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Corrigendum

The article by Emeritus Professor Enid Campbell, published in *AIAL Forum 29*, entitled "Parliamentary Privilege and Judicial Review of Administrative Action": was refereed by an independent academic assessor, and should have been identified as such.

PERFECTED JUDGMENTS AND INHERENTLY ANGELICAL ADMINISTRATIVE DECISIONS: THE POWERS OF COURTS AND ADMINISTRATORS TO RE-OPEN OR RECONSIDER THEIR DECISIONS

Professor Margaret Allars[*]

Paper delivered at a seminar entitled "The Power of Tribunals to Reconsider Their Own Decisions", New South Wales Chapter of the Australian Institute of Administrative Law in conjunction with the Administrative Law Section of the New South Wales Bar Association, on 16 May 2001. This paper is also published in (2001) Australian Bar Review *1.*

1 Introduction

The title of my paper is drawn partly from the realm of practice and procedure. A judgment or order is said to be perfected when it has been entered. Generally a judge who recognises his or her decision is affected by a serious error may on the basis of narrowly defined principles reopen the judgment or order prior to entry, but is unlikely to have jurisdiction to do so after entry. Thus, unperfected judgments which are recognised to be imperfect may be reopened, but perfected judgments which are recognised to be imperfect may not. It is somewhat ironic that a judgment recognised to be less than perfect is persistently described in this context as perfected. In her thorough review of the principles in 1996, Enid Campbell adopted the language of unperfected and perfected judgments.[1] However I shall abandon it for the remainder of this discussion, preferring instead the less misleading language of judgments which have not been entered and those which have. As for inherently angelical administrative decisions, I have borrowed not the rhetoric of a defensive bureaucrat but a passage in the judgment of French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*.[2] While French J reached the conclusion in that case that a primary decision-maker did not have implied power to reconsider a decision, he certainly did not assume that administrative decisions are inherently angelical. Far from it.

Neither courts nor administrators are perfect or inherently angelical. They can make mistakes. Should they have power to reconsider or revoke their decisions when affected by mistakes? The answer to this question in the case of judges demands reference to inherent jurisdiction, rules of court, and perhaps even constitutional law. The answer in the case of administrators is often not expressly provided by the legislature and becomes a matter of statutory interpretation. Can the power be implied? This paper considers firstly the reopening of judgments and orders, secondly the powers of administrators generally to reconsider or revoke their decisions, and thirdly the position of merits review tribunals as a particular kind of administrative decision-maker. The competing policy considerations suggesting answers to the question are then assessed.

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[*] *Faculty of Law, University of Sydney.*

1 E Campbell “Revocation and Variation of Administrative Decisions” (1996) 22 *Monash UL Rev* 30 at 31-36.

2 (1992) 28 ALD 480. See discussion at text accompanying nn 72-5.

2 Courts

The general rule is that a court has no power to set aside or vary a final judgment which has been passed and entered, because of the public interest in the finality of litigation. This was recently re-affirmed by the High Court in *DJL v Central Authority*,[3] which concerned an attempt to re-open a decision of the Full Court of the Family Court.

However there are cases where exceptions have been made to the general rule. Some exceptions are confined and not controversial. Then there is the question of a more general exception where the interests of justice or procedural fairness requires it. When this exception is considered we need to bear in mind whether the court's judgment or order has been entered. The outline of case-law which follows is accordingly ordered under the headings of judgment not entered, and judgment entered. Some of the exceptions to finality apply both where the decision is entered and where it is not entered. These exceptions are discussed under the heading of judgments entered. I reserve for later discussion whether the dichotomy of judgments entered and not entered provides a logical approach to the issue of whether a judgment should be reopened.

Judgment not entered

A court may set aside or vary a judgment or order where notice of motion for the setting aside or variation is filed before entry of the judgment.[4] For example where reasons for judgment are delivered orally, the judge may edit or correct the text before the judgment is entered. This power of a court to review, correct or alter its judgment prior to entry of a judgment, is exercisable within certain clearly defined exceptions to the general rule about the finality of judgments. Most are also available after entry of the order: setting aside of default judgments, variation of interlocutory orders, absence of a party, the slip rule, consent orders and judgments obtained by fraud, each of which is considered below. It remains to consider here an additional exception applying before entry of a judgment or order, namely reservation of further consideration of proceedings and a more general exception, capable of catering for a wide range of circumstances where a decision should be reopened in the interests of justice.[5]

Reservation of further consideration of proceedings

An order reserving further consideration of proceedings may be made where proceedings or some part are referred to a Master, or not all matters in dispute have been dealt with. In exceptional cases proceedings may be so urgent there is a possibility some matter has been overlooked, such as the taking of partnership accounts. But this exception does not permit either party to re-litigate the matter.[6]

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3 (2000) 170 ALR 659.

4 Federal Court Rules (FCR) O 35 r 7(1); NSW Supreme Court Rules (SCR) Pt 40 r 9(1).

5 Some cases refer to a jurisdiction to reopen a judgment which was "irregularly obtained": *Ritchie's Supreme Court Procedure* (looseleaf, Butterworths) para 40.9.11. This group contains a great variety of circumstances, some being cases involving fraud, some cases where the applicant seeking reopening is in default , some concerned with entry of default judgments, and others with the availability of the slip rule. In the light of the general exception to the general rule, it is not considered further here as a separate exception.

6 Compare liberty to apply, when granted in relation to a final order. This is limited to ancillary matters concerning the implementation of the earlier order, such as costs, and does not extend to variation or amendment of the judgment or orders: *Wentworth v Woollahara Municipal Council* (unreported, Court of Appeal of NSW, 31 March 1983); *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 87-8.

General exception

The leading judgment setting out the principles governing the exercise of a court's inherent jurisdiction to re-open a judgment which has not been entered, is that of Mason CJ in *Autodesk Inc v Dyason (No 2)*.[7] The public interest in maintaining the finality of litigation requires great caution in the court's exercise of this inherent jurisdiction.[8] Yet when the orders have not been entered the jurisdiction to re-open a judgment is a wide one, arising where:

> a judgment .. has apparently miscarried for other reason … a misapprehension as to the facts or the law.[9]

Mason CJ approved existing authorities for the re-opening of a judgment when orders have not been entered on the grounds that:

- the orders were made on the basis of authorities which were overruled by the House of Lords[10]
- the court mistakenly assumed that particular evidence had not been given at earlier hearings[11]
- the judge the next day determined that he or she had erred in a material matter in his or her approach to the case.[12]

In *Autodesk* Brennan J appeared to accept that a judgment could be re-opened in a case of ignorance or forgetfulness of some statutory provision or some critical fact, in other words in cases decided per incuriam.[13] Gaudron J also affirmed that the jurisdiction arises where the interests of justice require it because the court misunderstood the facts or misapplied the law in relation to one or more issues.[14]

The boundaries of the inherent jurisdiction are expressed in terms of:

- the importance of the public interest in the finality of litigation[15]
- exercise of the jurisdiction with great caution[16]
- there being no neglect or default on the applicant's part that he or she has not been heard on the issue[17]

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7 (1993) 176 CLR 300.

8 Ibid, p 302.

9 Id.

10 *In re Harrison's Share under a Settlement* [1955] Ch 260.

11 *New South Wales Bar Association v Smith* (1992) 176 CLR 256.

12 *Pittalis v Sherefettin* [1986] QB 868.

13 *Autodesk* (1992) 176 CLR 300 at 310, relying upon *Morelle Ltd v Wakeling* [1955] 2 QB 379.

14 *Autodesk* (1992) 176 CLR 300 at 328.

15 *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-6; *Autodesk* (1992) 176 CLR 300 at 302, 310, 317.

16 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; *Autodesk* (1992) 176 CLR 300 at 302, 322.

17 *Autodesk* (1992) 176 CLR 300 at 303.

- not exercising the jurisdiction for the purpose of re-agitating arguments already considered by the court, providing a backdoor method by which unsuccessful litigants can seek to re-argue their cases[18]

- not exercising the jurisdiction simply because the party seeking a rehearing failed to present the argument in all its aspects or as well as it might have been put.[19]

Three factors about *Autodesk* should be noted. Firstly, the rationales provided by the judges for the jurisdiction differed. Without making the rationale explicit, Mason CJ appeared to present the principle as an aspect of the court's inherent jurisdiction to correct a miscarriage of justice. Similarly, Gaudron J stated the principle by reference to the requirements of the interests of justice, as a rationale which stood independently of the question whether a party was afforded an opportunity to be heard.[20] This was because a judgment could be re-opened if the court misunderstood the facts or misapplied the law in relation to one or more issues. The jurisdiction was not confined to the circumstances where a hearing on all issues was denied. By contrast, Brennan J characterised the jurisdiction as an aspect of the court's duty to afford procedural fairness.[21] If procedural fairness has been denied, the court's jurisdiction to hear and determine the matter is not exhausted. Deane J also regarded the rationale for the jurisdiction to re-open a judgment as part of the doctrine of procedural fairness, for the party concerned has never been given a clear and adequate opportunity to place before the court the full submissions about a proposition which forms the basis for the court's decision.[22] Dawson J stated the principle briefly without explicitly linking it with either inherent jurisdiction to ensure justice is done, or procedural fairness.

Secondly, while the judges on the basis of these varying rationales agreed that in principle the High Court had jurisdiction to re-open its judgment and vacate its orders, they divided 3:2 on whether the circumstances of the present case warranted exercise of this jurisdiction. The Court had held the respondents infringed the appellant's copyright. After argument was concluded, at the direction of the court the registrar wrote to the parties inviting written submissions on whether it was common ground, as stated in one of the Federal Court judgments, that the respondents had not reproduced part of the "Widget C program". Although both parties made supplementary written submissions in response, prior to delivery of the judgment, the respondents now sought to re-open the judgment on the ground that the letter was equivocal and they were denied an opportunity to address the court on a matter which was critical to what became the central issue for the court. Brennan, Dawson and Gaudron JJ held that the respondents had enjoyed an opportunity to address the issue, while Mason CJ and Deane J in dissent held they had not.

Thirdly, though this was a case where judgment had not yet been entered, little emphasis is given to this in the exposition of the legal principles about reopening judgments. Certainly Mason CJ's fuller exposition of the principles accepts that the scope for reopening a judgment which has been entered is much more restricted. This aspect of his judgment is discussed below. But in many respects in the other judgments in *Autodesk* the principles are stated without express restriction to the circumstances where the judgment has not been

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18 Ibid, p 303. For a recent example see *Community & Public Sector Union v Telstra Corporation* [2000] FCA 872, where Finkelstein J declined to reopen his order to enable the applicant unions to reargue their case on a question of law he acknowledged was decided in error. The substantive decision was then reversed by the Full Court: *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267.

19 *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71; *Autodesk* (1992) 176 CLR 300 at 303, 309-10, 322.

20 *Autodesk* (1992) 176 CLR 300 at 322, 328.

21 Ibid, p 308-9, relying upon *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684 and *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29.

22 *Autodesk* (1992) 176 CLR 300 at 314.

entered. The stricter approach taken where judgment has been entered is, however, evident in the very recent decision of the High Court in *DJL v Central Authority*, discussed below.

High Court judgments

Do these principles apply without qualification to judgments of the High Court? In *Autodesk* the High Court accepted that it could re-open its own decision. Although members of the Court differed as to the rationale for the principle, and were divided on its application to the facts of the case, with the majority holding that the judgment should not be re-opened, there was agreement with regard to the principle. Indeed Mason CJ noted that the fact that the court was a final court of appeal provided:

> no reason for it to confine the exercise of the jurisdiction so as to inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.[23]

Since *Autodesk* was decided, the High Court has re-affirmed its own jurisdiction to reopen its judgments or orders. In *De L v Director-General, NSW Department of Community Services (No 2)*,[24] the Director-General of the New South Wales Department of Community Services sought to reopen a costs order made against him in the High Court in a case concerning international child abduction and his exercise of functions in his capacity as the Commonwealth Central Authority. The High Court's order had not yet been entered. The issue concerned the validity of a regulation which provided that a person performing such functions shall not be made subject to any order to pay costs.[25]
The High Court did not doubt its own power to re-open its judgment. This was a case where its oversight of the regulation was accidental and the court had not invited oral submissions on the question of costs. It was important that the orders had not been entered, and the court made it clear that different considerations apply when the orders have been entered.[26] Having re-opened its judgment, the Court upheld the validity of the regulation and interpreted it as not confining the general discretionary power of the court pursuant to the Judiciary Act 1903 (Cth) s 26 to make costs orders. In the exercise of its discretion, the court concluded that the costs order should stand. Perhaps inconsistently with its reasoning on whether it should re-open its judgment, the Court observed in relation to relief that the fact that the Director-General had not raised the point when it was appropriate to do so weighed against his present claim to immunity from costs.

De L[27] suggests a broad test for the general exception to the finality of judgments which have not been entered for the joint judgment leaves open the question whether the rationale for the principle is a miscarriage of justice or a denial of procedural fairness. The proceedings may be reopened and the Court's order vacated if it proceeds on a misapprehension of the facts or the law; or there is matter calling for review; or, to use the test of Gaudron J, that the interests of justice so require.[28]

Judgment or order entered

Limited exceptions have been made to the finality of a judgment or order which has been entered. However the list of exceptions is surprisingly long. The exceptions permit reopening

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23 Ibid, p 302.

24 (1997) 190 CLR 207.

25 Family Law (Child Abduction Convention) Regulations (Cth) reg 7.

26 (1997) 190 CLR 207 at 216. None of the judgments contains reference to the High Court Rules.

27 (1997) 190 CLR 207.

28 Ibid, p 215 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ. Brennan CJ and Dawson J in a separate joint judgment reached a similar conclusion based on the proposition, accepted without discussion, that the court had jurisdiction to re-open its judgment: ibid at 210.

of a default judgment, variation of interlocutory orders, reopening where an order was made in the absence of a party, the slip rule, consent of the parties, judgments affected by fraud and a stay of execution. After outlining these well defined exceptions, the discussion focusses upon the scope of the more controversial general exception permitting a court in exercise of its inherent jurisdiction to re-open a judgment which has been entered.

Default judgment

A court may set aside or vary a judgment where it has been entered as a default judgment.[29] The court balances the competing interests of the parties to determine whether the interests of justice require that the defendant should be permitted to contest the claim. Factors to be taken into account are the reasons for default, delay by the defendant in taking steps to have the judgment set aside, the defendant's prospects of success in the action, and whether the judgment was obtained irregularly or in breach of good faith.

Order is interlocutory

As a general principle interlocutory orders may be varied or set aside in appropriate circumstances, even where made by consent and entered.[30] The court has wide powers to alter an interlocutory order concerning matters of practice and procedure. The description interlocutory covers a wide range of different types of orders and distinctions may have to be drawn between those relating to purely procedural matters and other interlocutory orders.[31] Where an interlocutory order finally determines the parties' rights an attempt to alter it may amount to an attempt to appeal which is inconsistent with legislative intention.[32] If an interlocutory order is intended to govern rights of parties until final hearing, it should not be altered unless there is a material change in circumstances.

Absence of party

A court may set aside or vary a judgment or order which has been entered after judgment has been given in the absence of a party, whether or not the absent party had notice of trial or of any motion for the judgment.[33] Particular provision may be made for setting aside or varying a judgment in proceedings for possession of land. The court may do so if the judgment was given in the absence of a person and the court decides to make an order that the person be added as a defendant.[34] Any interested party may apply, not just the absent person.

Slip rule

Where there is a clerical mistake or an error arising from an accidental slip or omission, in a minute of a judgment or order, or in a certificate, the court on the application of any party or of its own motion, may at any time correct the mistake or error.[35] This is a common law rule which is reflected in rules of court and which encompasses errors of a mechanical nature as

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29 Rules of court deal with default judgments, for example, NSW SCR Pt 17. See NSW SCR Pt 40 r 9(2)(a).

30 FCR O 35 r 7(2)(c),(d); NSW SCR Pt 40 r 9; and the inherent powers of the courts to control their proceedings.

31 *Wentworth v Woollahara Municipal Council* (unreported, CA, 31 March 1983) per Mahoney JA.

32 Thus, a restraining order made by the Supreme Court under the Proceeds of Crime Act 1987 (Cth) could not be reopened. The existence of a statutory appeal by leave to the Court of Appeal indicated a legislative intention that an inherent jurisdiction under NSW SCR Pt 40 r 9(5) to reopen the order should not be exercised so as to set at naught the requirement that an appeal be brought only with leave: *Woodcroft v DPP (Cth)* (2000) 174 ALR 60 at 70.

33 For example, FCR O 35 r 7(2)(a); NSW SCR Pt 40 r 9(2)(b), 9(3)(a).

34 NSW SCR Pt 40 r 9(2)(c).

35 FCR O 35 r 7(3); NSW SCR Pt 20 r 10(1).

well as situations where the court's order does not correctly reflect its decision, as contained in its reasons.[36]

The slip need not be that of the judge, but could have been introduced by a clerical mistake of legal representatives. The rule does not apply to errors which are the result of a deliberate decision rather than a slip.[37] Nor does it extend to supplementing orders on a point not argued, considered or decided at the hearing. Further, a court will not make an order for amendment when rights of third parties are affected or it would otherwise be inexpedient or inequitable. In determining whether the mistake is accidental it is appropriate to ask whether if it had been drawn to the attention of the court or the parties at the relevant time, the error would have been corrected as a matter of course.

Examples include clarification of a costs order, amendment of a wrong figure or date, insertion of an order made by the judge but omitted from the minute, insertion of a date for compliance with an order, insertion of a wrongly named or mis-described party, or a party shown to have died or to be non-existent.[38]

Consent judgments

Where both parties consent and the rights of third parties are unaffected the court may set aside a final judgment. For example, it may be that the client did not in fact authorise the compromise. In obiter in *DJL v Central Authority,*[39] the High Court affirmed this jurisdiction.

Setting aside judgment for fraud

An application may be made to set aside a judgment obtained by fraud.[40] This ought to be done in separate proceedings where the applicant clearly establishes the fraud, that the information would probably have affected the judgment of the court and that the fraud was discovered after the judgment. This approach, set out by Barwick CJ in 1965,[41] was re-affirmed by the High Court in obiter in 2000 in *DJL v Central Authority.*[42] However, if fresh evidence is discovered, the applicant should proceed by way of appeal, not separate proceedings.

Stay of execution

A person bound by a judgment may move the court for a stay of execution of the judgment, or for some other order, on the ground of matters occurring after the date on which the judgment takes effect and the court may, on terms, make such order as the nature of the case requires.[43] The order may be supplementary to the earlier final judgment or order. For example, an order for specific performance may be supplemented by an order for an inquiry as to damages. There is even power under this rule to stay or set aside an earlier order where exceptional circumstances have removed the basis for the original judgment or would render further compliance with it futile.

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36 *DJL v Central Authority* (2000) 170 ALR 659 at 685 per Kirby J.

37 *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385 at 391, 404-5.

38 *DJL v Central Authority* (2000) 170 ALR 659 at 685.

39 Ibid, p 670, 685.

40 FCR O 35 r 7(2)(b).

41 *McDonald v McDonald* (1965) 113 CLR 529 at 532-3.

42 (2000) 170 ALR 659 at 670, 685, referring to *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 50.

43 FCR O 37 r 6, 10; NSW SCR Pt 42 r 12(1).

Thus, in *Permewan Wright Consolidated Ltd v Attorney-General (ex rel) Franklin's Stores*[44] the New South Wales Court of Appeal suspended a permanent injunction it had just granted. The order was based on the court's interpretation of an interim development order and restricted the manner in which a Permewan's store carried on business at particular premises. Three weeks after the Court granted the stay, the High Court refused an application for special leave. Within hours, the minister exercised a power to vary the order so that it permitted Permewan's to carry on business free of the restrictions. Mahoney JA held that the court had an inherent power to make an order suspending the stay to ensure that its order did not operate after the statutory basis upon which it was made had ceased to operate.[45] While Mahoney JA preferred to rely upon the inherent power of the Court, Reynolds JA relied upon Pt 42 r 12 of the Rules of Supreme Court which empowers the Court to stay the execution of a judgment on the ground of matters occurring after the judgment takes effect.[46]

General exception: courts with inherent or limited jurisdiction

In practice the jurisdiction of courts to re-open decisions after entry of the order, is exercised rarely, in a much narrower class of cases than the jurisdiction prior to entry of the order. This was apparent in 1971 in *Bailey v Marinoff*,[47] where the High Court held, Gibbs J dissenting, that once an order made by the New South Wales Court of Appeal disposing of a proceeding had been entered, the Court had no further power in relation to that proceeding. The principle was applied again in *Gamser v Nominal Defendant*.[48]

However, according to Mason CJ in *Autodesk Inc v Dyason (No. 2)*, the jurisdiction to re-open a judgment when orders have been entered and grant a re-hearing arises:

> where the applicant can show that by accident and without fault on the applicant's part, he or she has not been heard.[49]

In 2000 in *DJL v Central Authority*[50] the High Court made clear the position of courts of limited jurisdiction with regard to judgments which have been entered. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in a joint judgment held that even if such a court be a superior court, since it has no inherent jurisdiction, any power to re-open its judgments must be found in express or implied statutory power. The Full Court of the Family Court did not have power to re-open its decision to enable it to respond to a recent decision of the High Court on the issue before it. No power to re-open was derived from the Court's position in the appellate hierarchy or from Ch III of the Commonwealth Constitution. Callinan J reached a similar conclusion on this issue in a separate judgment. Kirby J dissented, preferring the dissenting judgment of Gibbs J in the cases concerning the New South Wales Court of Appeal, that certain appellate courts have jurisdiction to correct even an order which has been entered, in wholly exceptional circumstances where a mistake has occurred which unrepaired would cause a serious injustice.[51] While they had no inherent power such courts

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44 (1994) 35 NSWLR 365.

45 Ibid, p 374. See also *QDSV Holdings Pty Ltd v Trade Practices Commission* (1995) 59 FCR 301 at 316.

46 Ibid, p 367. Both judges described this power as analogous to the power under NSW SCR Pt 44 r 5 to stay the execution of an order: ibid, p 367, 374. Hutley JA did not decide the point, holding that the court should not entertain the application until the applicant had purged its contempt of disobeying the stay order in the intervening period.

47 (1971) 125 CLR 529 at 530.

48 (1977) 136 CLR 145.

49 (1993) 176 CLR 300 at 301-2.

50 (2000) 170 ALR 659.

51 Ibid, p 687, 689.

by implication from their empowering statutes had jurisdiction to re-open their judgment after its entry.

One decision not yet discussed is intriguing in terms of its place in this discussion. It is *Fox v Commissioner for Superannuation*.[52] The Full Federal Court had not had drawn to its attention a particular provision of the Superannuation Act 1922 (Cth), whose effect was that the appellant was entitled to a pension at the higher rate for which he had unsuccessfully contended. The Court, Black CJ dissenting, reopened its own decision. The majority set aside its own order, and the decision of the Administrative Appeals Tribunal (AAT), and remitted the matter to the AAT for further consideration. Unfortunately it is not clear whether the judgment had been entered. It is clear that the first judgment was delivered on 20 August 1997, the motion to reopen the decision was brought three months later, and that the decision had been reported in Federal Court Reports by the time of the second decision on 8 April 1999.[53]

Black CJ discussed the principle regarding reopening very briefly, saying that the court should be very reluctant to reopen a case in such circumstances but could do so if it was persuaded that it would have reached a different conclusion on the issues had it been referred to the provision.[54] In the event, Black CJ concluded that the Court had not erred in law.

The majority judges, Branson and Sackville JJ, applied *Autodesk*, holding the Court had jurisdiction to reopen the judgment on account of a misapprehension by the Court of the relevant law.[55] It is not clear whether the motion was allowed under Federal Court Rules O 35 r 7(1) and (3) which respectively provide for reopening a decision before entry of the judgment and for the slip rule. While these rules are reproduced in the majority's joint judgment, it also contains reference to the inherent jurisdiction of the court and indeed asserts that the approach taken by Mason CJ in *Autodesk* is applicable not only to the High Court but also to an intermediate court of appeal. In the event counsel for the respondent conceded that the judgment could be reopened, and the question of the basis for doing so was left undecided.

While the court was concerned about the public interest in correcting its erroneous decision, it could not acquire jurisdiction simply via a concession made by counsel. If the judgment reopened in *Fox's* case had been entered, then the later High Court decision in *DJL* indicates *Fox's* case is no longer good law on the issue of reopening of a judgment.

The rationale for this general exception, recognising a jurisdiction to reopen a judgment after its entry, remains unclear. Mason CJ in *Autodesk* described it as denial of procedural fairness, thus posing a rationale different from that applying to reopening of a judgment prior to its entry. *DJL* leaves unanswered the question of the rationale. Indeed *DJL* tends to introduce a separation of the issue of jurisdiction and the basis for its exercise A court of limited jurisdiction has no inherent jurisdiction to reopen its judgments and in the absence of any express or implied jurisdiction to do so, there is no occasion for considering on what basis. The only definite position taken with regard to the rationale for exercise of the jurisdiction was the view of Kirby J in dissent, opting for a rationale of miscarriage of justice.

52 (1999) 56 ALD 618.

53 *Fox v Commissioner for Superannuation* (1997) 78 FCR 151.

54 (1999) 56 ALD 618 at 619.

55 Ibid, p 630.

High Court judgments

As noted in the joint judgment in *DJL*, there is no direct authority as to whether the High Court may re-open its judgments after entry of final orders.[56] In obiter in *Autodesk* Mason CJ held that the High Court had jurisdiction to reopen its own judgment after entry on the ground that, through no fault of his or her own, a party had not been heard. If constitutional arguments are excluded, as in the joint judgment in *DJL*, the High Court should have no greater powers than a court with inherent jurisdiction. I return to this question later.

Assistance might be sought by referring to the jurisdiction of the highest appellate court in the United Kingdom to reopen its judgments. In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*[57] the House of Lords re-opened its own decision in an action challenging the validity of warrants for the extradition of Senator Pinochet. The House of Lords held that Lord Hoffmann was disqualified by operation of law from hearing the matter on account of an appearance of bias arising from his position as a director of a company operating as the charitable wing of Amnesty International, which had been joined as a party in the proceedings. Referring to an earlier decision where an order for costs was varied because the parties had not had a fair opportunity to address argument on the point,[58] the House of Lords briskly rejected a submission that it did not have jurisdiction to re-open its decision:

> There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. …
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of the party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[59]

The House of Lords did not advert to the question whether the order had been entered.

The High Court came close to deciding an issue similar to that in *Pinochet*, in proceedings challenging the constitutional validity of legislation amending the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), culminating in the High Court's decision in *Kartinyeri v The Commonwealth.*[60] At an early stage of the hearing the plaintiffs sought recusal by Callinan J from hearing the case as a member of the High Court on the ground of an appearance of bias. The plaintiffs' submissions focused almost entirely on the question whether the High Court had jurisdiction to hear the issue, including constitutional arguments.[61] After initially declining to recuse, in the event Callinan J withdrew from hearing the matter.

At the stage when the issue was raised, jurisdiction would not have presented a problem. There is no doubt that the full High Court may hear an appeal from a ruling made by a single High Court judge. If the recusal request were raised at a later stage, *Autodesk* and *De L* make it clear that prior to entry of its judgment the court has an inherent power to re-open its

56 *DJL v Central Authority* (2000) 170 ALR 659 at 672.

57 [1999] 1 All ER 577.

58 *Cassell & Co Ltd v Broome (No 2)* [1972] AC 1136.

59 [1999] 1 All ER 577 at 585-6.

60 (1998) 195 CLR 337.

61 S Tilmouth and G Williams "The High Court and the Disqualification of One of its Own" (1999) 73 *ALJ* 72.

decision if the judgment has miscarried due to a misapprehension as to the facts or the law, there is a matter calling for review, or the interests of justice require it.[62]

What is unclear is whether the High Court would have had power to re-open the decision after entry of its orders. If the rationale for the jurisdiction to reopen a decision after entry is procedural fairness as suggested by Mason CJ in *Autodesk*, rather than the interests of justice, then the argument for reopening of the decision of the High Court is clearly supported. The basis for the application to reopen would not have been just any error of law, but a denial of procedural fairness resulting from the failure to recuse.

In *DJL*[63] the Court was concerned with whether a federal court of limited jurisdiction has jurisdiction to reopen its judgment after entry, rather than with the basis on which such a jurisdiction might be exercised. Two passing references are made to procedural fairness. Kirby J referred to procedural fairness as a means for collateral attack on a judgment.[64] Callinan J himself in *DJL* went furthest in this regard, referring to a jurisdiction to reopen orders which have been entered, where there is a correction under the slip rule, fraud, or failure to give a party a hearing.[65]

The joint judgment in *DJL* put to one side constitutional arguments based upon Ch III of the Commonwealth Constitution, as a basis for reopening a decision of the Full Family Court. In the case of the High Court, at the apex of the system of courts, the position is arguably different. Constitutional requirements under Ch III may indicate that in a case of denial of procedural fairness the court has failed to exercise its constitutional jurisdiction and therefore the proceeding remains on foot even after entry of the order. On this basis then if a judge of the High Court with an appearance of bias failed to disclose the matter warranting disqualification or declined to recuse from a proceeding, the Court would have jurisdiction to reopen its decision after entry of the orders.

3 Primary Decision-makers in Executive Branch

In determining whether administrators have implied power to reconsider or revoke their decisions the courts do not engage in arguments by analogy with courts, but engage in a process of statutory interpretation. Most important among the principles of statutory interpretation applied are s 33(1) and (3) of the Acts Interpretation Act 1901 (Cth) (and their equivalent in other jurisdictions), which provide:

> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> (3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention applies, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

62 See text accompanying nn 23-28 above. See also Sir Anthony Mason "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law and Policy Review* 21.

63 (2000) 170 ALR 659 at 686.

64 Ibid, p 686. See note 144 in Kirby J's judgment, the only reference made in *DJL* to *Pinochet*.

65 (2000) 170 ALR 659 at 707.

Power exercised from time to time

The leading case on powers of primary decision-makers to re-exercise their powers is *Minister for Immigration and Ethnic Affairs v Kurtovic*.[66] Neaves, Ryan and Gummow JJ held that the criminal deportation power of the Minister for Immigration, Local Government and Ethnic Affairs was by implication exercisable from time to time, rather than on only one occasion.[67] In this case the Minister's delegate had refrained from exercising the power when the conditions for its exercise arose, but could exercise the power later, even on the basis of the same facts. If a deportation order had previously been made, it could for the same reason be revoked or revived, whether or not the facts had changed or indeed simply because of a change of ministerial policy.[68] This conclusion was reached as a matter of statutory interpretation. There was no intention in the Migration Act contrary to s 33(1) of the Acts Interpretation Act, which was applicable in this case. As Gummow J described it, the purpose of s 33(1) is to overcome "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise".[69]

Section 33(1) and *Kurtovic* do not of course rule out the possibility of cases where a legislative intention contrary to s 33(1) indicates that a power is spent once it is exercised rather than available to be exercised from time to time. The decision-maker is then described as *functus officio*, and any attempt to re-exercise the power is ultra vires.[70] Further s 33(1) does not support an exercise of power to revoke which is bad for other reasons, such as its exercise for an improper purpose.[71]
Sloane v Minister for Immigration, Local Government and Ethnic Affairs[72] provides an example of such a case. The Minister's delegate declined to reconsider a decision refusing a temporary entry permit under the "remaining relative" category, as it then stood, when additional medical reports were sent to him. The delegate took the view that having already made a decision that the applicant did not qualify for the permit his power was spent. In this case French J did not refer to s 33(1) of the Acts Interpretation Act but did refer to its general counterpart at common law, the principle of statutory interpretation which permits implication of a power on the basis that it is necessary, or implied in a more general way by reason of construction of the statute. The implication of incidental powers of statutory courts was based upon the same principle of interpretation which was now relied upon as a basis for generally implied powers of administrators.[73]

French J considered the competing policy considerations. On one hand to imply into an express statutory power a power to reconsider:

> would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances[74]

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66 (1990) 21 FCR 193.

67 Ibid, p 195, 201, 211, 218.

68 Ibid, p 218-9 per Gummow J.

69 Ibid, p 211 per Gummow J , quoting from a description in *Halsbury's Laws of England* (1st ed) Vol 27, p 127 of the purpose of the counterpart provision in the United Kingdom Interpretation Act upon which s 33(1) was based.

70 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow J.

71 *Vella v Grey* (1985) 9 FCR 81.

72 (1992) 28 ALD 480.

73 Ibid, p 486-7, referring to *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.

74 (1992) 28 ALD 480 at 486.

On the other there was:

> the convenience and flexibility of a process by which a primary decision-maker may be persuaded on appropriate and cogent material that a decision taken ought to be re-opened without the necessity of invoking the full panoply of judicial or express statutory review procedures. There is nothing inherently angelical about administrative decision-making under the grant of a statutory power that requires the mind that engages in it to be unrepentantly set upon each decision taken.[75]

The competing policies affected the application of the principle of statutory interpretation. French J concluded that in the context of the Migration Act 1958 (Cth) and Migration Regulations which made detailed provision for the powers of review of decisions, suggesting statutory codification of review functions, it was not possible to imply by necessity a legislative intention to confer a power to reconsider a decision to refuse an entry permit. It was true that the medical reports would not receive consideration by the Immigration Review Tribunal, which in this case had no jurisdiction to review the initial decision. However, if the delegate had power to reconsider, the reconsideration decision would be justiciable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act), triggering potentially endless judicial review applications.

Power to revoke

It is well established that s 33(3) of the Acts Interpretation Act has a narrower operation than s 33(1). In *Collector of Customs v Brian Lawlor Automotive Pty Ltd*,[76] the Full Federal Court declined to imply a power of the Collector of Customs to revoke a warehouse licence. The Customs Act 1901 (Cth) conferred an express power to grant a licence but no express power to revoke it. Section 33(3) did not assist in implying a power to revoke. Section 33(3) applies where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws). The power to grant a licence did not fall within this category of powers. The Comptroller may happen to exercise the power to grant the licence in written form, but it was still not a power to grant or issue an instrument.[77] This, as Smithers J said, was a distinction between a transaction and an instrument implementing it.[78]

By contrast, in *Nashua Australia Pty Ltd v Channon*[79] s 33(3) of the Acts Interpretation Act did operate to imply a power of revocation in relation to a power by instrument to determine that an item of the customs tariff applied to goods. In *Edenmead Pty Ltd v Commonwealth of Australia*[80] a power by notice published in the gazette to prohibit fishing in certain waters was a power to make, grant or issue an instrument and hence by reason of s 33(3), included a power to repeal, rescind, revoke amend or vary the prohibition by notice. Also belonging to this group of cases is *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*[81] although it contains no explicit reference to s 33(3). The Full Federal Court held that the Comptroller-General of Customs had an implied power to revoke a tariff concession order. This was so irrespective of the fact that the order was already under challenge as being invalid and that the ground for revocation was its doubtful validity. In this case the Comptroller-General and his delegate had an express power to make, and an express power to revoke, such an order. The only issue was whether the express power to revoke carried as a necessary incident an implied power to revoke where a doubt had been raised as to the

75 Id.
76 (1979) 2 ALD 1.
77 Ibid, p 3.
78 Ibid, p 13.
79 (1981) 58 FLR 325 at 331-2.
80 (1984) 4 FCR 348.
81 (1991) 25 ALD 418.

validity of the order. Without relying on s 33(3), Beaumont J held that the power to revoke could be implied. An older English case to the contrary could be confined to its own particular statutory circumstances.[82]

These decisions are consistent, turning upon the requirement of a power "to make, grant or issue any instrument (including rules, regulations or by-laws)" which narrows the ambit of operation of s 33(3). The power in *Brian Lawlor* did not satisfy this requirement. The power to grant the warehouse licence was of an adjudicative nature rather than of a rule making nature like the powers in issue in *Nashua*, *Edenmead* and *Kawasaki*. A distinction between adjudicative and rule making powers as the limitation upon the ambit of s 33(3) underlies the later decision of Lee J in *Australian Capital Equity Pty Ltd v Beale.*[83] The publication of a notice that tenders were invited for multipoint distribution station (MDS) licences was not a decision of a legislative character despite its formality, nor did it even have continuing effect which would render it appropriate for revocation.[84] Lee J held that even if the term "instrument" in s 33(3) is to be interpreted as covering a wider class of document than those which are made by an exercise of legislative power, the provisions of the statutory scheme indicated a contrary intention precluding implication of a power to revoke.[85]

A decision issued in a formal document may, however, amount to an "instrument" for the purpose of s 33(3) though it is not issued as an exercise of rule making power. Thus, in *Leung v Minister for Immigration and Multicultural Affairs*[86] it was argued that the Minister had an implied power to revoke an individual's certificate of citizenship prior to the ceremony where the pledge of commitment to Australia is made and the individual becomes an Australian citizen. On the basis of information contained in an anonymous letter the minister's delegate purportedly revoked the applicants' certificates on the ground of failure to meet residency requirements. The AAT affirmed the revocation decision but the question for the Federal Court was whether the delegate had power to revoke. The applicants argued that once the delegate had made a decision to approve the issue of the certificates, he was *functus officio* and could not reconsider. The Australian Citizenship Act 1948 (Cth) ss 21 and 50 contained part of a code with regard to loss of citizenship, covering only the situation of deprivation of citizenship after the pledge has been taken, on the grounds of conviction for certain offences, including making false or misleading representations for the purpose of obtaining citizenship. Following the approach of Beaumont J in *Kawasaki*, Marshall J held that at the stage prior to the pledge of citizenship the delegate had implied power to revoke the certificate. Section 33(3) of the Acts Interpretation Act supported this conclusion of implication of a power to revoke.[87] Further, policy considerations supported this conclusion for it "made good administrative sense"[88] to allow revocation rather than require the minister to instigate a prosecution under s 50 for giving false or misleading information.

The Full Federal Court dismissed an appeal from Marshall J's decision.[89] The reasons of Heerey J were similar to those of Marshall J. However Finkelstein J, with whom Beaumont J concurred, held that a primary decision-maker may ignore an invalid decision, irrespective of whether he or she has power to reconsider or revoke a decision.[90]

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82 Ibid, p 667-8. The case was *Re 56 Denton Road, Twickenham* [1953] Ch 51. A similar approach was taken to the case in *Rootkin v Kent County Council* [1981] 1 WLR 1186.

83 (1993) 114 ALR 50 at 62-65.

84 Ibid, p 64.

85 Ibid, p 64-5.

86 (1997) 46 ALD 519.

87 Ibid, p 524-5.

88 Ibid, p 524.

89 (1997) 79 FCR 400.

90 Ibid, p 414.

The latter approach is, with respect, out of step with the requirement, evident in the case-law discussed, to establish a source of power to reconsider or revoke, whether the decision is made by a court, tribunal or primary decision-maker. When an administrator ignores a decision, so as to set it at naught, he or she as a matter of fact re-exercises the power and must have express or implied power to do so. If the previous decision was made by another officer, questions of delegation and hence power arise. If the previous decision has already been conveyed to the individual affected, expectations may be disappointed. While a pure policy decision may be changed with relative ease, ignoring a policy when making an adjudicative decision, or ignoring a previous adjudicative decision, has implications in administrative law. Irrespective of its validity, once conveyed to the individual affected, the previous decision normally generates a legitimate expectation entitling the individual to a hearing before it is ignored; is itself one relevant consideration which the administrator is bound to take into account on the subsequent occasion; and, being made at the operational level, may raise an estoppel against the decision-maker. An existing decision which is invalid cannot therefore be entirely ignored but has practical and legal consequences.

4 Merits Review Tribunals

No distinction appears to have been drawn between primary decision-makers and merits review tribunals for the purposes of application of the principles relating to reconsideration or revocation. In both cases it is a question of statutory interpretation. However, it is arguable that in the case of merits review tribunals which often bear a close resemblance to courts, there is greater scope to draw upon arguments by analogy with the implied incidental powers of courts, hence suggesting a more cautious approach to implication of a power to reconsider or revoke a decision which has been rendered formal in some way or notified to the parties. However with the exception of the brief reference made by French J in *Sloane*, such analogies have not been attempted.[91]

The discussion which follows examines the powers of merits review tribunals to reopen or re-consider decisions, their powers to revoke their decisions, and then turns to a recent case which raises both issues.

Reconsideration

In the case of migration tribunals the complex provisions for review in the Migration Act and regulations made under it militate strongly against the implication of additional powers of the tribunals, such as a reconsideration or re-exercise of power. Thus, the reasoning in *Sloane* was applied to the Refugee Review Tribunal (RRT) in *Jayasinghe v Minister for Immigration and Ethnic Affairs.*[92] Goldberg J rejected a submission that the RRT had power to reconsider its decision to affirm a refusal of a protection visa when new evidence of country information came to light. While the statutory scheme had changed since *Sloane* was decided, it still indicated a comprehensive system for further review by the RRT and limited judicial review of the RRT's decision. No further function of the RRT remained to be performed. The RRT was *functus officio*.[93]

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91 See text accompanying n 73. In *Broken Hill Pty Company Ltd v Finestone* (1997) 49 ALD 62 Einfeld J referred to *Autodesk* in an appeal from the AAT on the ground of denial of procedural fairness. No significance attaches to the reference since this was not even a case raising the issue of reconsideration, reopening or revocation.

92 (1997) 48 ALD 265.

93 Statutory provisions may not only preclude the re-exercise of power, they may also preclude the making of a second application for an exercise of the power. Thus, in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2001] FCA 18 (unreported, Federal Court, Dowsett J, 29 January 2001) s 48A of the

Associated with the idea of a power which may be exercised from time to time, as conveyed in s 33(1) of the Acts Interpretation Act, is the idea of a continuing duty of a merits review tribunal to give a fair hearing, whether expressly conferred in the statute or at common law. In *Minister for Immigration and Multicultural Affairs v Capitly*,[94] the applicant telephoned the RRT an hour before the hearing, and spoke to an unknown person at the RRT to advise that he was sick and could not travel to attend the hearing in the severe weather conditions. When at the request of the officer the applicant called back ten minutes later, he was told that it was too late for him to obtain a postponement of the hearing. Without reference to s 33(1) of the Acts Interpretation Act, Wilcox and Hill JJ, with whom Madgwick J agreed, held that the duty of the RRT under s 425(1)(a) of the Migration Act to afford the applicant an opportunity to give evidence is a continuing one, as the circumstances exist from time to time, until the applicant either does or does not make use of the opportunity. The duty did not end when the RRT notified the applicant of the hearing date. The RRT's apparent refusal to grant an adjournment to an applicant who was sick and could not attend a hearing in circumstances where there was no real opportunity to appear and give evidence constituted a failure to comply with the duty.

Capitly is concerned with the manner in which the hearing is afforded until the decision is made. Probably the registry staff responding to the telephone call made enquiries of a member of the RRT who refused the adjournment, prior to dismissal of the application. In the absence of direct High Court authority that failure to comply with s 425 is not reviewable on the ground of failure to observe a procedure required by the Act, within s 476(1)(a) of the Migration Act, the Federal Court could set aside the RRT's decision.[95] *Capitly* has nothing to say about implication of power to re-exercise a power, reconsider a decision or revoke it where that decision-making process has already been completed, say by dismissal of an application. *Capitly* does not assist in resolving the question when a tribunal's process of decision-making has been completed. Yet the Full Federal Court placed significant reliance upon *Capitly* in reaching its decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[96] considered below, which recognised a power of the Immigration Review Tribunal (IRT) to reopen its decisions.

Revocation

The scant authority on the second issue, of revocation of decisions, is probably explained by the presence in most empowering statutes of merits review tribunals of express powers to reopen decisions, similar to the powers of courts. A decision of the Administrative Appeals Tribunal (AAT) which varies, or is made in substitution for, the decision of the primary decision-maker is deemed to be the decision of the primary decision-maker, but is not a decision which is itself subject to review by the AAT.[97] However, the AAT has defined powers to reconsider and reopen its decisions. When the AAT dismisses an application on the ground that the applicant failed to appear, it has express power to reinstate the application upon application by the applicant within 28 days.[98] The AAT may also reinstate an application which it has dismissed in error.[99] This power was recently considered in

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Migration Act expressly precluded the making of a second application for a protection visa. This provision was equivalent to a partial prohibition upon reconsideration.

94 (1999) 55 ALD 365.

95 See however *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611, which provides oblique authority that review on this ground in the Federal Court may be excluded by s 476(2)(a) of the Act.

96 (2000) FCA 789.

97 Administrative Appeals Tribunal Act 1975 (Cth) s 43(6).

98 Ibid, s 42A(8),(9).

99 Ibid, s 42A(10).

Brehoi v Minister for Immigration and Multicultural Affairs,[100] where the Full Federal Court observed that when an application is made within the time limit, the AAT continues to have power to determine the reinstated application and determine it on its merits.[101]

A slip rule empowers the AAT where it is satisfied there is an obvious error in the text of a decision it has made, or in a written statement of reasons for the decision, to direct the registrar to alter the text of the decision or statement.[102]

The AAT has accepted for itself that it does not have a general power to reopen its decisions.[103] In *Re Sanchez and Comcare*[104] the AAT declined a request that it relist a matter in which it had already made a decision, setting aside the decision of Comcare and ordering it to pay the applicant's costs.[105] Comcare wished to argue the issue of costs. The AAT determined that the parties had been afforded an opportunity to argue costs and the decision could not be reopened. Since an AAT decision could not properly be characterised as an "instrument" for the purpose of s 33(3) of the Acts Interpretation Act, no power to revoke its decision could be implied. Nor could a power to revoke or vary its decision be implied on some more general basis. The express statutory provision for a slip rule and for reinstatement of a dismissed matter militated against implication of a more general power to reopen a decision.

Like the AAT, the Administrative Decisions Tribunal (ADT) in New South Wales may not review again a decision deemed to be that of the primary decision-maker, where as a result of its review the ADT has varied or substituted its decision for the decision-maker's original decision. Like the AAT the ADT has a slip rule, expressed in terms very similar to that of the AAT.[106] Unlike the AAT the ADT does not have express power to reinstate an application which has been dismissed when the applicant fails to appear. The availability of an appeal from a decision within a Division of the ADT to the Appeal Panel as of right on questions of law, and by leave on the merits, also provides a facility for reconsideration which has no counterpart in the AAT.[107] Decisions of the Victorian Civil and Administrative Tribunal (VCAT) affirming, varying or substituting the decision for that of the primary decision-maker, are deemed decisions of the decision-maker and are not themselves reviewable by the VCAT.[108] The VCAT may however reopen an order made when a person did not appear, and has a slip rule.[109]

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100 (1999) 58 ALD 385.

101 The court referred to *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400; *Brehoi*, ibid, p 392. See also *Kouieder v Commissioner of Taxation* (2000) 60 ALD 320.

102 Administrative Appeals Tribunal Act 1975 (Cth) s 43AA.

103 Cf *Re Gourvelos and Telstra Corp Ltd (*AAT No 9158A, 28 July 1994); *Re O'Halloran and Comcare* (AAT, No 10198A, 8 August 1995).

104 (1997) 48 ALD 785.

105 Pursuant to the Safety, Rehabilitation and Compensation Act 1988 (Cth) s 67.

106 Administrative Decisions Tribunal Act 1997 (NSW) s 87. In the AAT the slip rule is expressed to apply where there is an obvious clerical or typographical error in the text of the decision or statement of reasons, or there is an inconsistency between the decision and the statement of reasons: Administrative Appeals Tribunal Act 1975 (Cth) s 43AA(5). By contrast in the ADT the rule applies where these grounds are established or where there is an error arising from an accidental slip or omission or a defect of form: Administrative Decisions Tribunal Act 1997 (NSW) s 87(3).

107 Ibid, ss 114-116.

108 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 51(4).

109 Ibid, ss 120, 119, respectively.

Bhardwaj's case

Issues of reconsideration and revocation were important in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[110] a majority decision of the Full Federal Court holding that the IRT had implied power to reconsider its decision to affirm the cancellation of a student visa. The decision is surprising in the light of the compelling reasoning in *Jayasinghe*, but draws upon the associated line of reasoning in *Capitly*.

The applicant was notified of the hearing date. He sent a facsimile to the IRT on the evening prior to that date to advise that he was sick but would still like to appear at a later date to give evidence and present arguments. The facsimile was filed in the correct file but behind the letter notifying the applicant. It was not brought to the attention of the tribunal member who consequently proceeded to make a decision affirming the cancellation of his visa. On learning of the error, the IRT was prepared to reconsider its decision. The matter was reopened and in the light of evidence presented by the applicant indicating he had been attending a course of studies, the IRT purported to revoke its earlier decision. The Minister sought review.

Beaumont and Carr JJ held that the IRT had to discharge its duty under s 360(1)(a) of the Migration Act to afford the applicant an opportunity to appear before it. This was a continuing duty like the duty of the RRT under s 425(1)(a) of the Act, considered in *Capitly.* The judges observed that mandamus could be issued against the IRT for failure to comply with this duty. Since the introduction of Part 8 of the Migration Act, under which the proceedings in *Bhardwaj* were brought, this remedy is no longer available in the Federal Court for a denial of procedural fairness. However the judges would have had in mind the ground of procedural ultra vires under s 476(1)(a) of the Act, which was the ground established in *Capitly*.

The majority in *Bhardwaj* relied upon *Kurtovic* as establishing that the IRT had power to consider the application from time to time. The majority distinguished *Sloane* on the ground that it was concerned with the issue of reconsideration by the Minister's delegate while the present case was concerned with whether the applicant had received an opportunity to present his case at the hearing. Further, in *Sloane* no reliance was placed on s 33(1) of the Acts Interpretation Act. *Jayasinghe* was distinguished on the basis that in the present case there was no suggestion of endless requests for reconsideration on new material or in changed circumstances. This case was concerned with a single request for an oral hearing, which had not been provided because of the IRT's oversight of the facsimile in the file.

Lehane J dissented, holding that the IRT did not have implied power to reconsider its decision, Section 33(1) of the Acts Interpretation Act did not assist in implying such a power because the Act showed a contrary intention. The strict time limits for seeking review, detailed provision for the procedure of the IRT, recording of its decision and reasons, publication of the decision and limitation of judicial review, established a scheme which indicated the IRT did not have a power which could be exercised as occasion required it from time to time. *Sloane* and *Jayasinghe* applied. The approach of Finkelstein J in *Leung* was rejected. The IRT could not at a later stage disregard or ignore its decision because it believed it was void for denial of procedural fairness. In particular in this case review by the Federal Court on the ground of procedural fairness would not have been available under Part 8 of the Act. According to Lehane J the IRT lacked jurisdiction to reconsider the cancellation decision.

The High Court has granted special leave to appeal in *Bhardwaj*.[111]

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110 (2000) 99 FCR 251.

111 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2001) 22(4) Leg Rep SL2b.

A serious problem in the scheme of merits review of migration decisions, exposed by *Bhardwaj*, is that unlike the AAT, the IRT apparently had no procedural rule permitting it to reinstate a proceeding dismissed on the ground that the applicant failed to appear, where that failure occurred through no fault of the applicant.

A second feature of *Bhardwaj*, of central importance to the reasoning process of the majority, is that the Full Federal Court considered only s 33(1) of the Acts Interpretation Act. This provides, in the absence of a statutory indication to the contrary, for an implication that a power may be exercised or a duty performed, from time to time as occasion requires. Could the IRT reconsider without first revoking its earlier decision? Was not s 33(3) of the Acts Interpretation Act the interpretive provision in issue? A situation where a power has been exercised is different from a situation like that in *Kurtovic,* where the power to deport had not been exercised and remained available for re-exercise at a later date. In contrast to *Kurtovic*, in *Bhardwaj* the power was exercised twice. Before the power could be re-exercised, favourably to Bhardwaj, the cancellation decision had to be revoked. So an implied power to revoke had to be established. This meant that s 33(3) of the Acts Interpretation Act needed to be considered. On the authority of *Brian Lawler,* s 33(3) does not assist in implying a power to revoke in the case of a power to make a decision rather than to make, grant or issue an instrument. Section 33(3) generally applies where the instrument is issued as a result of rule-making, not an adjudicative decision. If it applies in relation to an adjudicative decision it must consist in the issue of a formal instrument like the certificate of citizenship considered in *Leung*. Like the AAT's decision in *Re Sanchez and Comcare*, the IRT's decision cannot properly be described as an instrument.

A third variable to be taken into account is the nature of the power. The power in *Sloane* was a power to confer a benefit. The benefit was denied on the first occasion. The powers in issue in *Kurtovic* and in *Bhardwaj* were powers to impose penalties, the former a criminal deportation order and the latter the cancellation of a student visa. In *Kurtovic* the decision-maker refrained from imposing the penalty on the first occasion then later imposed it. In *Bhardwaj* on the first occasion the IRT, in affirming the cancellation decision while standing in the shoes of the Minister's delegate, imposed the penalty. The IRT later sought to re-exercise the power to set aside the primary decision to cancel the visa and substitute a decision to refrain from imposing such a penalty. The delegate's decision in *Kurtovic* is readily described as a re-exercise of power, and cannot sensibly be described as a decision to reopen or revoke its decision. The decision in *Bhardwaj* cannot be described as a re-exercise of power in the face of the cancellation decision.

Fourthly, the reconsideration issue is much more complex in the context of merits review where the tribunal stands in the shoes of the primary decision-maker, exercising in the review the same powers and discretions. When reconsideration of a decision of a merits tribunal is sought, is it the tribunal's decision or the primary decision which must be revoked? In *Bhardwaj* the applicant approached the IRT with a request that it reconsider its own decision. However when it reconsidered, the IRT employed the language of revocation of the cancellation decision, apparently referring to revocation of the delegate's cancellation decision rather than revocation of its own decision affirming the cancellation.

When a merits review tribunal's decision is to vary or substitute its decision for that of the primary decision-maker, it is deemed to be the decision of the primary decision-maker. A second opportunity for review of that deemed decision is generally expressly excluded. The susceptibility of primary decisions to re-exercise or revocation varies from one decision to another. For example, the earlier discussion indicated that some migration powers may be exercised from time to time, while the exercise of others is expressly limited to a single

occasion.[112] The answer to the question whether it is the tribunal's decision or the primary decision which must be revoked may also depend in part on whether the power to revoke is express or implied, and the appropriate approach to interpretation of the provision which confers jurisdiction upon the tribunal. Where a tribunal has an express or implied statutory power to reconsider or revoke its decision in certain circumstances, it may be argued to have a second layer of power to reconsider or revoke flowing from its earlier exercise of review jurisdiction.

5 Policy Considerations

The policy considerations applying to reopening of judicial decisions have been clearly articulated in the case-law. In its recent decisions the High Court has given most emphasis to the public interest in the finality of litigation. However in *Fox* the Full Federal Court was more concerned with the public interest in a major decision relating to interpretation of superannuation legislation being correct in law.
The ambiguity of *Fox* with regard to whether the order was entered prompts a question about the dichotomy posed by the case-law between judgments and orders which are entered and those which are not. In *Pinochet* the House of Lords reopened its judgment without adverting to the question whether the judgment was entered or not. There is a live question as to why the entry of a judgment has been identified in Australian case-law as the magical point at which reopening of the judgment renders the adverse impact upon the public interest in finality of litigation more severe. It seems a fair proposition that the public would be more surprised or even affronted at uncertainty in the law if a judgment which had stood for a year were reopened, than if a judgment which had been made the previous day were reopened. On the other hand there are also circumstances where reopening a judgment made long ago safeguards public confidence in the legal process, as where a settled procedure is followed for reviewing a criminal conviction which appears to involve a miscarriage of justice. If the entry of judgments is in the present context nothing more than a handy device for indicating how much time has passed since the judgment was delivered then perhaps the dichotomy is due for careful review. This raises issues of the appropriate time for entry of a judgment, res judicata, issue estoppel, and pursuit of appeals or judicial review, which are too large to be pursued further here.

Should the policy considerations and the law applying to primary decision-makers in the executive branch differ from that applying to courts? The competing policy considerations applying to primary decision-makers are articulated well by French J in *Sloane*. Why is the public interest in finality of litigation not equally compelling in the case of primary decision-making?

As expressed in relation to courts, the policy consideration cannot readily be applied according to its terms. At what point is an administrative decision "final" in a sense parallel to an entered judgment?[113] Some primary decisions are made in a tripartite context with the administrator determining contested rights of two or more parties, which may be interest groups. Most often, decision-making involves an administrator allocating a benefit to, or imposing a penalty upon, an individual and would not be described as "litigation". Nor is litigation necessarily dampened by bureaucratic resistance to correcting obvious errors.

In *Sloane* French J referred specifically to the fact that the delegate's decision had been "formally made and notified to the applicant". In *Leung* the time at which the power to revoke

112 See text accompanying nn 66-75.

113 The idea of a "final" or "operative" decision has been central to defining the test of justiciability of administrative action under the Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3(1). See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

was claimed to arise was parallel to the position of reopening a judgment which had not been entered. Yet the argument for finality may be stronger in a case like *Leung* because the context is citizenship rights. However in many other fields of public administration the argument for flexibility and capacity of government to rectify errors is a much stronger policy consideration than is finality. The fundamental doctrine in administrative law that government should not be shackled in its capacity to make and change policy in the future in the public interest reflects this policy consideration.

What of merits review tribunals? In many respects merits review tribunals resemble courts for they adjudicate individual rights and obligations. Usually the tribunal has the role of umpire in a tripartite contest but in some cases, notably the RRT, only the applicant appears before the tribunal. A resemblance to courts suggests that there is more scope to argue for a restrictive approach to reopening of decisions, fostering the public interest in finality of litigation. On the other hand, merits review tribunals are part of the executive branch, generally have a role in policy review where they are in principle as unfettered as a primary decision-maker, and generally are required to operate in a manner which is non-technical, speedy and informal. Speediness cannot be assumed to secure finality of decisions. The pressures placed on tribunals to make speedy decisions, handling a high volume of cases, increases the risk of errors and with it the practical need for a power to reopen decisions. The very informality of tribunals tends to obscure the point at which their decisions are indeed final. A majority of the Full Federal Court has recently identified a decision of the RRT as being final when a signed copy is delivered to and recorded in the registry of the RRT.[114] This is an issue which deserves further discussion, but cannot be pursued here. Nor is it possible to examine the linked questions as to whether the notion of functus officio is no more than a label applied to a conclusion reached after interpretation of the statute, and the modification of the doctrine of issue estoppel in the case of tribunals.

Most often the inclusion in a tribunal's empowering statute of an express power to reinstate an application which was dismissed on the ground of non-appearance of an applicant, and a slip rule, covers the categories of cases where a need to reopen a decision may be perceived. In the absence of such provision the position of the merits review tribunal depends upon implied power and may be assessed by analogy with the position of courts.

If the rationale of the general exception to finality of judgments and orders which have been entered is procedural fairness, as suggested by Mason CJ in *Autodesk*, procedural fairness may also be argued to support an implied power of a merits review tribunal to reopen its decision. However the issue of jurisdiction needs to be resolved before the basis for its exercise is considered. In *DJL* even a superior court whose jurisdiction was limited and sourced in statute, had no express or implied power to reopen a judgment after its entry. If parallels are to be made with courts, the argument for a power of a tribunal to reopen its decision so as to perform its duty to afford procedural fairness cannot succeed in cases where the statutory scheme precludes the implication of a power to reopen.

The migration context is special by virtue of the statutory scheme. If, as in *Bhardwaj*, an applicant could simply return to the IRT, or its successor the Migration Review Tribunal, to argue the denial of procedural fairness then this would ameliorate the exclusion of the Federal Court from hearing such arguments. Viewed in its particular context of the migration review scheme, *Bhardwaj* thus subverts the clear intention of Part 8 of excluding accountability of the MRT and RRT for denials of procedural fairness, except accountability to the High Court. The policy behind the legislation is clear: to confine litigation so far as possible to the level of the tribunals and leave them free, but for the constitutional constraint of the High Court's original judicial review jurisdiction, to deny procedural fairness.

114 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.

To conclude, judgments are not always without error. Prior to “perfection” of an imperfect judgment a court has available to it a wide range of exceptions to the general rule of finality of judgments, enabling it to reopen the judgment. An imperfect judgment which has been “perfected” may also be reopened on the basis of a list of exceptions almost as extensive. However a “perfected” judgment may not be reopened in exercise of a general exception based on a rationale of procedural fairness, unless the court has inherent jurisdiction. There are real questions whether so much should turn upon the fact that the judgment has been entered and upon the vesting of inherent jurisdiction, particularly in a legal system which despite drawing upon an ancient history, itself has relatively modern statutory origins. The questions are more pressing when no appeal or judicial review is available to correct the imperfect judgment. Indeed, the High Court is likely to accept that it may reopen its own judgment even after it is entered in order to ensure there is no denial of procedural fairness.

Administrators are not inherently angelical. If no appeal or judicial review is available with respect to a tribunal decision which is made in error, it is highly desirable that the statutory scheme should include a reinstatement rule and slip rule. Unfortunately that is not the environment within which we find ourselves. In the absence of such power can the duty to afford procedural fairness in relation to the decision already made, a duty the tribunal recognises it has breached, in some sense keep the decision-making process alive? Difficult as it may be to identify when an administrative process ends, there is an endpoint which is more readily identified in the case of a merits review tribunal, as in the case of a court. Where there is no express or implied power to reopen or revoke a decision which has been made, as in the scheme of migration review, the tribunal may not purport to exercise such power. Regrettably we live in a very imperfect world. It is likely for this reason that the appeal to the High Court in *Bhardwaj* will be successful.

NATURAL JUSTICE, THE HIGH COURT AND CONSTITUTIONAL WRITS

John Basten QC *

Edited version of a paper presented at an AIAL seminar in Canberra, 13 June 2001.

Introduction

When Australia ratified the 1951 Convention and the 1967 Protocol relating to the status of refugees it is doubtful whether many would have foreseen the significance the Convention was to play in the legal life of Australia some decades later. Nor has the legal significance of the Convention been limited to this country, although for reasons to which I will turn shortly, it may have a greater legal significance here than in many other parts of the world. The English Court of Appeal and the House of Lords have each had a steady flow of refugee cases often raising points in parallel with those considered in the higher courts in Australia. The Supreme Courts of Canada and the USA have also considered the Convention from time to time, but in far fewer instances than in this country.

This paper considers recent developments in High Court cases concerning natural justice and s.75 of the Constitution, with particular reference to a number of recent cases arising under the *Migration Act 1958* (Cth). It does not deal with the huge volume of cases flowing through the Federal Court, or even through the Full Court of the Federal Court. Nor does it deal with overseas developments.

Early History

The reason why the Convention has overwhelmed virtually every other area of administrative law (with the possible exception of taxation) in Australian courts is to be traced to the 1992 amendments which drastically rewrote the *Migration Act,* removing almost every category of discretionary visa, and substituting a highly mechanical scheme for the management of immigration. Importantly, amendments passed in 1992 repealed s.6A of the *Migration Act* which had provided a broad discretionary power allowing for the grant of visas on humanitarian considerations, including, but not limited to, eligibility under the Convention. No doubt refugees often have the best humanitarian claims, but because the Minister's discretion under that provision was so much broader than the limited terms of the Convention, application of the Convention had rarely been a critical issue.

It was not until November 1985 that *Minister for Immigration and Ethnic Affairs v Mayer*[1] established that judicial review was available under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) in relation to decisions to refuse claims under the Convention. However, the case we now consider as establishing the modern era of jurisprudence in relation to the Convention was *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, decided in 1989.[2] *Chan's* case followed closely on the heels of *Immigration*

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* *John Basten practises at the Sydney Bar.*

1 (1985) 157 CLR 290.

2 (1989) 169 CLR 379.

and Naturalisation Service v Cardoza-Fonseca[3] in the United States and *Ex Parte Sivakumaran* in the House of Lords.[4] These cases identified the scope of the test of 'a well-founded fear of persecution', adopting and applying the well-known 'real chance' test.

This is all well-known, and need not be dwelt upon. However, it is significant that following *Chan* there are two quite separate lines of High Court authorities. One line, like *Chan* itself, deals with the substantive interpretation problems which follow from the application of the Convention. In this line one finds cases such as *Applicant A v Minister for Immigration and Ethnic Affairs,*[5] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[6] and *Minister for Immigration and Multicultural Affairs v Ibrahim*.[7]

The other line of authority concerns the scope of judicial review of immigration decisions, particularly decisions of the Refugee Review Tribunal (the Tribunal). This line of authority commenced in 1996 with *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang*.[8] This paper focuses on this line, because it is obviously of more immediate interest to administrative lawyers generally.

The next development, and still in the middle distance, was the decision in 1998 of *Minister for Immigration and Ethnic Affairs v Guo Wei Rong*.[9] Like *Wu* (and as one of the members of the Full Court is said to have quipped to a member of the High Court, it was a case of “déjà wu”), the message from the High Court was that creative mechanisms to identify errors of law were in danger of being struck down as exceeding the proper bounds of judicial review and as entering upon an assessment of the merits of individual decisions.

That tendency was not immediately quelled and, in *Minister for Immigration and Multicultural Affairs v Eshetu*,[10] the High Court turned once again to limit the judicial creativity of members of the Federal Court. *Eshetu*, however, illustrates a new development in the focus of concern, namely the development of a new jurisprudence in relation to Part 8 of the *Migration Act*, a set of provisions included in the 1992 amendments which commenced on 1 September 1994,[11] and which have been widely perceived as providing a restrictive regime of legislative control over the grounds of review available in the Federal Court. Faced with obstacles to what had by then become the well-known scope of operation of the ADJR Act grounds, the Federal Court had sought to escape the strictures of the new regime by relying on s.420 of the *Migration Act*. That provision enjoined the Tribunal to act “according to substantial justice and the merits of the case.” In *Eshetu*, the High Court held that s.420 created no substantial obligation for contravention of which review was available in the Federal Court.

Eshetu, and the matter heard with it, *Abebe v The Commonwealth*,[12] reflected a growing trend for applications to the Federal Court to be accompanied by applications in the original jurisdiction of the High Court, invoking s.75(v) of the Constitution. In each of those cases, that alternative claim for relief was unsuccessful. However, two judgments suggested

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3 (1987) 480 US 421.
4 [1988] AC 958.
5 (1997) 190 CLR 225.
6 (2000) 201 CLR 189.
7 (2000) 74 ALJR 1556.
8 (1996) 185 CLR 259.
9 (1998) 191 CLR 559.
10 (1998) 197 CLR 611.
11 *Migration Reform Act 1992,* No. 184 of 1992.
12 (1999) 197 CLR 510.

directions which were to bear further fruit in future cases. The first concerned the ground known as 'breach of the rules of natural justice', which was excluded from the grounds of review available in the Federal Court by s.476(2)(a). Because bias was otherwise dealt with, Gaudron J in *Abebe* suggested that the excluded ground might properly be described as 'denial of procedural fairness'.[13] Significantly, her Honour continued:

> There are numerous cases in which prerogative relief has issued for breach of the rules of natural justice … [I]t has long been accepted that denial of natural justice will ground prerogative relief.[14]

Her Honour continued:[15]

> Consistency with those rules requires that it be accepted that, where a decision-maker is required to accord procedural fairness, that requirement is an essential condition of the exercise of the decision-making power. Thus, subject to the operation of discretionary factors, breach of those rules is a jurisdictional error which will ground prerogative relief.

This statement was to attract the express support of six members of the Court[16] last year in *Re Refugee Review Tribunal; ex parte Aala.*[17]

Justice Gaudron made two other statements in *Abebe* which may yet bear fruit, and one which may not. The first of these was the proposition that an essential condition of the exercise of any decision-making power, at least absent a statutory indication to the contrary, will be that it not be exercised in a manifestly unreasonable manner.[18]

The second proposition concerned the relationship of relevant and irrelevant considerations and jurisdictional error. Thus her Honour said:[19]

> "Not every failure to have regard to relevant matters or to disregard irrelevant matters constitutes jurisdictional error. Even so, a failure of that kind may, in the particular circumstances of a case, lead a tribunal to wrongly deny the existence of its jurisdiction or to mistakenly place limits on its functions or powers.

This statement suggested that some such errors might be fundamental, but others not. However, at least in relation to procedural fairness, a distinction based on the seriousness of the breach was to be rejected in *Aala* as a criterion for determining whether or not there was jurisdictional error.

Finally, Her Honour suggested that there might be some role for constitutional relief by way of injunction to prevent a Commonwealth officer giving effect to an administrative decision based on error, "even if that error is not jurisdictional error."[20] This proposition may invoke the combined effect of sub-ss.75(iii) and (v) of the Constitution. That suggestion has yet to bear fruit. One apparent difficulty with it is that, unless the decision could properly be identified as 'void', a categorisation which would normally require a finding of jurisdictional error, it is not clear how injunctive relief could flow without the decision being set aside on conventional grounds.

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13 197 CLR 510 at par 109.

14 Ibid, par 110.

15 Par 113.

16 McHugh J reaching a different conclusion, but not disagreeing with this principle.

17 (2000) 75 ALJR 52.

18 Ibid, par 116.

19 Ibid, par 108.

20 Ibid, par 105.

The other judgment in this pair of cases which foreshadowed future developments was that of Gummow J in *Eshetu.* There are a number of themes which can be teased out of a lengthy passage at paragraphs 121-148 of his judgment. First, whilst noting that the concept of *Wednesbury* unreasonableness was developed in cases dealing with the exercise of a discretionary power, his Honour developed a theme, similar to that referred to by Gaudron J, of a decision-making power conditioned upon a basic element of reasonableness.[21]

His Honour noted that there was a "crucial question" arising from the rejection by Mason CJ in *Australian Broadcasting Tribunal v Bond*[22] of certain English authorities which held that "findings and inferences are reviewable for error of law on the ground that they could not *reasonably* be made out on the evidence or *reasonably* be drawn from the primary facts".[23] His Honour suggested:[24]

> On the other hand, where the question is whether a decision-maker in the position of the Minister under s.65(1) of the Act reasonably could have formed the opinion as to satisfaction of statutory criteria upon which jurisdiction depends, different considerations arise in an application under s.75(v) of the Constitution.

In *Aala*, Gaudron and Gummow JJ returned to the question of reasonableness and approved the reasoning of Brennan J adopted by Gummow J in *Eshetu* as stated in *Kruger v The Commonwealth*,[25] to the following effect:

> Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

Perhaps even more significantly, Gummow J in *Eshetu* developed another line of argument concerning the possible nature of jurisdictional error in relation to the formation of the state of satisfaction required by the Migration Act for the grant or refusal of a particular visa or other benefit. His Honour described this state of satisfaction as a "jurisdictional fact", although by that his Honour appears to have meant no more than that the valid formation of such a state of satisfaction was an essential pre-condition to the exercise of power, the absence of which would constitute jurisdictional error. The sting, however, lies in what may demonstrate that the opinion was not validly formed.

As was made clear in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[26] a decision as to "satisfaction" is reviewable, at common law, on identified grounds.[27] In *Eshetu*, Gummow J noted:[28]

> "A determination that the decision-maker is not 'satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s.75(v) of the Constitution. This is established by a long line of authority in this Court which proceeds upon the footing that s.75 is a constitutional grant of jurisdiction to the Court.

His Honour then quoted the view expressed by Latham CJ in *R v Connell; ex parte Hetton Bellbird Collieries Ltd*:[29]

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21 197 CLR 611 at par 145.

22 (1990) 170 CLR 321 at 356-357.

23 197 CLR 611 at par 138, emphasis added.

24 Ibid, at par 139.

25 (1997) 190 CLR 1 at 36.

26 (1996) 185 CLR 259 at 275 (Brennan CJ, Toohey, McHugh and Gummow JJ).

27 The nature of those grounds is dealt with below at Part 4.

28 197 CLR at par 131.

> [W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

His Honour then quoted a further passage from Latham CJ to the following effect:[30]

> What the Court does is to enquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

This passage, Gummow J noted, had been approved in subsequent decisions of the High Court. The passage was also the basis for a succinct statement of principle set out by Jordan CJ in *Ex parte Hebburn Ltd; re Kearlsey Shire Council*,[31] which was cited with approval in the majority judgment of the High Court in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission.*[32]

This statement of principle by Gummow J in *Eshetu* contained the seeds for two further developments, neither of which is revolutionary, but neither of which was widely foreseen until very recently. The first is that, at least in relation to administrative tribunals (as compared with inferior courts), the basic grounds of review could provide the elements of jurisdictional error for the purposes of the prerogative writs and constitutional relief. That proposition is not revolutionary, because it finds express statement in a dictum in the majority judgment in *Craig v South Australia.*[33]

The second development followed relatively smoothly from the first. If one could establish jurisdictional error by demonstrating a failure to take account of relevant considerations, why could that not grant jurisdiction in the Federal Court to set aside a decision under s.476(1) of the *Migration Act*? Paragraphs (b) and (c) of that provision refer, respectively, to the person who made the decision 'not having jurisdiction' and to the decision being one which was 'not authorised by this Act'. Want of jurisdiction and lack of authority sound very like jurisdictional error. And if they encompass jurisdictional error, why do they not encompass a failure to take account of relevant considerations?[34] And that in turn might well include a failure to make a finding on a material question of fact.

Until the recent decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf*[35] it had been assumed that s.476(3) effectively excluded from Federal Court review a failure to take account of a relevant consideration or taking into account an irrelevant consideration. However, that sub-section, in its terms, merely excluded those grounds as elements of the identified ground of 'improper exercise of a power'. By express contrast, when the drafter wished to exclude a ground generally, that had been done, for example in relation to procedural fairness and manifest unreasonableness.[36] Accordingly, it was hardly

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29 (1944) 69 CLR 407 at 430, quoted at 197 CLR, par 133.

30 197 CLR 611 at par 133; *Connell* (1944) 69 CLR 407 at 432.

31 (1947) 47 SR(NSW) 416 at 420.

32 (2000) 74 ALJR 1348 at par 31.

33 (1995) 184 CLR 163 at 179.

34 See Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24, 61.5.

35 [2001] HCA 30 (31 May 2001). Now reported at (2001) 180 ALR 1.

36 Section 476(2).

surprising that, in *Yusuf*, the Court accepted that these might be grounds for review by way of jurisdictional error. Thus, the breadth of jurisdictional error, at least in relation to an administrative tribunal, combined with the conclusion that all aspects of jurisdictional error, other than want of procedural fairness and manifest unreasonableness, remained within the scope of Federal Court review. That result appears to have followed in part from the assumption by the drafter that the various grounds set out in the ADJR Act were discreet and independent, whereas it is clear that they are, in reality, subject to extensive overlap and were originally formulated so as to be comprehensive, rather than as an identification of discreet forms of error.

It may be added that the result of this construction of s.476 is to recognize an expanded view of the powers of the Federal Court, thereby limiting the need to invoke of the constitutional jurisdiction of the High Court, except in relation to grounds covered by s.476(2).

Perhaps the irony of all this is that this result was achieved in a case in which the Federal Court had sought to reach a similar conclusion by reliance on the statutory obligation imposed on the Tribunal to provide a statement of reasons and to set out therein its findings in relation to any material question of fact. That provision, contained in s.430 of the *Migration Act,* was not seen by the majority in the High Court[37] as sufficient support for such a broad proposition. However, the absence of a finding of fact might well demonstrate a failure to give genuine, realistic and proper consideration to a material fact and, as the Chief Justice noted, the distinction between failing to find a material fact and a failure to take into account a relevant consideration, was, in his word, "elusive".[38]

There is one further proposition which may be identified in the judgment of Gummow J in *Eshetu* which invites attention. In discussing review of jurisdictional facts, his Honour referred to the well-known passage in the judgment of Lord Wilberforce in *Tameside*[39] in which his Lordship identified as a ground of review the question whether the facts relied upon by the decision-maker "exist". Of course, in relation to jurisdictional facts, subject to appropriate principles of deference, it has long been acknowledged that a court has jurisdiction to reach its own conclusions. However, the passage in *Tameside* has also been identified as the basis for the so-called 'no evidence' ground which is currently found in both the ADJR Act and the *Migration Act*. In order to satisfy that ground it is necessary to prove that a decision was 'based on' a particular fact and that the fact 'did not exist'. The precise scope of that ground has never been entirely clear and is currently the subject of an appeal pending in the High Court.[40]

However, as already noted, there may be a tension between the proposition that "there is no error of law simply in making a wrong finding of fact", so long as there is some supporting evidence, and the proposition that the use of that supporting material was not subject to a reasonableness test. What is the relationship between that principle, for which a passage in the judgment of Mason CJ in *Australian Broadcasting Tribunal v Bond*[41] is usually relied upon, and the proposition that decision-making is conditioned by a requirement that it be carried out reasonably? How do those dicta in *Bond* fit with the 'no evidence' ground and how does that ground fit with the ground of error of law, especially as identified by s.476(1) of the *Migration Act*?

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37 Kirby J dissented on this question.

38 (2001) HCA 30, par 7.

39 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047.

40 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2000] FCA 1023 now reported at (2001) 179 ALR 495; special leave granted 1 June 2001.

41 (1990) 170 CLR 321 at 355-356.

These are undoubtedly exciting times in relation to the development of administrative law principles in this country.

There are a few remaining points to be made about these recent developments. As indicated, the significance of *Ex parte Aala* was primarily that it upheld the right to constitutional relief in a case of breach of procedural fairness. *Re Minister for Immigration and Multicultural Affairs; ex part Miah*[42] was another case in which procedural fairness was successfully invoked albeit in relation to a decision of the Minister's delegate.

Miah deserves mention for two specific points. It should be noted, first, that the issue in *Miah* concerned the failure of a delegate to advise the claimant of an inference he drew from a change of government in Bangladesh. The case never got to the Tribunal for merits review, because Mr Miah's then solicitor had failed to file the signed notice of appeal within the inflexible statutory period. The first question concerned the effect of the statutory scheme for procedural fairness which the Migration Act itself described as a "code". Although the Court split as to the effect of the scheme, no member of the Court treated the use of the term "code" as sufficient, in the statutory context read as a whole, to exclude a particular requirement which would otherwise be implied. The problem for the drafter in such circumstances is one of general importance. Where it may be implied (or, as in this case, the legislation expressly states) that decisions are to be made "fairly", the failure of the drafter to identify a particular aspect of procedural fairness, which is obviously not intended to be excluded (in this case, one instance was actual bias) prevents much preclusive weight being given to a descriptive term like "code" as a basis for excluding unidentified elements.

The second point is that a general attempt to prescribe, in line with *Project Blue Sky* principles, the effect of a contravention of the Act is difficult. Again, it is the attempt to be comprehensive by means of a simple provision which gives rise to the difficulty. Thus s.69(1) of the *Migration Act* provided:

> Non-compliance by the Minister with [specified procedural provisions] in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

As Gaudron J (with whom McHugh J agreed) noted, review was available for breach of procedural fairness at least in the High Court: such a provision did not, therefore, demonstrate a clear intention to limit the content of the rules of procedural fairness, which would otherwise provide a ground for such a review.

Re Minister for Immigration and Multicultural Affairs; ex parte Jia[43] was concerned with allegations of bias on the part of the Minister personally, in making decisions as to good character under ss.501 and 502 of the Migration Act. The relevant principle was succinctly stated by Gleeson CJ and Gummow J in the following terms:[44]

> The Minister was obliged to give genuine consideration to the issues raised by ss.501 and 502, and to bring to bear on those issues a mind that was open to persuasion. He was not additionally required to avoid conducting himself in such a way as would expose a judge to a charge of apprehended bias.

The case provides an interesting discussion of principle in relation to bias with respect to administrative decision-making, a theme which attracted further attention in *Re Refugee*

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42 [2001] HCA 22 (3 May 2001). Now reported at (2001) 199 ALR 238.

43 [2001] HCA 17 (29 March 2001). Now reported at (2001) 178 ALR 421.

44 Ibid, par 105.

Review Tribunal; ex parte H.[45] *H* was a case in which apprehended bias was established by the constant and unrelenting interventions by the Tribunal member during a hearing. In that case, the Court concluded, a fair minded observer "might well infer, from the constant interruptions of the male prosecutor's evidence and the constant challenges to his truthfulness and to the plausibility of his account of events, that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account".[46] The decision was set aside on the ground of apprehended bias.

Needless to say, there are a number of aspects of these cases which deserve closer attention.

Christos Mantziaris recently drew to my attention a paper by Professor Legomsky of Washington University entitled "Fear and Loathing in Congress and the Courts: Immigration and Judicial Review."[47] The author bemoans the lack of effective review of visa decisions in the U.S.A. It seems that in Australia the courts at least adopt a more liberal approach.

45 [2001] HCA 28 (24 May 2001). Now reported at (2001) 179 ALR 425.

46 Ibid, par 32.

47 78 Texas L.Rev 1615 (2000).

SHIFTING MODELS OF ACCOUNTABILITY: THE CONSEQUENCES FOR ADMINISTRATIVE LAW IN THE RISE OF CONTRACTUALISM IN SOCIAL SECURITY

Claire Downey *

This paper was awarded the AIAL Victorian Chapter 2001 Essay Prize.

1 Introduction

Contractualism is changing the way governments organise what has come to be seen as the business of government. The use of contracts to organise the business of government is providing a different model of accountability to that provided by administrative law. In the area of social security, the administration of benefits, the provision of unemployment services, and the qualification for benefits are all characterised by a contractual relationship. Each of these shifts to a contractual model of accountability has the potential to undermine important functions of administrative law and challenges the underlying compact between citizen and state which Australian administrative law embodies.

That this shift is occurring in the area of social security is of particular concern. Social security is an important site of administrative law because of its size and the nature of its constituency. Social security is one of the largest areas of administrative law at the Commonwealth level. The Social Security Appeals Tribunal (SSAT) receives around 10,000 applications for review each year.[1] The provision of social security benefits is generally crucial to the lives of those people who receive them. Recipients of income support are among the most vulnerable in society. Administrative law's role in redressing power imbalances between the citizen and the state and its normative effect on administration is particularly significant in this area as "the presence of mechanisms to promote the principles of administrative law are essential for those consumers who are unable to seek positive outcomes of their own initiative".[2]

2 Mutual Benefit Mutual Obligation

"An adequate understanding of the nature and purpose of administrative law requires us to probe further into the way in which our society is ordered. At the most basic level it requires us to articulate more specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses.'[3]

There is no immutable or neutral concept of what administrative law should be. Administrative law, more than any other area of law, is a product of political theory. To talk of undermining the principles of administrative law is more accurately described as undermining the principles of a particular view of what administrative law should be.

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* *Law student, University of Melbourne.*

1 Social Security Appeals Tribunal, *Annual Report 1998/99* (1999) 16 (10,130 were lodged in 98/99).

2 Anita Tang, "The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review" (1997) 56 (2) *Australian Jo of Pub Admin* 95, 96.

3 Paul Craig, *Administrative Law* (3rd ed, 1994) 3.

Paul Craig argues that administrative law theories are based on differing concepts of democracy[4]. He identifies two theories of administrative law that illustrate this point: Dicey's model of administrative law as simply a means of ensuring the will of parliament is carried out and the rule of law maintained based on a unitary model of democracy in which parliament is supreme.[5] In contrast the rights based approach of writers such as Dworkin,[6] in which administrative law takes on the role of a protector of fundamental rights against governmental or legislative interference, is based on the idea that those rights underlie democracy. It is useful to look at the development of administrative law in Australia and discern what it has come to represent about our democracy.

Modern administrative law at the federal level in Australia is based on the "New Administrative Law" package developed through the 1970s and early eighties with the enactment of the *Administrative Appeals Tribunal Act 1975* (Cth)*, Ombudsman Act 1976* (Cth) *Administrative Decisions Judicial Review Act 1977* (Cth) and the *Freedom of Information Act 1982* (Cth). These pieces of legislation represent both a concern that the will of parliament be carried out by the executive, and individual citizens have access to government decision making. Accountability is not limited to the narrow conception of preventing *ultra vires* acts. It encompasses notions of fair process, openness through the provision of reasons for decisions, and a general right of access to information.

This demonstrates that the new administrative law was brought about in contemplation of mutual benefits being derived by both citizen and state. The citizen gained access to a means of review of government decisions that affected them and also to information, while the government and legislature gained a means of improving decision-making and greater accountability for a burgeoning public service. It was a form of compact with the public allowing the expansion of administrative power, by providing for greater accountability in the exercise of that power. Thus there was a form of mutual obligation inherent in the package - obligation on the part of government to provide public accountability, and obligation on the part of the public to accept an expanding role for administrative action.

The idea of mutual benefit and mutual obligation provides a useful paradigm for examining these recent shifts from the administrative law model of accountability to contractual accountability.

3 Changes to Social Security Administration and Entitlement

In 1997 the Commonwealth Services Delivery Agency, Centrelink, was established.[7] Centrelink is a statutory authority established on a corporate model. It contracts with various government departments to provide administrative services,[8] serving as a "one stop" interface between government and the public in the area of community services. Centrelink has a contract with the Department of Family and Community Services to assess the eligibility of applicants for social security benefits under the *Social Security Act 1991 (Cth)* and to administer the payment of those benefits.

In 1998 the federal government dismantled the Commonwealth Employment Service and undertook a massive tendering process to contract out employment services for those on unemployment benefits. The successful tenders for these contracts became Job Network

4 Ibid, p 3.

5 Ibid, p 4.

6 Ibid, p 19.

7 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 6.

8 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 7.

Providers. At the same time Employment National was incorporated and established as a government owned Job Network Provider.

As a criteria for continuing eligibility for Newstart allowance (unemployment payments for those over 25) and Youth Allowance (unemployment payments for those under 25) after a certain period recipients must enter into activity agreements and fulfil their obligations under them.[9] This has been implemented as a part of the current federal government policy of "mutual obligation".

In addition to the basic function of assisting Newstart and Youth Allowance recipients to find employment, Job Network Providers also negotiate Activity Agreements with some unemployed people which are then approved by Centrelink. The remainder are negotiated with Centrelink directly.

4 Shifting Models of Accountability

The introduction of Centrelink, the Job Network and activity agreements have altered aspects of administrative law to varying degrees. While these changes are concerning, of greater interest are the indications of a directional shift away from the mutual benefit/mutual obligation model of administrative law brought about by the rise of contractual models of accountability.

(a) Centrelink

The introduction of Centrelink has left the formal application of administrative law largely unchanged. Centrelink officers simply make decisions as delegates of the person authorised to take the decision under the relevant enactment. Decisions thus remain subject to judicial and merits review to the same extent as with departmental secretaries, usually the proper party to a review application.[10] This is in line with the opinion of the Administrative Review Council that where a "service provider is given power to exercise legislative decision making... it is appropriate for those decisions to be reviewable on their merits as with legislative decisions made by government departments".[11]

Centrelink falls within the definition of a prescribed authority under s 4(1) of the *Freedom of Information Act* 1982 (Cth) and s 5(1) of the *Ombudsman Act* 1976 (Cth) as a statutory authority established for a public purpose. Centrelink staff are employed under the *Public Service Act 1922* (Cth).[12]

In the second reading speech relating to Centrelink's enacting legislation, the Minister emphasised the government's policy of continuing administrative law mechanisms, but pointed to an economic motivation rather than a rights based justification.

> The government considers that these scrutiny and accountability arrangements are central to the management structures for the agency given that it will be responsible for the day-to-day administration of large sums of public moneys[13]

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9 *Social Security Act 1991* (Cth) s 544 (Youth Allowance) s 604 (Newstart Allowance).

10 *Dudzinski and Department of Family and Community Services* [1999] AATA 860 (Unreported, 17 November 1999) 42.

11 Administrative Review Council, *Administrative Review and Funding Programs (A Case Study of Community Service Programs)* Report No. 37 (1994) 67.

12 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 35.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1996, 7624 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs).

The shift which has occurred through the introduction of Centrelink has been a cultural rather than a legal one. However, given that a prime function of administrative law is to engender a certain culture in administration, the significance of cultural shifts should not be underestimated.

Outwardly the change in language from social security administration to corporate service delivery has been one of the first indications of this cultural shift. In a speech to the National Press Club, Centrelink CEO Sue Vardon referred to Centrelink as being "in the top one hundred of Australian companies in terms of size and turnover".[14] She described Centrelink's function as follows: "Centrelink provides services to government departments who purchase them from us."[15]

The introduction of a contractual relationship between government departments and Centrelink is more than just a change in terminology. It is a deliberate attempt to foster a managerialist culture. This is part of a wider shift in the public sector towards managerialism.

Public sector managerialism seeks to import aspects of private sector management that are seen to encourage the virtues of efficiency and responsiveness. The establishment of a corporate entity with a contractual basis for its functions is an attempt to mimic a private sector structure in the hope that it will embody these virtues. The contractual basis for the performance of government functions is seen to allow greater specification not only of tasks to be performed, but outcomes to be achieved. The contract also provides an incentive for efficiency, as "doing more with less" means increasing profits. As Vardon boasts "in six years Centelink will deliver a one billion dollar efficiency dividend".[16]

Yateman describes the rise of managerialism in the Australian public sector as a "cultural revolution"[17] because it alters how public servants understand their tasks and identities.

In terms of public servants performing their tasks, there is a shift from a process focus to an outcome focus. Whereas previously "public servants place(d) more emphasis on avoiding mistakes than on improving productivity",[18] managerialism engenders a culture of "risk management" whereby eliminating the potential for mistakes is a goal only in so far as mistakes cost money. "Risk management" dictates that if it is not cost effective to reduce mistakes then no action is taken. At its core, managerialism refocuses administration on meeting the tasks set by government and away from wider public considerations.

Tang argues that there is:

> an inherent conflict between the principles of administrative review and those of managerialism. Under a managerialist regime, accountability focuses on program outcomes and the efficiency and cost effectiveness of meeting stated objectives. This is in sharp contrast to the principles of administrative review which focus on redress for individuals and on ensuring that decision making processes are fair, open and accountable.[19]

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14 Sue Vardon, "We're From the Government and We're Here to Help- Centrelink's Story" (2000) 59 (2) *Aust Jo of Pub Admin* 3, 3.

15 Ibid, p 4.

16 Vardon, above n 14, p 4.

17 Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*, (1990) 13.

18 Richard Mulgan, "Contracting Out and Accountability" (1997) 56 (4) *Aust Jo of Pub Admin* 106, 110.

19 Tang, above n 2, pp 97-8.

Centrelink embodies these conflicting principles: an agency characterised by a managerialist culture yet subject to administrative law. In the absence of empirical research, the rhetoric would seem to suggest that managerialism is in ascendancy.

In terms of identity, public servants' relationship to government and to the citizens they deal with are redefined by managerialism. In this cultural shift, "citizens are redefined as consumers, customers, or clients in relation to publicly provided goods and services".[20] This is seen to encourage greater responsiveness to consumer needs in line with the private enterprise model.

While this rhetoric is consistently used by Centrelink, it is the departments Centrelink contracts with who are their true "customers". "People receiving services could not be considered to be consumers in the commercial sense"[21] because they are not purchasing anything. It is only because Centrelink's actual customers have ordained that Centrelink adopt customer service charters in relation to the public, that a customer service culture exists.

Where it does exist, customer responsiveness is often perceived as an adequate substitute for accountability. However, they are qualitatively different concepts.[22] Responsiveness is valuable in that it means the organisation adapts to customers' needs as a group. However, accountability is about individual accounting for mistakes as well as a normative effect of encouraging fair procedure without the need for specific consumer demands. It is the relationship between the administrator and the public which fundamentally differentiates the two.

> Services provided to members of the public viewed simply as customers do not involve obligations of public accountability because the public are not cast in the role of principals or owners of the services concerned. It is only when members of the public are seen as citizens and the service providers as their agents that the concept of accountability has any purchase.[23]

While the discipline of administrative law still applies to Centrelink, there is a discernible shift towards a model of customer responsiveness as accountability.

The creation of a contractual relationship between departments and the practical administration seeks to effectuate a managerialist ideal, reinforcing the administration's accountability to government while subtly changing the culture of public accountability. This is tempered in the case of Centrelink by the continued application of administrative law, highlighting its importance.

(b) Job Network

Job Network providers are not mentioned in a single piece of legislation. Their functions, obligations, rewards and review are purely matters of contract. There is no provision in law for decisions made by private Job Network providers or Employment National to be subject to merits review. As incorporated companies, Job Network providers are not subject to the

20 Yeatman, above n 17, p 2.

21 Tang, above n 2, p 98.

22 Mulgan, above n 18, p 115.

23 Ibid, p 107.

Freedom of Information Act [24] and it is doubtful whether the Ombudsman's jurisdiction could extend to them.[25]

Technically, Job Network providers do not take decisions under any enactment. While they are obliged under contract to pass on information to Centrelink which may effect or indeed determine an individual's eligibility for benefits, any operative decision is legally made by a Centrelink officer as a delegate of the Secretary. The Job Network provider's actions are preliminary to any decision and therefore not subject to judicial review under the ADJR Act. The Administrative Review Council has taken the view that there is no need for recommendations to ultimate decision-makers to be open to merits review because "an individual's interests may only be affected when the recommendation is acted upon".[26] Ultimately the operative decision regarding entitlement remains open to review, and in practice the assessments made by job network providers come under scrutiny in the context of those reviews.[27] Accordingly, it may well be unnecessary to provide direct merits review. However, concern remains for other decisions taken by Job Network providers and the environment in which they are taken.

(i) The previous regime

The exclusion of Job Network providers from administrative law's operation is in contrast to the previous regime for case managers under the *Employment Services Act 1994* (Cth). Under this system established by the Keating Labor Government a mixture of public and privately run case managers performed similar tasks to those currently performed by Job Network providers. However, the case management system was designed "to ensure that the accountability of service providers and individual rights are not lessened by the contracting out of services".[28] Case manager's functions were defined in legislation, a regulatory body was formed to oversee their operation (the Employment Services Regulatory Authority[29]) and legislative amendments were made to ensure that they were subject to the full range of administrative law mechanisms.[30]

The employment services arrangements came to be viewed as a prime example of how administrative law had been successfully extended to private contractors[31] breaking down the public/private divide. Although the *Employment Services Act* is now defunct, the fact that such a system was once implemented "illustrates that contracting out and competition do not necessarily represent the triumph of economic over social objectives if these are explicitly considered in the policy design".[32] It demonstrates that the exclusion of administrative law in relation to those contracted to perform functions for government is a policy choice, not a necessary consequence.

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24 *Freedom of Information Act 1982* (Cth) s 4(1).

25 Phil McAloon, 'When the Business of Business is Government: The Role of the Commonwealth Ombudsman and Administrative Law in a Corporatised and Privatised Environment' (1999) 3 *AIAL Forum* 37-8

26 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) 21.

27 For example see *Long and Department of Family and Community Services* [2000] AATA 33 (Unreported, 11 January 2000)

28 Andrew Stuart and Kerran Thorsen, "Quality and Client Rights in Market Based Reforms: The Case of Employment Services", John Tomlinson, Wendy Patton, Peter Creed and Richad Hicks (eds), *Unemployment Policy and Practice* (1997) 351, 358

29 *Employment Services Act 1994* (Cth) s 68.

30 *Freedom of Information Act 1982* (Cth) s4 (the definition of agency was amended to include 'eligible case managers').

31 Patricia Ranald, *The Contracting Commonwealth: Serving Citizens or Customers?*, (1997), 23.

32 Stuart and Thorsen, above n 28, p 359.

(ii) Reasserting the public/private divide

Traditional administrative law's jurisdiction has been limited to the control of government actions. Now that traditional governmental functions are being performed by private companies, the public/private distinction has become blurred. Whether a government service is provided by a government agency or a private contractor, the public is affected by it in the same way and requires the same level of accountability from whomever provides it. However, the example of the Job Network demonstrates that the distinction remains.

There are a number of justifications made for not extending the ambit of administrative law to private contractors such as Job Network providers. Chief among them is the argument that the market provides comparable accountability mechanisms. People receiving unemployment benefits are obliged to register with at least one Job Network provider, but are more or less free to select which provider to register with and may register with several. Part of the remuneration Job Network providers receive under their contracts is dependent on results, with some upfront payments for assisting those deemed most difficult to place in employment.[33] It is a market of sorts, in that there is an incentive for providers to attract business. This market system, the government would argue, performs the dual roles of ensuring providers are responsive to consumer needs and allows the consumer the choice to shop elsewhere if they are dissatisfied, thereby eliminating the need for administrative law accountability.

There are two basic flaws in this argument. Firstly, it is questionable whether this particular market lives up to expectations. Result based payments provide an incentive to attract those *easiest* to place in employment, because they require the least outlay in terms of assistance. Private Job Network providers have been reluctant to even tender for the contracts to provide services to those most disadvantaged in the job market despite up front payment incentives. Problems such as this lead to the restructuring of payments. There is a serious concern that poorly designed market incentives may adversely affect the decision making process once clients register with a provider, possibly leading to incorrect advice being forwarded to Centrelink.[34]

The unemployed as "consumers" of employment services are likely to operate in an environment of limited information to enable them to compare providers. Consumer choice of Job Network providers is limited by location. In rural and remote areas choice may be highly circumscribed producing a monopoly effect. The Administrative Review Council has questioned the effectiveness of "consumer choice as a remedy for service recipients where there is only one or a limited number of providers of a particular contracted out service".[35]

Secondly, responsiveness and the ability to shop elsewhere are inadequate public accountability measures. Responsiveness is a concept of generalised service not individual transactions. Agencies will only respond to what is expressed. The ability of a

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33 For a more detailed explanation of the pricing system see *The Staff Development and Training Centre and Secretary, Employment, Workplace Relations and Small Business* [2000] AATA 78 (Unreported, 8 February 2000) 51.

34 Terry Carney and Gaby Ramia, "From Citizenship to Contractualism: The Transition from Unemployment Benefits to Employment Services in Australia", (1999) 6 *Australian Journal of Administrative Law* 117, 133
> if the contracted price to remunerate agencies for placement is too low, providers may be enticed to forward breach information to Centrelink even though the client has co-operated fully and actively in the attempt to find work. Conversely, if the price is too high, some "less deserving", or inactive, jobseekers will land work which removes their risk of breach for lack of effort. Market signals may drown out the prospect of equitable assessment of the extent to which the client has sought to keep their side of the "mutual obligation" bargain.

35 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper* (1997), 34

disenfranchised group to advocate for fairer procedure in an organisation they may know little about is doubtful.

The consumer choice theory does not address situations which have already occurred" "the equation of accountability for service providers, with the customer's ability to 'shop elsewhere'...does nothing to address the problems the individual has already experienced".[36]

(iii) Contract substitution

The policy decision not to extend the operation of administrative law to private job network providers was not the dismissal of the value of administrative law as an accountability mechanism it would appear to be. The conditions of the contracts between the Commonwealth and Job Network providers reveal that the efficacy of administrative law mechanisms in providing accountability are valued by government.

Internal review, external review, reasons for decisions, freedom of information and ombudsman-like investigation are all provided for in the contract through a binding code of conduct.[37] While Job Network providers are obliged to make their clients aware of the code, there is no independent enforcement mechanism. Complaints may be made to the Department of Workplace Relations and Small Business Customer Service Line.[38] The Department may take action under the contract at its discretion. Complaints can only be made to the Commonwealth Ombudsman about the department's handling of the complaint.

What has been left out of the equation are the facets of administrative law that allow the citizen to directly instigate and benefit from these mechanisms. This power has shifted from the citizen back into the hands of government. Government has created a system whereby it derives the benefits of an administrative law structure without conveying the mutual benefits to citizens. It has always been in government's interests to make those performing governmental functions accountable. When services are contracted out and government loses the day to day control of activity, its interest in accountability is even greater. What the current government has achieved in designing the Job Network, is to separate accountability from *public* accountability. Government receives feed back from the public about Job Network providers allowing it to monitor their performance and correct it where they wish, thereby achieving its qualitative goals on the macro scale without necessarily having to deal with remedying the situations of individuals. The administrative benefits for government are no longer tied to a process which delivers redress mechanisms for individuals.

Individual citizens may still have their concerns addressed and may even receive some form of redress from government action to enforce the mechanisms it has established to bring its contractors to account. However, the discretion to do so rests with government as a party to a contract and therefore its discretion is not open to review.

(c) Activity Agreements

One of the motivating factors for the introduction of the new administrative law package in the 1970s was to ensure the proper exercise of wide discretionary powers. The reduction of discretion afforded individual decision makers has been a direct outcome of administrative

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36 Rick Snell and Emily Langston, "Who Needs FOI when Markets Mechanisms will Deliver Accountability on Demand? A Critical Evaluation of the Relationship Between Freedom of Information and Government Business Enterprises" (1999) 3 *Fed L Rev* 215, 230

37 *Job Network Code of Conduct* (2000) available at http://www.jobnetwork.gov.au/general/iproducts/jncc/codeofc.htm

38 *Job Network Code of Conduct* (2000), 12

review. Like many other areas of government, social security legislation has become more codified. Government was forced to articulate and enact policy in order for it to be enforced.

The introduction of the undertaking and performance of obligations under individualised activity agreements as a condition of entitlement means that "central determination of claims based on satisfaction of pre-ordained eligibility criteria is being replaced by the theory of individual reciprocal bargaining".[39] Discretion has been reintroduced into decision making in a new form and "the scope for arbitrary decision-making is an unavoidable concomitant of the new arrangements".[40] Koller argues that under the activity agreement system:

> some qualification conditions have been better than others and some have been wholly inappropriate. It is, therefore, important that the terms of an agreement be readily reviewable at any time... because they form discretionary qualification provisions.[41]

However, the exercise of this discretion has been excluded from determinative merits review. The SSAT's general power to "exercise all powers and discretions that are conferred by the social security law on the Secretary"[42] does not extend to remaking the terms of Activity Agreements.[43]. Upon review, its power is limited to affirming the agreement or setting it aside and remitting it to the decision maker with recommendations.[44]

Individualised contracts between government and citizen have come to replace the broader concept of public accountability through administrative law. The legitimacy of government action in negotiating the terms of these agreements is no longer based on the existence of an avenue of independent review, but on the individual's consent to the agreement.

The recipient's consent to the agreement is seen to override the need for avenues for review. The flaw in this view is that "concepts of contractualism assume individual choices and consent to legal obligations, options which will rarely be open to consumers of community services",[45] and which are certainly constrained in the case of those on unemployment benefits. The basic contractual premises are undermined in the case of activity agreements. Entering into an activity agreement is a condition of receiving benefits- there is no option but to form a contract of some sort. Certain conditions of the agreement are non-negotiable such as the obligation to accept employment if offered.[46] The unemployed as a group by definition are in a position of disadvantage. They are likely to be at a disadvantage in terms of asserting their preferences in negotiations with Centrelink officers or Job Network providers, with the withdrawal of income support an ever present possibility.

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39 Terry Carney, "Welfare Appeals and the ARC Report: To SSAT or not to SSAT: Is that the Question?" (1996) 4 *Aust Jo of Admin Law* 25, 26.

40 Ibid, p 25.

41 Sandra Koller "The Holes but not the Cheese: An Overview of Trends in Income Support Law" R Creyke & M Sassella (eds), *Targeting Accountability and Review: Current Issues in Income Support Law* (1998) 59, 64.

42 *Social Security Administration Act 1999* (Cth) s 151(1).

43 *Social Security Administration Act 1999* (Cth) s 151(4).

44 *Social Security Administration Act 1999* (Cth) s 150.

45 Jonathon Sprott, "Privatisation, Corporatisation and Outsourcing: Critical Analysis from the Consumer Perspective" (1995) 5 *Aust Jo of Admin Law* 223, 233.

46 *Long and Department of Family and Community Services* [2000] AATA 33 (Unreported, 11 January 2000)

5 Conclusion

Public acceptance of Government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions. The expectation that Government should be accountable is a product of the electorate's grant of power to the Government.[47]

There has been a great deal written about trends towards privatisation, corporatisation, contracting out and managerialism in Australian government and its effect on administrative law. There are serious concerns being raised about the reduction in avenues for gaining access to information and review of decisions in areas where this has occurred. The fact that administrative law is being diminished by this move towards entrepreneurial government is sometimes seen as a motivating factor for these moves. A general dissatisfaction with and even hostility towards administrative law has been in evidence in government circles for some years. The response has often been to reiterate the benefits which government derives from administrative law's operation by way of greater accountability, improved decision making, a more open public service culture and greater legitimacy for government actions. The theme of mutual benefit has been reiterated to oppose every attempt to limit or wind back the jurisdiction of administrative law, in a bid to influence debate by appealing to government's self interest when rights based arguments are received with little sympathy.

The changes to social security administration and entitlement discussed above indicate that the government has now developed a preference for contractual accountability and managerialism over administrative law and a culture of open, fair and publicly accountable administration. The contractual model supplies government with the ability to control those who administer policy and services (departmental or contractual) and hold them to account at its discretion and on its own terms. Once this model is established administrative law has little to offer government, its benefits are no longer necessarily mutual. The continued existence of administrative law rests on the political obstacle of public outcry. It has become necessary to reassert the importance of public accountability and individual redress as rights. To place them on the same level as the democratic process of election, as a means through which government legitimacy is established.

Accountability has many interpretations and can be provided in a myriad of ways. The fundamental rationale for administrative *law* as an accountability mechanism is the need for the presence of an independent third party enforcement to provide effective accountability. If we believed that government was the proper body to regulate itself and its functions as performed by others, there would be no administrative law.

Administrative review recognises that people have rights of redress against abuses of discretion and a vested interest in government accountability. If the Australian government is to give such rights a meaningful place in people's relationship with government, it is necessary to identify a body of matters unable to be placed outside a system of administrative review.[48]

47 Administrative Review Council, above n 35, p 10

48 Helen Murphy, "Administrative Review Rights and Changes to Commonwealth Government Service Provision" (1998) 2 *Flinders Journal of Law Reform* 235, 250

ADMINISTRATIVE LAW — THE EMERGING ROLE OF CONSTITUTIONAL AND PRIVATE LAW REMEDIES

Tom Brennan *

Edited version of a paper presented to a joint Australian Corporate Lawyers Association / Australian Institute of Administrative Law seminar held on 30 May 2001 in Canberra, entitled "Administrative Law—What Now?".

This afternoon I will address four issues.

The first three issues are related to the notion of an integrated system of administrative review as outlined by the Kerr Committee.

First is the expansion of concepts of standing upon applications in equity for injunctions or declarations directed to the enforcement of public duties; and the consequent expansion of the availability of the injunction and declaration as a public law remedy.

Second is very recent High Court consideration of the nature of "standing" requirements under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Third is the dispensing with the separate requirement for standing on an application which enlivens the jurisdiction to grant a constitutional writ.

In the short term these three developments mean that government agencies and their officials cannot rely on the statutory administrative law regime as if it were a code of administrative review. There is an expanding class of persons with an expanding range of remedies available to them capable of enlivening the jurisdiction of the court to control the performance of public functions.

In the medium term it might well be that following the High Court's decision on the appeal in *Allan v Transurban City Link Limited*[1] (*Allan v Transurban*), the oral arguments of which occurred in Melbourne on 23 May 2001, retention of an "integrated system of administrative review" will require a more fundamental examination of the questions of the qualification of applicants for merits review and for review under the ADJR Act.

The fourth issue I address is the potential direct applicability of judicial review remedies to non statutory governmental functions and to the providers of at least some contracted out services. That was a question not addressed by the Administrative Review Council (ARC) in its contracting out report.[2] It has nevertheless been a live issue since the 1986 decision of the English Court of Appeal in the *Datafin* case.[3]

The state of Australian authority since that case suggests that public law remedies could run to public or private entities which exercise public functions, exercise functions which have

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* *Partner, Corrs Chambers Westgarth, Canberra.*

1 (1999) 168 ALR 687.

2 "The Contracting Out of Government Services", ARC Report No. 42.

3 *R v Panel on Takeovers and Mergers, ex parte Datafin plc & Anor* [1987] 1QB 815

public law consequences or whose functions include a public element. It is now clear law that there is no requirement that the decision or conduct impugned be made under a statute.

Further there would appear to be nothing in constitutional case law to prevent the High Court from holding that the provider of an outsourced government service was, at least to the extent of the performance of that service, an "officer of the Commonwealth" for the purposes of grounding the constitutional writs jurisdiction.

I do not seek to deal in this paper with the recent developments in the law of procedural fairness and suggestions emanating from the High Court that there may be a constitutional base to requirements to act fairly. Nor do I seek to deal with Migration Act issues.

The Expansion of "Standing" in Equity

Sir Anthony Mason said:

> equitable relief in the form of the declaration and the injunction has played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.[4]

Where legislation did not confer a private right or interest, English law developed to deny to the private citizen standing to obtain the declaration or injunction to enforce a duty owed only to the public. Rather, such relief was available only on suit by the Attorney-General or with the fiat of the Attorney-General.

That position was somewhat ameliorated by *Boyce v Paddington Borough Council*[5] in which a private party was found to have a sufficient equity to obtain an injunction to prevent the commission of a public nuisance.The rule in *Boyce's* case was developed, arguably beyond recognition, by the High Court in a series of cases.[6] Through these decisions it became clear that a citizen with "a special interest in the subject matter of the action" had standing to obtain a declaration or injunction to enforce a public duty.

That rule was flexible in nature and the subject matter of the litigation dictated what amounted to a special interest. Thus a curial assessment of the importance of the concern which a plaintiff has with the particular subject matter of the litigation and the closeness of that plaintiff's relationship to that subject matter was required. As a consequence the Court found that a member of an Aboriginal community had standing to enforce the provisions of heritage protection legislation by reason of her special connection to the particular items of heritage significance which were the subject of the litigation.[7] Similarly the union representing shop assistants had standing to enforce legislation relating to shop opening hours.[8]

The decision of the High Court in *Batemans Bay Local Aboriginal Land Council v The Aboriginal Community Development Fund Pty Limited* (*Batemans Bay Land Council*)[9]

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4 Sir Anthony Mason: "The place of equity and equitable remedies in the contemporary common law world" [1994] 110 *Law Quarterly Review* 238

5 [1903] 1 Ch 1009

6 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association [SDA] v Minister for Industrial Affairs* (1995) 183 CLR 552

7 *Onus v Alcoa*, above n 6.

8 *SDA v Minister for Industrial Affairs*, above n 6.

9 (1998) 194 CLR 247

significantly expands the availability of declarations and injunctions to enforce public law. In that case the Aboriginal Community Benefit Fund Pty Limited was established under the Corporations Law. It conducted a business of operating a contributory funeral benefit fund. The Batemans Bay Local Aboriginal Land Council was constituted by and derived its functions from the Aboriginal Land Rights Act 1983 (NSW). It also received funds through the New South Wales Aboriginal Land Council to assist in the financing of its activities. Those funds were sourced from land taxes imposed in New South Wales. The Batemans Bay Local Aboriginal Land Council proposed to establish a contributory funeral benefit fund. That was beyond the statutory functions conferred on it under the Aboriginal Land Rights Act.

The substantive issue in the case was defined by McHugh J in the following terms:

> whether a public corporation is acting contrary to a statute in the way that it disburses public funds and enters into contractual arrangements.[10]

The majority of the Court[11] stringently criticised continuing reliance on the *Boyce* principle in Australian public law. In dicta the majority said that

> it may well be appropriate to dispose of any question of standing to seek injunction or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process.[12]

That is, their Honours suggested that there might not be a requirement for standing to ground an application for an injunction or declaration to enforce public duties. Where a mere stranger to a dispute seeks such a remedy the discretion to refuse the remedy may be more readily exercised.

Their Honours based their decision on the following reason:

> The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period has been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence and modified form of the *Boyce* principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive procedural stipulation.[13]

While there may remain some particular restrictions on the availability of injunctions and declarations to enforce provisions of the criminal law, the reasoning in *Batemans Bay Land Council* establishes that in proceedings in which a plaintiff seeks to enforce a public duty, or to confine the functions of a public authority to their statutory limits, the law of standing will be “an enabling, not a restrictive, procedural stipulation”.

A stranger can now obtain declarations and injunctions to enforce such public duties. Whether the stranger will succeed will be a matter of discretion exercised by reference to factors including the nature of any interest in the subject matter of the litigation.

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10 Ibid, p 284

11 Gaudron, Gummow and Kirby JJ

12 Ibid, p 263.

13 Ibid, p 267.

Standing Under Federal Administrative Review Statutes

There are three separate tests of standing, or more accurately entitlement to apply for review, under the Federal statutory administrative review arrangements.

First, judicial review is available under the ADJR Act to a person aggrieved by a decision to which that Act applies.[14] A reference to a person aggrieved by a decision in that Act includes a reference to a person whose interests are adversely affected by the decision.[15] This "at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has an ordinary member of the public".[16]

Second there is the formulation used in provisions conferring "jurisdiction" on the AAT (and providing for internal review of rights). That term varies – the usual terms include "a person whose interests are affected" by the decision[17] and "a person affected by the decision"[18]

The third relates to section 27 of the AAT Act which provides that an application may be made by or on behalf of any person whose interests are affected by the decision.

There is no textual difference between the provisions in the ADJR Act and AAT Act. It is interesting to note the characterisation of the wording of this provision (at least in the context of the Therapeutic Goods Act) given by the majority of the High Court in the *Batemans Bay Land Council*. There their Honours[19] said:

> Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of competitors or other third parties. An example is the special but limited provision by the legislation considered in *Alphafarm Pty Limited v Smith Kline Beecham (Australia) Pty Limited* for judicial review of successful applications for registration.

In the case of *Allan v Transurban*[20] a Full Court of five Federal Court justices based their decision on the reasoning of the earlier Full Federal Court in *Alphafarm v Smith Kline Beecham (Australia) Pty Limited* referred to in that passage.

In the High Court hearing of *Allan v Transurban* the following exchange occurred between counsel for the applicant to the AAT and the Justices:

> **MR DREYFUS: …** We say that that is really where the error made by the second Full Court lies, and I wanted to take your Honours to a particular passage in the decision of the second Full Court, which is at page 216 of the appeal book, paragraph 50 of the judgment. That is where their Honours summarised the effect of the judgment. They said:
>
> > In summary, the question of standing to review an administrative decision is to be determined by reference to the interest which the applicant has in the decision which is under review. It is to be determined by reference to the nature and subject matter of the review and the relationship which the applicant individually or a representative body may have to it. An interest in the outcome of the review may give standing. But there will be no standing where the actual outcome of the review will not affect the applicant.

14 section 5(1)

15 section 3(4)(a)(i)

16 Per Ellicott J in *Tooheys Limited v Minister for Business and Consumer Affairs* (1981) 36 ALR 64

17 See for example *Alphafarm Pty Limited v Smith Kline Beecham (Australia) Pty Limited* (1994) 121 ALR 373

18 *Allan v Transurban City Link Limited* High Court M90/2000 transcript of 23 May 2001

19 Gaudron, Gummow and Kirby JJ (1998) 194 CLR 247 at 266

20 *Transurban City Link Limited v Allan* (1999) 168 ALR 687

> Then they say: "There will be a question of degree involved in many cases."
>
> **GUMMOW J**: That is all put at some level of generality, which I do not understand, I am afraid.
>
> **MR DREYFUS**: We say not only is it put at a level of generality, your Honours, but it is incorrect to say that the question of whether or not Mr Allan's interests are affected by the decision, or whether he is affected by the decision, is to be determined in the way that their Honours have here stated.
>
> **GUMMOW J**: I mean, what *Boyce v Paddington Borough Council* has to do with this statute, I cannot imagine.
>
> **MR DREYFUS**: That point was already made on the special leave application, your Honours, and I do not apprehend that anybody here before your Honours today is going to contend that it has anything to do with this case.
>
> **KIRBY J**: It is all because we see it so many times that lawyers' minds get locked into common law notions and they resist looking at legislation. They hate it.
>
> **MR DREYFUS**: We would respectfully endorse your Honour's comments.
>
> **KIRBY J**: It happens all the time. There are so many recent cases where people will not look at the legislation."

Making every attempt to avoid the trap identified by Kirby J the following can be said:

- Gaudron, Gummow and Kirby JJ, at least in the context of the Therapeutic Goods Act, appear to regard the wording of the provisions conferring an entitlement to apply for merits review under the AAT Act and judicial review under the ADJR Act to be "special but limited".[21]

- In the case of applications to the AAT the Court seems to have contemplated in argument in *Allan v Transurban* that there will be two "gates" through which an applicant must pass; the statutory provision conferring an entitlement to apply to the AAT, and section 27 of the AAT Act.

- In argument in *Allan v Transurban* some members of the Court were clearly exploring ways in which the phrases "person affected" and "person whose interests are affected" might be given a broader meaning than has been understood to date.

- To the extent that that phrase is given a meaning in the context of merits review which is broader than it is given in the context of the ADJR Act there will be created an asymmetry in the scheme of statutory judicial review.

- Whatever meaning is given by the Court to those phrases in *Allan v Transurban* the preconditions for obtaining relief under the ADJR Act and AAT Act now appear to be significantly more stringent than are the standing requirements of equity.

It may be that the decision of the High Court in *Allan v Transurban* will be limited to an interpretation of the particular Act there in question – the Development Allowance Authority Act. If the reasoning goes further to articulate a significant difference in the content of the test for persons entitled to apply for merits review to that applying in respect to judicial review, the maintenance of an integrated statutory scheme of judicial review could require legislative amendment.

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21 Per Gaudron, Gummow and Kirby JJ in *Batemans Bay Local Aboriginal Land Council*

The Constitutional Writs

The High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth[22]. A counterpart jurisdiction is conferred on the Federal Court of Australia by the *Judiciary Act 1903* (Cth).[23] These writs, since *Aala's* case[24] are properly known as constitutional writs.

In *Aala's* case a majority of the Court[25] held that the Constitution confers on the High Court the jurisdiction and the power to ensure that:

> all officers of the Commonwealth .. are rendered accountable in this Court to the Constitution and the laws of the Commonwealth. Being the means by which the rule of law is upheld throughout the Commonwealth [s75(v) of the Constitution] is not to be narrowly construed or the relief grudgingly provided.[26]
>
> The jurisdiction and power is to be exercised against "the background of the animating principle … [that] those exercising Executive administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the Courts should provide whatever remedies are available and appropriate to ensure that those possessed of Executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[27]

In *Croome v Tasmania*[28] Gaudron, McHugh and Gummow JJ held that:

> Where the issue is whether the Federal jurisdiction has been invoked with respect to a "matter" questions of "standing" are subsumed within that issue.

It is clear that for these purposes "matter" means the subject for determination in a legal proceeding and not the legal proceeding itself.

In *Truth About Motorways*[29] a majority of the Court accepted that an application for a constitutional writ seeking the exercise of the judicial power of the Commonwealth under section 75(v) of the Constitution may be made by a "stranger".[30]

> There is no basis for concluding that either the concept of "judicial power" or the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings… there may be cases where absent standing there is no justiciable controversy. That may be because the Court is not able to make a final and binding adjudication. To take a simple example, the Court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed. Or there may be no justiciable controversy because there is no relief that the Court can give to enforce the right, duty or obligation in question.

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22 Constitution section 75(v)

23 Section 39B

24 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219

25 Kirby J; Gleeson CJ, Gaudron and Gummow JJ were to the same effect.

26 Per Kirby J at paragraph 140 quoting *Re Carmody ex parte Glennan* (2000) 173 ALR 145 at 147 per Kirby J.

27 Per Gaudron and Gummow JJ at paragraph 55 quoting *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 per Gaudron J. On this aspect Gleeson CJ and Hayne J agree with Gaudron and Gummow JJ.

28 (1997) 191 CLR 119

29 *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 74 ALJR 604

30 Gleeson CJ and McHugh J at paragraph 2

> There is nothing in the word "matter" appearing in Chapter III of the Constitution which demands a particular requirement as to standing … there is no holding of this Court to that effect in the many decisions which would address the requirements of Chapter III.[31]

Truth About Motorways establishes that there is no requirement for Chapter III judicial power for there to be any reciprocity of interests between the parties to a Chapter III "matter". The lack of interest in the matter by the stranger will go to inform the exercise of the discretion whether to grant relief[32]

Aala's case then establishes that these principles apply to applications for mandamus, prohibition and injunction under section 75(v) of the Constitution and probably extend to the grant of any ancillary relief (such as certiorari or declarations) appropriate to disposal of the particular matter. It follows that in respect of applications under section 75(v) of the Constitution a stranger may succeed in an application to enforce the public duties of an officer of the Commonwealth.

Thus the "standing" requirements of the general equitable jurisdiction to grant injunctions to enforce public duties and the constitutional writs jurisdiction have developed to be significantly more liberal than the statutory administrative review regime.

Supervision of Non-Statutory Functions

In *R v Panel on Takeovers & Mergers; ex parte Datafin PLC & Anor*[33] the English Court of Appeal held that the decisions of the Panel on Takeovers & Mergers were susceptible to judicial review, even though the body had no statutory basis and exercised no statutory power. This was based on the finding that the panel exercised de facto governmental powers backed by public law sanctions. A finding of fact was that the Panel was a key element of the government's approach to industry regulation of takeovers.[34]

In his judgment Lloyd LJ argued that the source of power test (which had previously been relied upon in England to determine whether or not a body could be susceptible to judicial review and which is at the heart of the Federal statutory administrative review regime) was not decisive in relation to whether power exercised under contract could be subject to judicial review. He said[35]:

> If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review. But in between these extremes there is an area in which it is helpful to look **not just at the source of the power but at the nature of the power**. If the body in question is *exercising public law functions*, or if the exercise of its functions have *public law consequences*, then that may be sufficient to bring the body within the reach of judicial review.

In the New South Wales Supreme Court decision in *Norths Ltd v McCaughan Dyson Capel Cure*[36] Young J held "…the fact that the non-member may not be able to enforce such rights contractually is probably by the by. Indeed, in the light of the **public law aspects** of the Stock Exchange's work under the Securities Industry Act…it may well be that a member of

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31 Per Gaudron J at paragraphs 43-47

32 See *R v Federal Court of Australia; ex parte National Football League* (1979) 143 CLR 190 at 201

33 [1987] 1 QB 815

34 At 835

35 At 847

36 (1988) 12 ACLR 739 at 745

the public could get an order in the nature of mandamus to compel the performance of art 63…"

This approach was later adopted in *Typing Centre of New South Wales v Toose*[37]. The decision in this case raises the main issue in the *Datafin* case, namely whether the determinations of the Advertising Standards Council (a body established by charter) – were susceptible to judicial review despite the fact its powers were not derived from legislation or the prerogative. "The fact that a body is self regulating…makes it not less, but more appropriate that it should be subject to judicial review by the courts"

In holding the relevant actions to be subject to judicial review, Mathews J applied the test of asking whether the ASC exercised **public functions**, or **functions which had public law consequences**, or whether there was a **public element in its functions**.

In *Victoria v Master Builders' Association*[38] the Supreme Court of Victoria followed the *Datafin* case to decide that a government taskforce which determined eligibility to tender for government construction work was amenable to public law supervision (and obliged to accord procedural fairness). The court had regard to "the nature of the power being exercised, the characteristic of the body making the decision and the effect of determining that the exercise of the power is not amenable to review". By looking at the subject matter of the power being exercised, it was held that the task force's decisions, if taken in the exercise of a public duty and affecting rights, interests or legitimate expectations of building contractors, were amenable to judicial review whether or not they derived from common law or from prerogative rather than statute. The Supreme Court found that the applicants (builders) should be granted declaratory relief: that they were entitled to procedural fairness. The remedy was available because of the public effect of the actions of the task force.

The constitutional jurisdiction looks to the status of the person performing the function – is he, she or it "an officer of the Commonwealth"?

In *Aala's* case Gaudron and Gummow JJ approved the reasoning of Bowen CJ in *Minister for Arts Heritage and Environment v Peko Wallsend Limited*.[39] That was a case in which Peko Wallsend sought to have set aside the decision of the Cabinet to seek listing of Stage 2 of Kakadu National Park on the World Heritage List. The passage in the judgment of Bowen CJ referred to with approval by Gaudron and Gummow JJ is as follows:

> Subject to the exclusion of non justiciable matters, the Courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative …

It is probably the case that in *Aala* Hayne J agreed with Gaudron and Gummow JJ on this point.

Thus public law remedies will be available to supervise the lawful conduct of the business of the executive branch of government, whether or not that conduct is made under an enactment. Further, public law may reach to supervise the conduct of private entities where that conduct involves a "public element". The constitutional writs will run to any minister or official – and may run to private parties performing functions for or on behalf of the government.

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37 unreported SCNSW 15/12/88

38 *Victoria v Master Builders' Association (Vic)* [1995] 2 VR 121

39 (1987) 15 FCR 274

Conclusions

The AAT Act and the ADJR Act only operate with respect to decisions (and relevantly, conduct) made under legislation. Further each of those Acts limits the class of persons who might apply for remedies under them. The precise scope of those limitations is currently before the High Court for clarification in *Allan v Transurban*.

The constitutional writs jurisdiction of the High Court (and the counterpart jurisdiction conferred on the Federal Court by the Judiciary Act) has now moved to be significantly broader than that provided by the statutory administrative review regime. The general equitable jurisdiction of the Supreme Courts has also developed to provide for public law remedies on application of a class of persons significantly broader than that entitled to apply for statutory remedies under the AAT Act or ADJR Act, in respect of a broader class of governmental, or public, functions.

The following clear issues emerge from this analysis.

First, statutory authorities and statutory agencies are subject to equitable and constitutional writ supervision to ensure that they do not stray from the performance of their statutory functions.

Proceedings can be taken to achieve that outcome by strangers with no direct or indirect interest in those proceedings.

Where a statutory authority or statutory agency strays from the proper limits of its statutory functions the grant of equitable or constitutional relief will be discretionary. In the exercise of that discretion the key factor will be as articulated by McHugh J in the *Batemans Bay Land Council*:

> It is hard to see how it could ever be contrary to the public interest to require a statutory corporation to spend its money and make contracts only in accordance with the statute which creates it and defines its powers and purposes.[40]

Second, where legislation in some way limits executive power equitable prerogative and constitutional remedies will be available to prevent the executive from transgressing those limitations.

For example, in *Brown v West*[41] the Remuneration Tribunal Act provided for the setting of remuneration for Members of Parliament. The High Court unanimously held that the executive power of the Commonwealth was conditioned by the Remuneration Tribunal Act such that the Minister for Administrative Services could not validly decide to provide remuneration to Members of Parliament other than in accordance with decisions of the Remuneration Tribunal. There was no issue in that case that any decision of the Minister was made under an enactment. The Federal statutory scheme of judicial review could not have applied to it. On the current state of law even a stranger to that decision might now succeed in an application for injunctions, declarations or the writ of prohibition to prevent any part of the executive government from acting inconsistently with the legislation in question.

The consequences for public administration and public law are very wide indeed. Conceptually it will only be where legislation which deals with public governance is held to be merely directory and not imposing any form of public duty that this consequence would seem to be excluded.

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40 (1998) 194 CLR 247 at 284

41 (1990) 169 CLR 195

The **third** potential consequence arises from the various suggestions emanating from the High Court that the executive power of the Commonwealth, and perhaps the prerogatives, are conditioned by a requirement to accord procedural fairness.[42] If there be such a limitation then public law remedies would seem to be available to prevent executive conduct without according the required procedural fairness. That would be a jurisdiction wholly divorced from the statutory judicial review regimes. It could have profound implications for the conduct of commercial transactions by the Commonwealth. In principle it is difficult to see how public law can operate to supervise the commercial conduct of the Australian Stock Exchange or the Advertising Standards Council but not operate to supervise similar conduct of government.

The **fourth** is the potential for public law remedies to be available to directly supervise the delivery of "governmental" services by outsourced service providers. Injunctions and declarations could be available as a matter of equity and the prerogative writs in common law – provided there is a "public" element to the function performed. The constitutional writs might be available as a matter of constitutional law on the basis that to the extent a person performs a government function he, she or it is an "officer of the Commonwealth". In each case the criterion for application might well be the nature of the function performed rather than the source of the power. Both the AAT Act and ADJR Act are framed by reference to the source of the power exercised.

If the continuance of an integrated system of Federal administrative review is a desirable objective the basic underpinnings of the AAT Act and ADJR Act need to be revisited. That revisitation will need to better align the entitlement of persons to apply for review under the statutory provisions with the law as it has developed in equity and in constitutional law.[43] It will also need to go significantly further than the ARC's Contracting Out Report to consider the nature of supervision of the performance of functions of a governmental nature – whether they are performed by entities owned by government, forming part of government or by private entities.

42 See for example the judgment of Gaudron and Gummow JJ in *Aala*, n 24.

43 See n 2.

THE ROLE OF JUDICIAL REVIEW IN AUSTRALIAN ADMINISTRATIVE LAW

John McMillan *

Edited text of an address to a judges' seminar, Melbourne, August 2001.

This address broadly covers trends in judicial review of administrative action in Australia. I will elaborate on concerns that I have expressed elsewhere concerning the direction taken by judicial review in Australia and its impact on public administration.[1] The topic is addressed in two stages: first, I outline some broad thematic concerns with judicial review trends; and secondly, I then undertake a more particular and critical analysis of aspects of administrative law doctrine. I trust that the second part of the address will illustrate and substantiate the points that are covered rather elliptically in the first part.

May I preface these remarks with an observation concerning the difficulty of undertaking administrative law analysis. Administrative law doctrine is an accumulation - a wilderness almost - of single instances, most cases turning ultimately on fine and often unique points of statutory interpretation or factual analysis. In the different arena of constitutional law one can often define trends by pointing to a few key decisions. That is rarely so in administrative law, where one is driven more commonly to making general observations and, in doing so, running the risk of over-generalisation and over-simplification.

Overarching Thematic Concerns

1 The standards for defining unlawful decision-making are increasingly more onerous, but at the same time more ambiguous and elastic

An apt example of this point is the obligation of a decision-maker to consider relevant matters, adorned as it now is by an expectation that the decision-maker will give "proper, genuine and realistic consideration" to all relevant matters, display an "active intellectual process" in considering those matters, and on occasions undertake a self-initiated inquiry into matters that are "credible, relevant and significant". The procedural demands imposed by the doctrine of natural justice have similarly become more elastic and uncertain, while at the same time becoming more onerous.

Uncertainty in the scope of legal standards has also crept in by the resurrection of orthodox administrative law concepts that are as likely to obscure as to illuminate what an administrator is required to do. In vogue is the judicial resurrection of prerogative writ concepts, such as "jurisdictional error", "jurisdictional fact" and "asking the wrong question". To add to the difficulty, it has been suggested in cases such as *Bateman's Bay Local Aboriginal v Aboriginal Community Benefit Fund*[2] that the operation of substantive

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* *John McMillan holds the Alumni Chair in Administrative Law, Australian National University and is a Consultant, Government Services Group, Clayton Utz.*

1 Eg, "Recent Themes in Judicial Review of Federal Executive Action" (1996) 24 *F L Rev* 347; "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1. I have also addressed the other side of the coin, namely, executive misunderstanding of the requirements of administrative law – eg, "Law and Administration – Conflicting Values" (2000) *Canb Bulletin of Pub Admin* ; and a series of pamphlets on "Good Decision-Making for Government" published by Clayton Utz.

2 (1998) 194 CLR 247.

requirements of administrative law can interact with and hinge on the equitable remedy chosen by the plaintiff to challenge the validity of a decision.

The broad concern I have with those trends is that not only do they involve constant movement of the goalposts for legal validity, but the posts are often hard to see through the mist. My present experience in legal practice is that, with the benefit of nearly thirty years experience in the field of administrative law, it is increasingly difficult to give definitive advice to a government agency as to whether a decision it has made and the process it has followed is lawful or unlawful. Another sign of the difficulty is the fact that nearly every major administrative law decision of the last two decades in Australia has involved a full bench or an appeal court reversing the decision of the court below. Understandably we would all entertain different views on the merits of decisions that are being reviewed, but if we lack common understanding as to what is lawful or unlawful, we place at risk other philosophical public law objectives deriving from the rule of law and the separation of powers.

2 The standards for measuring the validity of administrative decision-making should be based less on the lawyer's perspective as to what constitutes good decision-making, and should be more a blend of executive and legal practice

There are minimum standards that are expected of all decision-makers, whether in the judiciary or the executive – good faith and lack of bias are obvious examples. But equally there are important differences between the context for judicial adjudication and executive decision-making, as the High Court emphasised recently in *Minister for Immigration and Multicultural Affairs v Jia*.[3] Standards for *lawful* decision-making necessarily play a role in defining what is *good* decision-making, but the latter concept should have room to move independently of legal prescription

My general concern is that there is a creeping tendency in administrative law for lawyers to reconstitute their own experience in the law as the legal standard for good administration, and to lay down criteria for administrative validity that are inappropriate in an executive context. An example I develop later in this address is the supposition, now entrenched in administrative law, that decision-making is discharged at the individual level rather than by collective or institutional process. Other tension points in administrative law – such as the scope of natural justice, the status that can be accorded to executive policy, and the operating procedures to be followed by public service promotion and disciplinary committees – are, in my view, less a dispute about fundamental standards of good administrative behaviour, and more a contest between competing legal and executive philosophies as to how decisions should be made.

3 A disproportionate importance is now ascribed to judicial review in establishing a framework of principles and procedures for administrative justice

A core objective of the administrative law reforms of the 1970s in Australia was the development of methods of administrative review that would be both a supplement and an alternative to judicial review, notably tribunals and Ombudsman. Those mechanisms were thereafter to play a major role in developing standards of administrative propriety and in delivering administrative justice.

This balance has been upset by a number of factors. I referred earlier to trends that have given undue emphasis to the judicial role, specifically the progressive judicial extension of the criteria for invalidity, including the revival of orthodox but imprecise legal concepts.

3 (2001) 178 ALR 421.

Another influential trend has been the domination of Australian administrative law by immigration litigation – a trend that has coloured the formulation of legal doctrine generally, at the same time creating a relationship between courts and tribunals that at times has pitted them almost as antagonists of each other. Numerous cases illustrate a judicial reluctance to accept the independent role and function of tribunals and Ombudsman. One such example is the High Court decision in *Craig v South Australia*,[4] which draws a disparaging contrast between courts and tribunals. Of equal worry (if I may restate a criticism I have made elsewhere[5]) has been the raft of Federal Court decisions that subtly sent a message that tribunals are error prone, do not accord substantial justice, do not know how to write reasons, and are more susceptible than other adjudicators to actual bias. Doubtless it is true that administrators and tribunals commit errors that need to be corrected from time to time, but implicit in what I have said is a belief that Ombudsmen, tribunals and administrators generally achieve a higher standard of justice and good decision-making than is sometimes acknowledged.

4 There is an imbalance in the jurisprudence defining the legality/merits distinction in Australian administrative law

Nearly all discussion of Australian administrative law begins with the observation that it is firmly based on a legality/merits dichotomy. It has been described recently in an article by Justice Sackville[6] as one of the twin pillars of Australian administrative law. Yet, if a dichotomy is to have practical or theoretical merit, it is important to understand the range of matters that lie distinctively in each component of the dichotomy, and how broad or narrow is the borderland between the two areas.

In Australian administrative law, nearly all discussion of the legality/merits distinction proceeds from the court-side of the equation - defining what comes within the concept of legality (rationality, illegality, proportionality, and so on) and where those notions begin and end as viewed from the courthouse. There is very little said about the values and aspects of administrative decision-making that are intrinsically the province of executive determination and re-evaluation by merit review processes – the room that must exist, for example, for unprovable skills such as executive sagacity, intuition and wisdom to play a part; for scepticism to be sustained, but within boundaries; for decision-making profiles to play a legitimate but restrained role; for tough decision-making to be undertaken; or for public policy objectives to imbue individual case management. Unless there is an understanding of the skill and insights that lie on either side of the legality/merits divide, the concept of legality will mean nothing as a limiting concept.

An example I will give later is that the statutory conferral of a function upon an officer such as a Minister is often viewed from the legality end of the dichotomy as a bestowal of significant legal obligations on the Minister. By contrast, from the executive citadel the conferral of the function could be viewed quite differently as a mechanism for drawing administrative decision-making into the arena of political accountability.

5 There is an insufficient recognition of the knock-on effects of a judicial finding of administrative invalidity

The ripple effect of a declaration of administrative invalidity can be marked, more so than the ripple effect of most private law decisions. There are particular incidents that illustrate this

4 (1995) 184 CLR 163.

5 "Commentary: Recent Developments in Refugee Law" (2000) 25 *AIAL Forum* 26.

6 "The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States" (2000) *Federal Law Review* 315 at 316.

point – such as the Hindmarsh Bridge episode, and the suspension of many of the functions of the Superannuation Complaints Tribunal for roughly 18 months after the initial finding in *Wilkinson v CARE*[7] (later reversed by the High Court) that the Tribunal was invalidly constituted. In less obvious ways, when the spectre of invalidity hangs tentatively over agency operations, one will observe executive agencies engaging in administrative second-guessing that is nervous, unproductive, sterile and wasteful. I see this particularly in relation to personnel management decisions proposing to discipline or take other adverse action against a non-performing employee: agencies sometimes become so fearful that the administrative action will be invalidated by a technical flaw that they make and re-make the decision, eventually reaching a point where the agency's focus on the employee looks from the outside to be an obsessive persecution of the employee.

The implication of this point is that there should in my view be a limited conception of the role that judicial review is expected to play in delivering administrative justice. The criteria for legal validity or invalidity should be developed with an air of restraint and not, as I think they increasingly are, as a remedy for perceived procedural unfairness. We should similarly be wary about travelling down the open path of allowing indistinct concepts such as rationality and proportionality to be the beacon lights of judicial review.

Particular Doctrinal Concerns

In this section I propose to offer a critical perspective on four aspects of administrative law doctrine. The purpose in doing so is twofold: to illustrate some of the overarching themes I have already touched on; and to examine areas where legal principle does not, in my view, adequately take account of executive practicalities. In each area of criticism I shall briefly outline an alternative approach, though I acknowledge that the issues run more deeply than an introductory presentation of this depth can illustrate and that reform is a more complex matter than simply waving the judicial wand.

1 Administrative law downplays too much the role that executive policy plays in good administration

One of administrative law's greatest successes has been the distinction it forged between legislation and administrative policy, a trend which in the modern era is traced to *Green v Daniels* (1977). I do not underestimate the importance of this success: it has driven home to administrators that they must consult the law, that they do not themselves make law, and that an open mind and a preparedness to look at the justice of the individual case are the hallmarks of good administration.

That said, I think the law goes too far at times in downplaying, even disparaging the role that executive policy plays in good administration. The law in this area is not, I acknowledge, single-tracked and my criticisms are directed at a doctrinal thread embodied in some but not all cases. They include the Full Court decision in *Howells v Nagrad Nominees Pty Ltd*,[8] stating that an administrator, in deciding an individual case, must display always "a readiness to depart from policy"; *Sacharowitz v Minister for Immigration*[9] (one of many similar immigration cases), holding that the departmental view that a discretion should be exercised favourably only if there were "compelling reasons" was an impermissible fetter on the statutory discretion; *Perder Investments Pty Ltd v Elmer*,[10] in which a temporary freeze on fishing licences was likewise held to be an impermissible fetter; *Riddell v Secretary,*

7 (1998) 152 ALR 332; reversed *Attorney-General (Commonwealth) v Breckler* (1999) 163 ALR 576.

8 (192) 43 ALR 283 at 307.

9 (1992) 33 FCR 480.

10 (1991) 31 FCR 201.

Department of Social Security,[11] holding that a Ministerial directive could not bind the Secretary, even though the directive had statutory backing, was tabled in Parliament as a disallowable instrument, and the statute declared the directives to be binding. I would criticise also the recent Full Court decision in the *Government Employees' Health Fund Ltd v Private Health Insurance Administration Council*,[12] holding that the Council, exercising a statutory power to make rules, could validly make a rule that confined a statutory discretion, but could not go the further mile of devising a policy to define prescriptively a term employed in the rule which the Council had itself just made.

My criticism of this line of judicial reasoning is twofold. First, I do not agree with it as the only feasible interpretation of the statute. The orthodox legal view is that if Parliament has by statute conferred a discretion, it is contradictory of Parliament's scheme for the Executive to introduce rigidity by forecasting when and how the discretion will be exercised. The alternative view to which I hold is that a major purpose of legislation is to establish a framework of rules, which are then filled up or elaborated by the policies of the elected government. To take a simple example, if a statute says "the Minister may deport a person who is unlawfully in Australia", it does not mean in my view that "a person unlawfully in the country has a conditional right to stay and the Minister must have an open mind about whether or not to deport any individual". Rather, it is quite consistent with that framework for the Minister to say, "the policy of my democratically elected government is that we will be deporting in the following three situations …".

My second line of criticism is that orthodox legal principle understates the importance of directive policy to good administration. It is generally acknowledged that policies can provide guidance on how discretions should be exercised. Yet they do much more. They can elaborate government thinking, by forecasting in a public and accountable way the view of the government of the day as to how statutory discretions should be exercised for the time being. They provide decision-making models for dealing with commonly occurring facts. They draw a prior balance between competing interests, thus regarding justice as a distributive as much as a one-dimensional concept. They achieve coherency where otherwise there would be a world of individual bargaining and unguided decision-making. They also offer a rational basis for explaining to angry clients why harsh (but consistent) decisions have been made.

My view as to what the law should be saying in this area lies midway between the competing views I have outlined. The accommodation of law and policy should be reflected in three principles:

- It should not be unlawful for an administrator to give presumptive weight to or to automatically apply a government policy which specifies how a discretion should be exercised and which is intra vires the legislation that is being administered. The main proviso is that the executive policy should be clearly defined and have been adopted by a person such as the Minister or governing board that is linked to the chain of political accountability of the agency. By contrast, so-called policy which is nothing more than the temporary whim of an individual decision-maker should have no status beyond that of a relevant consideration. In effect, the Executive should have the option of attributing importance to policies by clearly spelling them out so that non-legal accountability mechanisms can come into play.

11 (1993) 42 FCR 443.

12 [2001] FCA 322.

- It would still be open to a court to examine whether an executive policy was *Wednesbury* unreasonable or irrational – for example, a policy which said that a discretion to issue licences or permits had been closed down indefinitely.

- If the discretionary decision in question is appellable to an administrative tribunal, the tribunal would have an independent duty, as explained in *Drake v Minister for Immigration*,[13] to evaluate whether the application of the policy in any individual case resulted in a correct or preferable decision. It would similarly be open to an Ombudsman to recommend that a decision reached by the automatic application of an executive policy was wrong.

2 Many principles of administrative law are inappropriately based on the premise that decision-making should be an individual rather than an institutional process

There is a strong presumption in Australian law that an officer upon whom a function is conferred by statute has an independent and personal legal duty as decision-maker to consider all relevant matters, ensure that natural justice was observed, sign off personally on the decision, and so on.

Numerous decisions illustrate how strictly this concept of a decision-maker, as individual officer rather than institutional actor, is applied. They include *Re Reference under the Ombudsman Act*,[14] holding that a decision was invalid because the decision-maker signed it "on behalf of" the statutory nominee rather than in his own name; *Din v Minister for Immigration*;[15] declaring invalid some English language tests, because the Minister as the statutory nominee had not personally approved for second-round testing the test paper, or the time and place of testing; *Norvill v Chapman*,[16] holding that the Minister for Aboriginal Affairs had to go further than merely adopting an independent inquiry report and had to display an active intellectual involvement in considering the 400 or so submissions and attachments. In a host of other instances decisions have been declared invalid because of a relatively technical flaw in an instrument of delegation or appointment.

It is undeniable that those rulings achieve some important public law goals. They give literal effect to the words in the statute that nominate who the decision-maker is. They identify a clear locus of responsibility and, correspondingly, a chain of accountability. They require management to turn its mind to the allocation of decision-making responsibility within the agency. They also make it more likely that relevant considerations, particularly the impact of decisions on individuals, will be taken into account.

Again, however, I think that other public sector goals are imperilled by a doctrinal view that is so strictly defined and applied. A hypothetical example will illustrate my concern. Many statutes nominate the Minister as the formal decision-maker for awarding financial grants for matters such as industry and educational research. Thousands of applications are received each year and then processed by specialist assessment panels and peer review boards. Their recommendations are formally adopted and signed (or "rubber stamped") by the Minister. From a public policy perspective it would be undesirable for the Minister to be more actively involved, because of the fear that political bias and other irrelevant factors would intrude in the process. On the other hand, it is desirable that the Minister formally has the status of decision-maker and signs off, because that links the whole process to the arena of

13 (1979) 24 ALR 577.
14 (1979) 2 ALD 86.
15 (1997) 147 ALR 673.
16 (1995) 133 ALR 226.

public and political accountability: if there are complaints about the process the Minister has to do more than shrug the shoulders and say "it was a decision of an independent statutory body".

The point to be drawn from that example is that our concept of how decisions should be made needs to be more sophisticated to take account of a greater range of factors than, I think, are presently reflected in legal doctrine. Again, without having the opportunity in this address to elaborate a comprehensive new theory, I would point to a few themes that are lacking at present:

- The central issue should be whether core administrative law obligations – such as observing natural justice, considering relevant matters, and implementing the statute – have been observed *within the agency* and as part of the decision-making process, rather than having been discharged personally by the statutory nominee.

- The statutory nomination of a Minister, Secretary or other agency head as the decision-maker should presumptively be an indication only of who has political and managerial responsibility for the function. A discharge of the decision-making function by another officer should ordinarily be acceptable, provided there is a clearly defined administrative structure for allocation of decision-making responsibilities, including procedures for internal or external review of decisions.

- Some categories of decision should nevertheless be made personally by the statutory nominee, the clear example being decisions that involve an exercise of the coercive or punitive powers of the state, such as search warrant powers and dismissal and revocation decisions.

I will finish this point by noting that the current rules, with their strict emphasis on decisions being made by properly-authorised individuals, produce some artificial legal conundrums that could be avoided if there was greater acceptance of an institutional concept of decision-making. For example, it is increasingly a problem, stemming from personnel mobility and other factors, that the actual decision-maker is not around at the time that a statement of reasons has to be written. Yet legal doctrine (and, to some extent, statutory procedures) require that the statement of reasons be prepared by the actual decision-maker on the assumption that that person alone is responsible for and has insight into the detail of the decision. The difficulty of the absent decision-maker could largely be avoided if it was accepted that decisions are frequently made by officers in an institutional role on behalf of their agency, and that the agency is as capable of constructing and signing off on a statement of reasons in the absence of the decision-maker on the record. (The practical reality, in any case, is that reasons statements are usually written after the event by someone else, often a person from the legal section.)

The complexities that can arise under present doctrine were similarly illustrated by the decision of the Federal Court in *Royal Queensland Aero Club v Civil Aviation Safety Authority*.[17] The case dealt with the question of whether numerous pilot licences and flight ratings were invalid as a consequential result of a hiatus in the validity of the appointment of an approved testing officer. Had there been a differently-constructed framework of legal doctrine, it would have been much easier for CASA, as the regulatory agency and delegator, to take subsequent overriding action to correct a technical break in the chain of validity.

17 (2000) 99 FCR 301.

3 The concept of procedural fairness as a legal obligation has been extended too far and applied too rigorously

The history of Australian administrative law over the last decade has, as much as anything, been a history of the incremental extension of the doctrine of natural justice. A doctrine that, three decades ago, applied mostly to decisions that took away property, personal liberty or occupational licences, now pervades nearly all aspects of decision-making. And the forward march has not stopped.

A foundational case for contemporary doctrine was the 1985 decision of the High Court in *Kioa v West*,[18] which illustrated both the breadth of interests that would henceforth attract a natural justice obligation, and the extent of disclosure that would be required to comply with that obligation. Since *Kioa*, many other decisions have shown just how demanding the obligation to comply with natural justice can be. *Haoucher v Minister for Immigration*[19] effectively required that three hearings be given to the plaintiff – by the Department, the Administrative Appeals Tribunal, and then the Minister. *Minister for Immigration v Teoh*[20] placed a practical onus on the executive to assist a person to formulate their submission, by specifically inviting them to present argument addressed to compliance with an international convention standard of which the person was either unaware or had overlooked. Cases such as *Johns v Australian Securities Commission*,[21] *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation*[22] and *Oates v Attorney-General (Cth)*[23] held that independent natural justice rights can arise at the earliest procedural stages of a process, before any substantive decision has been made. *Re Minister for Immigration; Ex parte Miah*[24] applied natural justice rigorously to a primary decision for which there was a full right of merit review by an administrative tribunal. *Pfizer Pty Ltd v Birkett*[25] held that natural justice rights arise at the application stage of a commercial accreditation process, requiring disclosure of information that was independently acquired by the decision-maker. A recent decision of the ACT Supreme Court in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority*[26] held that the acceptance by a land development authority of an amended tender proposal constituted a breach of procedural fairness towards the other tenderer. Together, those and similar cases are steadily fulfilling the prediction of Mason CJ and Deane & McHugh JJ in *Annetts v McCann* (1990)[27] that procedural fairness should be recognised "as applying generally to governmental executive decision-making".

My own view is that the concept of procedural fairness as a legal obligation has been extended too far; to regard it as a universal decision-making obligation would not, in my view, be the conceptually more satisfying position. To fashion the doctrine as a legal antidote for any perceived procedural unfairness overlooks too many other considerations. The reality is that there is procedural unfairness in most decision-making, sometimes unforgivably, but as often for reasons of practical judgment at the time, resource restrictions, administrative practicality, and the like. For instance, nearly every personnel selection or promotion committee on which I have ever sat has undertaken a frank evaluation of candidates, using

18 (1985) 159 CLR 550.
19 (1990) 169 CLR 648.
20 (1995) 183 CLR 273.
21 (1993) 178 CLR 408.
22 (1995) 129 ALR 443.
23 (1998) 156 ALR 1; appeal allowed on other grounds (1999) 164 ALR 393.
24 (2001) 179 ALR 238.
25 [2001] FCA 828.
26 [2000] ACTSC 89.
27 (1990) 170 CLR 596 at 598.

prejudicial information and ideas that are never known to the candidate. The procedural unfairness in that situation is frequently more serious than that which led to the decisions being declared invalid in *Kioa v West*[28] and *Re Refugee Tribunal; Ex parte Aala*.[29] And yet, it seems to me that most observers would baulk at the consequences of so rigorously applying natural justice doctrine to all personnel selection and promotion procedures.

Lawyers need to acknowledge frankly that administrative law criteria cannot and should not address all instances or types of procedural unfairness. If we expect the law to perform that role, we broach all the dangers I referred to earlier – the introduction of uncertainty into decision-making, the imposition of legal cultural paradigms on executive processes, and the disregard of the knock-on effects and disruption caused by findings of legal invalidity. The harsh reality is that legal principle can play only a limited role in securing administrative justice. Greater reliance has to be placed on other aspects of the system of law and government, such as internal training, personal integrity, Ombudsman investigations, internal review, tribunal review, ministerial control, and public pressure.

4 The judicial discretion to refuse relief notwithstanding a breach of an administrative law ground of review should play a more active role in judicial review

It is an entrenched principle of Australian administrative law that relief should ordinarily be granted if a breach of a ground of review is established. The principle became firmly established in cases such as *Kioa v West*[30] and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[31] and has prevailed ever since. It was reiterated recently and firmly in *Re Refugee Tribunal; Ex parte Aala*,[32] the majority of the High Court (Justice McHugh dissenting) expressing the view that every breach of natural justice should lead to a decision being overturned, unless the breach is insignificant and the result would inevitably have been the same. This parallels the view earlier taken in *Peko-Wallsend*, that a breach of the relevant/irrelevant consideration rules should result in a new decision being made unless the consideration that was considered or overlooked was insignificant or insubstantial.

The first observation to make about this thread of principle is that it does not emanate textually from the scheme for judicial review codified in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (or the State equivalents). Indeed, the ADJR Act arguably points in an opposing direction. The Act says no more than that a person can seek an order of review if there is a breach of one of the criteria listed in s 5 of the Act, with s 16 then conferring a general discretion on the Court as to the granting of relief. Importantly, s 5 does not explicitly say – as it is sometimes assumed or represented as saying – that a decision-maker who is in breach of a criterion in s 5 is assumed to have acted invalidly. A tenable construction of the ADJR Act is that s 5 outlines the first step to be taken by a person in establishing that there has been unlawful conduct of a kind that entitles the person to seek an order of review from the Court.

The power vested in courts to grant relief on a discretionary basis provides the courts with the opportunity to take appropriate account of the practical context for administrative decision-making, importantly the individual skill level of administrators and the resource constraints that often necessitate a streamlined decision-making process in which time for inquiry and reflection can be a scarce commodity. Courts have often observed that

28 (1985) 159 CLR 550.
29 (2000) 176 ALR 219.
30 (1985) 159 CLR 550.
31 (1986) 162 24.
32 (2000) 176 ALR 219.

administrative practicalities are irrelevant to any determination as to whether, for example, a decision-maker failed to consider a relevant matter or failed to undertake a proper natural justice hearing. Accepting that to be the case, the practical and resource dimension could nevertheless be relevant to the grant of discretionary relief, if the probable outcome is relatively clear and the merits have been substantially considered by the decision-maker.

It is my view that discretion should have played a more significant role in the grant or refusal of relief by the Federal Court in its immigration review jurisdiction (though I note that there has been a refusal of relief on discretionary grounds in some recent cases – for example, *Paul v Minister for Immigration*[33]). The legal defect that was exposed in many of the immigration cases was the omission of a "material fact" or the reliance on a disproved factual assumption in the reasons for decision of an administrator or tribunal. In many such cases the mistake may have been a product of the lack of formal legal training of the decision-maker, or of the contextual difficulty faced by the decision-maker in not being able to spell out in writing why assertions of fact by a claimant either were not accepted or were not decisive. At any rate, if one stood back from the situation and took account fully of the steps taken in the decision-making process and the justification given by the decision-maker for the final decision, it was hard to see in many cases that the mistake in the statement of reasons had the significance that a finding of invalidity presupposed.

I am not suggesting that defective decision-making can be justified on the basis that it was the best that could be expected in the circumstances. Nor am I suggesting that "near enough is good enough" should be the prevailing standard. I simply reiterate the point that administrative law, by paying more regard to the context for executive decision-making and to the disruptive consequences of a finding of invalidity, should undertake a more pragmatic assessment of the significance of a legal error. The prevailing notion that the entire administrative process should be restarted merely because a question mark has been introduced by one mistake in the process or in the reasoning is unbalanced. The *Aala* case is an interesting case in point. Prior to the High Court's decision, Mr Aala's case had been heard twice by the Refugee Review Tribunal, his application being rejected both times. The error which caused the High Court to grant relief and to order a new hearing before the RRT stemmed from the failure of the Tribunal in the second hearing to consider a supplementary submission by Mr Aala which some judges noted was unsworn, irrelevant in part and of uncertain evidentiary value. Mr Aala's case has since been back to the RRT, where his application has now been rejected for the third time.

Conclusion

I will draw the threads of this together. I have given examples of legal principles that in my view promote an inappropriate and unrealistic model for administrative decision-making. That is not to condemn all or even a majority of judicial decisions, most of which collectively contribute to a system of law and government that appropriately demands high standards of the administration and, appropriately too, embodies a sensitivity to the rights of individuals that is laudable.

That said, I do think that there are deep-seated issues that need to be addressed. While society rightly expects increasingly higher standards of decision-making in government, that should not necessarily mean a corresponding elevation in legal standards or in the role of courts. To expect the law to provide a guarantee that a wrong or inappropriate decision was not made with the bureaucracy is to expect too much of the law. To secure the promise of higher standards we must rely principally on other mechanisms, such as the Public Service Commission, the Ombudsman, tribunals, parliamentary committees, and democratic control.

33 [2001] FCA 1196; see also *Minister for Immigration v Al Sham* [2001] FCA 919.

I will end with two examples to illustrate this point. The first concerns the recent Presidential election in the United States that was beset with electoral counting problems in Florida. One school of legal thought, which held sway in the early stages of the dispute, was that every individual who had a legal right to vote had a correlative right to ensure by legal process that that vote was counted correctly. The logical and practical ramifications of that individual right/individual justice theory soon became apparent: as the majority of the Supreme Court realised, unless there was a judicial back-off an electoral result would never be declared. Legal claims had to accommodate other practicalities.

The same principle perforce governs the area of administrative decision-making in which I am mostly involved as an academic, namely, assessment of student essays and exams. The decisions that I and colleagues make have a dramatic effect on the interests, expectations and careers of students. The individual decisions that academics routinely make on the assessment of student papers would, in many instances, be questionable on standard administrative law grounds. Nor do I have any doubt that administrative law review of individual assessment decisions would bring some needed improvements to the assessment process. Yet to travel too far down that path, and to give singular importance to the administrative law rights of any aggrieved student, would inevitably distort the overall assessment process and unfairly advantage some students over others on grounds that would have less rational or objective appeal. For better or worse, the major procedural and legal guarantees for students have to rest on the appointment of skilled staff, the introduction of procedures for monitoring assessment patterns, and the creation of grievance procedures for students. Rights have to be secured in the system overall, not by objective proof of the integrity of individual decisions made within that system. The same lesson should apply to most other areas of decision-making.