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MINISTERIAL ADVISERS AND THE SEARCH FOR ACCOUNTABILITY

*Professor Meredith Edwards**

Australian Institute of Administrative Law Seminar, Canberra, 16 July 2002

Introduction

I am here as a practitioner who not so long ago was a senior public servant. Although I have been a ministerial consultant, that was more a policy than a political position. I therefore will speak from the perspective of a public servant. I also have an interest in proper processes around how decision-making occurs given that, as the Director of the National Institute for Governance at the University of Canberra, I study and attempt to promote good public sector governance practices.

While there has been much recent attention to the Certain Maritime Incident[1], I will not go over any details of that case but, rather, make some observations about what we could learn from that incident.

Today I will not only cover the issue of the accountability of ministerial advisers, but will also address the related roles and responsibilities of senior public servants whose jobs necessarily involve them in close liaison, if not, at times, partnerships with staffers in ministers' offices. How do we both ensure adequate accountability of ministerial advisers and protect the political neutrality of our public servants?

I will argue, using one or two accounts from my own experience, that, ultimately, all good governance arrangements and the achievement of desired outcomes depend on the establishment of good relationships between all players in the decision-making process. This, in turn, requires clear expectations about the respective roles and responsibilities of the various players and about the appropriate structures and processes required to achieve this.

In my remaining time, I will provide some background on where we have come from and where we appear to be now, attempt to disentangle some of the current confusions in roles and responsibilities, and make some suggestions for change.

Past and present

What has gone before?

Ian Holland[2] and Maria Maley[3] are two authors who have documented well the evolving role of ministerial advisers and of the public service with which they deal. We can distinguish four main periods:

* *Director, National Institute for Governance, University of Canberra.*

- 1950s and into the 1960s, when the mandarins appeared to rule supreme, and ministers, with small office staffs, were heavily reliant on them.

- 1970s, when ministers were concerned about the lack of responsiveness of the public service to the needs of the government and so set up the Royal Commission on Australian Government Administration[4]. Public servants, previously not required to attend Parliamentary committees, started to appear at them. This was the time when partisan outsiders became ministerial advisers and started to have an influence on the policy process, even if their influence was usually somewhat limited. In light of recent events, it is interesting that Whitlam justified the increased numbers that his government employed as a way of ensuring a de-politicised public service.

- 1980s and into the 1990s, when substantial public service reforms occurred alongside an increase in the range of functions undertaken by ministerial advisers, including much heavier involvement in policy processes. By this stage the attitude of some senior bureaucrats that "ministers come and go but we remain" was being replaced, as the balance of power switched from the bureaucracy to the political executive. (This was the period that I witnessed and in which I was involved.)

- Toward the end of the 1990s until now, when we have much more responsive public servants : the Public Service Commissioner[5] recently reminded us that the Prime Minister, on coming into office in 1996, applauded the increased responsiveness of public servants compared to his earlier period as Treasurer. In this period, we have witnessed ministerial advisers sitting on Interdepartmental Committees and some blurring of ministerial advisory and public servant roles.

Where are we now?

There has been at least a doubling in the numbers of ministerial advisers over the last 30 years – it is hard to say how many now exist[6]; under the narrowest interpretation the number is around 150 but under the broadest interpretation (including Departmental Liaison Officers and electorate staff), the figure is around 350.

Much more significant is the extensive span of roles now adopted by ministerial advisers. Maley[7] categorises five of those roles:

(1) involvement in setting policy agendas inside government and also with community/business groups;

(2) linking ideas, interests, and opportunities;

(3) mobilising – driving proposals and building political support for them;

(4) bargaining on behalf of ministers;

(5) delivering on policy outcomes, eg, a national strategy[8].

Current confusions

The activities of ministerial advisers can now significantly overlap with those of both ministers and public servants, leading to confusion as to who should be responsible for what. The main factor leading to confusion appears to be the assumption by ministerial advisers of executive authority. The increase in the roles and power of ministerial advisers can be argued to have contributed to a breakdown in governing processes.[9]

Recent events have sharpened the focus on ambiguities in the relationship of advisers to their Ministers and in their relationship to Parliament, so that we can no longer say, as we once could, that ministerial staffers were accountable to their minister and that the minister, in turn, was accountable to the Parliament and through it to the electorate.

Some of the issues here include :

- If a ministerial staffer decides not to tell or show a minister something, then is the staffer accountable for that decision?

- What if the staffer considers the minister does not want to know and acts independently of the minister? Is the staffer or minister ultimately accountable? If it is the staffer, should Parliament be able to call the staffer to account for information?

- What if the Minister had said he did not want to know anything about a certain incident? Does he effectively delegate responsibility to the adviser, and is the Minister still accountable?

- More broadly, have we now reached a position where an adviser can be accountable for a Minister's actions (or inactions) rather than the traditional approach of the Minister assuming accountability, including for the activities of the adviser?

Whatever the answers to the above, there is general agreement that there is an accountability vacuum.

What does all of this mean for public servants? John Uhr has observed that there is a systemic fault in current arrangements because :

> many people within government do not know what their roles are … Worse, many of those who are certain of their role cannot convince others. Many of the conflicting stories before the senate inquiry can be traced back to conflicting expectations of role.[10]

The Public Service Commissioner's view of the relationship between a public servant and a ministerial adviser is that ministerial staff do not have the power to direct public servants since public servants are the responsibility of the head of agency.[11] But who is really in charge here *in practice* when the department is a creature of the Minister? What if an adviser :

- Asks a public servant for information that may take much time to collect; or
- Asks for a paper as background which the staffer claims is needed by the minister; or
- Gives instruction – directs – on work (eg, a policy proposal) to be done and claims to speak for the minister in wanting that work done?

Obviously, building up relationships is important, not least between the head of the agency and the Minister about the broad ways in which the department and office will work together.

Some other areas requiring further clarification include:[12]

- Are public servants expected, whatever their private views, to work within the ideological position of an elected government? Or are they now expected to go beyond that and show some commitment, if not enthusiasm, for the relevant government policy or program?
- How far should public servants get involved in the provision of information around government programs : where does explanation about a program to the public end and marketing of that program begin?
- What is the role of public relations units in departments compared with that of the media advisers in a minister's office?
- What responsibilities do public servants have when it comes to their attention that the public has received incorrect information? Is it enough to ensure that the ministerial office has the correct facts; or should attempts be made to ensure the Minister directly gets those facts? Is it the

responsibility of public servants to simply ensure that the public is not misled; or should they be active in ensuring that the public has accurate information?

- More broadly, how "responsive" should public servants be when there is conflict with other values as stated in the *Public Service Act 1999*?

A further issue, little discussed in the relevant literature, is how ministerial advisers manage their relationships with each other. Maley indicated a situation in which ministerial advisers, distrustful of officials around an interdepartmental committee (IDC) table, got together and agreed to inform an IDC of what the ministerial advisers thought should be the policy – with quite an effect.[13]

Related to this issue is an experience I once had, when a line agency disagreed with our position in PM&C : a senior official there took the matter through the ministerial route from their minister's office to the office of the Prime Minister. In this way the relationship of the two departments was put under stress, even if only temporarily. More importantly, so was the relationship between the Prime Minister's Office (PMO) and his department. Though the PMO might have appeared to not be interested in the issues that PM&C was dealing with at the time, once the issue was brought to the attention of the PMO, they were not pleased at not knowing what the two departments had been in dispute about. The lesson here, of course, is of "no-surprises" : ensure the Minister's office knows what you are doing and the outcomes you expect. Similar experiences are not uncommon : this is another example of the complexity in the web of relationships in which ministerial advisers and public servants can find themselves.

Another experience from which I learnt a lot arose from the publication of an article in the *Australian Financial Review* in 1996, where the journalist claimed that senior officials in PM&C regarded the advisers in the PMO as rather "amateurish". This claim sparked fury, as would be entirely expected, from within the PMO, from the Prime Minister himself. The article came some months after the election of the Howard government, and after an intensive effort on the part of senior PM&C officials to build up good relationships with the PMO. This included encouraging the PMO to have weekly meetings with senior PM&C officers so as to break down any barriers that appeared to have been there as a result of the new government inheriting a team that had served the past government well. A setback, such as that article, can take you back to the beginning, if not further.

More recently, without ministerial advisers being called to parliamentary committees, public servants have been placed "in the front line", which must breed in them increased fear for their futures. As John Nethercote has observed,[14] we have moved a long way from the position where ministers answered for the actions of officials (as well as advisers), to the position today where public servants are in the front line defending ministers and their staff. This, he says, leads to concern for the current vulnerability of the public service.

Next steps?

Any next steps obviously need to achieve clarification of the roles and responsibilities of players – just as we now expect of directors of boards and their CEOs, for example. There is a need to both address the "accountability free zone" around ministerial advisers and examine ways of protecting the objectivity of public servants.
The UK is worth examining for what it has done and for what it is likely to come up with in the future.[15] The UK has a code of conduct for ministerial advisers as well as a complaints structure. The Committee on Standards in Public Life (chaired by Sir Nigel Wicks) is currently reviewing the role of ministerial advisers and considering how the existing code should be revised. One part of this code includes the obligation of ministerial staff to respect the integrity of the political neutrality and professionalism of civil servants.

It is time for new institutional arrangements to match current circumstances. We have a new *Public Service Act 1999*, but the *Members of Parliament (Staff) Act 1984* needs updating.

Two main approaches need to be taken : there is a need to set boundaries around what ministerial advisers do and on their behaviour (as public servants have had done for them in the Public Service Act), and also a need to clarify for public servants what is expected of them in their relationship with ministerial offices, so they can give frank, honest, comprehensive, accurate, and timely advice.

A code of conduct for ministerial advisers could be similar to the one that applies to public servants through the Public Service Act, even if framed differently. Richard Wilson, Cabinet Secretary in the UK has made the interesting suggestion that what should be stated in a code is not what ministerial advisers can do but what they cannot do.[16] I like this approach because it gives maximum flexibility for the Minister to use the adviser as he or she wishes, as well as permitting a statement about which accountabilities matter. A critical issue here would be the limits that are placed on advisers in their "power to direct" public servants, but other issues will emerge, such as whether all briefs from a department should be sent directly to ministers without being screened by their advisers.

Importantly, the code of conduct would need to cover the relationship that Ministerial Advisers have with Ministers, who frequently want advisers to act for them and to make decisions on their behalf. And, of course, it should cover how Parliament calls advisers to account for any executive authority they exercise. There are some tricky issues to be resolved here in the relationship with departments : for instance, whether or not the law should state that advisers cannot direct public servants

In the light of recent events, the "operationalisation" of the APS code of conduct and values is urgent. Hopefully more guidance will be provided, not just on how public servants relate to ministerial offices, but also on appropriate record keeping practices and on when and how to be involved with the media.

The use of codes of conduct, while helpful in setting the right tone, is not enough – Ministers and their heads of agencies need, as a matter of course, to agree on how the relationship between the department and office is going to work and to regularly review that relationship. I found helpful the involvement of ministerial staffers, if not ministers themselves, in the strategic planning process around what were to be the priority policy areas of work over the next year, always acknowledging, of course, that priority areas may need to be revisited shortly afterwards.

Conclusion

My own experience is that the building-up and maintaining of good relationships with ministerial advisers and the gaining of on-going trust can be extremely time consuming and hard, but that it is essential for good results. Sometimes public servants have to deal with stupid advisers and sometimes with bright ones. In both cases, some weird ideas can emerge and take hold, and this can be frightening for public servants to contemplate. Similarly, ministerial advisers sometimes have to deal with rigid, if not arrogant, public servants, who have their pet agendas that they try to make relevant to the minister's agenda. Without a trusting relationship, both the frank and fearless advice that public servants should be giving, and the confidential explanations from ministerial advisers as to their reasons for accepting or rejecting that advice, may not be forthcoming.

Our contemplation of the impact that the lack of accountability of ministerial staffers can have and the consequent potential danger of a more political public service (as highlighted by the recent Certain Maritime Incident), will hopefully lead on to some corrective action in the near future. All organisational relationships need clarity on expectations of roles and responsibilities if successful performance or desired outcomes are to be achieved. Governments today are making moves to ensure that private sector decision-making bodies are more accountable to their shareholders and stakeholders than they once were. Similar moves are also required to ensure that those exercising executive authority within government are called to account.

Endnotes

1 The inquiry by a Senate Committee into the children overboard affair.

2 *Accountability of Ministerial Staff?* Parliamentary Library, Research paper no 19, 2001-2.

3 "Conceptualising Advisers Policy Work : the distinctive policy roles of ministerial advisers in the Keating Government, 1991-96" in (2000) 35 *Australian Journal of Political Science* 449.

4 Royal Commission on Australian Government Administration 1976 (the Coombes Report).

5 Denis Ives, "Special Advisers for Ministers in the UK: an update" (2002) 104 CBPA 63.

6 Holland, above n 2.

7 Maley, above n 3.

8 The following extracts are pertinent:

"There is an inner circle of advisers who are very powerful. ... You had a small group of advisers, who tended to be the coordinating departments of PM&C, Finance and Treasury, and they were close to each other and it was hard to get things past them if they didn't agree."
(A Minister, on mobilising, p461)

"It's an important part of an adviser's role – 'driving the bureaucracy'. ... To be able to drive the department you have to be very clear as to what you want and where you can push it. So I would make a list of people in the department and I would ensure I rang them regularly and asked them where are you up to, how's it going, when will it be ready and so on. ... If I want to force the pace I might say we will meet with the minister on X date to review where we are up to. There's nothing like a meeting with the minister to get bureaucrats working."
(A Ministerial Adviser, on mobilising, p462)

"A lot of things can be resolved ... between advisers in ministers' offices. I mean if departments can reach agreement, and advisers can reach agreement, it is frequently not necessary to actually engage the ministers, except in ratification of the final outcome."
(A Public Servant, on bargaining on behalf of ministers, p463)

"It's usually not a visionary or a vital package that comes out of an IDC. So by setting up this group of advisers that would run parallel to the IDC, I wanted to try ... to get the ministerial advisers' discussions to influence the IDC so that stronger positions would then be taken in the package. So on the things that we got agreement on in our meetings then messages were sent back to the departments that this is what the advisers wanted in the package. And ... the things we didn't get agreement on, well, nothing was done about those."
(A Ministerial Adviser, on bargaining on behalf of ministers, p464).

9 Holland, above n 2.

10 *Public Sector Informant*, Canberra Times, June 2002 : 14

11 Statement made 18 April 2002 to inquiry of Senate Committee into a Certain Maritime Incident.

12 See also Uhr, above n 10.

13 Maley, above n 3.

14 *Sydney Morning Herald* : 27 June, 2002.

15 See further Ives, above n 5.

16 "Portrait of a profession revisited, 26 March 2002: 9 (http://www.cabinet-office.gov.uk/2002/senior/speech.htm.

COMMENTARY ON MEREDITH EDWARDS PAPER

*David Williams**

One of the interesting sides of what's happening with the performance of ministerial advisers in recent times has come to light through the children overboard committee – the Senate Committee on a Certain Maritime Incident. I have been involved in that committee's inquiry but this has been a longer term issue for us in Parliament House, and what I am about to talk about today comes from my views of involvement in that process. I want to make it clear that I am talking about my views and my involvement over some significant period of time within Parliament House and within both Minister's offices and Shadow Minister's offices rather than any of the views that my Shadow Minister may hold.

One of the issues that Meredith raised was a series of questions about current confusions and where confusions about roles and responsibilities and accountability may have arisen in recent times. I do not want to get into commenting on specific things that have come up during the Howard Government's time, but I want to talk more generally and with reference to a longer period of time.

Meredith asked the rhetorical question "If a ministerial staffer decides not to tell or show a minister something, then is the staffer accountable for that decision?" Now that was a very relevant question during one of the travel rorts incidents in the early time of the Howard Government, and in fact the Prime Minister's chief of staff was held accountable for not having shown the relevant material to the Prime Minister at the time. Graham Morris tendered his resignation. During the early days of the current government staffers were held accountable for not telling or showing a minister something. We have probably had some more recent examples where the same issues have arisen of a staffer not telling or showing a minister something and there being little accountability flowing from that decision. Certainly there has been relevance in the Certain Maritime Incident inquiry for what is or is not told to a minister or Prime Minister. Something that the Americans call "deniability" may well have been operating here where ministers do not wish to be told something, or where the staff know that they do not wish to be told something, or they are safer not being told something so that they can deny it afterwards. There is a valid question about whether that was operating during the election campaign in relation to the children overboard incident.

Meredith also asked the question "Have we reached a position where an adviser can be accountable for a minister's actions or inactions rather than the traditional approach of the minister assuming accountability, including for the activities of the adviser?" Correctly, Meredith indicates that the spot for doing that may well be the *Members of Parliament (Staff) Act 1984* (MOPS Act), which currently defines the terms and conditions of engagement of ministerial staff, but does not go to their roles and responsibilities. That is left completely in the discretion of the minister or parliamentary office-holder. There are valid questions, now, about whether that should continue to be the case – whether it should be completely discretionary on the politician involved or whether there are some guidelines, some

* *Chief of Staff of Senator John Faulkner.*

parameters, which ought to be put in place, and the correct place for that may well be the MOPS Act. It is not something that has been addressed in the past, whenever governments and oppositions in parliament have addressed issues through the MOPS Act.

Meredith also posed some more rhetorical questions - what happens if an adviser asks a public servant for information that may take time to collect, or asks for a paper as background which the staffer claims is needed by the minister, or gives instructions – in effect directs - that work be done and claims to speak for the minister in wanting that work done. Some recent examples may actually be of ministerial staffers going one step further and making decisions and directing a department to implement those decisions.

Now, again, the information that has come out through the children overboard committee is relevant to that. It appears that staffers did not even put a cover of "the minister wants X to be done" or "the minister wants X approach to be taken here", but said "this is what should happen – go and do it – go and make it happen". Where caretaker conventions are relevant – that is during an election campaign – that becomes even more sensitive, and obviously even more political. That is really where the line is crossed of going into executive action. The issue of ministerial staff taking executive action is becoming more concerning and more relevant. Certainly as we have delved into what happened behind the children overboard incident, that taking of executive action was clearly an issue for us, the Parliament, considering that issue. We do not, of course, know whether that line – that differentiation – was relevant to the ministerial staff who were involved in making those decisions because those staff have not had an opportunity nor necessity to make public statements, including before the parliamentary committee, even though they have been asked on a number of occasions to come along and do so. They have been given a number of opportunities but they have not so far taken up those opportunities.

Meredith also raised the issue of "What is the role of public relations units in departments compared with that of the media advisers in the minister's office?" Again, this has been a very relevant issue during the work of the children overboard committee. We have heard, though it took quite a bit of teasing out, the direction that was given by the minister's office to a substantial public relations unit in the Department of Defence about the way the public relations activities should occur in relation to the border protection operation that the Navy was involved in. We have also heard that the Prime Minister's office was involved in giving directions – in a very overt way – that the Prime Minister's office was not interested in having images taken or portrayed by the Navy that were in any way sympathetic to the asylum seekers on board the leaky fishing boats. The Minister for Defence's office was very active in ensuring that the public relations unit put that policy in place, and implemented that policy down to removing public relations officers off ships where that was appropriate. It is a very unusual situation and I am sure that sort of direction is unprecedented.

Meredith also correctly identified the importance of the relationships between a minister and agency head, a minister and other people in the department, and a minister's staff and other people in the department. There was certainly a widespread feeling amongst the Howard government when they came to power in 1996 that there was some politicisation of the public service, or sympathy of the public service for the previous government. Therefore an element of distrust existed in those relationships. That was reflected in the way that the Howard government dealt with the public service for a significant period of time.

They were not the first government to be distrustful of public servants on coming to government. The Whitlam Government was also very much of that mould in 1972, although they had had 23 years in Opposition in order to feel paranoid about the public service at the time. That distrust from the Howard government we saw as continuing for a significant period of time, and it was certainly reflected in the way minister's offices were set up and operated and may continue to do so until today. Ian Holland's paper referred to by Meredith does

reflect the cut in ministerial office numbers that occurred in 1996. There was a cut in advisers and the position of ministerial consultant was done away with, so that the total number of ministerial staff dropped dramatically at that time. Since then, they have built up again until the total number of ministerial advisers now exceeds the number of advisers and consultants that were in place during the Keating Government's period in office. Without that differentiation between advisers and ministerial consultants, I think it is fair to see a blurring of the role of the current ministerial advisers – they are undertaking the roles of both ministerial advisers as they were in the Hawke and Keating Governments, and also of the ministerial consultants that were on board at the time. We might see those roles as being both technical professional roles that the Hawke and Keating Governments had consultants on board for, and the more overtly political process oriented advisers roles. That distinction has now been blurred significantly in my view. Ministerial staff now approach both of those roles more or less successfully, but I think there has been a significant blurring and confusion of those roles and responsibilities, and it leads to certain ramifications when the issue of accountability is considered. For instance, ministerial consultants were often more accountable than advisers because they were on contract for a specific period of time for a specific task and so could be held responsible against the output for those tasks and responsibilities. That is certainly not the case now with federal ministers' staff.

A couple of points I wanted to finish up on. The children overboard committee has undertaken a roundtable on some of the public administration issues that have been arising during the work of the Committee. We all found it extremely useful to have an academic input into the issues of accountability that were arising. It was clear to everyone involved that the accountability mechanisms that were in place where Parliament holds ministers accountable, did not cover some of the issues that were arising in the Committee's work – particularly in regard to ministerial staff. The members of the Committee had dealt with this in a number of different ways – including asking for particular people to come along on a number of different occasions. It has been relevant to consider the subpoena powers of parliamentary committees and how much those are useful in ensuring accountability.

The Committee decided to appoint an independent assessor to assess the evidence in relation to a number of the people who have been invited to come along and have declined those invitations, particularly those who have declined on the direction of the Cabinet. The Committee is put in a difficult position where it could enforce subpoenas against particular public servants or former public servants or former ministerial staffers or former ministers, but where the people concerned are acting under the direction of Cabinet or individual ministers not to appear before the Committee. It would be an untenable situation to threaten public servants, for instance, with gaol where they are simply complying with the directions of their minister. The independent assessor will be assessing the evidence in relation to those people and advising the Committee. Essentially this will serve to identify where the real power lies in ensuring any form of accountability, and demonstrate the relevance of political pressure. If the evidence is assessed on a legal basis by an independent person, it will enable the identification of the political influences on any subsequent decision. Another issue relating to ministerial staffers is that, if there are likely to be adverse findings made by a committee in relation to them, they have a matter they must face – whether they exercise any natural justice rights that they might feel the have. So the issue gets turned around to them. The Committee has invited them to come along, and they must decide whether they have a position that they need to protect. The natural justice rights of these people are just as important as for the rest of the Australian society. If a parliamentary committee is likely to make findings, recommendations or comment that might be adverse to them, how much should they exercise their right to comment on the committee's work and the committee's findings?

The other statement that was made at the time that the independent assessor was appointed by the Committee, was made by the Opposition members of the Committee and in

relation to a way of taking these issues of accountability of ministerial staff one step further. When the Parliament sits again, the Senate will be asked to decide on a reference to a committee (the most appropriate being the Finance and Public Administration References Committee) in relation to the broad issues of accountability of ministerial staff - their appearance before parliamentary committees, the scope of the MOPS Act, the broadest definition of their roles, responsibilities and functions. The reference may also touch directly on issues of executive action by ministerial staffers. So there will be a way for the Parliament to take the issue one step further.

It was clear to the children overboard committee when we held the roundtable that there were important issues to be dealt with here which the committee was not in a position to do properly. So the opposition members of the committee made a public statement about wanting to put a reference to a parliamentary committee. I think that it would be important for everyone who had views about these issues to consider how best to put information before that parliamentary committee, because it is the way of taking this one step forward. The MOPS Act may well be the appropriate way to deal with the issues in legislation, but a parliamentary committee may be the best way to get the best result in terms of increasing the accountability and transparency of the actions of ministerial staffers.

PRIVATIVE CLAUSES—LATEST DEVELOPMENTS

*David Bennett AO QC**

Paper presented at an AIAL seminar in Canberra, on 27 August 2002

Outline

On 15 August 2002 the Full Court of the Federal Court (Black CJ, Beaumont, Wilcox, French and von Doussa JJ) handed down its decision in five appeals heard together on 3-4 June 2002.[1] I will call these appeals collectively "the *Privative Clause cases"*. The appeals concerned the rights of visa applicants and visa holders under the *Migration Act 1958* (Cth). Each of the five judges delivered his own set of reasons for his decision. The complete judgement of the Court therefore in effect comprises some 25 sets of reasons for decision (more strictly, 22, since in three of the cases the Chief Justice simply agreed with von Doussa J). The Austlii computer print-out of the case runs to 204 pages, and 676 paragraphs. Central to each case, however, is the privative clause contained in section 474 of the *Migration Act*.

I will begin with some general comments on what a privative clause is, and how it works. I will then move on to a brief account of the history of privative clauses in the jurisprudence of the High Court, and then make some remarks on the various qualifications on how a privative clause operates. With that, I shall then be in a position to offer some more detailed comments on the significance of the recent *Privative Clause cases*.

1. Introduction

In order to understand the rationale of privative clauses, it is necessary to take a step back to the concept of judicial review. There is a well-developed principle of the common law that the courts can use prerogative writs to control excesses of jurisdiction by inferior tribunals and, in certain cases, bodies with obligations to act judicially. This extends to refusals to exercise jurisdiction. It also has developed to matters not always classified as jurisdictional such as denial of natural justice (or absence of procedural fairness as it is now often called), asking the wrong question, taking into account irrelevant considerations, failing to take into account relevant considerations, and error of law on the face of the record.

In England (subject now to some EU considerations), all this can be altered by legislation. In Australia where we have a Parliament with limited powers and a written Constitution, it is not so easy. Section 75(v) of the Constitution confers original jurisdiction on the High Court in all matters in which certain prerogative writs are sought against officers of the Commonwealth. That jurisdiction cannot be taken away but its content can be altered.

Let me illustrate with an extreme example. The Federal Court has no power to grant a divorce. The High Court could issue a writ of Prohibition if it were to try. Parliament could not legislate to prevent the High Court from doing so. However, Parliament could confer

* *Solicitor-General of Australia.*

jurisdiction on the Federal Court to grant divorces. Prohibition would then not lie because the court would be acting within jurisdiction.

The next question is one of construction. Suppose Parliament enacts "Prohibition shall not lie to prevent the Federal Court granting divorces". Which side of the line does this fall on. The answer lies in the *Hickman* doctrine.

The High Court decided *R v Hickman, ex parte Fox and Clinton*[2] in 1945. The National Security (Coal Mining Industry Employment) Regulations conferred jurisdiction on Local Reference Boards to settle disputes between employers and employees "in the coal mining industry". Mr and Mrs Fox were haulage contractors who sometimes carried coal. They sought prohibition in the High Court to prevent a Local Reference Board hearing a dispute involving them. They were successful notwithstanding a clause in the regulations providing that a decision of a Board:

> shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court on any account whatsoever.

The decision was unanimous but Dixon J set out some principles in his judgment which have become enshrined in our jurisprudence and which have been described by the High Court as "classical".[3] The statement (at pages 614-5) is as follows:

> The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg.17 is well established. They are not interpreted as meaning to set at large courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority, provided always that the decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

So that is the answer to the question about the validity of a provision that prohibition shall not lie to prevent the Federal Court granting divorces. We read it as meaning not what it says but as saying that "the jurisdiction of the Federal Court is extended to permit it to grant divorces". In his submissions in the recent *Privative Clause cases*, Bret Walker SC submitted that this meant that a *Hickman* clause not only was read as not meaning what it said but also prevented another provision (the provision describing the jurisdiction of the court) meaning what it said.[4]

That is to say, a *Hickman* clause has the effect--subject to the three qualifications stated by Dixon J--of supplementing the jurisdiction of the court or the power of a decision maker. As Black CJ put it in his reasons for decision in the *Privative Clause cases*, the "implicit effect" of a *Hickman* clause is that, "where certain provisos are met, the area of valid decision-making is expanded".[5]

That indeed was the legislative intention when a *Hickman* clause was inserted into the *Migration Act*. The Minister said in his second reading speech:

> Members may be aware that the effect of a privative clause such as that used in *Hickman's* case is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.[6]

In the result, the privative clause in the Migration Act represents the highest example of co-operation between the courts and the Legislature. A line is to be drawn as to what words have a particular effect. The courts have told the Legislature that certain words will be construed as falling on a particular side of the line and the Legislature has taken the hint and used those precise words. There are strong reasons why the courts should not change their minds.

2. The subsequent history of *Hickman* clauses in the High Court

Dixon J's analysis seems to pass over .the literal words of the *Hickman* clause, which are quite emphatic: "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". This was the result of what academic commentators have described as a "High Court compromise".[7] The compromise, which quieted somewhat an argument that had existed since the early years of the Federation, was between the power of the Parliament to take steps to ensure the decisions of government officials are final on the one hand, and ability of the courts to control the exercise of executive power on the other. The effect of Dixon J's exposition in *Hickman*'s case is to acknowledge the ability of the legislature to ensure a degree of finality in decision making; but also to assert that the courts retain a measure, albeit a lesser measure, of control over certain types of error in decision making.

In the years following *Hickman's* case Dixon J repeated and re-affirmed his analysis in a number of High Court cases dealing with World War II national security regulations[8], and industrial legislation.[9] At first, the cases do not show the other members of the Court fully embracing his analysis (although they by no means show the other members of the Court rejecting it either). Aronson and Dyer suspect that in the years following *Hickman's* case Dixon J's analysis may have "commanded no more than lip service".[10] If this is so, Dixon J's lips must have moved authoritatively enough, for in time his doctrine came to be affirmed by other members of the Court[11] and indeed by 1960 Menzies J was able, as I have already said, to describe it as "classical".[12]

Even so, it is true that for fully three decades after *Hickman's* case, the scope and effect of Dixon J's analysis--and in particular the three limits he placed on the legislature's power to supplement the powers of decision makers--was relatively little explored. Sir Anthony Mason has observed that:

> The scope and content of the three provisos in the *Hickman* principle have not been examined in any detail in subsequent decisions of this Court.[13]

The *Hickman* doctrine began its re-ascent to prominence in the early 1980s. Since then, several High Court cases have reaffirmed the ability of the legislature, by means of a *Hickman* clause, to "stretch the jurisdiction which would otherwise be conferred" on a decision maker.[14]

3. The three express exceptions

What is the extent of this stretching of jurisdiction or power?

We must begin with a caveat: as we shall see, giving an exact answer to this question in any particular case always resolves down to a matter of statutory construction having regard to the relevant legislation. A *Hickman* clause should not be construed in the abstract. The clause must be considered in the context of the statute that surrounds it. It must be ascertained how the clause interacts with the other provisions in the statute.

That said, some general propositions can be stated as to the expansionary effect on jurisdiction of a *Hickman* clause. Subsequent cases which have had to interpret privative clauses, including the recent *Privative Clause cases*, involved clauses "in substantially the same terms" as the clause used in *Hickman's* case.[15] So there is a deal of case law that sets out the basic position.

Most important, and despite the apparently emphatic nature of the words used, a *Hickman* clause does not make an administrative decision utterly impervious to judicial review. A *Hickman* clause does not, to use Dixon J's words, "set at large" decision-makers and empower them to do absolutely anything they please. In a case not long after *Hickman*, in which Dixon J reaffirmed his earlier analysis, he said that a privative clause cannot be construed as intending to provide that a decision-maker's powers are "absolutely unlimited".[16] The legal effect of the *Hickman* clause is to expand the powers of decision-makers, or the jurisdiction of courts and tribunals, not to make them legally omnipotent.

There is an obvious reason for this. A decision-maker that is "set at large" could, in an extreme case, be empowered to subvert the very legislation that he or she is supposed to administer. Take a hypothetical dog-licensing act. It empowers dog-inspectors to fine dog-owners who do not have dog licences. It is no part of the purpose of this statute to allow dog-inspectors to fine cat-owners. But suppose our hypothetical statute contained a provision that made the actions of dog-inspectors completely impervious to every kind of legal challenge. The dog-inspectors could, even though under no misunderstanding about the difference between cats and dogs, perversely seek out cat-owners and fine them. Or the dog-inspectors might exempt their own families without good reason. More extremely, one might purport to grant a divorce. Such behaviour would tend to subvert the very purpose of the legislation the dog-inspectors are charged with administering.

The problem is solved by the three "exceptions" to the operation of a *Hickman* clause stated by Dixon J in his "classical" formulation.

In the first place, there must be a bona fide exercise of power: decision-makers must act in good faith and so conscientiously apply themselves to the questions before them. The *Hickman* clause has expanded the power of decision-makers, but not to the extent that they may behave dishonestly, or out of malice.[17] The presence of a standard-type *Hickman* clause will not give our hypothetical dog-inspector the power to issue fines merely out of spite. It has been suggested that "bona fides" includes more than merely the absence of dishonesty, spite or malice. One judge has recently suggested that bias might mean the absence of a bona fide exercise of power[18]; another has suggested that being motivated by an improper purpose might mean the absence of bona fides.[19] However, the content of the concept of good faith has not yet been fully explored.[20] In 1863, Lord Justice Turner of the English Court of Chancery could find no lack of bona fides in a local authority's decision to erect a urinal adjacent to the wall of Buckingham Palace. However, he doubted that the authority would be able to "erect a urinal in front of any gentleman's house". "It would be impossible", his Lordship said, "to hold that to be a bona fide exercise of the powers given by statute."[21] The law of bona fides has not advanced sufficiently since then to enable us to pronounce, with certainty, that he was wrong but we may at least have our doubts. What we do know, at minimum, is that an allegation of lack of good faith is a qualitatively different thing from a complaint of mere poor decision making.[22] Heerey J has said, and Beaumont J in the *Privative Clause cases* has agreed with him, that a charge of lack of bona fides involved "a serious question involving personal fault on the part of the decision maker". There is High Court authority, in the *Hickman* context, for the proposition the true test is whether there has been "an honest attempt to deal with the subject matter confided" to the decision maker.[23]

In the second place, a *Hickman* clause will only protect a decision if, to use Dixon J's words, "it relates to the subject matter of the legislation". Dixon J's third qualification is like it[24]: the decision must be "reasonably capable of reference to the power given to the body". There may be a difference between these two exceptions but, if there is, it is too subtle for me to detect it. The best one can say is that one relates to the statute as a whole and one to the provisions conferring jurisdiction. They mean that it is enough that the decision, on its face, does not exceed the authority of the decision maker.[25] That is a less demanding test than whether there was a "jurisdictional error" of the kind discussed by the House of Lords in *Anisminic*[26] and by the High Court in *Craig v South Australia.*[27] That class now seems wide enough to include all of the staple kinds of errors of law known to administrative law: misconstruing a statute and thereby asking the wrong question, failing to afford procedural fairness, taking into account irrelevant considerations, failing to take into account relevant considerations, and so on. Errors such as this will generally not be sufficient to fall within the second or third of Dixon J's qualifications. There must be an error of a much grosser kind. Indeed, if *Anisminic*-type errors were incapable of validation by a privative clause, then the privative clause would be drained of effect. And indeed, an argument in the *Privative Clause cases* to the effect that all "jurisdictional errors" of the *Anisminic* kind were beyond curing by a *Hickman* clause was squarely rejected.[28] The classic example of the second and third exceptions is *Hickman* itself where lorry owners who occasionally carried coal were held not to be subject to a body having jurisdiction in relation to the coal industry. Our dog-inspector who fines the cat-owner or grants a divorce would fall into the same category.

To summarise the original exceptions, a *Hickman* clause is not a shield that protects a decision maker who acts in bad faith, or makes a decision completely unrelated to matter at hand, or whose decision cannot on any view be related back to the power the decision-maker has been called upon to exercise. But the clause does remove the limitations on decision-making power otherwise imposed by many, if not all, of the other kinds of "jurisdictional errors", in the broad sense of the term, known to administrative law.

4. The possible fourth exception

So much for the three (or two) qualifications on the jurisdiction-expanding effect of a *Hickman* clause that are expressly mentioned in Dixon J's seminal exposition. Some have said, however, that in certain circumstances there may be a fourth (or third) qualification. An argument in support of this view might go like this. Every statute deals with a more or less confined topic.[29] Statutes that confer power on decision-makers empower them to act in certain circumstances. It may be that the provisions of a statute are such that for a decision maker to act in a certain way may undermine the statute. Let me again use an extreme hypothetical example to make the argument clear. Suppose our Dog Licensing Act provides that the inspector must not issue a dog licence where the owner already holds three dog licences. If the *Hickman* clause means that the inspector can do so, the statute may be at risk of becoming self-contradictory. It could be argued that this is a basic reason why a *Hickman* clause cannot be given literal effect. As Dixon J himself said in *Hickman's* case:

> In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them.[30]

The contrary argument is that the competing provision is read as merely indicating what the decision maker must attempt in good faith to do rather than creating a jurisdictional pre-requisite. Thus it has been said of particular statutes that they can impose "imperative duties or inviolable limitations or restraints" on a decision maker above and beyond Dixon J's three.[31] Whether a statute does in fact do so will always depend on the statute in question. If there truly is a "fourth exception", the wording of each particular statute will govern the

degree to which the express words of a *Hickman* clause must be adjusted so as to prevent the statute from falling into self-contradiction.[32]

Thus, in the end, it a matter of statutory construction. "The apparent inconsistency should be resolved by an attempt to arrive at the true intention of the legislative document containing the two provisions considered as a whole".[33] This is indeed what Black CJ accepted in the *NAAV* cases. He extracted from the "long line of High Court authority" the proposition that:

> Essentially what is involved is the reconciliation of apparently inconsistent statutory provisions.[34]

For this reason, the so-called "fourth" exception to *Hickman* will not always operate. Indeed, the general position may be that, by inserting a *Hickman* clause into legislation, Parliament is indicating that decisions of the relevant kind should be treated as invalid if, and only if, one of the three *Hickman* conditions is not met. The use of a *Hickman* clause would seem to evince a legislative intention that the only restraints that are to be placed on a decision maker are the "classical" three enunciated by Dixon J, and that there are no other "inviolable limitations". (This is one of the submissions that the Minister for Immigration and Multicultural and Indigenous Affairs took in relation to the *Migration Act* in the *Privative Clause cases*.)

5. The recent Federal Court decisions (ie the five *Privative Clause cases*)

With that I turn to the detail of the decisions of the Full Court of the Federal Court, in the recent five *Privative Clause cases.*

NAAV of 2002

The first case is *NAAV of 2002*. The appellant was an applicant for a visa whose application had been refused. The Refugee Review Tribunal had affirmed that refusal. The appellant argued before the Federal Court that he had not been accorded procedural fairness before the Tribunal. This was thus the most significant of the five cases. It required the court to decide whether the privative clause precluded prerogative relief for the denial of natural justice.

The appellant had claimed that he had been held in a prison in Burma; but that, as he had been hooded for a deal of that time, he was unable to remember details about the prison. The Tribunal read first hand reports of conditions in the prison in question, including by Amnesty International. The Tribunal in its reasons, said:

> I can find no reference to prisoners being hooded whilst being interrogated over the time as the applicant claims he was. Indeed, given the nature of the regime operating in Burma, it is difficult to understand the purpose of hooding prisoners like the applicant. The applicant's lack of knowledge about the prison, inconsistent information and his lack of information in relation to matters of prison life confirmed my view that he was not arrested and then detained in Insein prison as he claimed.[35]

The appellant also gave an account of travelling by boat from one part of Burma into Bangladesh, saying that the journey took 15 hours. The Tribunal consulted the Microsoft Incarta Interactive World Atlas 2000 and found that the distance of the journey was so great as to make it "implausible that the journey took just 15 hours". The Tribunal also noted some other geographical difficulties with the applicant's account.[36]

Finally, the appellant gave an account of a 100 metre long bridge being destroyed by fire. When questioned about the incident, the appellant said that the bridge was not a long one. The Tribunal said:

> From my own military experience, the applicant's account of the bridge being small at 100 metres long and being destroyed by fire is a nonsense.

The sources of information relied upon by the Tribunal--the prison accounts, the atlas and the Tribunal's own experience--were not disclosed by the Tribunal to the appellant in advance of its decision. This was despite the fact that during the hearing, the Tribunal made some comments to the effect that it would not be considering undisclosed independent information,[37] although Gyles J held that this was effectively neutralised by some subsequent comments by the Tribunal. The result was said to be that the appellant was not given an opportunity to address the Tribunal's concerns on these points. The appellant therefore argued that the Tribunal had not afforded him procedural fairness, and its decision was therefore invalid.

By a 3-2 majority, the court rejected this argument. Von Doussa J, with whom Black CJ agreed on this point, accepted that natural justice requirements of procedural fairness had indeed not been met in the appellant's case. However, in His Honour's opinion, the rules of procedural fairness had been excluded by section 474.[38] Beaumont J did not decide whether there had been a breach of the common law rules of procedural fairness. To do so was unnecessary, he said, because section 474 operated to prevent the Court from granting prerogative relief in cases of procedural deficiencies.[39]

Wilcox and French JJ dissented.

Wilcox J held that, as a matter of statutory construction, and notwithstanding the words of the *Hickman* clause, the words of the statute did not evince a clear legislative intention to exclude the rules of procedural fairness.[40] His Honour noted that there might be cases where the Tribunal could act on undisclosed information. However, given the Tribunal's earlier comments to the effect that it would not be considering undisclosed independent information, this was not one of them.[41] The Tribunal's decision was therefore invalid by reason of want of procedural fairness, notwithstanding section 474.

The other judge in dissent, French J, held that while section 474 created "a climate in the Act which is hostile to the general application of the common law procedural fairness"[42], the rules were not wholly excluded. There was in the appellant's case, he said, "a departure from the minimum standards of procedural fairness". In His Honour's opinion, "[t]he unfairness of what occurred is so clear and its impact on the outcome of the case so obvious that it may be said it was a breach which vitiated the exercise of the Tribunal's power".[43]

NABE of 2002

The second case involved a Sri Lankan national whose visa application had also been refused. He claimed that he had had some involvement with the Liberation Tigers of Tamil Eelam, an anti-government group. For this reason, he said, a pro-government group had detained him and mistreated him. He applied for a protection visa and was refused. The Refugee Review Tribunal affirmed the decision to refuse.

It appeared from the Tribunal's reasoning that it had misunderstood the applicant's story. The Tribunal thought that the applicant's claim was that he had been detained and mistreated by the authorities by reason of involvement with the pro-government group. Such a claim, of course, seems inherently implausible: why would the authorities mistreat someone who supported the government?

The applicant therefore claimed that the Tribunal, by misunderstanding and failing to genuinely and realistically consider his claims, had failed to exercise its jurisdiction. Moreover, he said that the Tribunal had acted on irrelevant considerations.

All five justices rejected this argument. The Tribunal's error, they said, was merely one of fact.[44] Moreover, at least two of the justices were of the opinion that even if this error was actually a "jurisdictional error" of the *Anisminic* type (as opposed to a mere error of fact), section 474 would have validated the decision in any event.[45] Each of the other three justices were either ambiguous on this point or did not express a view.[46]

Ratumaiwai

In the third case, *Ratumaiwai,* an applicant for a visa claimed that the Tribunal had misinterpreted the statutory criteria for the grant of a visa. The applicant claimed to be, in the words of the statute, a "special need relative" of his brother, who was an Australian resident and who was suffering osteoarthritis of the knees. The relevant statutory criteria for being a "special need relative" included being "willing and able to provide substantial and continuing assistance" to the Australian resident. The applicant said that the nature of the "assistance" that he could provide to his brother was financial and emotional. The Tribunal held that this kind of "assistance" does not fall within the statutory criteria. The applicant argued that the Tribunal had erred in law by misconstruing the statutory criteria.

All five justices rejected this argument. Each of them had, at the least, some doubts that the Tribunal misconstrued the statutory criteria in a relevant way.[47] Three judges added that any misconstruction that would have amounted to a "jurisdictional error" was shielded from invalidity by section 474 in any event.[48]

Turcan

In the fourth case, *Turcan*, a delegate of the Minister took steps to cancel a visa after forming the view that the visa holder had given false information in support of his initial visa application.

There is a provision in the Act that allows the Minister to cancel a visa on the basis of incorrect information having been given by the visa holder.[49] However, the Minister's delegate did not rely on this ground. She relied on a different ground, namely that she was "satisfied" that the initial grant of the visa was "in contravention" of the *Migration Act*.[50] For technical reasons I shall not burden you with, it was held that she was wrong. As a matter of law the initial grant of the visa, though it may have been made on the basis of false information, was not in contravention of the *Migration Act*.

Thus the delegate's "satisfaction" that this particular ground for cancellation was available to her was based on a wrong interpretation of the statute. Mr Turcan argued that the delegate's decision was therefore invalid: she purported to exercise a power that was not relevantly available to her.

By a 3-2 majority, the Court found for Mr Turcan. The result turned on whether or not the *Migration Act*, and in particular section 474, operated so as to make final and conclusive the delegate's "satisfaction" that the relevant ground for cancellation existed -- even if her satisfaction was based on a misunderstanding of the statute.

Von Doussa and Beaumont JJ took the view that, by reason of section 474, the delegate's satisfaction was beyond challenge--even if tainted by error of law. Von Doussa J said:

> In the present case I consider … [the relevant provision of] the Act should be construed as extending authority and power to the Minister (or the Minister's delegate) to reach an unchallengeable state of satisfaction as to the matters therein specified, provided that the three *Hickman* provisos are all fulfilled.[51]

However, a majority of the Court disagreed. The majority held that, to be valid, the delegate's satisfaction needed to be untainted by a mistake of law. French J said:

> Where the Minister or delegate relies upon a ground for cancellation which does not apply because he or she mistakes the law, the requisite state of satisfaction does not exist. So the delegate may not be satisfied of the breach of a section wrongly construed.[52]

Thus (in the majority's view) in this context section 474 only operated to protect a decision to cancel a visa that was based on a correct interpretation of the availability of the statutory grounds for cancellation.

How is it possible that section 474 can protect some erroneous decisions and not others? It is a matter of statutory construction: in reconciling the literal words of section 474 with other statutory prescriptions in the Act, in some places section 474 may take precedence and in others it arguably does not. It will be a matter of interpretation as to which provisions must give way, and to what extent. In the opinion of the majority, the requirement that the Minister's delegate's "satisfaction" that the relevant ground of cancellation was legally available was more virile than section 474. Black CJ thought the requirement was such as to be an "inviolable limitation" upon the power to cancel a visa.[53] Without it, the power to cancel was simply not triggered.

In a sense, the reasoning in *Turcan* is reminiscent of the line of cases following the decision of the High Court in *R v Connell, ex parte The Hetton Bellbird Collieries Limited*[54] where it was suggested that, where a decision-maker's power was conditioned on his or her being satisfied of a fact, that satisfaction was a jurisdictional pre-requisite so that if there was an error of law in reaching that satisfaction, it could be corrected by a prerogative writ. This has not been universally accepted but if it is not merely accepted but actually applied as a *Hickman* exception, it will represent a serious hazard for the effectiveness of *Hickman* clauses. It is, with respect, difficult to see how this doctrine can rise to that level.

Wang

In the fifth and final case a delegate of the Minister purported to cancel the appellant's visa after forming the view that the appellant's initial visa application had been supported by "bogus" documentation. The appellant claimed that the Minister's delegate had failed to comply with a statutory requirement in section 129 of the Act the effect of which was to require the appellant to be given notification of which documents in particular (for the appellant has submitted a number of them) the Minister's delegate considered to be "bogus".

The court, again by the same 3-2 majority, upheld this argument. The reasons of the majority and minority were roughly the same as in *Turcan*.

The majority took the view that the statutory notification requirement in section 129 was so fundamental a precondition to the exercise of a power to cancel a visa that, notwithstanding section 474, its absence was fatal to the cancellation decision. According to Black CJ, it is "one of the very few procedural requirements in the Act that have to be satisfied before the decision-maker's power is attracted, and the expansive effect of s 474(1) is activated."[55] According to French J, "[t]he internal logic of the scheme points to notification under section 129 as one of its essential elements".[56] Wilcox J agreed with the description of the notification requirement as a "jurisdictional fact prescribed by the Act".[57]

To the minority, however, section 474 trumped the statutory notification requirement. Otherwise, the object of section 474 would be defeated.[58] A "blatant disregard" of the notification requirements might mean that a decision to cancel was not a bona fide exercise of power, and therefore beyond the protection of a *Hickman* clause.[59] But that was not suggested in this case.

Summary of cases

In summary, then, in two of the cases the position of the Minister was, broadly speaking, upheld by all five judges. In one case it was broadly upheld by a 3-2 majority. In the remaining two cases, the position of visa-holders were upheld by a 3-2 majority.

Analysing the result by reference to the judges, Beaumont and von Doussa JJ found for the Minister in all five matters. Black CJ found for the Minister in 3 of the matters, and against him in the other two. Wilcox and French JJ found for the Minister in two of the cases, and against him in the remaining three. The Chief Justice was therefore the "swinging judge" who made the difference in the cases decided by majority.

6. Significance of the reasoning in the Privative Clause cases

So much for the detail of the cases. At a more general level, what is their significance? There are three general areas I should briefly like to touch on.

In the first place, there is the effect of a *Hickman* clause on what I described earlier as "the staple kinds of errors known to administrative law"—for example the failure to accord procedural fairness. So far as the *Privative Clause cases* concerned claims of a failure to afford procedural fairness, a majority of the Court (Black CJ, Beaumont and von Doussa JJ) held that, to the extent that there had been a failure to afford common law rules procedural fairness in the cases before them, that had been cured by the *Hickman* clause.[60] On the other hand Wilcox J (in dissent on this point) held that, considering the provisions of the statute as a whole, there was no sufficiently clear legislative intention to exclude the obligation to provide procedural fairness in decisions affecting visa entitlements. There was, therefore, still an obligation to provide procedural fairness.[61] Somewhere in between these two positions was French J. He said that:

> Broadly speaking the interpretive force of s 474 may be taken to create a climate in the Act which is hostile to the general application of common law procedural fairness. It cannot be taken to have excluded it altogether in all cases. In some cases a want of procedural fairness will amount to a failure to exercise the relevant power for other reasons such as bad faith or failure to comply with an essential requirement of the statute. In some cases the power to be exercised by an official decision-maker may be so dramatic in its effect upon the life or liberty of an individual that, absent explicit exclusion, attribution of an implied legislative intent to exclude procedural fairness would offend common concepts of justice…[62]

Thus a majority of the Court held that, in the particular statutory context of the *Migration Act*, the effect of the *Hickman* clause was to expand the power of decision-makers by removing, or at the very least (according to French J) lessening, the limitations that would otherwise be imposed by the common law rules of procedural fairness. And indeed, there are tolerably clear indications that the thrust of the majority reasoning applies similarly to matters such as misunderstanding a fact, taking into account irrelevant considerations, and failing to take into account relevant considerations.

In the second place, there is the content of the requirement to act bona fide. I have already said that this is a relatively undeveloped area of law. It may be that there will be an

increasing tendency among litigants to try to fit alleged errors into the category of bad faith. Indeed, in one of the five *Privative Clause cases* a visa-holder argued that the errors of which he complained amounted to bad faith on the part of the decision maker. The nature of his complaints seemed to fit more comfortably into the categories of failure of procedural fairness or misconstruction of a statute. The High Court has not yet spoken authoritatively on how great the area of overlap is between bad faith and other categories of legal error in decision making. Only French J seemed to clearly countenance a potentially significant degree of overlap.[63] The opinions of the other justices in the *Privative Clause cases* is less clear. It is an issue which may arise in future cases. In any event, as I suggested earlier, the concept of bad faith may not be so elastic as some have suggested.

In the third place, there is the so-called fourth exception to the effect of *Hickman* clauses. Whether there are, in the *Migration Act*, "inviolable limitations" on the exercise of administrative power beyond the classical three expressed by Dixon J, and, if so, what they are generated a diversity of comment among their Honours.

Black CJ took the view that a statute could be such that it contained inviolable limitations that a *Hickman* clause could not relax. The test, in his view, was whether there were limitations on decision-making power that are essential to the structure of a statute:

> Constitutional considerations aside, the cases where "inviolable limitations" have been identified by the High Court can be seen, however, as cases in which, if the legislation were interpreted in a particular way, essential structural elements created by the legislation would be violated, or else some other quite fundamental aspect of the legislation would change its character in a way and to an extent that the Parliament could not be taken to have intended. [64]

Von Doussa J, with whom Black CJ and Beaumont J expressed general agreement, spoke of a "jurisdictional factor that attracts the jurisdiction" of the decision maker.[65] He cited the language of Dixon J to the effect that a decision-maker must not contravene a "final limitation upon the powers, duties and functions" of the decision maker.[66] However, von Doussa J added that, in the context of the *Migration Act*:

> the jurisdictional factors that will attract the authority and powers of decision makers in the sense described in a particular case will be few.

One such factor would be, he said, the making of a visa application. That is a very rudimentary requirement. It may therefore be that such "jurisdictional factors" are of such a basic kind as to be unlikely greatly to tax decision-makers.[67] Indeed, von Doussa J suggested that the so-called fourth condition may not be significantly different from one of the three classical limitations, namely that a decision must be reasonably capable of reference to the power given to the decision maker:

> Whether the "fourth condition" stands separately or is encompassed within the three *Hickman* provisos, the consequence of the condition is the same. [68]

The Chief Justice agreed that the inviolable limitations in the *Migration Act* were very few. He nonetheless differed from von Doussa J in holding that in two of the five cases, certain statutory requirements in the visa application process (one of them of a procedural kind) were of such importance as not to be relaxed by the *Hickman* clause.[69] In the upshot, Wilcox and French JJ reached similar conclusions, although their reasoning was not the same.[70] Thus an authoritative test, for determining whether or not a statute with a *Hickman* clause contains additional "inviolable limitations" on decision-making power awaits authoritative articulation (if such a test is possible). This may be a reason for rejecting the "fourth exception".

Conclusion

All in all, then, in many respects (and leaving aside the constitutional issues raised by the case, which I have not touched upon), the decisions in the *Privative Clause cases* represent an application of settled *Hickman* doctrine.[71] As Wilcox J put it, the use of the standard *Hickman* clause words in section 474 of the *Migration Act* "is code for an instruction to apply the line of authority stemming from *Hickman*".[72] To apply that line of authority is what all the members of the Court sought to do.

The resulting analysis by the various members of the Court was (with the possible exception of Wilcox J) very broadly in a similar, though by no means identical, direction. As I have said, cases involving *Hickman* clauses ultimately resolve down to issues of statutory interpretation a subject on which, par excellence, judges can disagree. So it is in this case. Notwithstanding a very broad agreement as to the general effect of a *Hickman* clause, there were some significant points of difference among their Honours.

Thus the recent *Privative Clause cases*, while resolving a number of important issues concerning *Hickman* clauses, and in particular section 474 of the *Migration Act*, have left some matters without (as yet) an authoritative resolution. That may be unavoidable given the somewhat painstaking and incremental work of statutory interpretation involved in *Hickman* clause cases. The fortieth chapter of Genesis has Joseph asking, rhetorically, "Do not interpretations belong to God?" It may be in any event, that for the rest of us it is slower and more prosaic work.

Endnotes

1 *NAAV v MIMIA*, *NABE v MIMIA*, *Ratumaiwai v MIMIA*, *Turcan v MIMIA* and *Wang v MIMIA* [2002] FCAFC 228.

2 (1945) 70 CLR 598.

3 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 455 (Menzies J)

4 See also *The Privative Clause cases*, [2002] FCAFC 228, [612] (von Doussa J).

5 *The Privative Clause cases* [2002] FCAFC 228, [21] (Black CJ), [633], [644] (von Doussa J); cf [354] (Wilcox J). Brennan J has said that a *Hickman* clause "expands the powers" conferred on a decision maker: *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 275; and see also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 194 (Brennan J): "expanded".

6 Quoted in *The Privative Clause cases* [2002] FCAFC 228, [8] (Black CJ), [397] (French J), [604] (von Doussa J).

7 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed) (2000), 689. In *The Privative Clause cases* [2002] FCAFC 228, [92]-[100], Beaumont J followed Wade and Forsyth in tracing the doctrine in *Hickman's* case back to the decision of the Privy Council in *The Colonial Bank of Australasia* (1874) LR 5 PC 417, see esp 542-543. Given the numerous comments as to the contrived nature of the "compromise", it is interesting to note Dixon J's claim in *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 that "[t]here is nothing artificial in such an interpretation" (ie his) of a *Hickman* clause.

8 *The King v The Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361, 369 (Latham CJ, Dixon J); *The King v Central Reference Board; Ex Parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123, 146 (Dixon J); *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398, 400 (Dixon J).

9 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 249 (Dixon J); *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119 (Dixon CJ, Williams, Webb, Fullagar JJ); *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 443, 446 (Dixon CJ).

[10] M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed) (2000), 689, 692.

[11] *The Queen v Kelly; Ex parte Berman* (1953) 89 CLR 608, 630-631 (Kitto J); *The Queen v The Members of the Central Sugar Cane Prices Board; Ex parte The Maryborough Sugar Factory Ltd* (1959) 101 CLR 246, 255 (Dixon CJ, Kitto and Windeyer JJ*); The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219, 252-253 (Kitto J); *North West County Council v Dunn* (1971) 126 CLR 247, 269 (Walsh J).

[12] *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 455 (Menzies J).

[13] *O'Toole v Charles David Proprietary Limited* (1991) 171 CLR 232, 249; and see *The Privative Clause cases* [2002] FCAFC 228, [297] (Wilcox J).

[14] *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 421 (Murphy J) and see also 418 (Mason ACJ, Brennan J); *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 251 (Mason CJ), 269, 275 (Brennan J), 286 (Deane, Gaudron, McHugh JJ); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179-180 (Mason CJ), 210-211 (Deane and Gaudron JJ),

[15] The authorities are collected by Black CJ in the *Privative Clause cases* [2002] 228, [7].

[16] *The King v Commonwealth Rent Controller; Ex Parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361, 369 (Latham CJ, Dixon J).

[17] See, most recently, *SBAP v Refugee Review Tribunal* [2002] FCA 590, [49] (Heerey J): "Good faith or what I think is the same thing, the absence of bad faith, is not a term of art. In the context of administrative decision-making bad faith is a serious matter involving personal fault on the part of the decision-maker going beyond the errors of fact or law which are inevitable in any such process…The ways in which bad faith can occur are infinite and no comprehensive definition is possible. Nevertheless it can be said that the presence or absence of honesty will often be crucial".

[18] *NAAX v MIMA* [2002] FCA 263 (Gyles J).

[19] *SBAP v Refugee Review Tribunal* [2002] FCA 590 (Heerey J); and see also HWR Wade and CF Forsyth *Administrative Law* (7th ed) (1994), 439-440, which perhaps gives too wide an interpretation of "bad faith". In Australia at least, a finding of absence of bona fides (at least in the *Hickman* context) "will be rare and extreme": *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron and McHugh JJ).

[20] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 249 (Mason CJ). See also *Smith v East Elloe Rural District Council* [1956] AC 737, 770 (Lord Somerville): "Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained in the region of hypothetical cases. It covers fraud or corruption".

[21] *Biddulph v The Vestry of St George, Hanover Square* (1863) 33 LJ Ch 411, 417.

[22] *NAAP v MIMA* [2002] FCA 805 (Hely J).

[23] *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398, 400 (Dixon J); and see *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 249-250 (Mason CJ).

[24] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron, McHugh JJ).

[25] *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 249 (Dixon J).

[26] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid).

[27] *Craig v South Australia* (1995) 184 CLR 163, 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).

[28] *The Privative Clause cases* [2002] FCAFC 228, [30] (Black CJ), [111]-[112] (Beaumont J), [636]-[638] (von Doussa J). See also Wilcox J at [374] and French J at [525]-[527].

[29] *The Privative Clause cases* [2002] FCAFC 228, [452] (French J).

[30] *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 597, 616 (Dixon J).

[31] *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 419 (Mason ACJ, Brennan J).

[32] "If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons, and in respect of all subject matters, and without observance of any conditions which the legislature has attached to the exercise of the powers": *The King v The Commonwealth Rent Controller; Ex parte National Mutual Life*

Association of Australia Ltd (1947) 75 CLR 361, 369 (Latham CJ, Dixon J); *NAAV v Minister for Immigration and Multicultural & Indigenous Affairs* [2002] 228, [17] (Black CJ).

33 *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399 (Dixon J); *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 418 (Mason ACJ, Brennan J).

34 *The Privative Clause cases* [2002] FCAFC 228, [11] (Black CJ); see also [629]-630 (von Doussa J).

35 Reproduced at [76].

36 See [128]-[129].

37 [50]-[52] (Beaumont J), [312]-[315] (Wilcox J).

38 [648].

39 [113]-[117].

40 [329]-[332].

41 [319]-[320].

42 [536].

43 [556].

44 [158] (Beaumont J), [343] (Wilcox J), [562] (French J), [650] (von Doussa J); [4] (Black CJ agreeing with von Doussa J).

45 [650] (von Doussa J), [4] (Black CJ agreeing).

46 Beaumont J at [158] and French J at [562] are ambiguous. Wilcox J held that, as the error was merely one of fact he did not need to express a view on the operation of section 474 [344].

47 [188] Beaumont J, [348] (Wilcox J), [572]-[573] (French J), [651] (Von Doussa J), [4] (Black CJ agreeing with von Doussa J).

48 [188] (Beaumont J), [651] (von Doussa J), [4] (Black CJ agreeing with von Doussa J). Wilcox J agreed with the primary judge who held that even if the Tribunal did misconstrue the statute in a way that amounted to an error of law, this was not a "jurisdictional error" [348]. His Honour thus appears to take the view that it remains possible for a Tribunal to commit an error of law within jurisdiction; see also [572] (French J) and [651] (von Doussa J). (For the decision of the primary judge, see *Ratumaiwai v MIMIA* [22] FCA 311, [18], [29] (Hill J)).

49 *Migration Act*, s 116(1)(d).

50 *Migration Act*, s 116(1)(f).

51 [667] (von Doussa J); see also [229], [234]-[241] (Beaumont J).

52 [579].

53 [33]; and see [379] (Wilcox J).

54 (1944) 69 CLR 407.

55 [38].

56 [592].

57 [371]-[372].

58 [672] (von Doussa J), [275] (Beaumont J agreeing).

59 [674] (von Doussa J).

60 Ibid [113] (Beaumont J), [638], [648] (von Doussa J). On this point Black CJ agreed with von Doussa [4].

61 Ibid, [329]-[331].

62 Ibid, [536]; and see also [555]-[556].

63 Ibid, [527].

64 Ibid, [15] (Black CJ).

65 Ibid, [624].

66 Ibid, [619].

67 Ibid, [625].

68 Ibid, [626].

69 Ibid, [30]-[31], [37].

70 See [366], [377] (Wilcox J), [524], [579], [592] (French J).

71 [9] (Black CJ), [101], [104] (Beaumont J), [630] (von Doussa J).

72 Ibid, [354].

LIABILITY OF PUBLIC OFFICERS

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Revised version of a paper given at a meeting of the New South Wales Chapter of the AIAL on 30 May 2002 in Sydney.

The public officers referred to in the title are those exercising statutory and non-statutory governmental powers. I leave aside legislators and those who exercise judicial power. It may be seen that I have already begged a number of questions:

- what are governmental powers?
- where does executive power shade into judicial power?
- are all statutory powers governmental?

But what I am speaking about is, broadly, "When may a public servant be sued in tort?"[1]

I put it this way rather than "When is a public servant liable to pay damages?" because the administrative law remedies do not, of themselves, give rise to a claim in damages.[2] It may of course be necessary to have administrative action or an administrative decision set aside on the way to a claim for damages but this is because, outside negligent acts or omissions, there is no claim for damages in respect of a lawful administrative action. "There can be no tortious liability for an act or omission which is done or made in valid exercise of a power."[3] I take this to mean that there is no such thing as a negligent/actionable exercise of a discretionary power where the exercise of the power is valid.

I should spend a minute or two on this point because it is sometimes overlooked. It is one thing to have a decision set aside when it is the justification for a positive act. For example, where you are being sued for a sum of money by a government agency and there is an administrative decision imposing the liability, you can defend yourself by attacking the validity of the administrative decision and, if successful, the agency's action founded on debt may disappear.[4] Similarly, where a statute is relied upon by a defendant government in an action for trespass to goods, if the statute is invalid then the claim for damages for trespass may succeed.[5] A revocation of a licence, if invalid, would sustain a similar analysis. So may detention, if invalid, give rise to an action for false imprisonment.

But the result would not follow where a positive grant or licence is fundamental to the plaintiff's cause of action, the activity being otherwise prohibited. This is because invalidating a decision not to grant would leave a causal gap: the plaintiff would still not have the necessary grant or licence unless and until the matter were remitted and a positive decision in favour of the plaintiff were made. To give an example, the absence of a licence or approval may mean that a person is denied the opportunity to conduct a business. But where the positive grant of a licence is, by legislation, a prerequisite to conducting the business, then the mere setting aside of the decision to refuse to grant would not found an

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action for damages. The lack of legal justification removes a shield, but does not provide a sword.[6]

Now that the action on the case exemplified by *Beaudesert Shire Council v Smith*[7] has gone the way of nominate torts,[8] there are only two torts which merit detailed consideration and as to one of them, misfeasance in public office, I will be encouraging you to look past its current fashionability to see that success in such a claim would be rare. This leaves the tort of negligence as it impacts on public officials and those dealing with them. For administrative lawyers this means, largely, the negligent exercise of a discretionary power.

Misfeasance in public office

The High Court has twice looked at this tort in recent times, once in *Northern Territory of Australia v Mengel* (*Mengel*)[9] and again in *Sanders v Snell*.[10] In neither case did the High Court delineate the most elusive element of the tort which is the state of mind of the official.

Sanders v Snell concerned a direction by the Norfolk Island Minister for Tourism to the members of the Government Tourist Bureau to terminate the employment of the Bureau's executive officer. Procedural fairness was not given. Gleeson CJ, Gaudron, Kirby and Hayne JJ, in considering the tort of misfeasance in public office, said:[11]

> Again it must be accepted that the precise limits of this tort are still undefined. It is an intentional tort. As was said in *Mengel* [at 345]:
>
> > ...the weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power. (Footnotes omitted)

Their Honours had earlier said:[12]

> For present purposes it may be accepted that the tort of misfeasance in public office extends to acts by public officers that are beyond power, including acts that are invalid for want of procedural fairness. But to establish that tort, it is not enough to show the knowing commission of an act beyond power and resulting damage. As the majority said in *Mengel*:[13]
>
> > The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability.[14] And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*,[15] or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.
>
> For the purposes of deciding *Mengel*, the majority considered it sufficient to proceed on the basis that the tort requires an act which the public official knows is beyond power and which involves a foreseeable risk of harm but noted also that there seems much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power.[16]

In *Three Rivers District Council v Governor and Co of the Bank of England*,[17] the House of Lords considered the scope of the tort of misfeasance in public office and followed *Mengel*. Their Lordships held that the tort involved an element of bad faith and arose when a public officer exercised his power specifically intending to injure the plaintiff, or when he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or persons of a class of which the plaintiff was a member; and that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences happened was sufficient.

Lord Steyn, with the agreement of Lord Hope and Lord Millett said:[18]

> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.
>
> The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In the *Mengel* case, the expression honest attempt is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

Why success in such a claim is rare is illustrated by the recent judgment of von Doussa J in *Chapman v Luminis Pty Ltd (No 5)*,[19] one of the decisions concerning the bridge to Hindmarsh Island. Having set out the law, his Honour needed to say little more than:

> In the present case I consider the claims based on the tort of misfeasance in public office must fail if for no other reason because the applicants have not established bad faith. On the contrary I consider that both Professor Saunders and Mr Tickner held honest beliefs that they were acting lawfully at all times.

In *Tahche v Abboud*,[20]Tahche had been convicted of rape and his conviction quashed on appeal. In a subsequent civil action brought by Tahche, one defendant was a solicitor employed by the DPP and another defendant was a member of the independent Bar, who had been retained to prosecute at the original rape trial. The plaintiff had sued them, amongst others, claiming damages for misfeasance in a public office, the allegation being founded on their alleged non-disclosure of information relative to the trial of the accused. On the trial of separate questions, Smith J summarised the basic elements of the tort as follows:[21]

> (1) the defendant must hold a public office;
> (2) there must be an invalid exercise of power or purported exercise of power;
> (3) the defendant must be shown to have acted with the necessary intent;
> (4) the plaintiff must suffer damage as a consequence of the exercise of power or purported exercise of power.
>
> The second requirement, the invalid exercise of power, includes an absence of power and acts invalid for want of procedural fairness. It includes the exercise of a power for an improper purpose, including the purpose of a specific intent to cause injury. It arguably

> includes an exercise of power for irrelevant considerations or for considerations that were manifestly unreasonable.

It may also include abuse of non-statutory powers.[22]

Also of interest for present purposes is the first of these elements, the requirement that the defendant must hold a public office. Smith J,[23] held that these defendants, a solicitor and counsel:

> were at the relevant time holders of a public office for the purpose of the tort of misfeasance in a public office in that they were holding specific positions with defined and specialised roles;
>
> (a) for which they were remunerated from public funds;
> (b) in which they were performing public services, public services of great importance; and
> (c) in which they owed a duty to both the community and to the accused, to disclose information of assistance to the accused.

Smith J also held that any immunity from suit did not apply to the tort as pleaded.

However, on appeal by the solicitor and counsel, the Court of Appeal reversed Smith J: *Cannon v Tahche*.[24] That Court held that one necessary component of the tort was the misuse or abuse by the holder of a public office of a relevant power which is an incident of the office. The prosecutorial function did not carry with it any relevant power so that it could not be said of a prosecutor appearing at a trial that he or she occupies a public office for the purposes of the tort. A prosecutor's obligation to act fairly, one aspect of which is the prosecutor's duty of disclosure, does not spring from any statutorily given power but from practices established by the judges over the years which have been designed to ensure that an accused person receives a fair trial. When briefed to prosecute at the plaintiff's trial, counsel did not thereby assume any office and did not acquire any relevant power as prosecutor. The same applied even more strongly to the solicitor who was a Crown servant. No relevant power attached to her position. Her obligations could rise no higher than those imposed on prosecuting counsel. Further, whatever the nature and extent of a prosecutor's duty, it is a duty owed to the court and not a duty enforceable at law at the instance of the accused.

In *Edwards v Olsen*,[25] Perry J summarised the law relating to the mental element.[26] The case concerned claims for some tens of millions of dollars based upon alleged maladministration of the various Fisheries Acts in their application to the South Australian abalone fishery. The plaintiffs had carried on business as commercial abalone divers. Perry J said:[27]

> In the early cases, it was said that malice was essential to the action.[28] Modern cases recognise that proof of "targeted malice", as it has come to be called, that is, conduct specifically intended to cause injury to the plaintiff, is not the only means by which the mental element may be satisfied. It is now accepted that the requirement of proof of the necessary state of mind of the defendant may be satisfied if the public officer is shown to have acted with actual knowledge ".... that he has no power to do the act complained of and that the act will probably injure the plaintiff".[29]
>
> Where there is targeted malice, the purported exercise of power, even though ostensibly within power, is invalid as the public officer has acted for an improper or ulterior motive.
>
> Both cases, that is, where there is targeted malice or where there is conduct accompanied by actual knowledge that there is no power to engage in that conduct, involve bad faith. In the first instance the act is in bad faith as it is committed for an improper or ulterior motive. In the second case it involves bad faith in that the public officer lacks an honest belief that his or her act is lawful.

> So that for this element of the tort to be satisfied, there must be bad faith in one or other of the two senses which I have explained.
>
> There is a further refinement.
>
> In cases involving bad faith of the second kind which I have described, it has sometimes been argued that the knowledge of the public officer that the act is beyond power may be constructive knowledge, or to put it in the language of the pleader, it is sufficient to prove that the public officer either "knew or ought to have known" of the absence of power. While the argument that the test could be satisfied in that way was expressly rejected by the High Court in *Northern Territory v Mengel*, both the High Court in that case and the House of Lords in their decision in the *Three Rivers case* accepted that, absent actual knowledge of the absence of power, the requisite state of mind might be proved if it could be shown that the public officer was "recklessly indifferent as to the existence of the power to engage in the conduct which caused the plaintiff's loss".
>
> So that, to put the matter comprehensively, the element of bad faith which is essential to proof of the requisite state of mind, may be satisfied by evidence amounting to targeted malice in the sense which I have explained that expression, or lack of an honest belief that the act is lawful. Lack of an honest belief that the act is lawful may be demonstrated either by actual knowledge of the lack of power or reckless indifference as to the availability of the power.

Negligence

I move now from intentional wrongdoing to negligence in relation to administrative acts or decisions. Because the threshold for establishing liability is far lower, the tort of negligence is in practice far more important than misfeasance in public office as a source of compensatory damages. But because the elements of the tort are well known and because it is not usual to consider this tort as going to the liability of an officer,[30] I shall limit myself to a few observations.

Invalidity without more does not constitute the tort. But in the context of personal injury or damage to property it is not to be thought that a governmental body cannot be found to have acted negligently merely because what it did was "valid". Indeed, McHugh J has said[31] that:

> On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires. In *Heyman*, Mason J rejected the view that mandamus could be "regarded as a foundation for imposing … a duty of care on the public authority in relation to the exercise of [a] power. Mandamus will compel proper consideration by the authority of its discretion, but that is all."[32]
>
> The concerns regarding the decision-making and exercise of power by statutory authorities can be met otherwise than by directly incorporating public law tests into negligence. Mr John Doyle QC (as he then was) has argued,[33] correctly in my opinion, that there "is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care".

It is useful to go back to *Mengel's case* and to consider it in a little more detail.

The facts of *Mengel* were that the Mengels purchased a property in the Northern Territory, Banka Banka, for approximately $3 million, financing its purchase with a bank loan. They intended to repay $1 million of that loan from the sale of cattle by the end of the 1988 season. However, they were not able to fully realize their selling plans and suffered loss because two inspectors of the Northern Territory Department of Primary Industry and Fisheries had said, following tests for brucellosis, the cattle could only be moved to an

abattoir for immediate slaughter. By the time the matter reached the High Court it was clear that there was no statutory or other authority for the acts of the inspectors notwithstanding that they were furthering the aims of a government-sponsored campaign to eradicate bovine brucellosis and tuberculosis. The Mengels' claims failed.

In the context of the claim for misfeasance in public office, the joint judgment contains the following passage:[34]

> If it were the case that governments and public officers were not liable in negligence, or that they were not subject to the same general principles that apply to individuals, there would be something to be said for extending misfeasance in public office to cover acts which a public officer ought to know are beyond his or her power and which involve a foreseeable risk of harm. But in this country governments and public officers are liable in negligence according to the same general principles that apply to individuals.

More directly for the present question, their Honours also said:[35]

> Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, *thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power*.[36] (Emphasis added)

Deane J[37] referred more obliquely to the possibility that the inspectors were in breach of a duty of care owed to the Mengels in failing to appreciate that their actions were unauthorised. His Honour would have given the Mengels the opportunity of applying for a further order which would have allowed them to apply to the Court of Appeal for leave to seek to reformulate their case as an action in negligence.

Brennan J said:[38]

> Different considerations apply when a tort other than misfeasance in public office is relied on as a source of liability. Public officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorized, justified or excused by statute. A statute is not construed as authorizing, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment. In particular, a statute which confers a power is not construed as authorizing negligence in the exercise of the power. Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted exercise of a power, statutory immunity that would otherwise protect the officer is lost.

But Brennan J went on to say that where the sole irregularity consists of an error as to the extent of the power available to support the action:

> liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability - namely, liability in negligence - where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss.[39]

The key, in my opinion, is in the emphasised part of the joint judgment.[40] In cases of potential claims for the negligent exercise of discretionary powers those advising a plaintiff, or a defendant, should closely consider whether it may be alleged that the government has failed to take steps to ensure that its officers and employees know and observe the limits of

their power. It would also be as well to consider whether or not the *officer* had a duty to ascertain the limits of his or her power and had failed to do so.

The approach I have described is more likely to bear fruit than more common ways of alleging negligence in the context of discretionary governmental powers. It is more likely to strike the appropriate chord with a finder of fact because it is consistent with what governments do or are perceived to do and see themselves as doing. Of course it would still be necessary for the plaintiff to establish causation and the other elements of the tort of negligence.

For example, outside safety legislation, a claim for breach of statutory duty would have limited prospects since a necessary first step is a conclusion that the legislation confers on the plaintiff a cause of action for the recovery of damages for breach by the defendant of duties imposed upon it by the legislation. It is necessary to find a relevant statutory duty attended by a sanction for non-performance. Secondly, "there is no action for breach of statutory duty unless the legislation confers a right on the injured person to have the duty performed" and, if no right is conferred, the general rule is that there is no liability in damages.[41] The legislation will rarely yield the necessary implication positively giving a civil remedy.[42]

I am of course considering cases where the negligence is said to be in the exercise of a discretionary power in the sense that there is a choice as to whether and to what extent and how the power is to be exercised, perhaps involving matters of policy. But is there a line between the application of a public law approach and private law concepts seen most clearly in personal injury cases where a government is a defendant? And if there is a line, how and where may it be found? Put differently, is there a resolution of the apparent conflict between the dicta of Brennan J in *Mengel*[43] and of McHugh J in *Crimmins*.[44]

One preliminary but important issue is whether the alleged tortious act is properly to be characterised as done in the exercise of statutory functions. If not, then the common law duty and breach of that duty should be approached without reference to issues arising from the exercise of statutory duty.[45]

This leads to a further consideration and that is the legal source of the alleged duty. If that source is the common law, as it would be in most personal injury cases, then issues arising from the exercise of statutory powers are unlikely to be relevant. It is otherwise where the statutory powers are relied on as the source of the alleged duty or as affecting the content of that duty.

The crucial consideration would appear to be whether the action involves the exercise of a discretionary power. If it does not, then the notion of *ultra vires* is not determinative because it may be assumed, as a matter of construction, that the tortious action was not authorised by the statute. The duty which is breached has its source in the common law and, as Brennan J said, a statute is not construed as authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment.[46]

If however the action does involve the exercise of a discretionary power then it is likely that one is in the realms of decision-making where public law remedies are paramount. This is so absent any common law right of action where invalidity exposes the officer to a liability in tort, such as trespass, in that the officer's defence depends on the validity of the warrant for the trespass. The alignment, at the level of duty, would not seem to be with whether the plaintiff's loss is purely economic rather than involving personal injury or damage to property. The clearer approach seems to be by resort to ideas which underlay the now questionable distinction between operational and policy decisions or by reference to the related notion explored at length by Lord Browne-Wilkinson that a failure in the exercise of a statutory duty

may not give rise to any claim for damages in private law because the regulatory system is to be treated as intended for the benefit of society in general rather than for the benefit of individuals, except where the statutory duty is very specific. On that analysis, a claim could succeed if it were based on a free standing common law cause of action but there would be no common law duty of care to the plaintiff in a matter of policy.[47] In that light it could be said that, subject to *Mengel*, there is not a common law duty owed by a public officer to an individual to make a valid decision and, therefore: "The validity of a decision and whether the harmful consequences of that decision are actionable are two entirely different questions."[48]

Negligent misstatement, in the context of liability for pure economic loss, appears to have escaped these difficulties. The reason is, perhaps, that an alleged tortious act is not properly to be characterised as done in the exercise of statutory functions.[49] Subject to statutory defences, it does not seem to be more difficult to succeed in an action for negligent misstatement against a government official than any other person. Indeed at the factual level it may be easier since, reflecting the passage I emphasised from the joint judgment in *Mengel*, Miles CJ in a recent case concerning negligent advice given to a naval officer about retirement options said:

> In this respect the Commonwealth is hardly to be compared with an inexperienced litigant or potential litigant who may not recognise a problem as one of a legal nature, who does not know where to turn for advice of a legal nature and who may have difficulty in affording such advice or indeed difficulty in understanding the advice when given. Whether the Authority had a legal officer on its staff or any officer with legal qualifications with the capacity to express a view on the merit of the interpretation of the Act that the appellant was urging does not appear to be answered in the evidence before the Magistrate. However if the Authority did not have a legal officer on its staff, the Commonwealth should have had in place arrangements, as was once common with Commonwealth instrumentalities, for the Authority to be able to consult with and receive advice from the Attorney-General's Department or the Australian Government Solicitor. [50]

Conclusion

Should not each jurisdiction, better still all jurisdictions together, consider a standard test to apply when the liability of an officer is in issue? It is, I suggest, the mental element which should be the key to statutory defences. The citizen is not well served by the variety of statutory defences[51] ranging from acts done honestly or in good faith or in pursuance of the execution or intended execution of any Act or public duty or authority[52] and in circumstances where good faith sometimes requires only subjective honesty or absence of malice and sometimes objective diligence.[53] I do not suggest the appropriate formulation would be easy since what is involved is a balance between "the freedom of the individual from unauthorised interference with interests which the law protects",[54] on the one hand and, on the other hand, efficient but reasonably competent public administration involving, as a minimum, an officer's duty to ascertain the functions of the office it is his or her duty to perform.

Endnotes

1 I do not consider criminal liability or liability under legislation such as the *Independent Commission Against Corruption Act 1988* (NSW). Neither do I consider liability for breach of contract, where only rarely would the official be the contracting party in his or her own right, nor breach of a fiduciary duty either to the Crown or to the public. Breach of fiduciary duty by a public officer is discussed by Tina Cockburn in "Personal liability of government officers in tort and equity" at pages 374-389 in Chapter 9 of Bryan Horrigan (ed) *Government law and policy - Commercial aspects,* The Federation Press, 1998.

[2] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 724, 731; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 645. There have been many suggestions for reform: see for example Rossana Panetta "Damages for wrongful administrative decisions" (1999) 6 *A J Admin L* 163.

[3] *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 per Brennan J at 356.

[4] *Federal Airports Corporation v Aerolineas Argentinas* (1995) 63 FCR 100; (1997) 76 FCR 582.

[5] *James v Commonwealth* (1939) 62 CLR 339.

[6] P W Hogg *Liability of the Crown* (2nd ed 1989) 110.

[7] (1966) 120 CLR 145.

[8] *Northern Territory of Australia v Mengel* (1995) 185 CLR 307.

[9] (1995) 185 CLR 307.

[10] (1998) 196 CLR 329.

[11] (1998) 196 CLR 329 at 346[42].

[12] At 344-345 [38].

[13] At 347.

[14] The issue of vicarious liability is considered by Weinberg J in *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 [250]-[257].

[15] [1897] 2QB 57.

[16] Note that when the matter was re-heard by Beaumont CJ, who had not considered the allegations of misfeasance in public office at the first trial, his Honour held this was a case of "targeted malice" in that the defendant actually intended to cause harm to the plaintiff by peremptorily and unlawfully removing him from office. Damages of $83,000 with costs, including the costs of the first trial, were awarded including exemplary damages of $10,000: *Snell v Sanders* [2000] NFSC 5 (24 November 2000).

[17] [2000] 2 WLR 1220. Reference should also be made to Dr Sadler's article '"Intentional abuse of public authority: A tale of three rivers" (2001) 21 *Aust Bar Review* 151.

[18] At 1231, 1269.

[19] (2002) ATPR (Digest) 46-214; [2001] FCA 1106.

[20] [2002] VSC 42.

[21] At [16]-[17].

[22] *Tampion v Anderson* [1973] VR 715 at 720; *Mengel* per Brennan J at 355: "The tort is not limited to an abuse of office by exercise of a statutory power." His Honour referred to *Henly v Mayor of Lyme* (1828) 5 Bing 91 at 107-108 [130 ER 995 at 1001] and to *R v Boston* (1923) 33 CLR 386 at 412.

[23] At [101].

[24] [2002] VSCA 84.

[25] [2000] SASC 438.

[26] Considered also in *Mengel* (1995) 185 CLR 307 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347, Brennan J at 359, Deane J at 370-371, *Sanders v Snell* (1998) 196 CLR 329 at 345, *Garret v AG* [1997] 2 NZLR 332; *Three Rivers District Council v Bank of England* [2000] 2 WLR 1220 at 1231-1233, 1236, 1266-7, 1269-70, 1273-5. In *Tahche v Abboud* [2002] VSC 42 at [19], Smith J said "What is involved is an abuse of power, and it is the absence of an honest attempt to perform the functions of the office which is at the heart of the tort."

[27] At [398]-[404].

[28] See, for example, *Ashby v White* (1703) 2 Ld Raym 938; 3 Ld Raym 320 [92 ER 126; 710] cited by Brennan J in *Mengel*, 185 CLR at 356.

[29] See *Three Rivers District Council and Ors v Governor and Co of the Bank of England* [2000] 2 WLR 1220 per Lord Steyn at 1231.

[30] The government would be the natural defendant but the officer would also be liable. For New South Wales see section 8 of the *Law Reform (Vicarious Liability) Act 1983*. For Federal Police see sec 64B of the *Australian Federal Police Act 1979*.

[31] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 35-36.

[32] (1985) 157 CLR 424 at 465.

[33] JJ Doyle QC, "Tort liability for the exercise of statutory powers", in PD Finn (ed), *Essays on torts* (1989) 203, 235-6.

[34] 185 CLR at 348.

[35] At 352-353.

[36] This approach had been argued in *Dunlop v Woollahra Municipal Council (No. 2)* [1982] AC 158, where it was doubted by the Privy Council, and in *Rowling v Takaro Properties Ltd* [1988] AC

473 where policy factors were discussed but, since it was held that there was no breach of duty (there being no particular reason why the minister should have taken legal advice), it was unnecessary to resolve the issue.

37 185 CLR 307 at 373.

38 At 358.

39 Cf *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 esp at 68; but see *Rowling v Takaro Properties Ltd* [1988] AC 473 at 511-512.

40 As indicated, Brennan J did not agree with this statement of the majority.

41 185 CLR at 343-344.

42 *O'Connor v SP Bray Ltd* (1937) 56 CLR 464 at 477-478; see also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 per Gummow J at [157]. See also *Bhagat v Global Custodians Ltd & Ors* [2000] NSWSC 321 per Young CJ in Eq.

43 185 CLR at 356.

44 200 CLR at 35-36.

45 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466. See also *Puntoriero v Water Administration Ministerial Corp* (1999) 199 CLR 575.

46 185 CLR at 358.

47 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 730-740; see also *Sullivan v Moody* (2001) 183 ALR 404 at 417 [59]-[60] (HC) where the Court found there was no duty to the plaintiff because it would be inconsistent with the proper and effective discharge of the defendants' statutory responsibilities that they should be subjected to a legal duty, breach of which would sound in damages. See also *Tame v New South Wales* (2002) 191 ALR 449 (HC) and *New South Wales v Paige* [2002] NSWCA 235 at 263. In *Chapman v Luminis Pty Limited* (No. 5) [2001] FCA 1106 Von Doussa J held that there was no duty of care owed by the Minister because to impose a private law duty upon him in the exercise of a legislative power to make a declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 would be to distort the focus of the Act in favour of individual interests of a few members of the community.

48 See Aronson and Whitmore *Public Torts and Contracts* LBC 1982, 103.

49 Nevertheless, in the case of an authority exercising statutory powers it is necessary to view the particular circumstances with an appreciation of that legislation: *Tepko Pty Limited v Water Board* (2001) 206 CLR 1.

50 *Glass v Commonwealth of Australia* [2002] ACTSC 30 at [12].

51 See *Little v Commonwealth* (1947) 75 CLR 94 and, more recently, *Webster v Lampard* (1993) 177 CLR 598 where the Police Act test was "unless there is direct proof of corruption or malice" and the *Limitation Act* test was "done in pursuance or execution or intended execution of any Act, or of any public duty or authority".

52 Or "in the bona fide exercise of such powers": see, eg, *Board of Fire Commissioners of New South Wales v Ardouin* (1961) 109 CLR 105.

53 See *Chief Commissioner for Business Franchise Licences (Tobacco) v Century Impact Pty Ltd* (1996) 40 NSWLR 511 which concerned good faith in sec 27 of the *Business Franchise Licences (Tobacco) Act 1987* (NSW) and compare *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290. In the former case the defence was made out although the officer was quite wrong in law in doing what he did and his belief that he was acting reasonably was itself unreasonable. The Court of Appeal said the critical point was that there was no finding and no suggestion that the officer was aware that he was acting unreasonably. In the latter case the Full Court held that the defence in sec 149(6) of the *Environment Planning and Assessment Act 1979* (NSW): "(6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5)", was not made out by "honest ineptitude". The Court said that the statutory concept of "good faith" with which the legislation was concerned called for more than honest ineptitude. "There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority."

54 185 CLR at 359.