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# DEFLATING THE *HICKMAN* MYTH: JUDICIAL REVIEW AFTER *PLAINTIFF S157/2002 V THE COMMONWEALTH*

*Hon Duncan Kerr MP**

*Paper presented at an AIAL seminar on Judicial Review, Privative Clauses and the High Court, Canberra, 13 March 2003.*

Sections 474 and 486A of the *Migration Act* 1958 (Cth) originated as separate Bills but were aspects of a single overarching policy. That policy was to restrict access to judicial review of migration decisions[1]. The validity and meaning of both s474 (the privative clause) and s486A (an absolute time limit on bringing applications for constitutional remedies) came before the High Court by way of a case stated in *Plaintiff S157/2002 v Commonwealth of Australia (Plaintiff S157/2002).*[2] The decision in *Plaintiff S157/2002* emphasises the High Court's continuing commitment to fundamental principles of the rule of law.

The judgment entrenched, as a constitutional entitlement, the right of any person affected by a decision made by an 'officer of the Commonwealth' to apply to the High Court in its original jurisdiction for judicial review for jurisdictional error[3]. It exploded the '*Hickman*[4] myth'—the argument, pressed by the Commonwealth as its view as to the effect of that decision, that a privative clause expands the jurisdiction of an administrative decision-maker or validates an otherwise invalid decision. It explained and distinguished *Hickman,* unanimously preferring the approach articulated by Gaudron and Gummow JJ in *Darling Casino*[5] to that advanced by the Commonwealth. This means that the only effect a privative clause can have is that the clause may be referred to (alongside all other indicia contained within the Act) to assist determine whether any express or implied provision in a statute is mandatory (that is essential to validity), or directory[6]. It prohibited some, and limited other, measures that the Australian government might otherwise have contemplated taking as alternatives to the failed strategy of removing judicial review. It sustained the validity of the impugned provisions--but only by denying to them any relevance to the proceedings intended to be brought by Mr Sayed (the plaintiff in *Plaintiff S157/2002*) under s 75(v) of the Constitution.

## The Legislation

Section 474(1) of the *Migration Act 1958* provided:

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* *Barrister; Counsel for Plaintiff (with George Williams) in* Plaintiff S157/2002.

**474 Decisions under Act are final**

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Subsections (2)-(5) defined the term 'privative clause decision'. It can be summarised as encompassing every decision of an administrative character made under the *Migration Act*, except for a very limited class explicitly excluded by subsection (4) or specified by regulations under subsection (5).

Section 486A of the Act provided:

**486A Time limit on applications to the High Court for judicial review**

(1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.

(2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

The words in s 486A(1), 'privative clause decision,' referred to the class of decisions affected by section 474.[7]

**The contentions of the parties**

***The plaintiff's case***

The plaintiff submitted that no statute might bar an applicant from seeking, or remove or limit, the High Court's right to grant, relief under s 75 (v) or the Constitution. The plaintiff argued that the High Court possessed a constitutionally entrenched power to:

- require officers of the Commonwealth to act lawfully and comply with the common law and any relevant legislation; and

- prevent the Commonwealth from removing or restricting the right of the High Court to supervise the lawfulness of the conduct of Commonwealth officers.

The plaintiff sought declarations that ss 474 and 486A were invalid on the grounds that, whether a literal or purposive approach to their interpretation was adopted, both were ouster clauses[8].

As to the facts in issue, counsel submitted that the High Court did not need to finally resolve the scope of review under s 75(v) of the Constitution (in the same way that

the *Communist Party Case*[9] did not set out all of the available grounds of review of legislative action). It was submitted that it was sufficient for the Court to hold that the scope of review entrenched by the Constitution extended to breaches of natural justice of the type alleged to have been made by the Refugee Review Tribunal in Mr Sayed's instance (that is, a failure to accord a hearing on materials adverse to a person whose rights had been affected). Counsel submitted that inclusion of this ground in the entrenched scope of review was clearly supported by decisions of the High Court relating to s 75(v)[10].

The plaintiff contended that, provided it was within a constitutionally conferred head of power, it remained open to Parliament, by plain and express language, to authorise executive action in wide discretionary terms or to narrowly prescribe it--but submitted that neither could an unbounded power be conferred[11] nor could the grounds of entrenched review be limited or abrogated by statute.

As well as contending that s75 (v) was included by the framers of the Constitution with the explicit intention of conferring a supervisory jurisdiction over acts of the executive, the plaintiff argued that judicial review was also implicit from the vesting of judicial power in Ch III of the Constitution and the opening words of s 71[12].

That argument built on Dixon J's statement in the *Communist Party Case*, that the Constitution 'is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed'. He continued: 'Among these I think that it may fairly be said that the rule of law forms an assumption'[13]. Counsel for the plaintiff submitted that an important aspect of the rule of law is that decision-makers exercising public power are constrained by law. For this to make sense, they must be constrained by law in the sense that a judicial (and hence non legislative or executive) body exists with the power to enforce those limits[14].

The plaintiff dealt with the defendant's reliance on *Hickman*[15] by attacking the body of academic and judicial comment that had built on the obiter observations of Dixon J[16] as having created a '*Hickman* myth'. The plaintiff submitted that the ratio decidendi of *Hickman* was consistent with earlier decisions of the High Court such as the *Tramways Case [No 1]*[17] and that to elevate any reading of Dixon J's obiter dicta in *Hickman* to one, which was inconsistent with that ratio, was wrong in principle.

The plaintiff's submissions noted that in a century of decisions there had been no instance in which the High Court had found that an officer of the Commonwealth had exceeded the jurisdiction conferred on him or her yet allowed the decision to stand because of the presence in the Act of a privative clause.

As to s 486A, the plaintiff submitted it was directly inconsistent with the Constitution. Section 486A(2) purported to prohibit, in absolute terms, the High Court of Australia from exercising its jurisdiction under s 75(v) in respect of any application, encompassed by its provisions, made to the High Court outside of 35 days of the notification of a decision[18].

The plaintiff contended that a constitutionally guaranteed jurisdiction could not be removed in this way. Sections 73, 74, 76 and 77 of the Constitution provide in detail the circumstances in which Parliament can legislate upon the type of matters specified in s 75. Section 77(i) of the Constitution is a conclusive indication that it is not within the power of the Parliament to grant or withhold the jurisdiction conferred on the High Court by s 75(v) (contrast the terms of s 73). Even if it were within the incidental power to regulate matters relating to the procedures of the High Court the incidental power was governed by the necessity that it be proportionate and reasonably adapted to the purpose. The plaintiff submitted that s 486A went beyond that which would be allowed as reasonable regulation. It amounted to an effective bar on the High Court's exercise of a constitutionally granted jurisdiction.

***The defendant's case***

The defendant's submissions conceded that, if read literally, s 474(1) would oust the jurisdiction of the High Court. To that extent it would be invalid. To meet this objection the Commonwealth referred to the parliamentary record to demonstrate that the Minister had intended s 474 to be construed other than in a literal sense.

Counsel also submitted that other provisions of Part 8 of the Migration Act made it clear that it was not any part of the intention of Parliament to oust the jurisdiction of any federal court.[19] Sections 475A, 476 and 477 were said to be expressly predicated on the Federal Court having jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) in respect of 'privative clause decisions'.

Instead of a literal reading, the Commonwealth submitted that s 474 should be given an interpretation consistent with the approach taken by Dixon J to the construction of such clauses in *Hickman,* as follows:[20]

> 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 [the privative clause] is well established. They are not interpreted as meaning to set at large the 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 or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its 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.

Thus the defendant submitted that the effect of a privative clause was not to limit the jurisdiction of a court, but to expand the power of the decision-maker whose decision is affected by the privative clause.[21]

Section 474(1) was a substantive provision but it characterised conduct as valid or invalid by reference to certain remedies – namely the constitutional writs (which require that a person has failed or refused to exercise some power of a governmental character) or an injunction (which requires a breach of the Act that makes some action proposed to be taken 'unlawful').[22] When it said that the constitutional writs do not lie it meant that (subject to the *Hickman* conditions) breaches of the Act do not involve jurisdictional error. When it said that an injunction

does not lie it meant that such breaches are not to be regarded as relevantly 'unlawful'. A statutory expansion of the concept of a 'decision' for this purpose merely sets the categories of conduct in respect of which the remedies referred to (if they lie at all) can only be obtained in the circumstances allowed by the *Hickman* principles.

The result, according to the Commonwealth submission, was that a decision (or purported decision) must be treated as valid so long as the decision-maker had complied with the three *Hickman* provisos[23] and so long as the Act conferring a power in those terms did not extend beyond the limits of Commonwealth legislative power.

Taking the argument to the instance of the *Migration Act 1958*, the Solicitor-General contended that when a privative clause was inserted as an amendment to an existing Act (rather than as a provision in the original legislation), there remained no place for the operation of any further *Hickman* exceptions (a reference to the notion of 'inviolable limits' referred to by Dixon J in subsequent judgments) because the amending law converted every statutory direction to, and limit on, a decision-maker's authority contained in the Act to mere points of guidance. This would leave a decision-maker free to ignore, or take as little or as much account of those limits as they may, so long as the decision-maker could not be proven to have acted in bad faith.

The Commonwealth submitted that the law governing the interpretation of privative clauses was well settled and the elaboration and application of the law following *Hickman* had never been marked by differences between members of the Court as to the basis or essential nature of the principles.[24]

As to s 486A the Commonwealth submitted that the absolute time bar did not remove the right or ability, conferred by s 75(v) of the Constitution, of any person with a sufficient interest to challenge a 'privative clause decision' made by an officer of the Commonwealth. The defendant argued that s 486A(1) was in a form common to statutes imposing limitation periods. It only stood in the way of a plaintiff seeking the specified remedies if his or her application was not made within a prescribed period (within 35 days of actual notice of the decision). It did not deprive the High Court of its jurisdiction; it merely regulated the right of persons to proceed. Subsection 486A(2), which stated that the High Court must not make an order allowing an applicant to make an application outside of the 35 day period, was justified by the Solicitor-General as merely reinforcing the content of subsection (1), namely that the time for commencing a proceeding was not to be extended.

By imposing an absolute time limit, the Commonwealth argued that s 486A revealed a specific legislative intent different from the general position where there is no such absolute bar to further proceedings: that is where legislation is otherwise silent, the making of a jurisdictional error by a decision-maker will generally mean that the purported decision has no legal significance.[25] However, the Solicitor-General's argument proceeded, the legislature may indicate a contrary intention, for example that decisions affected by jurisdictional error are to be treated as valid after a reasonable period for challenging them has expired. There is, the Commonwealth submitted, no constitutional bar on Parliament determining that flawed decisions of

that kind can be or become effective. It is a matter for Parliament to determine what effect is to be given to decisions affected by some kind of error.

The end result, the Commonwealth submitted, was that s 486A worked in combination with s 474 to bring about a regime whereby a person adversely affected by a privative clause decision could successfully seek judicial review only for breach of one of the *Hickman* provisos, narrowly confined. If there was no such breach, the decision would be valid and effective irrespective of when any challenge was lodged. If there was a breach of a *Hickman* proviso, the decision would be liable to be set aside if proceedings were commenced within 35 days of the affected person receiving notice. Thereafter, Parliament intended that the decision must be treated as valid and effective irrespective of any kind of error affecting the decision, even fraud.

**The impact of the Federal Court decision in *NAAV***

*Plaintiff S157/2002* was commenced in the original jurisdiction of the High Court by writ of summons naming the Commonwealth of Australia as Defendant. The statement of claim sought declarations that the two impugned statutory provisions were invalid. The matter was listed for hearing before a seven member bench of the Full Court of the High Court of Australia by way of a case stated by Gummow J in that action. Thus the constitutional issues came before the High Court directly and not by way of an appeal.

However, a large number of primary applications for review of migration or refugee decisions were, contemporaneously, before the Federal Court of Australia. In those matters the meaning and effect of ss 474 and 486A was also in issue. A group of those cases came before a Full Court of the Federal Court shortly before the listing of *Plaintiff S157/2002* for hearing. The decision in those cases, *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [26] (*NAAV*), was delivered after initial written submissions had been filed in *Plaintiff S157/2002.*

Although there is little reference to the case in any of the judgments delivered in *Plaintiff S157/2002,* the decision in *NAAV* played a crucial role in undermining a key submission of the Commonwealth. The nub of the Commonwealth's case as put to the High Court was that Dixon J's statement of principles in *Hickman* were settled law and that elaboration of these principles had never been marked by differences between members of that Court as to their basis or essential nature. In *NAAV* all five judges who constituted the Full Court were of a common view that *Hickman* bound them and that s 474 was thus not invalid. Yet despite this superficial unanimity three very divergent approaches emerged from their reasons. Ironically the success of the Commonwealth in obtaining a majority for an outcome substantially favourable to it in the Federal Court undermined its key argument in the High Court.

## NAAV highlighted inconsistent 'expansion of jurisdiction', 'validation' and 'Darling Casino' theories of Hickman

### *The 'expansion of jurisdiction' theory*

The law asserted by the Commonwealth to have been settled by *Hickman* was that 'the effect of a privative clause is not to limit the jurisdiction of the court but to expand the power of the decision-maker whose decision is affected by the privative clause[27]'. For convenience this may be described as the '*expansion of jurisdiction*' theory of *Hickman.*

However, as a result of the contrasting judgments in *NAAV*, it became impossible to assert that there were not other, very differently premised, theories of *Hickman* that had commanded strong support in the High Court. Two of those theories were starkly highlighted by the divergent judgments of Black CJ and French J.

### *The 'validation' theory*

Black CJ articulated what counsel for the plaintiff in *Plaintiff S157/2002* later termed a '*validation*' theory of *Hickman.* His Honour held:

> The Parliament must however be taken, by enacting s 474(1), to have implicitly changed the substantive law governing the Minister's power and jurisdiction under the Act, so that decisions that may otherwise have been invalid may, by reason of the intention implicitly expressed in s 474(1) (interpreted according to the *Hickman* principle), now be 'validated'[28].

This '*validation*' theory depended on giving effect to the words of Dixon J in *Hickman* that 'such a clause is interpreted as meaning that no decision *which is in fact* given by the body concerned shall be invalidated.'[29]. The *'validation*' theory does not treat a privative clause as expanding the decision-maker's jurisdiction, but instead as making valid a determination that would, otherwise, have been unlawful. This idea emerged most clearly in the joint judgment of Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers Union* where their Honours stated:

> Consequently, *the making of the award or order* is the occasion for taking the privative clause into account in interpreting the Tribunal's authority or power more liberally. Before the award or order is made the Tribunal will be held to a strict construction of its powers uninfluenced by the clause, thereby enabling the grant of prohibition, notwithstanding that had the proceedings reached the stage where an award or order was made prohibition could not have been obtained (italics added)[30].

On analysis the '*expansion of jurisdiction*' theory and the '*validation*' theory of *Hickman* are mutually inconsistent.

The '*expansion of jurisdiction*' theory posits that no invalid decision was ever made; the '*validation'* theory posits that an otherwise invalid decision was made but by the operation of the privative clause, it was, instanter, validated. The '*validation'* theory, if applicable, must give the Minister, his officers and the relevant tribunals power to determine questions of law conclusively and finally. Thus in *NAAV,* Black CJ, accepting a submission to this effect advanced by the Minister stated:

> It must also be accepted that there is no constitutional reason why s 474(1) should not have the effect that the substantive law of the Act is altered so that the Minister has the power to determine questions of law (other than matters going to constitutional limits) conclusively and finally[31].

### *The* **'Darling Casino'** *theory: privative clauses do not protect invalid decisions.*

French J, by contrast, in *NAAV* held that a privative clause, expressed to apply to decisions under an enactment, applied only to valid decisions. In doing so his Honour drew on the distinction made by Gaudron and Gummow JJ in *Darling Casino v New South Wales Casino Control Authority* [32] between a 'decision under the Act' and a decision 'under or purporting to be under the Act'. In *Darling Casino* their Honours said:

> There is one point we should add, because the Court of Appeal appears to have proceeded on a contrary view. It concerns the content of the phrase in s 155(1), [the relevant privative clause] 'a decision of the Authority under this Act'. The phrase is not 'under or purporting to be under this Act'. Section 11 obliges the Authority to have regard to certain matters. Section 12 forbids the Authority to grant an application unless satisfied of the matters there specified and for that purpose the Authority is to consider the items specified in s 12(2)(a)-(h). Section 13 contains a definition of 'close associate', a term used in s 12. Sections 11, 12 and 13 are central to the legislative scheme. Section 155 cannot fairly be construed as declaring an intention of the legislature that the Authority is empowered and protected in respect of determinations under s 18 reached other than upon satisfaction of the conditions which enliven its power. Those decisions would not have been made 'under this Act'[33].

Brennan CJ, Dawson and Toohey JJ concurred, adding:

> Although we agree with Gaudron and Gummow JJ that the administrative procedure adopted by the authority in this case did not affect the validity of the exercise of its power…it should not be assumed that the exercise of a power conferred in general terms cannot be confined by the procedures adopted by a repository. If the power must be exercised in conformity with the rules of natural justice, a failure by the repository to adhere to a declared procedure may constitute or result in a failure to accord natural justice to a person whose interests are liable to affection by the exercise of the power. In such a case, an exercise of the power adversely to the interests of the person denied natural justice is liable to be set aside[34].

Such a '*Darling Casino*' theory of the *Hickman* obiter neither expands the decision-maker's jurisdiction, nor validates error. All it does is permit the Court to have regard to the clause (together with other indications contained within the Act) as a factor to assist it to determine whether a provision in an Act is mandatory or directory[35].

Early traces of the '*Darling Casino*' theory of the *Hickman* obiter can be identified in the joint judgment of Latham CJ and Dixon J in *R v Commonwealth Rent Controller*[36] and, more clearly, in the decision of Latham CJ in *R v Murray; Ex parte Proctor* [37] in which his Honour stated:

> But reg 17 does prevent an order of the Board from being held to be invalid by reason of irregularities not going to jurisdiction. It is a statement of the intention of the legislature that not every direction prescribed for the conduct of the tribunal should be regarded as mandatory.'[38]

In *Commonwealth Rent Controller* Latham CJ and Dixon J, and in *R v Murray* Latham CJ, applied ordinary rules of statutory interpretation to ascertain whether or

not the provision they were then considering was mandatory. Had they been uncertain as to whether or not the provision was meant to be mandatory or directory the privative clause then under consideration might have had some effect (as a general indication of parliament's intention that not every direction need be regarded as mandatory) but because there was no ambiguity, there was no occasion for the privative clause to operate. While the decision in *Hickman* was referred to in each judgment, in neither was the methodology, nor the theory, of '*expansion of jurisdiction*' or '*validation* ' applied.

Thus French J, in *NAAV* held that the reference in s 474 to a 'decision of an administrative character made…under this Act' must refer only to a valid decision; one made in substantive compliance with the decision-maker's statutory and common law obligations under the Act[39].

**The decision in Plaintiff S157/2002**

***The 'Darling Casino' theory prevails: the Constitution entrenches judicial review***

The High Court unanimously[40] applied the '*Darling Casino*' theory to the construction of s 474. The privative clause was held neither to expand a decision-maker's jurisdiction, nor to validate error. Section 75(v) was held to introduce into the Constitution 'an entrenched minimum provision of judicial review[41]' 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them[42]'.

A privative clause thus understood does not affect judicial review. It merely requires a judge to consider any such clause (and the terms in which it is expressed) as one factor, alongside other indications contained within the Act, to assist the reviewing court to decide whether compliance with any express or implied provision of an Act is essential to a decision's validity[43].

Each of the judgments expressly rejected the Commonwealth's submission that a privative clause took effect by expanding the jurisdiction of a decision-maker. Instead the High Court reaffirmed that any jurisdictional error results in a nullity[44]. The fundamental premise of the legislation was held to have been unsound[45] and founded on an incorrect understanding of *Hickman*[46].

Further the court held that if s 474 was amended to give effect to the intention that the Solicitor General had contended it had—that is to expand the jurisdiction of a decision-maker (such that it would apply to decisions purportedly, rather than lawfully made) or to take effect by validating what would otherwise be an invalid decision--such a privative clause would then be in direct conflict with s 75(v) of the Constitution, and thus would be invalid[47].

In their joint judgment Gaudron, McHugh, Gummow, Kirby and Hayne JJ summarised that conclusion as follows:

> When regard is had to the phrase 'under this Act' in s 474(2) of the Act, the words of that subsection are not apt to refer either to decisions purportedly made under the Act or, as some of the submissions made on behalf of the Commonwealth might suggest, to decisions

> of the kind that might be made under the Act. Moreover, if the words of the subsection were to be construed in either of those ways s 474(1)(c) would be in direct conflict with s 75(v) of the Constitution and thus invalid. Further they would confer authority on a non-judicial decision maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71[48].

Because the High Court concluded that the section was not to be read as applying to invalid decisions, it also rejected the plaintiff's submission that the privative clause was unconstitutional, holding that, properly construed, s 474 did not attempt to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution.

Thus s 474 was held to be valid--but only because it did not apply to applications under s 75(v) for the issue of constitutional writs in respect of 'decisions' affected by jurisdictional error.

It followed, logically, from the court's construction of s 474 that section 486A was also valid, but without effect, in respect of the proceedings intended to be brought by the plaintiff.

The joint judgment and the concurring judgment of Gleeson CJ both held that, because the expression 'privative clause decision' in s 486A had the same meaning assigned by s 474(2) of the Act, it followed that s 486A did not apply to a decision where there had been jurisdictional error. Such a decision was not a decision 'made under the Act[49].

In respect of injunctive relief under s 75(v) (a remedy available to cure some non-jurisdictional errors but not sought by the plaintiff in this case) Gleeson CJ[50] and Gaudron, McHugh, Gummow, Kirby and Hayne JJ[51] found it unnecessary to decide whether s 486A would prevent the court from granting such remedy, but the joint judgment suggested that s 486A might need to 'be read down to bring it within constitutional limits'[52].

Callinan J took a different approach. His Honour accepted that the parliament might regulate the procedures by which proceedings for relief under s 75(v) of the Constitution may be sought and obtained. He stated: 'But the regulation must be truly that and not in substance a prohibition.'[53] His Honour took into account the reality that the people seeking remedies for defective refugee determinations may not speak English and will often be living or detained in localities remote from the availability of legal advice. Mindful that the section purported to deny power to the High Court to extend time that it might otherwise have under O 60 r 6 of the High Court Rules, Callinan J concluded that s 486A was 'therefore invalid to the extent that it purports to impose a time limit of 35 days within which to bring proceedings under s 75(v) in this court'.[54] His Honour thus held:

> Section 486A, although not wholly invalid, can have no operation in relation to the constitutional remedies of mandamus, prohibition and injunction[55].

## Settled issues: Ratio decidendi

### *General principles*

- Section 75(v) introduces into the Constitution 'an entrenched minimum provision of judicial review',[56] 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'[57].

- A privative clause is therefore ineffective to reduce the scope of the constitutionally entrenched powers of judicial review granted to the High Court by s 75(v)[58].

- The constitutional writs of prohibition and mandamus are available to correct jurisdictional error. As no constitutional provision confers jurisdiction with respect to certiorari it remains open to the parliament to legislate to prevent the grant of that particular form of relief[59].

- There is a presumption that parliament does not intend to cut down the jurisdiction of the courts. Privative clauses must be strictly construed[60].

- A privative clause neither expands the jurisdiction of a decision-maker nor confers validity on a decision invalidly made[61].

- In respect of decisions taken by officers of the Commonwealth,[62] regard may be had to a privative clause to assist a court to determine whether compliance with an express or implied provision of an Act was intended to be essential to validity[63]. This is all that remains of *Hickman*[64]*.*

- This task is to be undertaken by applying ordinary rules of statutory interpretation[65] to ascertain whether or not the provision under consideration is, or is not, essential to validity.

- In ascertaining the intention of parliament, Australian courts will operate on the assumption that the legislature does not intend to abrogate or curtail any fundamental rights and freedoms. Nor will courts impute to the legislature an intention to authorise partiality or unfairness[66].

- If compliance with an express or implied provision is essential to validity, a decision otherwise made is vitiated by jurisdictional error[67].

- While it is necessary to attempt to reconcile the apparent conflict between a statutory provision imposing limitations or restraints upon a decision-maker's jurisdiction or power and a privative clause, it is not necessary that that reconciliation be effected[68].

- Where there is no ambiguity there is no occasion for the privative clause to operate. It is wrong to read the rest of an Act as subject to any privative clause, or to make the privative clause the central and controlling provision of the Act[69].

- When it is unclear if a provision was meant to be mandatory or directory, then the privative clause can be taken into account, as a general indication that the parliament did not intend that every direction must be regarded as mandatory[70].

### *The application of these general principles*

*Express provisions*

- Express statutory provisions, which define or confine the ambit of a decision-maker's powers, are not to be read as subservient to the general intention expressed by a privative clause[71]. They remain inviolable limits and constraints[72]. Any breach results in invalidity.

*Implied provisions*

- Implied provisions whose breach the High Court would, in the absence of a privative clause hold to constitute jurisdictional error,[73] (and thus result in invalidity) will ordinarily not be displaced by the general intention expressed by a privative clause[74].

- More specifically, a decision taken in breach of the rules of natural justice is not within the scope of protection given by a privative clause[75].

*Purported decisions*

- A privative clause drafted in terms applying to 'purported decisions', or 'decisions of a kind that might be made under a [specified] Act', would be in direct conflict with s 75 (v) of the Constitution and would be invalid in respect to any application to a decision of an officer of the Commonwealth. It would also infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth is to be exercised only by the courts referred to in s 71[76]. Thus the protection is substantive, and cannot be evaded by such a legislative device[77].

*Time limits*

- Time limits expressed to bar applications under s 75(v) of the Constitution by parties seeking judicial review of administrative 'decisions' are ineffective[78].

### Issues that appear to be settled because of clear obiter dicta

- It is not open to the executive and parliament to get around the issue of judicial review by conferring an unreviewable power on the Minister or his delegate by way of a totally open ended discretion as to which aliens can, and which aliens cannot, come to and stay in Australia[79].

- It is not open to the executive and parliament to get around the ineffectuality of the time bar by recasting s 486A so that it does not apply to decisions made under the Act but rather to 'purported' decisions[80].

## Issues that remain unsettled

- While it may not be open to the executive and parliament to confer totally open ended discretions on an officer of the Commonwealth, it is not yet clear as to how and where the High Court will draw the boundary between the parliament lawfully conferring a discretion on an administrator, and the parliament going beyond that point so as to unlawfully grant effectively unreviewable power on a minister or a minister's delegate[81].

- It is an open question as to whether broader review (for non-jurisdictional error) is constitutionally entrenched when injunctive relief is sought under s 75(v). The pleadings in *Plaintiff S157/2002* did not seek such relief. However, Gaudron, McHugh, Gummow, Kirby and Hayne JJ drew attention to this possibility in terms that suggest in their Honours' view it may be entrenched:

  > The other aspect of s 75(v) that should be noted is its conferral of jurisdiction in matters in which 'an injunction is sought against an officer of the Commonwealth'. Given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus. In any event injunctive relief would clearly be available for fraud, bribery or improper purpose.[82]

  Callinan J reached no concluded view on this question, but tentatively expressed a contrary opinion[83].

- The validity of the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth) remains untested. That legislation was not material in *Plaintiff S157/2002* because it came into force after the challenged tribunal decision had been made. Only Gleeson CJ referred to those recent amendments. His Honour pointed out that they were irrelevant[84] to the issues under consideration but observed:

  > A statute may regulate and govern what is required of a tribunal or other decision maker [in respect of the elements of procedural fairness] and prescribe the consequences, in terms of validity or invalidity, of any departure[85].

  It is not clear whether Gleeson CJ meant this passage to convey anything more than a general statement of principle. Even if his Honour did so intend, the possibility remains open that other members of the Court would subject the principle to exceptions, for reasons grounded in the general principles articulated by Gaudron, McHugh, Gummow, Kirby and Hayne JJ[86] and their Honours' remarks regarding the primacy of the rule of law. This would not be a surprising outcome. The foundations for it exist. The *Communist Party Case*[87] demonstrates that it is not constitutionally possible for Parliament to legislate to confer a power upon a member of the executive that is arbitrary in the sense of being unconstrained.

  In a similar vein Kirby and Callinan JJ in *Gerlach v Clifton Bricks*[88] stated:

  > Where a discretion is conferred by statute, it must be exercised in accordance with the language by which it is conferred and to achieve the purposes for which the power has been granted. To talk of 'absolute' judicial discretions, at least where such discretions are

> conferred by an Australian statute, involves a contradiction in terms. Absolute discretions are a form of tyranny.
>
> All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No parliament of Australia could confer absolute power on anyone. Laws made by the federal and state parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this court, in accordance with the constitutional standard.

It may be that a law which purports--as does the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth)--to confer validity upon a tribunal decision for which there is no rational basis, and that is so unreasonable that no reasonable decision-maker could have made it, is vulnerable to challenge on the above grounds. Such a challenge would raise the kind of issues that are referred to in the above judgments. The argument would be that any legislative provision that authorises a decision-maker to reach arbitrary outcomes lacks the necessary connection with a head of power in s 51 of the Constitution.

A result along these lines would go along way towards realigning the law of Australia (at least as it applies with respect to decisions made by officers of the Commonwealth) with the common law of England, where legislation that was intended to authorise decisions made not in conformity with the rules of natural justice has been held ineffective to immunise a decision against judicial review.[89]

- The validity of s 91X of the *Migration Act* 1958 remains an open question. That section directs the High Court, the Federal Court and the Federal Magistrates Court not to publish (in electronic form or otherwise) the name of any person who has applied for a protection visa in related proceedings. It has prompted judicial disquiet. In other matters argued before the High Court, Gaudron J and Kirby J have each expressed concerns regarding the validity of s 91X[90]. Gaudron J directed particularly harsh criticism at the measure[91]. In *Plaintiff S157/2002* Gummow J asked, during interlocutory proceedings, why the plaintiff's name could not be used[92]. In a footnote to their judgment Gaudron, McHugh, Gummow, Kirby and Hayne JJ pointedly observed 'in the absence of any direct challenge, it will be assumed that s 91X is constitutionally valid'[93].

- Finally it is uncertain what, if any, implications the High Court's decision in *Plaintiff S157/2002* will have with respect to State laws containing privative clauses and common law judicial review[94]. Because their concerns involved only Commonwealth law, neither the plaintiff nor the Solicitor General made submissions as to whether, were the plaintiff's arguments to be adopted (as in substance they were), that that conclusion would require the principles of the common law of Australia as applying in the States and Territories, which are not constrained by s 75 (v), to be revisited. It seems likely that this area of the law will receive renewed attention.

## Judicial methodology: a concluding comment

Justice Susan Kenny's paper *The High Court on Constitutional Law: the 2002 Term*[95] focused on the interpretive analyses that the High Court has employed in constitutional law cases in recent matters coming before it. Following Bobbitt[96], Kenny discerned five principle modes of interpretation employed by the High Court in resolving questions of construction—(1) textual[97]; (2) historical[98]; (3) structural[99]; (4) doctrinal; and (5) prudential-ethical[100].

Her Honour suggested that in the recent past the doctrinal method has taken priority over other interpretive approaches. Her Honour described this approach as follows:

> What may be termed the 'doctrinal' approach depends on the claim that principles may be derived from the Court's previous authorities relevant to the resolution of the constitutional question at hand….It joins the Constitution to the common law, which is part of our distinctive tradition as a common law country[101].

The reasoning employed by Gleeson CJ and Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002* strongly conforms to Justice Kenny's analysis. The High Court resisted the plaintiff's invitation[102] to hold sections 474 and 486A invalid and directly repudiate Dixon J's obiter remarks in *Hickman*. Instead the High Court resorted to traditional common law methodologies, distinguishing and explaining *Hickman* while effectively replacing it with, and consolidating, the very different conceptional approach articulated by Gaudron and Gummow JJ in *Darling Casino*[103].

I have suggested earlier in this paper that *Plaintiff S157/2002* 'exploded' the *Hickman* myth. Perhaps a better analogy is that the myth was quietly deflated. Given the level of public controversy surrounding migration and refugee policy, and the fact that strong differences and highly complex reasoning had hitherto marked the High Court's history of dealing with privative clauses, this was a remarkable result. The result was remarkable because not only did High Court craft a unanimous outcome entrenching judicial review (denying sections 474 and 486A any relevance to the proceedings intended to be brought by the plaintiff), but also it did so without provoking yet another outburst of political criticism directed at so-called judicial activism.

Yet this is perhaps the strength of the interpretive method employed by the court in this case. Justice Kenny drew attention to its advantages[104] as follows:

> The virtues of what may be called the doctrinal mode are largely the virtues of the common law. In interpreting the constitutional text by reference to prior authorities, the Court promotes the values of continuity, stability and predictability. By promoting these values the Court enhances its own institutional legitimacy….These values are, furthermore, important to the institutional well-being of the other arms of government. That is, although they are the virtues of the common law they are constitutionally relevant values[105].

This may partly explain why even the Commonwealth, made subject to a costs award because its submissions had been 'rejected in significant measure',[106] claimed victory in this case.

**Endnotes**

1 Minister Ruddock, *Commonwealth Parliamentary Debates, House of Representatives*, Second Reading Speech *Migration Legislation Amendment Bill (No 4) 1997*, 25 June 1997; Senator Abetz, *Commonwealth Parliamentary Debates, Senate,* Second reading speech, *Migration Legislation Amendment Bill (No 1) 2001*, 26 February 2001.
2 (2003) 195 ALR 24; [2003] HCA 2.
3 The term 'jurisdictional error' has a narrow meaning when applied to a judicial decision (made by an independent judge, whose decisions are usually subject to appeal) but a substantially wider meaning when applied to a decision of a public servant, minister or administrative tribunal: see *Craig v South Australia* (1995) 184 CLR 163 at 179 per curiam (Brennan, Deane, Toohey, Gaudron and McHugh JJ). The distinction between jurisdictional and non-jurisdictional error has been abandoned in England.
4 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
5 *Darling Casino v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 635.
6 For more detailed analysis see below under the headings: The decision in *Plaintiff S157/2002,* and, Settled Issues.
7 See the definition of 'privative clause decision' in s 5 of the Act.
8 That is a clause expressed to, and intended to, oust the jurisdiction of the High Court.
9 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1.
10 *Re Australian Railways Union; Ex parte Public Transport Corporation* (1993) 117 ALR 17 at 23-24; *Re Media Entertainment and Arts Alliance; Ex parte Arnel* (1994) 179 CLR 84; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238; *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30.
11 Kirby and Callinan JJ held to this effect in *Gerlach v Clifton Bricks* (2002) 188 ALR 353 at 371.
12 The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Also see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 134 per Kirby J; 139 per Hayne J.
13 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 at 193.
14 As Brennan J noted in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36, judicial review is rooted in the nature of the judicial function. This creates a responsibility confronted by all courts: not only by courts exercising jurisdiction under a written constitution, but also by courts applying the law within an unwritten constitution. Hence, English courts, even without a foundation such as Chapter III of the Constitution, have held it fundamental that the rule of law obliges them to disregard privative clauses of a kind such as s 474.
15 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
16 p 614-316.
17 (1914) 18 CLR 54.
18 The plaintiff's writ of summons was filed within 35 days but the substantive proceeding in contemplation --an application for writs of prohibition, mandamus and certiorari to set aside a decision of the Refugee Review Tribunal--was not. The plaintiff's statement of claim contended the purported effect of the impugned provisions of the *Migration Act* stood in the way of such an application being made--but asserted that those proceedings would be commenced should the plaintiff obtain the orders he sought. It was common ground between the parties that unless s 486A was invalid, or was otherwise inapplicable, any future substantive application must fail for having been brought out of time.
19 The Commonwealth submitted that although the Minister may have desired to 'restrict' judicial review, his Second Reading Speech had made it clear that this object was to be achieved by expanding the jurisdiction of decision-makers with the result that judicial review will be less likely to succeed and, therefore, less attractive.
20 70 CLR 598 at 615.
21 Citing, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J at 142.
22 Cf *Project Blue Sky Pty Ltd v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392-393 [99]-[100] per McHugh, Gummow, Kirby and Hayne JJ.
23 For example, *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 251 per Mason CJ, 274 per Brennan J, 286-287 per Deane, Gaudron and McHugh JJ, 305 per Dawson J (with whom Toohey J agreed at 309).

24 The defendant's written submissions argued that the plaintiff should apply for leave to argue that Dixon J's exposition of the relevant principles in *Hickman* or the adoption of those principles in later cases was wrong. This argument was not pursued—unsurprisingly given that the plaintiff contended that the ratio decidendi of *Hickman* was correct but incorrectly understood and that Dixon J's comments were obiter.
25 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598; [2002] HCA 11, Gaudron and Gummow JJ at [51]; McHugh J at [67]; and Callinan J at [165].
26 (2002) 193 ALR 449.
27 Written submissions of the first respondent on the construction and validity of s 474(1) of the *Migration Act 1958* para 8: citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J at [166].
28 193 ALR 449 at 460.
29 70 CLR 518 at 615 (italics added).
30 (1983) 153 CLR 415 at 418-419.
31 193 ALR 449 at 460.
32 (1997) 191 CLR 602.
33 At 635.
34 At 609.
35 It is commonplace for courts faced with the interpretation of statutes to have to determine whether or not compliance with a particular provision should be mandatory (that is essential to validity) or directory such that a failure to comply with the strict letter is not fatal).
36 (1947) 75 CLR 36.
37 (1949) 77 CLR 387.
38 At 394-395.
39 193 ALR at 581-2; 590.
40 By a joint judgment of five justices, Gaudron, McHugh, Gummow, Kirby and Hayne JJ; the Chief Justice delivering a concurring but separate, and Callinan J a substantially concurring, but differently nuanced, judgment.
41 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [103].
42 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [104].
43 Or in the older language more recently disapproved of by the High Court (see the cases cited by Callinan J at fn 143 of His Honour's judgment), whether the provision is mandatory or directory. Whatever the language to be used to describe this technique of statutory construction, the High Court was resorting to well-established judicial methodology. It is commonplace for courts faced with the interpretation of statutes to have to determine whether or not compliance with a particular provision should be mandatory (that is essential to validity) or directory (that is such that a failure to comply with the strict letter is not fatal); see Gleeson CJ at [20].
44 That is an outcome having no legal effect.
45 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [91].
46 Gleeson CJ at [35]; Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [91]; Callinan J at [162].
47 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [75].
48 Ibid.
49 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [87]; Gleeson CJ at [41].
50 At [39].
51 At [91].
52 At [91].
53 At [173].
54 At [174].
55 At [175].
56 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [103].
57 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [104].
58 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [73].
59 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [80-81].
60 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [72].
61 See the discussion above under the heading, 'The decision in *Plaintiff S157/2002*'.
62 See s 75 (v) of the Constitution.
63 Gleeson CJ at [33].
64 Gleeson CJ at [33] and [35], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [64].
65 Gleeson CJ at [20], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [60].
66 Gleeson CJ at [37].

67 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76].
68 This is implicit in the outcome of *Plaintiff S157/2002* and explicitly stated by Gaudron and Kirby JJ in *Re MIMA; Ex parte S134/2002* (2003) 195 ALR 1 at 18.
69 Gleeson CJ at [133].
70 Gleeson CJ at [20]; see also Latham CJ in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 394-495.
71 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [65-66]; Callinan J at [162].
72 Gaudron, McHugh, Gummow, Kirby and Hayne at [76].
73 For analysis of what the High Court has held to constitute jurisdictional error on the part of an administrative tribunal see *Craig v South Australia* (1995) 184 CLR 163. The Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) stated at 179:

> If… an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

74 Gleeson CJ at [25-27].
75 Gleeson CJ at [38]; Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [82].
76 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [75].
77 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [98].
78 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [86-91].
79 Gaudron, McHugh, Gummow, Kirby and Hayne JJ addressed this issue at [101-102]. In responding to the Solicitor-General's oral argument on this point, Gleeson CJ expressed similar views. He intimated that in his view such a provision would lack the indicia of a 'law'. The transcript is on the High Court web site: 3/4 September 2002. It seems clear that provided it is within a constitutionally conferred head of power, it is open to Parliament by plain and express language to authorise executive action in terms importing some discretion or to narrowly prescribe it. But an unbounded power cannot be conferred.
80 This is contended for in reliance not only on Callinan J's express finding at [174-175] but also on Gaudron, McHugh, Gummow, Kirby and Hayne JJ's reasoning at [75] and their Honours' strong comments at [98] and [103-104] that differences in understanding about privative clauses between the submissions of the Commonwealth and the decision of the Court were real and substantive and not mere verbal quibbles, and their Honours' finding that the High Court's jurisdiction to exercise judicial review is constitutionally entrenched.
81 Only the outline of the principles involved are set out, see Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [102].
82 At [82].
83 At [131].
84 Gleeson CJ at [24].
85 At [25].
86 At [98-104].
87 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1.
88 (2002) 188 ALR 353 at 371.
89 *Reg v Home Secretary, Ex p Fayed* (CA) [1998] 1WLR 763; *R v Secretary of State for the Home Department ex p. Mehta* [1992] COD 484.
90 Gaudron J in *Applicant S275-02 and Anor v MIMA* S200/2003 High Court transcript 23 September 2002; Kirby J in *Dranichnikov v MIMA* B96/2000 High Court transcript 4 February 2003 (noting it was a 'purported' provision).
91 In an exchange between counsel for the Minister and the bench that may be unprecedented in its savagery.
92 High Court transcript 19 July 2002.
93 Footnote 41 p 37.
94 This issue was not addressed by the decision notwithstanding the intervention of the Attorney General of South Australia.
95 A paper delivered at the Gilbert and Tobin Centre of Public Law Constitutional Law Conference, Sydney, 21 February 2003.
96 Bobbitt, *Constitutional Fate*, pp 7-8, 93-94; Bobbitt, *Constitutional Interpretation* pp 12-13, 31f.

97 The doctrine of literalism; that is the text carries the meaning the words naturally bear. This was until relatively recently the High Court's preferred mode: see, for example, *The Engineers Case* (1920) 28 CLR 129.
98 A mode of interpretation that relies on ascertaining the purpose or understanding of the Constitution's framers to assist a court understand the text's meaning.
99 A mode of interpretation that looks to the way in which a provision intersects with other parts of the Constitution and gives it a meaning consistent with the structure of government created by the document as a whole.
100 A mode of interpretation that takes into account the relevant economic, social and moral considerations attending the case.
101 Op cit, f/n 95, at 8.
102 Extended by the plaintiff's arguments based on textual, historical and structural considerations.
103 (1997) 191 CLR 602 at 635.
104 It of course also has weaknesses as well as strengths. No single approach commands universal support. Many decisions of the High Court have been marked by robust disagreements as to methodology. *Plaintiff S157/2002* is a rare example of near unanimity in approach. The advantages and disadvantages of different approaches to constitutional interpretation are destined to remain the subject of judicial and academic argument and study for so long as the Court's duty to interpret the Constitution remains.
105 Kenny, op cit at 9-10
106 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [107].

# PRIVATIVE CLAUSES—AN UPDATE ON THE LATEST DEVELOPMENTS

*David Bennett AO QC**

*Paper presented at an AIAL seminar on Judicial Review, Privative Clauses and the High Court, Canberra, 13 March 2003.*

## Introduction

Three months ago, at a forum very similar to this one, I delivered a paper entitled 'Privative Clauses – Latest Developments'.[1] That paper analysed the decision of the Full Federal Court in *NAAV v Minister for Immigration and Multicultural Affairs and others* ('***NAAV***'),[2] a case which examined the validity and effect of the privative clause contained in s 474 of the *Migration Act 1958* (Cth) ('the **Act**'). *NAAV* gathered together five applications for review by failed visa applicants and thus gave the Full Federal Court the opportunity to determine the validity and effect of the Commonwealth's new privative clause legislation across a wide cross-section of possible circumstances and grounds for review.

In the normal course of events, one would have expected the *NAAV* cases to make their way to the High Court on appeal, at which point the Court would have had the opportunity – aided by the reasoning below of five of the most senior judges of the Federal Court of Australia[3]– to determine finally the validity and effect of the privative clause across the same wide cross-section of possible circumstances and grounds for review.

The Commonwealth has always taken the view that one of the central policy questions in the area of migration has been the question of 'queue jumping', so it is ironic that, in what one might see as an example of litigious 'queue jumping', the High Court was asked to address the validity and effect of the privative clause legislation before it heard *NAAV*. This occurred, without the benefit of intermediate court consideration, in two cases brought in the Court's original jurisdiction, which the Court handed down together on 4 February 2003.[4]

In this paper, I propose to update my previous paper[5] by examining the High Court's decisions and their impact on the law of privative clauses. As will be seen, in practical terms, I think the recent decisions settle very little of the uncertainty surrounding privative clauses in Australian law. Most of the issues remain to be

* *Solicitor-General of Australia.* *I acknowledge the great assistance I have received in writing this paper from my counsel assisting Benjamin O'Donnell.*

decided by the High Court, probably in those of the *NAAV* cases that find their way to the Court on appeal.

## Privative Clauses – A Brief History

It is desirable first to put the problems raised by privative clauses in their context. The problems raised by privative clauses have been compared to the classical philosophical conundrum of what happens when an ‘irresistible force’ meets an ‘immovable object’?[6]

The ‘irresistible force’ is the principle of parliamentary supremacy. Parliament has a general, plenary power to make laws ‘subject to the Constitution’ and it is well established that an argument that a particular law is unfair or unjust or wrong or ill-advised is beside the point of whether the law is valid.[7]

The ‘immovable object’ is the principle of the rule of law by which is meant, in this context, that it is for the courts to have the final word on the interpretation of the law in its application to particular cases. The role of the courts in judicial review in this sense is constitutionally entrenched by the presence, in s75(v) of the Constitution, of the High Court’s original jurisdiction in all matters, ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. The High Court has held that this entrenches the Court’s power to review decisions by Commonwealth officials and bodies for ‘jurisdictional error’, by granting what it now calls the ‘constitutional writs’ of mandamus and prohibition.

When Parliament invests a particular administrative decision-maker with power to make a decision under a statute and then says, in what is called a ‘privative clause’, that the decision is final and shall not be questioned in the courts, these two principles come into conflict: a ‘supreme’ parliament should be able to pass such a law; but the courts must retain the final word on the legal validity of administrative action. Which principle prevails?

### *Hickman*

In what some commentators have seen as an innovative but expedient compromise,[8] the High Court appeared to reconcile these conflicting principles in the 1945 case of *R v Hickman, ex parte Fox and Clinton* (‘***Hickman***’).[9] In that case, the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth)[10] conferred on Local Reference Boards the power to settle disputes between employers and employees ‘in the coal mining industry’.[11] Regulation 17 contained a classic privative clause – decisions of the Local Reference Boards were:

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

Mr and Mrs Fox were general haulage contractors who sometimes carried coal. They sought a writ of prohibition to prevent a Local Reference Board from holding a hearing to settle a dispute in which they were involved. In spite of the privative clause, the Court unanimously granted prohibition on the basis that the dispute was not ‘in the coal mining industry’. In coming to this conclusion, the Court did not find

the privative clause invalid, but instead sought to reconcile it with the Local Reference Board's limited grant of dispute resolution power through a process of statutory interpretation. In a statement that came to be described as 'classical',[12] Dixon J (as he then was) set out this interpretive approach:[13]

> 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*. [italics added]

The effect of exposition of Dixon J in *Hickman's* case was 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. Section 75(v) of the constitution demands no less. That lesser measure of control was expressed in the last (italicised) part of the passage quoted above, which became known as the '*Hickman* provisoes'. Thus a privative clause was seen as a kind of drafting device that, instead of outsing the jurisdiction of the courts, expanded the jurisdiction of the decision-maker to the very limits of its possible scope.

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[14], and industrial legislation.[15] In time his doctrine came to be affirmed by other members of the Court[16] and indeed by 1960 Menzies J, as I have already said, described it as 'classical'.[17]

### *The Hickman provisoes*

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.[18]

There is an obvious reason for this. A decision-maker who 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. Section 75(v) of the Constitution invests the High Court with the responsibility of preventing this sort of

thing. But how? The problem was solved by the three 'exceptions' to the operation of a *Hickman* clause stated by Dixon J in his 'classical' formulation.

*Bona fides*

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.[19] 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[20]; another has suggested that being motivated by an improper purpose might mean the absence of bona fides.[21] However, the content of the concept of good faith has not yet been fully explored.[22] 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.'[23]

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.[24] There is High Court authority, in the *Hickman* context, for the proposition that the true test is whether there has been 'an honest attempt to deal with the subject matter confided' to the decision-maker.[25] There are also three recent decisions of the Full Federal Court in South Australia limiting the scope of 'actual bias' which is an aspect of absence of bona fides[26].

*Relation to the legislative subject matter and the specific power*

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 similar.[27] The decision must be 'reasonably capable of reference to the power given to the body'. The difference between these two exceptions is subtle. One relates to the statute as a whole and the other to the provisions conferring jurisdiction. For example, if a dog inspector under our hypothetical Dog Licensing Act were given the power to fine owners of unlicensed dogs, but instead decided to confiscate the dogs, the decision would 'relate to the subject matter of the legislation' but not be 'reasonably capable of reference to the power given to' the inspector. Together, the two provisoes mean that it is enough that the decision, on its face, does not exceed the authority of the decision-maker.[28]

That is a less demanding test than whether there was a 'jurisdictional error' of the kind discussed by the House of Lords in *Anisminic*[29] and by the High Court in *Craig v South Australia.*[30] 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. 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.

*Inviolable limitations?*

Some argue that in certain circumstances there is a fourth *Hickman* proviso. Statutes that confer power on decision-makers empower them to act in certain circumstances and 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. As Dixon J himself said in *Hickman*: [31]

> 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.

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 the original three set out by Dixon J.[32] The contrary argument is that the competing provision is read merely as indicating what the decision must *attempt* in good faith to do rather than creating a jurisdictional pre-requisite. In the end, it is a matter of statutory construction. For this reason, the so-called 'fourth' proviso to *Hickman*, even if it exists, will not always operate.

Indeed, the Commonwealth has argued that that, by inserting a *Hickman* clause into the *Migration Act*, Parliament was clearly indicating that decisions of the relevant kind should be treated as invalid if, and only if, one of the first three *Hickman* conditions is not met. The use of a *Hickman* clause evinces 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 to be no other 'inviolable limitations'.

**The Migration Act Privative Clause**

Section 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) and came into effect on 2 October 2001. It contains the following privative clause:

> (1) A privative clause decision:
> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

The similarity between sub-s (1) and the clause in *Hickman* was by no means coincidental, as the Minister's Second Reading Speech made clear:[33]

> 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.

In practice, the decision is lawful provided:

- the decision-maker is acting in good faith;
- the decision is reasonably capable of reference to the power given to the decision-maker – that is, the decision-maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
- the decision relates to the subject matter of the legislation – it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the Migration Act is dealing with visa applications; and
- constitutional limits are not exceeded – given the clear constitutional basis for visa decisions making in the Migration Act, this is highly unlikely to arise.

Thus the privative clause in the *Migration Act* represented an attempt at the highest example yet of cooperation between the courts and the Legislature. The Court had told Parliament that certain words will be construed as having a particular effect and Parliament took the hint and used those precise words with the expressed intention of having that precise effect.

**The view of the Federal Court – NAAV**

As I have said, five of the most senior judges of the Federal Court, Black CJ and Beaumont, Wilcox, French and von Dousa JJ, examined the effect of this privative clause in five cases heard and decided together by the Full Court last year. The cases covered a cross-section of circumstances and grounds of review – procedural fairness, misunderstanding the issue, taking into account an irrelevant considerations, error of law, making a decision under the wrong power and failure to comply with specific statutory requirements – in other words, most of the species of 'jurisdictional error' identified in *Craig v South Australia.*[34]

With respect to the so-called fourth *Hickman* proviso, the question whether the Act contained '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 the judges.

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.[35] 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.[36]

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.' [37] 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 reasonably capable of reference to the power given to the decision-maker.[38]

Black CJ agreed that the inviolable limitations in the *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 so as not to be relaxed by the *Hickman* clause.[39] Wilcox and French JJ reached similar conclusions, although their reasoning was not the same.[40]

With respect to the requirement to act bona fide, I have already said that this is a relatively undeveloped area of law. Indeed, in one of the *NAAV* cases an applicant 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. In *NAAV*, only French J seemed to countenance a potentially significant degree of overlap.[41] The opinions of the other judges in *NAAV* are less clear. It is an issue which may arise in future cases.

With respect to procedural fairness, a majority of the Court (consisting of Black CJ and Beaumont and von Doussa JJ) held that, to the extent that there had been a failure to follow common law rules of procedural fairness in the case before them, that had been cured by the *Hickman* clause.[42] In dissent, Wilcox J 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.[43] Somewhere in between these two positions was French J. He said that: [44]

> 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…

Thus a majority of the Full Federal 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 applied similarly to matters such as misunderstanding a central fact, taking into account irrelevant considerations, and failing to take into account relevant considerations.

**The (incomplete) view of the High Court**

As I have said, before the appeal from *NAAV*, the High Court addressed the issue of the validity and effect of the privative clause in two cases in the Court's original jurisdiction: *re Minister for Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002*[45] and *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*').[46] The first mentioned of these cases was decided upon its facts and the principles laid down in the second case, thus that second case will be the focus of the remainder of this paper.

The plaintiff in *Plaintiff S157* was a failed visa applicant who claimed that, but for the privative clause (and the new time limits on claims in s 436A of the Act) he would have been able to challenge the decision of the Refugee Review Tribunal ('the **Tribunal**') to not grant him a protection visa on the ground that the Tribunal failed to comply with the rules of procedural fairness. The plaintiff also challenged the new time limits on applications in the High Court's original jurisdiction in s 468A. Gummow J stated a case on these two issues to the Full Court.

The plaintiff's primary argument with respect to the privative clause was that it was directly inconsistent with the terms of s 75(v) of the Constitution and was thus wholly invalid.

The Commonwealth argued that, consistent with the clear legislative intent and the history of the *Hickman* doctrine, s 474 had the effect of expanding the Tribunal's jurisdiction such that it had the power to make any decision that was a bona fide attempt to exercise its power, that related to the subject matter of the Act (ie related to migration decisions) and that was reasonably capable of reference to the power given to the Tribunal by the Act. Thus, even if the Tribunal had not fully complied with the rules of procedural fairness, this would not have been a ground for judicial review of the Tribunal's decision.

***The judgments***

The Court unanimously rejected the plaintiff's argument and upheld the validity of the privative clause in s 474. However, in doing so, the Court disagreed with the Commonwealth's view of the effect of the privative clause upon the Tribunals' jurisdiction and thus the grounds of review available to an applicant for review of a Tribunal decision.

The Court delivered three judgments: a joint majority by Gaudron, McHugh, Gummow, Kirby and Hayne JJ and separate concurring judgments by Gleeson CJ and Callinan J.

*The joint majority (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)*

The joint majority confirmed that the presence of a privative clause in a statute required the Court to attempt, as a matter of statutory construction, to reconcile the privative clause with the other terms of the Act.[47] Further, the joint majority also affirmed that the presence of a privative clause may mean that certain statutory requirements and prerequisites for decision-making, which would otherwise invalidate a decision if not complied with, become merely guidelines for decision-making.[48]

However, the joint majority rejected the Commonwealth's argument that the privative clause expanded the Tribunal's jurisdiction, or impliedly repealed other requirements in the Act, so that the only restrictions upon the Tribunal's decision-making power were those in the first three *Hickman* provisoes – that is, that the decision be a bona fide attempt to exercise the Tribunal's power, that it be related to the subject matter of the Act and that it was reasonably capable of reference to the power given to the Tribunal by the Act. The joint majority wrote:[49]

> Rather, the position is that the 'protection' which the privative clause 'purports to afford' will be inapplicable unless those provisos are satisfied. And to ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question. Thus, contrary to the submissions for the Commonwealth, it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an 'expansion' or 'extension' of the powers of the decision-maker in question. [footnotes omitted]

Thus, the *Hickman* provisoes represent the outer maximum of a decision-maker's *possible* jurisdiction, a bare minimum for judicial review. They represent the limit of the jurisdiction which a decision-maker *may* have, but not necessarily the limit which it *does have* where the statute contains both a privative clause and other apparent limitations on the decision-maker's power. The actual limits of a decision-maker's power will lie somewhere between the *Hickman* provisoes and any apparent limits provided for in the statute – determined in each case by a process of interpretative reconciliation.

Then, when it applied these principles to the case at hand, the joint majority did something very strange. The joint majority said this:[50]

> When regard is had to the phrase 'under this Act' in s474(2) of the Act, the words of that sub-section are not apt to refer either to decisions purportedly made under the Act or, as some of the submissions made on behalf of the Commonwealth might suggest, to decisions of the kind that might be made under the Act.

They then went on to say: [51]

> Once it is accepted, as it must be, that s474 is to be construed comformably with Ch III of the Constitution, specifically s75, the expression 'decisions[s] … under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.

On its face, this is remarkable reasoning. It would certainly astonish administrative lawyers to be told that a decision infected by jurisdictional error was not a 'decision under an enactment' for the purposes of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.[52] Does this mean that all the grounds of review that the Court found in *Craig* may give rise to jurisdictional error – for example failure to accord procedural fairness, taking into account irrelevant considerations or failing to take account of relevant considerations? No. In the very next paragraph, the joint majority said:[53]

> Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in s474(2) as 'a decision … made under this Act' and is, thus, not a 'privative clause decision' as defined in ss474(2) and (3) of the Act.
>
> To say that a decision that involves jurisdictional error is not 'a decision … made under [the] Act' is not to deny that it may be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision maker exceeding jurisdiction.

So, the privative clause does not apply to a decision infected by jurisdictional error; but what constitutes jurisdictional error is determined by interpreting the Act in the light of the privative clause. This looks like the expanded, four provisoes version of *Hickman* expressed in a form of circular reasoning – the privative clause does not apply to decisions that are not a bona fide attempt to exercise power, do not relate to the subject matter of the Act, are not reasonably capable of reference to the power given to by the Act *or contravene an inviolable limitation or imperative duty laid down by the Act*.

Then in one paragraph, the joint majority applies this reasoning to the plaintiff's claim of a breach of the rules of procedural fairness:[54]

> Because, as this Court has held, the constitutional writs of prohibition and mandamus are available only for jurisdictional error and because s 474 of the Act does not protect decisions involving jurisdictional error, s 474 does not, in that regard conflict with s 75(v) of the Constitution and, thus, is valid in its application to the proceedings which the plaintiff would initiate. The plaintiff asserts jurisdictional error by reason of a denial to him of procedural fairness and thus s 474, whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision' within s 474(2) of the Act.

What is really surprising is that, apart from an early paragraph in which the joint majority *describes* the plaintiff's claim,[55] this paragraph is the only place in the whole of the joint judgment in which the phrases 'procedural fairness' or 'natural justice' appear. We are told that procedural fairness is an inviolable limitation upon decision-makers under the Act, but we do not know why and we do not know what other inviolable limitations there may be nor whether it applies to every failure to render procedural fairness, however minor. As will be seen, Callinan J supports a distinction between categories of denial of procedural fairness. On reading the joint judgment, one begins to sympathise with Sir Anthony Mason's recent comments about judicial reasoning that 'conceals rather than reveals the reasoning process.'[56]

*The concurring judgment of Gleeson CJ*

The question of why procedural fairness was an 'inviolable limitation' was addressed by Gleeson CJ in his separate judgment. He said:[57]

> In the present context, there is a question whether a purported decision of the Tribunal made in breach of the assumed requirements of natural justice, as alleged, is excluded from judicial review by s 474. The issue is whether such an act on the part of the Tribunal is within the scope of the protection afforded by s 474. Consistent with authority in this country, this is a matter to be decided as an exercise in statutory interpretation, the determinative consideration being whether, on the true construction of the Act as a whole, including s 474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable. The line of reasoning developed by Dixon J in *Hickman* and later cases identifies the nature of the task involved, and the question to be asked. By identifying the task as one of statutory construction, all relevant principles of statutory construction are engaged.

Gleeson CJ identified the 'relevant principles of statutory construction' in this case as:

(a) **International law:** where a statute is enacted pursuant to Australia's international obligations, such as the Migration Act with respect to refugees, in the case of ambiguity the Court should favour an interpretation that accords with those international obligations.[58]

(b) **Fundamental rights:** the Court should not impute to Parliament an intention to abrogate or curtail fundamental human rights without clear, unambiguous and unmistakable language.[59]

(c) **Rule of law and access to justice:** the fundamental importance to the rule of law of judicial review and thus the Court should not impute to Parliament an intention to deprive citizens of access to the courts without clear words or necessary implication.[60]

Having examined the general scheme of the Act in the light of these principles, Gleeson CJ concluded that the presence of the privative clause was insufficient to enable him to conclude that the Tribunal was not bound by the rules of procedural fairness. If Parliament wished to circumscribe the Tribunal's obligations of procedural fairness, it would have to say so more clearly.[61]

*The concurrence of Callinan J*

Callinan J also held that privative clause did not apply to the plaintiff's action but he also held that, '[i]t may be … that to attract the remedies found in s75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice, a matter which it is unnecessary to decide at this stage of proceedings.'[62] This may appear to be a similar position to that of French J in *NAAV* – that the presence of the privative clause may pare down the requirements of natural justice.[63] However Callinan J appears to be raising the more fundamental point that the constitutionally protected writs in s75(v) may only extend to a limited form of natural justice and that, since a privative clause could constitutionally exclude all review apart from that under the 'constitutional writs' in

the High Court, such a clause would have the effect, through a different route to that taken by French J in the Federal Court, of paring down the requirements of procedural fairness.

### *Implications*

When he was still President of the New South Wales Court of Appeal, Kirby J said the following in a case on the interpretation of an industrial relations statute:[64]

> There is a presumption, useful in statutory interpretation, that where a provision of legislation has been passed upon by authoritative decisions of the courts and is later re-enacted, Parliament can be taken, in the absence of a clear intention to the contrary, to know and accept the interpretation given to the legislation.

In *Flaherty v Girgis*, Mason ACJ and Wilson and Dawson JJ cast doubt on this principle on the basis that, 'the difficulty is determining the existence of parliamentary approval'.[65] However, one would be hard pressed to think of a case in which the 'existence of legislative approval' was clearer than that of s 474 of the Migration Act. The Courts interpreted the same privative clause as in s 474 in *Hickman* as having a certain meaning. Taking the hint, Parliament re-enacted those same words with the clear intention – made crystal clear by the Minister's Second Reading Speech and the Explanatory Memorandum – that it be interpreted in the same way. The Court told Parliament that a *Hickman* clause was code for giving decision-makers jurisdiction to make any decision that was bona fide and related to the subject matter of the legislation and the grant of power and Parliament duly cooperated by adopting the code.

True it is that the High Court appears to have nailed its colours to the mast of the 'four proviso' version of the *Hickman* doctrine; whereas the Commonwealth took the view that there were only three provisoes. But, as I have said, the so-called fourth proviso is a matter of statutory interpretation in each case and there will be cases in which the fourth proviso has no content. Given the clear intention of Parliament in enacting s 474, one would have thought that this was a case in which the fourth proviso had little or no content.

Nevertheless, after the High Court's privative clause decisions we now know procedural fairness is an 'inviolable limitation' upon decision-makers under the Act as then drafted. The High Court has said that it requires Parliament to make its intentions absolutely clear if it wants to exclude or limit obligations of procedural fairness. The Court has removed from the Commonwealth's armoury the convenient drafting device of the *Hickman* 'code' – but it has made it clear that Parliament can exclude or limit procedural fairness (and presumably other limitations on administrative discretion) by using unmistakably clear language.[66]

This Parliament has done by passing the *Migration Legislation Amendment (Procedural Fairness) Act 2002*. This legislation amends the Act to provide that the provisions of certain explicitly outlined requirements in the Act are all that is required for a decision-maker to comply with the hearing rule of natural justice. This, I would submit, is exactly the sort of explicit language that the Court has said is required to narrow the ambit of procedural fairness.[67] These amendments had not yet come into

effect with respect to the plaintiff in the High Court privative clause cases and were thus not there considered.

However, the question of what other limitations on jurisdiction apply in the wake of the privative clause remain to be decided. Unlike the Federal Court in *NAAV*, the High Court did not have the benefit of a wide cross section of 'test cases' and many of the issues in *NAAV* are yet to be decided in the High Court. Gleeson CJ acknowledged as much when he said:[68]

> As French J observed in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, the Act is 'replete with official powers and discretions, tightly controlled under the Act itself and under the Regulations by conditions and criteria to be satisfied before those powers and discretions can be exercised'. In that case, and a number of related cases heard at the same time, the Full Court of the Federal Court dealt with several different kinds of challenge to decisions under the Act, and the operation of s 474 in relation to each of them. Here we are concerned with only one kind of challenge, involving a claim of denial of natural justice. A rejection of the Commonwealth's global approach to the operation of s 474 does not mean that the opposite conclusion follows in relation to every possible kind of challenge to a decision.

It may be – now that the *Hickman* doctrine has been held to require such a subjective judgment as to which requirements in the Act are and are not 'inviolable limitations' – that the Parliament will choose to put the issue beyond doubt by passing similar legislation with respect to other possible grounds of review.

## Conclusion

Thus, in practical terms, the High Court privative clause decisions come to very little. We now know that the High Court adopts the 'four proviso' version of the *Hickman* doctrine - where a statute contains both a privative clause and specific limitations on a decision-maker's power, the limits of the decision-maker's power will lie somewhere between the first three *Hickman* provisos and any apparent limits provided for in the statute – determined in each case by a process of interpretative reconciliation. We know that procedural fairness applies under the old Act, but we are yet to find out whether it applies now that Parliament has passed the *Migration Legislation Amendment (Procedural Fairness) Act*. And all the other issues dealt with by the Federal Court in *NAAV* remain to be decided, perhaps in one or more of the four *NAAV* cases in which special leave to appeal to the High Court has been sought.

All the queue jumping seems to have achieved for the law is the multiplication of further litigation.

#### Endnotes

1 (2002) 34 *AIAL Forum* 11.
2 (2002) 193 ALR 449; [2002] FCFCA 228 (15 August 2002).
3 Black CJ, Beaumont, Wilcox, French and von Dousa JJ.
4 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 195 ALR 24 and *Re Minister for Immigration and Indigenous Affairs; ex parte Applicants S134/2002* [2003] HCA 1; 195 ALR 1.
5 Op cit n 1.

6 G Loughton, 'Privative Clauses and the Commonwealth Constitution: A Primer', unpublished paper delivered to the Australian Government Solicitor's Constitutional Law Forum at Old Parliament House in Canberra on 23 October 2002.
7 *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 503-504 (Williams J): 'It is trite law that the powers conferred upon the Commonwealth Parliament by s51 of the Constitution are plenary powers of legislation as large and of the same nature as those of the Imperial Parliament itself.' See also *R v Burah* (1878) 3 App Cas 889 at 904; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
8 See for example, M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC Information Services, Sydney, 2000) at 689; A Mason, 'The Foundations and Limitations of Judicial Review' 31 *AIAL Forum* 1 at 20; HWR Wade and CF Forsyth, *Administrative Law* (7th ed, Oxford Clarendon Press, 1994) at 742; but note the insistence of Dixon J that, 'there is nothing artificial in such an interpretation' in *The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 146.
9 (1945) 70 CLR 598.
10 Made under *National Security Act 1939* (Cth).
11 Regulation 14.
12 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455 (Menzies J).
13 *Hickman* (1945) 70 CLR 589 at 614-5.
14 *The King v The Commonwealth Rent Controller; ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361 at 369 (Latham CJ, Dixon J); *The King v Central Reference Board; ex Parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 146 (Dixon J*); The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 398, 400 (Dixon J).
15 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 249 (Dixon J); *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 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 at 443, 446 (Dixon CJ).
16 *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 at 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 at 252-253 (Kitto J); *North West County Council v Dunn* (1971) 126 CLR 247 at 269 (Walsh J).
17 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455 (Menzies J).
18 See *The King v Commonwealth Rent Controller; ex Parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361 at 369 (Latham CJ, Dixon J).
19 See *SBAP v Refugee Review Tribunal* [2002] FCA 590 at [49] (Heerey J).
20 *NAAX v MIMA* [2002] FCA 263 (Gyles J).
21 *SBAP v Refugee Review Tribunal* [2002] FCA 590 (Heerey J); and see also HWR Wade and CF Forsyth *Administrative Law* (7th ed, Oxford Clarendon press, 1994) at 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 at 287 (Deane, Gaudron and McHugh JJ).
22 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 249 (Mason CJ). See also *Smith v East Elloe Rural District Council* [1956] AC 737 at 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'.
23 *Biddulph v The Vestry of St George, Hanover Square* (1863) 33 LJ Ch 411 at 417.
24 *NAAP v MIMA* [2002] FCA 805 (Hely J).
25 *The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 398 and 400 (Dixon J); and see *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 249-250 (Mason CJ).
26 *Minister v SBAN*, *Minister v WAAK* and *Minister v WAAG* [2002] FCAFC 431.
27 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 287 (Deane, Gaudron, McHugh JJ).
28 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 249 (Dixon J).

29 *Anisminic and Foreign Compensation Commission* [1969] 2 AC 147 at 171 (Lord Reid).
30 *Craig v South Australia* (1995) 184 CLR 163 at 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
31 *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 597 at 616 (Dixon J).
32 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 (Dixon J); *The Queen v Coldham; ex parte Australian Workers' Union* (1982) 153 CLR 415 at 419 (Mason ACJ, Brennan J).
33 *Commonwealth Parliamentary Debates*, *House of Representatives*, 26 September 2001 at 31, 561.
34 *Craig v South Australia* (1995) 184 CLR 163 at 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
35 [2002] FCAFC 228 at [15] (Black CJ).
36 [2002] FCAFC 228 at [624].
37 [2002] FCAFC 228 at [625].
38 [2002] FCAFC 228 at [626].
39 [2002] FCAFC 228 at [30]-[31], [37].
40 See [2002] FCAFC 228 at [366], [377] (Wilcox J), [524], [579], [592] (French J).
41 [2002] FCAFC 228 at [527].
42 [2002] FCAFC 228 at [113] (Beaumont J), [638], [648] (von Doussa J). On this point Black CJ agreed with von Doussa J at [4].
43 [2002] FCAFC 228 at [329]-[331].
44 [2002] FCAFC 228 at [536]; and see also [555]-[556].
45 [2003] HCA 1.
46 [2003] HCA 2.
47 [2003] HCA 2 at [60].
48 [2003] HCA 2 at [69].
49 [2003] HCA 2 at [64].
50 [2003] HCA 2 at [75].
51 [2003] HCA 2 at [76].
52 I am indebted to Stephen Gaegler SC, of the New South Wales Bar, for pointing out this contradiction between the interpretation of the phrase 'decision under this Act' in the Act and 'decision under an enactment' in the *Administrative Decision (Judicial Review) Act*.
53 [2003] HCA 2 at [76]-[77].
54 [2003] HCA 2 at [83]
55 [2003] HCA 2 at [45].
56 Sir Anthony Mason, speech at the dinner honouring the centenary of the High Court in Sydney, 28 February 2003. Text available at <http://www.justinian.com.au/Mason_speech.html>.
57 [2003] HCA 2 at [26].
58 [2003] HCA 2 at [29].
59 [2003] HCA 2 at [30].
60 [2003] HCA 2 at [31]-[32].
61 [2003] HCA 2 at [37].
62 [2003] HCA 2 at [159].
63 See [2002] FCAFC 228 at [536].
64 *Public Service Association of New South Wales v Industrial Commission of New South Wales* (1985) 1 NSWLR 627 at 640.
65 (1987) 162 CLR 574 at 594. See also *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 584 (PC).
66 See, for example, [2003] HCA 2 at [59].
67 [2003] HCA 2 at [24] (Gleeson CJ).
68 [2003] HCA 2 at [36].

# ADMINISTRATIVE DECISION-MAKING — AN INSIDER TELLS

*AS Blunn**

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You should be aware from the outset that I approach this subject and this occasion with a great deal of trepidation. My initial reaction was what is there, what can there be, that I can say that is new about administrative decision-making? But it got worse – 'An Insider Tells' – it suggests a titillating exposé of that which was previously hidden and is bound to have given rise to expectations I cannot hope to fulfil. I suppose it could have been worse – it could have been 'An Insider Tells All'. However, in thinking about it, I found there were some things I wanted to say from the perspective of an 'ex-insider'.

At this point I must make it clear that the views I express and reflect on are my own: I am not speaking for or on behalf of the Australian Public Service (APS) or the current management of any department or agency.

I am not going to define what is meant by 'administrative decision'. For the main part, but not exclusively, I relate it to program delivery decisions as distinct from decisions made in the policy making processes. Obviously, however, many administrative decisions are dependent upon decisions made in developing policy.

Most of the departments in which I spent my public service career were responsible for delivering very large programs. As a result one way or another I was involved in the introduction of the administrative law changes in the mid 1970s which I believe really did revolutionise decision-making in the APS. Indeed, the significance of those changes were emphasised to me by no less than my then Minister, one RJ Ellicott QC, so to say I was receptive to the changes hardly does justice to his powers of persuasion or my good sense.

Much of the history of that revolution has been canvassed fairly recently in celebrating the 20th anniversary of the Administrative Appeals Tribunal (AAT),[1] and more recently the 25 years of administrative review generally.[2] The only thing I would wish to add is that from my point of view, as even administrative revolutions go, it was a fairly bloodless affair: most of us knew change was both desirable and inevitable. Certainly we had concerns: we were moving out of our comfort zones,

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could we manage the task? Would we get the resources? Where would it all end? Well – we coped – the sky did not fall on us. There will be different views as to how well we coped but in my opinion, and to borrow from my very favourite Minister, Jim Hacker, we did 'alright' and decision-making in the APS, and therefore the AFP itself, is more professional as a consequence.

It is worth noting that review of administrative decisions did not spring out of nothing. Even in the APS some of the changes were anticipated. In the Social Security portfolio the Social Security Appeals Tribunal has been established. My own Department at the time, Capital Territory, which, as a federal department, had responsibility for a wide range of local and state government type functions, had done a considerable amount of work on reviewing decisions, particularly in the area of rating appeals.

In part, those anticipatory moves were responses to the development of increasingly effective and well resourced 'lobby' groups able and willing to debate aggressively with government both about policy and program delivery. Not surprisingly, there was an accompanying enthusiasm for challenging the role and authority of public servants. The result was a demand for better mechanisms both to air and resolve the issues and this is what the reform package delivered, but it also had other consequences.

It is now hard to believe that, generally speaking, until quite recently there was little demand within the executive government for any real measurement of the effectiveness of program delivery and therefore of the policy those programs delivered. In my opinion, this was a failing critical to better administrative decision-making, amongst other things. I think that it stemmed, at least in part, from a class distinction within the APS between 'policy officers' and 'program officers'. The policy advising role was, and to some extent still is, seen to be the important work of the APS. Once the policy was decided the real work was done: the delivery processes were a matter of mechanics and it could be left to the technicians to fill in the details. The technicians, basically those who make the bulk of the administrative decisions, were generally speaking less highly regarded and that was reflected in their pay and conditions, including their career prospects.

Over fairly recent times that too has changed, although there are some vestiges of the old traditions and attitudes, particularly within the so-called central policy departments of Prime Minister and Cabinet, the Treasury and the Department of Finance. The truth is, of course, that the roles are interdependent and equally important in terms of outcomes.

The focus on administrative decisions brought about by the reforms was significant in focussing the demand for measurement of the effectiveness of programs which in turn shone the spotlight on policy formulation.

Almost certainly, because I was involved in it, I think one of the more interesting developments in the area of the management of the policy, program development and delivery continuum has been the creation of Centrelink, principally out of the program delivery roles of the old departments of Social Security and Employment, Training and Youth Affairs.

On the surface, the creation of Centrelink as a specialised delivery agency could be seen as a deliberate separation of the responsibility for policy development, which remained with Departments, and program delivery. Indeed sadly, and contrary to the original intention it does appear at least to an outsider that it has developed somewhat along those lines. What was intended was that the Department would remain ultimately responsible for both policy development and implementation: that is they would remain accountable to government for the effective delivery of the policy whatever the delivery mechanism; in this case delivery was in effect ‘contracted out’ to Centrelink.

From my point of view, what is important about the Centrelink model is the opportunity it presented by providing, within the structure of government, a common delivery mechanism to achieve a partnership through greater cooperation, initially between two departments often serving common clients in overlapping programs and often without appropriate regard for the impacts of their policies on those clients.

It also promised some economies of scale, provided opportunities for the development of staff in cross-program and an experimental alternative to contracting out to the private sector with its attendant difficulties – an issue fairly recently considered by the Administrative Review Council (ARC).

As a program delivery model, Centrelink provides a useful focus for some general observations about the decision-making process.

I hope it will not come across as a surprise that one thing that is drilled into decision-makers at all levels and across all functions in the APS is that they should act ‘according to law’: the rub is for them to know what is, and what is not, ‘according to law’. Much time and effort is spent in trying to answer just that question. Staff involved in program delivery functions receive training and are also provided with guidance through a profusion of manuals and instructions. Help desks and other points of reference are available to provide assistance and answer queries. Before elaborating on those aspects, however, allow me to remind you of the context in which many of those decisions are made. I will again use Centrelink as my model.

Currently annually Centrelink spends about $54.5 billion on programs: it has some five million (plus) clients and processes about six and a half million new claims which result in some nine and a half million new entitlements. The day to day situations counter-staff deal with are often complicated both in terms of the application of the legislation in the circumstances presented and in ensuring that they observe all the other requirements necessary to achieve a valid decision, for example, that they observe the rules of natural justice. Their clients with whom they are face-to-face are often emotional, sometimes disturbed, usually, and not surprisingly, without much understanding of the issues but confident of their right to assistance. Although there is no ‘darg’, on average staff can only afford about 15 minutes with each client. These are not lawyers or senior officers making these decisions, they are usually junior to middle ranking public servants. Of course, they can in appropriate circumstances refer cases to more senior officers but that has to be the exception not the rule if the system is to work.

Those are facts, not excuses. It is not about numbers. The objective in terms of program delivery is to ensure that claimants receive what they are entitled to: with the corollary that persons who have no entitlements do not receive benefits. I suspect that the number of wrong decisions, on both sides of the ledger, is still too high.

This was demonstrated in the *2002 Review of Breaches and Penalties in the Social Security System* undertaken by Professor Dennis Pearce AO, Professor Julian Disney AO and Heather Ridout.[3] That review identified that while the existence of phrases such as 'reasonable steps', 'reasonable excuse', 'without sufficient reason' and 'special circumstances' in the relevant legislation indicates that the Parliament intended to guard against arbitrary and unfair imposition of penalties:

> in practice … insufficient investigation and consideration of reasons and surrounding circumstances have often prevented achievement of this intention.[4]

The Review arose following ACOSS research released in 2000 that showed that the number of breaches issued and penalties imposed as a result of those breaches had trebled over a 3 year period from 1998. The ACOSS research also indicated that a high proportion of decisions to impose a breach were overturned at all stages of review – ranging from 22% of decisions to impose administrative breaches being overturned on internal review to 47% of activity test appeals being overturned at the AAT.[5]

I would not wish my referring to this material which relates to one area of decision-making to be construed as an attack on the system, as a whole. But it does indicate that the need for an active and relevant review system remains (and the high overturn rates indicated to some extent that the system does work).

Already very considerable efforts are made across the APS to provide appropriate training in decision-making. Most of that training is conducted at agency level. Increasingly it is continuous, modular, and much of it computer based with satisfactory completion at various levels as a condition of advancement. Statistically sound systems are used to check decisions randomly and there are elaborate internal review processes for both decisions and complaints. The latter are due in no small part to the activities of the Commonwealth Ombudsman who has established their existence as one of his benchmarks for departments and agencies. The resultant drop in his case load has enabled him to initiate more 'own motion' reviews of systemic problems not least in the area of administrative decision-making. All of those mechanisms are in addition to the external reviews of decisions, including, of course, judicial review in appropriate cases.

All the training and manuals and guides are only effective in achieving the right results if they are sound. As I have already intimated, one of the problems is the sheer amount of material provided. Information overload is a real problem in many departments. However, I must say that does not stop people at all levels adding their views as to what is, what should be, and how it should be done. That said, in my opinion, proper instruction in decision-making is an area that should be further developed. Perhaps a guiding principle should be 'less not more'.

Getting decisions right does of course involve resource issues. I am fairly confident that a business case for more resources to avoid or recover wrongly paid benefits would have a good chance of success. I am less confident that support would be as forthcoming for more resources to achieve better decisions which would increase outlays.

In the context of improving guidance to decision-makers it has been very helpful where review bodies actually look at the materials relied upon in the decision-making processes and themselves offer guidance as to content or expression. However, I understand that that too involves resource issues.

In general, decisions which demonstrate some understanding of and sympathy to the original decision-making process are more useful in changing attitudes and establishing better approaches amongst decision-makers. The recent 'de-emphasising' of process has not improved decision-making. There can be no argument that the result is what is important and that process should seldom, if ever, be an end in itself: but process is both a guide and a way to achieve more disciplined and consistent results that are more likely to be right. It would be a mistake to regard 'proper processes' as antiquated bureaucratic concepts (it is after all the basis of much of the grounds of judicial review). But the drive for proper processes as well as increasing the support for decision-makers (avoiding information overload) has taken a modern twist with the development of expert systems to guide administrative decision-making. (Such systems seek to provide an automatic and logical process for identifying the relevant facts and law, and for the application to them to decision-making.) These systems are currently employed in a number of Commonwealth agencies.[6]

It is therefore timely that the ARC is conducting an investigation into such systems, which will consider issues such as:

- the desirable qualifications and subject knowledge for designers of rule-base systems;
- the appropriate procedures for testing the accuracy of the rule-base and how accuracy can be reasonably assured;
- who should audit the relevant computer programs?;
- whether there should be opportunities for independent scrutiny of the rule-base before it becomes operational and for regular on-going scrutiny, and who should undertake and fund such scrutiny?;
- how is the possibility of error or manipulation by officers minimised?;
- what is the best means of ensuring that the rule-base is kept up-to-date?

We now have what I would describe as a fairly robust jurisprudence in the area of administrative decision-making. However, to suggest that the issues are settled, that the task is done, seems to me to ignore the likely direction, growth and challenge of and to administration and therefore decision-making. It seems to me for example that

many of the administrative consequences of 'globalisation' have yet to be seriously felt in Australia, but based on experience in the areas of trade and the environment, to nominate but two, they are likely to be profound. Similarly, as the concepts of natural justice continue to be built upon there will be continuing consequences for administration and administrative decisions. The area of contracting out, although at last recognised as not the universal solution to everything, has its valuable place and despite the work done by the ARC[7] – or perhaps because of it – I think it is likely to give rise to more problem issues in the area of administrative decisions.

All that said, however, the area of most friction is still in my opinion the inherently different approaches adopted by tribunals and by agencies, including departments, to the weight to be given to policy in the decision-making process. Much has already been said elsewhere on this issue, and it has of course received its fair share of judicial attention, but this fundamental problem remains. It is rooted in the fact that from an agency point of view the task is to deliver the program to achieve the intention of the relevant policy. In developing that policy an agency is bound to 'act according to law' but otherwise it is duty bound to give effect to the intentions of the government and, unlike the experience of some tribunals, agencies do not have great difficulty in determining those intentions. That is of course in large part because they are involved in the formulation process and where, as is usually the case, the policy is legislated they are involved in the drafting of the law. They 'know' what was intended. Policy to them is not just one of a number of matters to which regard is to be had. It is the reason for the program and unless and until it, or the expression of it, is clearly declared unlawful they will give it effect.

Another factor which weighs heavily with delivery agencies is the ability to apply the policy across the target group, ie action the program with certainty across the relevant population. That too is usually an important policy objective.

That a perception of what constitutes justice in an individual case can and should override what is to them the clearly identifiable policy intent of a program, usually expressed through legislation, when the original decision can be supported in terms of the statute is a source of irritation and concern to administrators.

It is somewhat ironic that the mechanisms which were designed to enable decision-makers to avoid unconscionable results in particular cases, namely discretions, have been largely taken away. Perhaps that is what really irks administrators: that that need is now being met on review by someone's view of what is a 'preferable' decision, often it seems without much regard to the consequences or the policy. However, it is worse when justice in an individual case is achieved through imaginative interpretations of a statute, sometimes by reference to the general intent of the legislation, when quite obviously the legislation has a number of quite valid intentions, some quite inimical to the 'general intent' relied upon. The other aspect which I think raises some interesting issues is the distinction between and treatment of the facts of a case and appreciation of the law, as if they were separable in the decision-making process.

Of course, the usual response to criticisms of decisions of that sort by review bodies is that if the government does not like them, it can seek to change the law. If the decisions are of major consequence that is true but generally speaking it takes a

long time to change the law. Any suggestion that it can be done routinely is either naïve or suggests a cynical exploitation of the realities. Those concerns are heightened when the upset is caused after the law has been 'accepted' by relevant tribunals for some time.

It is perhaps interesting to speculate whether any Government will patiently sit by and watch bodies, which have at best very limited accountability when it comes to the expenditure of public moneys, exercise what are effectively discretions in ways which are not only inconsistent but at times inimical to the policy intention. The interests of government policy exercised in the common good is sometimes seen as being more important than the interests of the individual – and sometimes it is. Involved are absolutely fundamental but sometimes competing issues: effective Government, accountability and independence. None of those words, or the concepts they encapsulate, are free from ambiguities and as history shows they are not immutable.

In the final analysis it will be public acceptance that will determine within a society the shape and discretion of dispute resolution. In that regard I believe that we live in 'interesting times'. I look forward to the constructive role that courts and tribunal as well as expert bodies such as the ARC will play in the ongoing development of more effective, administrative decision-making in those times.

**Endnotes**

1 See, The AAT: Twenty Years Forward, ed John McMillan, AIAL, 1998; Administrative Appeals Tribunal, AAT Essays 1976-1996, ed Peter Bayne, AAT, 1996.
2 The Kerr Vision of Australian Administrative Law - At the Twenty-five Year Mark, ed Robin Creyke and John McMillan, Centre for International and Public Law, ANU, 1998.
3 Deputy Chief Executive, Australian Industry Group.
4 Report, para 1.51.
5 Australian Council of Social Service, press release, 23 March 2000.
6 The Departments of Veterans' Affairs, Defence, and Family and Community Services, Comcare, Environment Australia, ARC and Centrelink.
7 Report No. 42: 'The Contracting Out of Government Services', ARC, 1998.

# CURRENT AND FUTURE CHALLENGES IN JUDICIAL REVIEW JURISDICTION: A COMMENT[1]

*Robin Creyke**

Decision-making by government is the focus of a range of accountability mechanisms, review by the courts being the most formal and demanding. That review process is designed not only to determine the lawfulness of the action under scrutiny but also to fashion guidelines on legality issues which will be of assistance to primary decision-makers and other review bodies. Given their stature and authority, it can be expected that in the exercise of their judicial review jurisdiction, the courts have an obligation to define with some precision the standards they are imposing on public administration. That has not always been achieved. In defence of the courts, judicial review is a dynamic area of jurisprudence and the range of matters subject to the courts' jurisdiction is broad and continually expanding to match developments in public administration. Nonetheless, given the courts' position as the final arbiter of judicial review standards, these features of the jurisdiction only emphasise the need for the courts to exercise vigilance in the performance of this aspect of their task.

This paper discusses some current and future challenges to review by the courts in light of the courts' standard-setting role. The discussion concerns not only the elasticity of the legal standards but also the administrative context in which review occurs.

**Number and quality of public sector decisions**

Despite downsizing and contracting out there appears to be no diminution in the volume of decisions being made in the public sector. In the context of decision-making by government it was salutary to be reminded[2] that Centrelink processes over 6.5 million new claims each year.[3] To further illuminate that picture, the Attorney-General in 2000 calculated that the Australian Public Service made some 50 million decisions a year, of which some 35 million relate to income support.[4] The focus for courts and tribunal, however, is not on the number of decisions but on their legality and quality. That in turn requires attention to the number of errors made by decision-makers in the application of the law and its administrative standards.

Estimating the level of errors of public administration Australia-wide is no easy task,[5] but some figures for the Commonwealth at least are available. A study by the

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Commonwealth Auditor-General of new age pension claims made to Centrelink found that the 'actionable error'[6] rate was 52.1 per cent (+/-6.8 percentage points).[7] Softlaw Corporation which has had access to files in high volume decision-making departments for the purpose of developing legal expert systems[8] for use by government has concluded, more conservatively, that: 'audits in most agencies would disclose error rates in primary decision-making of at least 25-30 per cent'.[9] These figures support the comment in Mr Blunn's paper that 'he suspects that the number of wrong decisions, on both sides of the ledger, is still too high'.[10]

The disparity in the figures for errors provided by the ANAO and by Softlaw are significant. Even more disturbing was the difference between the figures provided under Centrelink's internal auditing figures at the time of the ANAO study. The current position in Centrelink may now be different,[11] but at the time the Auditor-General was conducting the survey referred to, Centrelink's internal auditing system showed an error rate of only 3.2 per cent for the period in which the ANAO figure for actionable errors was over fifty per cent.[12] So the comment in the paper that as part of agencies' internal monitoring of the accuracy of decisions 'statistically sound systems are used to check decisions randomly'[13] may need qualification.

Although there is debate about the methodology used by the ANAO[14] and what qualifies as an 'actionable error', the available figures, even if closer to the Softlaw more conservative error rates, suggest that there is considerable room for improvement in decision-making within government. They also indicate that there is a continuing need for robust checking by external review bodies including the courts and tribunals.

**Impact on decision-making of introduction of legal expert systems**

One emerging development which has the potential to address some of these issues is the introduction within government of legal expert systems[15], particularly rule-based systems.[16] This is an era when decisions are increasingly being made or assisted by computer systems, a prime reason being the capacity of such systems to produce more consistent and accurate outcomes at the initial decision-making stage.[17]

Australian public administration leads the world in this field.[18] The Department of Veterans' Affairs introduced the first computer-assisted automated decision-making in Australia in 1994; Centrelink has embraced the technology and its family assistance payments, since 2002, have been made with the benefit of the Legal Edge program - the first of its suite of payments decisions which will be computer-assisted. At the time of writing at least eight other Commonwealth and several State agencies had also adopted the rule-base technology in some form.[19]

The novelty of these changes and their potential impact on standards of decision-making has as yet not been the subject of any comprehensive assessment. In this context, it is easy to concur with the conclusion in Blunn's paper that it is opportune for the Administrative Review Council to be investigating the introduction of such systems to assist decision-makers in high volume decision-making agencies.[20]

At the same time, there are dangers in this development from an administrative law viewpoint, as the following anecdote illustrates. A colleague recently wanted to negotiate periodic payment of a tax debt. He telephoned the Tax Office to be connected to an automated system. Having negotiated his way through the predetermined questions he was finally advised by the computer-generated voice: 'You will be notified if the Tax office has approved your application'. Subsequently he received a letter, possibly also computer-generated, imposing a payment schedule different from the one he had proposed.

Apart from the impersonal nature of the process, the example raises a number of questions. In the first place, there was nothing in the letter to indicate whether the reply was produced by a process involving an automated system. That knowledge would prompt a different response to one generated by conventional individual decision-making. For example, are the options offered by the automated system comprehensive? Or, in other words, has there been a failure to consider relevant matters? [21] If the claim is automatically decided unless the application falls outside the guidelines has the claim been decided by the statutorily nominated decision-maker?[22] If there has been no intervention of an official into the process, has there been a proper exercise of discretion? In restricting the range of questions which have been programmed into the database, has an inflexible policy been applied? If so, how is the special case to be taken into consideration?

Given that there is nothing on the face of the decision to alert recipients to its computer-assisted status, a major difficulty for individuals, and for courts and tribunals on review, is to know when these questions should be asked. A search of the database has identified only one decision which even adverts to the issue and it was not officially reported.[23] A degree of vigilance will be required by applicants, review bodies and advocates to identify whether the decision was expert system-assisted and then, if necessary, to identify whether there might have been a breach of an administrative law standard.

**Development of new grounds of review**

Another challenge to those involved with judicial review arises from the emergence of new legal concepts and administrative law standards not easily related to the codified grounds, typified by those in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This creates several difficulties.

Codification of the judicial review grounds in the 1970s was intended to be all-embracing and to provide more clearly defined precepts for those in public administration. Courts and tribunals were given the supplementary function of fleshing out the grounds. That task, as Justice von Doussa described it was:

> … to develop coherent and explicable legal principles which provide administrators, the public, and their legal advisers, with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspects of the public interest in the infinite variety of circumstances that come before the courts.[24]

The question which may be asked is how well is administrative law meeting that challenge?

Traditionally, it was accepted that a court could review a matter only if it came within one of the codified grounds of review.[25] Applicants needed to be able to tie their claim to a ground in section 5, 6 or occasionally 7 of the ADJR Act or face exclusion from the court. At the same time, from its inception some room was allowed for flexibility with the inclusion of grounds such as 'otherwise contrary to law'[26] and 'any other exercise of a power in a way that constitutes abuse of power'[27]. In the years following the introduction of the ADJR Act it was clearly understood that these concessions justified the rejection of applications for review unless an applicant could bring a claim within one of the legislative grounds.

Subsequently, that principle appears to have been abandoned. Today it is more common to find new legal standards broadly accommodated under various ADJR Act grounds of review, some might say by stretching the grounds beyond their intended territory. This development imposes dual burdens on decision-makers: first, they must gauge which of the existing grounds to rely on, and here guidance has not been consistent; second, the decision-maker is faced with the need to apply disparate factual and legal tests depending on which ground is chosen.

There are now, in effect, several new legal standards, breach of which will lead to a finding of invalidity by the courts. None are listed in the statutory judicial codes.[28] The novel grounds include a failure to give a 'proper, genuine and realistic consideration'[29] to a matter, the probative evidence rule,[30] and the duty to enquire.[31] There are others.[32]

A failure to give proper, genuine and realistic consideration to a matter has variously been said to be unreasonable,[33] a failure to follow lawful procedures,[34] a failure to consider a relevant matter,[35] an error of law,[36] a breach of procedural fairness,[37] or a breach of the non-dictation rule.[38] Similarly a decision-maker who has not met the standard embodied in the probative evidence rule has been said to breach procedural fairness,[39] and to have made an error of law.[40] The duty of inquiry has founded invalidity on the basis of a breach of the duty to follow statutory procedures,[41] a failure to take account of relevant matters,[42] breach of procedural fairness,[43] unreasonableness,[44] and error of law.[45] Imposition of additional requirements such as these imposes a considerable burden on decision-makers,[46] not least because the elements of the particular ground chosen must be established and these vary widely.

To continue to accept the continued expansion of the grounds in this manner negates the value of the codification of the judicial review grounds and a quarter of a century of jurisprudence explaining and clarifying those statutory standards. Blurring the boundaries of the existing grounds by using them as host to novel legal concepts not envisaged by the drafters of the codified grounds tends to return courts to the indeterminate standards captured in Lord Diplock's judgment in *Council of Civil Service Unions v Minister for the Civil Service* - illegality, irrationality, and unfairness[47] and does nothing to promote the approach advocated in the passage of Justice von Doussa.

To stem this development necessitates attention being paid to this expansion of the grounds. If agreement could be reached about whether these novel grounds or concepts should be accepted in their own right - a matter which will require

legislative attention - that would be a start. In the interim, if these grounds are not to be banished it would be helpful if consensus could be reached as to which of the existing grounds is to act as host for these emerging concepts. That should not be too difficult, given their flexibility - a quality aptly captured by Professor Carol Harlow when she referred to unreasonableness - as 'the judge's flexible friend'.[48]

**Regulated industries**

The expansion of judicial review is illustrated graphically by its use in another area of growing importance, namely, regulation of utilities. This is likely to be a growth area for the courts and to pose particular challenges. Administrative law has now impacted on regulators of utilities - gas, electricity and water - in two significant decisions: *TXU Electricity Ltd v Office of the Regulator-General*, [49] a decision of the Victorian Supreme Court, and the more recent decision of the Court of Appeal of the WA Supreme Court in *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd*. *TXU* dealt with the regulation of electricity; *Epic Energy* with gas.[50] Although it had been anticipated that appeals from decisions of regulators would be handled by the statutory appeal bodies such as the Australian Competition Tribunal, these cases clearly signal that applicants will increasingly choose the remedies offered by courts exercising judicial review. The impact of this development is that there needs to be a shift in focus from a largely economically regulatory model to one in which more attention will need to be paid to the application of administrative law standards.

In *TXU*, the Victorian Regulator-General had set the rates which could be charged by Electricity distributors in the State. TXU, an electricity distributor, challenged the decision on the basis that the calculation of the charges had been based on the interpretation of expressions in Tariff Orders made under the *Electricity Industry Act 1993* (Vic) which it claimed were incorrect according to the standards of orthodox economics, a challenge which was ultimately unsuccessful. In *Epic Energy*, the concern of the applicant was the tariffs set by the regulator which Epic could charge third parties for access to the Dampier to Bunbury Natural Gas Pipeline which Epic had purchased from Western Australia's Gas Corporation. The tariff was based on a capital cost for the purchase adopted by the Regulator which was much lower than the price paid and would not permit Epic Energy to recover the costs of its investment. Epic Energy argued that the capital base on which the reference tariffs were calculated involved a misconstruction of terms in the relevant gas code,[51] a claim which was successful. The Court did find errors by the Western Australian Independent Gas Pipeline Gas Access Regulator in his draft decision.

Several messages have been delivered by these cases. The first is that interpretation of terms in the electricity, gas, and it is predicted, soon, water legislation and codes require interpretation. In the TXU decision, for example, the principal issue involved a decision on the meaning of 'price based regulation adopting a CPI-X approach' as compared with a 'rate of return approach'.[52] *Epic Energy* involved examination, among others, of the expressions 'competitive market', 'abuse of monopoly power' and 'efficient costs'.

The interpretations of the terms (including economic formulae) involved in both the electricity and the gas codes are terms of art - the art of the regulation of public utilities. Under standard interpretation rules, a court may receive evidence from

experts as to the technical meanings of terms of this nature.[53] Expert evidence, however, is not a complete answer. As the Victorian Court noted 'on any view of the evidence, there is a degree of uncertainty as to what each formula means'[54] and, as the Court pointed out in *Epic Energy*, the terms under examination had no uniform or accepted meaning, even among economists.[55] Parker J (with whom Malcolm CJ and Anderson J agreed) (hereafter the Court) noted in *Epic Energy*:

> How best to determine the efficient level of costs or the outcome of a competitive market are matters of economic theory and practice which, on the evidence, are in the course of constant revision, development and refinement.[56]

The issue is further complicated since these technical formulae must be interpreted against the purposes of the legislation. That task is never easy. Even articulation of rules for concepts such as fairness and good administration is fraught with difficulties and these are terms operating in relatively familiar territory for courts.[57] That task is the more difficult when courts are reviewing the regulated industries because not only are the expressions complex and necessitate input from economists but the relevant legislation commonly requires weight to be given to conflicting objectives. For example, how can the requirement 'to promote economic efficiency' be measured alongside the need 'to protect the interest of consumers'[58], or the maintenance of 'ecologically sustainable development' be measured against 'the need to promote competition' and 'the social impact' of determinations?[59] Social and environmental goals may not lead to economically efficient choices, nor will a measure which is economically efficient necessarily promote business investment.[60]

The issue was appreciated at the time of the Hilmer Report into competition policy[61] which underpin these legislative standards. As the Court noted in *Epic Energy*:

> … at the time of the Hilmer Report, it was recognised that economic theory offered no clear answer to how best to resolve many competing considerations, including how to achieve the most appropriate balance between the interests of consumers in obtaining low prices and the service provider in receiving higher prices, including monopoly rents, that might otherwise be obtainable … .[62]

Further, as the Court concluded:

> The evidence before this Court does not establish that by December 1997, or even today, economic theory had resolved these competing considerations, or has come to a settled view as to the most appropriate balance.[63]

Not surprisingly, given these difficulties, in *Epic Energy*, the Regulator sought the advice of the Court as to how to weigh these competing considerations, a request, the Court, in its supplementary decision,[64] declined to provide.[65] However, these issues will come before the courts in the future. It will then not be a case for courts and tribunals to 'Brush up their Shakespeare' but to 'Excavate their economics!'

The third lesson is the stage at which challenge is likely. The decision in *Epic Energy* related to a draft, not the final, decision. The decision was said to be justiciable because of the strong likelihood 'that the position of the Regulator revealed in the draft decision may well prevail to the end of the decision-making process'.[66] If that conclusion was imposed generally on regulators it could impose a significant burden on them.

Regulatory bodies routinely produce preliminary discussion or issues papers for consideration by stakeholders. To require that the regulators give the same careful attention in these preliminary reports to the issue of what weight they are assigning to the applicable standards in the legislation will change the character of these reports to something much closer to the final product. The expression of too settled or final a view in the draft, carefully weighing all the factors, may leave little room for commentators to counter the reasoning underlying the preliminary conclusions. The requirement would undermine the purpose behind publication of such papers which is to stimulate discussion and provoke suggestions for alternative approaches. If imposed uniformly the principle which underpinned the findings of invalidity in Epic Energy could be counterproductive since it may inhibit those with views on the subject from making alternative suggestions about the direction in which the findings might go and will inevitably elongate the preliminary report-writing process.

The early caution exhibited by courts against too ready an incursion[67] or too early an involvement in judicial review processes[68] is increasingly ignored, as this example illustrates. Procedural fairness led the way in abandoning this sensible limitation,[69] and sadly the same disregard for prematurity appears to be spreading to other grounds of review.[70] It may be time to be reminded about the need for caution about intervention by the courts at preliminary stages in the proceedings. Otherwise, as one judge mused 'One simply asks - where would such a process stop?'[71]

**Oil & Vinegar - to borrow an analogy**[72]

The following discussion also illustrates the complexity of the judicial review task. Although the common law is the genesis of administrative law standards, for the most part those standards were derived from the prerogative remedies. Those remedies primarily had a public law function, and were supplemented in part by equitable remedies refashioned for public law purposes. It is clear that on occasions elements of the common law with a more private law focus are also co-opted into the public arena. Experience shows that some of this common law jurisprudence is not easily miscible with public law doctrines. What is needed is legislative attention to these doctrines to fit them for their public law role. The courts too have a role in identifying the difficulties posed by the simple transposition of common law principles into a public law decision-making context.

The issue arises because there is no well defined standard against which to judge whether incorporation of private common law principles into administrative law will work effectively. As it has been acknowledged: 'English law … has no tradition whereby distinct legal principles are created specifically for the purpose of structuring and regulating the achievement of public objectives'.[73] Two examples are the impact in the public sector of the private law's guardianship principles and the operation of the delegation/agency dichotomy.

***Guardianship law***

The first illustration involves the imposition on officials, under Commonwealth legislation, the *Guardianship (Immigration of Children) Act 1946* (Cth), of the essentially private law functions of guardians. The effect of the Act has recently received the attention of the Federal Court in at least three decisions.[74]

Guardianship law is ancient law originating in the prerogative.[75] Although modern guardianship law is generally regulated by legislation, the foundation principles which impose obligations on guardians and property managers, and which are incorporated in the legislation remain essentially those carved out by the Court of Chancery, as expanded by internationally agreed concepts.[76] The *Guardianship (Immigration of Children) Act 1946* (Cth) provides for the Minister to be the guardian of 'non-citizen' children who arrive in Australia.[77] The cases have found that the absence of any statutory guidance for the operation of the guardianship role clearly indicates that the common law's principles apply to the Minister.[78]

The primary tenet of guardianship law is that the guardian acts in the best interests of the person under guardianship. In the case of a child, this requires that the guardian ensure the basic needs of the child - food, housing, health and education - are provided, and, when necessary, this may include legal assistance, through a tutor or legal guardian.[79] Significantly, the focus of the guardian must be exclusively on the interests of the child at the expense of the interests of the guardian or of third parties.

Here the anomaly arises, at least in relation to the Minister's guardianship of children who are asylum-seekers. The Minister also has other duties under the *Migration Act 1958* (Cth), such as to detain certain would be asylum-seekers, including children, and to resist challenges to decisions of the Department or the Refugee Review Tribunal refusing applications for refugee status.[80] In these circumstances, as the cases have conceded, there is an inherent conflict between the interests of the Minister under the *Migration Act 1958* (Cth) and the Minister's obligations as guardian.[81]

Although the Minister's guardianship functions are delegated to state and territory welfare officers and staff in detention centres, and this may appear to distance the Minister from day-to-day decision-making, thereby avoiding the conflicts of interest problem, the Federal Court has identified another issue arising from this practice, which again breaches the best interests standard.

As the Full Court of the Federal Court noted in *Odhiambo*, '[t]here do seem to be difficulties in a solution that involves a delegation to many state officials, none of whom is normally concerned with the operation of the Migration Act, rather than to a specified independent person'.[82] Indeed, the Court found in *Odhiambo* that although a notice of the review tribunal proceedings was served on the relevant State agencies to whom guardianship functions had been delegated, and letters in response were received from the State officers concerned, 'Each officer indicated lack of interest in the proceedings' and 'Neither responded to the court's concern that one or other of these departments might have a statutory obligation to assist the appellant'.[83] In other words, although delegation of the function by the Minister avoids the conflict of interest inherent in the dual roles the Minister performs under the relevant migration Acts, that is replaced by the danger that the alternative guardians are either from ignorance of the Commonwealth's legislative framework or due to excessive caseloads incapable of providing children under guardianship with the attention that the common law's guardianship principles enjoin.

The absence of a dedicated office or individual with the function of representing the best interests of the child in detention presents both a conceptual and a practical impediment to the implementation of the common law's injunction that guardians focus solely on what is best for the child. The problem suggests that too little attention was given by Parliament to the consequences of the assumption that the private law's principles could be tacked on to the *Guardianship (Immigration of Children) Act 1946* (Cth) scheme under which the Minister is titular guardian.

A preferable legislative alternative which would demonstrate an understanding of the common law guardianship standards would be to require that the guardianship function be provided by an independent person or body which could properly fulfil this role. An obvious candidate is a state or territory office of the public guardian, for example. That office, of its nature, possesses the expertise to ensure that the interests of the child are safeguarded and the child's needs for, among other things, independent assistance with legal proceedings, are met. Further such an office could be excused, legislatively from balancing countervailing interests under related legislation such as the *Migration Act 1958* (Cth), while still being required to acquire that knowledge of migration law which would ensure that the child's interests are adequately protected. In other words, the operation of this guardianship role needs to be spelled out in legislation which incorporates the common law's standards but tailors those principles so that they operate effectively in a public law context and avoid the difficulties identified.

Although these are legislative solutions, it is as well for the courts too to be sensitive to these issues. The few cases to date which have come before the Federal Court have found against the need for tutorship assistance for tribunal hearings.[84] In *Odhiambo*, for example, the Court held that the Refugee Review Tribunal had not erred in conducting its hearing without having a guardian or legal tutor present to represent the applicants. The Court found that the presence of a tutor would not have given any more legal assistance than had been provided under the standard forms of assistance provided to applicants to the Tribunal, and that the two 16 or 17 year old boys were well able to manage without additional support.

Certainly the boys had been offered the legal advice and support generally provided by registered migration agents and their associated firms of solicitors, but the advisers did not appear to pay any particular attention to the fact that they were minors and possibly entitled to special treatment and protection. Nor was it readily apparent that the two were capable of managing the process unaided. The boys may have been street-wise, having survived homeless in Mombasa for a number of years prior to their arrival in Australia, but it appears that neither appreciated that they could apply for a bridging visa after their arrival in Australia, a critical step in the process.[85]

This is not to suggest that the courts have hitherto been insensitive to these issues. However, the findings that either the apparent maturity of the children,[86] or the need not to burden the child with additional procedural hurdles or costs,[87] denied the need for a tutor gives undue weight to one aspect of the 'best interests' test over the child's need for advice and assistance in a complex legal process. Had a tutor been appointed, a different style of advocacy and more information on the individual child's circumstances might have led to a different outcome, an outcome of considerable

importance to the long-term future of the individuals concerned. Again, if there had been a legislative standard spelling out when a tutor was needed and the processes for applying for one, the courts might have found it easier to make a positive finding that a tutor should be provided.

### *Delegation/agency*

A second illustration of the problems of co-option, without modification, of common law concepts is provided by a consideration of delegation/agency principles. These principles have been developed in the private sector in the context of personal decision-making by an individual with the need, at times, to act through others. In defined and limited circumstances, either a formally appointed delegate or a less formally appointed agent are permitted to make decisions or undertake action with legal consequences on behalf of the principal. These relationships - between principal and delegate, or principal and agent - operate in the private sector in a relatively simple, one-dimensional decision-making context. To adapt these concepts and their attendant principles such as the no sub-delegation rule, for use within the more complex and hierarchical environment of government decision-making creates problems.

The following examples illustrate the difficulties. In orthodox delegation law there is a prohibition on sub-delegation - the delegatus non potest delegare principle. In a government agency which comprises multiple layers of decision-makers and inter-related structures and processes for making decisions, it is frequently impracticable to limit formal decision-making to either the nominated decision-maker or the formally appointed delegate.[88] Circumstances arise in which the volume of matters for decision, rapid change of personnel with delegations, slowness to exercise the delegation-granting power, or reluctance to appoint junior officers as delegates, has meant decisions are made by persons with no formal legal authority. The courts have been reluctant to permit reliance in such circumstances on a relationship of principal and agent[89] and the consequence of their strict application of the delegatus rule has invalidated many decisions within public administration.

In part, the rigidity of the non-delegation principle has been softened by legislative extension of the concept, notably for public service employment laws in the Commonwealth.[90] For example, the *Public Service Regulations 1999* state:

> 9.3(5) A person (the first delegate) to whom powers or functions are delegated … may, in writing, delegate any of the powers or functions to another person (the second delegate).

These limited exceptions only expand by one layer those to whom lawful decision-making powers are granted. Hence, the statutory modification is capable of remedying the problems created by the no sub-delegation rule only if used widely. However, few agencies appear to have adopted this change. Statutory authority to extend the delegatus rule in this fashion or to provide for some other form of formally appointed alternative needs to be adopted generally within public administration if the limitations of the common law rule are to be avoided.

Can these difficulties be ameliorated by reliance on agency principles, another common law doctrine? At least the principal/agent relationship is established easily -

indeed the appointment may be ad hoc and oral - and this flexibility avoids the problems due to the sometimes volatile personnel arrangements within the public sector. The disadvantage is that agency principles have the potential to undermine the impetus for public administration to establish clear and publicly ascertainable rules for choice of authorised decision-makers. If informal processes are acceptable for appointments, it becomes harder for the public to discover who has the authority to make decisions, a necessary prerequisite if an effective challenge is to be made. The informality of the arrangement may also diminish a sense of responsibility by the agent for ensuring that the administrative law standards are adhered to.

The importation of the delegation concept for identifying who, apart from the statutorily nominated decision-maker, is an authorised decision-maker has focused attention within the public sector on the need for a formal appointments process and for care in the choice of delegates. Ideally, delegates are appointed at an appropriate level of seniority and possess a suitable level of skills. The informal nature of the processes for appointment of agents undermines these desirable criteria for appointment and any indiscriminate reliance on agency principles has the potential to negate these advantages.

The prohibition on sub-delegation and the indeterminate nature of the agency appointments processes are not the only problems. The technicalities at common law of the distinction between delegation and agency also impinge unnecessarily on the administration. This was illustrated in a recent challenge to a decision in the veterans' jurisdiction.[91] The challenge was made to a decision by a delegate of the Principal Member of the Veterans' Review Board to dismiss an application to the Board for failure to bring on the application within time. The veteran argued before the Federal Court that the decision was invalid because the delegate had no authority to act since the instrument of delegation under which he was acting had not been replaced when a new Principal Member was appointed. In other words, the delegate's authority lapsed with the change of Principal Member

That argument was rejected by the Court relying on the presumption of regularity and the convenience of public administration.[92] However, *obiter*, the Court noted that if the relationship had been one of principal and agent the result would have been different. Presumably the comment was based on the common law principle that the authority of an agent or *alter ego* is wholly dependent on the continued existence of the principal. Strict enforcement of that principle within the public sector with its constant change of staff would be unworkable. Further, it is difficult to see that arguments of administrative efficiency and the needs of collective decision-making which sustain the validity of the appointment of a delegate when there is a change of principal are any the less persuasive when the decision-maker nominated in legislation is relying not on a delegate but an agent. The distinction, although orthodox in common law jurisprudence, has no place in appointments within the public sector and again underscores the awkward consequences of applying these concepts within public administration.

There are considerable difficulties for the public sector in adoption of the principal/delegate and principal/agent dichotomies as these examples illustrate. In the multi-faceted, multi-layered processes of decision-making within public administration there is a need for more creative legislative thinking as to the

identification and allocation of those with decision-making responsibilities. That is essential if the benefits of ease of identification and care in choice of alternate decision-maker are to be preserved, while at the same time injecting greater flexibility into the processes.

## Conclusion

This paper has outlined some challenges for courts arising from developments in administrative law doctrine and from the expanding reach of administrative law standards. They suggest avenues for development or rethinking of existing jurisprudence, and possible legislative changes.

If these suggestions indicate any dissatisfaction with the performance by the courts of their supervisory jurisdiction, that criticism should not be seen as pervasive. In the eyes of many the challenge posed by Justice von Doussa[93] has been met. Empirical research into the impact of external review bodies on the Australian Public Service found that the Federal Court of Australia was the review body which has the most beneficial impact on administrative decision-making (by over 30 per cent of the nearly 400 respondents to the survey conducted in 1999-2000).[94] There is no reason to assume that a similar survey of the State and Territory superior courts by State and Territory administrators would produce different results with respect to the superior State and Territory courts.

At the same time there are further challenges, as this brief survey indicates, which will test the courts in their exercise of the judicial review jurisdiction. The creditable approval rating identified in the empirical survey will only be maintained if the courts embrace their task of standard-setting with the same will, perceptiveness and enthusiasm exhibited over the twenty-five or so years in which administrative law has become a significant area of their jurisprudence.

**Endnotes**

1 This paper emerged from a commentary on the paper by AS Blunn delivered to the Supreme Court and Federal Court Judges Conference in Adelaide in January 2003 that is published above at 35.
2 Blunn at 37.
3 Id.
4 The Hon D Williams QC AM MP, opening the joint AIAL, Legal and Constitutional Legislation Committee Seminar on the proposed Administrative Review Tribunal, 25 October 2000.
5 The Australian National Audit Office (ANAO) noted that ‘there is no readily-available data’ on costs and ‘the expense of obtaining such data to make a reasonable comparison would be prohibitive’ (ANAO Audit Report No 29, 2000-2001 at [2.21]).
6 An ‘actionable error’ is one which involves an incorrect payment, but also a potential for an incorrect payment because significant information was not provided by the claimant (ANAO Report No 34 *Assessment of New Claims for the Age Pension by Centrelink* Audit Report No 34 2000-2001, Glossary, 8).
7 Ibid at [29].
8 A legal expert system has been defined as ‘a computer program that performs tasks for which the intelligence of a legal expert is usually thought to be required - whether the legal expertise be that of a lawyer or of a non-lawyer with legal expertise in a particular area of the law’ (D Baker, *The Probable Impact of Legal Expert Systems on the Development of Social Security Law* a paper submitted for the Research Unit, Faculty of Law, Australian National University, October 2001, 6. An expert system is ‘a computing system, which, when provided with a certain amount

of basic information and a general set of rules instructing it how to reason and draw conclusions, can then mimic the thought processes of a human expert in a specialised field'(*The Macquarie Dictionary* (3rd ed) (The Macquarie Library Pty Ltd, 1998) 743).

9 P Johnson and S Dayal, unpublished paper, presented to a seminar of the Institute of Public Administration Australia in March 1996. See also, by the same authors, 'Knowledge Management, Knowledge-Based Systems and the Transformation of Government', paper presented to a conference organised by the Australian Human Resources Institute and the Public Service and Merit Protection Commission, Canberra, 1999, 21.

10 Blunn, above at 38.

11 Centrelink responded to that report with several strategies to improve its decision-making (*Centrelink Annual Report 2000-2001,* 61).

12 ANAO *Assessment of New Claims for the Age Pension by Centrelink* Audit Report No 34, 2000-2001 at 21.

13 Blunn, above at 38.

14 *Centrelink Annual Report 2000-2001* 6. See also Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming) at footnote 88 and accompanying text.

15 See note 8.

16 A rule-base system is a sub-set of an expert system. The distinctive feature of the rule-base is that it involves 'the modelling of complex or intricate rules accompanied by an 'engine', that is, able to automate the process of investigating those rules by interacting with users to establish relevant client details. Such systems create a 'decision tree', that is, the response to each question leads to another question and so on until all the requirement for the decision have been considered' (Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming), 3).

17 Ibid.

18 Softlaw Corporation Pty Ltd, the Australian company which has spearheaded these developments, opened an office in London in the last three years and in 2002, expanded its operations into North America.

19 Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming), Part 2. Appendix 2 of the Issues Paper lists agencies which have adopted expert systems other than rule-base systems.

20 At 39.

21 *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (NSW)* (1986) 65 ALR 353; *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (NSW) (No 2)* (1987) 71 ALR 376.

22 In some areas such as social security this issue has been dealt with by providing in the authorising statute that a decision made with computer assistance is deemed to be a decision of the nominated decision-maker (*Social Security (Administration) Act 1999* s 6A; *A New Tax System (Family Assistance)(Administration) 1999* s 223).

23 *MC and Department of Social Security* (1996) 2 SSR 12a.

24 Justice John von Doussa 'Natural Justice in Federal Administrative Law' paper presented at a seminar by the Australian Institute of Administrative Law, Darwin, 7 July 2000, 3.

25 For example, *Australian Broadcasting Commission Staff Association v Bonner* (l984) 2 FCR 561; *Johnson v Federal Commissioner of Taxation* (1986) 11 FCR 351 per Toohey J at 354. In *Johnson*, the *Income Tax Assessment Act 1936* (Cth) s 185 provided that an objection against a taxation assessment must be lodged within 60 days of the taxpayer receiving notice of the assessment. Regulation 59 made under the Act provided that a notice sent by the Commissioner through the mail was deemed, unless the contrary was proved, to have been received at the time when it would arrive in the ordinary course of posting. The Commissioner refused to accept an objection lodged by Johnson as it was lodged outside the 60 day period. Further, the Commissioner refused to accept the assertion of Johnson's accountant that the assessment had been received by the accountant through the post long after it was posted by the Tax Office. Toohey J said in response to a challenge under the ADJR Act: 'The applicant does not succeed in the present case merely by calling evidence which, if accepted by the court, would show that the assessments were not served until 9 May or thereabouts, with the consequence that the objections were lodged in time. The applicant must persuade the court that the decision-maker erred on one of the grounds in s 5(1)'. On the evidence His Honour was not satisfied that a breach of any of the grounds had been made out.

26 ADJR Act s 5(1)(j)

27 ADJR Act s 5(2)(j).

28 ADJR Act; see also *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas).
29 This development has been firmly rejected in the migration jurisdiction (*Minister for Immigration, Multicultural and Indigenous Affairs v Anthonypillai* (2001) 106 FCR 126 at [59] and [86]) but the Court was at pains to confine its remarks to Part 8 of the *Migration Act 1958* (Cth). However, even in the context of Part 8 the duty to inquire may arise in special or exceptional circumstances (*Minister for Immigration, Multicultural and Indigenous Affairs v Anthonypillai* (2001) 106 FCR 126; *Foroghi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1875 per Marshall J).
30 *Mahon v Air New Zealand Ltd* [1984] AC 808; *Minister for Immigration v Pochi* (1980) 31 ALR 666.
31 For example, *Benjamin v Repatriation Commission* (2001) 64 ALD 411.
32 For example, absence of proportionality; estoppel; breach of statutory duty.
33 *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* (1997) 142 ALR 632.
34 *Li v Minister for Immigration and Multicultural Affairs (No 2)* [2000] FCA 172; *Foroghi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1875.
35 *Alcoa of Australia Retirement Plan Pty Ltd v Thompson* (2002) 68 ALD 343 at [53]; *Turner v Minister for Immigration* (1981) 55 FLR 180 at 184 per Toohey J; *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195 per Fox and Franki JJ; *Kioa v West* (1985) 159 CLR 550 at 604 per Wilson J; *Parramatta City Council v Hale* (1982) LGRA 319 at 331 per Street CJ.
36 *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 126 at [78] and [80].
37 *Re Fenton and Commissioner of Police, New South Wales Police Service* [2000] NSW ADT 16 (23 February 2000).
38 *Ibid; Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 (per Wilcox, Madgwick JJ; Hill J, dissenting).
39 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666; *Yelds v Nurses Tribunal* (2000) 49 NSWLE 491.
40 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397. The Full Court of the Federal Court disagreed with this finding (*Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411). This ground was not considered relevant by the High Court (*Epeabaka v Minister for Immigration and Multicultural Affairs* [2001] HCA 23 at [9]).
41 *Li v MIMA (No 2)* [2000] FCA 172; *Tickner v Bropho* (1993) 114 ALR 409; *Garcha v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 55.
42 *Lek v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455.
43 *Mahon v Air New Zealand Ltd* [1984] AC 808; *Nand v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 527; *Luu v Renevier* (1989) 19 ALD 521; *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 124 ALR 383; *NCSC v News Corp Ltd* (1984) 156 CLR 296; *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1993) 34 ALD 324; *Lek v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455.
44 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170. See also *Luu v Renevier* (1989) 19 ALD 521; *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 170-171 per Toohey J; *Cheer v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 91 (22 May 2002); *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 124 ALR 383; *Secretary, Department of Social Security v O'Connell & Sevel* (1992) 28 ALD 626.
45 *Cruz v Minister for Immigration and Multicultural Affairs* (Full Court of the Federal Court, unreported) (23 May 1997).
46 Notably in relation to the duty to enquire: see Senior Member Sassella in *Re Hunter and Repatriation Commission* [2002] AATA 485 at [88].
47 [1985] AC 374 at 410-411.
48 Comment made at the ANU's Public Law Weekend, 1 November 2002, Canberra, during her presentation of a paper delivered at that conference, to be published in 2003.
49 *TXU Electricity Ltd v Office of the Regulator-General* [VSC] VSC 153 (unreported, 17 May 2001)).
50 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511.
51 The *National Third Party Access Code for Natural Gas Pipeline Systems 1997* (Gas Code).
52 Tariff Order cl 5.10(a).
53 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 397; *Australian Lighting and Hardware Pty Ltd v (Falkner) Brightlight Nominees Pty Ltd* [1994] 1 VR 553; *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561 at 572; *General Accident*

*Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax (NSW)* [1982] 2 NSWLR 52.

54 *TXU Electricity Ltd v Office of the Regulator-General* [VSC] VSC 153 (unreported, 17 May 2001) per Gillard J at [143].

55 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [145].

56 *Id* at [144].

57 Justice John von Doussa 'Natural Justice in Federal Administrative Law', Australian Institute of Administrative Law Seminar, Darwin, 7 July 2000, 3.

58 *Electricity Industry Act 1993* (Vic) s 157 which sets out the objectives of the Office of Regulator-General.

59 Eg *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) s 15(1)(f), (i), (k).

60 Productivity Commission Report No 17, *Report on the National Access Code*, Chapters 4, 12.

61 In 1994 the Council of Australian Governments agreed to general principles for the reform of competition policy in Australia as recommended in a report chaired by Professor Hilmer (FG Hilmer, M Rayner and G Tapperell *Report by the Independent Committee of Inquiry into Competition Policy in Australia* (AGPS, 1993)).

62 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [144].

63 *Id* at [145].

64 *Re Dr Ken Michael AM; Ex parte Energy (WA) Nominees Pty Ltd* [2002] WASCA 231 (20 December 2002).

65 At [14] - [16].

66 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [31].

67 *Board of Education v Rice* [1911] AC 179, 182.

68 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 371.

69 *Annetts v McCann* (1990) 170 CLR 586; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360; *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Board of Education v Rice* [1911] AC 179; *Consolidated Press Holdings v Federal Commissioner of Taxation* [1999] FCA 1314; cf *Croft v McNamara* [1999] VSC 495; *Wood v Australian Community Pharmacy Authority* [2002] FCA 1592.

70 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40 ; cf *Croft v McNamara* [1999] VSC 495.

71 *Croft v McNamara* [1999] VSC 495 at [41].

72 Gleeson CJ 'Legal Oil and Political Vinegar', title of a speech to The Sydney Institute, Sydney, 16 March 1999.

73 Thomas 'Continental Principles in English Public Law' in Harding and Orucu (eds), *Comparative Law in the 21st Century* (2002) 121 at 133, quoted in their joint judgment by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] FCA 6 at [75].

74 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 per Black CJ, Wilcox and Moore JJ at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).

75 *De prerogativa regis*.

76 *The Laws of Australia* Vol 20 *Health and Guardianship Law*, R Creyke and N Seddon 'Guardianship and Management of Property' title, Part A, [1], [4].

77 *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

78 *Re Application of K* (1995) 36 NSWLR 477; *Re adoption of S* (1976) 28 FLR 427 at 430; *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312.

79 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34]; cited with approval by the Full Court of the Federal Court (Black CJ, Wilcox and Moore JJ) in *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [57] and [88].

80 *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [90] - [92].

81 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).

82 At [92].

83 At [46].
84 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 per Black CJ, Wilcox and Moore JJ at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).
85 At [71] and [90].
86 *Ibid*.
87 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).
88 *O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1. An argument against too ready a reliance on the use of an agent is that the *Carltona* principle which underpins the principal/agent relationship emerged in a war-time context and arguably on historical grounds should be available only in extreme circumstances (SH Bailey, BL Jones and AR Mowbray *Cases and Materials on Administrative Law* (2nd ed) ((Sweet & Maxwell, 1992) at 280).
89 Ibid.
90 *Public Service Act 1999* (Cth) s 78(9), (10), (11); *Public Service Regulations 1999* (Cth) reg 9.3(5), (6), (7); *Long Service Leave (Commonwealth Employees) Act 1976* (Cth) s 9; *Parliamentary Service Act 1999* (Cth) s 70.
91 *Johnson v Repatriation Commission* [2002] FCA 1543.
92 At [32].
93 See note 57.
94 R Creyke and J McMillan 'Executive Perceptions of Administrative Law - An Empirical Study (2002) 9 *Aust Jo of Admin Law* 163 at 173, 187.