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TABLE OF CONTENTS

THE EQUITABLE GESIT IN THE MACHINERY OF ADMINISTRATIVE JUSTICE

*Justice R S French**

Paper presented to an AIAL seminar on Recent Developments in Administrative Law, Sydney, 22 May 2003.

Introduction

The empire of equity is substantial in its extent. So too is that of administrative law. Their most visible interaction lies in the crossover into administrative law of the equitable remedies of injunction and declaration as instruments for the announcement and restraint of unlawful official action. Beyond those remedies however the territories of administrative law are receptive to the more subtle normative and doctrinal influences of equity. Their effects are still unfolding. Some of these influences and interactions are explored in this paper.

The Equitable Spirit of Administrative Justice

Administrative law is concerned with the delivery of administrative justice according to law. The core elements of administrative justice are lawfulness, fairness and rationality in the exercise of public power. They are not mutually exclusive. They shade into each other. But they are central to any just process of official decision-making. They are important reflections in administrative justice of the broadest understanding of equity.

Equity is as protean in meaning as it is in application. Its first and second definitions in the Shorter Oxford English Dictionary identify the qualities of being equal or fair, impartial or even-handed. It refers to that which is 'fair and right'.[1] In this wide sense it embraces the long standing aspiration of administrative justice enunciated by Lord Halsbury LC requiring official power to be exercised:

> …according to the rules of reason and justice, not according to private opinion: … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself….[2]

That standard in turn incorporates the central requirements of natural justice or procedural fairness which are substantive supports of lawfulness and rationality in administrative decision-making. So equity in this wide sense informs basic doctrines of administrative law. In that sense it also finds a place in statute law by implication or judicial imposition and sometimes as an express statutory criterion of behaviour.[3]

There is an important Commonwealth statute, the *Public Service Act 1922,* which has as its objective:

> The efficient, equitable and proper conduct … of the public administration of the Australian government.[4]

That objective underpinned the view of the Full Federal Court in a case involving the termination of the appointment of the Secretary of the Department of Defence that the Act did not intend to exclude procedural fairness in respect of such terminations. The Court said:

> Fairness is not a moral fetter on efficiency. Fairness, expressed in recognition of the right to be heard and want of bias on the part of the decision-maker operates in aid of informed decision-making that has regard to relevant criteria and so advances the statutory purpose. So equity serves efficiency.[5]

This is not regarded by all as a universal truth. Privative clauses and limits placed on the requirements of procedural fairness offer recent testimony to that lack of unanimity.[6] Because it is of importance and not universally accepted, it bears repetition in circles outside those of law professionals.

Equitable conduct, expressed as procedural fairness in official decision-making is not a form of ethical ornamentation inimical to efficiency. Procedural fairness is a necessary element of many aspects of the valid exercise of statutory power. A decision affected by actual bias may also be made in bad faith or for purposes foreign to those for which the relevant power is conferred and in some cases the internal logic of a statutory power requires that processes be followed which reflect procedural fairness.[7] A decision made, without providing the person affected with an opportunity to be heard, may overlook necessary criteria and relevant factors which must be considered if it is to be valid. It may also overlook evidence that would, if taken into account, give rise to a better decision on the merits, albeit the failure to take it into account would not render the decision invalid.

Equity, in its broadest sense, also implies equality of treatment. Equality of treatment is a principle of lawful administration.[8] Discrimination without justification in the purported exercise of a power may vitiate that exercise.[9] Inequality of treatment has been treated as an 'abuse of power' for the purpose of the *Administrative Decisions (Judicial Review) Act 1977.*[10] The equality principle has also been used to strike down delegated legislation.[11]

Equity in its broadest definition may be found at the heart of administrative justice. It is necessary now to turn to narrower meanings of equity and their interaction with administrative law.

Equity – Corrective and Supplement of the Common Law and Statute Law

Beyond the important general considerations outlined above, this paper is concerned with the relationship between administrative law and equity in its narrower senses. The first of these dates back to Aristotle who, as Story said '… defined the very nature of equity to be the correction of the law, wherein it is defective by reason of its universality'.[12] This reflects the first part of the third definition of equity in the Shorter Oxford English Dictionary:

> The recourse to general principles of justice to correct or supplement common and statute law.

Story proposes a purposive approach to statutory construction as an example of the application of equity in the Aristotelian sense:

> So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged, or of a more restricted meaning, or of two meanings equally appropriate. The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity, as contradistinguished from a strict adherence to the mere letter of the law.[13]

Equity in a more technical sense stands alongside statutory power under the protection of the proposition that statutes will not lightly be taken to displace equitable principles. That

proposition is a particular case of the general approach to statutory interpretation which in this country dates back to the judgment of O'Connor J in *Potter v Minahan*[14] where, citing the 4th edition of Maxwell on *The Interpretation of Statutes*, he said:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[15]

The presumption against the modification or abolition of fundamental rights or principles was restated in *Bropho v Western Australia*[16] and *Coco v R.*[17] A like interpretive principle affecting the exercise of official power is expressed in the United Kingdom as a 'principle of legality', namely a strong presumption that broadly expressed discretions are subject to the fundamental human rights recognised by the common law.[18] The application of the interpretive principle to equitable doctrines was recognised by the New South Wales Court of Appeal in *Minister for Lands and Forests v McPherson*.[19] The Court held that the Supreme Court, exercising its equitable jurisdiction, could give relief against forfeiture of a Western Districts lease created under the *Western Land Act 1901* (NSW). The Minister had argued that the lease was a creature of statute and that the statute provided for its termination by forfeiture, the means by which it would cease to exist by forfeiture and the means by which relief could be granted. In rejecting that proposition, Kirby P, with whom Meagher JA agreed, acknowledged the long established principle relating to the effect of statute law on common law rights and freedoms.[20] The question was whether a similar principle applied in relation to the doctrines of equity. Kirby P posed the question thus:

> Does a similar principle apply in relation to basic principles of equity, where those principles have been developed over the centuries to safeguard the achievement of justice in particular cases where the assertion of legal rights, according to their letter, would be unconscionable?[21]

The answer was:

> In principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity. The justice of equity may equally supply the omission of the legislature, filling the silences of the statute.[22]

Common law and equity were part of the legal order with which statute law must harmoniously operate.

The flexibility of equity in the context of relief against forfeiture was compared with the rigidity of administrative policy. So it was said:

> … administrators may be governed by general rules and their concern for the overall administration of the Act, to the detriment of particular parties whose conduct has led to forfeiture.

Mahoney JA adopted similar reasoning leading to the same conclusion. Noting the existence of the statutory power on the part of the Minister to relieve against forfeiture, his Honour said:

> The fact that the statutory power existed would no doubt mean that the court would not interfere except where the result would otherwise be unconscionable. But such matters go to the exercise rather than the existence of the power.[23]

From equity as an influence in the interpretation of statutes, including statutes involving the use of official power, it is now necessary to pay attention to the lawyer's understanding of the term.

Equity – A Body of Law Historically Defined

Despite the interpretive principle referred to above there was never an unbounded jurisdiction of courts of equity to correct, modify or supersede the positive law.[24] Courts of Equity, like other courts of law, decided new cases as they arose by principles derived from precedent and developed or elaborated upon those principles. But those principles were:

> … as fixed and certain as the principles on which the courts of common law proceed.[25]

For lawyers the traditional definition of equity was historical and institutional in its terms. It was that used in the dictionary as an example or special case of the third definition, namely:

> The part of the English law originally administered by the Lord Chancellor and later by the Court of Chancery.

This was Maitland's definition. He called it supplementary law:

> It is a collection of appendixes between which there is no very close connection. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses.[26]

As Chancery historically kept clear of public law, crime and much of tort, so too did equity. However it engaged closely with Contract and Property law supplying both with equitable appendices including the law of trusts. So Maitland could say:

> The bond which kept these various appendixes together under the head of Equity was the jurisdictional and procedural bond. All these matters were within the cognizance of Courts of Equity and they were not within the cognizance of the courts of common law.'[27]

The institutional monopoly of that jurisdiction was removed by the *Judicature Acts* leading to the prediction that:

> The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice that it is a well established rule administered by the High Court of Justice.'[28]

In one sense that day has come. Equity is part of the single body of unwritten law administered by most, if not all, Courts of the land, albeit it retains its distinctive character and functions. To say that of course is not to say anything about fusion between the common law and equity, a topic which seems to raise peculiar passions in some quarters.[29]

Equity Entangles with Public Law

Maitland and other equity authors of his time seem to have had little or nothing to say about public law even though equitable injunctions and declarations were already being applied in that area. Indeed this is still the case in some contemporary texts. But in 1934 Hanbury's *Essays in Equity* included a chapter 'Equity in Public Law'. This began by reflecting upon the blurring of the public-private law divide and the extent to which:

> In the law of property, the law of tort, the law of contracts, at every turn we find public interests intruding upon the sphere of the interests of individuals.

Hanbury referred to housing and town planning legislation and even the *Law of Property Act 1925* which enabled persons interested in freehold land affected by restrictive covenants to apply to an arbitrator to modify or discharge such covenants. In the area of tort, private citizens were bringing actions against public officials. He concluded that:

> … the growing importance and unresting penetration of public law is gradually awakening our minds to the fact that it, just like private law, is composed of a medley of common law and equity, cemented by statute. It is true that there is not so much equity in public as in private law, but nevertheless a sketch of either constitutional law or criminal law that did not mention the equitable influences at work in those branches of the law would be a very imperfect and one-sided sketch.

Much common law, equitable and statutory water has passed under the bridge, both in the United Kingdom and in Australia since Hanbury wrote his essays. But even then, the intersections between equity and public law were various:

1 Breaches of trust by the Crown.

2 The question whether a trust was a charitable trust and therefore exempt from income tax.[30]

3 The function of the Attorney-General with respect to charitable trusts.

4 The use of injunctive relief in public law, including relief to restrain a person from applying for a private bill and in the colonies to restrain the introduction of a public bill.[31]

5 The use of injunctive relief to restrain the commission of a crime and the development of the associated doctrine of the standing requirements for a private citizen claiming relief against breach of a public right.[32]

6 Proceedings in equity against the Crown in the Courts of Chancery and Exchequer.

The growth of the relationship between administrative law and equity has been untidily organic in character. That is not an unusual feature of the interaction between disparate areas of law whose territories overlap. Common law and statute law provide a paradigm case.[33] There is no grand unifying principle to bring administrative law and equity into a coherent whole. Their interaction occurs in different ways. Specific levels of interaction involve the use of equitable remedies, the injunction and the declaration, to provide relief against the unlawful exercise of statutory or other power. Even where equivalent statutory remedies are available equity supplies analogues for their application particularly in the identification of considerations relevant to the discretion to grant them.

Some equitable doctrines have potential application to official conduct. Doctrines of estoppel at common law and equity and associated preclusionary rules may apply to certain categories of case although not so as to extend statutory power, contract statutory duties or fetter discretions. A statutory duty in some circumstances may equate to a fiduciary duty. Equitable doctrines governing fiduciary duties and the conduct of fiduciary relations have a place if only by analogy in the exercise of some statutory powers. And where the Crown or public bodies are assimilated to the position of private corporations or persons by the removal of Crown immunity or otherwise then equity will apply to them as it does to private corporations and persons. Statutory bodies engaged in commercial or trading activities will in their private or privatised capacity, absent any statutory immunity or modification of their liabilities, attract to their conduct the general body of the law including equity.

At a more general level equity influences the development of principles of administrative law and the bases of judicial review.

Both the specific and the general interactions are reflected in the often quoted observation by Sir Anthony Mason that:

> Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of

> the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.[34]

It is helpful in this context to recall Maitland's prophecy, cited earlier, that the day would come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law. It has a resonance with the further observation by Sir Anthony Mason in his paper that:

> There is no reason why the courts in shaping principles, whether their origins lie in the common law or in equity, should not have regard to both common law and equitable concepts and doctrines, borrowing from either as may be appropriate, just as courts have regard to the way in which the law has been developed by statute and has developed in other jurisdictions and, for that matter, in other systems of law.

Relevantly for the present topic, he noted the comment of Justice Somers of New Zealand that over the years words such as 'unconscionable' and 'inequitable' had drawn closer to more objective concepts such as fair, reasonable and just.[35]

This is not to say that the operation of equitable principles in administrative law today is in any sense comprehensive or complete. As Dal Pont and Chalmers have observed, while there is a well developed equitable jurisdiction regulating the relationships of trust between private individuals, Courts of Equity have shunned a parallel jurisdiction between government and the governed:

> The relationship between government and the people has attracted the jurisprudence of equity, but in a less developed fashion. The breadth of equitable remedies are, with limited exceptions, available to plaintiffs who establish the relevant cause of action against the government. Similarly, public sector organisations and agencies are generally subject to equitable doctrines. There is no reason for equity not to apply in public law, as otherwise there would be inconsistency with the accepted social and legal policy of equality before the law, with all having access to the same rights and remedies. Equity and public law is a subject of only rudimentary perusal by commentators, and remains largely unexplored by the courts.[36]

Equitable Remedies and Public Law – An Historical Perspective from the High Court

An account of the historical development of equitable doctrines and remedies in public law is given in the judgments in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*.[37] The case concerned the standing requirements for persons other than the Attorney-General seeking the grant of equitable remedies by way of declaration and injunction to restrain the excess of statutory power. The relief was claimed by the respondents against apprehended conduct by the appellant Land Council. The Land Council proposed to establish a funeral benefit for Aboriginal people in New South Wales, a service already provided by the first respondent.

The Court held that the respondents had standing to seek declaratory and injunctive relief on the basis that if not restrained the appellants could cause severe detriment to the respondents' business and that the respondents therefore had a sufficient special interest to seek the relief they did. The Court rejected the 'special damage' criterion of standing enunciated in *Boyce v Paddington Council*.[38] It adopted instead a sufficient criterion of standing, the existence of a special interest in the subject matter of the proceedings. This reflected the reformulation of the *Boyce* 'special damage' test in *Australian Conservation Foundation Inc v The Commonwealth* [39] and *Onus v Alcoa of Australia Ltd* [40] and more recently *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA).* [41]

In a joint judgment, Gaudron, Gummow and Kirby JJ discussed the relationship between equity and public law. Equity, they said, provided remedies to vindicate the public interest in the maintenance of due administration where other remedies and in particular the prerogative remedies, were inadequate. The application of equitable doctrine to the grant of relief in these circumstances was expressed thus:

> There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction. The position is expressed in traditional form by asking of the plaintiff whether there is an 'equity' which founds the invocation of equitable jurisdiction.[42]

The public interest in due administration was evidenced historically by the Crown's power of visitation of municipal and other chartered corporations and enforced primarily by mandamus, quo warranto and scire facias. Chancery already had broad jurisdiction in respect of charitable trusts but it intervened more generally on two bases:

1 The right of the Attorney-General to come to Chancery even for a legal demand.

2 The inadequacy of legal remedies.

The three justices noted that in the public law arena equitable intervention had not been limited to the protection of particular proprietary rights. The administration of charitable trusts was a matter of public concern and, analogously with the enforcement of that interest, the English Attorney-General would move for equitable relief to restrain municipal corporations misapplying funds which they held upon charitable or statutory trusts. The remedies were then extended to prevent statutory bodies from unauthorised application of their funds. The role of the Attorney-General was further generalised to protect the public interest against conduct by statutory authorities exceeding their power in a way which would interfere with public rights and so injure the public.[43] This historical background, which informed an important judgment about the standing of private persons to seek equitable relief, leads into a wider consideration of equitable remedies in this area.

Equitable Remedies

A substantial part of the contribution of equity to administrative law has come from the use of the equitable remedies of injunction and declaration. The injunction is available to restrain threatened official conduct which is beyond power or otherwise unlawful. Interlocutory injunctions are an indispensable tool by which the status quo is maintained in judicial review applications pending their final hearing and determination.

The place of the injunction in administrative law in Australia is secured by s 75(v) of the Constitution. That provision was inserted at the suggestion of Andrew Inglis Clark to avoid the possible application in Australia of the decision in *Marbury v Madison*.[44] Although the case is famous for the assertion by the Supreme Court of the United States of authority to review the constitutional validity of legislation it also held that the Court could not validly be given original jurisdiction under the Constitution to issue writs of mandamus to non-judicial officers of the United States. Edmund Barton accepted Inglis Clark's concerns and formally moved the insertion of the provision in March 1898 observing as he did that absent that specific provision in the Constitution it might be held 'that the court should not exercise this power, and that even a statute giving them the power would not be of any effect….'. The power thus conferred on the High Court he said could not do any harm and might 'protect us from a great evil'. In the event, s 75(v) has become a bulwark of the rule of law in Australia, proof against privative clauses which might otherwise have had the effect of depriving the High Court of the jurisdiction to review and restrain unlawful official action. So the injunction

stands as a constitutional remedy against unlawful executive action along with the constitutional writs of mandamus and prohibition.

The injunction and declaration are species of equitable relief available in all manner of litigation coming before both Federal and State courts. It is not necessary that claims for such relief be conjoined with other prerogative or statutory remedies. In *Corporation of the City of Enfield v Development Assessment Commission*[45] the council of the City of Enfield contended that a development plan consent granted by the Development Assessment Commission was invalid by reason of the misclassification of the proposed development as other than a 'special industry'. It claimed injunctive and declaratory relief in the Supreme Court.

The Council's action invoked a jurisdiction of the Supreme Court which was characterised in the joint judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ as:

> … its jurisdiction as a court of equity to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.[46]

Their Honours pointed to the differences between the availability in public law of equitable remedies on the one hand and judicial review by mandamus, prohibition and certiorari on the other.[47] An applicant with standing to apply for prohibition or certiorari could fail to obtain an order absolute for reasons which would not have precluded the availability of a declaration. So although in *FAI Insurances Ltd v Winneke*[48] certiorari and mandamus were not available against the Governor in Council, a declaration could be made against the Attorney-General of Victoria as representative of the Crown.[49]

Gaudron J who agreed with the joint judgment added some observations about the inadequacies of the prerogative writs as general remedies to compel executive government and administrative bodies to operate within the limits of their powers.[50] She said:

> Equitable remedies are available in the field of public law precisely because of the inadequacies of the prerogative writs. Thus… it is not incongruous that equitable relief should be available although prerogative relief is not. What is incongruous is the notion that equitable remedies should be subject to the same or similar limitations which beset the prerogative writs. In the field of public law, equitable remedies are subject to the same considerations, including discretionary considerations, as apply in any other field. There is no need for the importation of other limitations.[51]

The application of the equitable injunction and declaration in public law may also be influenced by the modern availability of statutory remedies which, because they are seen as serving the public interest, may not impose any particular standing requirement. Section 80 of the *Trade Practices Act 1976* (Cth) which provides that injunctive relief to restrain contraventions of the Act can be sought by any person is the leading case in point. Its constitutional validity was considered in the recent decision of the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*.[52] In his reasons for judgment in support of validity, Gummow J returned to the role of equity in public law which he had considered in the *Bateman's Bay* case. He pointed out that in Chancery a plaintiff would seek to lay out facts and circumstances demonstrating the equity to the relief claimed. That equity might arise from the violation or apprehended violation of rights secured in equity's exclusive jurisdiction or because of the inadequacy of legal remedies to vindicate legal rights or as a defensive equity to resist legal claims. The legal rights, interests and remedies in question might come from common law or from statute. Equity could intervene to protect statutory rights. Alternatively, where statute conferred obligations upon administrators or particular sections of the community it might provide no means or inadequate means for enforcement of the obligation or the restraint of ultra vires activity. His Honour said:

> This led to the engagement of the equity jurisdiction in matters of public law.[53]

In the context of questions about the competency of parties, other than the Attorney-General or absent an Attorney-General's fiat, to seek enforcement of statutory regimes the modern concept of 'standing' was born. His Honour said:

> The litigious activity did not involve the exercise by a plaintiff of personal rights bestowed upon the plaintiff by statute. Rather, it involved the use of the auxiliary jurisdiction in equity to fill what otherwise were inadequate provisions to secure the compliance by others with particular statutory regimes or obligations of a public nature.[54]

In the context of the challenge to validity raised in relation to s 80, this historical background counselled caution in extrapolating to Ch III of the Constitution narrow rules of standing from the fields of public law involving the intervention of equity (as at 1900) and the field of judicial review for constitutional validity.

In an interesting article, focusing on the *Truth About Motorways'* case, in the March 2001 edition of the Public Law Review, David Wright has referred to the indirect effect of analogical reasoning or what might more loosely be called 'cross fertilisation of ideas' between equitable and like statutory remedies. In this respect he concluded:

> … the role of equitable remedies is being reinvigorated particularly with regard to cases understood as public law matters. These cases frequently involve the *Trade Practices Act*. *Truth About Motorways* is simply part of this larger pattern. Finally, also with reference to the *Trade Practices Act* (and the New Zealand *Fair Trading Act*) the private law has been altered and most particularly the law of remedies has been fundamentally altered. The combination of all three effects means that there is an emerging decline in the importance of the strict divide between public and private law. This movement is accompanied by the rise of the unifying force of equitable remedies, particularly injunctions, as modified by the *Trade Practices Act*. These changes outside the narrow scope of the relevant legislation will have an impact around the common law legal world. The role of equitable remedies is changing. They are now a potent force for the unification of private and public law.

Equitable Estoppel

The application of estoppel at common law and equity to the exercise of statutory power is a topic itself deserving of a substantial paper.[55]

A number of species of estoppel were identified by Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic*[56] as having a conceivable application to administrative law. These included estoppel by representation which comprises common law estoppel, relating to present facts, and equitable or promissory estoppel relating to the future. He also referred to issue estoppel and proprietary estoppel.

It is well established that a public authority cannot be required, by the application of doctrines of estoppel, to exceed its statutory powers or breach its statutory duties. That would involve equity amending the statute. That is not to say that a statutory power or duty might not, in appropriate circumstances, be capable, on general principles, of a construction accommodating obligations arising from equitable principles. But such a construction would by definition allow the performance of the obligation intra vires or in accordance with the relevant statutory duty. For example, in *Kurtovic* Gummow J recognised that there are cases where upon its proper construction the legislation may permit a decision-maker to waive procedural requirements. This does not involve an exception to the principles of ultra vires in favour of an estoppel doctrine but a process of construction.

Not only is estoppel unable to authorise ultra vires action, it cannot prevent or hinder the performance of a positive statutory duty or the exercise of a discretion intended to be performed or exercised for the benefit of the public or a section of the public.[57]

There may be put to one side the classes of case in which officials or public authorities enter the realm of private law by making contracts, acquiring or disposing of property or engaging in tortious conduct. There the private law, including equity, applies to them. This was well exemplified in *Verwayen v The Commonwealth* [58] where the Commonwealth was held estopped in negligence litigation from invoking a limitation period which it had previously indicated it would not invoke. It is increasingly a feature of modern life that statutory authorities engage in trade and commerce. The Full Court of the Federal Court has recently held, for the purposes of the application of the *Workplace Relations Act,* that the University of Western Australia is a trading corporation and also a financial corporation within the meaning of those terms in s 51(xx) of the Constitution – *Quickenden v O'Connor*.[59] Many other universities and public bodies with significant commercial operations would attract a similar characterisation.

In *Kurtovic* Gummow J referred to a number of cases where the dealings of public bodies with outsiders have attracted the operation of principles of estoppel and proprietary estoppel.[60] He noted the distinction drawn in the United States between proprietary and governmental capacities of public bodies. Where a public body acts in its proprietary capacity then an equitable estoppel may arise. Here his Honour drew an important distinction between the planning or policy level of decision-making by public authorities, in which statutory discretions are exercised, and operational decisions implementing such policy. He said:

> Where the public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel. It must, however, be recognised that it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely 'operational'.[61]

The distinction applied also to the operation of doctrines of promissory estoppel. It is a distinction which, as his Honour recognised, may be difficult of application. Indeed in one sense it is paradoxically too easy resembling one of Julius Stone's categories of indeterminate reference and offering a mask for judicial choice.

His Honour also expressed the view that, before an estoppel can be raised against a donee of a statutory discretion it is necessary for the party seeking to raise the estoppel to have suffered detriment by his reliance on the expectations generated by the representor.

Some important observations concerning the availability of estoppel against the Executive were made subsequently by Mason CJ in *Attorney-General v Quin*[62] where his Honour said:

> The Executive cannot by representation or promise disable itself from or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power.

He cited with approval the observation of Gummow J in *Kurtovic* that in the case of a discretion there is a duty under the statute to exercise a free and unhindered discretion and that an estoppel cannot be raised to prevent or hinder its exercise. This is on the basis that the legislature intends the discretion to be exercised on a proper understanding of the statutory requirements. The repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding. Nevertheless Mason CJ did not deny the availability of estoppel against the Executive arising from conduct amounting to a representation if holding the Executive to its representation would not significantly hinder the exercise of the discretion in the public interest. He said:

> … as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.[63]

The possibility that estoppels may apply in public law is not foreclosed by the current state of authority in Australia.

The doctrine of legitimate expectations which attract particular requirements of procedural fairness in some cases[64] bears some resemblance to estoppel but is not itself an equitable doctrine. Nor is it a species of estoppel. In particular, in Australia, it does not afford substantive protection to the rights the subject of the claimed expectation. As with the application of estoppel to the exercise of statutory discretions it would entail curial interference with administrative decisions on their merits by precluding the decision-maker from ultimately making the decision which he or she considered most appropriate in the circumstances. In *Quin* Brennan J said of the concept of substantive protection:

> That theory would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not.[65]

A submission in support of the use of a legitimate expectation to support endorsement of substantive rights was made in *Barratt v Howard*.[66] It was submitted that Mr Barratt had been led to believe that his office would not be terminated on the basis of his conduct at the time when it was terminated. It was argued that in the circumstances he had the legitimate expectation that 'prevented his termination in the manner adopted and on the grounds relied on.' That submission was rejected on the basis that, in Australia, there is no doctrine which recognises substantive rights by reason of a legitimate expectation, induced by official representations, that they will be afforded.

Fiduciary Obligations in Administrative Law

Fiduciary obligations are creatures of equity. The Latin word '*fiducia*' means trust. Originally applied to trust relationships in English law it has evolved a wider application covering a range of rules and principles of which it has been said:

> These rules are everything. The description 'fiduciary', nothing. It has gone much the same way as did the general descriptive term 'trust' one hundred and fifty years ago.[67]

The private law of fiduciary obligations requires persons entrusted with powers for another's benefit to observe a general equitable obligation, when exercising such powers, to act honestly in what they consider to be the interests of the other. In this category we will find company directors, trustees, liquidators, executors, trustees in bankruptcy and others. The repositories of such powers are subjected, by reason of their equitable obligations, to judicial review of their actions. And as Paul Finn has said:

> Perhaps not surprisingly, given the close resemblance which the fiduciary officer bears to the public official, this system of review reflects in a very large measure that described by the late Professor De Smith in Judicial Review of Administrative Action.

A distinction has been drawn between the concept of a trust enforceable in equity and that of a non-justiciable public or 'political' trust. The idea of a 'political' trust has been applied to the discharge by public officers of duties or functions belonging to the prerogative and authority of the Crown.[68] This has been said not to be a conventional but a 'higher sense' of the word.[69] The distinction was relied upon by the Privy Council in 1902 in a case involving the

allotment to a Maori Chief in 1870 of certain land over which native title had been extinguished. The land was to be held in trust by the Chief '… in the manner provided or hereinafter to be provided by the General Assembly for Native Lands held under trust'. Notwithstanding the use of the term 'trust' it was held that the allottee had taken absolutely and beneficially and that there was no trust in favour of the traditional owners of the land.[70]

There is no presumption or general rule that the imposition or assumption of a statutory duty to perform certain functions gives rise to fiduciary obligations notwithstanding that the word 'trust' may be used.[71] In *Bathurst City Council v PWC Properties Pty* Ltd[72] Gaudron, McHugh, Gummow, Hayne and Callinan JJ referred to the notion developed in decisions such as *Kinloch v Secretary of State for India*[73] that:

> … an obligation assumed by the Crown even if it be described as a trust obligation, may be characterised as a governmental or political obligation rather than a 'true trust'.

Later, their Honours observed, *Tito v Waddell* emphasised that, although not a trustee, the Crown might 'nevertheless [be] administering property in the exercise of the Crown's governmental functions…'. A trust for public purposes could fail because 'purposes of a public character would not necessarily qualify as charitable purposes'.[74] The existence of an unenforceable political trust is not inconsistent with the existence of particular duties imposed on public authorities which have a fiduciary character and are enforceable at law. The duty of local authorities in England to their ratepayers was said, as early as 1925, to be similar to that of the trustees or managers of the property of others.[75] It was designated as 'fiduciary' in *Bromley London Borough Council v Greater London Council.*[76] The duty may operate as a mandatory relevant consideration which informs the exercise of discretionary powers involving expenditure or levying of charges and is an element to which the Court will have regard in deciding whether a decision is unreasonable in the *Wednesbury* sense.[77]

In *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* [78] Gummow J discussed with evident approval the approach taken by Dr Margaret Allars[79] to the taxonomy of *Wednesbury* unreasonableness and its classification into three paradigm cases. These were characterised by his Honour as follows:

1 The capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not.

2 Discrimination without justification, a benefit or detriment being distributed unequally among the class of persons who are the objects of the power.

3 An exercise of power out of proportion in relation to the scope of the power.

Of these his Honour said:

> All of them are consistent with a view of Lord Greene's 'doctrine' as rooted in the law as to misuse of fiduciary powers: see Grubb, Powers, Trusts and Classes of Objects [1982] 46 Conv 432 at 438.[80]

The 'duty' identified in many of these cases arises out of particular statutory regimes. The use of the word 'duty' may be misleading. It may be no more than descriptive of a rule of construction which imports a requirement to act fairly in the sense of paying due regard to the interests of those who may be affected by the exercise of a power or discretion. So used, the idea of a fiduciary duty, in the statutory context, may be analogous to procedural fairness and able to be viewed either as an implication to be drawn from the statute or a judicially imposed gloss to be displaced only by clear words.

There is longstanding and continuing controversy about whether the common law of judicial review of administrative action rests on imputed legislative intention or judicially invented rules or some hybrid.[81] Whether or not a fiduciary relationship properly so called may be said to exist between the repositories of public power and those affected by its exercise, it is right to say that the classical fiduciary relationship between trustee and beneficiary '… is one particularly apt to illuminate the relationship between the government and the people'.[82]

Fiduciary Duties and Indigenous People

In the United States, Canada and New Zealand as well as in Australia the question whether governments owe fiduciary duties to indigenous people has been considered. The relationship between the Indian peoples and the United States government was described in fiduciary language in *Cherokee Nation v State of Georgia*.[83] Marshall CJ described Indian peoples as domestic dependent nations saying:

> Their relation to the United States resembles that of a ward to his guardian.[84]

The Supreme Courts of the United States in *US v Mitchell*[85] found the United States government to be liable in damages for mismanagement of forest resources on Indian Reservation lands. In that case a fiduciary duty arose from Federal Timber Management Statutes and other legislation under which the government had 'elaborate control over forests and properties belonging to Indians'. Reference was made to 'the undisputed existence of a general trust relationship between the United States and the Indian people' and the 'distinctive obligation of trusts encumbered upon the governments in its dealings with these dependent and sometimes exploited people'.[86]

In *Guerin v R*[87] the Supreme Court of Canada found the Crown in a fiduciary relationship to Indians whose lands had been surrendered to it for lease to a golf club. The lease was granted on terms which had not been discussed with and which were disadvantageous to the Indians. The grant was held to be a breach of the Crown's fiduciary duty. The nature of the Indian title and the statutory scheme for disposing of Indian land placed upon the Crown an equitable obligation enforceable by the Court to deal with the land for the benefit of the Indians. Dickson J (with whom Beetz, Chouinard and Lamer JJ concurred) said:

> This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

While it might be thought the judgment of Dickson CJC based the fiduciary duty upon the surrender of Indian lands to the Crown a broader interpretation of his judgment was open. In *R v Sparrow*[88] the relevant duty was founded upon a fiduciary obligation derived from the nature of Indian interests in the land.

New Zealand jurisprudence establishes the existence of the fiduciary relationship between the Crown and Maori people. These cases support the proposition that the Treaty of Waitangi created an enduring relationship akin to a partnership between the Crown and Maori, each accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.[89]

In Australia in *Mabo (No 2)*[90] it was submitted that Queensland was under a fiduciary duty or affected by a trust of which the Meriam people were beneficiaries in connection with their rights and interests in land. It was not contended that the trust or fiduciary obligation fettered legislative power. It was argued however that it limited the way in which power otherwise granted, for example, under Crown lands legislation, could be exercised. The claim for relief

in *Mabo (No 2)* included a claim for a declaration that Queensland was under a fiduciary duty or alternatively bound as a trustee to the Meriam people to recognise or protect their rights and interests in the Murray Islands.

Brennan J did not deal directly with the claim in his judgment. He did say, however, that:

> If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.[91]

His reasoning about the existence and nature of native title and the extinguishment of native title did not involve any consideration of a fiduciary relationship between government and native title holders or indigenous people generally. Nor did Deane and Gaudron JJ afford any comfort to those who would argue for the existence of a fiduciary duty as an invalidating principle in respect of executive action extinguishing native title. They did say however:

> Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies. Indeed, the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title. The principle of the common law that pre-existing native rights are respected and protected will, in a case where the imposition of such a constructive trust is warranted, prevail over other equitable principles or rules to the extent that they would preclude the appropriate protection of the native title in the same way as that principle prevailed over legal rules which would otherwise have prevented the preservation of the title under the common law.[92]

Dawson J, having formed the view that traditional rights had been extinguished upon annexation of the Murray Islands, concluded that there was no fiduciary duty imposed on the Crown. Toohey J, alone among the judges, accepted the existence of such a duty arising directly from or by close analogy to equitable principle. It arose 'out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power'. The obligation was of the character imposed on a constructive trustee. The content of the obligation was to ensure the traditional title was not impaired or destroyed without the consent of, or otherwise having regard to, the interests of the title holders. It could not limit legislative power but the enactment of legislation could amount to a breach of the obligation.

Mason CJ in *Coe v Commonwealth*[93], a pleadings case, considered a claim for breach of fiduciary duty arising out of the enactment of a statutory power of alienation. He said:

> The existence of a fiduciary duty cannot render the legislation inoperative, though according to Toohey J it could generate a right to equitable compensation if the legislation constituted a breach of duty.[94]

The state of authority to this date is unpromising in relation to the identification of any fiduciary duty owed to indigenous people by reason of their status as such or as native title holders. If it does it would not appear to condition the validity of either legislative or executive acts, albeit its breach could give rise to a claim for equitable compensation. That is not to say that in this case, as generally, principles analogous to those governing fiduciary relationships may not inform the exercise of statutory power as mandatory relevant elements for consideration. Nor is it to exclude the possibility of an interpretive principle under which laws impacting on the rights of indigenous people should be construed by reference to fiduciary considerations where such a construction is open. There is at present no specific authority for such a proposition.

Conclusion

As may be seen from the foregoing review, administrative law and equity interact in a variety of ways from the level of general equitable principles informing the construction of statutes and the exercise of discretions to the specific applications of equitable remedies. The substantive application of equitable doctrines particularly relating to fiduciary duties and estoppels is problematic but open to future development. That openness holds the promise of a fruitful union between the two areas of law in the years to come.

Endnotes

1 Shorter Oxford English Dictionary.
2 *Sharp v Wakefield* [1891] AC 173 at 179 (Halsbury LC); See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 (Kitto J) and *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1980) 144 CLR 45 at 49.
3 An interesting historical discussion of 'Equity and Good Conscience' Clauses in English Courts of Requests and Small Claims Tribunals is found in Geoffrey Sawer, The Administration of Morals in AR Blackshield (ed) *Legal Change – Essays in Honour of Julius Stone* Butterworths (1983) at 88-97.
4 *Public Service Act 1922* s 6.
5 *Barratt v Howard* (2000) 170 ALR 529 at 544.
6 Section 476 of the *Migration Act 1958* (Cth) prior to 2 October 2001 excluded judicial review in the Federal Court on the grounds of procedural fairness (other than actual bias). Section 474, introduced post-Tampa by the *Migration Legislation Amendment (Judicial Review) Act 2001*, purported in terms to exclude all judicial review albeit the Second Reading Speech recognised that it would be construed according to the principles in *Re Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. Its construction was considered by the High Court in *Plaintiff S157 v Commonwealth* (2003) 195 ALR 24. Recently there has been limitation by codification of the natural justice hearing rule effected by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.
7 See the discussion in *NAAV v Minister for Immigration, Multicultural and Indigenous Affairs* (2002) 193 ALR 449 at 585-586.
8 De Smith, Woolf and Jewell, *Judicial Review of Administrative Action* 5th Edition, Sweet & Maxwell (1995) 13-040-13-046.
9 See *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153 at 167. In this context also the common law equality principle or anti-discrimination principle so called is of interest – Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed) *The Province of Administrative Law* Hart (1997) 6-17.
10 *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121; *Aboriginal Land Council (NSW) v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559 and see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*, LBC (1996) at 379-381.
11 *Kruse v Johnson* [1989] 2 QB 291; *R v Immigration Tribunal; Ex parte Manshoon Bugum* [1986] Imm AR 385.
12 Joseph Story, Commentaries on Equity Jurisprudence (1884) Ch 1 par 3. Story traced this concept of equity through Justinian to Grotius and Puffendorf, Blackstone and Bracton.
13 Ibid at par 7.
14 (1908) 7 CLR 277.
15 Ibid at 304.
16 (1990) 171 CLR 1 at 18.
17 (1994) 179 CLR 427 at 437.
18 *R v Lord Chancellor; Ex parte Witham* [1998] QB 575; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; Dyzenhaus, Hunt and Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford Uni Commonwealth L Jo* 5-34.
19 (1991) 22 NSWLR 687.
20 Ibid at 698.
21 Ibid at 700.
22 Ibid at 700.
23 Ibid at 715.
24 Story, Ch 1 par 19.
25 *Bond v Hopkins* 1 Sch & Lefr 428 at 429 cited by Story at Ch 1 par 20.
26 FW Maitland, *Equity a Course of Lectures* 2nd Ed, Cambridge Uni Press (1936) at 19.
27 Ibid at 20.
28 Ibid at 20.
29 See Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* 4th Ed, Butterworths (2002) by R Meagher, D Heydon and M Leeming at 2-310 and 23-020 where the discussion of this question and of the

decision of Palmer J in *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487 is a touch overwrought; see also a useful discussion of this case and the judgment of the Court of Appeal in *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626 in J Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 *LQR* 375 – 380.

30 *Income Tax Commissioners v Pemsel* [1891] AC 531.
31 *Attorney General for New South Wales v Trethowan* [1932] AC 526.
32 *Boyce v Paddington Borough Council* [1903] 1 CH 109.
33 WMC Gummow, *Statutes Equity and Federalism*, Cambridge Uni Press; and R French, 'Statutory Modelling of Torts' in Nicholas J Mullany (ed) *Torts in the Nineties* LBC (1997) Ch 7.
34 Mason A, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 238.
35 *Elders Pastoral Ltd v Bank of New Zealand* (1989) 2 NZLR 180 at 193.
36 GE Dal Pont and DRL Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services (1996) at 116.
37 (1998) 194 CLR 247.
38 [1903] 1Ch 109.
39 (1980) 146 CLR 493.
40 (1981) 149 CLR 27.
41 (1995) 183 CLR 552.
42 *Bateman's Bay v Aboriginal Fund* above n 37 at 257.
43 Ibid at 259.
44 (1803) 5 US 137.
45 (2000) 199 CLR 135.
46 Ibid at 144.
47 Ibid at 145.
48 (1982) 151 CLR 342.
49 (2000) 199 CLR 135 at 146.
50 Ibid at 156.
51 Ibid at 157-158.
52 (1999) 200 CLR 591.
53 Ibid at 628.
54 Ibid at 628-629.
55 For an excellent and comprehensive treatment see J Thomson, 'Estoppel by Representation in Administrative Law' (1998) 26 *Fed L Rev* 83-113; E Campbell, 'Estoppel in Pais and Public Authorities' (1998) 5 *AJAL* 157-167; and EJ Morzone, 'Estoppel and Other Private Law Preclusionary Doctrines in Public Law' [1999] *Queensland Lawyer*, 135-138.
56 (1990) 21 FCR 193.
57 See fn 51 at 208 citing Halsburys Laws of England (4th Ed) Vol 44, 'Statutes' par 949.
58 (1990) 170 CLR 394.
59 (2001) 194 ALR 260.
60 (1990) 21 FCR 193 at 215.
61 Ibid at 215.
62 (1990) 170 CLR 1 at 17.
63 (1990) 170 CLR 1 at 18.
64 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 which may foreshadow a revisiting of *Teoh.*
65 Ibid at 39.
66 66 (2000) 170 ALR 529.
67 PD Finn, *Fiduciary Obligations,* Law Book Co (1977) 1.
68 This does not raise the question whether the exercise of prerogative or executive powers are non-justiciable. That the limits of such powers may be tested in judicial review is clear – see the discussion in *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368-369 (Gummow J) and its application in *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242.
69 *Kinloch v Secretary of State for India in Counsel* (1887) 7 App Cas 619 at 625-6.
70 *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56 at 72 per Lord Lindley.
71 *Tito v Waddell (No 2)* [1977] Ch 106; *Swain v Law Society* [1983] 1 AC 598. See also Hogg, *Liability of the Crown*, 2nd Edition, Caswell (1989) at 186-188.
72 (1998) 195 CLR 366 at 591.
73 (1887) 7 AppCas 619.
74 At 591-592 citing *Blair v Duncan* [1902] AC 37.
75 *Roberts v Hopwood* [1925] AC 578 at 596 (Lord Atkinson) and 603-4 (Lord Sumner).
76 [1983] 1 AC 768 at 815 (Lord Wilberforce) and 838 (Lord Scarman).
77 Michael Supperstone and James Goudie (ed)*, Judicial Review,* Butterworths (1992) at 266-7.
78 (1990) 96 ALR 153.
79 Margaret Allars, *Introduction to Australian Administrative Law,* Butterworths (1990) at par 5.54-5.57.
80 (1990) 96 ALR 153 at 167.

81 For contending views see Wade and Forsyth, *Administrative Law* 8th Edition, Oxford University Press, New York, (2000) at 36; Forsyth 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) *Cambridge L Jo* at 122-40; Laws, 'Law and Democracy' [1995] *Public Law* 72 at 79; M Elliott, *The Constitutional Foundations of Judicial Review* Oxford, Hart, (2001) at 109-10; Paul Craig 'Competing Models of Judicial Review' [1999] *Public Law* 428 at 446; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' (2002) *Cambridge L Jo* 87.
82 GE Dal Pont and DRL Chalmers, *Equity and Trusts in Australia and New Zealand* LBC Information Services (1996) at 117.
83 5 Pte 1 (1831).
84 See also *Worcester v State of Georgia* 6 Pte 515 (1832); *United States v Kagama* 118 US 375 (1886) at 383-4.
85 463 US 206 (1983).
86 At 225.
87 (1984) 13 DLR 4th 321.
88 (1990) 70 DLR (4th) 385.
89 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.
90 (1992) 175 CLR 1.
91 Ibid at 60.
92 Ibid at 113.
93 (1993) 118 ALR 193.
94 At 204.

THE BOUNDS OF FLEXIBILITY IN TRIBUNALS

Justice Keith Mason AC*

Paper presented at the inaugural meeting of the NSW Chapter of the Council of Australasian Tribunals, 24 February 2003

The rule of law is the bedrock of civilised society. It is the assumption upon which even the Constitution is based.[1] It represents the supremacy of law over naked power and unbridled discretion. It is as binding upon judges as administrators.

In 1983 a security training exercise arranged by the Australian Secret Intelligence Service went awry. Four ASIS agents were meant to rescue one of their number who was playing the role of hostage from his imagined 'captors' in a hotel room. They did so by breaking down the door of a room at the Sheraton Hotel. Unfortunately the hotel manager had not been warned about the exercise. When he went to investigate, the participants, wearing disguises and carrying firearms left hurriedly and somewhat sheepishly.

The Chief Commissioner of Police for Victoria began to investigate the commission of criminal offences in relation to this incident. At his request the State government asked the Commonwealth to reveal the names of the participants so that the police enquiries could proceed. The participants moved the High Court for an injunction to restrain the Commonwealth from revealing their names on the basis that it was a breach of a term in their contracts of employment to disclose their identity. A major constitutional case ensued and you will find it reported under the name *A & Ors v Hayden (No 2)*[2].

Given the unusual facts it is hardly surprising that Mason J opened his judgment by suggesting that there was an air of unreality about the case. He said:[3]

> It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart.

This notwithstanding, the judgments in the High Court, which culminated in the refusal of the injunctions sought by the agents, contain a ringing endorsement of the rule of law and its application to the Executive government even in matters of national security.

The idea that law is superior to arbitrary power has an ancient lineage. But it is much more than a philosophical proposition. In the 17th century much blood was shed, including that of a king, to vindicate the principle. And when Charles I's successors still missed the point, the Stuart line was deposed in the Glorious Revolution. It is therefore unsurprising that courts sometimes hark back to these brutal facts of history when wishing to lecture the executive arm of government. Thus, when Windeyer J once referred to the Act of Settlement as expressing the principle that all officers and ministers ought to serve the Crown according to the laws, he added:[4]

> It may be desirable that sometimes people be reminded of this and of the fate of James II….

* *President, Court of Appeal, NSW.*

Tribunals help ensure the effective and just delivery of government programs. The remarkable growth of tribunals as a permanent arm of Executive government is witness to the fact that 'good government' often depends upon informed and fair decision-making. Without elementary fairness, the Executive does not have the right to expect that spirit of compliance that is even more essential than an effective police force. Tribunals, like mercy, bless both those that give and those that receive the fruits of government.

The qualities of tribunals have been identified as openness, fairness, impartiality, efficiency, expedition and economy.[5]

The growth of tribunals has not occurred without opposition. Sometimes the higher echelons of government resent the public accountability, delay and cost of a tribunal doing that which would formerly have been achieved by a faceless public servant. For one thing, tribunals that sit in public and give reasons expose governmental decision-making to the winds of judicial review more effectively than the silent stamp of an unidentified official in a dossier.

Courts have also shown surprising hostility to the expansion of tribunals. I say surprising, because most tribunals do not involve themselves in the adjudicative tasks traditionally performed by the courts. Judges should hardly complain if Parliament sees fit to take certain categories of dispute out of the judicial context, so long as the court's jurisdiction to supervise legality is maintained; all the more so if the transfer came about because of **unnecessary** inefficiencies in the judicial process or the excesses of the adversary process.

On 13 February 2003 the High Court handed down its decision in *Plaintiff S157/2002 v Commonwealth of Australia*.[6] The case involves the scope and validity of privative clauses affecting decisions of the Refugee Review Tribunal. Much of the discussion relates to federal constitutional law. There are however, points of general application which are relevant to my topic this evening. These concern the explanation of the differences between judicial and executive power, including the executive power exercised through tribunals.

Gleeson CJ quoted Denning LJ with approval when he said:[7]

> If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

This might seem a little heavy-handed, but it is within the legal tradition I have already spoken about.

My point in starting at this heavy end is to offer a framework for understanding why there are and must be bounds to flexibility in tribunal procedures.

Obviously a tribunal must obey its jurisdictional signposts, doing everything it is set up to do but not a jot more. That is a given and it stems from the rule of law principles already adverted to. My topic tonight concerns matters procedural, although rule of law principles intrude here as well. They explain why flexibility has its bounds. Obviously some of these bounds are to be found in mandatory procedural stipulations in legislation. Others derive from fundamental principles of the common law touching administrative law, most notably the rules of natural justice.

Flexibility, informality and despatch

Section 73 of the Administrative Decisions Tribunal Act 1997 (NSW) ('ADT Act') encourages flexibility, informality and despatch. It has its counterparts in other State and federal enactments dealing with tribunals. Its detailed template should encourage innovation and discourage heavy-handed judicial review. Tribunals are not courts. What is more, they are

not intended to act as if they are courts. If tribunals slide into the legalistic, adversarial, judicial model they will be thanked by neither courts nor government.

Section 73 does not merely authorise flexibility, informality and despatch. It mandates these qualities, although in terms that sometimes suggest their outer limits. Thus the Administrative Decisions Tribunal is required to act as quickly as is practicable (s 73(5)(a)) and with as little formality as the circumstances of the case permit, according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 73(3)). These are duties, although obviously qualified by the scope of other duties.

In aid of these goals, the legislature has conferred broad procedural powers that are not necessarily part of the judicial armoury or, if they are, are not spelt out so explicitly. Thus, the Tribunal has express and undoubted powers:

- to require evidence or argument to be presented in writing (s 73(5)(c))

- to set time limits for the presentation of the respective cases of the parties if limits are determined reasonably necessary for the fair and adequate presentation of the cases (s 73(5)(d)

- to dismiss at any stage proceedings considered frivolous or vexatious or otherwise misconceived or lacking in substance (s 73(5)(h))

- to hold directions hearings (s 73(6)) and preliminary conferences (s 74).

The Tribunal's statutory authority to determine its own procedure (subject to the Act and Rules) is a further express indication that flexibility and innovation are encouraged. This is not just innovation vis á vis courts, but innovation within the Tribunal's own docket of work. What is right for one type of inquiry may not be suitable for another.

Sometimes, only sometimes, it may be better to work through a matter issue by issue, at least with respect to hearing evidence or submissions. Except where findings on one issue will dispose of the whole case, you should beware of issuing interim or piecemeal findings. There is the risk that the position you adopt (say on credibility) at one stage may need to be revisited later.

There might be circumstances where expert witnesses should be directed to consult with one another first so that their evidence can concentrate upon genuine points of difference. In this regard you might pick up some good ideas from the recent amendments to the Federal Court and Supreme Court Rules. Perhaps your Rule Committee might like to look at this.

If the Tribunal is required to reconstitute itself due to the unavailablility (for whatever reason) of a member, s 79 allows the reconstituted Tribunal to have regard to evidence previously taken in the proceedings. Recent appellate decisions have emphasised the width of this power and the authority it confers to dispense with the recalling of evidence or the repetition of argument.[8]

Limited application of the rules of evidence

Section 73(2) of the ADT Act provides:

> The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

The law of evidence started off as judicial common sense practised in context. But by the mid-twentieth century it had hardened and atrophied. Its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.

The Evidence Act 1995 is a much more flexible and task-oriented tool than the corpus of black and white technical rules found in Phipson's Law of Evidence. That is not to say that the Evidence Act is free from complexity and arcana. Nevertheless, it arrived on the scene too late to stem a major shift from courts to tribunals. There are many good and understandable reasons why this shift occurred. However, one reason was that the courts were too slow in adapting the rules formulated for criminal trial by jury to the quite different context of civil disputes tried by judge alone.

Section 73(2) has many counterparts in other jurisdictions and there is a body of jurisprudence that discusses its scope and limits. I would commend Professor Enid Campbell's article on 'Principles of Evidence and Administrative Tribunals'[9] for a general exposition.

Section 73(2) has the effect that, except in proceedings involving legal professional misconduct in the Legal Services Division,[10] the Administrative Decisions Tribunal is entitled to have regard to sworn and unsworn evidence as well as information as to fact or opinion to be found in reports or published works. I repeat that all this is subject to the principles of natural justice. But within those limits, in the words of Hill J, the provision:[11]

> means what it says. The fact that material may be inadmissible in accordance with the law of evidence does not mean that it cannot be admitted into evidence by the Tribunal or taken into account by it. The criterion for admissibility of material in the Tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.

There are however, some fundamental principles of law which masquerade as rules of judicial evidence but which cannot be overreached by a tribunal in the absence of the clearest statutory authority. These include client-legal privilege, public interest immunity and the privilege against self-incrimination. Indeed s 83(3) of the ADT Act goes further, stipulating that the Tribunal's powers in relation to witnesses do not enable it to compel a witness to answer a question if the witness has a '*reasonable excuse for refusing*'. A reasonable excuse is broader than a lawful excuse.[12]

Nor does s 73 excuse the Tribunal from the obligation to ensure that its findings and ultimate conclusions rest upon material having '*rational probative force*'. This qualification is explained with magisterial clarity by Brennan J in *Pochi v Minister for Immigration and Ethnic Affairs*.[13]

I would remind you that s 73(2) does not stipulate that the Tribunal must *ignore* the rules of evidence. Within those rules there may be principles reflecting the wisdom of the ages which, though not necessarily forming part of the concept of natural justice, are designed to aid the Tribunal in its endeavour to administer '*substantial justice*'.[14] One such principle, now written into the Evidence Act worthy of being borne in mind, is found within s 135 of that Act:

> 135 The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party, or
> (b) be misleading or confusing, or
> (c) cause or result in undue waste of time.

In essence, you will often have a choice when faced with material that you are convinced is really marginal. You may decline to admit it, so long as you are not thereby refusing a fair

opportunity to present a case. Or you may decide to admit it, making it plain from the outset that its weight is slight because better evidence is available. The Administrative Decisions Tribunal Appeal Panel has approved the following remarks of Davies J when he was President of the Administrative Appeals Tribunal:[15]

> In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.

Another principle of evidence apt to be borne in mind are the rules in relation to opinion evidence. They reflect good sense and sound principle in excluding information that carries no probative weight. In this regard they may also save time and expense.[16]

The doctrine of 'official notice' means that a tribunal may draw upon the expertise and experience of its specialist members, as well as upon its accumulated institutional wisdom. The controlling factor remains that of procedural fairness. I agree with the following comment of Professor Smillie:[17]

> It is necessary to ensure that the parties to an administrative proceeding are given a fair opportunity to address submissions to all the crucial issues, and to produce all relevant material within their possession. The obvious solution is to permit administrative tribunals to rely for any purpose upon relevant material of any kind within the personal knowledge of their members *provided any such material which will play an important part in the final decision is disclosed to the parties in advance and they are given a fair opportunity for discussion and rebuttal*.

A tribunal is not restricted to acting only on expert opinion given on oath by a live witness. It may have regard to reports published by research bodies, subject always to procedural fairness.

Rules of natural justice

The need to ensure procedural fairness is fundamental. It qualifies everything I have already said about flexibility, informality and despatch and it is specifically flagged in s 73 of the ADT Act itself and its counterparts in other legislation.

As you know, the rules of natural justice or procedural fairness cluster around two broad principles expressed as maxims: *nemo debet esse judex in propria sua causa* and *audi alteram partem*.

The former maxim translates as *no one can be judge of his or her own cause*. The rules of bias and ostensible bias cover so many possible issues that it is impossible to expound them on this occasion.

Day to day problems are more likely to arise with the second maxim, which translates literally as *hear the other party*. The context of this rule is itself spelt out in s 73(4) which states:

> (4) The Tribunal is to take such measures as are reasonably practicable:

(a) to ensure that the parties to the proceedings before it understand the nature of the assertions made in the proceedings and the legal implications of those assertions, and

(b) if requested to do so – to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have the fullest opportunity practicable to be heard or otherwise have their submissions considered in the proceedings.

I wish to draw attention to two aspects of subs (4), which in my view reflect the common law of natural justice or procedural fairness, but which at times are overlooked.

The opening portion of subs (4) speaks of a duty '*to take such measures as are reasonably practicable*' to ensure or do specified things. The principles of natural justice or procedural fairness must always be viewed in context and tested against the benchmark of what is reasonably practicable.

Procedural fairness does not make a tribunal the passive captive of the party who is too rich, too poor, too manipulative or too stupid to cooperate in the focussed search for truth in the matter at hand. Remember that s 73(5)(a) enjoins the Administrative Decisions Tribunal to act as quickly as is practicable; and that s 73(5)(h) enables it to dismiss at any stage any proceedings before it if it considers the proceedings to be frivolous or vexatious, otherwise misconceived or lacking in substance.

In *Gamester Pty Ltd v Lockhart*[18] the High Court was entertaining an application for judicial review in relation to the conduct of Lockhart J of the Federal Court. His Honour had dismissed proceedings before him because he was satisfied that they were vexatious and an abuse of process. The proceedings were being conducted by a litigant in person who had filed a great deal of material and was engaged in very lengthy cross-examination. Lockhart J stopped further cross-examination and sought to elucidate the subject matters about which the litigant wished to ask questions. It was very difficult to obtain any rational account of those matters. The forthcoming information did not show any matter that the Judge regarded as relevant to the proceeding. He concluded that the case had reached a point where he would not allow it to go on any longer, because to do so would be a serious erosion of the resources of the Court and the Commonwealth and a waste of everybody's time and money. (I would interpose that these considerations are equally relevant to the Administrative Decisions Tribunal, especially in view of its obligation '*to act as quickly as is practicable*' (s 73(5)(a)).)

Gaudron J had dismissed the application for prerogative relief directed to Lockhart J. A further appeal to the Full High Court was dismissed. In the course of the Court's reasons their Honours approved the remarks of Gaudron J when she said:

> It seems to me that there is no denial of natural justice involved in terminating an opportunity to be heard when the evidence appears not to support the relief claimed and requests to state the matters which are said to support the grant of relief fail to produce a statement of those matters.

Their Honours also said this about a submission which asserted in effect that Gaudron J was obliged to pore through a huge mass of undifferentiated written material. The submission was described as suggesting:

> … that a judge who has given a party a reasonable opportunity to state that party's claim for relief is under an obligation, without having the benefit of relevant and intelligible submissions, to extract from a mass of apparently non-supportive evidence any pieces of the evidence which could be regarded as supportive. The submission is misconceived. In court proceedings, a judge is bound to give a party a reasonable opportunity to state the party's claim for relief and to point to the evidence which supports it. But if the opportunity is not taken, the judge is not bound to set out in a search for supportive evidence to support a claim which the party has failed to articulate intelligibly.

This leads to my second point based upon the language of s 73(4)(c). Please note that it speaks of taking reasonably practicable measures to ensure that parties have '*the fullest* ***opportunity*** *practicable*' to be heard or otherwise have their submissions considered in the proceedings. The principles of natural justice are concerned with giving litigants a fair opportunity to make their case. The judicial officer or tribunal does not have an obligation to ensure that such opportunity is availed of to the nth degree. Very recently Kirby J, who is well known for his robust defence of the principles of natural justice, said:[19]

> Sometimes, through stubbornness, confusion, mis-understanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided. Affording the opportunity is all that the law and principle require.

Earlier, in *Sullivan v Department of Transport*, Deane J said that:[20]

> … it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable *opportunity* to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.

I understand that tribunals are frequently presented with unrepresented litigants, often lined up against a well-represented governmental party. This almost invariably increases the difficulties and complexities involved in ensuring the right balance of fairness and passivity that is essential to natural justice. Section 73(4)(b) does not mean that the duty to explain matters is only enlivened by a request. Sometimes this will be necessary because the unrepresented party does not even know for what help to ask. For an excellent discussion of the general issues in this regard, one should consult the recent Full Federal Court decision in *Minogue v HREOC*[21]. The Court endorsed the following observation by Mahoney JA in an unreported decision[22]:

> Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

Conclusion

The principles I have discussed are held in uneasy tension. Your tolerant flexibility as tribunal members may be viewed as unbridled licence by your colleagues or, worse still, appellate panels or courts. Mistakes will be made in the process. None of us are immune. In our system, the only people who are incontrovertibly right in a particular dispute are the justices who form the majority in the High Court of Australia in the ultimate appeal.

To err is human. Sometimes we look back on what we have done or written and we say (as Baron Bramwell once did):[23]

> The matter does not appear to me now as it appears to have appeared to me then.

Lord Westbury once rebuffed a barrister's reliance upon an earlier opinion of his Lordship in the following terms:

> I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.

Sometimes, too, we will be troubled by having to go the extra procedural mile for an undeserving litigant or applicant. If, despite all injunctions about flexibility, despatch and the like, we are required to do so, we should remember Felix Frankfurter's remarks that:[24]

> … the safeguards of liberty have frequently been forged in controversies involving not very nice people.

Endnotes

1 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J. See also *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 77 ALJR 454, 195 ALR 24, [2003] HCA 2 at [103].
2 (1984) 156 CLR 532.
3 Ibid at 550.
4 *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272.
5 De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* 5th ed, 1-075.
6 (2003) 77 ALJR 454, 195 ALR 24, [2003] HCA 2.
7 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586, quoted by Gleeson CJ at [8].
8 *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541, *Lloyd v Veterinary Surgeons Investigating Committee* [2002] NSWCA 224.
9 Campbell and Waller eds, Well and Truly Tried: essays on evidence in honour of Sir Richard Eggleston (1982) p36.
10 Legal Profession Act 1987, s168.
11 *Casey v Repatriation Commission* (1995) 60 FCR 510 at 514 per Hill J. See also *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 44 ALR 690 at 694; *Shulver v Sherry* (1992) 28 ALD 570.
12 *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423.
13 (1979) 36 FLR 482 at 492-3.
14 See the discussion in *Kevin v Minister for The Capital Territory* (1979) 37 FLR 1.
15 *Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5, approved in *United Bonded Fabrics Pty Ltd v Roseman* (2000) EOC 93-049, [2000] NSWADTAP 13 at [27].
16 See *Kevin*, above note 14, at 3-4.
17 J A Smillie, 'The Problem of Official Notice' [1975] PL 64 at 67 (emphasis added). See also TJH Jackson 'Administrative Tribunals and the Doctrine of Official Notice: "Wrestling with the Angel"' in Harris and Waye eds, *Administrative Law* (1991) p120. See also *R v Milk Board; ex parte Tomkins* [1944] VLR 187 at 197, *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456; *Boral Besser Masonry Ltd v Jabarkhill* (1999) 19 NSWCCR 227, [1999] NSWCA 476.
18 (1993) 67 ALJR 547.
19 *Allesch v Maunz* (2000) 74 ALJR 1206 at 1213.
20 (1978) 20 ALR 323 at 342. See also *Adams v Wendt* (1993) 30 ALD 877; *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117, [2002] HCA 11 at [40].
21 (1999) 84 FCR 438 at 445-6.
22 *Rajski v Scitec Corp Pty Ltd* (NSWCA, 16 June 1986, unreported) at 27.
23 *Andrews v Styrap* 26 LTNS 704, 706.
24 *United States v Rabinowitz* 339 US 56 at 69 (1950).

JUDICIAL REVIEW OF THE WORK OF ADMINISTRATIVE TRIBUNALS—HOW MUCH IS TOO MUCH?

John McMillan*

An address to the 13th Commonwealth Law Conference, Melbourne, 14 April 2003[1]

Why is this an issue?

The executive government can control most aspects of our lives – the tax to be paid, the conditions of work, the opportunity to enter or exit the country, receipt of social support benefits, the location of public parks, shop trading hours, standards of schooling – the list is endless. It is axiomatic that the exercise of those powers, usually discretionary in nature, should be subject to a means of control other than the good sense and judgment of the decision-maker. The traditional underpinnings of civilised government – representative democracy, separation of powers, and the rule of law – have their part to play, but more often by way of comfort and reassurance rather than as a practical and accessible constraint.

In an age of administrative justice the legal system has turned ever more to other techniques of independent control of executive power. One such technique, administrative tribunals, now play a central role in reviewing both the legality and the merits of executive decision-making. In Australia, for example, just five tribunals – the Administrative Appeals Tribunal, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Veterans' Review Board – together review upward of 40,000 federal decisions in some years. The caseload of tribunals grows ever larger if we add other federal and State administrative review bodies – not all of them called 'tribunals', but fitting the description nonetheless – which review government decisions in areas as diverse as town planning, guardianship, conservation, professional discipline, business regulation, superannuation complaints, and personnel promotion.

Administrative tribunals thus play a pivotal role in our system of law and accountability, but their life has not been trouble free. From one side, they face pressure from the executive branch of government (of which they are part) to adjudicate in a fashion that comports with the realities of executive government. For example, it is generally expected that tribunals will operate efficiently and informally within resource and budgetary constraints; that they will heed the same breadth of factual and policy considerations as the executive decision-maker; that they will apply common sense, and not be obdurate and doctrinaire in evaluating executive action; and that individual tribunal members will strive for consistency of approach and outcome, notwithstanding their individual qualms.

In short, in the context of tribunal adjudication, justice and fairness are decidedly relative concepts. While tribunals are meant to bring an independent mind to the review of government decisions, the notion of independence cannot be taken to extremes. If it is, then,

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as history has demonstrated time and again, the effectiveness of the tribunal or its memberswill be short-lived. The tribunal may be restructured; its budget may be reduced; the tenure of tribunal members will be progressively reduced; members deemed unacceptable to government will not be reappointed; or new members thought to be more compliant will be appointed. This is not the place to argue the propriety of those methods of executive control: it is enough to note that they are an ever-present reality of government.

From the other side, tribunals face pressures of a different kind from the judicial arm of government. Tribunals are ordinarily subject to curial scrutiny, either by appeal for error of law or by judicial review of executive action. As noted below, the criteria of administrative law are not precise, yet they cannot be ignored by tribunals. A tribunal must be ever-mindful that its proceedings and decision are appeal proof – or, as tribunal members more commonly see it, 'judge proof'. For practical purposes, that usually means that the tribunal must be cognisant of how a lawyer, a judge, would appraise what the tribunal has done. Taken too far, either the judicial standards or the tribunal's estimation of what those standards might be, will translate into the tribunal simulating the adversarial method as closely as possible.

Another consideration that magnifies the difficulty confronting a tribunal is that there is no prototypical procedure to guide a tribunal in how to approach each case. The differences can be as marked within tribunals as between tribunals. Much will depend on the nature of the tribunal, the issue in dispute, the way the tribunal is constituted (eg, 1 or 3 members), whether lawyers constitute the tribunal or appear before it, and the time-frame for adjudication. While there is variation also in judicial proceedings, it is not as marked: generally we have a much better picture of what to expect when we walk into a courtroom or pick up a court judgment.

The impact of judicial scrutiny on tribunal adjudication

The purpose of that brief sketch is to introduce the proposition that administrative tribunals must be given room to move within their statutory framework, and to develop a system of adjudication that is adapted and responsive to the work of the tribunal and its experience. That is not to say that the tribunal can be above the law, but that the law must be restrained in finding legal error in the proceedings of an administrative tribunal. My argument, in summary, is that the view sometimes espoused explicitly by judges, but more often implicitly, that 'a special vigilance is required' in reviewing the decisions of 'non-court repositories of functions, powers and discretions'[2], is an inappropriate approach to judicial review.

There can no doubting that judicial review has a valuable role to play in ensuring that tribunals keep within their statutory mandate and deliver justice to the parties appearing before the tribunal. But that is only part of the picture. Judicial overreach can be equally damaging to the pursuit of administrative justice, and can result in a worse rather than a better system of administrative law and justice. There are many examples of that occurring in Australia, of which I will give two.

The first example relates to the Administrative Appeals Tribunal, which from its early days became mired in a debate about whether it was too adversarial and formal. This was a complex issue, but a prominent concern at the time was that the Federal Court in its appellate role maintained an active oversight of the Tribunal's development, often requiring it to follow procedures or to apply standards that predestined the Tribunal to conform more closely to orthodox legal stereotypes than it might otherwise have chosen to do. Though the stature of the AAT is still high, arguably it never fulfilled its potential; the subsequent phase of tribunal development in Australia has been marked by government attempts to move away from an AAT-model.

The second example is more contemporary and relates to the troubled fortunes of the Migration and Refugee Review Tribunals. It is important to recall that both Tribunals were established in 1989 and 1993 at the initiative of the Government and Parliament, to guarantee a measure of fair process in a sensitive and highly complex area of executive decision-making. Yet the life of both Tribunals has been studded by judicial review and legal controversy, that has had less to do with the Tribunals' comprehension of migration and refugee law, and mostly to do with their procedure and methods in adjudicating cases. One product of this disputation has been that migration and refugee determination has become encumbered by protracted and costly litigation, which the legislature has acted in turn to combat. Among the resulting legislative changes were the abolition in 1999 of a preliminary tier in the migration review process (the Migration Internal Review Office); the introduction in 1994 of a restricted scheme of judicial review; and its replacement in 2001 by an even more restricted scheme built around a privative clause. It is hard to deny that the system that has resulted is worse in many respects than the system that Parliament first established.

Legal and political controversy is not the only downside of inapt judicial review. Two other examples I shall give illustrate the diversity of problems that can result. First, there can be an implicit pressure on governments to appoint only lawyers to tribunals, because of the importance attached to legal procedure and the preparation of reasons (often lengthy) that will withstand judicial scrutiny. There are some advantages to be had from this trend, but overall the utility of merit review by administrative tribunals will be hampered if too much emphasis is given to legal skills. The very notion of merit review, of gauging what is the correct and preferable decision, presupposes that a broad range of disciplinary skills can be called upon and contribute to the prudent development of principles for good decision-making.

Another shortcoming is that a tribunal can become excessively concerned with the possibility of judicial review, and orient (even sanitise) its proceedings accordingly. This is noticeable at times in tribunal reasons statements that have been prepared on the assumption that the primary audience for the reasons is an appellate court rather than the parties before the tribunal. A result is that the reasons may take an inordinately long time to prepare and obscure rather than illuminate the tribunal's chain of reasoning.

Some problem areas

I will turn now to consider whether judicial review of administrative tribunals should be undertaken differently. There are two aspects to this issue: identifying the main problem areas, that is, the features of tribunal adjudication that are commonly targeted in judicial review; and considering whether a different model for control of tribunals is needed. I shall consider those two aspects in turn.

The categories of legal error are not closed, and for that reason there is an endless variety of substantive and procedural legal errors that can be committed by tribunals and that warrant judicial correction. However, intrusive and demanding judicial review is usually manifested in one of four ways.

First, the statutory codes applying to tribunals are often not given their plain and natural meaning. Tribunal statutes commonly declare that 'the procedure of the tribunal is within the discretion of the tribunal' and that 'proceedings shall be conducted with as little formality and technicality, and with as much expedition' as circumstances warrant (eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33). The import of that direction, which has not been fully respected, is that a tribunal is to have a large measure of control in deciding the rules to be followed on a great range of general and specific procedural issues – including the adaptation of natural justice requirements to the tribunal, the format of reasons statements, the reliance on translators, the adjournment of proceedings, examination and cross-

examination of witnesses, and the format of notices. A common pattern in most tribunals is that issues of that kind are regarded as legal questions on which a review court can over time provide detailed instruction to the tribunal.

Once again, there are examples concerning the Migration and Refugee Review Tribunals which illustrate how statutory language can be inappropriately applied. One such example was a controversial phase in which the Federal Court was divided over whether the statutory direction to the Tribunals to 'act according to substantial justice' was exhortatory in nature or instead imposed on each Tribunal a raft of substantive obligations concerning the observance of natural justice, the preparation of reasons statements, and the evidentiary processes of the Tribunal[3]. Another example has been a series of decisions by the High Court holding that the statutory decision-making code that was explicitly and comprehensively set out in the *Migration Act* was not an exhaustive statement and did not displace the less distinct common law standards of natural justice[4].

The **second** problem area is a matter to which I have just adverted – the application of natural justices principles to tribunals. The doctrine of natural justice is rightly a cherished feature of common law heritage, but taken too far and applied inappropriately the doctrine can be a cloak for invalidation of administrative decisions for minor procedural shortcomings that have little to do with either the merits or the fairness of the administrative process.

My general observation is that it is often harder nowadays for administrative decision-makers and tribunals to comply with natural justice than it is for courts – a curious result, by any standard. The reason is that courts can adequately discharge their natural justice obligations by holding a hearing at which the parties are given an opportunity to present their evidence and submissions. But it is otherwise with administrative decision-makers and tribunals. The natural justice spotlight now follows every stage of the decision-making process, looking in particular at internal agency and tribunal processes, the correspondence passing between the tribunal and the parties, and the shape and content of internal agency documents. A study of the case law will reveal that in nearly every case in the last decade or more in which there was a finding of breach of natural justice, a full hearing had in fact been given by the decision-maker or tribunal, yet the finding of breach attached to some other step or document in the decisional process.

The **third** problem area is judicial rigour in scrutinising the reasons for decision of administrative tribunals. One empirical analysis I undertook a couple of years back showed that the formulation of the reasons was the principal target of challenge in nearly 50% of legal challenges to migration and refugee tribunal decisions. Over the years, reasons statements have become lengthier and more elaborate, but not necessarily less defective when viewed through the prism of court decisions. The reason is not hard to see. When put to the test, it is very difficult for any decision-maker, even the most skilled wordsmith, to explain convincingly on paper why, in a confused factual setting, a particular decision is preferable to the alternatives. Nor, often times, is it easy to explain, beyond the level of conclusion or assertion, why the credibility of a person was doubted, or why an uncontradicted but self-serving statement by a person was regarded as implausible. And yet it is a beguilingly simple exercise for a court, wishing to overturn a decision with which it disagrees, to find fault with a reasons statement by condemning the logic or rationality of a tribunal's reasoning.

The **fourth** problem area has been the introduction of opaque standards for judicial review that can magnify questions of fact into questions of law. Legal standards for judicial review are, in their nature, succinct but adaptable. The concepts of 'error of law' and 'no evidence' are accustomed examples. However, the greater problem in Australian administrative law has been the subtle role played by legal standards that have never been explicitly sanctioned by a superior court, yet lie behind much of the controversy as to whether the

legal goalposts are located in shifting sand. The three most common examples are the obligation on a decision-maker to give proper, genuine and realistic consideration to the merits of the case; the duty to conduct an adequate inquiry into matters that are in dispute; and the rule that an adverse finding of fact must be supported by rationally probative evidence.

As I say, there is no unequivocal endorsement by a superior court of any of those principles, and yet their subtle influence and periodic re-emergence in administrative law doctrine is easy to discern. They pose an inherent danger of disguised merits review, whereby the rigour and intensity of judicial scrutiny, and thereby the propensity for legal error to be detected, is conditioned principally by a court's own evaluation of the harshness and justice of the decision under challenge. As the Full Federal Court recently observed of one of those standards, it 'creates a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any … decision can be scrutinised'[5].

Changing the relationship

If there is a need for a restrained approach to judicial scrutiny of administrative tribunals, how should that approach be manifested?

The formal model for judicial scrutiny is, in many ways, the less important issue. Whether, for example, there is appeal for 'error of law', whether there is some other variant of judicial review principles, or whether tribunal proceedings are protected by a privative clause, the issues described in this paper are likely to arise. In short, restraint and moderation are a question of outlook and approach as much as a question of doctrine or principle. Yet outlook and approach are frequently conditioned by other attitudinal factors, and it is to three that I now turn.

Firstly, there are few decision-making processes that are flawless, and shortcomings in administrative method and fact-finding will often be apparent to a court undertaking judicial review. It is understandably hard for a court to ignore those shortcomings, especially when the potential adverse impact of a decision is apparent. And yet there is a need to do so, and for courts to focus more narrowly on their conventional task, of inquiring whether the tribunal was properly constituted, whether it correctly construed the legal standard it was applying, and such like. To do otherwise is to mistake the context and dynamics of executive decision-making and administrative review. Unavoidably, the quality of administrative decision-making is a context-relative exercise, in which procedural perfection is a castle in the air. The promise of higher standards in administrative decision-making must arise principally through other mechanisms and devices, such as member training, internal auditing of decision-making, and standard setting by the Ombudsman and public service commissions.

Secondly, judicial rigour is commonly justified nowadays by a judicial emphasis on human rights protection. The valuable role historically played by courts in safeguarding individual rights against executive wrongdoing is not in question, but problems start to emerge when 'human rights protection' is super-added to the task of judicial review. It is inappropriate for judicial review to be undertaken on the assumption that the human rights dimension has been given less emphasis at other points in the process. Indeed, the underlying premise of this paper is that the creation of tribunals and the conferral of rights of administrative review is a vital means of safeguarding human rights. But the cure will be worse than the disease if that framework for administrative review becomes unduly complex or discredited in an effort to improve it.

Thirdly, the common law and legal method subscribe to a principle of incrementalism, whereby legal doctrine is adapted and extended over time to align with contemporary

notions of fairness and governmental responsibility. Again, while there is a valuable side to that trend, there is an inherent danger of the judicialisation of public policy and the lawyerisation of dispute resolution. The contemporary trend in administrative law is that legal standards have been elevated in importance as a tool for measuring the propriety of executive and tribunal decision-making. Those legal standards have also become more demanding. Administrative action that, in an earlier age, would have been accepted as lawful is now more likely to be declared unlawful.

That trend would be uncontentious if the reason for it had been explained and justified. Generally speaking it has not been, and some objective indicators point to a contrary view. Executive decision-making is now more transparent than it used to be; decisions are better reasoned; consultation with those affected is commonplace; internal auditing of the quality of decision-making has been introduced; there is far more training of decision-makers; the standards for good decision-making have been better articulated; and there are considerably more avenues for non-curial scrutiny of decisions. It is not easy, in that context, to explain why administrative law standards have become more demanding or why there should be judicial leadership in defining the standards for public administration.

Conclusion

It is important, in conclusion, to note that this discussion of the judicial role is part only of the picture that needs to be painted. If there is to be judicial restraint in tribunal scrutiny, there is a correlative obligation on the legislative and executive branches of government to design and support a model for tribunal adjudication that promotes excellence and integrity, and not obeisance and submission to executive will. There is much to be concerned about on that score as well. This is not the place to explore those concerns in depth, but nor should they be ignored. They include the need for longer term appointment of tribunal members, diversity in the selection of tribunal members, more generous conditions of service for members, more systematic training of tribunal members, a restoration of multi-member panels in more cases, and the creation of an appeal structure within tribunals (to obviate the need for regular judicial oversight). In short, there are problems with tribunals that need to be addressed, but not necessarily through the medium of judicial review.

The establishment of a comprehensive system of administrative tribunals in Australia and elsewhere over the last twenty years ushered in a public law revolution. Until then, the historical focus of the law had been upon protection of private rights to property, employment and similar interests. The claims that people had against government – to social welfare support, information disclosure, heritage protection, customs classification, migrant entry – were of a different kind that had hitherto been regulated by unconfined discretionary action that was largely unreviewable. The creation of administrative tribunals was an important turning point in legal history, by acknowledging that those public law claims against the state should now be subjected to review on the merits by assiduous legal method in an independent forum. We should not forsake that triumph by undermining its effectiveness.

Endnotes

1 Before being appointed Commonwealth Ombudsman, John McMillan held the Alumni Chair in Administrative Law at the Australian National University. This paper draws from research conducted as an academic and not from his recent experience as Ombudsman – eg, see J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 2 *Fed L Rev* 335; 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1.

2 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585 at [85].

3 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

4 For example, *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.

5 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 192 ALR 256 at 271.

LEGAL IMPLICATIONS OF VALUES-BASED MANAGEMENT—OBSERVATIONS ON *HOT HOLDINGS PTY LTD V CREASY*[1]

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Introduction

At the outset let me just note that Max Spry will be dealing with the legal analysis of *Hot Holdings Pty Ltd v Creasy*[2] while I will discuss more broadly some of the ethical issues raised and how the case illustrates that statements of values and codes of conduct should be taken seriously by government agencies, and not be seen merely as rhetoric.

The facts and what the High Court decided

This case concerned a decision by the Western Australian Minister for Mines to grant an exploration licence.

The Minister took advice from a number of sources, including from the Department of Minerals and Energy of Western Australia. That advice was contained in a minute signed by the Director General of the Department. This minute was prepared following discussions between two senior public servants in the Department, in the presence of a third, who was asked to prepare a minute reflecting their views. He did so (although the minute was actually drafted by his subordinate), and after some changes were made to its contents, not altering the substance of its recommendation, the Director General considered it, agreed with it, signed it, and sent it to the Minister. The Minister, before agreeing to the recommendation to grant the licence, discussed the matter with two other public servants, including a senior legal advisor.

The Minister's decision was challenged by some unsuccessful applicants, on the basis that it was tainted by a reasonable apprehension of bias, through the pecuniary interests of two of the public servants involved in preparing the Department's advice to the Minister.

The son of one of the senior public servants involved in the discussion held shares in a company that had an option to buy an interest in any exploration licence, as did the public servant who was asked to prepare the minute. Neither of these interests was declared.

It is perhaps useful to remember that the case involves a minister in the Government of Western Australia, and when considering the issues involved, it is against the background of past concerns about the conduct of public and corporate officers in that State in the 1980s and 1990s. Those concerns produced demands in WA, as elsewhere in Australia, for higher standards, including in respect of financial probity and the avoidance of conflicts of interest and duty by those entrusted to exercise power on behalf of others.

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The application by the unsuccessful applicants for the licence to quash the Minister's decision failed in the first instance before the Supreme Court of Western Australia, but succeeded on appeal to the full Supreme Court on the basis that the decision of the Minister gave rise to a reasonable apprehension of bias. On appeal, the majority of the High Court of Australia reversed that decision, finding that the involvement of the advisors in this case was peripheral and so there was no reasonable apprehension of bias.

It is worth noting that several eminent Judges of the WA Supreme Court were of the opinion that the facts here warranted the setting aside of the Minister's decision. As it turned out, a majority of the High Court found on the facts that there was no reasonable apprehension of bias because the involvement of one official in the preparation of the minute was at most peripheral and the shareholding of his adult son was not enough to disqualify the other official.

Justice Kirby's minority judgment

Although Justice Kirby was in the minority, in my role of promoting the APS Values and Code of Conduct, I share with him concern for upholding the integrity of public administration and many of his comments resonated with me. His judgment demonstrates that the courts may draw directly on statements of values and codes of conduct. I suspect this is particularly likely in the Commonwealth arena where the values and code of conduct is written into legislation.[3]

The main difference between the majority of the High Court and Justice Kirby was in how they applied the test as to whether a fair-minded observer would have decided there was a reasonable apprehension of bias. Would such a fair-minded observer have had regard to the peripheral role of the official who had a direct pecuniary interest - which is what the majority said? Or would a fair-minded member of the public have taken a more global approach, influenced by the same concerns about the integrity of public administration as Justice Kirby?

Of course it is better to act in a way that avoids the need to debate whether a fair-minded observer has short focus or distance lenses on their glasses. The whole expensive business - and four years of costly delay in resolving the rights of the parties - could have been avoided had the officials involved declared the relevant interests.

For those who have not had the opportunity to read the High Court judgement in the *Hot Holdings* case, and Justice Kirby's minority judgement, it might help if I illustrate some of the flavour, and its relevance to the values-based environment now operating in the APS, and to some of the themes and directions being promoted by the Commission.

Justice Kirby draws heavily on the institution of the public service in Australia, derived from the British heritage. The first APS Value of being apolitical, impartial and professional underlies this feature of uncorrupted administration, as does the APS Code of Conduct's references to honesty and integrity and compliance with the law. And, of course, disclosure and avoidance of conflict of interest.

Justice Kirby refers several times to the responsibilities of public officials exercising public power. For example: 'Officials authorised and required to exercise public power are sometimes said to be the public's trustees.'[4]

In our promotion of the APS Values, we in the Commission frequently make a similar point. The requirement to have the highest ethical standards is not just rhetoric that might be mouthed by anyone, in any organisation, but reflects in particular the fact that most APS employees are funded by the taxpayer and very many exercise public power through

delegations authorised by the Parliament. The public has the right to expect its power to be exercised according to the highest ethical standards.

At another point in his judgement, Justice Kirby refers to a separate case, in which he also delivered a minority judgment. In that case he said the law of imputed bias does not operate by a lawyerly dissection of events, rather, he says, '[B]eing concerned primarily with the impact of events upon the persons affected and upon reasonable members of the public, what is involved is the general impression derived from the evidence.'[5]

This has a resonance in the realpolitik that we frequently face in the APS. It is not always possible to say with precision what is the appropriate ethical behaviour in every case. In the *Hot Holdings* case, none of the judgments were based on the view that a public servant whose son held shares in a relevant company, of itself represents an unacceptable conflict of interest. The different views expressed all had regard to some broader appreciation of the circumstances. In our advice, we frequently refer to the 'Bronwyn Bishop test': if you were called upon to justify your decision before a Senate Estimates Committee, would you fear embarrassment? If so, the appropriate decision is usually staring you in the face. (I hasten to add; sometimes it is important for a public servant to stand their ground against possible populist and unreasonable views taken by honourable Senators.)

Discussing whether an appearance of bias should be capable of determination in advance, Justice Kirby suggests that if the public servants had disclosed their respective interest and association to the Minister: 'the Minister, in such a sensitive area of decision-making would have said - and rightly said – "Well you had better have nothing to do with this matter. And please record that you informed me and that I gave you that instruction"'.[6]

This point is also interesting. It goes to the importance of transparency. Note that the provision in our Code of Conduct says that an APS employee '**must** disclose' any conflict of interest, real or apparent. It has a caveat on the requirement to avoid any conflict of interest ('take reasonable steps to avoid'), but not on the requirement to disclose.

This gives you the broad flavour of Justice Kirby's judgement, and its relevance to our environment, based on Values. His concluding paragraph, in which he quotes Professor Carney, and says he would like to endorse his words, again highlights that the perception of conflicts of interests, as well as actual conflicts, may be damaging:

> Public integrity as an ideal which must be nurtured and safeguarded, describes the obligation of all public officials to act always and exclusively in the public interest and not in furtherance of their own personal interests. ... [C]onduct less heinous than that of corruption may ... betray this trust... The dangers posed for the public interest by the existence of conflicts of interest on the part of public officials, whether the conflicts of interests are real or perceived to be real, demand the adoption of mechanisms which prevent such conflicts arising or which resolve them if they do arise.[7]

Decision making in a values-based environment

Although it is interesting to be aware that there can be legal or political consequences if things go wrong, it is important to remember that our focus as administrators should be on preventing reasonable apprehension of bias from arising in the first place in order to ensure public confidence in our decisions.

Today I would like to focus on situations where, as in *Hot Holdings*, the reasonable possibility of apprehension of bias relates to conflict of interest. There are of course other circumstances where questions of reasonable apprehension of bias might arise. I will also talk a little more generally about the values-based environment in which we operate.

Those of us who are part of the APS have an obligation to behave, at all times, in a way that upholds the Values and the integrity and good reputation of the APS, and we must comply with the provisions of the Code of Conduct. The Values and the Code are not merely aspirational. Our obligations to meet the behavioural requirements they embody are real and legally binding. A failure to meet them can have serious consequences, both for individuals - in that breaches of the Code may result in action being taken under the *Public Service Act 1999* (Cth) (the PS Act), including termination of employment - and also for the Service as a whole. When corrupt or inappropriate conduct comes to the attention of the public, by way of the courts or through the media, public confidence in the integrity of the APS may suffer, and legal remedies may be open to address unlawful decisions.

SES employees have an additional, and even more active obligation in terms of ethical behaviour. The role of the SES is defined in section 35 of the PS Act. In part, it says that the SES 'by personal example, and other appropriate means, promotes the APS Values and compliance with the Code of Conduct'. Not only must they uphold the Values and comply with the Code; as leaders, the SES must educate others about the importance of ethical behaviour and act as role models for the rest of the service.

And of course Agency Heads have a vital role to play in promoting values-based cultures in their agencies, both by ensuring that the Values are 'hardwired' into their agency corporate governance systems, and through personal example, such as encouraging discussion and awareness of ethical issues in their dealings with people in their agencies.

The Code of Conduct is also binding on Agency Heads. Added to this, they have a responsibility to ensure that procedures are in place to determine whether an employee in their agency may have breached the Code. (And of course, as Public Service Commissioner, I am empowered to evaluate the adequacy of systems and procedures agencies use to ensure compliance with the Code, as well as the extent to which agencies incorporate and uphold the Values.)

In my view there are particular Values and elements of the Code of Conduct that define the institution of the Public Service. They also set the principles for relationships with the Government and the Parliament, the public and other external stakeholders and within the workplace, and guide personal behaviour.

The five Values which I think reflect core principles of public administration and the role of the APS as an institution of Australia's democratic system of government are:

- the *apolitical nature* of the APS;
- the *merit principle* governing employment decisions;
- the *ethical standards* required;
- *accountability* within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public; and
- *responsiveness* to the elected Government.

One element in particular of the Code of Conduct is also a foundation stone of the Service, and that is *compliance with the law.*

The apolitical nature of the service and its impartiality and professionalism are crucial to our interaction with Government. This does not mean that the APS is independent of the Government. The APS must help Ministers to develop and implement policies, recognising their authority to determine the public interest and their concern to achieve better outcomes for the Australian community. The APS provides advice to, and gives effect to, the policies of the government elected by the Australian people. Professional commitment is owed by the

APS to the Government, not to the political party or parties to whom the members of the Government belong.

In our dealings with Government we are also required to be responsive, and critical to meeting this obligation in building a high level of trust between the Agency and the Minister and the Minister's Office. Trust requires, in particular, confidential handling of information, knowledge and expertise on the part of the APS, and a sense of partnership. That said, APS responsibilities are distinguishable from those of the Minister and the Minister's Office, and open appreciation of this is important to a relationship of genuine trust and cooperation.

In our dealings with the public, we must have regard to the Value that requires services to be delivered fairly, effectively, impartially and courteously and with sensitivity to the diversity of the Australian public. The Code of Conduct also requires public servants to act with care and diligence and to treat people with respect and courtesy and to declare (and if possible avoid) conflict of interest. These are key principles behind decision-making affecting the public.

In the guidance that the Commission provides to agencies about managing conflict of interest, we make the point that public confidence in the integrity of the APS is vital to the proper operation of government. Where the community perceives a conflict of interest, that confidence is jeopardised. Public servants need to be aware that their private interests, both financial and personal, could conflict at times with their official duties. While it will not always be possible to avoid conflict of interest, the disclosure of any interest that may involve a conflict is crucial. Possible conflicts **must** be disclosed. Once this has been done, steps can be taken to manage the situation, but it is identifying situations where a conflict might occur, or might be **seen** to occur, prior to the event, upon which these matters can turn. In the present case, for example, if the employees concerned had been mindful that their interests, even if they thought them to be peripheral, had the potential to create at least an appearance of partiality, and had disclosed them, we would very likely not be here talking about the case today.

Conflict of interest is not an isolated issue facing a minority of the APS in a few agencies. With the breadth of decisions that the APS is now involved in, and increased interaction with business and the community, the risk of conflict is widely spread. There are many contexts in which conflict of interest can be an issue. Following the MRI 'scan scam', the Department of Health added to their Chief Executive Instructions some interesting and useful provisions on conflict of interest. The Health Instruction deals with a range of issues, including staff with partners in the Department; conflict of duty; employees serving on Boards or Committees; procurement or tender assessment processes; selection advisory committees; privacy; outside employment and post-separation employment (ie, where employees are contemplating taking up employment after leaving the APS in industries that are closely aligned with their departmental responsibilities).

While avoiding conflicting interests is generally preferable, in practice there are some situations in which conflicts of interest cannot be wholly avoided. It is important for agencies to have in place processes to manage such situations that will withstand public scrutiny. Processes must include declaration of the interests, and full and open communication to all stakeholders of the way in which the actual or potential conflict is to be managed. Agency Heads, in their own case, need to declare to their Minister any personal involvement in a situation where there is actual or potential conflict of interests.

In the APS, SES employees and above, as well as those acting in SES positions for more than three months, are required to provide written statements of their private interests and those of their immediate family. This stems from a Government decision in 1983 that Ministers, Ministerial staff, senior APS employees including those working in statutory authorities, and statutory office holders would be required to provide a written statement of

their private interests. The practice is intended to draw attention to those actual or potential situations where a conflict of interest could arise. Agency Heads are responsible for implementing this government decision in respect of staff in their Agency.

The *Hot Holdings* case illustrates a critical limitation, and even risk, of this policy. No regular bureaucratic process of declaring interests will meet every circumstance of possible real or apparent conflict. The specific circumstances may well require declaration of interests not mentioned in the regular statements. Moreover, and possibly more importantly, no declaration obviates the individual's personal responsibility to draw attention to, and avoid if possible, conflict in a particular circumstance. Just because an employee has informed his or her Agency Head in the past, even recently, responsibility is not shifted to the Agency Head if an issue arises. It is still up to the individual concerned to declare any interest when it becomes relevant.

In the late seventies, the possible conflict between public duty and private interests was the subject of a Committee of Inquiry chaired by Sir Nigel Bowen. The Committee's Report included a code of conduct, for application to public servants and statutory office-holders, which was endorsed by the Government of the day. The introduction of the PS Act has not changed the Government's position in relation to the Bowen Code. It is important that agencies continue to advise statutory office holders within their portfolios of their obligations in relation to these Principles.

Some requirements for good decision-making

In my view, the first requirement of good decision-making is *compliance with the law.* As I have discussed already, public servants are bound by the APS Values and Code of Conduct set out in the PS Act and compliance with the law is specifically required in the Code of Conduct. Other key words in the Values and the Code are *impartial, professional, ethical, accountable, fair, effective, courteous, honesty and integrity.*

Apart from the PS Act, public servants are bound by financial legislation (eg the Financial Management and Accountability Act 1997 (FMA Act) and the Commonwealth Authorities and Companies Act 1997 (CAC Act)) and by any other legislation governing the programs they administer.

In reflecting on this case it is important to consider also the body of administrative law, both in statute and from common law, that sets out a range of principles for decision-making, including:

- appropriate use of powers exercised by those properly authorised;
- provision of reasons to explain and justify decisions, ensuring fairness, transparency, consistency and accountability; and
- 'fair and reasonable' approaches to decisions, and 'natural justice' or 'procedural fairness' for anyone impacted by a decision.

For example, the Administrative Decisions (Judicial Review) Act 1977 identifies a number of improper uses of powers that should be avoided. When making a decision under an enactment, decision-makers, including public servants, must not:

- take account of an irrelevant consideration in exercising a power,
- fail to take account of a relevant consideration in exercising a power,
- exercise a power for purposes other than that for which it was conferred,
- exercise a discretionary power in bad faith,
- exercise a discretionary power at the direction of another person,

- exercise a discretionary power in accordance with a rule or policy without regard to the merits of the particular case,
- exercise a power that is so unreasonable that no reasonable person could have so exercised the power,
- exercise a power in such a way that the result is uncertain, or
- exercise a power in a way that constitutes abuse of power

I should also emphasise that the financial legislation, like the PS Act, is based on principle, in that a Chief Executive must manage the affairs of his or her Agency in a way that promotes the *efficient, effective and ethical* use of Commonwealth resources.

The ethical emphasis is again important. The public which has vested power and authority in public servants rightly expects that power and authority to be exercised in the highest ethical manner.

Conclusion

This case leaves open the possibility that, if an advisor with **more than a peripheral role** in a decision has a personal interest in a decision, or has a close family member with such an interest, the decision could be set aside in administrative law on the ground of reasonable apprehension of bias. Whether such a challenge would succeed would depend on the nature of the decision being made and of the personal interest and the level of involvement of the advisor.

Also, regardless of the likelihood of a successful challenge in administrative law, the involvement in a decision of a public servant with an undisclosed interest:

- might give rise to grounds for disciplinary action for breach of ethical codes – as pointed out by Justice Gleeson;
- can damage public confidence in the integrity of the institutions of public administration – as pointed out by Justice Kirby; and
- can lead to protracted and expensive legal challenges with serious effects on the rights of third parties – in this case, the decision in question was made in June 1998, over four years before the High Court case was finally settled.

A key lesson I take from the case is that the APS Values and Code of Conduct are not just rhetoric – if public servants do not act in accordance with the relevant values and code of conduct there may be serious legal consequences.

Finally, I'd just like to mention a couple of initiatives that the Commission is undertaking that are relevant to the issues we are discussing today.

The first is the Values in Agencies project, begun in September 2002. The project is examining how six Commonwealth agencies are applying the APS Values, integrating the Values into systems and procedures and ensuring compliance with the Code of Conduct.

Fieldwork for the project is complete and conclusions are being developed based on the findings of the study and a literature search. The results will provide material for a good practice guide for service-wide use to be published later this year. The results of the project may also feed into the next State of the Service Report. The new guide will assist agencies to embed the Values and Code of Conduct into their governance arrangements and suggest ways of using the employment framework to best effect.

The second initiative is the revision of the Guidelines on Official Conduct. I am conscious that this is taking longer than I had hoped, but I am determined to have a product that is authoritative and widely agreed. It will be structured around the working relationships that the Values help to shape: of the APS with Government, with the public and other external stakeholders, and amongst APS employees in the workplace. They will include a focus on the meaning of impartiality, both in our dealings with Government and in decision-making, and on managing conflicts of interest, including in the context of post-separation employment. I think they will contain valuable advice for all public servants, and particularly those at more senior levels, for whom issues like the perception of bias in decision-making and the need to disclose and if possible avoid conflicts of interests are real and serious considerations. The document is still a little away from finalisation, but it will provide an important aid to values-based management.

Endnotes

1 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70; 193 ALR 90.
2 See below p xx.
3 See Public Service Act 1999 (Cth) ss 10 and 13.
4 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70, at 93 ([135]).
5 Ibid at 92 ([131]).
6 Ibid at 96 ([150]).
7 Ibid at 97 ([156]).

HOT HOLDINGS PTY LTD V CREASY: COMMENT

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Hot Holdings v Creasy[1] gives rise to two broad and important questions:

1. What are the implications, if any, for public service Codes of Conduct – an issue dealt with by Mr Podger, and to which I will return; and

2. What are the broader implications in terms of public sector decision-making – a question I wish to discuss. When will a decision be invalidated when the conduct or interests of a person involved in the decision-making process, but not the actual decision-maker him or herself, might be said to give rise to a reasonable apprehension of bias. This in a nutshell was the question before the High Court in *Hot Holdings*.

The facts

On 15 October 1992 certain lands in Western Australia were released for mining or exploration, and a number of applications for mining leases and exploration licences in relation to those lands were lodged within minutes of each other. The applications were considered by the Mining Warden and the Warden decided a ballot should be held to determine which of them had priority under the Western Australia *Mining Act 1978* (the Act). After various legal challenges, including an appeal to the High Court, a ballot was conducted in December 1997.

Hot Holdings was the first applicant drawn, the second was Mark Creasy. In January 1998 the Mining Warden reported to the WA Minister for Mines, whose decision it was to grant an application under the Act. The Warden recommended that Hot Holdings have priority to the other applicants. After receiving submissions from the applicants and advice from the Department of Minerals and Energy, the Minister decided to grant Hot Holdings' application.

Mr Creasy and other unsuccessful applicants challenged that decision on various grounds. Only one need concern us – that is the allegation of reasonable apprehension of bias.

To understand that allegation it is necessary to consider the advice the Minister received from his Department. The Department's advice was contained in a Minute from the Director-General dated 30 June 1998. In short the advice was that there was no reason for departing from the Mining Warden's recommendation that Hot Holdings have priority. The Minute was signed by the Director-General, Mr Ranford. It contained the initials of Mr Miasi, Mr Burton, Mr Phillips and Mr Hicks.

Mr Burton was the General Manager, Policy and Legislation, of the Mineral Titles Division of the Department. Mr Miasi was the Manager of the Tenure Branch of the Department.

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Heenan J, at first instance, said that Mr Miasi 'was a substantial shareholder in Audax Resources NL, a company which in November 1993 entered into an option agreement to purchase the exploration licence in question from Hot Holdings.'[2] Mr Miasi's shareholding was not disclosed to the Minister. Mr Phillips was the Director of the Mineral Titles Division. His adult, and independent son, had purchased shares in Audax Resources NL in 1996. Mr Phillips became aware of this in 1998. The Minister was unaware of the interest held by Mr Phillips' son. Mr Hicks was an officer of the Mineral Titles Division. It seems he did not have any shares in Audax.

The Minute was prepared after a meeting between Mr Burton and Mr Phillips. Present at that meeting was Mr Miasi. Mr Burton and Mr Phillips concluded that the Minute should support the warden's recommendation. On the evidence before the Court, Mr Miasi played no role in that decision. He was, however, made responsible for preparing a draft Minute to that effect, which he did. Sometime after the meeting, Mr Miasi gave his draft to Mr Hicks and arranged for Mr Hicks to prepare the Minute. Mr Miasi played no further role in the preparation of the Minute. Mr Hicks prepared a draft Minute in consultation with Mr Burton and in May 1998 he gave the draft Minute to Mr Burton. Mr Burton had carriage of the Minute from that time on.

Mr Creasy contended that because of the pecuniary interest of Mr Miasi in the success of the Hot Holdings application he had been denied procedural fairness. This was rejected at first instance. This decision was reversed on appeal by the West Australian Court of Appeal.

Sheller AJ (with whom Wallwork and Steytler JJ agreed) said:

> In my opinion the holding by an officer in the Department who had taken part, albeit at the periphery, in the giving of advice to grant an exploration licence on which advice the Minister acted, of an undisclosed share interest in a company with a direct interest in the grant of the exploration licence must give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the Minister, acting on or taking account of such advice, which he believed was impartial, but which could fairly be suspected was not, had himself for this reason not acted impartially.
>
> Mr Miasi's non-disclosure of his share holding and the interest of Mr Phillips' son, also undisclosed, strengthen the suspicion.'[3]

Further:

> The Minister's decision is infected, even though he acted unwittingly on this tainted advice. The fair minded and informed member of the public must be taken to know that the Minister's decision was likely to have been influenced by the Director-General's minute in the preparation of which one person with a direct pecuniary interest and another, whose son had a direct pecuniary interest, had taken part. In my opinion, those circumstances give rise to a reasonable apprehension or suspicion on the part of that member of the public that the Minister's decision was not an impartial one. All this falls under the umbrella of a reasonable apprehension of bias.4

Hot Holdings appealed to the High Court.

The High Court's decision

The High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) allowed the appeal. Kirby J dissented.

Gleeson CJ

Gleeson CJ said that the Minister had a duty to act according to the dictates of procedural fairness. 'One of the incidents of that duty was "the absence of the actuality or the appearance of disqualifying bias."'[5] But where it is said that the unfairness arises from the

conduct of a person other than the decision-maker, 'then the part played by that other person in relation to the decision will be important.'[6]

Mr Miasi 'made no significant contribution to the Minister's decision. That is a sufficient reason for concluding that his financial interest did not deprive the Minister's decision of the appearance of impartiality.'[7] Putting it another way, no person with a personal financial interest in the outcome of the matter participated in any significant way in the making of the decision.

Gleeson CJ said it was unnecessary to consider in what circumstances an administrative decision may be impugned upon the ground that a person, other than the decision-maker, but involved in the decision-making process, had a personal interest in the outcome of the process. It is not sufficient, his Honour said, to answer this question by 'reference to the ethical standards of public servants.'

Further:

> The possibility that Mr Miasi's conduct may have been improper does not necessarily lead to a conclusion that the Minister's decision was invalid. It might expose him to disciplinary action, but the question is whether it exposes the appellant to the loss of its licence.[8]

Gaudron, Gummow and Hayne JJ

Gaudron, Gummow and Hayne JJ delivered a joint judgment. Their Honours said that all Mr Miasi did was to 'prepare a document reflecting a decision made by others. That being so, it could not be said that a fair-minded and informed member of the public, who knew what Mr Miasi had done, could fairly suspect that the content of the minute was influenced, or affected in any way, by Mr Miasi or the interest which he had in AuDAX.'[9]

On that basis alone, their Honours, said the appeal should be upheld.

McHugh J

McHugh J said that the peripheral nature of the roles of Mr Miasi and Mr Phillips was decisive.[10] His Honour said:

> A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. The focus must be on the nature of the adviser's interest, the part that person played in the decision-making process and the degree of independence observed by the decision-maker in making the decision. If there is a real and not a remote possibility that a Minister has not brought an independent mind to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias.[11]

Further his Honour said: 'It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.'[12]

Kirby J

Kirby J delivered a strong dissent. His judgment has been discussed by Mr Podger. Briefly, his Honour said, on the facts in this case, 'the appearance of integrity has been undermined, whatever may have been the actuality. That is enough to require that the process be performed again, excising the participation of officials who had known but undeclared personal interests.'[13]

And, further:

> Financial probity, and the absence of undeclared pecuniary self-interest, or undeclared but known interests of close family members, are not only attributes of sound public administration. They lie at its heart. This Court should reinforce them. It should not sanction practices that have a tendance to undermine their strict observance.[14]

Comment

It seems to me that what the Court has done is open the door to further litigation to test the bounds of when it might be said that an adviser has played a significant role in the preparation of the advice to the ultimate decision-maker. Further litigation will be needed to clarify the boundaries of what may constitute a significant interest in the decision. When can it be said that an adviser's role is merely peripheral? When is it sufficiently central? What this means, it seems to me, is that even greater attention will be paid to the conduct and interests of public servants in an attempt to establish in the courts that a particular adviser played a significant and not a peripheral role in the decision making process, and thereby invalidating the ultimate decision. Is this an effective use of resources – both public and private? I doubt it. As Kirby J said:

> The question is not one of fine analysis. Instead, it is whether, looking at this decision by the Minister, and the participation in the steps that led to it of the two senior officials of his Department, a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers who, personally or through their intermediate families, had undisclosed interests of which they were aware and these interests would be advanced if the Minister accepted the departmental recommendation.[15]

Finally a brief comment on the decision and its possible impact on public sector Codes of Conduct. What effect do public sector Codes of Conduct have? Are they working? Surely if senior public servants do not feel the need to comply with the Codes of Conduct, should not the public have the right to ask whether Codes of Conduct are effectual in maintaining public sector integrity or whether they are mere window-dressing or rhetoric.

More importantly, it is of little comfort to the parties denied the licence to say that the public servants concerned may be subject to disciplinary action. If the Legislature is serious about Codes of Conduct, if a breach of the Code is so grave as to lead to disciplinary action, it should surely also lead to the invalidation of the ultimate decision.

Endnotes

1 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70; 193 ALR 90.
2 *Creasy v Hot Holdings* [1999] WASC69 (23 June 1999) at [17].
3 *Creasy v Hot Holdings Pty Ltd* [2000] WASC 206 (4 August 2000) at [91]-[92].
4 Ibid, at [93].
5 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70 at 73 ([21])
6 Ibid at 73-74 ([22]).
7 Ibid at 74 ([24])
8 Ibid at 73 ([20]).
9 Ibid at 77 ([47]).
10 Ibid at 81 ([72])
11 Ibid at 81 ([72].
12 Ibid at 82 ([74]).
13 Ibid at 95 ([146]).
14 Ibid at ([156]).
15 Ibid at 93 ([132]).

THE LEGISLATIVE INSTRUMENTS BILL— LAZARUS WITH A TRIPLE BY-PASS?

Stephen Argument*

Introduction

On 26 June 2003, the Federal Government introduced the Legislative Instruments Bill 2003 ('Bill') in the House of Representatives. The Bill is the latest in a series of attempts to put in place 'a comprehensive regime for the consistent management of, and public access to, Commonwealth delegated legislation'.[1] Similar Bills were introduced in 1994, 1996 and 1998 but, for various reasons, they were never passed into law. This article discusses the history of the Bill, its key features and also the differences between this and previous versions of the Bill.

What's the problem?

The Bill, and its predecessors, is, in large part, the Government's response to the Administrative Review Council's 1992 report, *Rule Making by Commonwealth Agencies* ('ARC Report').[2] The ARC Report recognised that delegated legislation in Australia, at the Commonwealth level, was something of a legislative jungle, with much of it being badly drafted and almost inaccessible to the general public. It also recognised that there was no discernible logic to the categorisation and nomenclature of delegated legislation or the extent to which particular examples of it were subject to scrutiny by the Parliament while others were not.
There are currently four basic problems. The first three are the:

- proliferation;
- poor quality of drafting; and
- inaccessibility;

of quasi-legislative instruments. This refers to the vast array of 'guidelines', 'directions', 'orders', 'rules' and other types of instruments that are provided for in Commonwealth legislation and that fall outside the jurisdiction of the *Statutory Rules Publication Act 1903* (Cth)).[3] The fourth problem is the tendency for legislative activity to be conducted other than by the legislature and without the scrutiny of the legislature.

It is important to note that comments about the poor quality of drafting should not be seen as a criticism of those who draft the vast bulk of instruments that are covered by the Statutory Rules Publication Act, that is, the Office of Legislative Drafting ('OLD'). Rather, it is a reflection of the fact that, since the kinds of instruments that are involved fall outside OLD's jurisdiction, they tend to be drafted by 'ordinary' public servants, rather than by professional drafters.

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History of the Bill's predecessors

In 1994, the (ALP) Federal Government introduced the Legislative Instruments Bill 1994 ('1994 Bill'). the 1994 Bill was subjected to fairly rigorous scrutiny by both Houses of the Parliament—including inquiry and report by Parliamentary committees in both Houses[4]—and was amended significantly by the Senate, in the light of that scrutiny.

At the time of the 1996 federal election, the 1994 Bill—as amended by the Senate—was awaiting passage. When the election was called, the Bill lapsed. In its election policies, the Coalition (then in opposition) affirmed its commitment to the reforms promoted by the 1994 Bill, focussing, in particular, on the Bill's potential benefits for business.[5] This commitment was given effect when the current (Coalition) Government was first elected. The Legislative Instruments Bill 1996 ('1996 Bill') was introduced into the House of Representatives on 26 June 1996. It incorporated many of the amendments that had been made to the 1994 Bill. The greater business focus was also evident in the 1996 version of the Bill, in provisions that would require public consultation in relation to legislative instruments 'likely to have a direct, or a substantial indirect, effect on business'.

The 1996 Bill went nowhere. Between June 1996 and December 1997, the 1996 Bill bounced between the House of Representatives and the Senate, essentially because the Senate kept making (and insisting upon) amendments that the Government (and, as a result, the House of Representatives) was not prepared to accept. Finally, on 5 December 1997, the House laid the 1996 Bill aside.

On 5 March 1998, the Legislative Instruments Bill 1996 (No 2) ('1996 (No 2) Bill') was introduced into the House of Representatives. It was in the same form as the (original) 1996 Bill. On 14 May 1998, the Senate passed the 1996 (No 2) Bill, again with substantial amendments. This was despite the Minister for Justice, Senator Vanstone, telling the Senate at the opening of the substantive debate that:

> The latest draft of amendments put forward are entirely unacceptable ...For the reasons given to the Senate last year, the Government is unable to accept the many recycled amendments that I understand are now being proposed by the Opposition and the Greens. The Government will again reject those amendments in the other House and the Bill will not be returned to this chamber.[6]

This response suggested that the 1996 Bill might be used as a double dissolution trigger. It was not. The Coalition Government was re-elected at the 1998 election. During the following Parliament, there were indications that a Legislative Instruments Bill would again be introduced but this did not occur in that Parliament.

The Bill

The central tenet of the Bill is to make 'legislative instruments' subject to a consistent requirements as to drafting, public consultation, disallowance by the Parliament and registration on a publicly-accessible electronic database.

A 'legislative instrument' is defined in the Bill as an instrument made in the exercise of a power delegated by the Parliament. The term includes regulations, ordinances, orders, determinations, guidelines and a myriad of other instruments. Significantly, the Bill operates in relation to instruments depending on their legal effect. It applies to instruments with 'a legislative effect', that is, instruments that determine or alter the content of the law, rather than apply it and that have the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right (clause 5). This is in contrast to the current situation, where the sorts of requirements imposed by the Bill operate more by reference to what an instrument is called. That is, the current

requirements concerning tabling, disallowance and publication apply in relation to 'regulations' and 'disallowable instruments' but, generally, not to orders, determinations, guidelines, etc.

Certain instruments are explicitly excluded from the definition of legislative instruments (clause 7).

The Bill imposes on the Secretary of the Attorney-General's Department an obligation to take steps to promote 'legal effectiveness, clarity, and intelligibility to anticipated users' of legislative instruments. This includes a role in the drafting or in supervising the drafting of instruments, scrutinising drafts, providing advice on drafting and providing training and precedents to officers of Government agencies (clause 16).

Under the Bill, legislative instruments must be tabled in the Parliament within 6 sitting days of being made (clause 38). This is a significantly shorter period than the 15 sitting days currently allowed by subsection 48(1) of the *Acts Interpretation Act 1901*. In this context, it should be remembered that, given the frequency of Parliamentary sittings, a period of 15 sitting days will generally cover a period of months rather than weeks. Once tabled, legislative instruments are subject to disallowance by either House of the Parliament, under provisions that replace the existing disallowance provisions of the *Acts Interpretation Act 1901* (clause 42).

As soon as practicable after they have been made, legislative instruments must also be lodged (in electronic form) with the Attorney-General's Department, for inclusion on the Federal Register of Legislative Instruments (clause 25). If a legislative instrument is not registered, it is not enforceable (clause 31). There is also a process for 'backcapturing' legislative instruments made prior to the passage of the Bill. For instruments made in the 5 year period prior to the enactment of the Bill, the rule-maker (ie the person who made them) has 12 months to lodge them for registration. For instruments made more than 5 years prior to the enactment of the Bill, a period of 3 years is allowed (clause 29). Failure to lodge these existing instruments within the stipulated timeframes renders them unenforceable (clause 32).

The Bill also contains mechanisms for 'sunsetting' existing legislative instruments. In simple terms, a legislative instrument ceases to have effect 10 years after being made, unless the Attorney-General is satisfied that this should be deferred (clauses 50 and 51). The purpose of such a mechanism is to ensure that the statute book is not cluttered by redundant or out-of-date instruments. If enacted, it would bring the Commonwealth into line with similar regimes in NSW, Queensland, South Australia, Tasmania and Victoria. A significant feature of the Bill is that it uses a 10 year sunset period, as do all the other named jurisdictions except NSW. This is double the 5 year period provided for in the previous version of the Bill (and which currently operates in NSW).

The effect of the sunsetting mechanism in NSW has been significant in reducing the number and volume of delegated legislation. The NSW Parliamentary Counsel compiles figures annually on the number of statutory rules and the number of pages of statutory rules, compared to previous years. The most telling comparison is between the numbers and number of pages of statutory rules when the sunsetting requirements came into effect (1990) and now. The relevant figures are:

	1 July 1990	1 May 2003
Total no. of rules:	976	445
Total no. of pages:	15,075	8,144

On these figures, the number of statutory rules operating today in NSW is approximately 46% of the number operating in 1990. These statutory rules occupy approximately 54% of the pages occupied in 1990. This is surely a significant reduction.

Certain legislative instruments are explicitly excluded from the operation of the sunsetting provisions (clause 54). The number of instruments excluded is substantially higher than in previous versions of the Bill.

The Bill provides that the Attorney-General must table in the Parliament a list of legislative instruments that are to be 'sunsetted', prior to the sunsetting taking place (clause 52) and gives either House the power to continue selected instruments in force (clause 53).

Another noteworthy feature of the Bill is that it contains a greatly-simplified process for public consultation in relation to legislative instruments. It provides that, before a rule-maker makes a proposed legislative instrument that is likely:

(a) to have a direct, or a substantial indirect, effect on business; or

(b) to restrict competition;

the rule-maker must be satisfied that any consultation that he or she considers to be appropriate *and* is reasonably practicable to carry out *has* been carried out (clause 17). While the Bill then suggests the forms that consultation might take, it does not contain the detailed provisions dealing with consultation that were set out in Part 3 of the 1996 Bill. Unlike previous versions of the Bill, there is no nomination of legislation that provides for legislative instruments that are 'likely' to have an effect on business. This means that the Bill leaves the decision as to whether consultation is required and, if so, what consultation is appropriate squarely with the rule-maker.

The 1996 Bill provided that the only legislative instruments in relation to which the consultation requirements applied were those made under the primary legislation specified in Schedule 2 of the 1996 Bill (which was headed 'Enabling legislation providing for legislative instruments likely to have an effect on business'). It is not surprising that, at the time of the 1996 Bill, Government agencies would have been keen that their legislation not be listed in this Schedule. This Bill avoids that issue.

It is important to note that a failure to consult has no effect on the validity or enforceability of a legislative instrument (clause 19).

The consultation process is also relevant in the context of 'regulatory impact statements' ('RIS').[7] The Australian Capital Territory,[8] NSW,[9] Queensland,[10] Tasmania[11] and Victoria[12] all have statutory requirements that (subject to certain specified exceptions) an RIS be prepared if delegated legislation is likely to impose an appreciable cost or burden on the community or on a part of the community. As the Second Reading Speech to the Bill notes, there is currently a requirement in the Commonwealth jurisdiction that an RIS be prepared - both in relation to delegated *and* primary legislation - if legislation will directly affect business, have a significant indirect effect on business, or restrict competition. These are administrative requirements only, however, and are not supported by legislation.[13]

The Bill contains many other differences when compared to the version introduced into the Parliament in 1998. Other than the (unexplained) dropping of the statutory position of 'Principal Legislative Counsel' (who would have assumed the obligations this Bill places on the Secretary of the Attorney-General's Department), the essence of those differences is that they appear to make the Bill less onerous for rule-makers than its predecessors. That said, it nevertheless seeks to impose a consistency and discipline that is currently lacking in

Commonwealth delegated legislation. We can only wait to see whether it meets with the approval of the Parliament. And hope that it does, as the reforms to be introduced by the Bill are both necessary and would also bring the Commonwealth into line with the majority of other Australian jurisdictions.

Endnotes

1 Note that the term 'subordinate legislation' is used in various jurisdictions and contexts to refer to the same form of legislation.
2 Parliamentary Paper No 93 of 1992.
3 For further discussion of 'quasi-legislation', see Argument, S, 'Parliamentary scrutiny of quasi-legislation', (15) *Papers on Parliament* (May 1990). See also Pearce, DC and Argument, S, *Delegated Legislation in Australia* (2nd ed) (1999, Butterworths, Sydney), at pp 7-12.
4 See Senate Standing Committee on Regulations and Ordinances Report No 99, *Legislative Instruments Bill 1994* (October 1994) (Parliamentary Paper No 176 of 1994); House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994* (February 1995) (Parliamentary Paper No 11 of 1995).
5 As part of both its *Law and Justice* and *New Deal for Small Business* policies.
6 Senate, *Hansard*, 13 May 2597, at page 2597. For further discussion of the detail of the Senate amendments, see Argument, S, 'The sad and sorry tale of the (Commonwealth) Legislative Instruments Bill', in Kneebone, S (ed), *Administrative Law and the rule of law: Still part of the same package?* (1999, Australian Institute of Administrative Law Inc, Canberra), at pages 259-60.
7 Sometimes referred to as 'regulation impact statements'.
8 See *Legislation Act 2001* (ACT), sections 34-7.
9 See *Subordinate Legislation Act 1989* (NSW), sections 5-7.
10 See *Statutory Instruments Act 1992* (Qld), sections 43-6.
11 See *Subordinate Legislation Act 1992* (Tas), sections 3A-10.
12 See *Subordinate Legislation Act 1994* (Vic), sections 6-12.
13 See *Legislation Handbook* (1999, Department of the Prime Minister and Cabinet, Canberra), at paragraphs 8.16-7 and, generally, *A guide to regulation* (2nd ed) (Office of Regulation Review, Canberra), especially at parts A3 and A12.

TREATIES AND THE INTERPRETATION OF STATUTES: TWO RECENT EXAMPLES IN THE MIGRATION CONTEXT

Glen Cranwell*

1 Introduction

It has been generally accepted that treaties and other international instruments require legislation to alter the rights and obligations of persons under Australian domestic law, if not domestic or municipal law generally.[1] However, this does not mean that treaties have no influence at all on Australian municipal law unless enacted into domestic law by statute. Treaties have had, and continue to have, effects on Australian law in a number of other ways. An interesting example of a modern qualification to the rule which establishes the need for legislation relates to the use of treaties and instruments to interpret ambiguous legislation, especially in the light of the presumption that Parliament normally seeks to legislate consistently with Australia's international obligations.

In this article, I propose to examine two recent cases in which treaties were used in the interpretation of statutes. First, in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*,[2] the Full Federal Court unanimously dismissed the Minister's appeal from the orders of Merkel J, who had released the respondent from immigration detention pending his removal from Australia. The Court noted that the appeal involved consideration of important questions in the application of common law principles to the interpretation of statutes where fundamental rights and freedoms are involved. Second, in *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*,[3] the Full Family Court gave judgment in an appeal concerning the relationship between the welfare jurisdiction of the Family Court and the power of the Minister to detain unlawful non-citizen children.

2 Background

It has been accepted for most of the history of the High Court that treaties can be used as an aid to the interpretation of statutes in certain circumstances.[4] What is not yet clearly resolved is exactly when an international instrument may be used in this way: it is unclear whether an ambiguity in the statute is necessary, or whether there is in fact a greater role for treaties in relation to the interpretation of any statute.

In the earlier days of Mason CJ's period on the High Court, his Honour took a very narrow approach to the use of international conventions as an aid to statutory interpretation. In two cases, *D & R Henderson v Collector of Customs for NSW*[5] and *Yager v R*,[6] he required both ambiguity in the language of the statute in question and that the statute be intended to give effect to the convention which is to be called in aid of interpretation.

It was only in 1992, in *Dietrich v R*,[7] that the High Court first acknowledged a role for treaties in the interpretation of legislation not intended to implement the treaty in question. This was

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the beginning of a broader approach to the use of treaties by the Court, although the Court's adoption of this approach in *Dietrich* was less than wholehearted. Mason CJ and McHugh J, in discussing the position in the United Kingdom, stated that:

> [I]t is 'well settled' that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations.[8]

However, it is unclear from the judgment whether Mason CJ and McHugh J considered this principle to be 'well-settled' in Australian law. Clearly, though, the principle referred to is not confined to statutes which are directed at the implementation of an international convention, but is directed at all statutes, as a general canon of statutory interpretation. Ambiguity, however, is still required. This was somewhat broader than the earlier, restricted view taken by Mason CJ.

Dawson J's judgment in *Dietrich* was not of much greater assistance. He stated that:

> There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation.[9]

Again, there is no real indication whether Dawson J considered that approach to be correct. And, again, ambiguity in the legislation is required before the presumption comes into play, although his Honour's view of ambiguity seems to have been a reasonably wide one.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[10] the plaintiffs were Cambodian nationals who had arrived by boat in Australia in 1989 and 1990 and who had been detained in custody since their arrival, pending determination of their applications for refugee status. In April 1992 the applications were rejected. In the Federal Court, the plaintiffs obtained an order setting aside this decision; they also sought an order that they be released from custody pending re-determination of their applications, but this aspect of the proceeding was adjourned. Prior to the return of their application for release, the Federal government passed the *Migration Amendment Act* 1992 (Cth) which, *inter alia*, purp orted to prohibit any court from ordering the release from custody of anyone of a defined class of persons which included the plaintiffs. The plaintiffs challenged the validity of the legislation. One of the bases of the challenge was the inconsistency of the amendments with international legal commitments undertaken by Australia, in particular the Convention relating to the Status of Refugees 1951 and its 1967 Protocol, and the International Covenant on Civil and Political Rights ('ICCPR'). Section 54T of the *Migration Act* 1958 (Cth) provided that the amendments were to apply despite inconsistency with any other Australian law other than the Constitution. Members of the High Court regarded s 54T as adequate to preclude recourse to international law:

> [Section] 54T ... unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties.[11]

One of the important *obiter dicta* which arose in *Minister for Immigration and Ethnic Affairs v Teoh*[12] concerned the extent to which treaties can affect the interpretation of statutes. Mason CJ and Deane J[13] took a broad approach to this issue, in contrast to the House of Lords, which has taken a narrower view of the extent to which treaties can affect the interpretation of legislation.[14] Their Honours noted that it is a principle of statutory interpretation that if a statute or legislative instrument is ambiguous, the courts should interpret it in a manner that is consistent with Australia's international obligations.[15] This rule, they noted, is based on the principle that 'Parliament, prima facie, intends to give effect to Australia's obligations under

international law'. They went on to explain how this principle must lead to a broad reading of the concept of ambiguity, stating:

> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph [that ambiguous statutes should be interpreted in accordance with Australia's international obligations] should be stated so as to require courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That is indeed how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[16]

In the case of *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*, McHugh and Gummow JJ stated that the rules of statutory interpretation

> favour construction which is in conformity and not in conflict with Australia's international obligations; this matter was discussed by Mason CJ and Deane J in *Teoh*.[17]

Nevertheless, their Honours noted that the treaty under consideration in *Teoh* had not been followed by any relevant exercise of legislative power with respect to external affairs, nor was it a self-executing treaty (such as a peace treaty).[18] There appears to be a clear implication in their joint judgment that the reasoning in *Teoh* failed to give sufficient attention to the relationship between international obligations and the domestic constitutional structure.[19]

3 Decision in *Al Masri*

(a) The factual background[20]

Mr Al Masri, the respondent, is a Palestinian from the Gaza Strip. He arrived in Australia illegally via a people-smuggling operation. His application for a protection visa was refused. That refusal was affirmed by the Refugee Review Tribunal. On 5 December 2001, Mr Al Masri signed a written request to the Minister that he be returned to the Gaza Strip. Five months later he was still in detention, as the surrounding countries would not grant permission for him to transit through their territory to the Gaza Strip.

On 21 May 2002, Mr Al Masri commenced proceedings in the Federal Court seeking his release from detention on the basis that, notwithstanding s196 of the *Migration Act*, the detention had become unlawful. Section 196 provides:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
> (a) removed from Australia under section 198 or 199; or
> (b) deported under section 200; or
> (c) granted a visa.
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

Section 198(1) provides:

> An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

Merkel J, at first instance, held that the mandatory detention regime provided for by the *Migration Act* is subject to implied limits. In his view, detention is only valid provided that:

- the Minister is taking all reasonable steps to secure the removal from Australia of a removee (who has requested removal under section 198(1)) as soon as is reasonably practical; and

- there is a real likelihood or prospect of removal in the reasonably foreseeable future.[21]

His Honour held that the detention in this case was unlawful because there was no evidence that there was a reasonable prospect of Mr Al Masri being removed to his home country in the foreseeable future.

Following Merkel J's decision, a number of other detainees filed habeas corpus applications. There are conflicting authorities, but at first instance the majority of Federal Court judges refused to follow Merkel J.[22] The issue became academic in relation to Mr Al Masri who was removed from Australia shortly following Merkel J's decision. However, the Full Federal Court decided to deal with the Minister's appeal because of the outstanding costs issue and because of the general importance of the substantive issue. This appeal is the first consideration of the issues at appellate level.

(b) The Full Court decision

The Full Court did not accept the first limb of Merkel J's formulation,[23] but did endorse the second. Unless the power (and duty) to detain unlawful non-citizens were subject to a temporal limitation like the one implied by the trial judge, then a serious question of invalidity would arise. The Court considered that, without an implied limitation, the relevant sections may be unconstitutional because the 'aliens' power does not authorise indefinite detention. The High Court's decision in *Lim* was distinguished on the basis that the legislation under consideration in that case contained a time limit on detention and because it was assumed in that case that a request by an applicant to be removed would bring detention to an end. The High Court was simply not dealing with the scenario where the Department is unable to remove an individual to his or her country of origin.[24]

The Full Court found it unnecessary to finally decide the constitutional issue because it considered that the appeal could be determined on statutory construction grounds.

(c) Construction in accordance with international obligations

The Solicitor-General for the Commonwealth, counsel for the Minister, submitted that the clear intent of the Parliament is that detention under section 196 is unqualified and in terms unlimited in time except by reference to the three terminating events specified therein. He went on to argue that it is not possible, having regard to the intractable language, to conclude that Parliament did not consciously decide upon curtailment of a person's liberty where a person cannot be removed for reasons beyond his or her control. It is not open to conclude that Parliament has not used sufficiently clear words to cover the circumstance where removal may not be readily possible. The Solicitor-General submitted that the words 'as soon as reasonably practical' in section 198 impose a continuing duty and it is not appropriate as a matter of statutory construction to require Parliament to deal with every possible contingency where removal may not be possible.[25]

This argument was not successful. The Full Court considered that the right to personal liberty is the most fundamental of all common law rights, so that any attempt to abrogate it must, in accordance with established principles of statutory construction, be expressed in clear, unambiguous words. Controversially, the Court did not consider that the language of sections 196 and 198 was unambiguous:

> We conclude that an intention to curtail the right of personal liberty to the extent discussed has not been clearly manifested. It has not been manifested by any unmistakable or ambiguous language. There is no indication by clear words or by necessary implication that the legislature has directed its attention to, or that it has consciously decided upon, the curtailment of a fundamental common law right to the extent contended for by the Solicitor-General.[26]

Rather, the textual framework of the relevant provisions suggested that Parliament had not directed its attention to the question of possible unlimited or permanent detention of unlawful non-citizens, but had instead assumed that detention will necessarily come to an end.

The Full Court considered that its conclusions on this point were supported by the decisions of overseas courts dealing with similar questions[27] and the presumption that legislation is to be interpreted and applied in a manner consistent with established rules of international law and in a manner that accords with Australia's treaty obligations.[28] Reference was made to Article 9 of the ICCPR and the view of the Human Rights Committee in *A v Australia*,[29] in which indefinite detention of aliens was found to be unlawful. Whilst the Court noted that the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Court also noted that it is appropriate to consider opinions expressed in works of scholarship in the field of international law and considered the jurisprudence of the European Court of Human Rights. Finally, the Court drew attention to Article 37(b) of the UN Convention on the Rights of the Child.

4 Decision in *B & B*

(a) The factual background[30]

Two male children (by their next friend, their mother) applied to the Family Court for release from immigration detention. The children's father (who is married to the children's mother) also made an application that the children and their three sisters reside with him in Sydney (where he then resided) or, alternatively, that he have contact with the children, that they be given adequate medical treatment and not assaulted, that they be accommodated in community housing and that they not be placed in Woomera or a similar environment.

At first instance, Dawe J dismissed the application, accepting the Minister's argument that the mandatory detention provisions of the *Migration Act* are specific and unambiguous in requiring detention of the applicants and that the general welfare jurisdiction provisions of the *Family Law Act 1975* (Cth) must be read as subject to the *Migration Act* provisions. The Family Court therefore did not have jurisdiction to make the orders for release sought by the children. Dawe J also dismissed the father's application on the grounds that the Family Court did not have jurisdiction because the *Family Law Act* did not confer a broad welfare jurisdiction for all children in South Australia. She also considered that the welfare jurisdiction is not an unlimited jurisdiction and cannot generally be used override other laws. The children and the father appealed.

(b) The Full Court decision

The Full Family Court allowed the appeal against the judgment of Justice Dawe of the Family Court and remitted the matter to a single judge for rehearing as a matter of urgency. The majority judges (Nicholson CJ and O'Ryan JJ) decided in a joint judgment that:

- the Family Court has power to release the children if their detention is unlawful. The Family Court could release the children on the basis that their detention is indefinite. Although the appellants had not put their case on the basis that their detention was unlawful and no facts had been found on this issue - or any other - the majority assumed that the children's detention was indefinite and expressed the view that the children's detention was probably unlawful;[31] and

- even if the Family Court cannot order release, the welfare jurisdiction gives that Court power to give directions as to the welfare of the children in detention, including as to medical treatment and education.[32]

Although it was not necessary to decide the issue in this case, the majority said that Part VII of the *Family Law Act* ('Children'), including the conferral of jurisdiction on the Family Court to make orders against third parties for the protection of children, is also supported by the external affairs power in section 51(xxix) of the Constitution because it implements the Convention on the Rights of the Child.[33]

Ellis J dissented in part. He decided that Part VII is not a law with respect to external affairs.[34] He did not agree that there was no real prospect in the reasonably foreseeable future of the children being removed and that the detention of the children was unlawful.[35]

(c) The Human Rights and Equal Opportunities Commission Act

A question which was raised, but unanswered, by the *B & B* case is the status of the international instruments which have been scheduled to, or are subject to a declaration under, the Commonwealth's *Human Rights and Equal Opportunities Act* 1986 (Cth) ('HREOC Act').[36] The argument is that they must be given a higher status than ordinary non-incorporated treaties because they have been subject to parliamentary debate and approval, as they either formed schedules to the Act when it was first passed by the Parliament, or were capable of being disallowed by either House of the Parliament if they were the subject of a declaration by the Minister.

In *Minister for Foreign Affairs and Trade v Magno*,[37] Gummow J considered that this was not the case. He gave the example of the Charter of the United Nations, which is contained in the schedule to the Charter of the United Nations Act. Gummow J observed that s 3 of that Act simply states that the Charter is 'approved', but said that this was insufficient to render the Charter binding on individuals in Australia.[38] Similarly, in *Dietrich*, it was observed by some members of the High Court that although the text of the ICCPR is contained in schedule 2 to the HREOC Act, this does not mean that this convention is part of domestic law conferring directly justiciable rights on individuals.[39]

Nicholson CJ stated in *Re Marion*[40] that he had changed his mind from his original view that parliamentary recognition of the treaties in the HREOC Act made no difference. He stated:

> It seems to me that the Act and its Schedules constitute a specific recognition by the parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia.[41]

His Honour concluded:

> Contrary to what I said in *Re Jane* ... I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the parliament as a source of Australian domestic law by reason of this legislation.[42]

A similar view was taken by Einfeld J in the *Magno* case.[43] After discussing the judgments of the High Court in the case of *Dietrich*, he concluded:

> Whilst authoritatively determining that treaties ratified only by the executive government do not per se become part of domestic law, *Dietrich* seems to make clear that the statutory approval or scheduling of treaties is not to be ignored as merely platitudinous or ineffectual, but must be given a meaning in terms of the parliamentary will. Thus when the Australian Parliament endorses and acknowledges a treaty by legislation, there being no contrary statutory or clearly applicable common law provision in relation to the matters contained in the treaty, it approves or validates the treaty as part of the law which ought as far as possible to be applicable to and enforceable on or by Australians and others in the country to whom it is available.[44]

Some support for this view may also be found in the judgment of Kirby P in *Young v Registrar, Court of Appeal (No 3)*, who said that the fact that the ICCPR is contained in a schedule to an Act of Parliament has been regarded by the courts 'as a consideration relevant to the attention which should be paid to the International Covenant'.[45] However, he added that this does not, as such, incorporate the covenant into Australian domestic law.[46] Similarly, in *Irving v Minister for Immigration, Local Government and Ethnic Affairs*, French J said that the approach to construction which he took was 'strengthened ... by the legislative recognition, albeit short of direct domestic force, given to the rights and freedoms under the covenant in the Human Rights and Equal Opportunity Act 1986 (Cth)'.[47]

In *Teoh*, this point was not directly relevant. Toohey J noted the comments by Nicholson CJ in *Re Marion*, but stated that '[w]hether this is so is a matter which does not arise in the present case'.[48] Mason CJ, Deane and Gaudron JJ did not address the argument. McHugh J, on the other hand, expressly rejected it. He concluded:

> The HREOC Act recognises that there may exist acts and practices that are inconsistent with or contrary to Australia's human rights obligations as defined by the Act. The mechanisms for remedying those inconsistencies are those provided in the Act. I find it difficult to accept that parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of s 47 of the HREOC Act when such remedies are not provided for by the Act.[49]

In *B & B*, Nicholson CJ and O'Ryan J noted that this issue appeared not to have been considered by the High Court in *Teoh* and concluded that '[t]he relevance of UNCROC being a declared instrument annexed to the HREOC legislation thus appears to be an open question'.[50]

Given the absence of clear authority on the question in *B & B*, it is still unclear whether the courts regard the international instruments which are scheduled to, or declared under, the HREOC Act, as having a higher status than other ratified treaties which have not been directly implemented by legislation.[51]

5 Conclusion

Where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations. It may also be that in the case of an ambiguity in any legislation, even if not enacted for the purpose of implementing a treaty, the courts will favour a construction that is consistent with Australia's obligations under international human rights treaties. This may be an aspect of a more general principle of statutory interpretation that a court will interpret statutes in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms.[52] However, as Albrechtsen commented:

> [I]t's funny how creative judicial decisions draped in the mellifluous language of international human rights invariably infringe upon one of the most fundamental human rights - the citizen's right to vote, to decide important moral, social and political issues, by a majoritarian democratic process. Mandatory detention, like other highly charged issues, is one over which rational minds differ. Even judicial minds differ. Given disagreement, how do we resolve these issues? Eminent legal philosopher Jeremy Waldron has a suggestion: if these matters are to be settled by counting heads, then citizens may well feel that 'it is their heads or those of their accountable representatives that should be counted'.[53]

Postscript

After this article was written, the Full Family Court (Nicholson CJ, O'Ryan and Ellis JJ) handed down a decision reported as *KN & SD v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*.[54] The Court looked at the issue of whether section 198 of the *Migration Act* could be read down so as to prevent the removal of an unlawful non-citizen mother who had an Australian citizen child. Nicholson CJ and O'Ryan J maintained (as they did in *B & B*) that the Convention on the Rights of the Child had been incorporated into Australian law by the *Family Law Act*, whereas Ellis J maintained that it did not have this effect. However, all three judges held that whether fundamental rights have been conferred by the *Family Law Act* or not, the reference in section 198 of the *Migration Act* to 'remove as reasonably practicable' did not create an ambiguity so that the principles set out in the *Family Law Act* operate so as to prevent the removal of the mother from Australia. The majority stated:

> We think it clear that this part of the *Migration Act* is expressed in terms that override Australia's international obligations (UNCROC) as incorporated in Australian municipal law and also the Act. If this is so then it is apparent that the effect is to override the rights of an Australian child to know and have contact with one of his parents who entered Australia on a false passport.[55]

Ellis J was also prepared to accept that the *Migration Act* provided a detailed code dealing with the removal of unlawful non-citizens from Australia.[56] The majority did not deal with this argument.

Endnotes

1 See Glen Cranwell, 'Treaties and Australian Law: Administrative Discretions, Statutes and the Common Law' (2002) 9 *Aust Jo of Admin Law* 65, 65-68.
2 (2003) 197 ALR 241 (Black CJ, Sundberg and Weinberg JJ).
3 [2003] FamCA 415 (Nicholson CJ and Ellis J; O'Ryan JJ dissenting in part).
4 See, eg, *Polites v Commonwealth* (1945) 70 CLR 60, 68-9, 77, 80-1.
5 (1974) 48 ALJR 132, 135.
6 (1977) 139 CLR 28, 43-4.
7 (1992) 177 CLR 292.
8 Ibid 306.
9 Ibid 348-9.
10 (1992) 176 CLR 1.
11 Ibid 38 (Brennan, Deane and Dawson JJ).
12 (1995) 183 CLR 273.
13 With whom Gaudron J agreed on this point.
14 See *R v Secretary of State for the Home Department; ex parte Brind* [1991] AC 696, 747-8 (Lord Bridge).
15 (1995) 183 CLR 273, 287, and see 315 (McHugh J).
16 Ibid 287-8.
17 (2003) 195 ALR 502, [100] (footnote omitted). See also *Kartinyeri v Commonwealth* (1998) 152 ALR 540, 599 (Gummow and Hayne JJ): '[A] statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is not in conflict with the established rules of international law.'
18 Ibid [98]-[100].
19 Ibid [98], and see [147] (Callinan J).
20 The factual background is extracted from the judgment of the Full Federal Court.
21 *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609.

22 French J doubted the correctness of the judgment at first instance in *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625; Beaumont J agreed with the principles of French J in *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2; Whitlam J in *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52, [36] agreed with the analysis of French J and labelled the *Al Masri* decision at first instance as 'plainly wrong'. Jacobson J in *NAKG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1600 also doubted the correctness of the decision in *Al Masri*. Selway J did not follow *Al Masri* in *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29, nor did von Doussa J in *SHDB v Goodwin & Ors* [2003] FCA 30 and *SHFB v Goodwin & Ors* [2003] FCA 294, nor Emmett J in *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224. On the other hand, Mansfield J in *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369 followed *Al Masri* at first instance and Finkelstein J in *WAIW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1621 applied *Al Masri* to grant interlocutory relief.
23 (2003) 197 ALR 241, [134]-[135].
24 Ibid [49]-[81].
25 Ibid [39]-[43].
26 Ibid [132]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* [2002] FCAFC 390, [108]-[113].
27 Ibid [133].
28 Ibid [138]-[155].
29 UNHRC Communication No. 560/93.
30 The factual background is extracted from the judgments of the Full Family Court.
31 [2003] FamCA 451, [319]-[390]
32 Ibid [391]-[400]
33 Ibid [248]-[289].
34 Ibid [424].
35 Ibid [426].
36 Ibid [252]ff.
37 (1992) 37 FCR 298.
38 Ibid 304, citing *Bradley v Commonwealth* (1973) 128 CLR 557, 582; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224.
39 (1992) 177 CLR 292, 305 (Mason CJ and McHugh J), 359-60 (Toohey J); also at 321 (Brennan J), 348 (Dawson J).
40 (1990) 14 Fam LR 427.
41 Ibid 449.
42 Ibid 451.
43 (1992) 37 FCR 298.
44 Ibid 343.
45 (1993) 32 NSWLR 262, 274.
46 Ibid.
47 (1993) 115 ALR 125, 140.
48 (1995) 183 CLR 273, 301.
49 Ibid 317-8.
50 [2003] FamCA 451, [263]. See also *Marriage of Murray and Tam* (1993) 16 Fam LR 982, 998 (Nicholson CJ and Fogarty J): '[I]t may be that this is still an open issue.'
51 See also Anne Twomey, '*Minister for Immigration and Ethnic Affairs v Teoh*' (1995) 23 *Fed L Rev* 349, 359-61.
52 *Potter v Minahan* (1908) 7 CLR 277, 304; *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 183 (Dawson J); *Nationwide News v Wills* (1992) 177 CLR 1, 43 (Brennan J); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24, 30 (Gleeson CJ).
53 Janet Albrechtsen, 'Judiciary oversteps mark on immigration', *The Australian* (Sydney), 2 July 2003.
54 [2003] FamCA 610.
55 Ibid [76].
56 Ibid [160].

HOW LONG IS TOO LONG? — THE IMPLIED LIMIT ON THE EXECUTIVE'S POWER TO HOLD NON-CITIZENS IN DETENTION UNDER AUSTRALIAN LAW

*Lara Wood Gladwin**

Detention of non-citizens, particularly mandatory detention, is a substantial abrogation of an individual's right to freedom and it is therefore vital that the use of detention has a sound legal basis in Australia and can be subject to ordinary accountability mechanisms in our democratic and liberal system. Under Australia's current detention scheme, there have been very few limitations on the executive's power to detain non-citizens in Australia. However, recent developments in the Federal Court suggest that there may in fact be implied limitations on the power to detain. The discussion will begin by outlining the current power to detain and limitations imposed by courts in the past. It will then focus on the recent '*Al Masri*' cases in which the Federal Court has imposed an implied limitation on the executive's power to detain non-citizens in Australia.

Current immigration detention situation and legislation in Australia

All non-citizens who are unlawfully in Australia must be detained under Australia's current migration law and removed as soon as practicable[1]. Mandatory detention in certain circumstances began in 1994 and prior to this date, officers detained non-citizens on a discretionary basis[2]. To complement the imposition of mandatory detention in certain circumstances, a regime of 'bridging visas' was also introduced in 1994. A 'bridging visa' allows unlawful non-citizens to be released from detention with certain conditions.

There are three main reasons why non-citizens may be unlawful:

1) they remain in Australia after the expiry date of their visa and become an 'overstayer';

2) they enter Australia without a visa; or

3) they breach the conditions of their visa and the visa is subsequently cancelled.

Broadly speaking, a non-citizen who enters Australia illegally, for example, as a 'boat-person' will be subject to mandatory detention under Division VI of the Migration Act 1958 (Cth) (the Act). These detainees are only eligible to apply for a protection visa. Non-citizens who breach their conditions and have their visa cancelled or remain in Australia after the expiration of their visa are also subject to mandatory detention. However, a decision-maker may, in certain circumstances, issue these non-citizens with a bridging visa, thereby releasing the non-citizen from detention. The bridging visa regime is complex and its operation will not be examined in any detail in this discussion.

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There are currently six detention centres in Australia and on 9 January 2003, the number of non-citizens detained in detention centres was[3]:

Villawood	477
Maribyrnong	69
Perth	25
Port Hedland	145
Baxter	239
Woomera	109
Christmas Island	11
Other Facilities	101
Total	***1176***

After being placed in detention, non-citizens are given advice concerning visa options and have an opportunity to lodge an application for a substantive visa. Many detainees, particularly those who have entered Australia illegally as 'boat people', will lodge protection visa applications, as discussed above. While a detainee's visa application is being processed, the non-citizen must remain in detention or, in certain circumstances, may be released on a bridging visa. In 1998-99, 55% of all detainees were released within 3 months, although some detainees may be in detention for a period of many years[4].

If an application for a protection visa is refused by the primary decision-maker, the applicant may appeal to the Refugee Review Tribunal (the Tribunal). If the Tribunal upholds the primary decision, the applicant may appeal to the Federal Court if they believe they have a legal ground for review. The operation of the 'privative clause'[5] has substantially limited the grounds of review. However, the court has upheld the constitutional validity of the privative clause, but has read down the operation of the privative clause[6] and it is still possible for a non-citizen to seek review in limited circumstances, namely if the decision was affected by a jurisdictional error. If the non-citizen has exercised all their avenues of review or has chosen not to exercise their right to review and has not been granted a visa, the Australian government will commence action to remove the non-citizen, usually back to their home country. While the government is attempting to arrange removal of the non-citizen, they must remain in immigration detention or be granted a bridging visa.

Basis for the executive's power to detain unlawful non-citizens

Section 51 of the Constitution gives the Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to naturalisation and aliens (s51(xix)), immigration and emigration (s51(xxvii)) and external affairs (s51xxix)). In addition, s61 provides for executive power to be vested in the Queen, exercisable by the Governor-General and states that it extends to the execution and maintenance of the laws of the Commonwealth.

Division VII of the Act provides the power for the Minister to detain unlawful non-citizens. While the operation of the detention scheme is complex, there are several key sections which are of importance for the following discussion. Section 189 of the Act 'Detention of unlawful non-citizens' states that:

> (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

Section 195 stipulates the time frame in which an unlawful non-citizen in detention can apply for a visa. Three situations in which a non-citizen may be released from immigration detention are allowed for in s196:

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
  (a) removed from Australia under section 198 or 199; or
  (b) deported under section 200; or
  (c) granted a visa.

Division 8 outlines the circumstances in which unlawful non-citizens may be removed from Australia. The key provision for the purposes of this discussion is s198(1), which states:

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

The validity of the power to detain

The power to detain and remove non-citizens under the Act has been upheld by the High Court. In *Chu Kheng Lim and Others v MILGEA and Another* [7] (*Lim*), the High Court examined the constitutional validity of the Minister's power to detain an alien pending deportation under the Act[8]. The High Court held that the power to detain is administratively necessary to maintain the laws in respect of ss51(xix) and (xxvii) and that the power to make laws for aliens gives rise to the power to detain aliens. However, the court held that the detention must be properly characterised as an incident of the executive power to exclude, admit and deport aliens. The law to detain an alien must not be punitive or penal in nature.

In addition, the court in *Lim* examined s54R[9], which provided that a court is 'not to order the release from custody of a designated person'. It was held that if detention of a non-citizen is found not be in accordance with the Act, that is, the detention itself is unlawful, then the courts have the power under s75(v) of the Constitution to release the detainee[10].

Beaumont J in *NAMU of 2002 v Secretary, Department of Immigration, Indigenous and Multicultural Affairs*[11] (NAMU) stated that *Lim* also stands for the proposition that:

> the character of the statutory authority to detain is determined by the particular statutory context and the purpose of that authority; that is to say, the crucial question is whether the authority is tied, in point of time, to that which is reasonably incidental to deportation or the processing of an application for an entry permit[12].

He also stated that 'if the law can be properly characterised as incidental to the executive power to process visas and to remove or deport non-citizens, then the law will not be punitive or penal'.

It is clear from *Lim* and subsequent cases which have upheld the decision in *Lim*, that the executive has the power to detain under the Act if the act of detaining is referable to the power in the Constitution to make laws for aliens. This, according to the courts, would include the power to exclude, admit and deport aliens. However, the courts have imposed a very important limitation on this power, namely, that the detention cannot be punitive or penal in nature.

Are there any other limitations on the Minister's power to detain non-citizens?

The courts have clearly stated that the detention power is limited by the Constitution and detention is not to be punitive or penal. It is to be used only with reference to the need to control the movement of aliens in and out of Australia. Beyond this, however, there are very few limits to the executive's power to detain non-citizens in Australia.

In the past twelve months, very interesting developments in this area have been occurring in the Federal Court. Courts have been asked to examine cases involving the writ of habeas

corpus and the power of the Federal Court to release a detainee from detention pending their removal from Australia. These cases have arisen from situations where efforts to remove the person have taken longer than expected, resulting in detention for an 'unreasonable' period of time. It is this aspect of the Federal Court's recent decisions regarding limits on detention that will be examined in the remainder of this discussion. Beginning with the seminal judgment of Merkel J in *Al Masri v MIMIA*[13] (*Al Masri*), subsequent judgements that have agreed and disagreed with Merkel J's decision will be examined. Finally, the Full Federal Court decision in *MIMIA v Al Masri*[14] will be discussed. These cases provide for a fascinating analysis of the climate of the current Federal court and the inclinations of judges to imply a limitation on the executive's power to detain.

Limitations implied by the text of the Act: the *Al Masri* decision

Merkel J in *Al Masri* was the first judge to imply a limitation of reasonable period of time from the text of the Act. Mr Al Masri was a Palestinian detainee who applied for and was refused a Protection Visa. Mr Al Masri declared his desire to return home to Palestine instead of appealing his decision. The Government detained Mr Al Masri until such time as they were able to arrange for his deportation to the Gaza Strip. However, the Australian government encountered difficulties in arranging for his return to Palestine as Israel, Jordan and Egypt all refused to give the applicant permission to transit their country[15]. Mr Al Masri then appealed to the Federal Court for the issue of a writ of habeas corpus on the basis that his detention was unlawful as a matter of statutory construction, resulting from reading s196 in conjunction with s198. The Minister argued that the length of detention was irrelevant to the lawfulness of the detention and that the court had no power to order the release of the applicant, particularly in light of s196(3) of the Act, which states the court cannot order the release of a non-citizen from detention.

Merkel J examined ss196 and 198 of the Act. He stated (at 614) that 'when s196(1) is read together with s198 it is clear that detention is only to be until removal as soon as reasonably practicable'. He continued, stating that:

> in conferring the power to interfere with individual liberty by providing for detention pending removal as soon as reasonably practicable, must be taken to have intended that the power to detain be limited to the period during which the minister is taking reasonable steps to secure the removal and be exercisable only for so long as removal is reasonably practicable.

This limitation of reasonableness that Merkel J held to be found in s196 and s198 led to the conclusion that 'if a court is satisfied that the Minister is not taking "all reasonable steps" or that removal is "not reasonably practicable" the implicit limitations on the detention power will not have been complied with or met and continued detention of the removee will no longer be authorised by the Act'.

In the course of his judgement, Merkel J referred to several decisions of foreign courts that he believed to be analogous situations to the case before him. He examined the English case of *R v Governor of Durham Prison; Ex parte Hardial Singh*[16] which was an application for release from detention pending deportation. In that case, Woolf J stated that, if the implicit limitations on the power are not complied with, it is appropriate for a writ of habeas corpus to issue or for an order to be made for the detainee's release. Merkel J went on to explain that the principles stated by Woolf J in *Hardial Singh* were subsequently applied by the courts in Hong Kong and were approved by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*[17] (*Lam*). *Lam* concerned the operation of the *Immigration Ordinance (Hong Kong)*, which conferred a power to detain pending removal from Hong Kong. The Court held that the burden lay on the executive to prove to the Court on the balance of probabilities the precedent or jurisdictional facts necessary to warrant the conclusion that the detention complied with the statutory limitations on the power. The

Hardial Singh principles were also applied in *Re Chung Tu Quan & Ors*[18] in Hong Kong. Finally, Merkel J looked at the US Supreme Court judgment in *Zadvydas v Davis*[19] in which the court held that deportable aliens held for removal must be released if a reviewing court finds no significant likelihood of removal in the reasonably foreseeable future.

Having examined cases which he considered to be similar from overseas courts, and considering the statutory construction of ss196 and 198, Merkel J's final order was that the detainee be released on conditions that required him subsequently to comply with 'arrangements made for his removal from Australia in accordance with s198 of the Act'.

This is an important decision. It indicates a willingness on the part of the judiciary to argue that there are limitations on the executive power to detain, and to declare that this power cannot go unrestrained. Mary Crock,[20] argues that the decision in *Al Masri* has 'begun a trend of sorts in the Federal Court. Although the prevailing jurisprudence in that court on the effect of the privative clause has induced a mood of judicial deference in the review process, there have been other occasions where single judges have ordered the release of asylum seekers from detention'[21]. However, not all Federal Court judges are convinced that the executive has overstepped the power conferred on it by the Act. Merkel J's decision has invoked both criticism and support from within the Federal Court. Inevitably, the *Al Masri* case was quickly followed by further appeals on the basis that detention was unlawful in the circumstances. Following Merkel J's decision, a few days after his release from detention, Mr Al Masri was removed from Australia[22]. Despite Mr Al Masri's removal, the Minister lodged an appeal to the Full Federal Court. The appeal was heard on 2 October 2002 and the Full Federal Court judgement was delivered on 15 April 2003. In the meantime, the subsequent cases that were heard demonstrate the uncertainty and the difference in views among judges in the Federal Court in relation to this issue.

Subsequent cases

The Federal Court has been split over the ruling in *Al Masri.* In *Al Khafaji v MIMA*[23] (*Al Khafaji*), Mansfield J had the first opportunity to support the *Al Masri* decision or to declare it wrong. Mr Al Khafaji's application for a protection visa was refused by the primary decision-maker and the Refugee Review Tribunal. Mr Al Khafaji asked several times to be returned to Syria. However, he had no travel documents and the Australian government encountered difficulties in arranging his return. Consequently, he remained in detention indefinitely and sought a writ of habeas corpus declaring this unlawful. The judge stated that the initial detention of the applicant was lawful under s189 of the Act, and the applicant agreed.

The applicant argued, following the reasoning in *Al Masri*, that 'the detention power in ss196 and 198 is impliedly limited so that he may be detained under those provisions only for as long as:

- the respondent is taking all reasonable steps to secure the removal of the applicant from Australia as soon as is reasonably practicable; and

- the removal of the applicant from Australia is "reasonably practicable", in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future'.

The Minister argued that the decision in *Al Masri* was plainly wrong and should therefore not be followed by Mansfield J. He claimed that the circumstances in which a person is to be released from 'immigration detention' are exhaustively defined by ss 191 and 196(1) and (2) of the Act. The statutory regime under the Act involves both the deprivation of liberty of the person and the assumption of control over the person. He pointed out that the obligation to detain contained in ss 189 and 196 of the Act is imposed in unqualified terms and does not

allow for the possibility of lawful release from detention except in the circumstances strictly defined by ss 191 and 196(1) and (2) of the Act.

The Minister also argued that the word 'reasonably' in relation to the word 'practicable' indicates the obligation is to be measured against all the circumstances, including the fact that removal often involves complex and sensitive discussions at executive level between governments having regard to circumstances in the country proposed for return. The focus, he argued, is upon whether the removal is reasonably practicable, rather than upon whether it is or may be achievable within some measurable time frame.

Mansfield J agreed with Merkel J's decision and found that 'the removal of the applicant from Australia is not 'reasonably practicable', because there is not at present any real prospect of the applicant being removed from Australia in the reasonably foreseeable future'. Mansfield J ordered that Mr Al Khafaji be released from detention under the powers conferred on him by s39 of the Judiciary Act. He also ordered him to report to his solicitor's office directly after his release and inform them of his new address. He was ordered to report to the Department daily, and to comply with any orders from the Australian Government concerning his removal from Australia.

This decision can be contrasted with *Daniel v MIMIA*[24], in which Whitlam J strongly disagreed with the judgment of Merkel J in *Al Masri*. Mr Daniel's application for a protection visa was refused by the primary decision-maker and the Refugee Review Tribunal. Mr Daniel was in immigration detention and requested release on the basis that 'there is no reasonable likelihood of removal of the applicant to Iraq within a reasonable time', following the decision of Merkel J in *Al Masri.*

Whitlam J analysed Merkel J's use of foreign cases in some detail, and concluded that the legislation in question in these cases was not analogous to the sections in the Act. Whitlam J said that he considered that 'Merkel J's constructs rest on a flawed analysis of these cases'. He agreed with the criticism of Beaumont and French JJ in *WAIS v MIMIA*[25] and *NAES v MIMIA*[26] and he found that the 'decision in *Al Masri* is plainly wrong'. Accordingly, he was not bound to follow Merkel J's decision and he ruled that Mr Daniel could not be released from detention. Whitlam J held that ss 196 and 198 did not impose an implied limitation on the Minister's power to detain and as such, Mr Daniel's detention was lawful and not subject to interference from the courts.

In *NAKG of 2002 v MIMA*[27] and *Applicant WAIA of 2002 v MIMIA*[28], Jacobsen and Finkelstein JJ respectively agreed with the decision in *Al Masri* and ordered the release of the applicants from detention on the basis that there was an implied limitation on the Minister's power to detain, if removal was not carried out within a reasonable period of time. On the other hand, in *WAIS v MIMIA*[29] and *NAES v MIMIA*[30], French and Beaumont JJ respectively held that the decision in *Al Masri* was wrong and ss196 and 198 did not impose a limitation on the Minister's power to detain.

The Full Federal Court decision on *Al Masri*

The Minister appealed the decision in *Al Masri.* Although Mr Al Masri departed Australia soon after the decision of the primary judge was handed down and the senior counsel for Mr Al Masri therefore asked for the appeal to be dismissed, the Court found that there was a very significant legal issue to be tried and that it would be 'wrong and unfair to the Minister and his officers to allow the order for release to stand if it were in fact based on an erroneous view of the law'[31]. Black CJ, Sundberg and Weinberg JJ heard the appeal and unanimously dismissed it. They stated that the primary issue in the appeal is:

> whether the power and duty of the appellant Minister to detain an unlawful non-citizen who has no entitlement to a visa but who has asked to be removed from Australia continues during a time when there is no real likelihood or prospect of that person's removal in the reasonably foreseeable future…The question is whether the Act authorises and requires the indefinite and possibly even permanent administrative detention of such a person[32]

The Minister argued that the trial judge's construction of the Act was not supported by the language of the Act or the context of the provisions regarding detention. The 'duty to remove a person as soon as reasonably practicable [s198] imposed a duty to seek to remove but that the authority to detain was unaffected by the prospects of a successful removal'[33]. He argued this construction was consistent with the Constitution and said s198(1) was 'reasonably appropriate and adapted' for the purposes of migration processing. It was the 'purpose of detention, and not its duration, that was determinative of validity'[34].

The arguments for Mr Al Masri supported the trial judge's construction of ss189, 196 and 198 of the Act. If s196 was construed to permit indefinite detention, it would be invalid of one or more of 4 grounds:

1) It would be contrary to the exclusive vesting of the judicial power of the Commonwealth in the courts under chapter III of the Constitution; or

2) It would not be supported by a head of power under s51; or

3) It would be an impermissible ouster clause purporting to prevent the court from reviewing detention; or

4) It would be a breach of s75(v) of the Constitution as a limitation on the courts to grant orders in the nature of habeas corpus.[35]

The Human Rights and Equal Opportunity Commission (HREOC) intervened by leave in the case. It submitted that 'constitutional limitations and principles of statutory construction all supported the implied temporal limitation on the power to detain pursuant to s196 found by the trial judge'[36]. HREOC also submitted that the trial judge's construction was supported by general principles of statutory construction found in international law, and that the statute should be interpreted in a manner consistent with Australia's obligations under international treaties. Therefore, the International Covenant on Civil and Political rights needed to be considered. Under common law principles of statutory interpretation, HREOC submitted that there must be clear words before a statute would be construed as removing a fundamental right or freedom.

The judges began by reasserting the proposition that the current detention scheme is lawful under the constitution and outlined the position in Australia, following *Lim* and other significant cases concerning detention. They held that 'detention depends upon the status of the person, and in that sense the detention regime is clearly administrative, mandatory and indefinite'[37].

However, despite acknowledging that the current detention scheme is legal, the judges held that constitutional considerations pointed 'very strongly to the need and foundation for a limitation such as the second found by the primary judge'. While the judges examined the constitutional position of ss189 and 196 in some detail, they did not decide the issue on a constitutional basis, as they considered the central issue in the appeal 'could be determined by the application of well-established principles of statutory construction concerning fundamental rights and freedoms'. They commenced with the decision *Coco v The Queen*[38] and the oft-cited passage that 'courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly

manifested by unmistakable and unambiguous language'. They stated that the 'right to personal liberty is among the most fundamental of all common law rights'[39] and that the 'common law's concern for the liberty of individuals extends to those who are within Australia unlawfully'[40]. They concluded that the current detention scheme does not intend in clear language that a person should be kept in detention indefinitely when there is no likelihood of removal. The language of neither s196 nor s198 (1) suggested that the parliament intended to curtail the fundamental right of personal liberty for an unlimited duration.

The judges examined the international cases that Merkel J had based his decision on in detail and conclude that Merkel J had been correct in using the cases as analogous decisions. They also concluded that the cases gave more weight to their interpretation that the language of the Act does not intend to curtail completely the right to liberty. In addition, they examined Australia's obligations under international law. They held that it was a 'compelling conclusion that detention [of a non-citizen with no likelihood of removal] would be arbitrary detention within the meaning of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), and stated that they were 'therefore fortified in their conclusion that s196(1) should be read subject to an implied limitation'[41].

The judges concluded that although the reasoning of Merkel J was not entirely correct, they agreed with the conclusion that the current detention scheme clearly does not allow for indefinite detention. They outlined the cases that had subsequently disagreed with Merkel J's decision and stated that they 'do not agree with these criticisms'. The judges also disagreed with the argument that the writ of mandamus to compel MIMIA to remove Mr Al Masri was a more appropriate form of relief. The judges held that the writ of habeas corpus was an appropriate remedy.

In dismissing the appeal, the judges emphasised that the implied limitation on detention, would be unlikely to have a frequent operation. They held that the 'limitation is not encountered merely by length of detention and it is not grounded upon an assessment of the reasonableness of the duration of the detention'. A decision to rely on the limitation 'should not be taken lightly'. Furthermore, releasing a person from detention does not mean that the person has acquired rights in Australia. They are still subject to the Migration Act and could be detained again as soon as the possibility of removal in the foreseeable future became real. In this way, while clearly stating that the implied limitation exists, the judges made it clear that it is not a decision to open the doors of detention.

Following the decision of the Full Court, the Minister applied for special leave to have the case decided in the High Court. The special leave application was held in conjunction with requests to remove two cases on similar issues to the High Court. The High Court granted permission for the two cases (*Al Khafaji* and *SHDB*[42]) to be heard but declined special leave for *Al Masri*. The decision not to hear *Al Masri* as based mainly on the fact that the other two cases raised the same issues and therefore any ruling given on *Al Khafaji* and *SHDB* would deal with the issues. In addition, Mr Al Masri had returned home, whereas the applicants in *Al Khafaji* and *SHDB* were still in Australia.

The Minister has also introduced the *Migration Amendment (Duration of Detention) Bill* 2003 which deals in part with the issues raised in *Al Masri*. The Explanatory Memorandum states that the aim of these amendments is to 'put it beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court finally determines that:

- The detention is unlawful; or
- He or she is not an unlawful non-citizen.'

At the time of writing, the Bill had not yet been passed in the Senate. The content of this Bill is worth a separate discussion and will therefore not be examined in any detail here; suffice

to say that its mere introduction adds to complexity of the current relationship between the judiciary and the executive in this area.

The significance of the *Al Masri* cases

These cases are very important both from an administrative law perspective and a human rights perspective. They highlight the benefits of an administrative law system in which the actions of the executive are not taken for granted but instead are thoroughly monitored and held accountable. A similar question regarding the executive power to detain under the Constitution arose from the circumstances surrounding the 'Tampa' incident in 2001. Armed Australian Service troops boarded a Norwegian vessel containing rescued asylum seekers heading for Christmas Island. A group of lawyers in Melbourne brought proceedings on behalf of the detainees on board the MV Tampa, requesting the writ of habeas corpus and arguing that the detention was unlawful[43]. One issue that arose was whether or not the executive power in s61 supported the government's actions. The judge at first instance, North J, held the executive was acting unlawfully and beyond its power and held that the writ of habeas corpus should be issued. On appeal, the court split 2-1, with the Chief Justice agreeing with the primary decision and Beaumont and French JJ arguing that the prerogative power of s61 did allow the executive power to detain the asylum seekers on board the Tampa. The government won this issue in court, but it is significant that overall, the Federal Court was evenly split 2-2[44]. In addition, it is worth noting that Beaumont and French JJ upheld the executive's power to detain in this case and these same two judges, when faced with *Al Masri* type decisions, also dismissed the appeals, stating that the executive's power to detain was not limited in those circumstances.

The *Al Masri* cases, like the Tampa incident, highlight the extent to which the executive is prepared to argue that its power to detain is subject to limitations. In issuing the writ of habeas corpus and limiting the executive's power to detain non-citizens, judges have exerted their role as a counter-balance to executive power under the system of separation of powers. The problem for this system in Australia currently, however, is the extent to which this type of accountability is becoming obsolete. According to Pringle and Thompson, the Tampa affair marked a 'strengthening of the executive at the expense of the legislature, judiciary – and the separation of powers'[45]. They go on to argue that the High Court in the 1990s was typified by decisions that proved the court to be 'defending separation of powers and a defender of liberal democracy against executive excess'. Cases relating to representative government, individual rights, freedom of expression and native title were heralded as keeping the executive and the legislature accountable to the rule of law. However, the court of the 21st century has not been quite so willing to defend liberal democracy. Judgments like that of Merkel J in *Al Masri,* Black CJ, Sundberg and Weinberg JJ in the appeal and North J in the first Tampa decision[46] indicate that some members of the judiciary continue to see it as their role to keep the executive accountable. However, the counter judgments following *Al Masri* and in the Full Court decision of the Tampa case[47] demonstrate that there is an equally strong tendency to submit to parliamentary supremacy.

It has been argued by several scholars that, in the area of migration law in particular, judges are reluctant to restrain the executive. Dr Simon Evans questions the extent to which the Migration Act has abrogated the executive power in s61 of the Constitution, insisting that s61 is not meant to be unlimited, allowing the executive to do whatever it thinks is in the 'national interest'[48]. If the rule of law is to be a meaningful concept, he argues, then s61 must also be constrained by the rule of law. North and Decle also argue that the area of migration law in particular is one in which the courts have been reluctant to rein in the decisions of the executive and the legislature. They argue that as well as the importance of the separation of powers, the significance of human rights and international treaties should not be underestimated. Although this discussion has not focused on international law, it is important to note that the reasonableness of periods of time spent in detention raises very important

questions in relation to our international obligations. On the other hand, according to McMillan, it is not the role of the courts to 'usurp the legislative and executive roles in formulating and articulating public policy'[49]. If, as the courts have held time and time again, the executive's right to detain is lawful and the power to do so stems directly from the Constitution, then it is not the court's role to imply limitations on that power from clever constructions of the text of the Migration Act. There are no simple solutions to the questions that these issues raise, and the *Al Masri* cases are yet another example of the difficulty faced in maintaining the separation of powers.

Conclusion

This discussion has aimed to provide an overview of the current situation in Australia in regards to certain limitations on immigration detention. Detention itself has been held lawful by Australian courts, but the recent *Al Masri* cases have held that there is an implied limit to the executive's power to detain using statutory construction of the text. On the other hand, there were several judges in the Federal Court who argued that there is no implied limitation on the power to detain. These cases are therefore important not only because they encourage us to consider the scope of the executive's power in relation to immigration issues, but also because of what they reveal about the current climate in the Federal Court. The Full Court's decision in *Al Masri* comes at a significant time in the history of the relationship between the courts and the executive in Australia, particularly in the area of migration law. While a High Court decision on *Al Khafaji* and *SHDB* will be significant in relation to the legal issue of implied limitation on detention, it will not resolve the tension between the Courts and the executive in regards to detention and migration law.

Endnotes

1 Mary Crock and Ben Saul *Future Seekers, Refugees and the Law* NSW, The Federation Press (2002) at 76.
2 Justice AM North and Peace Decle 'Courts and Immigration detention: 'Once a Jolly Swagman camped by a Billabong' (2002) 10 *Aust Jo of Admin Law Vol* 1 at 18 (North and Decle).
3 Immigration Fact Sheet 86 – Immigration Detention.
4 Mary Crock and Ben Saul *Future Seekers, Refugees and the Law* NSW, The Federation Press (2002) at 80.
5 S474 Migration Act 1958.
6 See, for example, *Plaintiff S157 v Commonwealth* (2003) 195 ALR 598.
7 (1992) 176 CLR 1.
8 *Al Masri v MIMIA* (2002) 192 ALR 609.
9 S54R is no longer in the same form in the Migration Act; it has been replaced with s196(3).
10 North and Decle at 18.
11 [2002] FCA 907.
12 Per Beaumont J at 9-12.
13 (2002) 192 ALR 609.
14 (2003) 197 ALR 241.
15 North and Decle at 23.
16 [1984] 1 WLR 704.
17 [1997] AC 97.
18 [1995] 1 HKC 566.
19 533 US 678 (2001).
20 Mary Crock, 'You have to be stronger than razor wire – Legal issues relating to the detention of refugees and asylum seekers' (2002) 10 *Aust Jo of Admin Law* 33.
21 *Ibid* p55.
22 *Ibid.*
23 [2002] FCA 139.
24 [2003] FCA 20.
25 [2002] FCA 1625.
26 [2003] FCA 2.
27 [2002] FCA 997.
28 [2002] FCA 1621.
29 [2002] FCA 1625.

30 [2003] FCA 2.
31 *MIMIA v Al Masri* (2003) 197 ALR 241.
32 *Ibid* at paragraph 2.
33 *Ibid* at paragraph 38.
34 *Ibid* at paragraph 40.
35 *Ibid* at paragraph 44.
36 *Ibid* at paragraph 45.
37 *Ibid* at paragraph 31.
38 (1994) 179 CLR 427.
39 *MIMIA v Al Masri* at paragraph 86; cf *VFAD and Williams v The Queen* (1986) 161 CLR 278.
40 *Ibid* at paragraph 89; cf *Kioa v West* (1985) 159 CLR 550.
41 *Ibid* at paragraphs 153-155.
42 *SHDB v Godwin & Ors* [2003] FCA 300.
43 North and Decle at 19.
44 *Ibid* p20
45 Helen Pringle & Claire Thompson ' The Tampa Affair and the Role of the Australian Parliament' (2002) 13 *Pub L Rev* 128.
46 *Victorian Council for Civil Liberties v MIMA* (2001) 110 FCR 452.
47 *Ruddock v Vadarlis* (2001) 110 FCR 491.
48 Simon Evans 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Pub L Rev* 94.
49 John McMillan 'Justiciability of the Government's Tampa Actions' (2002) 13 *Pub L Rev* 89.

PRIVATIVE CLAUSES AND THE THEORETICAL UNDERPINNINGS OF ADMINISTRATIVE LAW IN AUSTRALIA

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Introduction

To speak of the merits of a privative clause is, it might be said, to reveal one's theory of the state. This has been evident in the debate generated by the privative clause recently introduced into the *Migration Act 1958* (Cth).[1] In this paper I will attempt to articulate some of the administrative law principles that underlie this debate. The Migration Act's privative clause is an expression of the belief that in the migration jurisdiction administrative efficiency and fairness are best served by leaving the executive's decision-making undisturbed by judicial review. This provision represents the latest and most dramatic attempt by successive Australian governments to diminish the judiciary's influence on migration decisions. I will argue that generally speaking privative clauses lack a secure jurisprudential foundation. I will further argue that in attempting to achieve certain policy objectives, the Migration Act's privative clause unbalances the relationship between judicial and merits review, and undermines the rule of law. My conclusion is that the provision does not strike a reasonable balance between the competitive priorities that constitute administrative justice.

Judicial review and privative clauses

A privative clause is a provision within an Act that restricts the scope of judicial review for decisions made pursuant to the Act. Privative clauses achieve their effect through a variety of methods and to differing degrees.[2] Having as their object the limitation of courts' jurisdiction, privative clauses throw into sharp relief questions about the purpose of judicial review. Judicial review's purpose, from a traditional perspective, is to ensure that those upon whom Parliament has conferred power act according to and not beyond that power.[3] From this perspective, the courts, in assessing whether the administrative agency has acted *ultra vires*,[4] ask whether the *intention* of the legislature has been adhered to.[5] Paul Craig has pointed out that the traditional concept of judicial review sits uncomfortably with the courts' history of reading down privative clauses: rather than, he said, the courts applying the legislative intent explicit in the language of the provision, they read certain 'judicially developed principles' into the legislation.[6] However, he further argues, the traditional mode does not acknowledge this activity, but rather assumes the judiciary is complying with 'implied' legislative intent.[7]

In Australia, *R v Hickman*; *Ex Parte Fox and Clinton*[8] remains the authority regarding the interpretation of privative clauses. This judgement has been repeatedly applied by the High Court,[9] and, as will be discussed, its language informed the drafting of the migration privative clause. The *Hickman* decision and subsequent cases therefore warrant some attention. I will argue that these cases, read in light of Craig's critique of the traditional model of judicial review, adduce legislative intent in their reasoning, but implicitly employ principles external to intentions attributable to the legislature. Moreover, the cases demonstrate some of the

shortcomings of judicial reasoning that suppress substantive elements in the judgement. The judgement's shortcomings arise in relation to administrative law principles closely associated with the 'rule of law': that reasoning in a judgement should be based on articulated premises, and that laws should be open, general and predictable.[10] The law *Hickman* produced demonstrably does not fulfil these standards,[11] and the ways in which it does not are important, for present purposes, to set out.

Privative clauses and the rule of law

Articulation of the conceptual basis of the decision

In *Hickman*, Dixon J's 'strict' legalism, was, as he himself pointed out, confronted by a case which turned on the interpretation of a non-technical term.[12] He therefore conceded that contextual factors were crucial in deciding the case.[13] However, the formulation he produced, in the process of assuming the status of authority, has been decontextualised and reified. In later judgements, the principle is recited rather than explained.[14] It is unclear how what has come to be known as the '*Hickman* principle'[15] was derivable from a purported 'reconciliation' of the overall Act governing the decision-maker and the privative clause.[16] In fact the judgement seems to be a product of pragmatism and an unstated concept of fairness – the principle appeared to produce what was judged to be a 'reasonable' outcome in the decision-making context and on the existing facts. Possibly for this reason, it is difficult to characterise the *Hickman* principle theoretically: it asserts a belief in parliamentary sovereignty and assumes individual rights can be protected by the processes of representative democracy,[17] but in a most unDiceyan way insulates executive action from judicial review. The specific elements of the *Hickman* principle are also untheorised. The assessment of which kinds of legal error are not protected without express legislative intent, and which can be shielded by a privative clause assumes a hierarchy of lawfulness, the most fundamental forms of which are not readily abrogated. There is no doctrinal basis adverted to, however, in *Hickman* or subsequent cases, that suggests how such a hierarchy is formulated – why for example bona fides is indispensable, but natural justice is not. To make this point another way, there is no doctrine adduced that defines limits to the power the privative clause may confer. Without a statement of such doctrine, one might equally argue that within constitutional limits a privative clause should be read to override all inconsistent earlier provisions.[18]

Open and general laws

A privative clause of the form found in *Hickman* results in decisions that would otherwise be clearly unlawful, being declared lawful and unchallengeable. The principles that are generally applicable to administrative decisions, and that are associated with procedural fairness and reasonableness,[19] can be violated by the decision-maker, but the decision nonetheless stands. Privative clauses therefore result in a reduction in the generality with which fundamental administrative law principles are applied. They also produce less open decisions insofar as a 'valid' decision is illogical or unreasonable, based on unacknowledged evidence or reasoning, or not referable to clear laws.

Transparency of the law pertaining to privative clauses

A privative clause causes the statute governing the decision-maker to mean something other than that which it would otherwise mean. The statute no longer ensures administrative legality other than that which the privative clause preserves. A privative clause of the *Hickman* variety is on its face unconstitutional because it appears to deny the applicant access to the constitutional writs under s75(v) of the Constitution. The High Court's approach to this has been to read the clause down so that it is not taken to prohibit recourse

to these writs.[20] Neither therefore does the privative clause itself mean that which its plain words indicate.

Promotion of predictability in the laws' application

Law that is not transparent and whose effect is the result of an Act's partial nullification by one of its provisions is not likely to produce predictable outcomes.[21] The *Hickman* principle has not been straightforward to apply.[22] The precise breadth of the protection it offers otherwise invalid decisions remains unclear,[23] and the designation of its terms such as 'a bona fide attempt to exercise power',[24] and 'inviolable limits'[25] is vague.

Central administrative law vales are interrelated.[26] A derogation in the rule of law of the kind considered here reduces the accountability of administrative decisions because they are not referable to clear laws. It also reduces the ability of individuals to participate in decisions affecting them, because opaque and unpredictable laws are a poor guide to remedial action. There are sound rule of law related grounds for the legislature to avoid recourse to privative clauses. There has been legislation, most notably the ADJR Act, that has repealed privative clauses en masse.[27] However their ongoing existence suggests that there may be cogent reasons why they are resorted to, a possibility explored below.

Restrictions on judicial review within the migration jurisdiction

Opportunities for Federal Court review of administrative decisions in the migration jurisdiction have been progressively restricted. An account of the range of measures enacted is beyond this essay's scope. What will be briefly considered here are some examples of judicial responses to these restrictions. The *Migration Reform Act 1992* introduced a Part 8 into the *Migration Act 1958* which removed a breach of the rules of natural justice, and various non-jurisdictional errors of law[28] as grounds for judicial review of the migration tribunals' decisions.[29] While Part 8 did not contain a *Hickman* privative clause, relevantly to the validity and construction of the provisions, *Hickman* and later cases had established limits to the extent judicial review could be curtailed.[30] In a judgement that demonstrated the narrowness and indeterminacy of these limits, a divided High Court in *Abebe v The Commonwealth*[31] found Part 8 to be wholly valid.[32]

The validity of Part 8 established, the High Court delivered a series of judgements interpreting the extent to which Part 8's provisions restricted the grounds for review, and these restrictions' implications for the High Court's original jurisdiction. I will consider several of these cases here.[33]

During the lifetime of the former Part 8, the High Court repeatedly drew attention to these provisions' tendency to cause applicants to apply for a constitutional writ under s 75(v) of the Constitution on the basis of grounds that were, as a consequence of Part 8, denied if review was sought within the Federal Court.[34] Such a case is *Re RRT; Ex Parte Aala*[35] in which the applicant sought a writ of prohibition on the grounds that the Refugee Review Tribunal had denied him natural justice. The aspect of the case relevant to our concerns is that it illustrates how there is a loss of coherence in administrative law principles underpinning judicial review when the grounds for judicial review are severely restricted. The court held that a denial of natural justice by an 'officer of the Commonwealth' results in a decision made in excess of jurisdiction, an error of law which provides grounds for the issue of a constitutional writ.[36] Such a constitutional guarantee has been available since the commencement of the Constitution[37] where a breach of natural justice occurs, whether this be considered a breach of a common law duty or an implication of the empowering statute.[38] Their Honours make it very clear they regard leaving a breach of natural justice undisturbed as fundamentally undermining the integrity of administrative justice.[39] The import of this judgement in relation to statutory restrictions on judicial review is that it affirms procedural

fairness as a fundamental requirement of administrative justice, and by implication, suggests that statutory regimes that remove procedural fairness as a ground for review severely hobble a court's capacity to remedy injustice.

This point, drawn here in relation to procedural fairness, can be stated more broadly. In *Durairajasingham*,[40] another case heard under the High Court's original jurisdiction, McHugh J held that a constitutional writ can be granted when a tribunal makes a jurisdictional error. He stated[41] that jurisdictional error should be defined according to the decision in *Craig v South Australia*.[42] The breadth of this definition meant that the range of errors traditionally associated with broad *ultra vires* was made available as grounds for review. This decision highlighted the gulf between what the High Court regarded as unlawful administrative conduct, and what Part 8 permitted the Federal Court to find unlawful in a decision by one of the migration tribunals.

While the High Court's decisions within its original jurisdiction affirmed the availability of redress for breaches of administrative law that the former Part 8 deemed unreviewable by the Federal Court, its approach to Part 8 itself has been to accept as valid the breadth of the restrictions imposed on judicial review. This has entailed resolving tensions between provisions within the Migration Act that establish standards of administrative justice and Part 8 which rendered such standards largely unenforceable. Consequently, provisions providing that the RRT must act according to substantive justice,[43] that it possesses inquisitorial powers of investigation,[44] and that it must make findings on material questions of fact[45] were found in their breach or non-application, not to establish grounds for review. The device employed to achieve this 'resolution' was to cast these provisions as non-obligatory[46] or subject to how the tribunal saw fit to define them.[47] There is a formalism in this approach to the former Part 8 that does not accord with a substantive concept of the rule of law. However, in one of its last pre-privative clause migration decisions, the case of *Minister for Immigration and Multicultural Affairs v Yusuf*,[48] the High Court partially broke with its deference to Part 8. That decision endorsed the definition of jurisdictional error found in *Craig*,[49] and held that elements of such an error are grounds for review by the Federal Court in spite of the exclusion provisions.[50]

Even from this briefest of overviews of the courts' responses to restrictions on judicial review, it is evident that there is the appearance of a haphazard course being steered between affirming statutory attempts to restrict review, and finding new avenues to circumvent the restrictions. Possibly this pattern has reflected a healthy interplay between the legislature and the judiciary. Another interpretation is, however, that judicial review has produced such eclectic results because it has proceeded to too great an extent on the basis of divining legislative intent, and with too little reference to an underlying body of administrative principles.[51] This at least is a view consistent with Craig and Dyzenhaus's argument that the judiciary needs to articulate what constitutes the set of common law and constitutional principles that in reality inform its judgements.[52]

The *Migration Act* privative clause: its relationship with principles of administrative law

The Migration Act*'s privative clause*

The amendments to the judicial review provisions in the Migration Act repeal the former Part 8 and substitute a privative clause regime that severely restricts access to the judicial review of migration decisions The new Part 8's definition of a 'privative clause decision' adopts words virtually identical to the provision considered in *Hickman*.[53] The provision, therefore, on its face excludes judicial review of any decisions deemed to be covered by the privative clause.[54] The privative clause covers all decisions made under the Act, including primary decisions and decisions by the tribunals, with exceptions only in the area of matters

unconnected to the granting of visas.[55] The grounds for judicial review at the High Court, Federal Court and Federal Magistrates Court are, or at least are designed to be, identical.[56] The government's stated expectation is that in adopting the language of the *Hickman* provision, the courts will interpret the privative clause according to the *Hickman* principle.[57]

A proposition has been put that the migration privative clause expands the decision-maker's powers rather than restricting judicial review in the manner of the old Part 8.[58] This distinction, in view of what has just been argued, and certainly from a substantive rule of law perspective is, however, quite artificial.[59] It is clear that the privative clause introduces a radical regime of exclusion of judicial review, apparently giving 'legislative effect', in the Immigration Minister's words, 'to the government's longstanding commitment to introduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances'.[60] The provisions embrace the *Hickman* approach to ousting judicial review, and therefore are attended by the same range of tensions in relation to administrative law principles and the rule of law that have been identified above. I will not reiterate these here, other than to suggest that such tensions, it can be persuasively argued, take on a particularly acute form in the migration jurisdiction. The *particular* effect of the restriction of judicial review of migration decisions must be considered in relation to the position of the applicant, the nature and role of the migration tribunals, and the human rights and international context of migration law. Before turning to these considerations, I wish to look, in brief overview, at the Federal Court's initial responses to reviews under the new Part 8.

Federal Court responses to the Migration Act privative clause[61]

In a number of ways the Federal Court's interpretation of s 474 of the *Migration Act 1958* has been illustrative of the criticisms directed at privative clauses in the discussion thus far. Section 474 has been accepted as constitutionally valid,[62] but there has been a schism in the court's understanding of the legal errors that the provision protects. The differing interpretation of the section's scope has been due to the adoption of two opposing approaches to how the *Hickman* test is applied,[63] to different views on when a jurisdictional error arises under the privative clause regime,[64] and to differences in the understanding of the three *Hickman* conditions.[65] Many of the decisions, in keeping with the government's expectation, confirm that the privative clause protects (and therefore in effect sanctions) legal errors[66] such as denial of natural justice,[67] exercise of power without reference to legislative criteria,[68] and the misconstruing of the applicant's claims.[69] The provision therefore clearly brings upon itself all the rule of law concerns that have been discussed above. Furthermore, the divisions within the Federal Court over the provision's construction again demonstrate indeterminacy and unpredictability in the operation of the *Hickman* principle. However, perhaps the most striking aspect of these judgements, in light of this paper's concerns, is the recourse to the legislature's intent to justify how the provision is read.[70] What is often happening here, very much in line with Paul Craig's propositions, is that Parliament is imputed with intentions that are in reality disguised judicial principles. Underlying this approach to judicial review appears to be an assumption that an overt assertion of administrative rights would amount to an affront to parliamentary sovereignty. Alternatively perhaps, considering the limited constitutional protection of individual rights,[71] together with the doctrine that holds that *explicit* legislative intent must override common law or statutory rights,[72] it may be that ascribing the source of the right to Parliament provides a safer basis for its assertion. Whether the emphasis on legislative intent is a consequence of the continuation of a Diceyan concept of parliamentary sovereignty or the dearth of entrenched individual rights, the predictability and clarity of the courts' judgements suffer as a result.

Performing merits review under a privative clause regime: implications for administrative justice

Arguments in support of the privative clause

Paul Craig has argued that, depending on the decision-making context and the interests at stake, administrative law principles should be and in fact are applied with varying 'intensity' by the courts.[73] The current government has argued that the migration jurisdiction is a context where judicial review should be constrained. The migration review tribunals were established to provide fair, expeditious and economical merits review of primary decisions.[74] Particularly in relation to the RRT, the government has claimed that judicial review has thwarted this objective in a number of ways.[75] Firstly, a relatively high proportion of RRT determinations are judicially reviewed which delays final determination, adds to costs, and, it is claimed, undermines the tribunal's legitimacy as an authoritative review body.[76] Secondly, the Federal Court, it is argued, has at times usurped the tribunals' merits review role, under the guise of applying an expansive notion of jurisdictional error, and has thereby ignored the legislature's clear intent to restrict the grounds for judicial review.[77] The court has consequently involved itself in matters going to the weighing of evidence and context which the tribunal is better equipped to assess. Consistent with this view, John McMillan has argued that the courts' failure to refrain from entering into nonjudicial areas of review has led to 'the imposition of legal cultural paradigms on executive processes'.[78] Thirdly, it is argued that judicial review has added little to the fairness of decisions.[79]

Similar arguments have been employed to justify privative clauses in other jurisdictions, and it is worth enumerating these in order to see whether they lend support for the migration privative clause.

(i) In some contexts tribunals' inquisitorial non-curial approach is better adapted to achieve a fair decision than are the courts' methods.[80]

(ii) In jurisdictions where cases typically turn on the weighing of complex evidence, a tribunal's specialist knowledge warrants deference from the courts.[81]

(iii) Tribunals are better placed to interpret ambiguous legislation with a view to its administrative consequences and in consideration of policy objectives.[82]

(iv) There are contexts in which the benefits of judicial review do not outweigh the delays, costs and frustrations to government policy it introduces.[83]

While these points taken together with the government's arguments require serious consideration,[84] they do not, in my view, in any way establish a persuasive case for the imposition of a privative clause. Most indeed are arguments for a credible merits review system, which is, I will contend, undermined by the privative clause. It needs to be stated, firstly, that a natural corollary of the separation of powers doctrine is a level of tension between the branches of government. The executive approaches individual decisions from the standpoint of government policy, public interest, economies of scale, and distributive justice. It tends to emphasise outcome over process.[85] A merits review tribunal must arrive at the correct or preferable decision,[86] and brings to its deliberations both the benefit of familiarity with the executive's functions, but also the executive's influence.[87] The judiciary must necessarily focus on the legality of the individual case.[88] Role tensions between the executive and judiciary are inevitable and only undesirable if they debilitate the functioning of one or other branch. If the proportion of RRT decisions judicially reviewed was undermining a government policy objective, and creating excessive workloads for the courts, the solution would not seem to be to undermine the judiciary's role. It has been argued convincingly that even if it is accepted that the proportion of RRT decisions reviewed has been too high,[89] this

phenomenon is a reflection of broader systemic problems not soluble by simply suppressing recourse to the courts,[90] and there are other ways of addressing the problem without compromising the rule of law.[91] I will not reiterate those arguments here, but will now direct the discussion to the ways in which the privative clause compromises the integrity of the merits review system.

Protecting the integrity of merits review

A merits review body that fails to enforce administrative law principles in the face of executive pressure loses any semblance of independence and has been reabsorbed into the bureaucracy from which it sprang. Judicial review of the tribunals' decisions affirms the tribunals' capacity to deliver decisions lawfully. Without judicial review being *in principle* available for every administrative decision, the decisions do not have the mantle of legality bestowed upon them.[92] A privative clause potentially renders many unfair decisions unreviewable. If there is no assurance that the tribunal has arrived at its decision through observing well established standards of administrative justice – those of procedural fairness, reasonableness, relevance, and acting within a clearly defined jurisdiction[93] - then the decision cannot claim to embody substantive justice. The decision has not had the potential of being subject to the scrutiny Chief Justice John Doyle associated with judicial review: 'wide ranging in terms of lawfulness, although it does not go to the merits'.[94]

Merits review and refugee determination – a special case?

The migration privative clause legislation transplanted a provision imposed primarily in industrial and licensing contexts into the migration jurisdiction.[95] The particular effects of the restriction of judicial review in the migration context relate to the applicant's situation, and the nature of migration law. A substantive application of the rule of law should conscientiously uphold a protection visa applicant's legal rights, because their circumstances are likely to make them less able to assert those rights.[96] As non-citizens they are subject to laws they have no ability to change.[97] Their applications before primary decision-makers and the tribunal are often conducted through an interpreter, in the absence of a thorough knowledge of how the determination is reached, without legal representation[98] and sometimes also without legal advice. The wrong decision regarding the likelihood of persecution will often cause the applicant to be deported and exposed to dangerous, even life threatening, circumstances. The government has frequently adverted to the number of cases reviewed in the Federal Court that affirm the RRT's decision. What is not as often acknowledged are the Federal Court reviews that expose fundamental legal errors made by the Tribunal.[99]

A second argument for active judicial oversight of refugee decisions is that they engage international legal obligations. The law applicable to protection visa applications must be interpreted in light of international jurisprudence. The courts have played an important role in interpreting domestic law according to developments in international refugee law.[100] Without such decisions Australia's laws might well stagnate and be less informed by international standards.[101]

Conclusion

The Migration Act's privative clause is an assertion of parliamentary sovereignty, but also a challenge to the rule of law. The provision again brings to our attention the paucity of entrenched rights protecting individuals affected by executive action. It was once possible to claim that responsible government is the 'ultimate guarantee of justice and individual rights'.[102] The provision reminds us of just how quaint this idea has become. For applicants within the migration jurisdiction the constitutional writs remain. Whether in relation to 'privative clause decisions' the writs offer substantive protection against administrative

injustice is a question for the High Court. The Court's answer will further shape the Australia polity's relationship to non-citizens.

Endnotes

* *This essay was written in 2002 before the High Court's decision in* S157/2002 v The Commonwealth *(2003) 194 ALR 24. For a discussion of that case see (2003) 37* AIAL Forum *1 and 20*.

1 The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) came into force on 2 October 2001. This act repealed the former Pt 8 of the Migration Act (which controlled the grounds for review of decisions by the Federal Court), and replaced it with new judicial review provisions including a privative clause.

2 Statutory measures to restrict judicial review, some of which are not always formally described as privative clauses, include the conferral of wide discretionary powers on the decision-maker, restrictions on the kinds of inquiry a court can engage in, measures preventing remedies being granted by the courts, restrictions on the grounds for review, time limits on when an application for review can be sought, and the type of provision discussed in this paper: the direct ousting of the judiciary's ability to review decisions in a particular jurisdiction: See Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed 2000) 675.

3 I will take the 'traditional' concept of judicial review to be the modern form of the Diceyan conception that has been attributed to William Wade and Christopher Forsyth: David Dyzenhaus, 'Reuniting the Brain: The Democratic Basis for Judicial Review' (1998) 9 *Public L Rev* 98, 100. In this conception of judicial review, the court is said to assist itself in determining legislative intent by reference to the values of the common law: where the statute is silent, these values may be imputed to the legislature's intent: Dyzenhaus at 100.

4 In administrative law a decision maker is *ultra vires* or 'beyond power' in a narrow sense, when the decision was not one authorised by the governing enactment, and in a broad sense, when the *way* the power was exercised in arriving at a decision was contrary to administrative law principles: see Paul Craig, *Administrative* Law (3rd ed) 5.

5 Paul Craig, *Administrative* Law (3rd ed) 5.

6 Ibid 14. Note that Craig is not arguing that legislative intent is unimportant, just that it does not fully explain what the judiciary actually does in interpreting legislation, nor is it adequate prescriptively.

7 Paul Craig, 'Competing Models of Judicial Review' [1999] *Public Law* 428, 436-439.

8 (1945) 70 CLR 598 ('*Hickman*').

9 See eg *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 ('*Darling Casino*'); for earlier applications of the *Hickman* principle, see those listed in *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168, 210.

10 These elements of the rule of law are associated with Joseph Raz's formal concept of the doctrine. The point argued here is that a privative clause violates even this limited version of the rule of law. A more substantive view of the rule of law sees these formal elements as a subset of the common law principles constituting a theory of justice that informs (or should inform) judicial decisions: see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytic Framework' [1999] *Public Law* 467, 468-9, 485. In this paper I will take the substantive concept to have this general meaning, while acknowledging its exact content is open to various interpretations.

11 As will be argued below, the '*Hickman*' type privative clause's departure from the rule of law becomes more dramatic still when it is taken from its habitual industrial or licensing context, and applied to decisions affecting individuals within the migration jurisdiction.

12 The issue was the denotation of the phrase 'the coal mining industry' which appeared in a regulation that defined the jurisdiction of a board established under an Act governing employment in the coal industry. The phrase was not statutorily defined.

13 '[W]e have been left to ascertain as best we may what is the denotation of the very indefinite expression "coal mining industry". It is, I think, unfortunate that it had become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court must rest. As it is, however, the question must be decided upon such considerations'.: *Hickman* (1945) 70 CLR 598, 614 (Dixon J). A case which Dixon J acknowledged would have been better resolved extra-judicially, and which turned on nebulous fact considerations, might seem unlikely to yield enduring principles of general application, but that it has done.

14 Thus for example, Mason CJ stated that the privative clause under consideration and the enabling provision represented a prima facie inconsistency, and explained that their reconciliation was to be achieved by 'reading the two provisions together and giving effect to each': *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179. See also *Darling Casino* (1997) 191 CLR 602, 632-33; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, para 15 (Mason CJ); para 31 (Brennan J) ('*O'Toole*). Mason CJ acknowledged in *O'Toole* that '[t]he scope and content of the three provisos in the Hickman principle have not been examined in any detail in subsequent decisions of this Court. And, in the absence of specific facts and evidence, the present case is scarcely a suitable vehicle for embarking on such an undertaking': para 16.

15 See *Hickman* (1945) 70 CLR 598, 614 (Dixon J); and for the elements of the principle stated according to their contemporary content, see Simon Evans, 'Protection Visas and Privative Clause Decisions: Hickman and The Migration Act 1958 (Cth), (2002) 9 *Aust Admin L Jo* 49-64, 54. Essentially a decision will be valid, notwithstanding provisions to the contrary in the enabling Act, if it 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': (Dixon J at 615). It must of course also not exceed constitutional limits (at

616). A further principle developed since *Hickman* suggests that (at least the High Court) cannot be prevented from reviewing a decision which involves the refusal by officers of the Commonwealth to discharge 'imperative duties' or which goes beyond 'inviolable limits or restraints': *Darling Casino* (1997) 191 CLR 602, 632 (Gaudron and Gummow JJ).

16 The *Hickman* principles apparently emerged from a process that Dixon J described thus: 'if in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding they are not observed, what is done is not to be challenged, there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation': *Hickman* (1945) 70 CLR 598,. 617.

17 Cf Mary Crock's argument regarding the limitations of representative government as a safeguard of individual rights: it is not valid, she said, for democracies 'to rely on the electoral mandate as a justification for the assertion of untrammeled administrative power': 'Privative Clauses and the Rule of Law: The Place of Judicial Review within the Construct of Australian Democracy' in Susan Kneebone (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999) AIAL, 78.

18 This would of course be a standard approach to statutory construction consistent with the doctrine that Parliament cannot bind itself, and with judicial opinion: eg, *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ). The qualification to this approach that has been developed post-*Hickman* is the doctrine stating that fundamental common law rights can only be abrogated by explicit legislative intent.

19 These principles which originally evolved in the common law, find statutory expression in ss 5-7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act').

20 *Hickman* (1945) 70 CLR 598, 616; *Darling Casino* (1997) 191 CLR 602, 631; *O'Toole* (1990) 171 CLR 232 para 21 (Mason CJ) paras 26-28 (Dawson J).

21 As stated in *R v Coldham; Ex Parte Australian Workers' Union* (1983) 153 CLR 415, 418: where the statutes are inconsistent, the *Hickman* principle requires that the inconsistency is 'resolved by reading the … provisions together and giving effect to each'.

22 See Roger Douglas and Melinda Jones *Administrative Law* (1999) 350.

23 For example, Gaudron and Gummow JJ stated, obiter, in *Darling Casino* (1997) 191 CLR 602, 633-634, apparently contrary to the traditional *Hickman* formulation, that 'a clause which provides only that a decision may not be called into question in a court of law is construed as not excluding review on the ground that the decision involved jurisdictional error, at least in the sense that it involved a refusal to exercise jurisdiction or that it exceeded the jurisdiction of the decision-maker'.

24 For example, Dawson J suggested, obiter, that there may be a natural justice element requirement associated with bona fides: *O'Toole* (1990) 171 CLR 232, 305. In the same case, the court was divided as to whether in establishing mala fides, a subjective element could be considered or whether reliance must be placed solely on the evidence on the face of the record.

25 See n 15 above. In the first Full Federal Court review of applications under the privative clause, involving five applicants (*Naav, Nabe, Ratumaiwai, Wang, Turcan*), the respondent Minister for Immigration argued that 'inviolable limits' is simply a shorthand for the three established *Hickman* provisos: FFC, 3-4 June, 2002. See Aronson and Dyer, above n 2, 695 regarding the differing curial opinion about the denotation of this phrase.

26 Mark Aronson has catalogued these values as including accountability, openness, fairness, participation, consistency, rationality, legality, impartiality, and accessibility of judicial and administrative grievance procedures: cited in Eloise Murphy, 'Corporation and accountability: the case of City West Housing Pty Ltd' (2001) 8 *Aust Jo of Admin Law* 100, 102.

27 Section 4 of the ADJR Act states that 'This Act has effect notwithstanding anything contained in any law in force at the commencement of this Act'.

28 Following *Craig v South Australia* (1995) 184 CLR 163, 179, 'jurisdictional error' rather than *ultra vires* is employed to describe errors made by a tribunal; jurisdictional error since *Craig* includes errors associated with broad *ultra vires*. The ADJR Act makes the distinction for decisions within its jurisdiction irrelevant because tribunals and primary decision-makers alike are for the purposes of the Act makers of administrative decisions under an enactment: s 3. In this essay, what is stated regarding *ultra vires*' role in relation to judicial review, is equally applicable to tribunals whose decisions may be reviewed on the basis of jurisdictional error. Paul Craig's work employs the *ultra vires* concept in ways that would usually allow it to be used interchangeably with jurisdictional error as far as administrative tribunals are concerned.

29 Ie, the Refugee Review Tribunal and the Migration Review Tribunal. Part 8 of the *Migration Act 1958* (Cth) came into operation on 1 September 1994. The amendments excluded access to Federal Court review of Tribunal decisions provided by the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth) as well as substituting a much narrower set of grounds for Federal Court review.

30 As discussed above, these limits are imposed by constitutional guarantees of access to review through s75(v) and the mysterious 'inviolable limitations' on the legislature's ability to restrict judicial review, first adverted to in *R v Metal Trades Employees' Association; Ex Parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 209, 248 (Dixon J).

31 (1999) 197 CLR 510.

32 While *Hickman* addresses the constitutional limits under s75(v) and instead *Abebe* was concerned with the constitutionality of restricting the Federal Court's ability to consider the whole of a legal 'matter', (a 'matter' as adverted to in ss 75-78 of the Constitution), one can argue that *Hickman* and subsequent cases' failure

to articulate the values underlying judicial review paved the way for the *Abebe* decision's deference to the former Part 8.

33 Obviously therefore, a survey of the relevant cases is not attempted. The cases were chosen because they were leading decisions in determining the scope of the 'former' Part 8. See Mary Crock, *Immigration and Refugee Law in Australia* (1998) chapter 13 regarding the operation of the former Part 8.

34 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham* (2000) 74 ALJR 405, 407 ('*Durairajasingham*'); *Re RRT*; *Ex Parte Aala* (2000) 176 ALR 219, 257 (Kirby J) ('*Aala*'); *Abebe v Commonwealth* (1999) 197 CLR 510, 534.

35 *Aala* (2000) 176 ALR 219.

36 The grant of a remedy was held to be discretionary: the issue was whether there had been a breach of natural justice, the determination of which may turn on the circumstances of the case: *Aala* (2000) 176 ALR 219, 223 (Gaudron and Gummow JJ); 259-260 (Kirby J). On the evidence, four of the five justices determined that the fair hearing rule had been breached, and constitutional writs were granted unanimously.

37 *Aala* (2000) 176 ALR 219, 225 (Gaudron and Gummow JJ).

38 *Aala* (2000) 176 ALR 219, 230 (Gaudron and Gummow JJ). Their Honours noted that differing views on the character of procedural fairness – as a common law duty or as an implication of the exercise of statutory power were expressed in *Kioa v West* (1985) 159 CLR 550. They also indicated that a statute might extinguish the obligation to procedural fairness and thereby make an action under s 75(v) unavailable on this ground, but did not touch on the constitutional issues this would raise (at 231). Obviously Part 8 was not regarded as causing the annulment of procedural fairness obligations in relation to constitutional writs.

39 For example, Kirby J asserted that: '[d]eparture from the fair hearing rule involves a derogation from the assumptions inherent in the grant to the tribunal by the parliament of the decision-making power. Those who enjoy such power must conform to the conditions of the grant. If they do not, they have not exercised the power in accordance with law but, instead, in accordance with some personal predilection. Correction by the issue of the constitutional writ simply upholds the rule of law': *Aala* (2000) 176 ALR 219, 230, 255. See also Gaudron and Gummow JJ (at 236).

40 (2000) 74 ALJR 405.

41 Ibid 412.

42 (1995) 184 CLR 163 (*Craig*').

43 *Migration Act 1958* s 420(2)(b).

44 *Migration Act 1958* ss 424(1), 424(2) and 427(1)(d).

45 *Migration Act 1958* s 430(1)(c).

46 The substantive justice 'direction' of s 420 was found not to be a mandatory procedural requirement in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577. Regarding the non-obligatory nature of the investigatory powers: *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209, 212-213 (McHugh J).

47 Regarding the finding that the Tribunal has only to set out findings on material questions of fact that *it* considers as material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105, 1108 (Gleeson CJ), 1117 (McHugh, Gummow and Hayne JJ).

48 (2001) 75 ALJR 1105 ('*Yusuf*').

49 (1995) 184 CLR 163.

50 *Yusuf* (2001) 75 ALJR 1105, 1121 (McHugh, Gummow and Hayne JJ).

51 Space prevents fuller treatment of this proposition. It remains true that the language of 'legislative intent' is consistently employed in recent judicial review of migration decisions, as identified below in the migration privative clause decisions. See also, for example, *Darling Casino* (1997) 191 CLR 602, 633.

52 Dyzenhaus, above n 3, 108 argues that the debate over the correct role of judicial review must escape the dichotomous thinking that posits either the common law or legislative intent as the preferable point of reference for judicial decision-making, and should instead address the question of what fundamental legal values underpin the relationship between Parliament and the judiciary.

53 Compare *Migration Act 1958* s 474(1) and the privative clause ('regulation 17') considered in *Hickman* (1945) 70 CLR 598, 598.

54 Another aspect of the amendments, that is not discussed here, is the time limits set on lodging an application to the High Court: *Migration Act 1958* s 486A. This time limit can be construed as another form of restriction on judicial review. The provision provides that an application must be made within 35 days of the actual notification of the (departmental or tribunal) decision.

55 See s 474(4) which permits judicial review of decisions pertaining to such matters as the constitution of the tribunals, costs associated with detention and deportation, and searches of persons and vessels.

56 This is achieved through providing that the Federal Court and the Federal Magistrates Court have no jurisdiction in relation to primary decisions except via the *Judiciary Act 1903* (ss 39B and 44) or s 39 of the *Federal Magistrates Act 1999* or s 32AB of the *Federal Court of Australia Act 1976* or s 483A of the Migration Act itself: see *Migration Act 1958* ss 475A, 476, 483A. Consequently these courts and the High Court can review primary and tribunal decisions by means of the constitutional writs.

57 See ss 475A and 484 which assume that some privative clause decisions are reviewable in the Federal Court and the Federal Magistrates Court.

58 Not atypical is Tamberlin J's view that '[u]nlike [the former] s 476, the effect of s 474 is not to withdraw jurisdiction from the Court in relation to a decision. Rather it purports to protect the administrative decision': *NABE v Minister for Immigration and Multicultural Affairs* [2002] FCA 281('*NABE*') para 11. The Explanatory

Memorandum for the Migration Legislation Amendment (Judicial Review) Bill 2001 states that the intention of the privative clause provision is 'to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned … and does not exceed constitutional limits, the decision will be lawful': para 16. It is acknowledged though that the clause limits review to certain grounds: para 15. In the Bill's second reading speech – see below, n 60, 31315, the Minister stated that the provision will both expand the decision-maker's powers and limit the grounds for judicial review.

59 Cf Stephen Gaegler's positivist approach to such questions: he suggests that if the scope of judicial review is defined by what constitutes jurisdictional error, then the issue of significance is the scope of the administrator's jurisdiction, which is rightly determined by the legislature: 'The Legitimate Scope of Judicial Review' (2001) 54 *Admin Review* 28, 39. This argument may have been asserted with an eye to the constitutionality of the privative clause, in that if the provision is characterised as restricting access to the High Court via s 75(v), rather than expanding the decision-maker's powers, it is perhaps more likely to be declared unconstitutional.

60 Commonwealth, *Parl Deb H of R*, 26 September 2001, 31314 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill.

61 An account, even in overview, of the hundreds of decisions to date regarding s 474 will not be attempted here. Some of the more important cases will be alluded to insofar as they bear on the general issue of privative clauses and principles of administrative law. It is recognised that at the time of writing curial understanding of the provision is unsettled and literally shifting on a weekly basis.

62 See *NAAX v Minister for Immigration and Multicultural Affairs* [2002] FCA para 38-44 ('*NAAX*'). The applicants submitted that s 474's practical effect is to make the migration tribunals the final arbiters on questions of law, thus requiring them to exercise judicial power (contrary to *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245); and secondly s 474's expansion of the tribunals' powers causes the constitutional writs' availability under s 75(v) to be narrowed to the point where they have no practical application. These arguments were rejected. If this view is upheld in the High Court, s 75(v) offers no substantive protection of a right to judicial review. Evans, above n 15, 62 notes that High Court opinion has been divided on this point.

63 There are two points of difference in the approaches. Firstly, should it initially be decided whether s 474 applies, ie that the decision is a privative clause decision, or should attention be first directed to the nature of the purported error (see *Alam v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 630 for a summary of the approaches). A second point of difference is the following: if under a *Hickman* privative clause jurisdictional error remains a ground for application for a constitutional writ (based on *Darling Casino* (1997) 191 CLR 602, 632), then is jurisdictional error to be defined broadly or narrowly?

64 The question here is the extent to which s 474 broadens the decision-maker's powers in relation to directive provisions of the Migration Act, such that their clear breach does not constitute a jurisdictional error: compare *Awan v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 594 ('*Awan*'); *Walton v Phillip Ruddock, The Minister for Immigration and Multicultural Affairs* [2001] FCA 1839 ('*Walton*'); *Boakye-Danquah v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 438 ('*Boakye-Danquah*') which find that breaches of directive provisions are not protected by s 474, and those decisions finding that the decision-maker's powers are extended by s 474 beyond what the directive provisions, read alone, would permit: *Wang v Minister for Immigration and Multicultural Affairs* [2002] FCA 477, para 29 ('*Wang*'); *NAAX* [2002] FCA 263; *Turcan v Minister for Immigration and Multicultural Affairs* [2002] FCA 397.

65 As previously discussed, the exact content of the *Hickman* conditions has never been precise. However the main point of difference regarding s 474 has been the concept of jurisdictional error consistent with the *Hickman* principle: that defined in *Craig v South Australia* (1995) 184 CLR 163, 179 (eg, *Boakye-Danqyah* [2002] FCA 438) or a narrower form of jurisdictional error (eg, *NAAX* [2002] FCA 263).

66 This is affirmed one should note, sometimes with considerable reluctance; for example Hill J wrote: 'I realise that in reaching this conclusion I am accepting that Parliament by enacting a privative clause can denude of any real content the ability of the Courts to grant relief by way of prerogative writ so that no remedy will be made available to a person whose future may be greatly affected by a decision made on entirely the wrong basis': *Wang* [2002] FCA 477, para 29.

67 *NAAX* [2002] FCA 263. The decision did however indicate that owing to the decision in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 179 ALR 238, and despite the Migration Act's code designed to replace common law requirements of natural justice, elements of the rule in relation to informing the applicant of adverse material evidence may still form grounds for a constitutional writ: see para 79-82 (Gyles J). Denial of natural justice may also not be protected when it involves bias (para 36). In response to *Miah*, the Migration Legislation Amendment (Procedural Fairness) Bill 2002 has been drafted with the objective of ensuring the removal of natural justice as a possible basis for an application for judicial review of privative clause decisions.

68 *Wang* [2002] FCA 477, para 19-29.

69 *NABE* [2002] FCA 281. Tamberlin J acknowledged that the error could have affected the outcome: para 37.

70 The judgements evince many examples of this approach to interpretation. For example, in *Walton* [2001] FCA Merkel J contended that '[a]s s 474 and Part 8 are altogether silent on compliance or non-compliance with the rules of natural justice there may be obstacles in the path of an argument that the section provides

a clear legislative intention to abrogate or exclude the rules of natural justice': para 37. Similarly see North J *Awan* [2002] FCA 594. This is a difficult argument to sustain, given the privative clause is designed to be more restrictive than the former Part 8 (which excluded from Federal Court review breaches of natural justice) and sought to 'align' grounds for review across the Federal and High Courts (see Gyles J in *NAAX*, para 46-85 on this point; and also the Explanatory Memorandum para 16 which states the expectation that only 'narrow' jurisdictional error will provide grounds for review). What is in fact being asserted here is a curial belief that natural justice cannot be readily annulled as a grounds for a constitutional writ. Conversely, in some cases 'legislative intent' is used as an argument for a non-substantive reading of constitutional writs. In *Wang*, Hill J concluded that s 474 must protect jurisdictional error, because otherwise the section 'would have little work to do', and this cannot be Parliament's intent: [2002] 477 para 32-33. But one might equally argue that such an operation of s 474 leaves s 75(v) with little work to do, because jurisdictional error will rarely be present to form the basis of a constitutional writ. The constitutional writs, owing to a vast expansion in the tribunal's powers, thereby become in practice rarely available.

71 The individual rights that are constitutionally protected are very limited: see George Williams, *Human Rights under the Australian Constitution* (1999). Currently there is limited procedural protection for individuals subject to decisions by officers of the Commonwealth. For example, in relation to s 474's scope, Gyles J in *NAAX* [2002] FCA 477 para 44 held that '[s]o far as the present case is concerned, there is no constitutional inhibition upon the legislature defining the procedure of a tribunal so as to exclude all rules of natural justice that might otherwise be implied'. Moreover as noted above n 67, his Honour held that breaches of natural justice are thereby removed as a source of jurisdictional error on which to base a claim for a constitutional writ.

72 *Re Bolton, Ex Parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Coco v The Queen* (1994) 179 CLR 427, 437. These judgements hold that if legislation is to abrogate a fundamental common law right, it must be 'clearly manifested by unmistakable and unambiguous language' (*Coco*, at 437). See discussion: Williams, above n 71, 15-18. However, there is no authority suggesting that fundamental common law rights will be protected if the legislature demonstrates unambiguous intent to abrogate them.

73 Paul Craig, 'Formal and Substantive conceptions of the Rule of Law: An analytical framework' [1999] *Public Law* 467, 487.

74 Sections 353 and 420 of the *Migration Act 1958* state that reviews by the tribunals should be 'fair, just, economical, informal and quick'.

75 The discussion will be conducted with the review of protection visa applications at the Refugee Review Tribunal in mind, but most of the points made are applicable to the migration jurisdiction in general.

76 Commonwealth, *Parl Deb H of R*, 26 September 2001, 31315 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill.

77 See for example, Commonwealth, *Parl Deb Sen*, 2 December 1998, 1025, (Senator Ian Campbell): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill (No 5) 1997. These criticisms have been unrelenting; for the most recent see Benjamin Haslem and Amanda Keenan, 'Butt out, Ruddock tells judges' *The Australian*, 4 June 2002, 1.

78 John McMillan, 'The Role of Judicial Review in Australian Administrative Law' (2001) 30 *AIAL Forum* 47, 54. McMillan's arguments were *not* made in relation to privative clauses, but are consistent with the tenor of arguments in their favour.

79 This argument is a corollary of the low rate at which the Federal Court remits decisions from the migration tribunals for reconsideration: about 90% of tribunal decisions are upheld in the courts: see second reading speech, above n 60, 31315.

80 See for example, *Public Service Association (SA) v Federated Clerks Union (SA)* (1991) 173 CLR 132 148-149 (Deane J), quoted in Aronson and Dyer, above n 2, 166 – in relation to industrial tribunals.

81 See discussion in Aronson and Dyer, above n 2, 164-165; the authorities only suggest deference regarding the tribunal's fact finding functions.

82 See for example, *Svecova v Industrial Commission of NSW* (1991) 39 IR 328, 331 quoted in Douglas and Jones, above n 22, 349.

83 Ibid. There is an implicit notion of 'efficiency' in this point that does not incorporate democratic participation as one measure of organisational effectiveness: see Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays in the Contemporary Australian State*, (1990) 46.

84 Criticism of delays and inefficiencies in the current system have not only come from the executive and some commentators, but also the judiciary. For example Gyles J recently stated regarding the RRT's objective to conduct reviews that are 'fair, just economical, informal and quick': '[t]here has been much emphasis in the cases upon the elements "fair" and "just", but little upon the elements "economical", "informal" and "quick" … The role of a court is not to prefer one objective over another. To do so is to subvert the will of the legislature. Achieving all of these objectives in a high volume jurisdiction necessarily requires balance and compromise. As this, and many other cases, show, the system has failed lamentably in relation to speed and economy, and perhaps in informality': *NAAX* [2002] FCA para 53.

85 Gabriel Fleming, 'The Proof is in the Eating: Questions about the Independence of Administrative Tribunals' (1997) 7 *Aust Jo of Admin Law* 33, 35. ARC Report No. 44, 5.

86 *Drake v Minister for Immigration* (1979) 46 FLR 409.

87 Fleming, above n 85, 53 commented that if tribunals are increasingly adopting the efficiency and performance orientation of the executive, the importance of their *independence*, the reason for their creation in the first place, must not be forgotten.

88 Cf Chief Justice John Doyle: the court is *not* considering the overall quality of decision-making – 'Accountability: Parliament, the Executive and the Judiciary' in Susan Kneebone (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999) AIAL 18, 27.

89 An issue that is itself contestable: see Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23 *UNSW L Jo* 190, 196.

90 See Susan Kneebone, 'Removing Judicial Review of Migration (Refugee) Decisions: A System in Crisis in Need of a Holistic Approach' (2000) 11 *Pub L Rev* 87, 87, 91. The author suggested that the problem needs to be addressed in the broad context of Australia's international obligations and the overall system of refugee status determination. She argued that judicial review is essential to provide jurisprudential guidance to the RRT, but in the then current [ie pre-privative clause] system, applicants turned to judicial review as a panacea for systemic problems, and this distorted the judicial role.

91 The possibilities of leave arrangements to seek review at the Federal Court (Kneebone, above n 90, 91; Crock, above n 17, 82) and a second layer of merits review (Kneebone, above n 90, 91) have been suggested. The independence, credibility and quality of refugee determination decisions is also something that needs to be addressed.

92 Cf Doyle, above n 88, 26 who argued that judicial review enables 'the individual to require the executive government to demonstrate that its decision is lawful'; and Fleming, above n 85, 54: 'Judicial review is the safeguard against the tribunals falling into illegality and unfairness'.

93 Ie, the standards that apply in many other jurisdictions by virtue of the ADJR Act ss 5-7.

94 Doyle, above n 88, 26.

95 It has been argued that the industrial context has unique considerations that sometimes justify privative clauses: *Public Service Association (SA) v Federated Clerks Union (SA)* (1991) 173 CLR 132, 148-149 (Deane J), quoted in Aronson and Dyer, above n 2, 166.

96 Cf Lesley Hunter's outline of measures necessary for substantive procedural fairness for non-English speaking background and asylum-seeker applicants: 20 *AIAL Forum* 13-21.

97 See Crock, above n 17, 78, 80.

98 *Migration Act 1958* s 427(6)(a) regarding the RRT; representation in exceptional circumstances is available at the MRT: s 366A.

99 See for example, the finding of apprehended bias in *Re Refugee Review Tribunal; Ex Parte H* [2001] HCA 28.

100 Possibly the most significant example of the judicial development of refugee law in Australia was the decision in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. A recent example is found in the decision of *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574.

101 Cf Kneebone, above n 90, 91. It has been accepted by the High Court that domestic law should be interpreted in a manner consistent with international law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

102 Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54 cited in George Williams, *Human Rights under the Australian Constitution* (1999) 58.