[80] But in what circumstances will such an opinion be reviewed where factual findings are involved? Gummow J made three observations. First, where the state of satisfaction depends upon factual matters as to which reasonable minds can differ, it will be difficult to show that no reasonable decision maker could have arrived at the decision in question, although 'it may be otherwise if the evidence which establishes or denies … that the necessary criterion has been met was all one

71 Ibid, 755, per Gummow J and 773, per Hayne J.

72 Ibid, 761-762. The error was said to be a failure to appreciate that the Ethiopian government might impute to Mr Eshetu a particular political opinion, namely a tendency to advocate violence. This error was never raised or suggested by any party or member of the courts at any relevant time during the litigation prior to the publishing of the judgment.

73 Ibid, 754.

74 Ibid, 753-754.

75 Ibid, 762.

76 Id. Hayne J stated that he prefer to express no view on the unreasonableness ground and its availability under s.75(v). His Honour agreed with Gleeson CJ and McHugh J that no manifest unreasonableness was demonstrated: *Eshetu*, 773. Callinan J's judgment was to similar effect: *Eshetu*, *779*-781.

77 Ibid, 765-766; see ss.36 and 65 of the Act.

78 Ibid, 766-767.

79 Ibid, 767-768.

80 Ibid, 768.

way'.[81] Secondly, factual findings in this context can be reviewed on a wider basis than that suggested in *Bond*[82] because they are matters going to jurisdiction.[83] Thirdly, in conducting that process, and depending upon the various circumstances, significant deference will be afforded to a tribunal's view on such factual matters.[84]

So what criteria are to be used in application under s.75(v) involving unreasonableness in a context such as this? Gummow J tentatively posed the following test:

> Where the issue whether a statutory power was enlivened turns upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably, I would not adopt the criterion advanced by Lord Wilberforce.[85] I would prefer the scrutiny of the written statement provided under s.430 by a criterion of 'reasonableness review'. This would reflect the significance attached earlier in these reasons to the passage extracted from the judgment of Gibbs J in Buck v. Bavone. It would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds.
>
> It may be that there should be accepted some stricter view as to what must be shown in such a case by an applicant seeking relief under s.75(v) of the Constitution. It is not necessary to determine whether this is so. That question may be left for developed argument in another case.[86] (emphasis added)

Gummow J held that there was nothing illogical about the RRT's reasoning in Mr Eshetu's case.[87] In dismissing the application Gummow J added the following remarks which may be of significant consequence.

> There is a further aspect of this procedural bifurcation which should be noted. The application to this Court under s.75(v) of the Constitution was instituted on the footing that the effect of s.476(2)(b) and s.485(1) of the Act was to deny to the Federal Court the jurisdiction it otherwise would have had under s.39B of the Judiciary Act 1903 (Cth) ('the Judiciary Act') in respect of a 'Wednesbury unreasonableness' ground of review. However, where the question is whether the Minister was obliged by s.65 to grant a protection visa upon satisfaction that the applicant met the criterion under s.36(2) for a protection visa, 'Wednesbury unreasonableness' does not enter the picture. Rather, *the question would appear to be whether the Minister did not have jurisdiction to make the decision* (s.476(1)(b)), the decision was not authorised by the Act (s.476(1)(c)), the decision involved an error of law (s.476(1)(e)) or there was no evidence or other material to justify the making of the decision (s.476(1)(g) as amplified by s.476(4)). The exclusion by s.476(2)(b) of 'Wednesbury unreasonableness' would not be material. Upon that footing, the Federal Court would have jurisdiction conferred by both s.486 of the Act and s.39B of the Judiciary Act, concurrently with that conferred upon this Court by s.75(v) of the Constitution.[88] (emphasis added)

It appears that, consistent with Gummow J's view that an attack upon whether a state of satisfaction was reasonably reached is a matter going to jurisdiction, His Honour considers that such an attack can invoke, *inter alia*, the ground of review specified in ss.476(1)(b), notwithstanding the express terms of s.476(2)(b). It may be that the comments of Gaudron J in *Abebe* set out above are to the same effect insofar as Her Honour suggests that, as a matter of construction, it is usually an essential precondition to the exercise of a statutory power that it be

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81 Ibid, 770.

82 (1990) 170 CLR 321, 355-356 (per Mason CJ).

83 *Eshetu* at 770.

84 Id.

85 In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977) AC 1014.

86 Ibid, 771.

87 *Eshetu*, 771.

88 Ibid, 772.

done reasonably. Presumably, if it is not exercised reasonably, it is not authorised by the statute.

## A Few Observations

It need hardly be stated that nothing in the judgments in *Eshetu* and *Abebe* can be taken as an endorsement of the clumsy scheme of judicial review created by Part 8, especially the restriction on the remittal power of the High Court. To require litigants to pursue similar remedies on different bases in different courts is only productive of expense, delay and uncertainty. With ever increasing restrictions on legal aid and the high cost of pursuing judicial review applications in the High Court as opposed to the Federal Court, the result will be that recipients of adverse but legally flawed decisions will be denied their rights, whereas less deserving but well resourced litigants will be given a second chance at judicial review and the opportunity to create further delay.

The RRT is often described as being an 'inquisitorial' or 'investigative' body and not an 'adversarial' one.[89] Certainly, there is no contradictor to the application for review and, to an extent, the conduct of the review from the time of filing the application, lodging material, conducting a hearing and the making of a decision, is codified.[90] Despite this, it was not seriously doubted in *Abebe* and *Eshetu* that the RRT must still observe the requirements of procedural fairness in its conduct of the review, although the content of those requirements was clearly affected.[91] Apparently, emphatic wording is required before 'procedural fairness' is excluded.

*Abebe* and *Eshetu* raise for consideration, but do not resolve, questions as to what is truly meant by 'manifest unreasonableness' and the circumstances in which the establishment of such a ground in the legislative context in which the RRT operated will result in the issue of a writ mentioned in s.75(v). For various reasons many of the views expressed were tentative. Clearly, manifest unreasonableness can be invoked where the exercise of a discretionary power relevantly miscarries. Beyond that, the position is less clear. Gleeson CJ and McHugh J appear to deny it any role in relation to factual findings. Gaudron and Kirby JJ allow it to operate where the decision lacks a logical basis. Gummow J suggests, but does not conclude, that factual findings made in the course of achieving or denying a state of satisfaction which is a precondition to the exercise of a power can be reviewed under s.75(v) if they are not, *inter alia*, based on 'logical grounds'.[92] Presumably this applies with equal force to the ADJR and, according to Gummow J, and possibly Gaudron J, can be invoked under Part 8 as well. Hayne J expressly left open whether unreasonableness extends beyond abuses of discretionary powers into reviewing findings of fact.[93] Otherwise there appears to be no movement (yet) from the *Bond*[94] position that findings of fact cannot be reviewed if there is some material to support them[95] as 'want of logic is not synonymous with error of law'.[96]

*Eshetu* is the third case in the last three years in which the High Court has 'corrected' what it saw as impermissible merits review by the Federal Court of administrative decisions concerning

89 See for example *Abebe*, 621, per Gummow and Hayne JJ.

90 See former ss.423 to 431 of the Act.

91 See also *Abebe*, 616-617, per Gummow and Hayne JJ.

92 See text to notes 78 and 88 above.

93 *Eshetu*, 773. Callinan J's judgment appears to assume, without deciding, that unreasonableness can extend into factual matters: *Eshetu*, 779-781.

94 (1995) 170 CLR 321.

95 Ibid, 356.

96 Ibid, 356; see *Eshetu*, 770, per Gummow J.

refugee applicants.[97] The irony of *Eshetu* was that, although one could disagree with the factual findings of the RRT when compared with the material before it, overall the decision was thorough and well reasoned. That the Federal Court was prepared to interfere with it might lead to the impression that it was seeking to assume a general jurisdiction to conduct merits review of RRT decisions via a combination of ss.420 and 476(1) of the Act. However, the decision of the Full Court of the Federal Court in *Eshetu* arose in a context where the Court was being confronted with numerous applications seeking to invoke s.476 in relation to RRT decisions where some of those decisions were perverse and logically indefensible. This is illustrated by some of the subsequent decisions in which the Federal Court invoked s.420.[98]

Where to now for the Federal Court? Recently the Court has taken an expansive view of what is required by s.430 of the Act in relation to the RRT's obligation to provide reasons and, in particular, its obligation to 'set out its findings on material questions of fact' and 'refer to the evidence or any other material on which the findings of fact are based'.[99] This has developed from implying an obligation to make findings on the crucial issues of fact presented by an application for a protective visa[100] to one which requires a finding in relation to each relatively important aspect of the *evidence* before the tribunal.[101] Gummow J may have had this development in mind when he stated in *Eshetu* that s.430 'does not provide the foundation for a merits review of the fact-finding processes of the Tribunal'.[102]

97 The other two are *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259 and *Minister for Immigration and Ethnic Affairs v. Guo* (1997) 191 CLR 559.

98 See for example *Calado v MIMA* (unreported, Law Mansfield and Emmett JJ, 2 December 1998) where the RRT reasoned that because the members of a tribe spoke a particular language, and the relevant applicant spoke Portugese, he was not therefore not a member of that tribe without finding whether he in fact spoke their language as well as Portugese. In *Elmi v MIMA* [1998] 1457 FCA (unreported, Emmett J, 19 November 1997) Emmett J set aside a decision where the RRT rejected the credibility of a 16 year old Somalian woman on the basis, inter alia, that even though she lived in Mogadishu's outer suburbs and left the city when she was 13, she could not identify where its university was. She was not even asked whether she had ever travelled to the centre of the city to see the university.

99 s.430(1)(c) and (d) of the Act.

100 See *Muralidharan v MIEA* (1996) 62 FCR 402, 413-416, per Sackville J.

101 See *Kandiah v. MIMA* (unreported, Finn J, 3 September 1998) and *Thevendram v. MIMA* [1999] FAC 182 (unreported, Spender, North and Merkel J, 9 March 1999). *Contra Ahmed v MIMA* (unreported, Lee, Branson and Marshall JJ, 21 June 1999).

102 *Eshetu*, 765.

# CLARIFICATION

The Registrar of the Federal Court of Australia has written to the *AIAL Forum* with a comment on the article by John McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1. The Registrar drew attention to a reference in the article to *Devarajan v MIMA* [1999] FCA 796 (see text to n 105). The article noted that the decision of Moore J in that case involved a 9 month delay for a 6 page judgment. The Registrar has pointed out that 6 months of the delay resulted from making available certain documents that had been filed by the applicant in the proceedings to the Minister, for him to consider whether to exercise discretionary powers conferred by ss 417 and 48B of the *Migration Act 1918*. The issue was mentioned in para 21 of the judgment of the Court.