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a i a l FORUM

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RECENT DEVELOPMENTS IN REFUGEE LAW

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How does the Refugee Review Tribunal Work?

The Refugee Review Tribunal (RRT) is an administrative tribunal established under the *Migration Act 1958* ("the Act") to conduct external, independent merits review of the Minister's decisions to refuse to grant, or to cancel, a protection visa. The Tribunal's jurisdiction is defined under ss.411, 412 and 414 of the Act. The Tribunal commenced operations on 1 July 1993.

Section 36 of the Act states that a criterion for a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees ("the Refugees Convention"), as amended by the 1967 Protocol. Section 65 of the Act in effect requires the RRT to determine whether or not, at the time it makes its decision, it is satisfied that an applicant is a person to whom Australia has protection obligations under the Refugees Convention.[1]

Australia's obligations under the Refugees Convention arise as a consequence of the Executive's ratification (in 1954 and 1973 respectively) of the Convention and the Protocol. Under s.36 of the Act, the Convention definition of 'refugee' is a part of the assessment of a claim for a protection visa.[2] Under Australian law any claims an applicant for a protection visa may be said to have derive solely from the Act.

However, the obligations of Australia under the Convention are very limited. Article 33(1) of the Refugees Convention, which has been described as the "engine room" of the Convention,[3] sets out Australia's principal obligation under the Convention. It states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principal obligation of Australia is not to expel or return a refugee to the country in which he or she faces persecution. Neither the Convention nor the Act confers upon a fugitive a direct right to asylum in Australia.[4] Article 1A(2), which includes the definition of a "refugee", sets out five grounds of Convention persecution: race, religion, nationality, political opinion, and membership of a particular social group.

Under the Act, the RRT operates as an inquisitorial tribunal. It is required under s.420 to provide a mechanism of review that is fair, just, economical, informal and quick. It is not bound by "technicalities, legal forms or rules of evidence", and must act "according to substantial justice and the merits of the case". This requires the Tribunal to address the

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1 Other requirements are set out in clauses 785 (applicants who are not immigration cleared) and 866 (applicants who are immigration cleared) of Schedule 2 to the Migration Regulations 1994.

2 But it is not the whole test, see n. 11 below.

3 *MIMA v Al-Sallal* (1999) 167 ALR 175, Heerey, Carr, Tamberlin JJ.

4 *SZ v MIMA* [2000] FCA 836 at [14] per Branson J with whom Beaumont and Lehane JJ agreed.

central issues raised in a case,[5] and to "plainly and unambiguously raise with the applicant the critical issues on which his or her application might depend".[6] In *MIEA v Singh* Lee J stated:

> The obligation to provide substantial justice in the circumstances requires a broad consideration of the various elements of the case of an applicant to the tribunal for review. For example, the extent of the harm feared by the applicant, the personal experience of persecution by the applicant, events suffered by the applicant's family, and the general history of persecution in the country of nationality of the applicant would be relevant.[7]

The High Court has ruled that s.420 is intended to be facultative, not restrictive.[8] Consequently, it does not provide a ground of review of decisions made by the Tribunal. It allows the RRT to operate under the flexible procedures appropriate to an inquisitorial tribunal. For example, the RRT can take into account hearsay evidence, which in a court would be inadmissible under the rules of evidence.

In reviewing a decision to refuse to grant a protection visa, the Tribunal must determine whether or not it is "satisfied" that Australia owes protection obligations to an applicant before it. As with other inquisitorial administrative Tribunals, there is in the technical sense no evidentiary onus on applicants appearing before the RRT.[9] The Full Court of the Federal Court in *SZ v MIMA*[10] has recently re-affirmed that neither the Minister nor the Tribunal upon review is (nor could be) exercising judicial power.

In the decision in *A, B&C*, the Full Federal Court stated,

> The fact finding and evaluation to be undertaken by decision-makers in relation to applications for protection visas and by the Refugee Review Tribunal on review of their decisions is administrative in character. In consequence, it is not appropriate for those decision-makers to draw too closely upon the rules of evidence applied in civil proceedings. … It is equally inappropriate for the Tribunal to apply curial devices such as presumptions of law or fact. [Such presumptions have] no part to play in administrative proceedings which are inquisitorial in their nature.[11]

The RRT has a duty to investigate and collect information. Historical and 'background' information on countries from which asylum seekers have departed is essential material for the RRT member's consideration in any given case. The RRT must inform itself as to the conditions of the applicant's country of origin, both throughout the period in which persecution is claimed to have occurred and the point of departure from the country, and the conditions that exist at the time of the Tribunal's determination.

Hearings before the RRT are private. Sections 429, 439 and 440 of the Act ensure this privacy, prohibiting the disclosure and restricting the publication of, confidential information. While decisions of particular interest may be published under s.431, s.431(2) restricts the disclosure of information that would identify the applicant.

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5 *Sun Zhan Qui v MIEA* (1997) 81 FCR 71.

6 *Meadows v MIMA,* Full Court, unreported, 23 December 1998, per Merkel J.

7 (1997) 74 FCR 553, at 566.

8 *MIMA v Eshetu,* (1999) 162 ALR 577, in particular Gleeson CJ & McHugh J.

9 See *McDonald v Director-General of Social Security* (1984) 1 FCR 354, and *Nagalingam v MIEA*, unreported, 22 September 1992, Olney J.

10 [2000] FCA 836.

11 *A, B & C v MIMA,* [1999] FCA 116 (23 February 1999), French, Merkel & Finkelstein JJ. See also the High Court's observations in *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282-3, and in *MIEA v Guo* (1997) 191 CLR 559 at 573-4.

Section 427(6) provides that persons appearing before the Tribunal to give evidence (including applicants) are not entitled to be represented before the Tribunal or to examine or cross- examine others. However, applicants are invariably allowed to have an adviser present, and are given the opportunity to provide legal or other submissions at the hearing or following the hearing.

The power of the RRT is set out under s.415 of the Act: the RRT can affirm the Minister's decision; or vary the decision; or in certain circumstances remit the decision back to the Department for reconsideration; or set aside the decision and substitute a new decision: s.415(2).

What will Happen when the Administrative Review Tribunal Comes into Being?

Subject to the legislative process, it is expected that on 1 February 2001 the Refugee Review Tribunal will cease to exist. Its functions will be taken over by the Immigration Review Division (IRD) of the Administrative Review Tribunal (ART). The IRD will also take over the functions of the present Migration Review Tribunal (MRT).[12] This will not have any effect on the substantive law to be applied in dealing with applications for protection visas. Obviously, the 1951 Convention will remain unaltered. This change may have some effect on the procedures to be followed in dealing with the claims. This will depend on the content of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000.

Recent Amendments to the *Migration Act 1958*

The *Migration Legislation Amendment Act 1998*

This Act introduced, from 1 June 1999, a new procedural code relating to the operations of the RRT. This code is set out under ss.420A, 422, 424 - 426A, 430A,B, C & D, and 441, and additional Regulations.

Following the allocation of a case to a member, a decision is generally taken within 14 days as to whether a favourable decision on the papers can be made, and if not, whether an applicant can be invited to a hearing immediately, or whether further information is to be requested from an applicant or given to an applicant for comment. The general rule remains that, if a favourable decision is not made on the papers, an applicant must be invited to appear before the RRT.

The new provisions allow the RRT to request further information from an applicant. Such a request must be made in writing, comply with the notification requirements of the legislation and regulations, set out the time by which a response is to be made, and set out the consequences of failing to make available the information. Failure to provide the information requested can result in a decision being made without further invitation to provide information and without the offer of a hearing.

The RRT observes procedurally fair practices in its decision-making processes. Under s.425, the Tribunal must invite the applicant to appear before it to give evidence and present arguments. Under s.424A, adverse material which is specifically about the applicant or another person, and which was not given to the Tribunal by the applicant, must be given to an applicant for comment within a prescribed period. Where the information is not specific about the applicant, applying common law notions of procedural fairness, applicants must be given an opportunity to consider and comment upon any adverse information that is relevant, credible and material (and therefore able to be taken into account by the Tribunal).

12 See Administrative Review Tribunal Bill 2000 introduced in the House on 28 June 2000.

Under s.420A of the Act, the Principal Member has the power to issue directions in relation to the efficient conduct of reviews. Such directions have been issued. They set out timelines for the processing of a review by members, and cover issues such as the provision of translated country and other material by applicants, the timeframes for the receipt of written submissions following a hearing, making adverse information available to applicants/advisers where such procedures are not already required under s.424A, and the proper conduct of a hearing. These directions indicate that once a member signs and dates a decision the matter is 'finalised'. The Principal Member's Directions are accessible on the Tribunal's website.

Under the new provisions, where a decision is not given orally, it must be handed down (except in the case of applicants in detention). The date of the handing down is the date of the decision for the purposes of the 28-day period within which Federal Court appeals must be lodged. About 23% of applicants attend the handing-down of the decision.

An administrative circular has been issued by the Principal Member, which states that once a member signs and dates a decision, the member is *functus officio.* This means that the member has no further functions to perform in relation to the decision.[13]

The *Border Protection Legislation Amendment Act 1999*

The *Border Protection Legislation Amendment Act 1999*, which commenced on 16 December 1999, introduced amendments to the Act designed to prevent "forum shopping". The Supplementary Explanatory Memorandum to the Bill refers to "forum shopping" as the practice of using refugee processes as a means of bypassing general immigration requirements to obtain residence in Australia, and notes that "this practice of seeking protection elsewhere … represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations."

This Act codified in the Act the principles developed by the Federal Court in relation to "effective protection". The expression "effective protection" means "protection which will effectively ensure that there is not a breach of Article 33 if the person happens to be a refugee."[14]

Under international law, and under Australia's domestic law at least since the 1992 amendments to the Act,[15] an assessment under the Refugees Convention properly begins with a consideration of whether, under Art 33(1), the country in which asylum is sought owes protection obligations to the applicant for refugee status. As indicated, Australia does not necessarily have protection obligations to a person merely by virtue of that person having satisfied the Convention definition of "refugee". Australia does not owe an obligation of protection to a person, although a refugee from his or her country of origin, who enjoys 'effective protection' in another country.

Under the general law the following principles in relation to 'effective protection' had been established:

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13 See *Semunigus v MIMA* [2000] FCA 240 at [78] per Higgins J, and also at [20] per Spender J. But see, *contra*, *Akand v MIMA* [2000] FCA 626, where Madgwick J took the view that the Tribunal is not *functus* until the decision is actually handed down.

14 *MIMA v Thiyagarajah* (1998) 80 FCR 543, per von Doussa J.

15 These amendments changed the decision under the Act from whether a person met the definition of "refugee", which was up until the amendments a part of the Act, to an assessment of whether Australia owed protection obligations to a person; part of such an assessment involves applying the Convention definition.

- Where an applicant has a right of residence and re-entry to a third country, that country may be considered as providing effective protection to the applicant. Where an applicant has effective protection in a third country, Australia does not have protection obligations under Article 33 of the Convention, in relation to that person.[16] However, the Tribunal must consider whether the third country protection is practically accessible to the applicant in the light of his or her particular circumstances.[17]
- That third country must be a "safe" country in the sense that the applicant does not have a well founded fear of being persecuted there or being refouled to his or her own country. That country does not have to be a signatory to the Convention in order to be "safe", if it meets the above criterion.[18]
- The right of residence contemplated for the purposes of effective protection is not confined to the recognition of refugee status in the third country.[19]
- The right of residence does not have to be permanent; it may only be temporary.[20]
- Where a person has resided in a third country and travelled to Australia on travel documents provided by that third country, it is for that person to demonstrate that they have no right of re-entry to the third country.[21]
- Unwillingness alone to seek the protection of the third country is not enough.[22]
- A country does not have to provide a guarantee of protection from all harms in order for it to be considered a safe third country.[23]
- It is an error of law for the RRT to fail to consider the possible application of Article 33 of the Convention.[24]

Section 36 of the Act has been amended by the 1999 Act. The provision applies to applications made on or after 16 December 1999. The new s.36 (3) codifies the general law position that, by virtue of Article 33(1) of the Refugees Convention, Australia does not owe protection obligations to a person who has a right to enter and reside in, whether permanently or temporarily any country apart from Australia, and however that right arose or is expressed. Such a country includes countries of which the non-citizen is a national, but it may also arise on other grounds. An interesting question is whether the applicant should have visited the country in question. Or does it suffice that the applicant has a right to enter a country he or she has never been to, as might be the case of an ethnic Jew facing persecution but who has the right to enter Israel. Or he or she could be an ethnic Russian from a CIS State. The non-citizen is expected to take all possible steps to avail him/herself of the right. The general law requirement that it is for the non-citizen to demonstrate that he or she has no right of re-entry is not specifically referred to, but presumably remains operative.

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16 *Thiyagarajah,* op. cit, von Doussa, Moore & Sackville JJ.

17 *MIMA v Sameh* [2000] FCA 578, O'Connor, Tamberlin and Mansfield JJ.

18 *MIMA v Al-Sallal*, (1999) 167 ALR 175, Heerey, Carr and Tamberlin JJ. Reaffirmed in *MIMA v Sameh* [2000] FCA 578, O'Connor, Tamberlin and Mansfield JJ.

19 *Rajendran v MIMA,* unreported, full Federal Court, von Doussa, O'Loughlin & Finn JJ, 4 September 1998.

20 *MIMA v Gnanapiragasam & Ors* (1998) 88 FCR 1, Weinberg J.

21 *Tharmalingam v MIMA* [1999] FCA 1180, Ryan, Tamberlin & Madgwick JJ. Leave to appeal to High Court refused.

22 *MIMA v Prathapan* (1998) 156 ALR 672, Burchett, Whitlam & Lindgren JJ.

23 Id.

24 *Thiyagarajah, Gnanapiragasam.*

The new s.36 (4) and (5) excepts from such third countries any country in respect of which the non-citizen has a well-founded fear of being persecuted on Convention grounds or of being refouled to another country where he or she fears such persecution.

The new s.36 (6) introduces a change to the general law. It provides for the purposes of s.36(3) that "the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country." This section was intended to render inoperative the ruling of the Full Federal Court in *Jong*,[25] where it was held that the reference to "nationality" under the second paragraph of Article 1A of the Convention (which deals with persons with more than one nationality) is to be interpreted as a reference to "effective nationality". At the same time, that Court re-affirmed the well-established rule that the "formal" nationality of a person depends on the law of the country whose nationality is claimed.[26] It is not clear whether the provision as drafted actually goes beyond restating that principle.

In *Jong* the Court stated,

> … the inquiry does not necessarily end, in the case of a person with dual nationality, once it is concluded that the person has a second nationality and has no fear of persecution for a convention reason in the country of the second nationality. In such a case there remains the question whether the nationality is "effective", which in turn may lead to an inquiry as to the "availability" of protection.

The Court referred to the UNHCR Handbook at para 107, and quoted Professor Hathaway's comment that "the major caveat to the principle of deferring to protection by a State of citizenship is the need to ensure effective, rather than merely formal, nationality."[27] The Court went on to state,

> What is involved here is the proper construction of Article 1A(2) of the Refugees Convention. To interpret "nationality" for the purposes of Art 1A(2) as something of a "merely formal" character (to use the language of Professor Hathaway), instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugees Convention. Nor would such a construction advance, in any practical way, another object of the Refugees Convention, namely the precedence of national protection over international protection. That precedence has no obvious relevance where national protection is not effective.

The Court concluded by stating that,

> … to construe "nationality" … as referring to nationality that is effective as a source of protection and which is not merely formal is, in our view, to interpret Art 1A(2) in the manner required by the Vienna Convention as explained in the High Court in *Applicant A*, that is to say, in accordance with the ordinary meaning of the text but considering also the context and the object and purpose of the Refugees Convention.

The new s.36(6) requires a decision-maker to have regard only to the laws of the country in question when deciding whether a person is a national of that country for the purposes of subs. (3). This may only repeat a well-established rule, or it may be interpreted more broadly as overriding the "effective nationality" concept. If the latter is the case, the decision in *Jong* that

> (e)ffective nationality for this purpose is of course something that must be assessed in the light of all the circumstances of a particular case. The inquiry will thus extend to a range of practical questions, parallel to those posed by the expression "unable" in the first paragraph of Art 1A(2)

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25 *Jong Kim Koe v MIMA* (1997) 143 ALR 695, 705, Black CJ, Foster and Lehane JJ.

26 See the Hague Convention on Certain Questions Relating to Conflicts in Nationality Laws 1930, Art. 2.

27 *Jong*, note 25.

may no longer be the law. Section 36(6), if broadly interpreted, may also render the decision of Finkelstein in *Lay*[28] inoperative, premised as it is on an inquiry as to whether the applicant had an "effective nationality". However, even if the provision has the broader effect, the question remains, as pointed out by Hathaway in the passage cited earlier, whether a person can avail himself or herself effectively of the protection of the country of nationality. This would not be the case if that person were unable to enter the country of which he or she was a national.

However, for the dual national the amending legislation has put a further obstacle in his or her way which makes the assertion of a lack of protection dependent on the permission of the Minister. The 1999 Act further amends the Act so that in certain circumstances, a person who has more than one nationality, or who has effective protection in a third country, may not make a valid application for a protection visa, unless the Minister gives written permission to do so. In a world where empires have dissolved, countries have been partitioned and which has seen massive movements of population, dual nationality is very common. However, many persons, including many Australians, may not be aware that they possess more than one nationality. In other cases, as in the case of the East Timorese, the question of dual nationality may be disputed.

Subdivision AK of Division 3 of Part 2 has been added to the Act. The provisions of Subdivision AK including s.91P, and in conjunction with amendments to s.46 of the Act, have the effect of preventing non-citizens who have more than one nationality, or who are deemed, by virtue of the Minister's written declaration,[29] to have effective protection in a third country where they have stayed for more than 7 days and to which they have a right of re-entry, from lodging valid applications for a visa whilst they remain in the migration zone (defined in s.5 to include the States and Territories of Australia, land that is part of a State or Territory at mean low water, and sea within the limits of a State or Territory and a port). Non-citizens who are in the migration zone, but who are not immigration-cleared, cannot make a valid application for a visa whilst they are in the migration zone, or once they have left the migration zone. There is a ministerial discretion, which is exercisable in the public interest, to determine that s.91P does not apply to a non-citizen.

Section 46 of the Act sets out the requirements for a valid application for a visa. Section 46(1)(d) of the Act was recently amended to preclude non-citizens with access to protection from third countries from making a valid application for a protection visa or for any visa if they are not immigration cleared.

How does the new Subdivision AK affect the RRT?

Section 414 of the Act gives the RRT jurisdiction to review "RRT-reviewable decisions". Section 411 defines the term "RRT-reviewable decision" to include a decision to refuse to grant a protection visa. Section 412(2) provides that "[a]n application for review may only be made by a non-citizen who is the subject of the primary decision."

Section 65 of the Act provides that if, after considering a valid application for a visa, the Minister is satisfied of a number of criteria, he or she is to grant the visa; or, if the Minister is not so satisfied, he or she is to refuse to grant the visa. This section has the effect of allowing a decision to be made by the Minister or his delegate only where a valid application for a visa has been lodged. Moreover, under s.47(3), the Minister is not permitted to consider an application that is not valid. It follows that an application for a visa, which is not valid, will not usually be the subject of a decision to refuse a visa. If there is no such decision, then

28 *Lay Kon Tji* v *MIMA* (1998) 158 ALR 681, FC, Finkelstein J.

29 No such declaration has as yet been made.

there is no RRT-reviewable decision. In such a case the RRT has no jurisdiction. The RRT does not have the authority to review a decision that an application is not a valid application.

If there is no decision by the RRT, there cannot be jurisdiction on the part of the Federal Court to review that decision under s.475(1).[30] However the High Court in its original jurisdiction may review a decision of an officer of the Commonwealth.[31] The only recourse open to a non-citizen may be to seek from the High Court a writ of mandamus to have a decision-maker make a decision, or certiorari to have a decision that an application is invalid quashed.

If the RRT makes a decision on the merits in a case where the Department has determined that no valid application was lodged, then the Minister may appeal this decision to the Federal Court relying upon s.476(1)(b) of the Act – that is, that the person who purported to make the decision did not have jurisdiction to make the decision.

If the RRT receives an application for review of a decision to refuse to grant a protection visa, and the RRT determines that an applicant is a person to whom Subdivision AK applies, and the application for a visa was made on or after 16 December 1999 (the date of commencement of the amendments introduced by the 1999 Act), then by virtue of the amended s.46, its conclusion must be that the applicant did not lodge a valid application for a protection visa. In these circumstances the non-citizen cannot be granted a protection visa.

In this scenario, the RRT has jurisdiction by virtue of the existence of an RRT-reviewable decision. The fact that the primary decision is wrong does not deprive the RRT of its jurisdiction under ss.411, 412 and 414 of the Act.

In these circumstances, the Federal Court has jurisdiction to hear an appeal from a decision of the RRT that an applicant did not lodge a valid application for a visa.

Stateless persons

At the other end of the spectrum from the dual national stands the stateless person. The Convention in Article A (2) specifically provides for that situation in stating:

> …or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

For a short period the idea gained acceptance that it was sufficient that a stateless person was unable to return to the former habitual residence for whatever reason, whether based on the Convention or not. This view has now been rejected. The Full Court of the Federal Court held in *MIMA v Savvin*[32] that the inability of a stateless person to return to his or her country of origin does not by itself attract refugee status.

Other invalid applications for a protection visa

Leaving aside the issues just discussed concerning Subdivision AK, a number of recent decisions of the Federal Court have dealt with the issue of what constitutes a valid application for a protection visa. The issue of whether or not an application is valid is to be considered in the light of the statutory scheme provided under the Act.

Section 47 provides that the Minister is to consider a valid application for a visa, and s.45(2) states that the regulations may prescribe the way to make an application for a visa. Section

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30 But query whether in that case the exclusion of the Court's jurisdiction under s 485 applies. It could conceivably have jurisdiction under the *Administrative Decisions (Judicial review) Act 1977*.

31 Section 75(v) Constitution.

32 [2000] FCA 478 per Spender, Drummond and Katz JJ.

46 states that a visa is valid "if, and only if" it is made in accordance with s.45(2). The regulations provide that the Minister may in writing approve forms for making an application for a visa (clause 1.18); that an applicant must complete an approved form in accordance with any directions on it (clause 2.97(3)); and that the applicant must make specific claims under the Refugees Convention (clause 866.211(a)). Section 65 of the Act states that the Minister is to either refuse an application for a visa or grant the application "after considering a valid application for a visa".

Section 54 of the Act provides that the Minister must have regard to all the information in the application. Section 55 provides:

> 55. Further information may be given
>
> (1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister may have regard to that information in making the decision.
> (2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

Section 25C of the *Acts Interpretation Act 1901* is also relevant:

> 25C. Compliance with forms
>
> Where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient.

It is not unusual for an application to be completed incorrectly. The crucial questions asked in Items 36 to 40 are sometimes not responded to at all. At other times an applicant may simply say: "statement attached" or "statement follows". Sometimes a separate statement is attached to the application. At other times the statement is filed shortly thereafter and reaches the primary decision-maker later. In some cases no statement is filed until an application is made for review by the RRT.

In *MIMA v A*,[33] the majority of the Full Court took the view that an application which does not state the grounds upon which a protection visa is sought is not a valid application. As Merkel J stated:

> There is much to be said for the view that the intent of the legislative scheme is that information necessary to enable the Minister or his delegate to decide the substantive issues raised by a visa application must be provided as directed in an approved form. However, I do not accept that the same intent exists in respect of all of the information sought in an incomplete application irrespective of the significance or relevance to the outcome of the application or the uncompleted parts of it. I respectfully agree with the observation of RD Nicholson J in *Wu* that a literal approach to compliance "would possibly occasion great injustice". I would add that such an approach would be a triumph of form over substance which I do not regard the legislature as intending in an area fundamental to the human and family rights of those falling within the purview of the Act, many of whom could be expected to experience some difficulty in duly completing approved forms.

Specifically this means that the questions asked in items 36 to 40 inclusive of Part C must be answered. It cannot suffice to state "Statement follows" when nothing is attached. Although the advantage of an invalid application may be that a fresh application can be lodged without requiring the permission of the Minister under s.48A, the disadvantage is that, until this is done or unless the non-citizen has another kind of substantive or bridging visa not linked to a protection visa application, the applicant has no protection from removal. Any fresh

33 (1999) 91 FCR 435.

application must, of course, also comply with the law as it now stands, including Subdivision AK. Work rights, which were available under an earlier regime, may not be available on a later application.

Following *MIMA v A*, the view was initially taken that if no substantive material had been placed before the primary decision maker there was nothing for the Tribunal to review. The submission of material after the primary decision could not "cure" the defect, since the Tribunal was a review body and could not be placed in the position of a primary decision maker.[34] It was even suggested that an application, which was not self-contained but referred to accompanying material was invalid.[35]

However, following the Full Court decision of *Yilmaz v MIMA*,[36] pragmatism has prevailed. The Full Court endorsed the view expressed in *MIMA v A* that an incomplete application was invalid. The primary decision-maker therefore could not consider it. However, if the primary decision-maker did mistakenly consider it, according to the majority of the Court (Spender and Gyles JJ) his or her decision was nevertheless an RRT-reviewable decision. The majority also held that the original invalidity of the application could be remedied by the subsequent supply of substantive claims. Marshall J dissented on the simple ground that since the initial application was invalid, there was nothing that could be reviewed by the Tribunal. The subsequent supply of information changed nothing; it could not change the Tribunal from a reviewing body into a primary decision-maker. It follows from the majority view that, a fortiori, the supply of information to the Minister before the primary decision is made means that there is a valid primary decision.[37] The application becomes valid as soon as the statement is provided.

It is still uncertain whether an application can only be valid if all requirements of the form are fully complied with. For example, must all questions in the form be answered, or is substantial compliance sufficient? Thus, an applicant may answer only one question but supply sufficient material therein from which a claim can be deduced. In *MIMA v A* Merkel J was of the view that the application of s.25C of the *Acts Interpretation Act 1901* to the Act has not been excluded, and that it operates to render valid those applications for visas which substantially comply with the requirements of the Act and the regulations. "Substantial compliance", in his Honour's view, involves at least the completion of that part of the form relating to the specific claims for refugee status. In *Samuels v MIMA*,[38] Wilcox took the view that s.25C did not apply and that consequently strict compliance was required. But this appears to be a minority view.[39]

In apparent contrast to the above decisions stands the decision of Finkelstein J in *Potier v MIMA*.[40] That case concerned an applicant who was held in detention. The applicant had only filled in and lodged the one page application form, which was at the last page of Part A of the "Application Pack". None of the information requested in items 36 to 40 of Part C had been supplied. Nonetheless, the learned judge (who had been a member of the Full Court Bench in *MIMA v A*) held that the application was valid because the relevant instructions given appeared to suggest that the completion of that page was all that was required of

34 *Li Wen Han v MIMA* [2000] FCA 421 (Heerey J).

35 *Li Wen Han v MIMA.*

36 [2000] FCA 906.

37 *Nader v MIMA* [2000] FCA 908; see also: *Najarian v MIMA* [2000] FCA 933 and *Wimalaratne v MIMA* [2000] FCA 964.

38 [2000] FCA 854.

39 The contrary view was taken by Heerey J in *Li Wen Han v MIMA* at [33], by Lindgren J in *Kundu v MIMA* [2000] FCA 560 at [7] and by Merkel J in *Najarian v MIMA* at [43].

40 [2000] FCA 252.

persons held in detention. Although both cases turned on the instructions given in the relevant form, the effect of that decision does not fit in readily with the emphasis given in the decisions referred to earlier, to providing the information necessary to enable the Minister to decide the substantive issues. No doubt, further consideration needs to be given to this issue.

Other procedural issues

The decision of the Full Court in *MIMA v Harinder Pal Singh*[41] has come as rather a shock to both the Department and the RRT. In that case the Full Court held reg. 5.03 of the Migration Regulations to be invalid. This regulation defines the time of receipt of a document that is sent by the Minister or a Tribunal. It is a "deeming" provision whereby a document is deemed to have been received 7 days after its date. The provision did not apply unless the document was in fact sent within 7 days after its date. The Full Court held this to be void for unreasonableness. It was particularly concerned about its application to person in detention, although arguably that situation is covered by reg. 5.02 rather than 5.03.

As from 1 July 2000 reg. 5.03 has been amended to meet the concerns expressed by the Full Court. However, the question may arise whether notifications of decisions made by the Department prior to 1 July 2000 in reliance upon the now invalidated (ab initio) reg. 5.03 are also invalidated in that they wrongly advised applicants to seek review within 35 days of the date of the letter of notification. A possible consequence could be that review could be sought of a primary decision at any time. The alternative view, as the Full Court suggested itself, is that the Department may be able to rely on s.29 of the *Acts Interpretation Act 1901* and s.160 of the *Evidence Act 1995* which together have the effect that notices sent "in the ordinary course of post" are deemed to have been received by the addressee 4 days after they are sent, unless the presumption is rebutted. The question, however, remains whether the now incorrect statement that the applicant has 35 days from the date of the letter to seek review complies with the statutory obligation under s.66(2)(d)(ii) of the Act to state "the time in which the application for review may be made". Presumably that must be the correct time. On the other hand, in almost all cases the time given to the applicant will have overstated the period. If the presumption of receipt is four days from posting (and assuming posting is on the same date as the date of the letter) the relevant period should be 32 days!

The Interpretation of the Convention: Some Issues

It is the function of the courts rather than the RRT to interpret the Convention. In Australia, the relevant courts are the High Court and the Federal Court. Since the Convention is an international instrument, it would be desirable for its interpretation to be uniform. However, apart from the International Court of Justice, which is not accessible to individuals, there is no body with international authority to interpret the Convention on a worldwide basis. Although Australian courts have on occasions referred to foreign decisions, most notably those made in the United Kingdom and Canada, essentially our case law is "home grown" and in some respects differs markedly from interpretations given in other member States.

Even within Australia, there is the risk of differing interpretations. As was said in *Jama* at first instance:

> The courts do not speak with one voice in these matters, despite the interpretation of a single international treaty being at the heart of such litigation. The subject matter and the wording of the Convention are apt to divide judicial opinion. It is a matter of self-criticism, as much as general observation, that individual courts and even individual judges cannot always ensure consistency.

41 [2000] FCA 377.

> These are emotionally charged matters. Consciously or unconsciously, judges are tugged at by emotions and perceptions that may not be easily reconciled.[42]

The "real chance" test

It is now well established that whether or not an applicant is a refugee under the Convention definition is to be determined on the facts as they exist at the time the determination is made.[43] However, the RRT also needs to consider and make findings on past events (the so-called "historical fear"), as indicated in the decision of the High Court in *Guo*.[44]

An assessment of whether a person is a "refugee" under the Refugees Convention requires in effect a decision to be made about the risk of the applicant being persecuted upon returning to the country of origin. In *Chan* the "real chance" test was put forward as the appropriate standard by which this risk was to be assessed. Mason CJ stated in relation to the "real chance" test that it

> … clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring. … If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty percent chance of persecution occurring.[45]

Whilst the RRT properly makes findings of fact on the standard of the preponderance of evidence or the balance of probability,[46] the "real chance" test itself is not an assessment on the balance of probability. In *Guo*, the High Court stated that:

> *Chan* is an important decision of this court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50%.[47]

The "real chance" test does not involve a decision-maker speculating on the risk of future persecution in the sense of conjecturing or surmising as to that risk: "Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. … A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation."[48]

In elaborating upon the application of the "real chance" test, the majority of the High Court stated in *Guo*, that:

> The extent to which past events are a guide to the future depends upon the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur will border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can safely be disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant

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42 *Jama v MIMA* [1999] FCA 977, para 2 per Madgwick J.

43 *Chan v MIEA* (1989) 169 CLR 379; *MIEA v Singh* (1997) 72 FCR 288.

44 *MIEA v Guo & Anor* (1997) 191 CLR 559. The High court held that "It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events".

45 *Chan*, 389.

46 *Wu Shan Liang* (1996) 185 CLR 259 at 281.

47 *Guo*, p 576.

48 Ibid, p 577.

> field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.[49]

This passage was cited with approval in the recent High Court case of *Abebe*.[50]

The proper approach for the RRT to take is to weigh the material before it and make findings before it engages in a consideration of whether a person has a well-founded fear of persecution under the Convention.[51]

The majority in *Guo* also stated that:

> [i]f … a tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a well-founded fear of future persecution.[52]

This passage reflects the so-called "What if I am wrong?" test. That question need not be asked in every case. If the RRT has no doubt about the correctness of its findings the question is inappropriate. It is only appropriate in cases where the RRT is uncertain as to whether an alleged event took place or finds that, although it is unlikely to have occurred, it may be possible that it did.[53]

Is there a requirement of bona fides?

The situation has arisen from time to time where an applicant who might otherwise have no claim to a protection visa arising out of his or her experiences abroad, creates a *sur place* claim by engaging in an activity in Australia calculated to win him or her the enmity of the authorities in his or her homeland. Often those activities may be engaged in out of sincerely held political conviction. At other times, the suspicion may arise that the act is engaged in for the sole purpose of creating a claim. In *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*,[54] Gummow J (with whose statement on this point Jenkinson and Keely JJ agreed) said:

> …it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be "well-founded".

This principle has sometimes been explained as based on the proposition that a refugee acting in bad faith cannot qualify as a refugee under the Convention, even if his or her act has resulted in a situation which gives rise to a well-founded fear of persecution. These remarks were obiter. More recently the issue was reconsidered by the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Mohammed.*[55] In that case French J stated:

> There will be cases in which a deliberate act, expressive of a particular political opinion will give rise to a risk of persecution that supports a well-founded fear for the purposes of the Convention. Good faith will not necessarily have any part to play in such a case. Acts of refugees expressing

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49 Ibid, p 578-9.

50 *Abebe v The Commonwealth* (1999) 162 ALR 1, Gleeson CJ & McHugh J at [81].

51 *Guo*, p 579.

52 Ibid, p 580.

53 *MIMA v Rajalingam* [1999] FCA 719, at [24-5].

54 (1991) 31 FCR 100. See also, *Heshmati v MILGEA* (1991) 31 FCR 123.

55 [2000] FCA 576, Spender, French and Carr JJ.

> political opinions outside the country of nationality may be done for a variety of reasons. They may be intended to be supportive of those who remain at risk within their country of origin. They may be designed to bring international pressure to bear upon that country. They may be designed to draw the attention of the country to whom they are applying for refugee status, and of its community, to the situation in the country of nationality. There may be a case in which a person genuinely holds an opinion which would attract persecution if known to the country of origin and who deliberately draws that opinion to the attention of authorities in that country to crystallise or demonstrate the basis for the fear which is asserted. All of these reasons may be consistent with the existence of a well-founded fear of persecution, albeit it is enhanced or even brought into existence by the conduct in the country of residence. Given the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions, it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from whom they are seeking protection.
>
> The imposition of a good faith qualification for refugees *sur place* as a gloss upon the Convention is not warranted by its language and is capable of eroding, in its practical application, the protection that the Convention provides. That is because of its very vagueness. Moreover the problem which that gloss seeks to address is more apparent than real. There can be few, if any, cases in which political statements made from the country whose protection is sought for the sole purpose of generating the circumstances attracting Convention protection will be found to reflect any political opinion genuinely held by the person making them. And even if that obstacle is sidestepped by invoking imputed opinion, a demonstration of a well-founded fear or the necessary causal connection between apprehended persecution and Convention attribute in such a case would also be difficult. But each case turns upon its own facts. The Convention must be given effect according to its language. Even those who, notwithstanding their want of good faith, could show that the conditions for protection are satisfied are entitled to that protection. Want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined which is whether the applicant satisfies the conditions of Article 1A. It is not a rule of law to be laid over the words of the Convention.

Spender J supported the reasoning of French J. Carr J dissented. Both Spender J and French J are at pains to point out that a "manufactured" *sur place* claim will not necessarily succeed. The question remains whether a person without any previous political or other profile who makes such a statement holds a genuine and well-founded fear of persecution or whether the authorities who become aware of such statement or act are likely to inflict sanctions upon a person whose actions they may not take seriously.

Civil War

Generally speaking, under the Refugees Convention when assessing whether a person has a well-founded fear of persecution on a Convention ground, a person fleeing civil war and the general deprivations which follow a civil war, will not have established a Convention ground for persecution.[56] But this does not exclude persons who become involved in a civil war situation from qualifying as victims of Convention persecution. There is a difference between the person caught in crossfire, as it were, and a person or group against whom the violence is specifically directed.

This distinction has been of particular relevance in relation to two countries, Somalia and Sri Lanka. The decisional law can be seen to have developed in response to the particular conditions in these countries, which distinguish them from other countries. In Somalia those conditions are the existence of clan warfare. In Sri Lanka the conditions are mistreatment of young Tamils in detention.

56 See UNHCR Handbook para. 164.

A useful starting point from which to examine the development of the law in relation to claimants from these two countries is the decision of the House of Lords in *Adan.*[57] In that case, which centred upon civil war in Somalia but which is relevant to both countries, it was held that a differential impact needed to be established to show that the applicant would experience persecution for reasons over and above the ordinary risks incurred in a country ravaged by civil war or acts of terrorism. This requirement was not accepted in Australia.

Clan Warfare and Civil Unrest

In *Adan* the majority of the House of Lords decided that in the context of a civil war, where there are warring clans an asylum seeker must show that he or she is being targeted for Convention reasons other than his or her membership of one of the warring clans: "He must be able to show … a differential impact. In other words he must be able to show a fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."[58]

This decision was not followed by the Full Federal Court in the decision of *Abdi.*[59] There it was held that

> … the statements made in *Adan* travel beyond the requirements of the Convention by imposing additional or differential requirements where the civil war in question is based on racial or clan grounds and not grounds such as a struggle for power or dominance, the acquisition of territory, the appropriation of property or the acquisition of access to strategic resources or facilities. In the latter examples where the civil war is not directed to racial persecution, it is necessary, of course, to establish the existence of selective harassment on a Convention ground, whereas in the former example such a ground is already present because the civil war is properly characterised as race based.[60]

Therefore a decision-maker must examine the reasons underlying the war to see whether or not it is based upon a Convention ground. It is, with great respect, difficult to understand the distinction drawn. A struggle for power usually involves the elimination of an opposing political group, which in many countries is ethnically based. Thus, in modern terms a struggle for resources will almost inevitably involve "ethnic cleansing". The era of wars for the greater personal glory of warrior kings has long ceased.

The Minister was granted leave to appeal this decision to the High Court. However, the appeal lapsed after Mr Abdi returned home to Somalia.

In the recent decision of *Jama*,[61] a majority of the Full Federal Court decided that the RRT had failed to consider, in applying the real chance test, whether the applicant could be safely repatriated to Somalia. The issue centered upon the conditions in northwest Somalia where the applicant's clan is based. The majority held that the RRT failed to consider whether, in the context of clan based warfare over control of the territory of north-west Somalia, the fighting might be indirectly advanced by acts aimed at destroying the morale of the applicant's clan, such as acts directed at "non-combatants". This it was said resulted in the RRT failing to consider whether the clan-based conflict gave rise to a real chance that members of the sub-clan including the applicant would be singled out for persecutory treatment because of their clan membership. No doubt German non-combatants in 1944 might have claimed that they were "persecuted" by the allies!

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57 *Adan v Secretary of State for the Home Department* [1998] 2 WLR 702.

58 Ibid, at 710-713 per Lord Lloyd.

59 *MIMA v Abdullah Sheikh Mohamed Abdi* (1999) 87 FCR 280, O'Connor, Tamberlin & Mansfield JJ.

60 Ibid, 42.

61 *MIMA v Jama* [1999] FCA 1680, unreported, Branson, Sackville and Kiefel JJ, 3 December 1999.

The Court, applying the reasoning of the Full Court in *Abdi*[62] and adopting the trial judge's references to the decision of *Abdalla,*[63] upheld the decision at first instance that whilst the clan-based war in north-west Somalia was centred upon attempts to control the territory, (a "traditional" war) the Tribunal should also have inquired whether there may also have been a persecutory element in the war. I understand that *Jama* is also the subject of a special leave application.

The disturbed conditions in Somalia do not prevent the return of claimants who are found not to be refugees within the meaning of the Convention. In *Yonis Hussein Abdi*[64] (decided on 10 March 2000, and not to be confused with the decision of March 1999 of the same name) the Full Court affirmed the reasoning of the trial judge that

> [a]s the issue of relocation, in so far as it affects the applicant's status as a refugee as opposed to the question of relocation in fact does not arise after the applicant has left [his] country of origin, and is concerned with whether he could have, reasonably, relocated prior to departure, the subsequent question of whether the applicant can, at this time because of other circumstances, be returned to North East Somalia, is not in this case, a material question of fact. That conclusion follows from the finding that there was no well-founded fear of persecution.

The Full Court commented on this statement in the following terms:

> … once the Tribunal made the central and material finding that the appellant did not have a well-founded fear of persecution if he returned to north-east Somalia, then other questions of relocation became academic and so were not material within the meaning of s 430. That is plainly correct.[65]

The inability to return must be due to a well-founded fear of persecution for a Convention reason. *A fortiori*, unwillingness to return, not based on a well-founded fear of persecution, cannot convert a person who is not a refugee into a person entitled to protection under the Convention. As the Full Court said in *Yonis Hussein Abdi*:

> It follows, in our view, from what was said in *Randhawa*, and from a proper understanding of the terms of the Convention definition, that unwillingness to return (not based on well-founded fear of persecution for a Convention reason) cannot of itself (nor can consequences that follow entirely from that unwillingness) convert into a refugee an applicant who would not otherwise be entitled to international protection. That is simply an application of the well established principle that third countries are obliged to give international protection only in circumstances where national protection is not available.[66]

General Maltreatment

The conditions in Sri Lanka which were central to the development of the law were:

- The fact that when people of any racial or ethnic background are detained they face a high risk of being mistreated once in detention; and
- A large proportion of the population (Tamils) is routinely and legitimately detained for questioning from time to time in response to the acts of terrorism committed by a small percentage of that population.

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62 26 March 1999.

63 *Abdalla v MIMA (*1998) 51 ALD 11, Burchett, Tamberlin & Emmett JJ.

64 *Yonis Hussein Abdi v MIMA* [2000] FCA 242.

65 Ibid, [7], per Whitlam, Lehane and Gyles JJ.

66 [2000] FCA 242 at [13].

The decision of the Full Federal Court in *Paramananthan*[67] examined the relationship between the above two factors, and concluded that, where a proportion of the population is legitimately rounded up and detained on the basis of the race or ethnicity - a Convention ground - of the people, and where it is a known fact that people are routinely mistreated in detention in Sri Lanka, then it is not enough to conclude that the mistreatment experienced by those detained on the basis of their ethnicity or race is merely indiscriminate. A causal nexus exists to render such mistreatment persecution on a Convention ground.

The reasons of the Court were delivered in three separate judgments, and although a ratio exists amongst the three, each judge reached his decision in different ways. The decision was approved by a differently constituted Full Court in the subsequent decision of *Nagaratnam,*[68] which summed up the principle as follows:

> When, in accordance with some law or government policy, persons are selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons may or may not amount to persecution for a Convention reason, depending upon the circumstances in which the law or government policy is being implemented. It may be implemented, for instance, in circumstances of war, whether foreign or domestic. If so and the criteria of selection of persons for detention is seen as appropriate and adapted to the successful prosecution of that war, then the act of detention will not be persecution for a Convention reason. However, when those who detain such persons in accordance with such law or government policy are aware that the probable consequence of such detention will be the physical mistreatment of those detained, even though those detained will not be selected for such physical mistreatment by those who administer that physical mistreatment upon a ground which equates to one of the Convention reasons and even though those selecting the detainees are unwilling that such physical mistreatment should occur, then those who detain such persons will be taken to have caused such physical mistreatment. As such persons have been selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons will amount to persecution for a Convention reason.

Membership of a Particular Social Group

Applicant A[69] is the leading case on this Convention ground. It dealt with the issue of whether people in breach of the one-child policy in the Peoples Republic of China constituted a "particular social group" under the Convention. The High Court ruled in *Applicant A* that a particular social group cannot be defined by reference to the persecution which its members experience or fear. Dawson J stated

> However, one important limitation which is, I think, obvious is that the characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.[70]

McHugh J stated:

> Discrimination - even discrimination amounting to persecution - that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. ... [71]

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67 *Paramananthan v MIMA; MIMA v Sivarasa* (1998) 160 ALR 24, Wilcox J, Lindgren J and Merkel J.

68 *Nagaratnam v MIMA* [1999] FCA 176, Lee, Moore, Katz JJ, para 25 (1999) 89 FCR 569.

69 *Applicant A & Anor v MIMA* (1997) 190 CLR 225.

70 Ibid, 242.

71 Ibid, 257.

Later on he continued:

> The concept of persecution can have no place in defining the term "a particular social group. Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee". It would also effectively make the other four grounds of persecution superfluous.[72]

In relation to the word "social" McHugh J stated,

> The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.[73]

Gummow J[74] approved the following passage from *Ram:*

> There must be a common unifying element binding the members together before there is a social group … When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group"[75]

In *MIMA v Zamora* the Full Court expressed the view that *Applicant A* is authority for the following proposition:

> To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.[76]

A "Black Child" Under the One-Child Oolicy of the Peoples Republic of China

"Black children" in the PRC are those born in contravention of the one-child policy. In the decision of the High Court in *Chen Shi Hai v MIMA*[77] the five member Court ruled unanimously that such children can be considered to be members of a particular social group who are persecuted for reasons of such membership.

"Black children" can face treatment in the PRC which includes the withdrawal of state funded basic education and medical treatment. The Court ruled that

> denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.[78]

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72 Ibid, 263.

73 Ibid, 264.

74 Ibid, 285.

75 *Ram v MIEA* (1995) 130 ALR 314,

76 *MIMA v Zamora* (1998) 85 FCR 458, 464 per Black CJ, Branson and Finkelstein JJ.

77 [2000] HCA 19, 13 April 2000 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

78 Ibid, para 29.

The Court ruled that enmity and malignity are not necessary elements of 'persecution'. As noted by Kirby J, "persecution is often banal".[79]

The Court dealt with the issue of whether the social group was being defined by reference to the persecutory conduct to which it was subjected by noting that in the present case a significant element of the definition of "black child" was the fact that the appellant had been born out of wedlock. The Court also rejected the reasoning of the majority of the Full Court that the persecution to be suffered by a "black child" is for reasons of the contravention by his parents of a law of general application (the one-child policy) rather than for reasons of the child being a "black child". The Court distinguished *Applicant A,*

> [*Applicant A*] was concerned with persons who feared the imposition of sanctions upon them in the event that they contravened China's "one-child policy". In this case, the question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. … The circumstances that "black children" receive adverse treatment in China is descriptive of their situation and, as McHugh J pointed out in *Applicant A,* that may facilitate their recognition as a social group for the purposes of the Convention but it does not define them.[80]

This does not mean, however, that every child born in China in contravention of the one-child policy is necessarily a refugee. As Kirby J stated:

> … it by no means follows that every child of PRC nationality born in immigration detention necessarily secures a right to refugee status in this country. Each case must depend on the evidence.[81]

Thus, the impact of being a "black child" may depend on ethnicity (Han or minority status), provincial policy and even whether the child is to live in a city or in the countryside. In some cases the consequences of breach may be averted by the payment of a fee. The irony of the two High Court decisions will be that, whilst the parents in the latter case were not entitled to refugee status by reason of their breach of the policy, their child will be.

Family as a Particular Social Group

In *Chan* and eight years later in *Applicant A* the High Court referred to the possibility of a family being a particular social group under the Convention.

The question is whether it is relevant that the family member faces persecution by reason of a family connection with a person who may not face such persecution himself or herself. In *Aliparo v MIMA*,[82] O'Connor J held that a wife was not a refugee, even assuming that her family constituted a "particular social group", because she was at risk of retaliation by reason of her husband having reported a wrongdoer to the authorities. That was not a Convention reason. On the other hand, in the decision of *Sarrazola*[83] the Full Federal Court ruled that where membership of a family renders a person subject to persecution, then a further Convention ground does not have to be found to attach to that family in order for the person to satisfy the Convention definition. The Court decided the proposition that ""the Convention

79 Ibid, [63].

80 Ibid at [22] – [23].

81 Ibid at [81].

82 [1999] FCA 79.

83 *MIMA v Sarrazola* [1999] FCA 1134, Einfeld, Moore & Branson JJ, 6 October 1999.

was not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition" is entirely unsupported by authority. In *Sarrazola* the applicant faced persecution because criminals sought to extort money from her which her brother owed to them as a result of his own criminal activities. However, the Full Court did not decide whether this particular family constituted a particular social group. This decision has considerable potential to expand the ambit of the Convention. Although the person who is the particular focus of the pressure may not qualify as a refugee (and may even be regarded as unworthy of protection), members of his or her family may qualify.

Prior to *Sarrazola* it was generally assumed that while a family can constitute a social group, it does not follow that all families constitute a social group. Thus in *Aliparo*, O'Connor J. noted that the characteristics which define a group must "pre-exist the persecution" and said "[t]here is no characteristic, on the evidence available to the Tribunal, of this applicant's family which distinguishes them from society at large, other than the fear of persecution or retaliation".[84] Similarly in *Mahuroof v MIMA*, Branson J applied the reasoning in *Applicant A* to hold that the applicant's family was not a particular social group in the circumstances, as there "was nothing before the Tribunal which suggested that the applicant's family is perceived in Sri Lanka as a cognisable group within society".[85]

In the subsequent decision of *C and S*[86] (a case where the factual situation did not differ much from that in *Aliparo*), Wilcox J expressly agreed with the statement made by the trial judge in *Sarrazola*, that "[m]embership of a family is a characteristic which distinguishes members of that family from society at large … family members possess a common unifying element which binds them together as a particular social group." According to Wilcox J,:

> [t]hat which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable.

This could be taken to mean that every family constitutes a "particular social group", a proposition the Full Court in *Sarrazola* was not prepared to accept.[87] On this analysis, the real issue becomes one of causation; does the feared persecution exist by reason of membership of the family?

Homosexuals

In *Applicant A*, McHugh J stated

> [a] group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient if the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. … If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status.

84 [1999] FCA 79 at [21]-[22].

85 Unreported, Branson J, 13 March 1998, at p. 7.

86 *C and S v MIMA* [1999] FCA 1430, Wilcox J, 20 October 1999.

87 Upon remittal the Tribunal again affirmed the primary decision. The case of *Aliparo* is before the Federal Court again.

In that same case, Kirby J stated,

> It is now well established … that it is not necessary for an individual applicant to have been a member of a concerted body or association affirming group identity. In some cases, such as homosexuals in certain countries, such a requirement could be extremely perilous to the members of the group and self-defeating.

There is little doubt that homosexuals can constitute a particular social group. As Burchett J said in *F v MIMA*:

> It is in accordance with settled authority to see as a member of a social group a person who identifies himself by some means with an ascertainable set of associated persons linked by shared homosexual activities. So, too, in the case of a person who is identified as such by others, though perhaps against his will.[88]

In other words the person must be identified in the eyes of others as a homosexual, either correctly or falsely. Being a "closet" homosexual may not suffice. As his Honour put it: "the mere possession of some homosexual feelings might not necessarily be enough".

What is not yet clear is whether a law or social attitude which punishes public manifestations of homosexuality amounts to persecution. In *MIMA v Gui,*[89] the Minister had conceded that homosexuals in Shanghai constituted a particular social group. However, the Tribunal had found that it was the applicant's behaviour in a public place (kissing another male), which was "unacceptable according to the cultural norms prevailing in China", which had brought him to the notice of the authorities. The Full Court said that that finding, which was open on the evidence, was inconsistent with a finding of persecution for a Convention reason. "What precipitated the police action was not Mr Gui's membership of a social group but his conduct in a public place".[90]

A similar issue arises of whether it is possible to avoid persecution by expressing one's sexuality in a "discreet" manner. In *Applicant LSLS v MIMA*,[91] Ryan J made the following comments:

> An error of law could readily have been imputed to the Tribunal had it acknowledged, on the one hand, that the practice of a homosexual lifestyle as a whole is "protected" by the operation of the Convention, but, on the other, had denied the applicant all means of meeting prospective sexual partners, thereby reasoning that the Convention does not, as a matter of law, "protect" a part of the activity of a particular social group that is necessary and integral to the defining characteristic of that group. That erroneous reasoning would render illusory the protection afforded by the Convention, but I am not persuaded that the approach of the Tribunal has been infected by that error and this ground is not made out.
>
> In truth, this complaint of the applicant is that the line drawn by the Tribunal between what it is, and is not, reasonable to require of the applicant in order to avoid persecution should not, on the material available to the Tribunal, have been drawn where it evidently was. The strong injunctions against merits review of Tribunal decisions which have been expressed in many recent authorities are a reminder that consideration of a complaint of this kind is allowed only to a limited extent. It is within the permissible limits to ask whether there was evidence to justify the Tribunal's determination that the applicant could avoid persecution by being "discreet", consistently with the practice of a homosexual lifestyle of the extent under the consideration of the Tribunal. ….
>
> The further error of law contended for by the applicant is the Tribunal's treatment of the effective criminalisation of homosexuality by the Sri Lankan Criminal Code. The finding of the Tribunal in

88 [1999] FCA 947 at [11].

89 [1999] FCA 1496, Heerey, Carr and Tamberlin JJ.

90 Ibid at [28].

91 [2000] FCA 211.

> this respect was that these laws were not, in practice, enforced "to any significant extent" and that the applicant, therefore, did not have a well-founded fear of persecution on that basis. This is said to be a misapplication of the test laid down by the High Court in *Chan Yee Kim v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*").
>
> The Tribunal's use of the phrase "to any significant extent" does not strictly accord with any of the descriptions in *Chan* of the degree of satisfaction required for making such a determination. However, in the context in which the phrase was used, I am unable to say that this criticism is anything more than "pernickety" (per Kirby J, *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1998) 151 ALR 711 at 714, referring to the earlier case of *Wu Shan Liang v. Minister for Immigration and Multicultural Affairs* (1996) 185 CLR 259), and it does not entail an error of law.

Domestic Violence and Discrimination against Women

The law in this area is still developing. Claims based upon these grounds must be characterised by reference to membership of a particular social group under the Convention. Much will depend upon the conditions in the country of origin when considering these grounds.

It must be remembered that the Convention is primarily designed "to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality".[92] This means that "persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is, or appears to be, powerless to prevent that private persecution".[93] Consequently, private harm, such as domestic violence or other violence against women does not qualify as persecution, unless the State permits it, condones it or appears to be powerless to prevent it. Even if State inaction converts it into State harm, the next issue is whether that State harm is inflicted for a Convention reason. This is no problem where the harm is inflicted for a reason such as an attempt to forcibly convert the wife to the husband's religion. [94]It is more problematic if one has to consider whether the harm was inflicted by reason of the victim's membership of a particular social group: the family to which the perpetrator may also belong, or gender which may be either too broad or amorphous.

The Department of Immigration and Multicultural Affairs has published *Guidelines on Gender Issues for Decision-Makers*[95] which state in part:

> 2.5 … due to social and cultural mores [women] may not necessarily have the same remedies for state protection as men, or the same opportunities for flight. …
>
> The issue of gender persecution and problems facing women asylum seekers have received attention from the Executive Committee of the United Nations High Commissioner for Refugees' Programme (EXCOM), UNHCR and some governments. UNHCR adopted Guidelines on the Protection of Refugee Women in 1991. A number of EXCOM conclusions have been adopted recommending the development of appropriate guidelines, culminating in 1995 with EXCOM's recommendation that:
>
> In accordance with the principle that women's rights are human rights, these guidelines should recognise as refugees women whose claim to refugee status is based on well-founded fear of persecution for reasons enumerated in the 1951 Convention and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution.
> …

92 *Applicant A v MIMA* (1997) 190 CLR 225 at 258 per McHugh J.

93 Id.

94 *A, B & C v MIMA* [1999] FCA 116.

95 July 1996.

> 3.5 The types of information which may be relevant in assessing gender related claims are often similar to those relevant to other types of claims. However, research should also focus on the following areas:
>
> - legal, economic and civil status of women in the country of origin;
> - the incidence of violence against women in the country of origin, including both sexual and domestic, and the adequacy of state protection afforded to women;
> - cultural and social mores of the country with respect to such issues as the role and status of women, the family, nature of family relationships, attitude towards same-sex relationships, attitudes to 'foreign' influences, etc;
> - respect for and adherence to fundamental human rights;
> - the differential application of human rights for women;
> - issues directly related to claims raised in the application.
>
> It should be noted that violence against women, particularly sexual or domestic violence, tends to be largely under-reported or ignored in many countries.
>
> Identifying these issues will enable an officer to become aware of the cultural sensitivities and differences in a particular country before considering the applicant's claims.
>
> 3.8 When assessing a woman's claims of well-founded fear of persecution … the evidence must show that what the woman genuinely fears is persecution for a Convention reason as distinguished from random violence or criminal activity perpetrated against her as an individual. The general human rights record of the country of origin, and the experiences of other women in a similar situation, may indicate the existence of systematic persecution for a Convention reason.

Where a woman and her children are subject to domestic violence, and the authorities refuse to intervene on the grounds that it is a domestic matter,[96] the Tribunal should consider whether that family constitutes members of a particular social group. Alternatively, O'Connor J opined in *Lupac*, the possibility of gender-based persecution should also be considered. As regards the latter, in *Ndege* Weinberg J observed in obiter that "[t]he finding that the particular social group was married women in Tanzania, and that its members could be a target for Convention related persecution, is in no way inconsistent with recent authority."[97] He referred with approval to the decision of the House of Lords in *Islam,* where it had been found that "women in Pakistan" were a particular social group.[98]

In *Khawar*[99] the court referred with approval to the test of causation applied by the House of Lords in *Islam.* Lord Steyn said:

> Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic. And that is so whether a 'but for' test, or an effective cause test, is adopted.[100]

Lord Hoffman noted that,

> … the reason for the persecution is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband … Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute

96 As occurred in the case of *Lupac v MIMA* [1998] FCA 696, O'Connor J, 24 November 1998.

97 *MIMA v Ndege* [1999] FCA 783, 11 June 1999, at [60].

98 *Islam v Secretary of State for the Home Department* [1999] 2 WLR 1015.

99 *Khawar* v *MIMA* [1999] FCA 1529, Branson J, 5 November 1999.

100 op cit, 1028.

> persecution within the meaning of the Convention. … An essential element in the persecution, the failure of the authorities to provide protection, is based upon [a Convention ground].[101]

In *Khawar*, Branson J found that this test of causation is consistent with Australian jurisprudence. Thus, the refusal or failure of State law enforcement officers to take steps to protect members of a social group from violence is itself capable of amounting to persecution under the Convention. That is, it is open to the Tribunal, if it found that women, or married women, constituted a particular social group in Pakistan, to find that the applicant had a well-founded fear of persecution by the Pakistani police for reasons of membership of a particular social group.

In *Jayawardene*, Goldberg J suggested that a Sri Lankan woman could experience persecution from her former husband because of their former relationship, and not because she was a member of the group of 'single women without protection'.[102] Goldberg J cited the passage from *Applicant A* where Dawson J stated,

> The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group.[103]

The latest decision is that of Branson J in *Mendis v MIMA*,[104] where the applicant had complained of sexual harassment ("stalking") falling short of physical assault after her husband had left for Australia. Her Honour remitted the matter because the Tribunal should have considered whether the applicant was pursued as a member of a vulnerable social group "unprotected women in Sri Lanka". If that was so,[105] the Tribunal should have further considered whether the Sri Lankan government was encouraging or was powerless to prevent that harm. To the argument that unwanted attention and propositioning without physical violence was insufficient, her Honour replied:

> The term "harassment" is apt to cover conduct of varying degrees of seriousness. I understand the Tribunal to have intended the term to embrace conduct which is offensive and perhaps threatening but not amounting to physical assault (or, more accurately, battery). I do not consider that offensive and threatening conduct, whether sexual or not, is incapable of amounting to persecution within the meaning of the Convention. Whether it will amount to persecution in any particular case will depend on all of the circumstances of the case. The cultural context in which the conduct is experienced may prove to be a relevant circumstance. Nor do I conclude that for a woman to be "followed by men and approached by others" is necessarily incapable of amounting to persecution within the meaning of the Convention. Depending on the circumstances of the particular case, such conduct might be highly frightening and capable of constituting intimidation and duress.

The decision is currently being appealed. If upheld, it would, like *Sarrazola*, expand the ambit of the Convention quite considerably.

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101 op cit, 1034-1035.

102 *Jayawardene v MIMA* [1999] FCA 1577, Goldberg J at [28]. The comments were *obiter*.

103 op cit p240-241 CLR.

104 [2000] FCA 114.

105 Goldberg J in *Jayawardene* at [29] doubted that a group such as "single women" or "single women without protection in Sri Lanka" was a proper group for the purposes of the Convention. See also *Jama v MIMA* [1999] FCA 977 (Madgwick J).

Grounds for Judicial Review

The grounds for judicial review of decisions of the Tribunal by the Federal Court are set out under s.476 of the Migration Act. These grounds include a failure to apply procedures required under the Act to be applied,[106] restricted grounds relating to a failure of jurisdiction, improper exercise of power, fraud or actual bias, and certain types of error of law. The Act specifically excludes as a basis for judicial review the common law grounds of natural justice, and *Wednesbury* unreasonableness.

The powers of the Federal Court are set out in s.481 of the Act.

In the decision of the High Court in *Wu Shan Liang*[107] it was held that the reasons of the RRT 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."

In the recent High Court decision of *Abebe v Commonwealth*[108] the constitutional validity of Part 8 of the Act was confirmed.

A legal controversy of relatively recent origin has emerged as advisers seek new ways of challenging Tribunal decisions in the Federal Court following the decision of the High Court in *Eshetu*. The dispute centres upon whether a failure to comply with s.430 of the Act constitutes a ground of review under s.476(1)(a) of the Act. Section 430 requires the Tribunal to set out its reasons for decision in writing, and, in particular "to set out the findings on any material questions of fact". Related to the dispute is a question as to what constitutes a "material question of fact", and issues pertaining to how detailed a reference needs to be made, if at all, in relation to evidence not supportive of a Tribunal finding of fact.

Two decisions of the Full Court of the Federal Court illustrate the conflicting approaches to the s.476 aspect of the dispute, which prevailed until recently.

In *Yusuf*,[109] the Court found that a breach of s430 does constitute a ground of review under s.476(1)(a). This is because although s.430 refers to acts being performed after a decision has already been made, the expression in s.430, "in connection with" is

> neutral as to time. In the literal sense a decision is made when the decision-maker reaches in his or her own mind a conclusion as to the question, Refugee, yes or no? Practicality however requires that more be done. Is the announcement of the decision to be made orally or in writing? And with reasons? And, if so, what kind of reasons? All these are, in ordinary language, matters "in connection with the making of the decision.[110]

The High Court has granted special leave to appeal in this case. An extension of this view would require the Tribunal not only to give its reasons for its findings on material facts on which its decision is based, but also its reasons for rejecting evidence which was adverse to such findings. The materiality of a fact was ultimately a matter for the court to determine.

This requirement, and, *a fortiori*, its more extended version, imposes a great burden on the members of the Tribunal. Since it is not clear what facts the Federal Court may consider to

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106 And which, following the decision of the High Court in *Eshetu v MIMA* [1999] HCA 14, do not include s 420.

107 op cit, at 272.

108 [1999] HCA 14.

109 *MIMA v Yusuf* [1999] FCA 1681, Heerey, Merkel & Goldberg JJ, 2 December 1999.

110 Ibid, [24].

be "material", the member must in fact consider every fact alleged by the applicant and give reasons for its acceptance or rejection. Indeed, the current s.430 approach by the Federal Court as well as the requirement that decisions be "handed down" at a special session to which the applicant must be invited, has led to an increase of 22% in the time taken to finalise a decision. It also provides an avenue for review on the merits by those judges who are tempted to do so.

In the case of *Xu*,[111] the majority of the differently constituted Full Federal Court decided that a breach of s.430 does not fall within the scope of s.476(1)(a) of the Act. This is because s.430 assumes that decision has already been made, and the requirement to write a statement under s.430 is not "sparked" until the decision has already been made. The Court referred to Gummow J in *Eshetu* where his Honour said "the subject matter for judicial review nevertheless remains the decision itself…section 430 …does not provide the foundation for a merits review of the fact-finding processes of the tribunal."[112]

Whilst reasons may reveal matters which will make a decision reviewable, reasons themselves are not reviewable. "The correct question is … not whether the procedure is in connection with the decision, but rather in connection with the making of the decision."[113]

In relation to the issue of what constitutes a material fact, the Court in *Xu* made *obiter* comments. In administrative law, materiality needs to be understood in the context of the relevant statute:

> Where a statute does not expressly or impliedly constrain the decision maker, the decision-maker is the sole judge of materiality and there can be no judicial review of that question, no matter how wrong or illogical the decision-maker is seen to be by the judge. In those circumstances a fact is material only if the decision-maker considers it so. … If a judge makes an assessment that an absent fact is material otherwise than by holding that the Act requires the fact to be considered, then that plainly involves a merits review which the High Court have emphatically said should not happen.[114]

The Court distinguished between material facts, and those facts of a lesser order of relevance to material facts, and drew attention to a finding of fact and the weight to be given to that finding. Courts are concerned only with the legality of a decision, and not the merits. It is necessary to look to the requirements of the Act to establish which facts must be found to exercise the statutory power. A flaw is only disclosed if the Tribunal fails to make a finding it was legally required to make.

A court should consider whether a tribunal has decided that a fact was material. "Mere consideration of the fact by the Tribunal would not establish a decision that the fact is material."[115] An applicant cannot make a fact a material fact merely by alleging it.

In the decision of the High Court in *Durairajasingham*,[116] McHugh J approved of the approach taken in *Xu* that s.430 is concerned with requirements to be met subsequent to a decision having been made. The language of s.430 indicates that it does not impose a jurisdictional requirement. Thus a breach of s430 will not entail a jurisdictional error. McHugh

111 *Xu v MIMA* [1999] FCA 1741, Whitlam, RD Nicholson & Gyles JJ, 17 December 1999.

112 *Eshetu* at [117], quoted in *Xu* at [21].

113 *Xu* at [26].

114 Id.

115 Ibid, [54].

116 *Re MIMA; ex parte Durairajasingham* [2000] HCA (21 January 2000),

J also approved of the reasoning in *Addo* that, in relation to evidence contrary to the findings of the Tribunal, s.430

> does not impose an obligation to do anything more than to refer to the evidence on which the finding of fact are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s430 (1) of the Act.[117]

The issue has now been considered by a special 5 member bench in *MIMA v Singh*.[118] The Chief Justice and Sundberg, Katz and Hely JJ delivered a joint judgment. In essence the majority maintained the view that s.430(1) prescribes a procedure "in connection with" the making of the decision within the meaning of s.476(1)(a). This means that the Tribunal is not only under an obligation to set out its findings on a question of fact which the court on judicial review holds to be material, but that a failure to do so could lead to the decision being set aside under s.476(1)(a) for lack of compliance.[119] Materiality, as the joint judgment asserted, is ordinarily an objective concept. If the Tribunal fails to make a finding on a fact which the court afterwards determines is a material fact then s.430(1)(c) has not been complied with.[120] However, and this is an important qualification, materiality is not to be determined by the applicant. In other words, the applicant cannot demand that there be a finding on every fact alleged because the applicant considers it to be material. "A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists".[121]

The joint judgment rejected the view taken in *Xu* that s.430(1) only requires the Tribunal to make findings on the ultimate facts, that is to say, whether the applicant has a well-founded fear of persecution. The facts which lead to that ultimate finding are also material. Furthermore, the Tribunal must refer to the materials on which the finding is based. But this "is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with".[122]

To sum up: the Full Court in *Singh* has adopted what is sometimes called the "moderate" view of s.430. It certainly has rejected the "extreme" view, which the trial judge in that case had adopted, of requiring reasons for rejecting evidence that is inconsistent with the findings. But it still maintains the requirement to make findings on material facts with the materiality to be determined by the court. It is true that the court cannot review those findings themselves: the finding does not have to be the correct one. But it still leaves it open to the court to redefine materiality if the court takes a different view of how the factual claims should have been dealt with, or even how they should have been determined. There is still scope for consideration by the High Court.

117 *Addo v MIMA*.
118 [2000] FCA 845 (Black CJ, Kiefel, Sundberg, Katz and Hely JJ.
119 Ibid, [43].
120 Ibid, [47].
121 Ibid, [57].
122 Ibid, [56].

COMMENTARY: RECENT DEVELOPMENTS IN REFUGEE LAW

John McMillan[*]

Edited version of a paper delivered as a commentary on the address by Dr Peter Nygh to an AIAL seminar held in Canberra on 15 August 2000.

The thesis of this commentary is that the substantive principles of refugee law, and the system within which they are elaborated, are integrated and inseparable. In any analysis of the administrative system for refugee determination, it is as important to pay attention to the structure and dynamics of the administrative review framework as it is to refine the principles of refugee law. I shall develop that point by looking at three issues - the complex and sensitive nature of the legal issues that arise in refugee determination; the adequacy of the existing tribunal framework for handling those issues; and the impact of Federal Court judicial review on the role of the Refugee Review Tribunal.

The Role of Administrative Tribunals in Refugee Determination

The character of the issues arising for determination under the *1951 Convention Relating to the Status of Refugees* illustrates the need for a system of administrative review that is reputed for its professional skill and integrity. The intensity of the public debate in Australia about refugee policy and the treatment of asylum seekers provides one illustration of the importance of those issues in the spectrum of Australian public affairs. Increasingly, too, that debate is being drawn into the international community, with Australia's policies and administrative practices being measured against international law standards. It is in Australia's interests, domestically and internationally, to nurture the system of administrative review as it applies to refugee determination.

The need for a first-rate tribunal system stems also from the indeterminate nature of the issues that frequently predominate in administrative review. It is a characteristic of public administration that when the rules that regulate access to a government concession are specific and restrictive, those who fall outside the major categories of entitlement will frequently focus their attention on residual and discretionary categories of entitlement. Clearly that is one reason why refugee law has become increasingly more important in Australia: many aspiring applicants for Australian resident status fall outside the defined categories in the *Migration Act 1958* (Cth) and Regulations, and target their applications accordingly at the more discretionary body of rules that define the entitlement to a protection visa, that is, to refugee status.[1] Similarly, even within the domain of refugee entitlement, applications are often targeted at the more indefinite elements of that category. Thus, in terms of whether a person's life or freedom is threatened by reason of "race, religion, nationality, membership of a particular social group or political opinion",[2] it is the phrase "particular social group" that has become a focus of exceptional attention. Issues that have

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1 In the same fashion, many appeals to the Migration Review Tribunal arise under the discretionary criterion of "special need relative", by which a person otherwise ineligible for an Australian resident visa can obtain a visa to provide special assistance to a relative: Migration Regulations, reg 1.03. See, eg, *Jun v MIMA* [2000] FCA 867; *MIMA v Chan* [2000] FCA 737. (The acronym "MIMA" is used for "Minister for Immigration and Multicultural Affairs".)

2 Article 1A(2) of the *1951 Convention Relation to the Status of Refugees*, adopted in Australia in the *Migration Act 1958* (Cth) s 36(2) and Migration Regulations, Schedule 2, part 866.221.

arisen in recent litigation include whether the phrase "particular social group" extends to the targets of organised crime,[3] parents in breach of China's one child policy,[4] Chinese children disadvantaged by that policy,[5] members of a family,[6] warring clans,[7] deserters from the police force,[8] young Somali women,[9] wives who have been the subject of domestic violence,[10] homosexuals,[11] and Tamils routinely questioned under Sri Lanka's anti-terrorist strategy.[12]

Those are all important issues. They are, moreover, complex issues that turn on a mixture of factual analysis, legislative interpretation, immigration policy determination, social policy judgment, and appreciation of international comity. If, as we have chosen in Australia, those issues are to be resolved through administrative adjudication, it is essential that the adjudicatory tribunal is reputed for its professional skill and integrity.

This goes to the heart of the current debate about the restructure of the system of administrative tribunals to be undertaken by the Administrative Review Tribunal Bill 2000 currently before the Commonwealth Parliament.[13] A principle which should guide debate on the Bill is that the quality and integrity of the tribunal system should not be downgraded by the restructure. It is premature to know which rumours to trust, but there are disturbing signs. Perhaps the greatest concern is that the conditions of appointment for members of the ART will, by comparison with those existing for the AAT, be downgraded substantially in terms of level of salary, term of appointment, and other conditions of service. The generally high standard of administrative review that has hitherto characterised the Commonwealth tribunal system cannot be maintained unless appointment to the ART is an an attractive option for people with the level of professional experience and skill that is needed to undertake the complex work of legal analysis and factual inquiry that is essential in administrative review. Above all, it hardly makes sense to establish a system of administrative review unless those who undertake the review function are at least as skilled as the government agency officials whose decisions are being reviewed.

Before leaving this theme, it is interesting to observe the parallel in the public debate swirling around us at the moment concerning reparation for members of the "stolen generation". The widespread call by commentators to utilise a tribunal model, rather than a court framework, for working through the complex and contested issues that arise in the stolen generation cases - issues that go to the heart of Australia's national identity - is an interesting confirmation of the faith that many people now have in the institution of administrative tribunals. It is similarly apparent, in the lead-up to the Olympics, that many sporting codes established tribunals to conduct independent review of sporting selection decisions.

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3 Eg, *MIMA v Sarrazola* [1999] FCA 1134.

4 *Applicant A v MIMA* (1997) 190 CLR 225.

5 *Chen Shi Hai v MIMA* [2000] HCA 19.

6 Eg, *C and S v MIMA* [1999] FCA 1430; *Sarrazola v MIMA (No 3)* [2000] FCA 919.

7 Eg, *MIMA v Abdi* [1999] 87 FCR 280; *Ibrahim v MIMA* [1999] FCA 374; *MIMA v Jama* [1999] FCA 1680.

8 *MIMA v Shaibo* [2000] FCA 600.

9 *MIMA v Cali* [2000] FCA 1026.

10 Eg, *MIMA v Ndege* [1999] FCA 783; *Mendis v MIMA* [2000] FCA 114; *MIMA v Khawar* [2000] FCA 1130.

11 Eg, *F v MIMA* [1999] FCA 947; *MIMA v B* [2000] FCA 930; *MIMA v Cai* [2000] FCA

12 Eg, *Nagaratnam v MIMA* (1999) 89 FCR 569.

13 For an analysis of the Bill, see the article by Professor Dennis Pearce, "Creation of A New Tribunal" (2000) 177 *Administrative Law Bulletin* 4-8.

Adequacy of the Existing Tribunal Framework

The professionalism and integrity of a tribunal system depends in no small measure on the adequacy of the framework for determination of cases. I will not explore this issue in the depth that it deserves, other than to repeat a point I made in an earlier article,[14] that it is essential in my view to have a two-tier tribunal framework for adjudication of the complex issues of the kind that arise in refugee law. The second tier would be constituted as an appeal panel of three members who would, on a by-leave basis, review cases that raise issues of general significance or of disputed questions of law.

The concept that I referred to earlier, "particular social group", is one such example of the complex issues routinely arising before the RRT. Litigation in the past two months throws up many similar examples, most having an importance that extends beyond refugee law to administrative law and public administration generally. They include: the legal requirements for a valid statement of reasons, addressed by a five bench Full Court in *Singh*;[15] whether an administrative tribunal has jurisdiction to consider an invalid application or appeal, addressed by the Full Court in *Yilmaz*,[16] and by single judges in a host of other cases;[17] when is a tribunal *functus officio*, addressed by the Full Court in *Bhardwaj*;[18] the scope of the no evidence principle, which was the subject of inconsistent Full Court rulings in *Li Yue* and *Charaev*;[19] how far a tribunal should go in identifying issues and drawing them to an applicant's attention, addressed by the Full Court in *De Silva*;[20] the scope of the duty of inquiry of an administrative tribunal post-*Eshetu*, addressed in *Candyah* and *Khoury*;[21] and the implications of the bias rule for tribunals, addressed (once more) in *Yit*.[22]

Each of those issues has been the subject of conflicting jurisprudence in the Federal Court, and no doubt in the tribunals as well. It is folly to expect that those issues can be addressed satisfactorily by a single member in a one-tier tribunal. If we persist with that model, as the rumours suggest that the Government intends to do for immigration appeals,[23] we can expect confidently that the Federal Court (or, most likely, and worse still) the Federal Magistrates Service, will *de facto* become a routine second appeal tier in immigration cases.[24] The result – an appeal from a single member of a tribunal to a single member of a court – fails to address a structural problem that bedevils the current framework for administrative review.

The creation of a two-tier tribunal structure, as proposed in the ART Bill, provides an opportunity to create a framework for administrative review that enables complex issues to

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14 J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1 at 16-17.

15 *MIMA v Singh* [2000] FCA 845.

16 *Yilmaz v MIMA* [2000] FCA 906.

17 Eg, *Samuel v MIMA* [2000] FCA 854; *Nader v MIMA* [2000] FCA 908; *Najarian v MIMA* [2000] FCA 933; *Wimalaratne v MIMA* [2000] FCA 964.

18 *MIMA v Bhardwaj* [2000] FCA 789.

19 *MIMA v Li Yue* [2000] FCA 856; *Charaev v MIMA* [2000] FCA 865.

20 *De Silva v MIMA* [2000] FCA 765.

21 *Candyah v MIMA* [2000] FCA 869; *Khoury v MIMA* [2000] FCA 733.

22 *Yit v MIMA* [2000] FCA 885.

23 At the time of writing, the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000 had not yet been published. It was rumoured that it would modify the ART Bill to remove the option for second-tier tribunal review in immigration matters.

24 The Administrative Review Tribunal Bill 2000, clause 170, provides that an appeal from the ART to the Federal Court can be transferred by the Federal Court to the Federal Magistrates Court. As Pearce comments (above n 13 at 8), "it is indicative of the downgrading of the status of the ART when compared with the AAT that appeals on questions of law can be determined at the Magistrates Court level".

be addressed initially and professionally within the tribunal system. The paper by Dr Nygh provides excellent substantiation – if it were needed – of the depth of understanding and experience of administrative law and immigration issues that presently exists within the Commonwealth tribunal system. It has been the experience of courts around Australia that the development of an internal two-tier structure – with either a Full Bench or a Court of Appeal – is the preferable model for the constitution of the court. One can only hope that this option of two-tier review for immigration matters will similarly be embraced by the Parliament in its passage of the ART Bill.

Impact of Federal Court Review on the Role of the RRT

Commonwealth administrative tribunals have lived and developed under the watchful presence of judicial review. Constitutionally this has been essential,[25] but functionally too it is an indispensable component of administrative justice that an opportunity should exist to test the legality of executive decision-making and tribunal adjudication in an independent judicial forum. Yet, no principle of justice is an absolute and unconditional truth, and the opportunity for judicial review is no exception. Judicial review which is undertaken without proper regard for the different context in which executive and tribunal decisions are made, and for the legitimate objectives which those processes uphold in a governmental system, can be as much a problem as the defective decision-making it is designed to correct. I have elsewhere discussed the distorting effects of judicial overreach in relation to immigration review,[26] and in this commentary will add only briefly to those remarks.

The many cases in which there has recently been an internal conflict within the Federal Court on questions of refugee law and administrative review have already been noted. To some extent, it is inevitable that different minds will reach different views on the complex issues that arise in the immigration jurisdiction. But that alone is not a satisfactory explanation. Too often the reason for the conflict and contradiction is that the goalposts have been moved in individual cases. No doubt this is in response for the most part to the arguments presented to the Court, but there is also an appearance from time to time of a solitary initiative by members of the Court to formulate new rules about administrative propriety, or (more cynically) to circumvent restrictions that have been placed on administrative review either by the Parliament or by the High Court. Inevitably, these explorations have been reined in, as they have been by the High Court and the Full Federal Court in cases such as *Wu Shan Liang*, *Guo Wei Rong*, *Eshetu*, *Epeabaka*, *Rajalingam*, *Singh* and *Yilmaz*.[27] Nevertheless, their recurrence dominates not only refugee review but also administrative law generally.

This trend raises profound questions about the dynamics of judicial review, and its compatibility with democratic foundations and the separation of powers. It has implications also for the professionalism and integrity of the system of administrative review by tribunals, in a number of ways. In the first place, the recent trend in judicial review of tribunal decisions engenders an atmosphere of ongoing disorder concerning the standards for administrative review and the professionalism of tribunals in meeting those standards. The fluidity in legal

25 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

26 McMillan, above n 14.

27 *MIEA v Wu Shang Liang* (1996) 185 CLR 259 (rejecting a trend of "reading behind" the decision-maker's reasons); *MIEA v Guo Wei Rong* (1997) 191 CLR 559 (rejecting a fallacious judicial approach to refugee determination); *MIMA v Eshetu* (1999) 162 ALR 577 (rejecting the characterisation of the "substantial justice" exhortation as a substantive requirement); *MIMA v Epeabaka* (1999) 160 ALR 543 (rejecting a probative evidence requirement); *MIMA v Rajalingam* [1999] FCA 719 (rejecting an inappropriate use of the "what if I am wrong?" test); and *MIMA v Singh* [2000] FCA 845 (rejecting the need for a statement of reasons to explain the dismissal of conflicting evidence); *Yilmaz v MIMA* [2000] FCA 906 (rejecting the view that incomplete appeals are necessarily invalid).

doctrine provides an incentive for unsuccessful visa applicants to litigate, more so when a lifeline is thrown by a Full Court either permitting the applicant to raise on appeal an issue that was expressly abandoned at trial (for example, *Teoh* and *White*[28]), or inviting or allowing the applicant to raise an issue that had not earlier crystallised in the case (for example, *Thevandram, MIMA v "A"*, and *Yilmaz*[29]).

The public standing of the administrative review system is endangered also by some of the subtle undertones in the litigation. For example, in the line of cases which led up to *Eshetu*, plaintiffs (with considerable judicial backing) were repeatedly asserting that tribunals defy their own statutory obligation to observe "substantial justice". In the line of cases which led up to *Singh*, plaintiffs were arguing (in nearly 50% of cases) that tribunals did not know how to write reasons statements properly. And, in the line of ongoing challenges premised upon *Sun Zhan Qui*,[30] parties routinely allege that tribunals are guilty of actual bias. An attitude of mind can soon develop in the broader community that the persistent repetition of these allegations is a sign that something must be wrong.[31] It is probable that if those allegations were thrown as repeatedly at courts, albeit in the velvet tones of advocacy, there would be judicial consternation concerning the implication for public confidence in the professional skill and integrity of the judicial system.

The adverse implications for administrative review are exacerbated too when the judgments of courts are spruiked with comments that are unfairly derogatory of tribunals or of the merits of the decisions under review. For the greater part judicial review is undertaken by the Federal Court in an exemplary and considerate fashion. However, in an earlier article I gave examples to suggest that a problem does exist in immigration review,[32] and I will briefly refer to recent examples to illustrate that the issue has not gone away.[33]

There is a recurring pattern of criticism of the factual inferences and merit determinations by the tribunal, sometimes rising explicitly to a generalised condemnation of "lack of competence" of the tribunal.[34] It is, to some extent, an accepted part of the pattern of administrative law review in Australia that it is undertaken in a robust fashion; the forthright declaration of principle and restraint of abuse of executive power can border on the bruising.

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28 *Teoh v MIEA* (1994) 49 FCR 409 (FC) at 416 (Lee J) and 428-429 (Carr J); and *White v MIMA* [2000] FCA 232 (FC) at paras 5-37.

29 See *Thevandram v MIMA* [1999] FCA 182 at para 11; *MIMA v "A"* (1999) 168 ALR 594 at paras 17, 109-111; and *Yilmaz v MIMA* [2000] FCA 906 at para 68. See also the examples given in H Burmester, "Commentary" (1996) 24 *Federal Law Review* 387.

30 *Sun Zhan Qui v MIMA* (1997) 151 ALR 505. See also *MIMA v Asif* [2000] FCA 228. For a critical analysis of the liberality of the test for actual bias applied in some decisions of the Court, see the judgment of Sackville J in *Yit v MIMA* [2000] FCA 885.

31 For example, see the submissions made by lawyers to an inquiry by the Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Judicial Review) Bill 1998* (1999) at paras 1.21-1.44.

32 McMillan, above n 14 at 10-12.

33 Cf also *Semunigus v MIMA* [2000] FCA 240 at para 98 per Madgwick J; *Mashayekhi v MIMA* [2000] FCA 321 at paras 16-17 per Merkel J; *Duzdiker v MIMA* [2000] FCA 390 at paras 15, 16, 32 per Madgwick J; *Zaltni v MIMA* [2000] FCA 399 at paras 62-63 per Einfeld, Lindgren and Tamberlin JJ; *Sultan v MIMA* [2000] FCA 829 at paras 14, 17 per Madgwick J; *Nader v MIMA* [2000] FCA 908 at 68 per Hill J; *Xavier v MIMA* [2000] FCA 927 at paras 15-18 per Merkel J. Of similar note is the tendency to disparage the use of the term "appeal" to describe appeals from the AAT to the Federal Court, on the basis that AAT decisions are reviewed in the original jurisdiction of the Federal Court – eg, *Gibson v Repatriation Commission* [2000] FCA 739 at para 1 per Burchett, Lee and Hely JJ, referring to "a so called appeal"; see also *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* [2000] FCA 900 per Lee J; and *Secretary, Department of Employment, Education, Training & Youth Affairs v Fitzalan* [2000] FCA 1061 per Burchett J. The use of the term "appeal" in this context has the support (apart from the dictionary) of a strong legislative tradition in Australia.

34 *Gamaethige v MIMA* [2000] FCA 1025 at para 34 per Branson J.

Nevertheless, there is a fine (yet important) line between correction of error in the individual case, and judicial disparagement of executive and tribunal processes. Arguably that line has been crossed when the criticism is made, as it recurringly is, in the context of a judicial statement along the lines that "there is no reviewable error of law in the tribunal's reasons, but the logic of the factual reasoning is questionable all the same".

It is implicit in comments of that kind that the legal principle that a tribunal is not required in its statement of reasons to explain why it has attached no weight to evidence contrary to its findings, is to be treated as a lowest common denominator standard beyond which the tribunal can safely get away with erroneous reasoning but attract judicial criticism when it does so. The orthodox alternative view is that the principle is meant instead to be a line which defines the boundary of a court's legitimate scrutiny. As Justice Mason observed in *Australian Broadcasting Tribunal v Bond*, "[s]o long as there is some basis for an inference – in other words, the particular inference is reasonably open – 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".[35]

A specific example of a recent comment that is disparaging of tribunals was an intimation by Lee J in *Zitoni*[36] that the Court should approach its task on the assumption that the RRT - and, presumably, most other tribunals - are error-prone. After acknowledging that a tribunal is not required to refer separately in its reasons to each individual item of evidence, his Honour continued:

> On the other hand, it should not be overlooked that the number of decisions a Tribunal member is expected to produce whilst constituting the Tribunal may be, on occasions, antithetical to due consideration of all relevant material in the conduct of a review hearing and the preparation of a decision free from error.

The authority given for that aspect of judicial knowledge was, interestingly, a similar claim in an academic article.[37]

A further example worthy of note comes from the decision of Madgwick J in *Akand*.[38] His Honour expressed "grave concern" about "a serious impropriety" on the part of the RRT and its registry. The impropriety arose from the fact that on a Tuesday the Tribunal was due to hand down a decision which had been written and signed over three weeks previously, and sent to the Registry for processing, a fact of which the parties had been notified. On the preceding Wednesday before the decision was due to be handed down, the applicant sent in a further submission, one of many. The Tribunal proceeded on the basis that, having already made its decision and duly notified the applicant, it was not obliged to consider the late submission. However, on the following day, Thursday, the Full Court in *Semunigus*[39] gave a split decision, of about 114 paragraphs, which dealt with the principle to be followed by the Tribunal in the case of late submissions. The "serious impropriety" alleged by Justice Madgwick lay, seemingly, in the following rationale: that, between the Thursday and the Tuesday, the Tribunal had not become aware of the Full Court decision (one of 3 Federal Court immigration decisions given that day, 15 that week); that the Tribunal had not digested the implications of the decision (a matter which, with respect, Justice Madgwick did not

35 (1990) 170 CLR 321 at 356 (emphasis added).

36 *Zitoni v MIMA* [2000] FCA 621 at para 22.

37 G Fleming, "The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals" (1999) 7 *AJAL* 33 at 46-47.

38 *Akand v MIMA* [2000] FCA 626.

39 *Semunigus v MIMA* [2000] FCA 240.

manage to do correctly in *Akand*[40]); and that the Tribunal had not considered whether to re-open the case before it (one of the 7,000 or so appeals received by the Tribunal each year). In considering whether there was "serious impropriety", one should note as well that the Full Court had not itself chosen to follow the practice which it follows in other cases it deems to be of public importance, of simultaneously publishing a summary of its judgment. Some may also think it relevant that the Full Court, of which Justice Madgwick was a member, had itself taken over 7 months to prepare judgment in the matter.

40 In *Semunigus*, the RRT member had on 12 June both signed his decision and handed it to the RRT registry staff for processing. Later that same day, a further and unforeshadowed submission was received from the applicant. At first instance, Finn J held that the RRT was *functus officio* when the submission was received and could not consider it. The Full Federal Court dismissed an appeal (Spender and Higgins JJ; Madgwick J dissenting). Spender J thought it probable that the RRT was not *functus officio* at the time of receiving the submission, but dismissed the appeal on the basis that the failure of the RRT to consider the late submission was not, in any case, a reviewable error under the *Migration Act*. Higgins J held that the decision was made when the Member's reasons were delivered to and recorded in the Registry of the RRT, and accordingly that the submission could not be considered by the Member at the time it was received. Higgins J also queried whether their could be a statutory obligation to consider a late submission, compatibly with the RRT's statutory obligation to be "economical, informal and quick" Madgwick J, dissenting, held that there was an implied statutory obligation on the RRT to consider whether to receive the late material. In *Akand* Justice Madgwick acknowledges that the majority in *Semunigus* held that there was no reviewable error, but otherwise his Honour's judgment in *Akand* proceeds on the basis that there was a legal obligation on the Tribunal to consider late submissions, which was the view taken in his Honour's own dissenting judgment in *Semunigus*.

THE COMMONWEALTH'S RESPONSE TO *RE WAKIM*: THE *JURISDICTION OF COURTS LEGISLATION AMENDMENT ACT 2000*

Kathryn Graham[*]

Introduction

The *Jurisdiction of Courts (Legislation Amendment) Act 2000*, ("the JOCLA Act") came into effect on 1 July 2000. Schedule 1 of the JOCLA Act is the Commonwealth's major legislative response to the High Court's decision in *Re Wakim; Ex parte McNally*[1] ("the cross-vesting decision"). The JOCLA Act amends the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") substantially, and the *Administrative Appeals Tribunal Act 1975* ("the AAT Act") to a lesser extent. This note explains the reasons for these amendments, and their practical effect.

Co-operative Schemes

Co-operative schemes have become a common feature of Australian federalism. Such schemes involve, to some extent, the conferral of both State and Commonwealth powers on some official or authority. The pattern in recent years is for States to confer functions and powers on a Commonwealth official or authority, although this is not universally the case.[2]

Providing for Merits and Judicial Review of Decisions of Commonwealth Officers/Authorities in Cooperative Schemes

Prior to turning to the amendments made by the JOCLA Act, the means by which the cooperative schemes provided for administrative and judicial review of decisions made by Commonwealth officers where the relevant power or function is conferred by a State will be examined.

Before the commencement of the JOCLA Act, s.9 of the ADJR Act prevented State courts from reviewing decisions or actions of Commonwealth officers; this restriction applied even where the powers being exercised by a Commonwealth officer were conferred by State legislation.[3] The operation of s.9 was limited to some extent by the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* ('the Cross-vesting Act') which vests Commonwealth jurisdiction in all matters[4] in State courts. However, State courts are required in all but extraordinary circumstances to transfer such proceedings to federal courts, because proceedings involving review of decisions of Commonwealth tribunals, and

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1 (1999) 198 CLR 511.

2 This note does not discuss the validity of such schemes. However, in *R v. Hughes* (2000) 171 ALR 155, the High Court cast some doubt on the capacity of a Commonwealth authority or officer to participate in such schemes in the absence of a Commonwealth head of legislative power supporting the conferral of duties on Commonwealth officers.

3 See ADJR Act paragraph 9(1)(d)

4 Other than those specifically listed in s.4(4) of the Cross-vesting Act.

matters under the ADJR Act are 'special federal matters' for the purposes of the Cross-vesting Act.[5]

Prior to the enactment of the JOCLA Act, the ADJR Act did not apply to decisions by Commonwealth officers taken under State laws; it only applied to decisions under 'enactments', which effectively meant Commonwealth enactments, and not State laws. It is important to recall, however, that section 75(v) of the Constitution applies to decisions of Commonwealth officers even when the officer is performing functions or exercising powers conferred by the law of a State.[6]

Some of the cooperative schemes do not make any specific provision for merits or judicial review of decisions taken by Commonwealth officers; aggrieved persons in these cases would be forced to rely on section 75(v) remedies. However, in a number of schemes it was considered appropriate for States to adopt the Commonwealth administrative law system, either in part, or entirely, for Commonwealth officers and authorities exercising powers conferred by States in the scheme.[7] This was done in order to extend a more comprehensive system of administrative law to aggrieved persons than section 75(v) would offer, while also ensuring that Commonwealth officers involved would be subject to a uniform system of administrative law, regardless of whether they were acting, in a particular case, pursuant to powers conferred by State or Commonwealth law.

The usual approach in the State legislation was for the States to adopt and apply, as State law, the provisions of some or all of the 'Commonwealth administrative laws' (ie, the ADJR Act, the AAT Act, the *Ombudsman Act 1976*, the *Freedom of Information Act 1982* and the *Privacy Act 1988*).[8] Each of these laws, adopted as State law, would operate in relation to Commonwealth officers when they were performing functions under the cooperative scheme law of a particular State. For example, if an officer of the Australian Securities and Investments Commission made a decision under the Corporations Law of Victoria, that decision would be judicially reviewable under the ADJR Act as the ADJR Act applied as *State* law.

The Effect of the *Re Wakim* Decision

Several of the Commonwealth administrative law statutes confer jurisdiction on the Federal Court (and now also the Federal Magistrates Court) in their own terms.[9] If they operated as the law of a State, those laws would result in the States conferring jurisdiction on these federal courts. The decision in *Re Wakim* established that the States could not confer such jurisdiction. It was therefore necessary to consider the effect of the *Re Wakim* decision on the application of the Commonwealth administrative laws to decisions and actions taken under State law, by Commonwealth officers, in the cooperative schemes.

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5 See section 6. For a comprehensive discussion of the relationship between section 9 of the ADJR Act and the Cross-vesting Act, see Campbell, Enid 'Cross-vesting of Jurisdiction in Administrative Law Matters' (1990) 16 *Mon UL Rev* 1.

6 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

7 The schemes were those where the States adopted the following Commonwealth legislation: the *Agricultural and Veterinary Chemicals Act 1994*, the *Australian Sports Drug Agency Act 1990*; the *Corporations Act 1989*; the Competition Code set out in Part 1 of the Schedule to the *Trade Practices Act 1974* and the Price Exploitation Code set out in Part 2 of the Schedule to the *Trade Practices Act*. Also relevant was the scheme where the States adopted the *Gas Pipelines Access (South Australia) Act 1997* of South Australia.

8 See for example, s.35, *Corporations ([Name of State]) Act 1989*.

9 See for example, section 8, ADJR Act.

The Ombudsman, FOI and Privacy Acts

The JOCLA Act did not amend the Ombudsman Act, the FOI Act or the Privacy Act, consequent on the *Re Wakim* decision. The FOI Act does not purport to confer jurisdiction on any federal court, and it could therefore operate as applied State law in relation to the actions of Commonwealth authorities under State law, without any *Re Wakim* issues arising.

The Ombudsman Act, in its operation as Commonwealth law, applies to the actions of Commonwealth officers taken under State law in any case, since it relates to action taken by relevant Commonwealth agencies regardless of the source of power for such action. Consequently, the Commonwealth Ombudsman Act would have operative force in all relevant circumstances, making the adoption by States of the Ombudsman Act unnecessary.

The ADJR and AAT Acts

However, the impact of *Re Wakim* upon the State adopted version of the ADJR Act and the AAT Act was more serious. As those Acts purported to confer State jurisdiction on federal courts, the application by States of the ADJR Act as State law was probably entirely invalid. The application by States of those parts of the AAT Act which confer jurisdiction on the Federal Court was also probably invalid.[10]

Finding a Solution for the ADJR and AAT Acts

The *Re Wakim* decision meant, in practical terms, that in relation to the decisions and actions of Commonwealth officers taken under State conferred powers, the only avenue of judicial review available was that provided by s.75(v) of the Constitution, and that real doubt existed as to whether there could be any appeal on questions of law, or referral of questions of law from the AAT to the Federal Court.

Either of two solutions to this problem might have been adopted. First, State courts could have been allowed to judicially review decisions by Commonwealth officers and authorities where the decisions were made under State law, and to allow State courts to hear appeals on questions of law from the AAT in the same circumstances. The most obvious way to do this would be for the States to adopt the Commonwealth administrative laws as State laws, in relation to cooperative scheme matters, but instead of conferring jurisdiction on the Federal Court in each case, have the States confer jurisdiction on State courts. However, this would have been a very different approach to the approach taken in the past - that is not to have the decisions of Commonwealth officers reviewed in State courts; this is the policy inherent in section 9 of the ADJR Act.

Moreover, this approach would create a situation where applicants would have to work out which of the State or Commonwealth cooperative scheme laws applied in the case of their particular grievance, in order to determine in which court proceedings should be commenced.

Alternatively the Commonwealth could rely upon its own powers with respect to its officers and the authorities created under Commonwealth legislation. The JOCLA Act adopts this approach.

The ADJR Act

The JOCLA Act amended the ADJR Act so that it applies not only to 'decisions under enactments' but also to decisions made by a Commonwealth authority, or officer of the Commonwealth under an Act of a State or Territory described in new Schedule 3 of the

10 *Re Wakim* did not have any negative consequences for the exercise of State-conferred functions and powers by the AAT (which is not, of course, a Chapter III court).

ADJR Act. Schedule 3 lists cooperative schemes in which State laws confer powers or functions upon Commonwealth officers or authorities. Hence, the ADJR Act will apply as Commonwealth law to decisions taken by Commonwealth officers or authorities under State laws listed in new Schedule 3, and the Federal Court will therefore have jurisdiction.

Split proceedings under the ADJR Act

One issue which the JOCLA Act highlights is the difficulties which may come into play when a judicial review proceeding is closely connected to another proceeding. For example, there may be a dispute between a person and the Commonwealth as to a decision which has been made by the ACCC under the Competition Code provisions of the *Trade Practices Act 1974* (applying as State law) which concerns a factual situation which is also in question in a dispute between two private parties, as to their respective rights under the Competition Code. The ACCC decision might give rise to judicial review proceedings (which can only be brought in the Federal Court because of the operation of s.9 of the ADJR Act and provisions of the Cross-vesting Act), while the dispute between the private parties can only be brought in a State court as it arises under a State law (ie, the State applied Competition Code provisions). Prior to the decision in *Re Wakim*, the proceedings between the parties could have been brought in a Federal Court under its cross-vested jurisdiction.

However, following *Re Wakim*, such a person would have been faced with a situation where two courts might be dealing with related proceedings, without the possibility of either proceeding being transferred to the other court. To address this, the JOCLA Act amended the Cross-Vesting Act to permit the judicial review proceedings to be transferred to a State Supreme Court where a related proceeding is either already commenced or is subsequently commenced in that State Supreme Court.[11]

AAT Act

The adoption by States of the AAT Act as State law is generally valid. However, the AAT Act does confer jurisdiction on the Federal Court (and now the Federal Magistrates Court) with respect to appeals and references on questions of law. These provisions, when applying as State law, would be contrary to the principle in *Re Wakim*, and invalid.

The JOCLA Act provides that where there is an appeal on a question of law, or a referral of a question of law from the AAT to the Federal Court, the Federal Court will deal with that appeal or referral as a matter of federal, not State, jurisdiction. The AAT Act now contains a new Part IVA, entitled: 'Appeals and references of questions of law to the Federal Court of Australia'. New section 43B provides, effectively, that Part !VA operates (as Commonwealth law) in respect of all proceedings before the AAT, including proceedings which are before the AAT by virtue of the application of the AAT Act as State law.

Conclusion

On 25 August 2000, States agreed in principle to refer powers in relation to corporations to the Commonwealth. If this comes to fruition, many of the most pressing problems which have arisen from the High Court's decision in *Re Wakim* will be resolved. However, it will not resolve the problems associated with the other cooperative schemes which have been established in reliance on the validity of cross-vesting. The JOCLA Act will ensure, at least, that the administrative law remedies which the cooperative schemes intended to make available under those schemes will be open. However, the future of cooperative schemes generally is, given the decision in *R v. Hughes*,[12] now in the hands of the High Court.

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11 See Cross-vesting Act section 6A.

12 (2000) 17 ALR 155.

JUDICIAL REVIEW AND THE PRE-TRIAL PROCESS

Sean Brennan[*]

Edited version of a paper presented to an AIAL seminar entitled "Recent Developments in Administrative Law", held in Canberra, 12 July 2000

This paper examines Schedule 2 to the *Jurisdiction of Courts Legislation Amendment Act 2000* ('JOCLA Act'). The JOCLA Act came in the wake of the High Court's decision in *Re Wakim*,[1] a constitutional decision which left co-operative legislative schemes involving the Commonwealth, States and Territories in considerable disarray.

The JOCLA Act consists of two Schedules. The policy background to Schedule 2 is entirely unrelated to that behind Schedule 1, but it is noticeable that the two Schedules do diametrically opposite things. Schedule 1 to the JOCLA Act restores a statutory right to judicial review, for decisions taken under a variety of co-operative schemes, after the right went up in smoke on constitutional grounds in *Re Wakim*.

Schedule 2, by contrast, is about taking away judicial review. Specifically it restricts access to statutory forms of judicial review, in relation to particular decisions taken prior to the commencement of a criminal prosecution.

Perspective

The author of this article is a member of the Law & Bills Digest Group, a part of the Parliamentary Library which provides legal information and research services to the Members and Senators of the Commonwealth Parliament.

The Law Group is primarily responsible for a Library publication known as a Bills Digest, which is produced for virtually every Government Bill introduced into the Commonwealth Parliament.[2] A Bills Digest is an attempt to provide parliamentarians with a one-stop document for the purposes of parliamentary debate, one which contains:

- a summary of the policy background to the Bill
- a plain English explanation (to the extent that is possible) of the technical provisions contained in the Bill
- reference to those aspects of the Bill which are likely to attract and/or which warrant parliamentary attention, for either technical or policy reasons.

Although public servants, staff in the Library are employed by Parliament rather than the Executive. Particularly where Bills are not referred to a parliamentary committee and there attract detailed analysis by interest groups and public submissions, a Bills Digest may be one of the few documents which provides a technical and policy perspective on incoming legislation which is independent of the Executive that introduced it.

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1 R*e Wakim; Ex parte McNally* (1999) 198 CLR 511.

2 Bills Digests are published in hardcopy by the Department of the Parliamentary Library (DPL). They can also be found at the DPL website at http://www.aph.gov.au/library/ pubs/bd/ (5 October 2000). The Bills Digest for the JOCLA legislation is at http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD149.htm (5 October 2000).

Accordingly, this paper takes what might loosely be called a parliamentary perspective on the JOCLA Act; and examines:

- what do its provisions contain as a matter of technical law?
- what issues might or should attract Parliament's (and public) attention?
- how persuasive is the case made by the Executive to the Parliament for changing the law affecting the legal rights of those facing criminal prosecution?

Overview of Schedule 2

Schedule 2 to the JOCLA Act is about restricting access to judicial review of administrative decisions taken in criminal cases prior to commencement of the trial. In summary, it:

- cuts back availability of judicial review of the decision to prosecute ;
- restricts access to *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act') review of other pre-trial decisions;
- clarifies exemptions from the right to obtain reasons under the ADJR Act for decisions made in the criminal justice process; and
- channels much of the remnant jurisdiction away from the Federal Court towards State and Territory Supreme Courts.

It achieves these objectives by amendments to 3 Acts: the ADJR Act, the *Corporations Act 1989* and the *Judiciary Act 1903*.

The Decisions in Question

Potentially many decisions can be taken prior to the commencement of a prosecution, under a Commonwealth enactment and/or by an officer of the Commonwealth. For example, under the Act governing his or her operations, the Commonwealth Director of Public Prosecutions (DPP) institutes prosecutions for offences against Commonwealth law, appeals and other legal proceedings.[3] A judge or nominated AAT member may issue a listening device warrant to the Australian Federal Police (AFP) to bug a person or premises.[4] A magistrate may issue a search warrant under the *Crimes Act 1914*,[5] the *Customs Act 1901*[6] and many other Commonwealth Acts. A non-exhaustive definition of decisions made in the criminal justice process is found in the JOCLA Act.[7]

The Amendments in Detail

(1) The ADJR Act

Two Features of the ADJR Act

The ADJR Act offers a statutory form of judicial review for a wide range of decisions made under enactments. Schedule 1 of the ADJR Act lists certain decisions exempted from review under the Act. Existing exemptions include, for example, decisions under the *ASIO Act 1979*,

3 *Director of Public Prosecutions Act 1983*, s.6.

4 *Australian Federal Police Act 1979* s.12G.

5 Section 3E.

6 Section 214AB.

7 Item 1 in Schedule 2, inserting new section 9A in the *Administrative Decisions (Judicial Review) Act 1977*.

the *Telecommunications (Interception) Act 1979* and the Commonwealth's witness protection program. Nevertheless, on its face, the ADJR Act applies to a number of decisions related to the criminal justice process.

The ADJR Act also, in section 13, gives people affected by a decision the right to obtain a statement of reasons from the decision-maker. Schedule 2 of the ADJR Act excludes some decisions from this requirement to provide reasons. Before the JOCLA Act, Schedule 2 already contained a general exclusion of decisions relating to the administration of justice, with some specific examples spelt out.

The Key Changes

Schedule 2 of the JOCLA Act does three main things in relation to the ADJR Act:

- it excludes from ADJR coverage decisions to prosecute for any offence (by adding that category of decisions to Schedule 1 of the ADJR Act);[8]
- it clarifies the general denial of a right to reasons for decisions made in the administration of criminal justice (ensuring decisions regarding committal, appeal and the grant of all varieties of warrant are included in the exempt category in Schedule 2 of the ADJR Act);[9] and
- it restricts the ability of defendants to seek ADJR review of other pre-trial decisions taken in relation to the criminal justice process.[10]

In relation to the third change, while a defendant can seek review prior to commencement of criminal proceedings, the Act now suspends the right to take these ADJR Act actions once a prosecution or appeal is on foot.

(2) The Judiciary Act

Section 75(v) of the Constitution constitutionally guarantees a right to obtain certain forms of judicial review against an 'officer of the Commonwealth'. The High Court has jurisdiction to hear such matters, but typically they are heard in the Federal Court, which has jurisdiction over such matters conferred on it by s.39B of the *Judiciary Act 1903*.

While the Parliament can remove the right to take *statutory* proceedings for judicial review of decisions under the ADJR Act, it cannot take away the *constitutional* right to take proceedings under section 75(v). In contemplation that defendants in criminal proceedings will continue to take section 75(v) proceedings despite or perhaps because of the absence of rights under the ADJR Act, the JOCLA Act deprives the Federal Court of its jurisdiction to hear such proceedings in certain circumstances and vests it instead in State and Territory Supreme Courts.[11] Essentially this will happen where the prosecution or appeal itself is before or heading for a State or Territory court. The intention is to avoid splitting matters between courts at different tiers of the federation.

(3) Corporations Act 1989

Other amendments achieve the same result for prosecution and other decisions taken by Commonwealth officials under the Corporations Law of the States and Territories.[12] Where the criminal proceedings are already in a State or Territory court or heading there, the

8 Item 2 in Schedule 2.

9 Items 3–5 in Schedule 2.

10 Item 1 in Schedule 2, inserting new section 9A in the *Administrative Decisions (Judicial Review) Act 1977*.

11 Items 11–15 in Schedule 2.

12 Items 6–10 in Schedule 2.

JOCLA legislation vests jurisdiction for related judicial review matters in the State or Territory Supreme Court at the expense of the Federal Court.

(4) Application of Schedule 2 Amendments

The last thing to observe about these amendments is that as originally drafted they applied not only to future decisions made in the pre-trial process, but retrospectively to decisions made before the commencement date, even when the relevant criminal or judicial review proceedings were already on foot. In addition, the effect of some provisions was to wipe out certain judicial review proceedings as soon as a prosecution commenced.

During parliamentary debate on the JOCLA Bill, the Senate made 9 amendments, which the Government accepted when the Bill returned to the House albeit 'with great reluctance'.[13] Thus the Act in its final form differed from the Bill in one major respect. The JOCLA Act effects a general denial of ADJR review of a 'related criminal justice process decision', while a prosecution or appeal is before the courts. But where, by the time he or she is prosecuted, a defendant has already commenced an ADJR action, the action can continue (as a result of the Senate amendment). A court may, however, grant a permanent stay of the ADJR proceedings where the issue is more appropriately dealt with in the criminal proceedings. Similar amendments were made regarding section 75(v) proceedings already on foot before the Federal Court, when a prosecution or appeal comes before a State or Territory court.

The retrospective operation of the JOCLA Act was modified by another amendment, so that only judicial review applications made after 13 April 2000 can be wiped out by the commencement of a prosecution or, in cases of the decision to prosecute itself, by the commencement of the Act.

Why Erode Judicial Review: Assessing the Government's Case

Obviously the question about Schedule 2 which warranted Parliament's attention was whether it should accede to the Executive's request that it restrict the rights of the accused in criminal matters, specifically their right to seek judicial review of decisions taken on the path to the commencement of a criminal trial.

Why? Because the Parliament should be concerned with the rights and liberties of Australians and with the lawful exercise of state power. Exposure of administrative action to judicial review has come to be seen as a close relative of the fundamental principle governing our legal system, the rule of law. As former Chief Justice Brennan put it:

> To the extent that the courts are impeded from exercising judicial review of administrative decisions, the rule of law is negated.[14]

In the migration context, but with potentially wider application, His Honour remarked:

> The Parliament has made a conscious incursion upon the rule of law. It is no answer to say that some grounds of judicial review are left standing or to point to the High Court's jurisdiction under s.75(v) of the Constitution that lies beyond the reach of the Parliament.[15]

Of course those comments are not necessarily of universal application. So the question is: does the Government make a case which outweighs or dissolves a prima facie concern that accountability and the rule of law may be at risk?

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13 House of Representatives, *Debates*, 9 May 2000, p. 16084.

14 The Hon Sir Gerard Brennan, 'The Mechanics of Responsibility in Government', (1999) 58(3) *Australian Journal of Public Administration*, 3–11, at 9.

15 Id.

Or to use the words of the Senate Committee for the Scrutiny of Bills concerning the JOCLA legislation:

> The Committee is concerned at such a significant reduction in the rights currently available to defendants and seeks the Attorney-General's advice as to why such action is appropriate; how the action proposed in the bill is proportionate to the mischief it is aimed at; and whether an alternative approach should be adopted…[16]

The Government's case for the JOCLA Act was set out in the obvious places: the second reading speech of the Attorney-General,[17] later contributions to the debate by Government Members and Senators, the explanatory memorandum and the Attorney-General's response to the Scrutiny of Bills Committee.[18]

The main arguments put in support of the amendments proposed in Schedule 2 of the JOCLA legislation were:

- avoiding fragmentation of proceedings between courts at different tiers of the federation;
- reducing cost and delay, and the consequential damage caused by delay to the prosecution case (loss of witness recall, possible unavailability of documents); and
- heading off 'the use of unmeritorious delaying tactics in the criminal justice process by removing the collateral access of defendants to federal administrative law procedures and remedies'.[19]

Other arguments which appeared in the course of the parliamentary debate included the following propositions:

- defendants still have judicial review remedies available to them (section 75(v) rights as available in State or Territory courts, ADJR jurisdiction either side of the prosecution proceedings);
- the criminal courts themselves provide adequate safeguards, through the discretion to deny admissibility to prejudicial evidence, the grant of a permanent stay to prevent an abuse of process and the appeal system; and
- the amendments place defendants in Commonwealth prosecutions in essentially the same situation as their State counterparts.

I will concentrate on three of these: the allegation of abuse of the system at present, the adequacy of the criminal process itself to deal with shortcomings in pre-trial decision-making and the likelihood of avoiding fragmentation.

Are such 'collateral' attacks always unmeritorious? Although the second reading speech might be interpreted to suggest that they are, the Attorney-General's response to the Scrutiny of Bills Committee was more carefully worded to suggest that judicial review was 'frequently' a stalling tactic.[20] But if the Government has a strong case on this point, it has not made the most of it. It is not assisted, for example, by the absence of statistics or any concrete examples to illustrate abuse of the system. Instead the assertions that 'collateral

16 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, p. 171.

17 House of Representatives, *Debates,* 8 March 2000, p. 14109.

18 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, pp. 172-174.

19 House of Representatives, *Debates,* 8 March 2000, p. 14111.

20 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, p. 172.

attacks' generally lack merit and are 'invariably used only by defendants with deep pockets'[21] were left to stand in the parliamentary materials without empirical support.

If not all such applications are unmeritorious, the question posed by the Act is whether on balance it is better to impose a blanket prohibition on access to ADJR review, at least for certain periods? Or is it safer to trust the courts to exercise their judgment and grant relief only in exceptional cases of meritorious challenge?

Certainly wider opinion appears divided on the question of administrative law and its interaction with the criminal justice system. Some applaud administrative law as a desirable discipline on decision-making in the criminal justice context, imposing much-needed notions of reasonableness and accountability. Indeed D.J. Galligan sees the present judicially self-imposed regime of abstinence and restraint as excessively cautious. He calls for *more* due process at the pre-trial stage, because it is where so many decisions with a major impact on defendants are made.[22] Others see administrative law as an unwanted intrusion, a costly duplication of judicial supervision.

The courts themselves appear relatively firm in their view. Since the Full Federal Court decision in *Lamb v Moss* in 1983[23] the legal position has been relatively straightforward: the courts will not ordinarily interfere with the processes of the criminal law by way of judicial review but will do so in exceptional circumstances. Put another way, the courts will generally exercise their discretion under the ADJR Act *not* to grant relief but exceptional circumstances may produce a different result. The same principle appears to apply whether the decision is one to commit a defendant for trial,[24] to issue a warrant,[25] to prosecute a defendant[26] or to arrest a suspect.[27]

In developing this doctrine of judicial restraint the courts have identified a number of factors which will generally stay their hand when judicial review is sought regarding pre-trial decisions:

- the courts should not be seen to stand too close to the executive decision to prosecute;[28]
- there is a strong public interest in the expeditious completion of criminal matters;[29]
- defects may be remedied by the court exercising criminal jurisdiction in the primary matter;[30] and
- the fragmentation of proceedings between federal and State courts should be avoided where possible.[31]

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21 House of Representatives, *Debates,* 5 April 2000, p. 15328.

22 D.J. Galligan, “Regulating Pre-Trial Decisions”, N. Lang (ed)., *Criminal Justice*, OUP 1994, 151-176.

23 (1983) 76 FLR 296.

24 *Lamb v Moss* (1983) 76 FLR 296.

25 *Brewer v Castles (No. 1)* (1984) 52 ALR 571 The warrant was successfully set aside without the Court having to specify whether it was done pursuant to the ADJR Act, section 39B of the *Judiciary Act 1903*, section 32 of the *Federal Court of Australia Act* 1976 or the 'accrued jurisdiction' of the Federal Court.

26 *Smiles v Commissioner of Taxation* (1992) 35 FCR 405 (subject to doubt expressed by Davies J about the effect of the High Court's decision in *ABT v Bond* (1990) 170 CLR 321). The decision to prosecute was upheld.

27 *Grech v Featherstone* (1991) 105 ALR 107 (the application was unsuccessful and the arrest, pursuant to the *Migration Act 1958*, was allowed to stand).

28 *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1994) 27 ATR 584 at 590.

29 *Flanagan v Commissioner of Australian Federal Police* (1996) 134 ALR 495 at 528.

30 *Jarrett v Seymour* (1993) 119 ALR 46 at 54 per Lockhart and Beaumont JJ.

In a Federal Court case earlier this year, *Crane v Gething*,[32] French J reaffirmed the general principle of judicial restraint, subject to exceptions in appropriate cases. He indicated that petitioners for judicial review are likely to confront a spectrum of responses, with the best chance of success residing in cases which crystallise a pure question of law uncontaminated by disputed questions of fact, where (though investigation has commenced) no criminal proceedings are pending.

Essentially the courts appear to have developed a number of safeguards against defendants who might gain inappropriate collateral advantage by launching judicial review proceedings. First, as we have seen, the courts will only intervene in exceptional cases.[33] Secondly, judicial review applications are open to be dismissed as an abuse of process.[34] Thirdly, success is virtually impossible unless a case poses a discrete question of law without factual dispute.[35] Fourthly, the courts will not allow suspects to use judicial review proceedings as a fishing expedition.[36]

With these judicial safeguards in place the question posed earlier becomes more pointed: should Parliament impose a blanket prohibition sweeping aside the prospect of ADJR review regardless of merit in individual cases?

Moving to the next question: is the criminal justice system itself adequate to cure defects in the pre-trial process? The Administrative Review Council ('ARC') thought not, in its advice in the mid-1980s to the Attorney-General after the Commonwealth Director of Public Prosecutions had sought the exclusion of committal proceedings from the ADJR Act. The ARC said certain questions are more appropriately resolved in a judicial review context by a court with specialist expertise in that area, and that defendants should not have to wait for trial to get an answer, for example, on the jurisdiction of a magistrate to conduct committal proceedings.[37]

More recently, Mark Aronson[38] has described changes to the criminal law which suggest that, after the JOCLA Act, defendants are now likely to be squeezed from both sides. It seems that the JOCLA legislation pushes defendants away from the judicial review arena towards the criminal courts, just as the climate on that side of the fence has, according to Aronson, also become a little more inhospitable. He suggests that the recent High Court decision in *Ousley v R*[39] imposes significant restrictions on the ability of a defendant to challenge a pre-trial decision from within the context of a criminal trial, ie as part of his or her defence.

Finally on the question of eliminating fragmentation and delay, we return to the legal reality that Parliament cannot escape the constitutional guarantee of judicial review against officers of the Commonwealth under section 75(v) of the Constitution. Judicial review continues to be an option for defendants and potential defendants, albeit by potentially more cumbersome

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31 *Kovess v DPP* (1997) 74 FCR 297 at 299.

32 [2000] FCA 45 (18 February 2000).

33 *Flanagan v Commissioner of Australian Federal Police* (1996) 134 ALR 495.

34 *Kovess v DPP* (1997) 74 FCR 297 at 299.

35 *Crane v Gething* [2000] FCA 45 (18 February 2000).

36 *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1994) 27 ATR 584 at 590.

37 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Redefining the Act's Ambit*, Draft Report, 1988, Appendix B p. 5. See also *Jarrett v Seymour* (1993) 119 ALR 46 at 54 per Lockhart and Beaumont JJ.

38 M Aronson, 'Criteria for Restricting Collateral Challenge' (1998) 9 *Public Law Review* 237.

39 (1997) 192 CLR 69.

legal means than those available under the ADJR Act. Will delay be eliminated or even reduced by the Act's proposals? As to fragmentation, most major criminal proceedings, in the populous State of New South Wales for example, are conducted in the District Court. The JOCLA Act vests jurisdiction in the related judicial review proceedings in the State *Supreme* Courts. By splitting cases between two levels of court, albeit within the same territorial jurisdiction, it is questionable whether a reduction in fragmented litigation will be achieved.

PREPARATION FOR TOWN PLANNING APPEALS IN THE ACT

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Edited version of a paper presented to an AIAL seminar entitled "Planning Appeals in the ACT" held in Canberra, 23 June 2000.

Introduction

In the ACT, most town planning appeals are heard in the ACT Administrative Appeals Tribunal. The decision appealed from is usually that of the Commissioner for Land and Planning. The appellants are either the developer who has been unsuccessful in a development application or an objector who opposes an approval. The Commissioner becomes the respondent. Other persons can apply to join the proceedings if their interests are affected by the decision. These persons are called "parties joined" or "joinders". Often they are other local residents who want to lend support to an objector. Sometimes the party joined is the developer who wants to support the Commissioner's decision. Sometimes there are numerous parties joined, some aligned with the Commissioner, some against.

The issues for each party are: what is involved in these cases? How best to prepare for the hearing? The purpose of this paper is to outline the essential steps for both lawyers and lay persons.

The Applicable Laws

This paper, mercifully for those reading it, is not intended to be an exposition on town planning legislation in the ACT, which has a reputation for complexity. Nevertheless, the legislation is the starting point in assessing preparatory steps.

Those unfamiliar with town planning legislation ought to look first at the Commissioner's decision, as it will recite the various laws and instruments to which regard has been had in arriving at a decision. Without being definitive, the following are the laws and instruments most commonly relevant in litigation:

- Land (Planning and Environment) Act 1991 ('the Land Act');
- The Territory Plan, and within that the most frequently litigated parts are:
  - Appendix III.1 Residential Design and Siting code for Single Dwellings
  - Appendix III.2 Residential Design and Siting Code for Multi Dwelling Developments
  - Appendix V, Heritage Places Register
  - Appendix VI, Definitions of Terms
- Draft Guidelines for Multi Unit Redevelopment Including Dual Occupancy in Residential Areas (PPN 6)
- Guidelines for Residential Redevelopment Forrest/Red Hill/ Deakin/Griffith Historic Areas (PPN 5)
- Draft ACT Parking and Vehicular Access Guidelines
- Interim Heritage Places Registers, most prominently in recent times the Interim Register for the Red Hill Precinct

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Other instruments may come into play from time to time, for example the National Capital Plan.

Guidelines, Draft Guidelines and Policy

It is a source of some frustration that development applications are often determined on the basis of compliance or non-compliance with numerous "guidelines", "draft guidelines" and "policies". Thus, in the preparation phase, the questions that arise are "what is the status of a guideline or policy, and if it has status, what evidence is required to convince the AAT to depart from it?". This can be an issue of immense difficulty for lawyers as well as lay persons.

The general propositions relating to the application of policy are as follows:

- A policy receives recognition under the Territory Plan if it is either a guideline "adopted by the Territory" or it is otherwise a published guideline.
- The meaning of "adopted by the Territory" is undefined by the Territory Plan. "Territory" is defined somewhat unhelpfully to mean “the body politic under the Crown by the name of the Australian Capital Territory”. Usually the guideline is taken to be adopted when it is adopted by the Chief Planner, or has been endorsed by the Minister. Some guidelines in the ACT have been endorsed by the Legislative Assembly.

The principles relating to the application of or departure from guidelines are:

- It is appropriate to take into account the terms of guidelines but they are not binding.[1]
- A planning appeal body must consider each appeal on its merits and not fetter is discretion by reference to some general policy considerations.[2]
- The mere existence of a policy does not preclude the exercise of discretion should special or unique circumstances arise for consideration. The weight to be given to a policy will depend on the circumstances in which the policy was developed and the appropriateness of its application to the case at hand.
- Where the formulation of an administrative policy is deficient it may be expected that the Tribunal will give little weight to it and reach its own conclusions on the merits of the individual application.[3]

The fact that a guideline is a "draft" should not be taken to indicate that it is of little weight. Some draft guidelines have been in existence and have been applied for years in the ACT. They are considered relevant by the AAT and usually have to be complied with. In practical terms a party should prepare a case on the basis that a guideline that has been applied for some time will have to be complied with in the AAT.

It should be noted there is a Draft Variation to the Territory Plan No. 155 (DV155) which contemplates that there will be a Register of Guidelines. Notification of registration will be gazetted and notified in a daily newspaper. A decision maker will take account of a guideline

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1 *Canberra Cruises and Tours v Minister for Urban Services* [1999] ACT AAT at 14; *Eric Martin and Associates v Commissioner for Land and Planning*, AAT, 17 May 2000.

2 *H Lavender & Sons Limited v Minister for Housing and Local Government* [1970] 1 WLR 1231; *Smith v Wyong Shire Council (No. 2)* (1980) 41 LGRA 202 at 213.

3 Re John Holman & Co and Minister for Primary Industry (1983) 5 ALN N154.

contained in the Planning Guidelines Register (para 9.2(b) of DV 155). It is to be hoped that this alteration to the Territory Plan will go some way to clarifying the status of guidelines.

Draft Variation 114 and "Old Red Hill"

An interesting and topical illustration of the conflict that can arise between existing law and "policy" is that of Draft Variation 114 which applied to one of the most heritage sensitive - not to mention exclusive - areas in the ACT, the Red Hill precinct. Development in that area has been the subject of town planning battles for many years, usually involving issues of "heritage".

Heritage protection requirements are to be found in the Territory Plan. Amending the Territory Plan to include new areas is not straightforward. The Land Act recognises an "Interim Register" which imposes restraints to protect heritage until amendments to the Territory Plan are debated and completed. The theory is that eventually an amendment to the Territory Plan will be proposed, debated in a public consultation process and either accepted or rejected, sometimes with amendments. The Red Hill precinct - or "Old Red Hill" as some residents of the area like to call it - was the subject of an interim register which contained provisions that limited multi-unit development.

Then came DV114, the intent of which was to complete the process of transformation of the Interim Register for Red Hill to part of the Territory Plan. If the Interim Register limited building development, DV114 was even more restrictive. It proposed plot ratios far more restrictive than those previously applicable and limited development to 2 dwellings per block (some blocks in this area are 9,000m^2).

Under the Land Act DV 114 had no effect until approved. One would think that until passed by the Legislative Assembly the provisions of the Interim Register would dictate the outcome of development applications. Not so. The Department of Urban Services elevated DV 114 to the status of "policy" and applied it to reject development applications even though the public consultation process was still in train.

The status and relevance of DV 114 as "policy" and its relationship to existing instruments was considered in *Martin v Commissioner for Land & Planning* (17 May 2000) where the Tribunal said:

> Put plainly, the fact that DV114 proposes to limit multi-dwelling residential development to two dwellings per block is not of itself a valid reason to refuse a development application such as this one to erect three dwellings on a block, because the current Citation does not impose that limit. Likewise, failure to comply with the specific plot ratios proposed in DV114 is not a valid reason to refuse the development application, because they cannot at this stage be imposed in preference to the provisions relating to plot ratios in the Guidelines for Residential Redevelopment Forrest/Red Hill/Deakin/Griffith Historic Areas ("the Historic Areas Guidelines") which have been endorsed by the ACT Legislative Assembly. But in the exercise of a discretion in reaching the correct or preferable decision on the application, it is proper to have regard to current government policy which appears to favour a limitation in the number of houses per block and, through the proposed imposition of a sliding scale of plot ratios for the Precinct, of density of development.

In short, DV114 had relevance - how much weight can be attributed to it is unclear - but it could not be applied to displace the provisions of existing town planning provisions. DV114 has since become law so the immediate problem has been resolved but it illustrates the propensity of town planners in the ACT to take some liberties with "policy".

Those preparing a case are best served by establishing compliance with a guideline or "policy". Non-compliance is risky in the ACT, even if the instrument is little more than a proposed change to the law. Normally only marginal non-compliance will be tolerated.

Is Legal Assistance Necessary?

The AAT is a relatively informal jurisdiction. Parties can be self represented. If they do not want to represent themselves, s.31 of the *Administrative Appeals Tribunal Act 1989* ('the AAT Act') permits representation by some other person.

Most objectors do not have legal representation because usually they have insufficient funds to retain lawyers. Whether developers wish to engage lawyers depends on a number of factors:

- Existing representation: A developer may already have an architect or may have engaged a town planning consultant to manage the appeal. The latter are familiar with the AAT process and know whether they can handle litigation or the matter should be put in the hands of lawyers.
- Dollar value of the project: Obviously the higher the stakes the greater the incentive to preserve the capital investment and the greater the capacity to absorb legal costs as part of the development.
- Whether the Commissioner's decision is favourable: The decision maker is usually represented by a government officer (sometimes by the ACT Government Solicitor). A party on the same side as the Commissioner may be content with going along for the ride. Historically the AAT has rarely overturned the Commissioner's decision, so a party may want to gamble that the Tribunal will endorse the Commissioner's decision, but there can be no guarantee of a favourable outcome.
- Cost of legal representation: If a town planning lawyer is engaged then, as a rule of thumb, one should budget for $5,000 for every day in the Tribunal. That is not to say that the practitioner will cost $5,000 per day. But if allowance of 1 to 2 hours of preparation for every hour at court is made, it usually works out that way. With less complex cases (eg dual occupancy developments) the cost will drop to perhaps $3,500 per day in court. For more complex cases it will rise to $6,000 per day in court. The difference is reflected in the amount of preparation time required. These are general guides only.

  If a barrister is engaged then the cost rises considerably. Another $2,000 to $2,300 just for the day in court, plus preparation time will have to be added. The preparation time may not be as great as if a solicitor were handling the case alone because much of the preparation will be done by the instructing solicitor. Senior counsel will charge $3,500 to $4,500 per day, plus preparation time plus airfares and accommodation if counsel is from interstate.

  Expert witnesses can add considerably to the cost. It is extremely difficult to anticipate those costs at the outset of the case. As a rough guide, expert fees will be 30% of the lawyers fees. If numerous experts are involved the cost of having the experts give evidence can easily match the lawyer's fees.
- T Documents: One of the first and most important documents a party will receive is the Tribunal documents ("T documents"). Under the AAT Act the decision maker is required to file all documents relevant to the review. This is essentially the Department's file relating to the consideration of the development application. The T documents will contain the objections lodged by objectors and usually a detailed assessment by the case officer as well as any comments by other agencies such as the Heritage Council. It is these documents that should be read first as they will identify very quickly the points of dispute.
- Directions Hearings: The first major step after becoming a party is the directions hearing. The directions hearing is notified to the parties by the AAT.

- The most important objective of the directions hearing is to set a timetable for the case. The timetable consists of:
- Dates by which each party is to file a Statement of Facts and Contentions;
- Date by which each party is to file its witness statements and any other documents (often the same date as filing the Statement of Facts and Contentions);
- Date by which witness statements in reply are to be filed;
- (Possibly) a further directions hearing;
- Dates for hearing.

The timing for each objective depends on the complexity of the case and the number of parties and witnesses. Each party should have at least an idea of the number and type of witnesses it is to call. The parties are not bound by this indication, nor need they name the witnesses.

Developers, for obvious financial reasons, want to proceed as quickly as possible. Objectors want the longest possible timetable because objectors often have to prepare in their spare time, which involves juggling commitments to work and family, school holidays etc. Care must be taken to ensure that too stringent a timetable is not imposed. Failure to adhere to it may result in the hearing date being vacated.

It is a perception and source of annoyance to developers that objectors are given special consideration. However, if there is a complaint in this regard, it is with the appeal regime set up by the Land Act. The AAT must give due weight to the fact that the town planning legislation confers appeal rights on objectors and those objectors cannot always be expected to understand the procedure. The Tribunal recognises the economic imperatives and is anxious to get on with a hearing especially where the proponent already has a development approval. In reality the AAT rarely gives the objectors a timetable much more favourable than that which a legally represented developer would get, but it will be more forgiving of breaches of the timetable by a self represented litigant.

On the other hand, the AAT has from time to time been the subject of quite unwarranted attack by disgruntled objectors who allege the AAT is too legalistic.
The Tribunal will usually try to set a date for hearing at the directions hearing. That will not always occur at the first directions hearing. Sometimes that will only occur later. A hearing date may be set 8 weeks to 3 months after the directions hearing, depending on complexity and the number of days required.

Providing a block of hearing time to complete the case is crucial. An adjournment can be disastrous for a developer. Thus one should be very careful in assessing duration of the hearing. There are two important factors: First, self represented people and lawyers have a propensity to underestimate hearing time. Once allowance is made for the usual skirmishing at the commencement (late notification of witnesses and documents etc) opening the case, the site inspection and submissions, one day is gone without a word of evidence being heard. Even simple cases take 2 days to complete.

Secondly, self represented people add to hearing time because of their lack of skill and familiarity with the process. That is not a criticism, simply an observation. As a general rule, if one of the parties is self represented then one should add another 50% to the estimate of hearing time that would be made if lawyers were running it. If more than one self represented person is involved then even more time should be allowed.

If there are numerous objectors the AAT often prevails upon them to nominate one spokesperson to run the case, which can save time. In reality if the others want to have a say as well then they are usually permitted to do so.

It is false economy to provide for a shorter period of time for hearing in the hope that the parties will work together to get things done. Where all parties are legally represented there is a financial incentive on both clients and lawyers to finish the case in the allotted time. Self represented parties – especially if they are objectors – will not be so constrained and, unfortunately, experience indicates that some will be quite shameless in wasting Tribunal time if it is to their advantage. There is no costs penalty in the AAT.[4]

If the case is not completed in the allotted time then it will usually not go on the next day but will more likely be adjourned for weeks or months.

Sometimes the evidence is finished in time but there is no time for oral submissions. Written submissions are often required. Written submissions at the end of a case are a poor alternative because they are expensive and generally take so long to complete that you would be better served by simply obtaining the next available date for oral submissions.

Standing

Lawyers are familiar with the concept of standing, non-lawyers far less so. A person with a sufficient interest in the outcome of the appeal is said to have "standing". The applicant for development approval, the owner of the land, the immediate neighbours and objectors will usually have standing in town planning appeals. Applications to be joined as a party are often dealt with by the AAT on the papers filed, without any submissions. Sometimes the applications are dealt with at the directions hearing.

Sometimes a party's interest in the appeal is so tenuous that its standing may be challenged. The Tribunal is unlikely to determine a challenge to standing at the directions hearing. The Tribunal may consider dealing with the issue by way of preliminary hearing in which case a full hearing may be avoided. There is a temptation to see a challenge to an opponent's standing as a quick and simple solution to the case . That is rarely so, for the following reasons:

- The test for standing is relatively easy to satisfy in town planning matters;
- Often the Tribunal has to hear most of the evidence before it can make a decision, thus it is more efficient to leave the standing issue to the substantive hearing;
- There is a real prospect that a preliminary hearing could be lost then set down for a substantive hearing months hence with all the evidence to be heard again;
- There may be more than one opponent. If other opponents have standing, knocking one of them out will not advance the case greatly.

In short, a preliminary standing issue should not be taken unless it has strong prospects of success.

4 *Candamber Pty Ltd v. Liquor Licensing Board* [1998] ACT AAT (6 November 1998).

Strike Out Applications

The AAT has the power to strike out at a preliminary hearing applications in respect of decisions that are not reviewable[5] and applications that are frivolous or vexatious.[6]

Most town planning matters raise numerous issues and involve matters of subjective opinion or assessment. For those reasons it will be rare for a case to be struck out but it does happen occasionally. Again caution should be exercised before making such an application because it may simply end up costing the client more than setting the matter down for hearing.

Site Inspection

One step that is regularly ignored until quite late in the preparation is an inspection of the development site and surrounding area. This is surprising because even the very briefest of site inspections can reveal much that is not evident in the T documents. For example, an objector might contend that the size and scale of the proposed development is out of character with the surrounding area, yet an examination might reveal that there is a wide variety of architectural styles and residential sizes and types or there is a similar development two doors away. Or that there is an overlooking problem, yet upon inspection it transpires that the overlooking problem has been exaggerated or can be easily dealt with by screening fences or planting vegetation or the objector in fact overlooks another neighbour to a greater extent, ie overlooking is an unavoidable consequence due to the topography of the area.

Statement of Facts and Contentions

Each party will be required to file a Statement of Facts and Contentions (SFC). It is best to begin by stating what the SFC is not: it is not evidence, it is not a summation of statements, it is not a final address. It is an outline of why one party says the Commissioner's decision is correct or incorrect. It is not binding but it should be prepared knowing that others will rely upon it to understand what one's case is about.

Drafting the SFC is the best opportunity to assess one's case against the Territory Plan, the guidelines, draft guidelines etc to determine its strengths and weaknesses. This process helps identify those areas in the case that require further evidence.

As the name suggests, the SFC consists of a statement of "facts" in one part and, secondly, a statement of "contentions". In practice it is difficult for both lawyers and non-lawyers to understand where to draw the line between "facts" and "contentions". In town planning, where there are so many subjective assessments to be made the dividing line is further blurred (eg does the application adversely affect the streetscape, does the proposed development "respect" the building line of other buildings in the street).

In the end one can only give general guidance as to what should go into a SFC:

- Keep the SFC short, dot point if necessary.
- The "facts" part is usually brief and sets the context of the dispute by:
  - identifying the players (eg. is the applicant the Crown Lessee or the architect or both);

5 Section 43(4) AAT Act.

6 Section 43A AAT Act.

- stating when the development application was submitted;
- providing a brief description of the location of the property and the proposed development;
- describing who the objectors are;
- stating when the decision was made;
- stating whether any conditions attaching to the approval have been complied with;
- where convenient, referring to portions of the T documents.

- The "contentions" part usually addresses compliance or otherwise with the Territory Plan and the various guidelines.

- The SFC should spell out at the end what it is the party wants the AAT to do - for example, to uphold the decision of the Commissioner for Land and Planning, or to have certain conditions added or varied.

Witness Statements

The AAT is not bound by rules of evidence. Nonetheless the Tribunal makes it quite clear that it requires parties to call witnesses to prove facts. The witnesses may be required for cross examination, so one must make sure they understand this. This is self-evident to lawyers but not non-lawyers. While the T documents will ordinarily go into evidence, one should not think that statements that find their way into the T documents will be accorded much weight if the maker of the statement is not made available as a witness.

It is desirable to have a statement that works methodically through the Territory Plan requirements, along with any applicable guidelines. Large portions of it may be uncontentious. Usually this will be prepared by the architect or some other person who has technical qualifications and understands the project. Often it is a town planner engaged by the developer to steer the development through the planning process. It is not essential that this be done – and it is excruciatingly boring to prepare - but it has advantages:

- The statement goes in as evidence and the contents do not have to be led orally (even more excruciating for those subjected to listening to it);

- The task of proving the mundane stuff is out of the way, leaving time to concentrate on the contentious issues;

- Sometimes small but significant matters come to light that had not previously been seen. These can often be dealt with easily in advance but may prove devastating if they crop up in the hearing or, worse still, after the evidence has closed;

- It provides an opportunity to pull together aspects of the case that are otherwise difficult to understand, eg it is common to find there have been several different plans submitted. Characteristically they are dispersed throughout the T documents and can be difficult to reconcile. It is useful in those circumstances to have the architect identify and explain the chronology of plans and the differences between the plans.

It is common to require evidence from experts in areas such as town planning/ urban design, heritage, engineering (safety and traffic), landscape design/horticulture, and architecture.

There is no formality to the setting out of witness statements. They do not have to be sworn (the witnesses take an oath or affirmation when they give evidence anyway).

Experts should always have their CVs attached to the statement.

Often people are confused about the degree of detail required in a witness statement. Essentially the statement has to let the other side know the evidence that the witness can give. Many choose to put in a brief statement, usually motivated by a desire to not give too much away. The danger is that the evidence has to be supplemented by extensive oral evidence which can be time consuming and unfair to the opposing party as it may involve an ambush.

Where a party is taken by surprise the usual remedy is an adjournment. For developers, for whom time is of the essence, this is not a viable option. And their opponents know it. Developers and their lawyers simply have to cope with the situation. One option available to the AAT is to reject the evidence but in reality that rarely occurs. This situation remains a source of considerable unfairness in town planning litigation.

Conclusions

Town planning appeals are time consuming to prepare and run, a reflection of the complex nature of the governing legislation. This is often annoying for non-lawyers as well as developers, particularly when lawyers are engaged at considerable expense. The points to remember are, first, that good preparation will usually shorten rather than lengthen the hearing time; secondly, good preparation will not win you an inherently bad case, but poor preparation can lose you a good case.

TOWN PLANNING APPEALS IN THE ACT
PRESENTING A CASE

Christopher Erskine[*]

Edited version of a paper presented to an AIAL seminar entitled "Planning Appeals in the ACT" held in Canberra, 23 June 2000.

The ACT Administrative Appeals Tribunal hears appeals from decisions made under the *Land (Planning and Environment) Act 1991* ('the Land Act') by the Commissioner or the Minister's delegate. Its task is to hear the matter all over again, and come to the correct or preferable decision. On the whole it is not interested in what errors the original decision maker might have made. The focus in an AAT appeal is on what the right decision ought to be.

Of course, mistakes made by the original decision maker might highlight what the right decision ought to be. But the AAT's task is not to analyse the original decision for error, but to come to its own decision on the merits instead.

For example, the original decision maker might have made a decision without giving an objector a reasonable chance to put submissions. That is a denial of natural justice. But the AAT can't overturn the original decision just because there was a denial of natural justice. The AAT would give the objector a chance to have their say. If the objector's comments don't persuade the AAT on the merits of the case, its task is to affirm the original decision, even though the original decision was made in the context of a denial of natural justice.

The AAT can only make a decision if it has some evidence. It is true that the AAT is not bound by the "rules of evidence". The rules of evidence largely deal with the manner of giving evidence, not with whether the tribunal needs evidence in the first place. For example, the AAT can refer to hearsay evidence (that is, evidence of what somebody said to somebody else), where a court of law cannot.

But the AAT cannot make a decision without evidence. Every finding of fact that it makes has to be supported by evidence somewhere in the record. If it makes a finding without having some evidence to back up that finding, it has committed an error of law and the Supreme Court would have no hesitation in quashing its decision and ordering the AAT to do it again.

Evidence in planning cases usually falls into three types:

- Descriptions of buildings and landscapes. This includes photographs, maps, and plans. It might also include a verbal description of the neighbourhood, perhaps made more meaningful by a view. In some cases where local amenity is relevant, the evidence might include a description of activities conducted in the neighbourhood. If environmental considerations are important, it might include a description of the flora and fauna in the area.
- Expert analysis. This includes shadow diagrams, computer generated pictures of how a building might look if extended, and traffic studies.
- Expert opinion. This is where experts such as architects, traffic engineers and town planners give their opinions on what ought to happen.

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It is important to understand that the AAT is not an investigator. A party must produce evidence to support its arguments. It is not enough for a party to raise an issue and expect the AAT to get its own evidence on the matter.

For example, the documents of the local department of planning and land management (PALM) might show that increased traffic was expected from a development, but no studies were done by PALM on how much traffic would be expected or what the effect might be on neighbouring streets. An objector might be concerned about the impact of increased traffic. But he or she must produce some evidence to the AAT about that: they can't simply point to the PALM documents and expect the AAT to guess what the traffic impact would be. The evidence would have to come from an expert traffic engineer. The evidence would probably include analysis of existing traffic, and the expert's opinions on what the effect the development might have on future traffic flows.

An AAT hearing proceeds in a predictable way on most occasions. The hearing begins with the formal placement of the T documents before the AAT. The T (short for "Tribunal") documents are copies of documents held by the decision maker that are relevant to the decision. Some of these will be important pieces of evidence - the development application, for example, and the plans. Others will be irrelevant - notes of discussions between officials where somebody was tasked to go and do something. The T documents also include the reasons for the decision.

The hearing then turns to the applicant to start its case. (The applicant is the person who appealed to the AAT. The respondent is the decision maker. Parties joined are other objectors, or developers, or other interested people whom the AAT has joined to the proceedings).

The applicant will often start by outlining its case. This outline is done purely to explain where the case is going, what the central facts are, and what the issues are. The outline is not evidence, and every statement of fact in the outline will have to be proved before the hearing is finished.

Next the applicant will produce the evidence it wants to rely on.

Ahead of the hearing, all parties have to exchange witness statements, which tell the other side what evidence a witness is expected to give. If the other parties don't need a witness to give oral evidence, a witness statement might be able to be tendered to the AAT without calling the witness. But if the other parties want to cross examine the witness, the witness must be called before the AAT.

Cross examination is an important part of the process of giving evidence. This allows other parties to ask questions of the witness. The purpose is to test the evidence. Sometimes the questions might be aimed at amplifying points that are obscure. Sometimes the questions might be aimed at putting different points of view and hearing what the witness has to say about them (the opinions of other experts, for example). Sometimes the questions might be aimed at trying to discredit the witness' evidence, showing it to be less strong or less credible than it first appeared.

Any witness who is called by any party may be cross examined by any other party. Cross examination cannot be avoided. For example, a witness statement can’t be tendered without calling that witness if another party wants to cross examine the witness. That would be unfair.

Once cross examination has finished, there is a right to clear up any matters in re-examination of the witness. Re-examination is usually brief, and often doesn't happen at all. It is not a chance to give some new evidence, but merely to clarify what might have been unclear.

Documents are also part of the evidence. Sometimes these can be put in evidence straight away. For example, a map of the area would be a useful document for the AAT to have at the beginning, and nobody is likely to object. But sometimes documents need to be proven strictly. This means you may need an expert to come to give evidence about their report, or some diagrams or plans they have prepared.

For example, a shadow diagram or a computer generated image of a proposed extension would probably need an expert to explain how the document was produced and what it means. Until that expert is called to give evidence, you often can't tender their documents.

Once the applicant's evidence is finished, the other parties gives evidence. The precise order of evidence from here onwards depends on the type of case. Usually the respondent's (decision maker's) evidence is next, followed by the other parties. Of course, the applicant has the right to cross-examine witnesses called by the other parties.

At some stage the AAT will probably have a view of the site. All parties have a look at the site. But it is important to understand that a view is not really part of the evidence. It helps to make sense of the evidence, but it is not evidence in itself. It is particularly important that parties do not try to introduce evidence during a view. Nobody is transcribing what is said on a view, and sometimes not all parties are within earshot. In practical terms it is impossible to give evidence on a view, and it is often unfair to other parties to try to do so as well.

Once the evidence is complete, the hearing turns to the last stage, submissions. Each party can make submissions about what decision the AAT should make.

Submissions may refer to the law, to the plan, and to the evidence. Ultimately the AAT must make a lawful decision, so it often helps to turn to the law and the Territory Plan first. Only when it is understood what a lawful decision is, can evidence to show what the decision ought to be be referred to.

Each party makes submissions. Usually the applicant goes first, followed by the respondent (the decision maker) and any other joined parties. The applicant has a right to respond to anything new in the other submissions at the end. This is not an opportunity to have another go at making submissions, but at answering particular issues that arose in the other submissions.

Once the submissions are finished, the hearing has ended. Almost always the AAT will reserve its decision. That is, it will go away and write up a decision that will be given days, weeks or (just occasionally) months later.

OBSERVATIONS ON THE 2000 ADMINISTRATIVE LAW FORUM: "SUNRISE OR SUNSET – REINVENTING ADMINISTRATIVE LAW FOR THE NEW MILLENIUM"

Emeritus Professor Dennis Pearce[*]

The tenth Administrative Law Forum was held in Adelaide on 15-16 June 2000. It was very successful, being one of the best attended of the AIAL conferences. Papers were given on a diversity of topics falling within the broad ambit of the Forum's theme "Sunrise or Sunset – Reinventing Administrative Law for the New Millenium". The papers of the Forum will be published as an AIAL publication shortly. The following are the concluding comments given by Professor Pearce at the Forum. The various references to matters discussed at the Forum are to the papers that will be found in the forthcoming Forum publication.

About 30 years ago I bought a reproduction of a Pieter Bruegel painting which was entitled *The War between Gluttony and Lent.* It is clear which side is favoured by the artist, because those supporting gluttony are having a great old time while the supporters of Lent look to be a very dreary bunch whose life is miserable in the extreme. The reason that I mention this picture is that it demonstrates two things. First, how fashions change. Second, that 500 years ago there were conflicts in society between those purporting to represent the power in the land and those who would challenge that power. And that too is a world of changing fashion. This notion of conflict between sections of our society has always been with us. For an example, one needs only look at the interchange between Lord Coke and James I in the early part of the 17th century in which the Chief Justice said that the King, when exercising executive power, was subject to the control of the law of the land as interpreted by the courts. Not long after came the great battles between the Executive and the Parliament for supremacy in the management of the society.

These disputes, though they took place long ago, still affect the way in which our society functions and they impinge on our understanding of the role of administrative law in the governance of the country. Australian government works on a system of checks and balances, even though they are not spelled out in quite as precise a fashion as those which are seen to underpin the US Constitution. In any system in which different institutions are recognised as having a role to play in the management of the country, there will be periods when the pendulum of power seems to swing more favourably towards one group or one institution and against the interests of another. For this reason, it is necessary when assessing the impact of particular events or actions on government to take a longer term view and not concentrate attention solely on what might have occurred in the immediate past.

This is the tenth AIAL Conference and it is significant that its title is "Sunrise or Sunset – Reinventing Administrative Law for the New Millennium". There is a suggestion in this title that administrative law is under attack and that its role in moderating the influence of government in the management of our society is somehow or another under threat. This has occurred with previous conferences, eg 1993: "*Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof*"; 1996: "*Administrative Law: Setting the Pace or Being Left Behind*".

I consider that this approach is far too defensive and represents a too pessimistic view of the astonishing impact that administrative law developments have had in a very brief period of

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time — particularly is this so when recent developments are placed in the context of those centuries that have passed since Lord Coke asserted the significance of the rule of law.

It is pertinent to consider what has happened under the broad umbrella of administrative law in just the last 30 years.

First take some common law developments. *Heatley's* case[1] definitively establishing procedural fairness as a concept in Australian law was decided in 1977. *FAI Insurance*[2], which took the matter further, was handed down in 1982. *Toohey's* case[3] holding the Crown representative subject to judicial review, was decided in 1981. *Peko Wallsend*[4] relating to Cabinet decisions was handed down in 1986. More recently there has been *Teoh*[5] relating to the impact of international conventions. This year we had *Barratt*[6] on the status of Departmental Secretaries. The effect of these decisions on government administration has been far reaching — almost revolutionary. They represented a massive reaching by the Judiciary into the accepted domain of the Executive. When each was decided the Executive regarded the conclusion as a usurpation of authority. But the result of the decisions — the requirements they imposed on decision-making processes — are still with us.

The federal statutory structures establishing the Administrative Appeals Tribunal, the Ombudsman and the simplified judicial review procedures of the *Administrative Decisions (Judicial Review) Act 1977* are products of the mid 1970s, as is the statutory right to reasons. Compare what existed before. Limited means of appeal to courts only. No simple means to call upon a decision maker to reconsider a decision once made. No need for a government official to explain or justify a decision.

Freedom of information legislation came in 1980 and privacy legislation soon after. The States have followed the Commonwealth pattern in various ways – sometimes providing greater rights for citizens.

In short, these dramatic constraints on the freedom of the Executive to do very much as it pleased and not to be accountable for its actions either to individuals affected or to citizens generally (except through the weak mechanism of the Parliament), are a product of less than 30 years.

It is in that same period that we have seen the awakening of parliamentary interest in delegated legislation in the States. The Senate Committee responsible for the scrutiny of federal delegated legislation was established back in the 1930s, but oversight committees in the State parliaments have become effective only much more recently. The further development that has occurred and is still occurring is the recognition of the need to permit public involvement in the determination of the content of delegated legislation.[7]

Another interesting and recent development has been the acceptance that non-court based procedures can be used for the resolution of disputes. There has been a growing acceptance of mediation as a means of achieving an outcome. With the advent of the Ombudsman we have also seen the use of unenforceable findings as a mechanism for resolving disputes between citizen and government. This is a significant change in thinking

1 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519

2 *FAI Insurances Ltd v Winneke* (1982) 41 ALR 1

3 *Re Toohey; Ex parte Northern Land Council* (1981) 38 ALR 439

4 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299

5 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353

6 *Barratt v Howard* (2000) 170 ALR 529

7 See generally Pearce and Argument, *Delegated Legislation in Australia*, 2nd ed, 1999, Butterworths

in the Australian context where the view has largely been that a body that cannot make enforceable orders is of no value.

It is impossible to believe that these dramatic changes will be reversed in their entirety. There may well be limitations imposed on mechanisms, e.g. the ouster clauses being used in relation to certain immigration decisions.[8] There may well be barriers placed in the way of the maximum use of particular rights, e.g. fees for FOI applications. But is it likely that any government now would be able to remove entirely the right to reasons for a decision or to repeal in its entirety an FOI Act? The credibility that a government in our system must maintain with citizens means that certain rights, once given, can only be removed at peril of electoral defeat.

The sheer dimension of the inroads into the freedom of the Executive that has been made by administrative law doctrines in the last 30 years needs to be appreciated when the future of this field of law is being considered. It can only be expected that there will be a reaction by the Executive to these inroads and that attempts will be made to limit their effect. The fact that this is occurring is simply a demonstration of the power struggles that are an inevitable part of a free democratic society. The real issue is how much the principles underlying those changes have become ingrained in our society so that any attempt to undermine them will be politically unacceptable. Attempts at restructuring around the edges such as with the proposed Federal Administrative Review Tribunal (ART), and other limitations such as of judicial review in the immigration field, will be inevitable. It is noteworthy that the ART substitutes a different structure for review — it does not take it away. The immigration changes deal with people who are not citizens. The populace remains ambivalent about their claims for special consideration. Neither of these amendments to the present system make fundamental changes of principle that take the rights of the people generally back to what they were 30 years ago.

The significant question remains how far can the Executive go towards restoring its paramount position? And, in fairness, how far will those who have become accustomed to the present system want to unravel it. The mandarins who foretold the death of government at the time of what was then described as the New Administrative Law have been proved wrong. A study being undertaken by Robin Creyke and John McMillan is showing that the majority of Commonwealth decision makers are happy with the present system.

The really interesting issue for the state of the new millennium is the extent to which those principles upon which administrative law is founded will be accepted as applicable to private sector decision making. This was a recurring theme throughout the Forum. It is significant that private sector bodies are accepting the notion that there should be some form of appeals mechanism or grievance body that caters for the concerns of the public in their dealings with a private sector body. Banking ombudsman, health ombudsman, telecommunications ombudsman, superannuation tribunal, insurance tribunal — these are bodies that have simply been adapted from public sector models. Only a short time ago the establishment of such grievance review bodies for the private sector would have been considered out of the question. The concept of self-regulation is one that is extending steadily through many areas of private sector activity. Currently we are seeing the extension of privacy limitations from the public to the private sector.[9] These are significant moves coming at a time when government activity is being outsourced and government sector decision making is being taken over by private organisations.

8 *Migration Act 1958*, ss 476-479

9 Privacy Amendment (Private Sector) Bill 2000

None of this is to say that there will not be challenges ahead for administrative law in the new millennium. One issue that did not figure all that strongly at the conference is the issue of the appropriate procedures to be adopted in the resolution of disputes between citizen and decision maker. The Federal government is focussing attention on the management of procedures of review bodies to reduce cost and increase turnaround while still maintaining an adequate review mechanism that deals with the concerns of those affected. This is at the heart of the establishment of the new ART. The use of mediation to resolve disputes is likely to be emphasised and this was discussed at the Forum in the context of Ombudsman complaint resolution. The impact of international law on government decision-making and effects flowing from globalisation were raised by speakers. These matters will continue to pose issues for administrative lawyers.

However, as was recognised throughout the 2 days of the Forum, it is the challenges arising from outsourcing that will probably be the major focus of administrative law in the future. It was not until the second half of the 20th century that the impact of the two World Wars and the 1930s depression passed sufficiently in time for there to be a reaction to the general approach that government action was not to be checked. This was the focus of the period 1960-80. The private sector may well soon have to face this same sort of thinking. Until recently it was accepted by the community that private sector decision making did not require justification or review processes. That notion is passing and as mentioned above we are seeing examples of acceptance by the private sector that they too must account for their action.

Related to this and perhaps the most important issue for the future will be that which has been the dominant underlying factor in the past — namely, the issue of legitimacy. Decision makers in a democratic country are dependent upon acceptance of their actions by the people. The need for legitimacy has been the factor underlying many of the administrative law principles now accepted as applicable to the public sector. Governments that forget this basic tenet do so at their peril as was pointed out by speakers dealing with contracting out issues. The demise of the Kennett government in Victoria was attributed at least in part to its refusal to accept that the people had an interest in the affairs of the State. This need for openness and public input into public sector decision-making was the subject of discussion at the Forum.

A complementary issue also considered in some depth was the independence of review bodies from the decision makers whose actions they were reviewing. This was seen as a crucial element in sustaining the legitimacy of the system of administrative review.

In my view administrative law plays a key part in the maintenance of confidence in the system of administration, whether it be by the public or the private sector. It is neither sunrise nor sunset time for administrative law. Nor is it a black hole consuming good administration. Rather I should like to think of administrative law as a shining constellation continuing to light the way to a better society.

CONTRACTING OUT AND ADMINISTRATIVE LAW

Nick Seddon[*]

A paper presented to the Australian Institute of Administrative Law and Australian Corporate Lawyers Association seminar, Lakeside Hotel, Canberra, 26 July 2000

Introduction

Public sector bodies are subject to administrative law challenge. This has become something of a controversial area of the law in connection with government contracting. To what extent is it possible to challenge government contracting decisions by using administrative law? The answer is that administrative law remedies have been patchy and, broadly, appear to be on the retreat. The courts, governments themselves and bodies such as the Administrative Review Council[1] have tended to say that government contracts are essentially "private" and should attract the same remedies as ordinary private sector contracts.

I have argued[2] that this is not a sound position to adopt because public contracts are not the same as private contracts. Not the least reason for saying this is that they involve the expenditure of public (the tax payers' or rate payers') money and that the profit motive is usually not part and parcel of the relationship from the government side.

I have also argued[3] that public law values do not sit easily with private law values and that it is not surprising that disquiet is shown from time to time at the idea that running government is just like running a business. Therefore, the extra scrutiny of public law remedies should be brought to bear on government contracting activity. However, this is a typical example of the divide between the academics and some other commentators, on the one hand, and those in power who find such carping an irritant at most, on the other hand.

Two "Frontiers" of Administrative Law

The difficulty of using public law remedies in connection with government contracting is not surprising when it is considered that using such remedies may push to the very edges of administrative law. There are two developments in administrative law that have excited attention: one is challenging the exercise of executive power (as opposed to power exercised under an enactment); the other is the use of administrative law against private organisations. As to challenge of executive power, this is of importance in the area of government contracting because most contracts are made under the executive power. As to the use of administrative law against private bodies, this is of importance the more that the government contracts out important functions previously the preserve of public bodies. Running gaols and providing case management services for job seekers are two examples where it might be appropriate to make use of public law remedies.

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1 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* Report No 38 (1995), AGPS.

2 N Seddon, *Government Contracts: Federal, State and Local* (2nd ed 1999) para [8.2].

3 Ibid at para [1.9].

In neither of these "frontier" areas of administrative law has there been much development in relation to government contracting activities.

Decision Under a Contract

It is well-established in Australia that administrative law challenge is not possible in respect of a decision made *under* a contract, such as a decision to terminate for breach.[4] In New Zealand, the position is different in that it may be possible to challenge such a decision made by a public body, though the scope for such a challenge is very limited, being confined to fraud, corruption or bad faith.[5]

An exception to the generally accepted position is the case of *Telstra Corporation Ltd v Kendall*[6] where it was held that a decision to disconnect a subscriber, on the alleged ground that the telephone was being used for the purposes of prostitution, was an invalid decision because Telecom (as it then was) had no power under the (then) *Telecommunications Act* 1991 (Cth) s 47 to cut off the telephone.

Decision to Make a Contract and Other Pre-Contractual Conduct

It is possible, on the other hand, to challenge the *award* of a contract or other preliminary decisions. In what ways can an administrative law challenge be mounted? As I have noted already, the basis for challenge is limited.

Removal from a panel or creation of a "black list"

It may be possible to challenge the way in which government conducts its commercial activities when there is a perceived obligation imposed on the government to provide fair access to government business. So, for example, it may be possible to challenge the removal of a contractor from a panel of approved contractors if there has been a lack of procedural fairness in the decision.[7]

Similarly it may be possible on administrative law grounds to challenge the government's creation of a "black list" of contractors with whom the government will not do business if the black list has been compiled without due process.[8] The *Master Builders'* case is a rare example of public law remedies being used to challenge a decision made under the executive power. The Commonwealth has a black list of contractors who have not, in the opinion of the Commonwealth, complied with the requirements of the *Equal Opportunity for Women in the Workplace Act* 1999. The black list is authorised by the legislation but the policy not to contract with entities on the black list is not and is therefore an exercise of executive power.[9]

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4 *Australian National University v Burns* (1982) 43 ALR 25; *Sellars v Woods* (1982) 45 ALR 113; *Bayley v Osborne* (1984) 4 FCR 141; *Australian Film Commission v Mabey* (1985) 6 FCR 107; *Cash v Australian Postal Commission* (1989) 88 ALR 547; *Federal Airports Corp v Machuka Developments Pty Ltd* (1993) 115 ALR 679.

5 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385.

6 (1994) 55 FCR 221.

7 *R v London Borough of Enfield* (1989) 46 BLR 5.

8 *State of Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278.

9 The policy is embodied in the Commonwealth Procurement Guidelines. These are not enactments.

The award of contracts

It may be possible to challenge a government decision to award a contract. This may be done on a limited number of grounds. Before examining these grounds, it is worth noting an important point made by Aronson,[10] namely, that successful administrative law challenge may not deliver very much. Unless an injunction is obtained quickly, it is often too late to have a decision re-made in the context of contracting activity. A similar point is made by Jolly.[11]

Failure to follow statutory procedures

If there is a statutory regime governing the award process (typically a tender) and the statutory provisions have not been followed, then it may be possible to challenge successfully. However, this type of challenge depends on establishing that the statutory procedure is mandatory, not directory, and the courts have been ambivalent about this crucial question in the cases.[12]

Improper motive

Secondly, if the award decision was motivated by an extraneous or improper purpose, a successful challenge may be mounted.[13] Obviously, it is extremely difficult to prove that an improper purpose motivated the decision to award the contract and so this type of challenge is of very limited usefulness.

Legitimate expectations

Thirdly, if the announced procedure has given rise to legitimate expectations that have not been fulfilled, it may be possible to challenge successfully.[14] Again, the scope for this type of challenge appears to be very limited.
This somewhat paltry list indicates that such challenges are difficult.

Statutory corporations and the award of contracts

The Full Federal Court has decided that a statutory corporation which makes a contract, under the usual statutory power to make contracts found in the corporation's establishing Act, is not making a decision "under an enactment",[15] despite earlier decisions to the contrary.[16] The reasoning employed in *General Newspapers* was

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10 M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997).

11 R Jolly, "Government Owned Corporations: Public Ownership, Accountability and the Courts" (2000) *AIAL Forum No 24* 15 at 23.

12 Successful challenges were mounted in *Australian Capital Equity Pty Ltd v Beale* (1993) 114 ALR 50; *Wade v Gold Coast City Council* (1972) 26 LGRA 349; *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328; *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 LGRA 168. But not so in *Maxwell Contracting Pty Ltd v Gold Coast City Council* [1983] 2 Qd R 533; *Capricornia Electricity Board v John M Kelly (Builders) Pty Ltd* [1992] 2 Qd R 240; *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 ALD 351.

13 *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.

14 *Century Metals and Mining NL v Yeomans* (1991) 100 ALR 383. But cf *Cord Holdings Ltd v Burke* (1985) 7 ALN n72; *White Industries Ltd v Electricity Commission of New South Wales* (unreported, May 20 1987, NSW SC, Yeldham J).

15 *General Newspapers Pty Ltd v Telstra Corp* (1993) 117 ALR 629. It is a requirement under the Commonwealth *Administrative Decisions (Judicial Review) Act* that the decision in question was made under an enactment.

16 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284; *James Richardson Corp Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277.

that the decision to enter into a contract is an exercise of a common law power to contract rather than a statutory power. The legislation merely provides the *capacity* to contract rather than the power.[17] This is a distinction which is subtle and the reasoning is open to challenge.[18] This is, in effect, a decision to insulate statutory corporations from judicial review in respect of their contracting activities, a stance that is consistent with the recommendation of the Administrative Review Council that government business enterprises should be immune from judicial review.[19] (There was a hint in the reasoning in this case that an improperly conducted tender may be amenable to challenge under the prerogative writs.)[20]

The Ombudsman's Role

Although the traditional administrative law remedies are on the retreat in conformity with the spirit of the new managerialism, the Ombudsman's role is not. The Ombudsman in all jurisdictions has been vigorous in investigating complaints about government contracts.

The Commonwealth Ombudsman has suggested that, if the government is going to contract out important public functions, then it is appropriate for the Ombudsman to be given wider powers so that he or she can investigate the way in which those functions are exercised by private firms,[21] but so far to no avail.

State Ombudsman's powers have on occasion been extended to private sector bodies, thereby pushing one of the previously-mentioned "frontiers" of administrative law. For example, the Victorian Ombudsman has jurisdiction over the conduct of private prisons[22] and the Queensland Parliamentary Commissioner has jurisdiction over contracted out entities.[23] Clearly this is a direction that should be pursued further but it would be futile to do this while at the same time cutting back the resources available to the Ombudsman.

Freedom of Information

A much-documented effect of contracting out is the erosion of the freedom of information regime. This occurs because (i) the legislation does not extend to information in the hands of private bodies; and (ii) information in the hands of government can be very easily screened from FOI scrutiny by making use of the commercial in confidence exemption written into the legislation.
As to the first point, it is possible to extend the reach of the FOI legislation to private bodies that are performing public functions, just as it is possible similarly to extend the Ombudsman's jurisdiction. This has been done in New South Wales and Victoria in relation to private prisons.[24]

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17 (1993) 117 ALR 629 at 636-637 (Davies and Einfeld JJ).

18 See Allars, M, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *Public Law Review* 44 at 62.

19 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* Report No 38 (1995), AGPS.

20 (1993) 117 ALR 629 at 637 (Davies and Einfeld JJ).

21 Commonwealth Ombudsman, *1993-94 Annual Report,* AGPS, 3-4.

22 *Corrections Act* 1986 (Vic) s 9G.

23 *Parliamentary Commissioner Act* 1974 (Qld) s 13(7) and (9).

24 *Correctional Centres Act* 1952 (NSW) s 31I; *Corrections Act* 1986 (Vic) s 9F.

As to the second point there is much work to be done to change government attitudes and to push for a policy of *not* misusing commercial in confidence clauses. There has been much criticism of the overuse of these clauses from many different quarters. There are some signs of movement:

- The Victorian government has been urged to adopt a policy of publishing government contracts (with necessary excisions for truly confidential material, such as trade secrets)—see Audit Review of Government Contracts, *Contracting, Privatisation, Probity and Disclosure in Victoria 1992-1999* (May 2000) and Pubic Accounts and Estimates Committee, *Inquiry into Commercial in Confidence Material and the Public Interest* (April 2000).
- The Western Australian government has voluntarily published the full text of the contract to construct and run the private Acacia prison.[25]
- The Senate Finance and Public Administration References Committee is inquiring into the use of commercial in confidence clauses.[26]
- The ACT Legislative Assembly is considering three Bills aimed at publishing details of government contracts.[27]
- There is arguably a move in FOI cases towards disclosure of information about tendering processes and contracts—possibly a more sceptical attitude to claims of commercial in confidence.[28]

Note that most of the points made above are about *voluntary* disclosure by governments rather than forced disclosure under the FOI legislation.

Disclosure of performance information

A final point to make is that disclosing the terms of contracts is not enough. It is just as important, or possibly more so, to reveal the performance of the contractor. After all, in the end the telling question about government outsourcing is: *has it worked?* Has the public received value for money? Has the level and quality of service improved or at least been maintained? This kind of information should be the subject of a systematic reporting rather than sporadic news stories or an auditor-general's report. Victoria has taken a very important first step in this direction. The government has started publishing *Track Record* which provides information on a regular basis about how the operators of the trams and trains are performing. This publication goes into a lot of detail about punctuality and other important performance measures and also indicates whether in the relevant period the operator earned a bonus for good performance or was penalised for bad performance. The amounts of bonuses and penalties are published. *Track Record* represents the best possible disclosure of performance.

Conclusion

The frequent complaints and disquiet expressed about the new contractualism and its deleterious effects on accountability can be met in part by making public law remedies more effective and putting in place polices that reflect public law values of openness and accountability. Governments are reluctant to engage in a process of

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25 http://www.justice.wa.gov.au/offmngt/acacia.pdf.

26 http://www.aph.gov.au/senate/committee/fapa_ctte/contract_accnt/contract.pdf.

27 Financial Management Amendment Bill 2000; Government Contracts Confidentiality Bill 2000; Public Access to Government Contracts Bill 2000.

28 For example, *Byrne and Swan Hill RCC* (2000) VCAT No 1999/048502; *Staff Development & Training Centre and Secretary, Employment, Workplace Relations and Small Business* (2000) AATA 78; *Coburg Brunswick Community Legal and Financial Counselling Centre and Dept of Justice* (1999) VCAT 28.

"opening up" government contracting activities but at least some are beginning to realise that a sceptical public may react in the one way that politicians fear if they are not responsive to publicly-expressed fears. The first phase of privatisation and contracting out was accompanied by a high-handed use of "private" measures to shield public contracts from challenge or scrutiny. The second phase will, one hopes, see a more responsible use of contract as a tool of public administration.