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# aialFORUM

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# ADMINISTRATIVE REVIEW COUNCIL RELEASES BEST PRACTICE GUIDES FOR ADMINISTRATIVE DECISION-MAKERS

***Margaret Harrison-Smith****

*Jillian Segal AM, the Hon Philip Ruddock MP and the Secretary of DIAC, Andrew Metcalfe at the launch of the Best Practice Guides at Parliament House, Canberra on 10 August 2007.*

The Administrative Review Council recently released a series of five *Best Practice Guides* for administrative decision-makers in government departments and agencies.

**Content of the *Guides***

The *Guides* follow on from a 2004 Council publication, *Legal Training for Primary Decision Makers: a curriculum vitae*, designed to help Commonwealth departments and agencies develop suitable administrative training programs.

Using the curriculum guideline as a foundation, the *Guides* provide a step by step outline of the issues that need to be taken into account in making an administrative decision.

Each *Guide* addresses one of the key elements of the decision-making process.
The topics covered by the *Guides* are:

- lawfulness
- natural justice
- evidence, facts and findings
- reasons; and
- accountability.

* *Executive director, Administrative Review Council*

As a result of support from the Department of Immigration and Citizenship (DIAC), the Council was able to engage the services of Monash University academic, Associate Professor Pam O'Connor, to assist with the development of the *Guides.*

Written in clear and succinct terms, the *Guides* provide a valuable benchmark for administrative decision -making across government. The Council anticipates that that they will be incorporated into departmental and agency internal training programs and on-line training resources.

The *Guides* will allow government decision makers to acquire and retain a fundamental knowledge of good decision making. This knowledge they will be able to take with them as they move within the Australian Public Service.

The legal framework in which State and Territory and local government agencies operate is broadly similar, but the guides do draw attention to areas where there are important differences. It is therefore anticipated by the Council that the *Guides* will also be of assistance to decision-makers in State and Territory departments and agencies.

**Supplementing the *Guides***

Importantly, the *Guides* can be used as building blocks that can be supplemented to meet the specific legislative needs of individual departments and agencies.

In recognition of this potential, DIAC has worked with the Council to produce DIAC-supplemented versions of the *Guides* for internal departmental use.

The Office of the Commonwealth Ombudsman and a number of other agencies are also in the course of producing their own supplemented versions of the *Guides*.

If you would like copies of the *Guides* or should you wish to speak further with the Council about the *Guides*, you are invited to contact the Council's Executive Director on tel (02) 6250 5800 or by e-mail at arc.can.ag.gov.au. The *Guides* are also available on the Council's website at: www.law.gov.au/arc.

**The Administrative Review Council**

The Administrative Review Council is an advisory body established under the *Administrative Appeals Tribunal Act 1975* (Cth) to provide advice to Government, through the Attorney-General, in relation to Commonwealth administrative law.

# BIAS IN COURT/TRIBUNAL PROCEEDINGS: SOME REFLECTIONS

***The Honourable Brian Sully QC****

Between 1922 and 1940 the office of Lord Chief Justice of England was occupied by Lord Hewart. Prior to his appointment he had been a very successful barrister and politician. He had served as both Solicitor General and Attorney-General.

As a judge Lord Hewart displayed characteristics which might be thought, certainly in the contemporary view of such things, to have been distinctly unjudicial. He was known to write letters while seated on the Bench and ostensibly hearing submissions. One commentator said of him that '…. he lacked only the one quality which should distinguish a judge: that of being judicial … …The opening of a case had only to last for five minutes before one could feel - and sometimes actually see - which side he had taken; thereafter the other side had no chance."' Lord Hewart's own view about his office is put with complete, not to say breathtaking, clarity in something said by him during a speech to the Lord Mayor's Banquet in 1936: 'His Majesty's judges are satisfied with the almost universal admiration in which they are held'.

Were one to stop there in appraising Lord Hewart as a judge, the impression conveyed would have to be that he did not sound like the kind of person to whom one would turn confidently for assistance in understanding anything to do with the topic of judicial and quasi-judicial bias. And yet it is this very same judge who authored what has become a defining statement of principle upon precisely that topic. In *R. v Sussex Justices* [1]Lord Hewart said:

> It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

There is, no doubt, always some particular exception to every general proposition; but the stark contrast between the two facets, as I have sketched them, of Lord Hewart's judicial personality and temperament seems to me to be a constant factor in any discussion, whether general or particular, of the topic of judicial bias. Lord Melbourne, Queen Victoria's first Prime Minister, once made this celebrated comment about the Order of the Garter: 'I like the Garter; there is no damned merit in it.'

Throughout my own professional lifetime I have never known, and I have never known of, a judge who would even think of saying: 'I like judicial office; there is no damned impartiality in it.' And yet there is a constant trickle of cases in which some aggrieved party or participant makes an allegation of ostensible bias; or, although mercifully much more rarely, of actual bias; and in some at least of those cases the complaint is upheld.

How can that be? The answer cannot lie, at least as it seems to me, in any difficulty in comprehending what the relevant principles actually are. They are well settled; and I shall re-state them presently. The answer seems to me to lie, rather, in the fact that the principles

* *Retired Judge of the Supreme Court of New South Wales*

have to be applied to concrete situations, no two of which can be expected to be identical; have to be applied, so to speak, on the run; and have to be applied in the context of the rapidly developing circumstances, challenges and stresses of an actual hearing the emotional temperature of which is not infrequently dangerously high because of the nature of the case itself, or the personalities and temperaments of the participants, not excluding counsel and the presiding judge or quasi-judicial officer.

If all of that be essentially correct, then it might be useful to recapitulate the content of the relevant principles; to take note of certain matters which the authorities say do not amount as of course to manifestations of bias; and to suggest some practical considerations that might be helpful in avoiding error by reason of bias.

Before doing that, I should explain that I propose to concentrate upon the case of a judge in the normally understood sense who is sitting in a Court in the normally understood sense. I do so because, first, my own experience as a decision- maker has been confined to the role of a judicial, in the strict sense, decision-maker; and secondly, because the approach keeps within a manageable focus a general discussion which will tend, if not so confined, to become too complicated to be discussed comprehensively in such a paper as the present one.

It is well recognised that propositions which are valid when applied to the case of a decision-maker who is a judge in the normally understood sense of that description, will not necessarily be applicable by way of simple analogy to the case of a decision-maker whose character is otherwise. This point is explained succinctly in the reasons of Hayne J in *Minister for Immigration and Multicultural Affairs v Jia Legeng*[2]. It will suffice to cite in detail two passages:

> The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is true to say that the rules of procedural fairness must be 'appropriate and adapted to the circumstances of the particular case'. What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ when what is appropriate when the decision is committed to an investigating body.
>
> Ministerial decision-making is different again. [183] In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision –makers, however, may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed,….the notion of an 'expert' tribunal assumes that this will be done. Conferring power on a Minister may well indicate that a particularly wide range of factors and sources on information may be taken into account, given the types of influences to which Ministers are legitimately subject. It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker. [565]. [Emphasis added].

For a comparatively recent re-statement of the basic principles applicable in the case of a judge in the normally understood sense of that description, it is convenient to refer to the joint judgment of Gleeson CJ and McHugh, Gummow and Hayne JJ in *Ebner v The Official Trustee in Bankruptcy*[3]. The fundamental rule in the case of alleged ostensible, as distinct from actual, bias is that the relevant judge is disqualified '… if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.' The question thus posed is not directed towards probabilities. It is directed towards possibilities, but always with a clear understanding that those possibilities must be real and not remote. Taking those general propositions as a correct point of departure, it is necessary then to graft on to the

propositions some important qualifications and clarifications. These latter can be summarised conveniently and as follows in point form:

1. An allegation of bias, whether actual or ostensible, does not more or less automatically prove itself. The Judge at whom the allegation is levelled is not only entitled, but is duty bound, to insist that the allegation be put in precise terms properly particularized; and that the allegation be supported by the production of appropriate evidence of the facts and circumstances that are said to establish the allegation.

2. These requirements of the law rest upon foundational propositions that are expressed succinctly by Mason J (as he then was) in his Honour's reasons in *Re JRL; Ex parte CJL* (1986) 161 CLR 248 at [5]:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases [1]as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established" (*Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, at pp 553-554; *Watson*, at p 262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12, at p 14; 32 ALR 47, at pp 50-51). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

3. The relevant assessment of the impugned conduct is an objective one. As Hayne J points out in another passage of his Honour's reasons in *Jia Legeng* at [185], there are several distinct contentions wrapped up in an allegation of bias or of apprehended bias; and each requires distinct consideration. The first contention is that the decision-maker does in fact have an opinion upon some relevant aspect of the issue for decision in the particular case before him. The second contention is that the decision-maker is in fact going to apply that opinion to that relevant aspect of the issue for decision. The third contention is that the decision-maker is going so to apply his existing opinion without giving the relevant aspect fresh consideration in the light only of such evidence and of such arguments as may be laid before him in the particular hearing of the particular case before him for decision. The fourth contention is that whatever it is that is said to have been the subject of the impugned pre-judgment is something that the law does require to be given such fresh consideration.

4. The law does not require that a judge embark upon a particular contested hearing with a mind that has been scrupulously cleansed of any opinion of any kind whatsoever about any aspect whatsoever of any issue or potential issue whatsoever that might conceivably arise during the course of the hearing. That proposition is endorsed as follows by Gleeson CJ and Gummow J in their joint reasons in *Minister for Immigration and Multicultural Affairs v Jin Legeng* [4]:

> The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

It seems to me that there is nothing particularly difficult about comprehending the principles that are thus established by the authorities. It seems to me, however, that it is always difficult, and sometimes extremely difficult, to give effect to those principles simultaneously with other principles that are just as clearly established in connection with the proper conduct of a judge in the hearing of a particular case.

I have in mind the following opinion expressed in the joint reasons of Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*[5]:

> It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.

In practically the same breath their Honours add these observations:

> Knowledge of his or her own integrity can sometimes lead a judge to fail to appreciate that particular comments made in the course of a trial may wrongly convey to one or other of the parties to the litigation or to a lay observer an impression of bias.

One simple way of dealing with the reconciliation of the established principles respecting bias, real or apprehended, and the *Vakauta* propositions would be to say, simply, that a judge will do well to keep firmly in mind that if silence is no longer golden, vanity is still the devil's favourite sin. More particularly:

1. I apprehend that any modern-day judge who spoke frankly would acknowledge being under constant pressure, to take some miscellaneous examples of court-management-speak to be 'a strong judge'; to expedite the hearing; to compel the parties and their representatives to get to the 'real issues' in the case; to take a no-nonsense approach to interlocutory applications; and the like. I suggest that a judge or, indeed, any other decision-maker, who tries too self-consciously to present an image of that kind of procedural martinet is courting a disqualification application. For it is, I suggest, just such posturing that is most likely to cause the judge to use language and tone of speech that will convey an image that is not so much appropriately firm as inappropriately peremptory.

2. There is a constant need for a judge or other decision-maker to keep carefully in mind that a decision such as *Vakauta* is intended to encourage a judge or other decision-maker to make proper and properly frank use of the opportunity, presented uniquely by the procedure of oral argument, to test in a serious and measured way with counsel the judges's impressions or provisional conclusions about the evidence, or the witnesses, or the proper definition of the issues remaining for decision, or other and particular problems which appear to be presented by the nature of the case and the course of the hearing. *Vakauta* cannot be thought sensibly to give any encouragement whatsoever to the judicial wisecrack or throwaway line.

3. Even a remark which is not intended consciously to be either a wisecrack or a mere throwaway line but which is cast in briskly colourful language, can bring a judge to grief. For a recent example see: *John Fairfax Publications Pty Ltd v Maurice Kriss* [6] .

It is worthwhile, I apprehend, to take a careful look at the *John Fairfax* decision. The case is a simple one and it is a salutary reminder: first, of how very easy it is for a judge or other decision-maker to cross the dividing line that separates acceptable from unacceptable

judicial intervention during the course of a hearing; and secondly, of how fine a line that dividing line can be. I stress that, in speaking about that particular case, I do not inply and nobody else should infer, any criticism particular to either the trial judge or the reasoning of the Court of Appeal.

The basic facts, as here relevant, are within a small compass. It is convenient to take them from the headnote of the report of the reasons of the Court of Appeal:

> The respondent who had been struck off the roll of barristers made an application for readmission which was granted by a judge. The appellant published an article which contrasted the plaintiff's readmission with the situation of barristers who had been or were about to be struck off for failure to comply with their income tax obligations. A jury … … found that the article conveyed an imputation that defamed the respondent. The balance of the trial came on for hearing before a Supreme Court judge. At the start of the second day of the trial counsel for the appellant asked the judge to disqualify himself. The application was based on comments made by the judge during the opening address of counsel for the respondent, and further remarks made when dealing with an objection to evidence during the respondent's evidence in chief. The judge overruled the objection and the trial continued. The judge delivered a reserved judgment in which he found for the plaintiff … and awarded damages…

The relevant newspaper article carried the heading: *Silk's purse empty*. Counsel for the plaintiff, in opening his client's case, said to the judge that he did not know what the headline was supposed to mean, the more so since the plaintiff had never been a silk. The judge interposed these comments:

> You don't expect a journalist to understand that or care. What do they know? They might know everything, but they don't care. Silk is a good expression for a barrister, and it was a nice pun.

The Court of Appeal held that these particular statements were insufficient to ground a disqualification by reason of ostensible bias. The Court held that, there having been no submission that the judge's tone or demeanour were relevant to the way in which the judge's actual words ought to be construed, the appropriate view was that:

> The judge's statement that 'you don't expect' a journalist to understand the distinction between a silk and a junior only meant that journalists as outsiders may not be aware of professional distinctions. His statement that they don't care, in context, only meant that journalists would think that such professional niceties were not important and should not get in the way of a good headline… The headline was not the basis of a separate imputation and his Honour's remarks were not directed to an issue or a matter relevant to an issue.

As the plaintiff's counsel continued his opening, he commented upon what he described as a campaign that the particular newspaper had been conducting against barristers, especially those who appeared to have paid, for some years, no income tax. The Judge thereupon remarked that the campaign:

> … …was unjustified in that it plainly carried the suggestion that the whole of the bar was involved.

Almost immediately, his Honour added:

> And that's one of the reasons, I think, why the bar as a whole deeply resented those of its members who had acted in this way, because all felt traduced by what had happened. It's obvious that The Herald didn't care much about the distinction.

These remarks were held by the Court of Appeal to evidence ostensible bias in a litigious context of which a significant part was the allegation: that a journalist had written a defamatory article based on a court judgment without taking enough care to get it right.

A little later, and still during the course of the plaintiff's opening, the judge said to counsel:

> Most members of the public I think would, prima facie, take the view they prefer a court report to a reporter's slur, wouldn't they?

These words, too, were held by the Court of Appeal to evidence ostensible bias. The Court said:

> A slur was what the plaintiff was complaining about. A fair-minded lay observer might apprehend this as passing judgment in pejorative terms on statements in the article.

In due course the taking of the plaintiff's evidence commenced. He was taken in chief to the fact that the article referred to him in several places as 'Maurie'. The plaintiff asserted that he had found such a form of reference to be belittling. It was objected by the defendant's counsel that this evidence was not relevant to any imputation pleaded by the plaintiff. The judge remarked that the reference was: plainly belittling and then at once added:

> It goes to two questions here, and the first is the plaintiff's own response of hurt to what he read … … … …that is one way of relevance… … .The next possible sense of relevance is to properly assess the significance of the quotation from the judgment. On one reading of this, everything is belittling, it is unremitting, every sentence is honed with exquisite precision to injure. Counsel for the publisher demurred to the concluding sentence and the Judge responded: I cannot see anything else.

Of these passages the Court of Appeal held:

> Although [the Judge] used colourful language his statement had begun with "On one reading of this" which seemed to indicate that the article could be read another way. In that event the question would be one for legal argument in due course. However when [counsel] demurred to the description the Judge said: 'I cannot see anything else'.

This could be seen as indicating that the Judge had made up his mind and that his adverse view was a considered one.

The relevant facts of the *John Fairfax case*, as previously described, and the relevant reasoning, as previously canvassed, of the Court of Appeal make it pertinent, to say the least, to reflect upon the lessons to be learned from that decision.

My own conclusion in that connection is that the surest aids for avoiding the needless courting of a disqualification application based upon alleged bias, whether actual or ostensible, or at the very least some of them, are:

*Gravity*: not pomp, circumstance and extravagant protocol; but an atmosphere of seriousness appropriate to the doing of justice in any case in any Court or Tribunal.

*Patience*: that is to say, a willingness to listen to any reasoned proposition that might be advanced by any party or representative; that willingness being itself based upon a recognition that experience teaches that it is at least on the cards that a reasoned proposition could actually be sound.

*Courtesy*: neither a frigid formality on the one hand, nor an affected egalitarianism on the other hand; just ordinary civility and good manners.

A sensible question is generally to be preferred to a statement unrelated to such a question: a judge who responds to a submission by saying simply and peremptorily: 'I reject that submission', invites, at least as a general proposition, an objection that he has inappropriately made up his mind.

It would be both better and safer to say some such thing as: 'I have difficulty with that submission. Does the submission not entail …[this or that result]…which seems to be

inconsistent with …[this or that decision]?' Or, in most cases, perhaps nothing more than the question, always relevant and permissible: 'Is there any authority for that submission?' The latter two suggested forms of question are not, of course, in any sense comprehensive examples. What might be thought to be a sensible question in a particular context must be conditioned by that context. My point is, simply, that a sensible question offers much less scope for a plausible disqualification application than does a peremptory, even a sensible peremptory, response to a submission.

There can be no denying that in recent years the burdens resting upon judges and other types of decision-maker have increased steadily and oppressively. One of those burdens is that parties and their representatives, many of whom have been reared in the contemporary culture of rights and grievances, have not the slightest compunction in alleging bias of some kind in the event that they do not get their own way. The worst possible way of meeting that challenge is by either pandering to it or becoming paranoid about it. The best way is to take the advice in Kipling's celebrated poem *'If'* :

*'and keep your head when all about you*
*Are losing theirs and blaming it on you'.*

**Endnotes**

1 (1924) 1 KB 259
2 (2001) 205 CLR 507 at 562 – 565
3 (2000) 205 CLR 337
4 (2001) 205 CLR 507 at [72]
5 (1989) 167 CLR 568 at 571
6 [2007]NSWCA 79

# STATE TRIBUNALS AND CHAPTER III OF THE AUSTRALIAN CONSTITUTION – FOUR CASES CONSIDERED

***The Hon Duncan Kerr SC MP****

***Radio 2UE Sydney Pty Ltd v Burns* (EOD)**[1]
***Commonwealth v Wood***[2]
***Trust Co of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Café Tiffany's)***[3]
***Attorney-General (NSW) v 2UE Sydney Pty Ltd***[4]

This paper discusses a quartet of recent cases involving State tribunals and Chapter III of the Australian Constitution. Each of these cases addresses previously uncontroversial aspects of the distribution of judicial power between the Commonwealth and the States. *Wood* and *Stockland*, decisions of the Federal Court of Australia and the New South Wales Court of Appeal respectively, apply distinctly different tests to answer the question of whether, and if so in what circumstances, a State tribunal is to be regarded as a 'court of a State' for the purposes of Chapter III of the Australian Constitution and the *Judiciary Act 1903* (Cth).

*Radio 2UE* (reversing *2UE v Burns*) deals with the related but subsequent question of whether a State tribunal that is not a 'court of a State' is limited in, or excluded from, exercising its 'power' or 'jurisdiction' over federal questions in consequence of implications arising from Chapter III. This paper suggests that the conclusions reached by the NSW Court of Appeal in both *Stockland* and *Radio 2UE* are difficult to reconcile with recent decisions of the High Court and may prove to be aberrations rather than portents.

## I Introduction

Australia's integrated judicial system is a product of Chapter III of the Australian Constitution. The drafters of the Australian Constitution provided for 'a Federal Supreme Court' — the High Court of Australia — to be the prime repository of the judicial power of the Commonwealth[5]. The new Commonwealth was otherwise thought neither to require, nor have the resources to justify, the establishment of a comprehensive parallel system of federal courts. To avoid the need to establish further federal judicial institutions, an autochthonous Australian constitutional device, s 77 of the Australian Constitution, empowered the Commonwealth Parliament to invest federal judicial power not only upon such other courts as it might later create, but also upon existing and future (then colonial, but soon to become) State courts.

* *LB (Tas); Federal Member for Denison; Adjunct Professor, Faculty of Law, Queensland University of Technology.* *This article is based on a paper titled 'The Federal and State Courts on Constitutional Law: The 2006 Term' and was presented by the author at an AIAL seminar in Sydney on 26 July 2007. The author, with Stephen P Estcourt QC and Greg Barns, was counsel for the respondent in Wood (2006) 148 FCR 276.* *Acknowledgement is given to the Melbourne University Law Review for permission to reprint.*

To ensure Commonwealth supremacy, s 77(ii) of the Australian Constitution empowered the Commonwealth Parliament to define the extent to which the jurisdiction of any federal court would be exclusive of that belonging to or invested in the states. Section 38 of the Judiciary Act was enacted pursuant to that authority.

Only in respect of a limited range of matters — the most important of which, for practical purposes, are those involving suits between states or between States and the Commonwealth — was the jurisdiction of the High Court made exclusive of the jurisdiction of the courts of the States[6]. In respect of the far larger residuum, s 39 of the Judiciary Act allowed, and continues to allow, State courts to also exercise federal judicial power[7].

Moreover, this important statutory device also withdrew from State courts all formerly existing State judicial power that overlapped with the judicial power of the Commonwealth[8] including, for illustrative purposes, jurisdiction over litigation 'between residents of different States'[9] where prior to the passage of the Judiciary Act, State courts routinely exercised State judicial power subject to the rules of private international law.[10] Section 39 then reinvested the 'several Courts of the States … within the limits of their several jurisdictions' with most of the substance of that withdrawn State jurisdiction as part of a wider grant of federal jurisdiction[11]. To the extent that there would otherwise have been an overlap between state and federal judicial power, that possibility was removed. Henceforth, State courts could only exercise judicial power over a federal matter if their jurisdiction could be sourced to the Commonwealth Parliament's legislative investiture in them of the judicial power of the Commonwealth.

Since 1903, the Judiciary Act scheme has permitted State courts to exercise concurrent federal and state judicial power. As such, they form part of the integrated Australian judicial system. But what of the many other State bodies that now exercise judicial power? At the State level there has been an explosion in the use of what Neil Rees has described as '"court substitute" tribunals'[12] What is their fit within the Australian constitutional structure?

Had this question been asked even a few years ago, the answer would have seemed not only obvious but also uncontentious. Such a State body, albeit named a 'tribunal', might be shown on proper legal analysis to actually be a Chapter III 'court of a State'[13]. If so, the Judiciary Act would operate to invest that tribunal with federal judicial power, just as it would any other State court[14]. On the other hand, a State tribunal capable of exercising aspects of State judicial power, but not on proper legal analysis a 'court of a State', would not be at all affected by Chapter III considerations. By contrast with the Commonwealth[15], State tribunals and other administrative bodies can, without objection, exercise admixed State executive, judicial and quasi-legislative powers[16]. Neither the Australian Constitution nor the Judiciary Act refer to the powers or jurisdiction of a non-court State tribunal. A State tribunal's capacity therefore would not be affected in respect of the exercise of any aspect of State judicial power it might possess over subject matter and parties which, had the tribunal been a court, would have been removed by s 39(1) of the Judiciary Act and reinvested as federal jurisdiction by s 39(2).

That these answers are now in doubt as a result of the divergent judicial approaches revealed by the decisions discussed in this case note well demonstrates the protean nature, and the seemingly endless possibilities of, Chapter III jurisprudence notwithstanding increasing overt resistance within the High Court to its continued development[17]. It also highlights the potential for an ongoing overflow of that jurisprudence from the federal to the State sphere[18].

*Wood* and *Stockland* illustrate contrasting judicial approaches to the methodology required to answer the question whether a particular state tribunal may be regarded as a 'court of a State' for the purposes of the Australian Constitution and the Judiciary Act.

*Wood*[19], a decision of the Federal Court applied the hitherto orthodox 'balance sheet' approach[20]. That approach compares the similarities and differences between the tribunal in question and a traditional court. In undertaking this comparison, *Wood* emphasised substance over form[21]. By contrast, in *Stockland*, the NSW Court of Appeal applied a novel test based on implications said to arise from Chapter III — concluding that to be a court for constitutional purposes a tribunal must be an institution exclusively, or at least predominantly, composed of judges[22].

*2UE v Burns*[23] and Radio 2UE[24] illustrate contrasting judicial approaches to the consequential question of whether a State tribunal that is not a 'court of a State' is limited in its jurisdiction over federal questions in consequence of implications arising from Chapter III. *Radio 2UE*, a decision of the NSW Court of Appeal reversing *2UE v Burns*, held that while ordinarily, a State tribunal could consider submissions regarding the constitutional validity of State legislation in the course of the exercise of its statutory powers, it lacked jurisdiction to do so if its decisions, made in consequence of those constitutional considerations, could be registered in and enforced as orders of a court[25].

The differences of judicial opinion highlighted in this quartet of cases will have significant and ongoing ramifications. Of equal importance to the development of Australian constitutional law is the recognition that the reasoning in *Radio 2UE* appears to require even more sweeping conclusions than those ultimately reached[26]. These cases are not only of theoretical interest; they also have direct and immediate practical implications. This is especially so given that '[o]ne of the most significant recent developments in the Australian legal system has been the creation of many new statutory decision-making bodies.'[27] Highlighting this point, Rees quotes the President of the Victorian Civil and Administrative Tribunal ('VCAT'), who identifies that Tribunal as having already become 'the principal jurisdiction for the resolution of mainstream civil disputes in Victoria.'[28]

Lawyers who represent clients involved unwillingly in State administrative proceedings will, without doubt, explore the possibilities of a Chapter III challenge seeking to oust such tribunal jurisdiction. The current uncertainties will encourage further litigation. It seems inevitable that some of the questions raised by these cases will be finally resolved only by the High Court[29]. Until that day, State tribunals exercising admixed administrative and judicial functions are likely to face continual challenges to their powers and jurisdiction arising from these complexities, which until recently, were not evident.

## II The facts and the decisions in outline

### *A 2UE v Burns*

In *2UE v Burns*, O'Connor DCJ, sitting as President of the Appeal Panel of the New South Wales Administrative Decisions Tribunal ('NSWADT'), decided that that Tribunal was a court both in the 'general sense' and the 'Judiciary Act sense' of the word[30]. The issue arose in the following way: a member of the public, Gary Burns, had made a complaint about homosexual vilification to the Equal Opportunity Division of the NSWADT[31]. He complained about comments made by radio presenters John Laws and Steve Price, which had been broadcast by the radio station Radio 2UE Sydney Pty Ltd ('2UE')[32]. The Tribunal upheld Burns' complaint under s 49ZT of the *Anti-Discrimination Act 1977* (NSW) ('ADA')[33] and ordered 2UE to broadcast an apology that was to be read by Laws and Price[34]. Laws, Price and 2UE then appealed to the Appeal Panel of the NSWADT. Their submissions challenged the constitutional validity of s 49ZT of the ADA[35].

Their counsel argued that the New South Wales law placed an unlawful burden on their freedom of political communication[36], an implied right under the Australian Constitution[37]. The NSW Attorney-General intervened[38]. On the NSW Attorney-General's behalf, counsel

objected to the Tribunal considering this question on the ground that the Tribunal was not a 'court' within the meaning of s 39(2) of the Judiciary Act[39]. The NSW Attorney-General asserted that because the Tribunal was not a court, 'it [was] not invested with the authority to hear matters arising under the Constitution or involving its interpretation'[40].

The NSW Attorney-General argued that as an administrative body constituted under State law, the Tribunal was bound to accept the constitutional validity of the laws of NSW, including s 49ZT of the ADA[41]. Hence, it was contended that if an argument of inconsistency with the Australian Constitution was advanced before it, the Tribunal was obliged to refer any such question to the NSW Supreme Court pursuant to s 118(1) of the *Administrative Decisions Tribunal Act 1997* (NSW)[42].

O'Connor P rejected the argument that the NSWADT (both as constituted generally and, more particularly, as the Appeal Panel) was not a court[43]. His Honour also rejected the NSW Attorney-General's related proposition that, assuming the Tribunal was not a court, it would lack authority to form a view regarding the validity of a State statute on the ground that it was inconsistent with Commonwealth law[44]. His Honour held that the Tribunal, even if it were not a 'court of a State', had a duty to ensure that its conduct was lawful and within power — it was both competent and indeed obliged to consider any question of law relating to its jurisdiction.

**B *Wood***

The litigation in *Wood*[45] involved a challenge by the Commonwealth to the Anti-Discrimination Tribunal of Tasmania ('TASADT') exercising its authority in respect of a matter in which the Commonwealth was itself a party.

The issue arose as follows: in late 2000, Eleanore Tibble, a 15-year-old member of the Tasmanian Squadron of the organisation then known as the Air Training Corps (since renamed the Australian Air Force Cadets), hanged herself in a shed on her mother's property[46]. A military investigation conducted after Tibble's death revealed that earlier disciplinary allegations against her had been badly mismanaged by her superiors in the Air Training Corps ('Cadets')[47]. A psychiatrist engaged by the Military Compensation and Rehabilitation Service found that the way the Cadets had mishandled the disciplinary matter had contributed more than 50 per cent to Tibble's decision to commit suicide.

Soon after Tibble's death, her mother, Susan Campbell, found her daughter's body. Campbell was deeply traumatised. She wanted to ensure that similar mishandlings of disciplinary allegations against young cadets would never happen again. One of the steps Campbell took was to complain to the Tasmanian Anti-Discrimination Commissioner, on her own and on her deceased daughter's behalf[48]. Her complaint included allegations against the Cadets of discrimination on the basis of 'age and gender/sex in education/training and membership and activities of clubs.'[49] Campbell sought orders directed to the prevention of further discriminatory conduct. Her complaint was accepted by the Commissioner and referred to the TASADT, constituted by Magistrate Helen Wood sitting as Chairperson, for determination[50].

Campbell's complaints identified two Cadet officers and the Cadets itself, as the parties against whom she sought remedies. However, after hearing preliminary submissions by counsel for the Commonwealth, Chairperson Wood ruled that the Commonwealth should be substituted for the Cadets as the proper party against whom the complaint would proceed.

The Commonwealth then applied to the Federal Court seeking orders to prevent the TASADT from further hearing and determining the complaints. The Commonwealth's submissions to the Federal Court were summarised by Heerey J as follows: 'it is a

necessary implication from Ch III that a State tribunal (ie a body which is not a "court of a State") cannot exercise any part of the judicial power of the Commonwealth.'[51]

The prohibition contended for by the Commonwealth extended, not only to matters in which the Commonwealth itself was a party, but also, for example, to all matters that involved residents of other States[52] and all matters arising under any law made by the federal Parliament.[53]

Conceived in this way, the Commonwealth's contended limitation bore little resemblance to that which had been proposed by the NSW Attorney-General in *2UE v Burns*[54]. In that case, the NSW Attorney-General had submitted that because a tribunal was disqualified from exercising the judicial power of the Commonwealth, it was obliged to accept the validity of any State legislation under which it operated[55]. By contrast, as articulated by the Commonwealth in *Wood*, the prohibition contended for had a very different consequence — it removed the entire jurisdiction of a tribunal whenever a case required any exercise by it of judicial power touching upon a federal question.

However, Heerey J decided the threshold question against the Commonwealth. His Honour held that the TASADT was in fact a court of the State of Tasmania for the purposes of the receipt of federal jurisdiction[56]. As such, it had undoubted jurisdiction over the Commonwealth. Heerey J did not find it necessary to adjudicate upon the wider propositions advanced by the Commonwealth.[57]

### C *Stockland*

The Chapter III issue in *Stockland* arose as a matter of statutory interpretation. Skiwing Pty Ltd ('Skiwing') conducted a cafe in a shopping arcade owned by Stockland Property Management Ltd ('Stockland Ltd')[58]. Skiwing brought various claims before the Retail Leases Division of the NSWADT[59]. Skiwing's claims included alleged breaches of s 52 of the TPA. At one level, the issue was a routine question of statutory interpretation. Federal legislation governed whether or not the Retail Leases Division of the NSWADT had the power to deal with these federal claims[60]. Section 86(2) of the TPA provides:

> The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise … with respect to any matter arising under … Part V in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.

The circumstance that took the matter into constitutional law territory was that the language of s 86(2) mirrored s 39(2) of the Judiciary Act and was clearly intended to confer jurisdiction on every court and tribunal that answered the description of a 'court of a State' under s 77(iii) of the Australian Constitution.

Approaching the matter in the same manner as O'Connor P did in *2UE v Burns*[61], the Appeal Panel of the NSWADT held that the Retail Leases Division was a 'court of the State' and, as such, had jurisdiction to entertain Skiwing's TPA s 52 claim[62].

Stockland Ltd then appealed to the NSW Court of Appeal. The Court of Appeal, constituted by Spigelman CJ, Hodgson and Bryson JJA, held that it was impermissible to treat the Retail Leases Division of the NSWADT as distinct from its other constituent parts[63]. It concluded that, taken as a whole, the NSWADT was not a 'court of a State' in the context of federal constitutional law[64].

Furthermore, the Court of Appeal disapproved of the reasoning of O'Connor P in *2UE v Burns*. It held that an essential feature of a 'court of a State', as that term is used in Chapter

III of the Australian Constitution, is that it be an institution exclusively, or at least predominantly, composed of judges[65].

Spigelman CJ acknowledged that the Court's conclusion in that regard was inconsistent with the approach taken by Heerey J in *Wood*[66].

### *D Radio 2UE*

In the aftermath of *Stockland,* a slightly differently constituted NSW Court of Appeal, consisting of Spigelman CJ, Hodgson and Ipp JJA, formally overruled *2UE v Burns* in *Radio 2UE*[67].

The Court of Appeal's conclusion that the NSWADT was not a 'court of a State' for the purposes of the Australian Constitution and the Judiciary Act, then required the Court to address the consequential question of how the NSWADT should have dealt with the asserted inconsistency of state law with the Australian Constitution — the issue that had been the subject of submissions on behalf of Laws, Price and 2UE.

In *2UE v Burns*, O'Connor P had held that the NSWADT, even if it were not 'a court of a State', was both competent and obliged to consider any question of law relating to its jurisdiction[68].

Setting that conclusion aside, the Court of Appeal in Radio 2UE granted a declaration that the Appeal Panel of the NSWADT lacked jurisdiction to determine whether s 49ZT of the ADA should be read down so as not to infringe the constitutional implication of freedom of communication about government matters[69]. However, the Court of Appeal reached this conclusion for reasons other than those that had been submitted on behalf of the NSW Attorney-General[70]. Spigelman CJ held that ordinarily, a state tribunal could consider submissions regarding the federal constitutional validity of State legislation in the course of the exercise of its statutory powers[71]. Hodgson JA rejected the NSW Attorney-General's contention that a state tribunal was required to make its decisions heedless of whether or not the State law might be invalid under the Australian Constitution[72].

The NSWADT (and its Appeal Panel) was held to lack jurisdiction 'solely on the basis' that its decisions could be registered in, and enforced as orders of, the NSW Supreme Court[73]. The underlying premise for this conclusion, articulated by Spigelman CJ, was that it is impermissible for '[a] State Parliament [to] confer on a court, let alone on a tribunal, judicial power with respect to any matter referred to in s 75 or s 76 of the Constitution.'[74] As decisions of the NSWADT could be enforced by registration in the NSW Supreme Court, that circumstance gave them judicial force and converted what would otherwise have been an inherent and legitimate consideration in the administrative decision-making process into a binding decision and, as such, an impermissible exercise of federal judicial power[75]. The NSW Court of Appeal held that *Brandy v Human Rights and Equal Opportunity Commission* ('*Brandy*')[76] compelled that conclusion and could not be relevantly distinguished[77].

## III Discussion

### *A When is a Tribunal a 'Court of a State'?*

On the subject of judicial power, the High Court has observed that '[t]he acknowledged difficulty, if not impossibility, of framing a definition … that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential … are not by themselves conclusive of it[78].'

The same is equally true of all attempts to frame a definition of a 'court'. Various negative and positive indicia have emerged, but there appears to be broad agreement that there is 'no unmistakable hall-mark by which a "court" … may unerringly be identified. It is largely a matter of impression.'[79] If no test can be definitive, it should not be surprising that differences arise between judges as to whether or not a particular body is a court.

In *Stockland,* the NSW Court of Appeal accepted that the NSWADT had many of the indicia of a court. It accepted that, Chapter III considerations aside, the question of whether or not that body was a court was finely balanced[80] and that for many statutory purposes, the NSWADT would have sufficient characteristics of a court to allow a finding that it met that description[81].

As if to emphasise this point, a later and differently constituted NSW Court of Appeal, consisting of Handley and Basten JJA and McDougall J, in *Trust Co of Australia Ltd v Skiwing Pty Ltd* held that the Appeal Panel of the NSWADT [82]possessed the 'relevant characteristics to be a "court" for the purposes of the *Suitors' Fund Act 1951* (NSW)'[83].

What therefore makes the disagreement between the judges in *Stockland* and those who decided the earlier cases of *2UE v Burns* and *Wood* significant, rather than merely interesting, is that the NSW Court of Appeal in *Stockland* concluded that the expression 'court of a State' was 'a constitutional expression' that[84], in the context of Chapter III, demanded that a more stringent meaning be given to the word 'court' than would ordinarily be required[85].

I will first set out the two contending positions.

*1 The position of the Federal Court of Australia*

In *Wood,* Heerey J commenced his analysis of the status of the TASADT by noting that the question was not how the *Anti-Discrimination Act 1998* (Tas) characterised the Tribunal, but rather whether the Tribunal answered the description of a 'court' in ss 71 and 77(iii) of the Australian Constitution and s 39(2) of the Judiciary Act[86]. The terms 'court' and 'court of a State' were to be construed in a context where a general separation of powers doctrine, strictly applied in relation to the federal judiciary, did not apply at a State level[87]. Heerey J accepted that there was no comprehensive test by which it was possible to define the characteristics of a 'court of a State'[88]. Accordingly, his Honour undertook that task by contrasting and weighing the cumulative effect of the various usual positive and negative indicia that had been advanced on behalf of the parties as lending weight to their submissions that the TASADT was, or was not, such a court[89]. That was in accordance with the submissions of counsel and followed conventional methodology.

Heerey J relied on *North Australian Aboriginal Legal Aid Service Inc v Bradley*[90] ('Bradley') as having settled the law as to whether or not the judicial power of the Commonwealth could be exercised by a particular tribunal — however named — otherwise appearing to possess the attributes of a State court[91]. Critically, to meet the *Bradley* test, the tribunal must be, and appear to be, independent and impartial[92]. His Honour reasoned as follows:

> In *Bradley* at [35]–[38] McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ pointed out that, until quite recent times in Australia, State and Territory summary courts have been constituted by members of the public service and subject to the regulation and discipline inherent in that position. One might add that this circumstance is explicitly recognised in s 39(2)(d) of the Judiciary Act.
>
> The federal jurisdiction of a court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate or 'some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction'. At the time the Judiciary Act was passed, such magistrates would have been salaried officials, as distinct from honorary justices of the peace, and members of their State public service, with nothing like Act of Settlement

> tenure. (And, as late as the 1970s Stipendiary and Police Magistrates in some States were not required to be lawyers.) Moreover, the fact that Parliament thought it necessary to impose such a condition suggests that at the time of the drafting of the Constitution a few years earlier it was contemplated that even honorary justices, who had no security of tenure at all, would, in the absence of such a condition, constitute a court of a State[93].

Heerey J concluded that the TASADT was both capable of being characterised as a court[94] and in possession of the requisite impartiality and independence:

> To my mind, reasonable and informed members of the public would think that the Tribunal was free from influence of the other branches of the Tasmanian government, and particularly the Executive. On reading the *Anti-Discrimination Act*, such persons would observe that it specifically applied to the conduct of the Tasmanian government, and other governments. They would also note that the Tribunal was empowered to do most of the things courts do, to conduct hearings in public of disputes between parties, to summon witnesses, to find disputed facts and apply legal rules to facts as found, to give reasons for its decisions, and to make orders which can be immediately enforced.[95]

Noting that specialist tribunals have come to play an important role in the legal institutional framework of the States, Heerey J endorsed O'Connor P's remarks in *2UE v Burns* that '[t]he Parliament could have, but did not, choose to vest the jurisdiction in the traditional courts. It established a specialist jurisdiction, with special procedures and a special bench[96].' His Honour also adopted[97] O'Connor P's conclusion that it would 'be a strange result if modern adjudicative institutions … were not seen to be "courts" within the meaning of the Judiciary Act.'[98]

*2 The position of the NSW Court of Appeal*

By contrast, in Stockland, Spigelman CJ concluded that '[i]n order to be part of the constitutionally required integrated judicial system, a tribunal must be able to be characterised not only as a court, but as a court of law.'[99] This proposition was stated as self-evident. But, save as referred to immediately below, it is not clear what, if anything, the distinction between a 'court' and a 'court of law' might require[100]. His Honour continued: 'One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges.'[101]

Spigelman CJ identified s 79 of the Australian Constitution as a source of textual support for his conclusion that an essential feature of a court, as that word is used in Chapter III, is that it is an institution composed of judges[102]. Section 79 of the Australian Constitution provides: 'The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.' Accordingly, his Honour noted that s 79 assumes that 'a "court of a State", like any other court exercising the judicial power of the Commonwealth, will be composed of "judges".'[103]

In addition, Spigelman CJ, with Hodgson and Bryson JJA in agreement, dismissed Heerey J's argument that the now repealed s 39(2)(d)[104] of the Judiciary Act served as a clear indication that the constitutional understanding at the time of Federation had been otherwise, observing that 'the meaning of a constitutional expression is not fixed as at 1900, save with respect to essential features.'[105]

*3 Which approach is to be preferred?*

The rival approaches of the Federal Court and the NSW Court of Appeal, whilst overlapping, are legally inconsistent. As *Wood i*llustrates, a tribunal can meet the *Bradley* test of integrity and independence, yet fail to satisfy the additional *Stockland* proposition that a Chapter III 'court of a State' must be composed exclusively, or at least predominantly, of judges[106].

The subsequent decision of the High Court in *Forge v Australian Securities and Investments Commission* ('*Forge*')[107] may shed some light on which approach is to be preferred. Forge decided that the appointment of acting State Supreme Court judges did not offend Chapter III[108]. The reasoning in *Forge* appears to be more consistent with the conclusions reached by the Federal Court in *Wood*, than those reached by the NSW Court of Appeal in *Stockland*.

Gleeson CJ's analysis of the factors bearing upon the question of whether a body should be regarded as a 'court of a State' includes a passage with a striking similarity to the analysis of Heerey J in *Wood*:

> No one ever suggested that, in that respect, Ch III of the Constitution 1901 (Cth) provided a template that had to be followed to ensure the independence of State Supreme Courts, much less of all courts on which federal jurisdiction might be conferred. Indeed, for most of the twentieth century, many of the judicial officers who exercised federal judicial power, that is to say, State magistrates, were part of the State public service. If Ch III of the Constitution were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the state Supreme Courts and other State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of federation, and have never done so since.[109]109

What was crucial, in Gleeson CJ's view, was a guarantee of impartiality and independence. The Australian Constitution did not otherwise specify minimum requirements. His Honour continued:

> It follows from the terms of Ch III that state Supreme Courts must continue to answer the description of 'courts'. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution. It is the principle that governs the outcome of the present case. … For the reasons given above, however, Ch III of the Constitution, and in particular s 72, did not before 1977, and does not now, specify those minimum requirements, either for State Supreme Courts or for other State courts that may be invested with federal jurisdiction.[110]

Gummow, Hayne and Crennan JJ, to the same effect, stated:

> Both before and long after Federation, courts of summary jurisdiction have been constituted by justices of the peace or by stipendiary magistrates who formed part of the colonial or state public services. As public servants, each was generally subject to disciplinary and like procedures applying to all public servants. Thus, neither before nor after federation have all state courts been constituted by judicial officers having the protections of judicial independence afforded by provisions rooted in the Act of Settlement and having as their chief characteristics appointment during good behaviour and protection from diminution in remuneration. That being so, if the courts of the States that were, at Federation, considered fit receptacles for the investing of federal jurisdiction included courts constituted by public servants, why may not the Supreme Court of a State be constituted by an acting judge?
>
> The question just posed assumes that all courts in a hierarchy of courts must be constituted alike. In particular, it assumes that inferior State courts, particularly the courts of summary jurisdiction, subject to the general supervision of the Supreme Court of the state, through the grant of relief in the nature of prerogative writs and, at least to some extent, the process of appeal, must be constituted in the same way as the Supreme Court of that State. Yet it is only in relatively recent times that the terms of appointment of judicial officers in inferior courts have come to resemble those governing the appointment of judges of Supreme Courts.
>
> History reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. The development of different rules for courts of record from those applying to inferior courts in respect of judicial immunity and in respect of collateral attack upon judicial decisions shows this to be so. The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases.[111]

The passages cited above appear to strongly reinforce the often stated principle that, subject to compliance with the 'stable principle' of institutional independence and impartiality[112], 'the Commonwealth must take [the States' judicial systems] as it finds them.'[113] Nothing in *Forge* suggests that the High Court discerned any Chapter III requirement that a 'court of a State' can only exercise federal judicial power if it is exclusively or predominantly composed of judges[114].

Heydon J noted:

> The arguments of the applicants turn on the meaning of the expression 'such other courts' in s 71 and 'any court of a State' in s 77(iii) of the Constitution. Those words now bear the meaning 'they bore in the circumstances of their enactment by the Imperial Parliament in 1900.'[115]

This, however, is directly contrary to the proposition advanced by the NSW Court of Appeal that the expression 'court of a State' is to be given a different meaning to the conception of a court existing at the time of Federation[116].

As the Court of Appeal did not identify any other issues of principle which would justify the imposition of a higher threshold, Forge appears likely to compel a reassessment of the correctness and authority of *Stockland*.[117]

*4 A circular argument?*

There is a further reason to doubt the conclusions reached in *Stockland*. The shift of the analytical focus from 'what is a "court"' to 'who is a "judge"' relies on an illusory distinction.

The NSW Court of Appeal in *Stockland* did not intend its conclusion, that in order to exercise the judicial power of the Commonwealth, a 'court' must be exclusively or predominantly composed of judges, to encompass only judges appointed under Chapter III of the Australian Constitution.[118]

Yet as Leslie Zines has noted, once that bright line threshold is crossed, as it must be for State appointees, the question of 'who is a "judge"' can only be answered by a functional test[119] — a 'judge' is a person who lawfully exercises the judicial authority of a 'court'.

Deeper examination of the question of 'who is a "judge"' inevitably leads back to the original question it was meant to help answer: 'what is a "court"'? It is impossible to avoid this inherent circularity. The two questions are one and the same. Zines' conundrum leads to the conclusion that the *Stockland* test, turning as it does on the requirement that a 'court of a State' be exclusively or predominantly composed of judges, can offer only illusory clarity.

Restating the way a question is posed does not, and cannot, simplify the task of legal analysis or reduce the complexity inherent in answering it. The underlying first order question will still remain: 'what is a "court"'? Because that question cannot be answered by any exclusive and exhaustive definition, it can only be approached obliquely by the kind of balance sheet approach that the common law has evolved to determine, case by case, whether or not a particular body is a court. And, to echo both O'Connor P and Heerey J, it would be a 'strange result' if independent and impartial state tribunals created to carry out modern, often specialist adjudicative tasks, and upon which no repugnant non-judicial functions have been conferred, are not seen to be 'courts' within the meaning of s 39(2) of the Judiciary Act[120].

*5 A caveat*

Some minor cautions are in order.

As *Stockland* was argued contemporaneously with *Forge*, the conclusion and reasoning of the NSW Court of Appeal in *Stockland* was not available to the High Court. Perhaps, should this issue come before the High Court again, the decision of a very strong bench of the NSW Court of Appeal in *Stockland*[121] might prompt some justices of the High Court to reconsider aspects of what was said in *Forge.*

Moreover, *Stockland* will continue to have practical consequences in NSW, at least until it is reconsidered within the hierarchy of the NSW court system or overturned by a later decision of the High Court.

### *B Does Chapter III limit the jurisdiction of non-court administrative tribunals?*

In *Radio 2UE*, the NSW Court of Appeal concluded that the NSWADT lacked jurisdiction to consider the constitutional validity of s 49ZT of the ADA because the decisions of the Tribunal could be registered in, and enforced as orders of, the NSW Supreme Court[122].

The Court of Appeal concluded that where the subject matter before it involved a federal question, a state tribunal was in no different a position to that of a Commonwealth tribunal in this respect[123]. Brandy was held to be binding High Court authority that could not be distinguished. It precluded both federal and State non-court tribunals alike from exercising any power over federal questions in instances in which their determinations could be given effect by registration in a court.

#### *1 Was Radio 2UE decided per incuriam?*

Although the NSW Court of Appeal in *Radio 2UE* relied on *Brandy* for its conclusions, that case assumed prominence only during the course of oral argument[124]. It had not been among the arguments advanced on behalf of the NSW Attorney-General or the subject of detailed submissions. *Brandy's* potential significance thus emerged late and as a side wind. This may explain why the Court of Appeal did not consider or even advert to a later decision of the High Court: *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority ('Henderson's case')*[125].

*Henderson's Case* involved a challenge to the power of the NSW Residential Tenancies Tribunal ('RTT') to make orders binding the Commonwealth[126]. The jurisdiction of the RTT was invoked by Dr Arvin Henderson who owned certain premises leased by the Commonwealth as manifested by the Defence Housing Authority ('DFA')[127]. The RTT was constituted under the *Residential Tenancies Act 1987* (NSW)[128].

The dispute before the RTT involved the Commonwealth as a party. The resolution of the dispute required the RTT to consider whether or not there were any constitutional or federal statutory impediments to the application of State law. Orders of the RTT for payment of money, including any amount awarded by way of costs, could be enforced by registration as an order of a court in a manner similar to the orders of the NSWADT considered in *Radio 2UE*.[129]

The DFA applied for a writ of prohibition. The Commonwealth argued that the RTT lacked power to exercise any authority over it.

The High Court rejected the Commonwealth's challenge to the jurisdiction of the RTT and upheld the Tribunal's power to make orders binding the Commonwealth. Two of the six majority justices, McHugh J[130] and Gummow J[131] arrived at that conclusion despite finding that the RTT was not a court of the State of NSW. Dawson, Toohey and Gaudron JJ found it unnecessary to decide whether or not the RTT was a court. Observing that the answer to that question would make no difference, their Honours stated:

> We very much doubt whether proceedings before the tribunal are judicial proceedings rather than proceedings of an administrative tribunal … but in the end it does not matter because in either event the DFA is bound generally by the Residential Tenancies Act and the tribunal has jurisdiction over it.[132]

The order nisi for a writ of prohibition was discharged[133].

The ratio of *Henderson's case* must therefore include the proposition that a State administrative tribunal which is not a 'court of a State' can nonetheless lawfully make decisions affecting, and exercise authority over[134], parties and subject matters that, if the tribunal had been a court, would have been transformed into an exercise of federal judicial power[135].

Although *Brandy* had been decided by the High Court only months before *Henderson's Case*, none of the justices who took part in both of these cases identified the fact that decisions of the RTT could be given effect by registration as an order of a court as being a relevant consideration. Accordingly, *Henderson's case* may suggest that *Brandy* can and should be distinguished, and its application confined to Commonwealth entities.[136]

*2 Broader issues*

However, criticism of *Radio 2UE* on the narrow ground that it was reached without sufficient regard to *Henderson's case* would not address the wider issues of principle that are common to the group of four cases examined by this article.

If court registration of their orders is the only problem that Chapter III creates for State tribunals, State Parliaments could readily devise other ways to enforce tribunal decisions to avoid disruption of their effective functioning. Moreover, it is not at all clear how Spigelman CJ's reasoning *in Radio 2UE*[137] can be reconciled with his Honour's conclusion that it is only when the decision of a State tribunal can be registered and enforced as a judgment of a court that a tribunal impermissibly exercises federal judicial power.

*3 The outcome in Radio 2UE is inherently unstable*

In respect of Chapter III issues, the Commonwealth's argument advanced in *Wood* had four steps[138]:

1 in hearing and determining a complaint under the *Anti-Discrimination Act 1998* (Tas), the TASADT is exercising judicial power;

2 where the Commonwealth is a party to a complaint under the Act, the power to determine that complaint is part of the judicial power of the Commonwealth;

3 the TASADT can only exercise any part of the judicial power of the Commonwealth if it is a 'court of a State' within the meaning of ss 71 and 77(iii) of the Australian Constitution; and

4 the TASADT is not a 'court of a State' for that purpose.

If, as Spigelman CJ stated in *Radio 2UE*,[139] the underlying principle is that a State cannot confer state judicial power with respect to any matter referred to in ss 75 or 76 of the Australian Constitution on a non-court tribunal, what objection can be offered to any of the logical steps argued for by the Commonwealth in *Wood?* That reasoning, carried to its logical conclusion, inevitably leads to the same end point as that submitted for on behalf of

the Commonwealth in *Wood* — that it is a necessary implication from Chapter III that a State tribunal which is not a 'court of a State' cannot exercise any part of the judicial power of the Commonwealth, and therefore, cannot exercise any judicial power at all in relation to matters referred to in ss 75 or 76 of the Australian Constitution. The underlying proposition advanced by Spigelman CJ cannot be reconciled with the narrow conclusion reached by his Honour and the NSW Court of Appeal in *Radio 2UE*. The outcome in *Radio 2UE* is therefore inherently unstable.

If the underlying principle articulated by Spigelman CJ is correct, its logical application requires the broader conclusion that a State quasi-judicial tribunal lacks jurisdiction to deal with cases involving the Commonwealth[140] or residents of different States[141]. No non-court tribunal exercising State judicial power can consider any issue arising under the Australian Constitution[142] or any laws made by the federal Parliament[143]. There are, however, objections that can properly be made to Spigelman CJ's statement of the underlying principle.

*4 Objections of principle*

The separation of judicial and executive power is not a constitutional requirement at the State level[144]. That a State administrative tribunal may also lawfully exercise judicial power is now too well-established a proposition to be doubted.

Sections 75 and 76 of the Australian Constitution did not withdraw any aspect of the pre-existing state judicial power of the former colonies[145]. State judicial power was, and remains, capable of being exercised by State administrative tribunals as well as courts[146]. The right of State tribunals other than courts to exercise State judicial power was not affected by s 77 of the Australian Constitution, nor was it diminished by the Judiciary Act. As Spigelman CJ correctly observed in *Radio 2UE*, the Judiciary Act does not speak in any way to the exercise of powers by tribunals that do not fall within the description of a 'court of a State'.[147]

Any restriction on the jurisdiction of a State tribunal to exercise the judicial power of its State must therefore rest not on the text of the Australian Constitution (because no basis for that exists) or on the effect of the Judiciary Act, but instead on an implication arising from the nature of the Chapter III scheme. However, there is nothing in the existing case law to suggest any High Court support for the existence of any such implication.

The right of State Parliaments to confer admixed judicial and administrative powers on their courts is subject to one Chapter III qualification. According to *Kable*, State Parliaments cannot confer repugnant non-judicial functions on state courts and, as potential repositories of federal judicial power, there must be institutional guarantees of their independence and impartiality[148]. Yet *Kable* appears to have no relevance in respect of the jurisdiction of bodies that do not meet the description of a 'court of a State'. *Kable* has consistently been held to neither require nor impose a de facto separation of powers doctrine on the States. McHugh J, for example, has observed that *Kable* would not prevent a State Parliament legislating so as to employ non-judicial tribunals even to determine issues of criminal guilt and to sentence offenders for breaches of the law[149].

The indisputable constitutional entitlement of the states to intermingle judicial and administrative functions, and to confer that admixed power on administrative tribunals — an entitlement not available to the Commonwealth[150] — is consistent with the right of State administrative bodies to lawfully exercise State judicial power notwithstanding that the subject matter of, or a party to, the dispute might be of a kind that, were it a 'matter', could also come within the original jurisdiction of the High Court pursuant to ss 75 or 76 of the Australian Constitution[151].

Although the recent jurisprudence of the High Court has been dominated by Chapter III questions, no decision of that Court can be referred to as authority for a contrary implication. Nor can any dicta of a Justice of that Court be advanced as a basis for its derivation — the only faintly arguable exception being a Delphic comment from Kirby J, in dissent, in *Henderson's case*[152].

*5 Does Chapter III require a separation of powers doctrine for the States?*

In *APLA Ltd v Legal Services Commissioner (NSW)*, Gummow J[153] and Callinan J[154] each set out compendiously what they understood to be the principles that should guide the High Court's approach to Chapter III of the Australian Constitution. Neither judgment provides any support for the proposed implication of a separation of powers doctrine for the States. Gummow J carefully listed each of the implications that his Honour accepted as arising from Chapter III and discussed them in detail — in terms that suggested that his Honour intended thereby to define their entire content in exclusive and exhaustive terms such that beyond those matters there was no room to develop any further implications derived from the nature and distribution of federal judicial power. Callinan J expressed even deeper scepticism[155].

Yet the decision and the reasoning in *Radio 2UE* can be sustained only if such a further implication exists[156]. In the context of the Australian Constitution, given that the High Court is able to reconsider its earlier decisions[157] the existence of hostile previous dicta and an absence of case law in support of a proposition need not be fatal. But, when these factors are coupled with an absence of any principled reasons for its necessity, there must be good reason to doubt that any such supposed implication exists.

As Kirby J recently noted, '[i]t is always valid to test a legal proposition by reference to the consequences that would flow from its acceptance.'[158] Adopting the supposed implication would give rise to capricious outcomes. Unless *Henderson's case* was also overruled, the Commonwealth[159] and residents of different States[160] would be subject to the authority of State officials and State tribunals exercising exclusively executive and quasi-legislative powers, yet immune to the jurisdiction of the most impartial and independent State non-court tribunals that exercised any authority capable of being characterised as a manifestation of State judicial power[161].

Moreover, the implication that flows logically from the reasoning in *Radio 2UE* would impose a separation of powers doctrine on the States. The resultant need to characterise what is done by State tribunals as belonging to executive, legislative or judicial power, in a State context in which no separation has hitherto been required, will give rise to endless complexity. The considerations left unresolved by Hodgson JA in *Radio 2UE*,[162] including his Honour's speculation (left unresolved in the absence of a further notice for the purposes of Judiciary Act s 78B) that a State tribunal might not be able to proceed to any decision at all unless and until all federal questions arising incidentally were addressed by a court having a federal jurisdiction, illustrate just some of the many difficult subsidiary issues the application of a separation of powers doctrine on State tribunals would open up.

The coherence of the integrated national scheme created by Chapter III and the Judiciary Act would be damaged, rather than enhanced, by such an outcome. The seamless capacity of both State courts and tribunals to each individually resolve disputes including intermingled federal and state law and parties would be lost. State administrative proceedings would be at risk of becoming a labyrinth trapping those subject to them in a maze of complexity. Such destructive outcomes are not required to render effective the ultimate supremacy of the Commonwealth in respect of the exercise of federal judicial[163] or executive[164]power.

For the above reasons, it may reasonably be doubted that any relevant supposed Chapter III State separation of powers implication exists.

## *IV Conclusion*

The quartet of cases discussed in this case note give different and conflicting answers to two important questions: (1) which test should be applied to discriminate between a non-court State tribunal and a 'court of a State'; and (2) whether a State tribunal that is not a 'court of a State' is limited in, or excluded from, exercising its 'power' or 'jurisdiction' over federal questions in consequence of implications arising from Chapter III of the Australian Constitution.

The decisions in *Stockland* and *Radio 2UE* will require considerable rethinking by Australian courts and tribunals of prior assumptions that Chapter III jurisprudence can have no practical relevance to State administrative law.

However, the conclusions reached by the NSW Court of Appeal in those cases remain difficult to reconcile with some of the more recent decisions of the High Court. For that reason, both *Stockland* and *Radio 2UE* may prove, in the long run, to be aberrations rather than portents.

**Endnotes**

1 2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) ('2UE v Burns').
2 (2006) 148 FCR 276 ('*Wood*').
3 2006) 66 NSWLR 77 ('*Stockland*').
4 (2006) 236 ALR 385 ('*Radio 2UE'*).
5 Australian Constitution s 71.
6 Judiciary Act 1903 (Cth) s 38 ('Judiciary Act').
7 It does this by first sweeping away every aspect of jurisdiction that state courts would otherwise have been able to exercise concurrently with the High Court: *Judiciary Act* s 39(1) acknowledges the jurisdiction made exclusive 'by virtue of section 38'. Section 39(1) further removes the remaining jurisdiction of state courts over all federal matters. Section 39(2) then fills the vacuum s 39(1) creates by investing 'the several Courts of the States' with the right to exercise federal jurisdiction with respect to 'all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38'. This conferral is subject to a number of conditions, one of the most important of which has recently been repealed. The now repealed s 39(2)(d) originally provided that the federal jurisdiction of a State court of summary jurisdiction could only be exercised by a stipendiary or police or special magistrate, or some magistrate of the State who is specially authorised by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred. This thereby excluded courts composed of lay justices from the right to any exercise of federal jurisdiction. Section 39(2)(d) was repealed by *Judiciary Legislation Amendment Act 2006* (Cth)Sch 1 item 1, but seemingly on the mistaken assumption that no such courts remained in use.
8 See above n 7.
9 Australian Constitution s 75(iv).
10 See, eg*, Re Richards; Ex parte Maloney* (1902) 2 SR (NSW) *B & P 3; Ex parte Penglase* (1903) 3 SR (NSW) 680; Fincham v Spencer (1901) 26 VLR 665; Ramsay v Eager (1902) 27 VLR 603. All Australian colonial Supreme Courts could exercise jurisdiction in respect of inter-colonial disputes. In the period leading up to Federation the Australasian Judgments Act 1886, 49 Vict 4 (Federal Council of Australasia) and the *Australasian Testamentary Process Act 1897*, 60 Vict 2 (Federal Council of Australasia) operated alongside the various 19th century colonial rules of court to facilitate inter-colonial service and execution of process. After the Commonwealth was formed in 1901 and the Australian Parliament enacted *the Service and Execution of Process Act 1901* (Cth) these Acts of the Federal Council were repealed. However, s 27(2) of the *Service and Execution of Process Act 1901* (Cth) provided for the continued transitional operation of pre-existing colonial rules of court until each State Supreme Court made rules of court relating to the new legislation. In due course, each State Supreme Court did so: see, eg, *Service and Execution of Process Act 1901*: *Rules of Court (NSW*), made 23 December 1902, published in NSW *Government Gazette*, 30 December 1902, 9229.
11 Judiciary Act s 39(2).
12 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 43–4.
13 Australian Constitution s 77(iii). In some cases this will be simple to establish. Thus the New South Wales Dust Diseases Tribunal, although called a tribunal, is expressly established as a court of record: *Dust Diseases Tribunal Act 1989* (NSW) s 4(2). But it has also always been possible for a state body to be a

court even if its empowering statute does not include such a clear statement: see, eg, *State Rail Authority (NSW) v Consumer Claims Tribunal* (1988) 14NSWLR 473, 477–9 (Hope JA).

14 Judiciary Act s 39.

15 R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.

16 See generally Kable v DPP (NSW) (1996) 189 CLR 51 ('Kable'). See also Building Construc-tion Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372, 381 (Street CJ), 398–401 (Kirby P), 407 (Glass JA), 407 (Mahoney JA); Clyne v East [1967] 2 NSWR 483, 487–8 (Herron CJ), 495 (Sugerman JA); City of Collingwood v Victoria [No 2] [1994] 1 VR 652, 663–4 (Brooking J); Nicholas v Western Australia [1972] WAR 168, 175 (Burt J).

17 See below Part III(B)(5).

18 This trend is observed initially in *Kable* (1996) 189 CLR 51.

19 (2006) 148 FCR 276.

20 This is an expression I have borrowed from Graeme Hill, 'State Administrative Tribunals and the Constitutional Definition of "Court"' (2006) 13 Australian Journal of Administrative Law 103, 105–6. For a good example of the balance sheet approach: see *A-G (UK) v British Broadcasting Corporation* [1981] AC 303.

21 (2006) 148 FCR 276, 292 (Heerey J), citing *Australian Postal Commission v Dao [No 2]* (1986)6 NSWLR 497, 515 (McHugh JA).

22 (2006) 66 NSWLR 77, 84, 87–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).

23 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005).

24 (2006) 236 ALR 385.

25 Ibid 397–9 (Spigelman CJ), 404–5 (Hodgson JA), 405 (Ipp JA).

26 See below Part III(B)(3).

27 Rees, above n 8, 41.

28 Ibid 46, citing Morris J, 'Civil Litigation: VCAT and the Courts' (Paper presented at the Advanced Civil Litigation Seminar Series 2004, Law Institute of Victoria, 15 April 2004).

29 Special leave to appeal was sought in *Stockland* (2006) 66 NSWLR 77, but the grounds raised did not involve the constitutional issues discussed in this case note. From the point of view of the appellant seeking special leave to appeal, the constitutional issues in *Stockland* became moot following remedial amendments to NSW statute law that created a parallel substantive right in State law to that contained in the *Trade Practices Act 1974* (Cth) ('TPA') in relation to misleading and deceptive conduct: see *Retail Leases Act 1994* (NSW) s 62D, inserted by *Retail Leases Amendment Act 2005* (NSW).

30 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [39], [49].

31 *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267 (Unreported, Rice JM, Alt and Bolt)

32 Ibid.

33 Ibid [103] (Rice JM, Alt and Bolt NJMM).

34 *Burns v Radio 2UE Sydney Pty Ltd [No 2*] [2005] NSWADT 24 (Unreported, Rice JM, Alt and Bolt NJMM, 16 February 2005) [47] (Rice JM, Alt and Bolt NJMM, 22 November 2004) [1]–[4]

35 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [4].

36 Ibid.

37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

38 2UE v Burns [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [6].

39 Ibid.

40 Ibid.

41 Ibid [7].

42 For a discussion of the facts: see ibid [1]–[7] (O'Connor P). While the Appeal Panel of the NSWADT had power to refer such a question to the NSW Supreme Court pursuant to Administrative Decisions Tribunal Act 1997 (NSW) s 118(1), at first instance, the NSWADT had no such power. This created the practical dilemma later noted in Radio 2UE (2006) 236 ALR 385, 402 (Hodgson JA).

43 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [39]–[76].

44 Ibid [77]–[96].

45 *Wood* (2006) 148 FCR 276, 276 (Heerey J); *Campbell on Behalf of Tibble v FLGOFF Smith* [2004] TASADT 16 (Unreported, Chairperson Wood, 12 March 2004) [4].

46 Coroner Peter Dixon, Record of Investigation into Death: Eleanore Tibble (Coronial Division,Magistrates Court of Tasmania, 15 February 2002) 3.

47 Ibid.

48 ibid.

49 Campbell on behalf of *Tibble v FLGOFF Smith* [2004] TASADT 16 (Unreported, Chairperson Wood, 12 March 2004) [4], quoting counsel for the respondent's written submission.

50 *Wood* (2006) 148 FCR 276, 281 (Heerey J).

51 Ibid 288.

52 Australian Constitution s 75(iv).

53 Australian Constitution s 76(ii).

54 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005).

55 See above n 37 and accompanying text.

56 (2006) 148 FCR 276, 289–96.

57 Ibid 288–9.
58 (2006) 66 NSWLR 77, 79 (Spigelman CJ).
59 Ibid.
60 TPA s 82(2).
61 See above n 39 and accompanying text.
62 *Trust Co of Australia Pty Ltd (Stockland Property Management Ltd) v Skiwing Pty Ltd* trading as Café Tiffany's (2005) ATPR (Digest) ¶46-264, 52 531–6 (Chesterman ADCJ, Molloy JM and Weule NJM).
63 *Stockland* (2006) 66 NSWLR 77, 84–6 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
64 Ibid 86–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
65 Ibid 84, 88–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA). However, Spigelman CJ did suggest that the application of a balance sheet approach to the NSWADT would have resulted in the same outcome: at 89.
66 Ibid 89.
67 This occurred as a result of the application of the NSW Attorney-General seeking a declaration from the NSW Court of Appeal that the NSWADT 'has no jurisdiction to, and cannot hear and determine, a question arising under the Commonwealth Constitution or involving its interpretation': Radio 2UE (2006) 236 ALR 385, 386 (Spigelman CJ). None of the other parties to the proceedings contended that Stockland (2006) 66 NSWLR 77 should be reopened: at 387, 400 (Spigelman CJ).
68 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [95].
69 Radio 2UE (2006) 236 ALR 385, 401 (Spigelman CJ). While in agreement as to the outcome, Hodgson JA expressed some reservations, leaving some questions open and only joining in the final outcome on the basis of his 'understanding' of the effect of the declaration: at 405. Unhelpfully, Ipp JA agreed with both Spigelman CJ and Hodgson JA: at 405.
70 Ibid 398 (Spigelman CJ), 403–4 (Hodgson JA), 405 (Ipp JA).
71 Ibid 399.
72 Ibid 402–4.
73 Ibid 398 (Spigelman CJ).
74 Ibid 395–6. Ipp JA concurred: at 405.
75 Ibid 398–9 (Spigelman CJ), 403–4 (Hodgson JA), 405 (Ipp JA).
76 (1995) 183 CLR 245
77 Note that Hodgson JA considered, but ultimately rejected, the view that *Brandy* was distinguishable: *Radio 2UE* (2006) 236 ALR 385, 404.
78 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane,Dawson, Toohey, Gaudron and McHugh JJ).
79 *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 351 (Lord Edmund-Davies).
80 (2006) 66 NSWLR 77, 83–4 (Spigelman CJ).
81 Ibid 84 (Spigelman CJ).
82 Their Honours did not advert to the proposition in *Stockland* (2006) 66 NSWLR 77, 84–6 (Spigelman CJ) that it is not permissible to treat one component of the NSWADT as separate from its other constituent parts.
83 [2006] NSWCA 387 (Unreported, Handley and Basten JJA and McDougall J, 21 December
84 (2006) 66 NSWLR 77, 86 (Spigelman CJ), [74] (Basten JA).
85 Ibid 86–9 (Spigelman CJ).
86 (2006) 148 FCR 276, 289.
87 Ibid.
88 Ibid.
89 Ibid 291–4.
90 (2004) 218 CLR 146.
91 *Wood* (2006) 148 FCR 276, 292–4.
92 Ibid 292 (Heerey J), citing Bradley (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
93 *Wood* (2006) 148 FCR 276, 293.
94 Ibid 289–96. Given the very different role that this consideration played in the NSW Court of Appeal's decision in *Radio 2UE* (2006) 236 ALR 385: see below Part III(A)(2); it is ironic that Heerey J concluded that the fact that the TASADT's orders could be enforced by means effectively identical to the mechanism considered in *Brandy* (1995) 183 CLR 245 tended to support the conclusion that the TASADT was a court of the State of Tasmania: ibid 292.
95 Wood (2006) 148 FCR 276, 293.
96 Ibid 295, quoting *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [50].
97 *Wood (*2006) 148 FCR 276, 295 (Heerey J).
98 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [53].
99 (2006) 66 NSWLR 77, 87.
100 Plainly Spigelman CJ did not mean by this expression that whenever a state tribunal has the power to determine existing rights and liabilities between parties it must ipso facto be a 'court of law' — this suggested criterion was criticised in Hill, above n 16, 105.
101 *Stockland* (2006) 66 NSWLR 77, 87 (Spigelman CJ).
102 Ibid 88.

103 Ibid. Note that Spigelman CJ accepted, in an earlier but related passage, that it was not necessary that state judges be termed such, rather than say magistrates, the issue being one of substance not form: at 87.
104 Repealed by Judiciary Legislation Amendment Act 2006 (Cth) sch 1 item 1.
105 *Stockland* (2006) 66 NSWLR 77, 89 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
106 This inconsistency has been assumed for the purpose of immediate discussion, but it holds true only if the legal conception of a 'judge' can logically be divorced from the legal conception of a 'court'. That such a divorce is possible was a necessary, if silent, premise of the decision of the NSW Court of Appeal in *Stockland*. However, the validity of that premise is doubtful for the reasons set out below in Part III(A)(4). If the premise is unsound, debate about a court having to be comprised of 'judges' becomes a red herring — a discussion of a distinction without a difference.
107 (2006) 229 ALR 223.
108 Ibid 234–5 (Gleeson CJ), 249–50 (Gummow, Hayne and Crennan JJ), 290 (Callinan J), 302 (Heydon J).
109 Ibid 232 (citations omitted). Cf *Wood* (2006) 148 FCR 276, 293 (Heerey J), extracted above in Part III(A)(1).
110 *Forge* (2006) 229 ALR 223, 234.
111 Ibid 245–6.
112 Ibid 234 (Gleeson CJ).
113 *Leeth v Commonwealth* (1992) 174 CLR 455, 498 (Gaudron J) (citations omitted). See also *Bagshaw v Carter* [2006] NSWCA 113 (Unreported, Giles, Ipp and McColl JJA, 12 May 2006) [32]–[37] (Ipp JA).
114 The precise meaning of this requirement is difficult to discern: see below Part III(A)(4).
115 *Forge* (2006) 229 ALR 223, 295, citing *R v Jones* (1972) 128 CLR 221, 229 (Barwick CJ).
116 See above n 105. English local courts to this day are still presided over by lay magistrates and rely on legally qualified clerks to give them guidance on the law, yet they are undoubtedly courts in the fullest sense: see, eg, *Boddington v British Transport Police* [1999] 2 AC 143, 162 (Lord Irvine).
117 Note also that in *Dao v Australian Postal Commission* (1987) 162 CLR 317, the High Court assumed, although without an express finding, that the then Equal Opportunity Tribunal of NSW, a body closely analogous to the present-day NSWADT, was a court.
118 Spigelman CJ's reference in *Stockland* (2006) 66 NSWLR 77 to 'judges' explicitly extended to State magistrates: at 87. But his Honour identified no method of distinguishing between those 'judges' and those who, although appointed to exercise the judicial power of the State of NSW as members of the NSWADT Appeal Panel, his Honour held were not 'judges'. *Forge* (2006) 229 ALR 223, 243–4, 246 (Gummow, Hayne and Crennan JJ) removes any remaining doubt that the *Act of Settlement 1701* (Imp), 12 & 13 Wm 3, c 2 terms of appointment are essential for a State 'judge'.
119 This comment was made verbally in response to the author's delivery of the paper on which this case note is based at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales: see Duncan Kerr, 'The Federal and State Courts on Constitutional Law: The 2006 Term' (Paper presented at the 2007 Constitutional Law Conference, Sydney, 16 February 2007).
120 See above n 98.
121 Individually, each of the justices would command the respect of the High Court. However, the weight to be accorded to their decision in *Stockland* (2006) 66 NSWLR 77 may be thought to be slightly lessened because of the reservations expressed, and the questions left open, by Hodgson JA: *Radio 2UE* (2006) 236 ALR 385, 402, 404–5; see also above n 68. Further, exactly what Ipp JA decided, beyond his bare assent to the actual declaration granted by the Court, is difficult to discern. His Honour expressed agreement with both Spigelman CJ and Hodgson JA: at 405.
122 Ibid 398–9 (Spigelman CJ).
123 Ibid 398–400 (Spigelman CJ).
124 Ibid 399 (Spigelman CJ).
125 125 (1997) 190 CLR 410.
126 126 Ibid 428–9 (Dawson, Toohey and Gaudron JJ), 449–51 (McHugh J), 461–2 (Gummow J), 476–7 (Kirby J).
127 A majority of the High Court was content to proceed on the assumption that the DFA was the Commonwealth: ibid 428 (Brennan CJ), 448 (Dawson, Toohey and Gaudron JJ), 510 (Kirby J). McHugh J made an express finding that it was the Commonwealth: at 460. Gummow J made an implicit finding to the same effect: at 474.
128 Residential Tenancies Act 1987 (NSW) pt 6 div 1, repealed by Residential Tribunal Act 1998 (NSW) ss 79–80.
129 Residential Tenancies Act 1987 (NSW) s 112(1), repealed by Residential Tribunal Act 1998 (NSW) s 80.
130 Ibid 461.
131 Ibid 474.
132 Ibid 448.
133 Ibid 428 (Brennan CJ), 448 (Dawson, Toohey and Gaudron JJ), 461 (McHugh J), 475 (Gummow J). Kirby J dissented: at 512.
134 It is not apparent from the judgments whether the power being exercised by the RTT was executive, judicial or a quasi-judicial mixture of both. It is arguable that the correct inference is that the Court took the view that nothing turned on these distinctions as they applied to the jurisdiction of a state tribunal.
135 This arises as a consequence of the withdrawal of all relevant State judicial power by Judiciary Act s 39(1) and its immediate reinvestment as federal jurisdiction by s 39(2): see above n 3 and accompanying text.

136 The alternative argument would be that *Henderson's Case* (1997) 190 CLR 410 can be distinguished on its facts because, with the exception of a possible costs order, the actual remedies sought in that case could not have been enforced by registration. Section 112(1) (repealed) of the *Residential Tenancies Act 1987* (NSW) provided for the registration of orders 'of the[RTT] for payment of an amount of money (including any amount awarded as costs)'. Dr Henderson had commenced proceedings in the RTT 'seeking an order that the [DFA] permit [him] to inspect premises at Epping in New South Wales' that he had leased to the Authority: at 449 (McHugh J).

137 Spigelman CJ argues that the text and structure of the Australian Constitution, particularly the strong doctrine of separation of powers arising from Ch III, means that a state cannot confer judicial power with respect to any matter referred to in ss 75 or 76 of the Australian Constitution on a non-court tribunal: *Radio 2UE* (2006) 236 ALR 385, 395–6.

138 (2006) 148 FCR 276, 288 (Heerey J).

139 See above n 73.

140 Australian Constitution s 75(iii).

141 Australian Constitution s 75(iv).

142 Australian Constitution s 76(i).

143 Australian Constitution s 76(ii).

144 See above n 16.

145 See above Pt I for a more detailed explanation of the relationship between these non-self-executing jurisdictional provisions of Ch III of the Australian Constitution and the provisions of the Judiciary Act Pt VI.

146 However, in the case of State courts, State judicial power is subject to the provisions of the Judiciary Act Pt VI.

147 (2006) 236 ALR 385, 395.

148 (1996) 189 CLR 51, 116–19 (McHugh J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591(Gleeson CJ), 598–9 (McHugh J), 626–7 (Kirby J).

149 Fardon v A-G (Qld) (2004) 223 CLR 575, 598–9, 601. See also Powercoal Pty Ltd v Industrial Relations Commission (NSW) (2005) 64 NSWLR 406; Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (2006) 66 NSWLR 151.

150 See above n 15.

151 *Henderson's case* (1997) 190 CLR 410, if it does not itself compel that conclusion, is strongly supportive of it: see the discussion of this case above in Part III(B)(1).

152 Ibid 512.

153 (2005) 224 CLR 322, 405–7.

154 Ibid 483–6.

155 See especially ibid 484–5.

156 See above Part III(B)(4).

157 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

158 New South Wales v Commonwealth (2006) 231 ALR 1, 147.

159 Australian Constitution s 75(iii).

160 Australian Constitution s 75(iv).

161 At the very least, the ratio of *Henderson's case* (1997) 190 CLR 410 must extend this far, if not further: see above n 136 and accompanying text.

162 (2006) 236 ALR 385, 402, 404.

163 The Commonwealth Parliament can remove the jurisdiction of any State court over the Commonwealth by a law made under s 77(ii) of the Australian Constitution. That it has not chosen to do so reflects the practical convenience thereby achieved.

164 Commonwealth supremacy in respect of the executive can be guaranteed by s 109 of the Australian Constitution. As Gummow J observed in *Henderson's case* (1997) 190 CLR 410,469, '[s]ection 109 … protects those rights and liabilities against such destruction, modification or qualification by State law as amounts to inconsistency in the constitutional sense.' Further, insofar as it falls within a matter of federal legislative power, the Commonwealth can remove the jurisdiction of any State tribunal over federal matters, should it choose to do so. As to any supposed general doctrine of Commonwealth immunity from such jurisdiction: see Mark Leeming, 'The Liabilities of the Commonwealth and State Governments' (2006) 27 *Australian Bar Review* 217.

# THE IMPACT OF EXTERNAL ADMINISTRATIVE LAW REVIEW: TRIBUNALS

***Linda Pearson****

External review of administrative decisions on the merits is an accepted part of the Australian administrative law landscape. The reforms made in the Commonwealth sphere during the 1970s included the establishment of the Administrative Appeals Tribunal and led to the creation and development of generalist and specialist review tribunals both in the Commonwealth and the States. The significance of these reforms is still recognised by, and influencing reforms in, other jurisdictions. Most recently, the *Leggatt Review* of tribunals in the United Kingdom drew on the Australian experience, commenting:[1]

> We found general agreement that the AAT had had a thoroughly beneficial effect on the development of administrative law, establishing a valuable tradition of individual treatment of cases, and of test cases. That had enabled the development of a distinctive process of merits review which all tribunals used in their separate jurisdictions.

Review of administrative decisions by an external, independent, tribunal which would have the power to substitute the 'correct or preferable' decision was seen by the Kerr Committee in 1971 as the key to correcting 'error or impropriety in the making of administrative decisions affecting a citizen's rights'[2]. The focus was on redressing individual grievances, and only incidentally in playing a role in improving administrative decision-making. The Kerr Committee expressed the hope that the recommended reforms should 'tend to minimise the amount of administrative error' and that the right to challenge administrative decisions should 'stimulate administrative efficiency'.[3]

By the time of the Administrative Review Council (ARC) *Better Decisions* report,[4] improving the quality and consistency of agency decision-making was seen as one of four specific objectives of the merits review system, the others being providing the correct and preferable decision in individual cases, providing an accessible mechanism for merits review, and enhancing the openness and accountability of government.

This paper raises three questions for consideration:

1. Why are we concerned about the impact of external tribunal review, whether on an individual level or on administration more generally?
2. What do we mean by "impact", and how might we measure it?
3. What do we know about how agencies respond to tribunal review decisions?

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### *1. Why does impact matter?*

External review by tribunals is only one part of the Australian system of administrative law (other key elements being the courts, and the Ombudsman). And those external review mechanisms are themselves only a part of what has come to be described as 'administrative justice', a term which has many meanings.[5] Adler has defined administrative justice as referring to 'the principles that can be used to evaluate the justice inherent in administrative decision-making'. Those principles comprise both procedural fairness, concerned with the process of decision making, and substantive justice, which refers to the outcomes of the decision-making process.[6] Adler has argued that the external review mechanisms are not particularly effective on their own in achieving administrative justice:[7]

> This is, in part, because few of those who experience injustice actually appeal to courts, tribunals or ombudsmen; in part because court, tribunal, and ombudsman decisions have a limited impact on the corpus of administrative decision-making. As a result, as Ison (1999:23) points out, "the total volume of injustice is likely to be much greater among those who accept initial decisions than among those who complain or appeal".

While external review may have a limited role to play on its own in achieving administrative justice, it is important to acknowledge that the various external review mechanisms require continuing commitment of significant resources, financial and otherwise, by governments and individuals. They also represent for many individuals the most direct opportunity available to participate in, and question, government decisions which affect them. So there is a need to understand the impact of external review, both in the individual case, and more broadly.

There is a clear shift from Kerr to *Better Decisions* in acknowledging that tribunal review could, and should, have consequences beyond the resolution of an individual dispute. There are several explanations for that. Sir Gerard Brennan, as the first President of the AAT, played an early and crucial role. In the second Annual Report of the AAT in 1978 Sir Gerard noted that '[t]he way in which the system can serve the individual and the administration must be learned, and learning is difficult'.[8] Sir Gerard saw the tribunal's influence on administrative decision-making as arising primarily from its determination of individual cases, and through the quality of its reasons for decision. In 1979 Sir Gerard stated:[9]

> The objective of administrative review on the merits is to improve the quality of decision-making, both in the particular case and, by precept, generally.

In 1996, at a seminar held to mark the 20th anniversary of the AAT, Sir Gerard commented:[10]

> The AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making. This had to be achieved by the quality of the AAT's reasoning. Departments, like any organised human activity, tend to have an inward focus and the corporate culture tends to be the most powerful influence on the conduct of individuals engaged in that activity. External review is only as effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded. AAT decisions would have a normative effect on administration only if the quality of those decisions was such as to demonstrate to the repositories of primary administrative power the validity of the reasoning by which they, no less than the AAT, were bound. Any effect that the AAT might produce in primary administration would depend upon the reasoning expressed in the reasons for AAT decisions.

Other factors were at play during the 1980s and into the 1990s, not the least of which was the changing focus of public administration. Chief Justice Gleeson noted in his speech marking the 30th anniversary of the AAT in 2006 that the AAT does not operate in a static context, and commented:[11]

> There have been major developments, since 1976, in the principles and practice of public administration. Methods of performance review and accountability within the public sector have changed, and continue to change. Privatisation, and the outsourcing of functions, have placed many activities affecting citizens outside the scope of the legislative scheme conceived in the 1970s.

Adler has described these changes as a challenge to the bureaucratic, professional and legal models of decision-making accepted in the early 1980s, by a managerial model associated with the rise of the new public management, a consumerist model focussing on increased participation of consumers in decision-making, and a market model that emphasises consumer choice.[12] The consequence of these challenges is a continuing focus on cost, and efficiency. For example, the 2007 Productivity Commission *Report on Government Services* on its Review of Government Service Provision, focuses on outcomes from the provision of government services - whether through government funding of service providers or the provision of government services directly - in an attempt to measure whether service objectives have been met. Outcomes are to be measured against indicators of equity, effectiveness, and efficiency.[13]

More generally, as the administrative review system has become entrenched, more is expected of it than simply delivering justice in the individual case. There is an expectation that tribunal decisions and decision-making have a role to play in ensuring that there is fairness and consistency in the treatment of individuals by government; that there is an improvement in the quality and consistency of agency decision-making beyond the individual case; and that there is an improvement in administration generally through the adoption of the values inherent in administrative review.[14]

### *2. How do we measure 'impact'?*

There is a growing body of empirical work, much of it coming from the United Kingdom, assessing the impact of judicial review. Some of the empirical studies have focussed on the impact of judicial review as a mechanism for handling individual grievances, examining the ultimate outcomes for applicants. Others have focussed on judicial review as a mechanism for addressing systemic bureaucratic failings.[15] Attempts to understand or measure 'impact' in this context have shifted between considering judicial review as a process, to bureaucratic reaction to particular decisions or series of decisions, or to the impact of judicial review as a system of values and legal norms.[16] The central requirement is that there is a clear understanding of what is being evaluated: impact *of* what, and impact *on* what.

Any evaluation of impact, whether it be of judicial review or tribunal review, must acknowledge that external review is only one influence on administrative decision-making. The 'administrative soup'[17] of influences on decision-making includes factors such as resources, policies, and personal pressures, and the principles and values that lawyers associate with external review change as they mix with those other factors.

While many of the approaches to assessing impact of judicial review are helpful, evaluating the impact of tribunal review raises some different issues. Judicial review as a process involves the interaction between two clearly separate branches of government, as expressed by Brennan J in *Church of Scientology v Woodward*:[18]

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

The relationship between a tribunal and the agency whose decisions it reviews is more complex than that between a court and that agency, and any attempt to evaluate the impact of tribunal review must reflect those complexities.

Tribunals are part of the system of adjudication, and they resolve disputes by methods of application of law to facts similar to those used by the courts.[19] The principle that tribunals should not seek to defend their decisions on review, but simply submit to such order as the court may make is perhaps a reflection of that.[20] However, those tribunals which review administrative decisions on the merits do so, most clearly in the federal context, as an exercise of executive power.

The High Court decision in *Craig v South Australia*[21] draws a distinction between inferior courts and other decision-makers, including tribunals, for the purposes of identifying jurisdictional error, and there is now little room for a tribunal to make an error of law which is not jurisdictional.[22] Under this approach tribunals are clearly part of the executive, and are accountable to the courts in the same way as other executive decision-makers. While tribunals are independent of the decision-making structure within which primary administrative decisions are made, they are still part of that structure – and some have described that position as at its apex.[23] However, tribunals occupy a distinctive role within the administrative decision-making structure. Tribunals are not simply correcting errors (whether of fact or law) made by the primary decision-maker:[24]

> Tribunals overturn departmental decisions for many reasons including: new evidence; applicants taking the process more seriously once they have received a negative decision from the department; changes in the law due, for example, to court decisions; applicants feeling the need to defend their credibility; and different exercise of a discretion.

Further, the ability of a tribunal to depart from government policy and guidelines sets it apart from primary decision-makers. In this regard, the traditional dichotomy of tribunals and primary decision-makers needs to be revisited, to reflect the development of government agencies which act simply as deliverer of services, with the real policy framework provided from outside.[25]

### *3. What do we know about impact, or how agencies respond to tribunal review?*

In Australia, after some early work on evaluating tribunals,[26] Creyke and McMillan have led the way in evaluating impact. Their study of the outcomes of judicial review focussed on outcomes for applicants. [27] The related part of their study on executive perceptions of administrative law looked at impact more broadly, and included responses to tribunal review as well as the other external review mechanisms.[28] Apart from this work (referred to below), we are left primarily with anecdotal observations, to a large extent contained in the proceedings of the AIAL, and those of the 1987 conference which provided the impetus for its formation.[29] The many contributions to those conferences and seminars over the years reflect a range of perspectives of external merits review, from impatience, and sometimes hostility, to a more positive recognition of the role of external merits review in clarifying principles and exposing deficiencies.

Cost has always been a concern, as reflected in the criticisms made by then Minister of Finance Senator Peter Walsh in 1987 of 'the capricious nature and considerable cost' of some AAT decisions.[30] Senator Walsh was referring to both the direct costs of running the system, and the broader costs to public programs of some AAT decisions. While there was early acknowledgement that the system would cost money, there has been little analysis of the real costs and benefits of administrative review.

The costs of running the tribunal system are difficult to calculate, as different measures are used by each tribunal, and administrative arrangements with other agencies complicate the picture. However, based on the information provided in Annual Reports for 2005-2006, the following points can be made.

In the federal sphere, total operating costs for the AAT, Social Security Appeals Tribunal (SSAT), Veterans Review Board (VRB), Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) were close to $90,000,000, and these tribunals finalised a combined 30,356 matters. The average cost per finalisation ranged from $1563 for the VRB to $5962 for the RRT. The State sphere is more complex, as tribunals combine both merits review and other jurisdictions, including civil claims, and it is difficult to extract the information relating to the costs of merits review. The NSW Administrative Decisions Tribunal has a retail leases jurisdiction; the Victorian Civil and Administrative Tribunal (VCAT) includes planning decision-making (which is handled in NSW by the Land and Environment Court) and guardianship (which in NSW is handled by the Guardianship Tribunal). The VCAT and the WA State Administrative Tribunal both deal with residential tenancy issues, which in NSW are handled by the Consumer Trading and Tenancy Tribunal. The residential tenancy decisions swamp all other jurisdictions in VCAT and also in those heard in the NSW CTTT.

The total operating cost of the federal tribunal system, some $90 million in 2005-2006, obviously does not include the costs to the agencies whose decisions they review, or to the individuals who apply to, or appear before, them. The total number of matters, 30,356 (which would include some double counting, for applications made to the AAT for review of decisions of the SSAT and VRB), is a small proportion of the number of decisions made by Commonwealth decision-makers which might affect the interests of an individual or organisation. To take the social security jurisdiction as an example, Centrelink has over 25,000 staff and 6.5 million customers; sends 90 million letters each year and distributes $60 billion in payments.[31] In 2002-3 there were a minimum of 109,000 reconsiderations by the original decision-maker, which flowed on to 39,383 reviews by authorised review officers.[32] In that year, the SSAT received 9,576 applications, and 1,869 applications were made to the AAT.

It is equally difficult to compare results, and the following statistics are based on information provided in the Annual Reports for 2005-2006. For the SSAT, 35.3% of decisions in jurisdictions involving at least 10% of the tribunal's work were set aside or varied,[33] as a percentage of set aside, varied or affirmed.[34] There were appeals to the AAT from 21.7% of appealable decisions (7% by the Secretary); of those, 20.4% were set aside or varied. More than half the matters determined in the AAT are by consent, and in those matters 57.1% are set aside or varied. For those matters that proceeded to a decision, in 28.7% of cases the decision under review is set aside or varied. In the VRB, 28.2% of entitlement decisions were set aside, while in 48% of assessment decisions the rate increased, and was reduced in 0.7% of matters. For those matters that went on to the AAT, the percentage set aside or varied by consent was similar to the overall rate; for matters finalised by decision, however, 36.9% were set aside or varied. In the MRT 51% of decisions were in the applicant's favour (ranging from 22% of decisions concerning bridging visas to 68% of partner visa decisions). For the RRT, an average of 30% of matters were determined in the applicant's favour (ranging from 2% for applicants from Malaysia, to 97% from Iraq).[35]

The general point that can be made about these statistics is that an individual has a reasonable prospect of having an adverse decision changed, and that this remains so if there is more than once chance at review, and those opportunities are pursued. However, those individuals who directly benefit in this way are only a small proportion of those affected by administrative decision-making. The direct costs, and benefits to those individuals who obtain a more favourable outcome, are only part of the picture. Chief Justice Spigelman has warned against the dangers of 'pantometry', or the belief that everything can be counted: '…not everything that counts can be counted. Some matters can only be judged – that is to say, they can only be assessed in a qualitative way'.[36] Qualitative assessments of tribunal review would include fairness, and the value of participation of individuals in decisions which affect them, sometimes for the first time.[37]

The ARC commented in *Better Decisions* on the need to foster cultural change within agencies, noting that "at the primary decision making level many agency decision makers remain sceptical of the value of merits review".[38] This may be an unwarranted assumption, as the empirical research conducted by Creyke and McMillan since then has found a high level of approval of external review.[39] The outcomes were summarised by Creyke in the following terms:[40]

> Overall there was a firm rejection of the following propositions, all of which were couched in the negative. That is, four out of five respondents disagreed or strongly disagreed with the proposition that external review bodies undermine government policy; more than half disagreed with the suggestion that external review bodies give too little focus to the economic and managerial imperatives of government; and nearly two-thirds rejected the proposition that external review bodies give too much emphasis to individual rights when they make decisions.
>
> However, although this was not the majority view, a significant number (around one-third) of respondents were critical of external review bodies, particularly tribunals, for their lack of understanding of the context for and pressures on government decision-making, and just over half the respondents considered that external review undesirably prolongs disputes.

In 1987 Derek Volker, then Secretary of the Department of Social Security, commented on how few people had used the various avenues of access to information or review of decisions: explained in part by the complexity of the system, but also by what he saw as rapid and significant improvements driven by external scrutiny of decisions in the quality of decisions, the reasons for decision, and clarification of legislative provisions and policies.[41] In 1998 Michael Sassella, then First Assistant Secretary in the Department of Social Security, agreed that clarification of the legislation had been positive, however, he was critical of the tribunals' 'lack of sufficient interest in government and departmental policy and practice'.[42] This criticism echoes a concern expressed in 1993 by Kees de Hoog, who commented that the tribunals involved in review of social security decisions tended to focus on legal technicalities and the individual facts before them, rather than on consistency and the needs for efficiency at the primary decision-making level.[43]

These comments reflect the impact of tribunal review as a mechanism for handling individual grievances. Consideration of tribunal review as a mechanism for addressing broader administrative issues has so far focussed on two factors: the influence of a tribunal's reasons for decision, and the need to build a bridge between tribunals and government agencies.

### *Tribunal reasons*

*Better Decisions* identified two ways in which review tribunal decisions could have a broader effect on agency decision-making: by ensuring that tribunal decisions are reflected in other similar decisions, and by taking into account review decisions in the development of agency policy and legislation.[44] The ARC argued that agencies need to have organisational structures and procedures to enable them to take account of tribunal decisions. The 'appropriate organisational systems' identified by the ARC required that agencies have in place processes for:[45]

- receiving review tribunal decisions and analysing their potential effects on agency decision-making (including determining whether further review should be sought of, or an appeal made against, particular review tribunal decisions);
- effective and timely distribution of relevant review tribunal decisions (or a synopsis of decisions where that is sufficient), and identification of changes to legislation, guidelines and policies which should arise from those decisions; and
- training staff (particularly primary decision-makers) in appropriate aspects of administrative law, including the role of external merits review.

The ARC discussed appropriate agency responses to tribunal decisions, noting that there is a range of possible responses, including a change in agency policies or guidelines. The ARC accepted that there may be legitimate reasons why an agency which believes that a tribunal decision is not correct does not pursue available appeal rights or seek Parliamentary clarification of its policy intention. However, the ARC commented that it is unsatisfactory for an agency to respond to a tribunal decision which it believes to be incorrect only by advising its decision-makers not to follow the decision in future similar cases. Such a response does not resolve any difference of opinion between the agency and the tribunal, may lead to different results for individuals depending on how far they pursue their appeal rights, and may diminish the credibility of the tribunal in the eyes of both agency decision-makers and tribunal users.[46] Appropriate responses would be to amend policy or seek an amendment to the law; to appeal or seek review of the tribunal decision; or to make a public statement of their position in relation to the tribunal decision.[47]

The other side of the equation is that tribunals need to deliver 'high quality and consistent decisions'.[48] Bayne has identified three ways in which tribunals can, through the process of making decisions, have a normative effect on primary administration:[49]

> First, in relation to the process followed, to reduce the possibility of error or injustice; secondly, in relation to the correct application of the law; and, thirdly, in relation to the kinds of considerations and policies which inform the making of discretionary judgments.

Creyke and McMillan observed from their empirical work that there was general satisfaction with the quality, length and comprehensibility of the reasons for decision of review bodies (courts and tribunals). However there were some concerns expressed about variations in the quality of reasons, and greater approval of reasons provided by the courts than those provided by the tribunals, with the AAT faring better than the specialist tribunals.[50] The study included questions intended to gauge the agencies' responses to the recommendations of the ARC. Those questions elicited the rather disappointing outcome, that only one third of agencies had addressed the specific recommendations concerning appropriate responses to tribunal decisions, or the recommendations for implementing appropriate organisational processes.

### *Communication between tribunals and agencies*

The Kerr Committee recommended that one of the three members constituting its proposed Administrative Review Tribunal should be an officer of the department or agency whose decision was subject to review. This was seen as being of benefit to the tribunal, as it 'would ensure that particular knowledge of the area of administration which produced the decision under review would be available to the Tribunal'.[51] Feedback from the Tribunal to the agency was considered only in the context of the limited role that the Kerr Committee perceived for review of government policy:[52]

> It may also be desirable that the Tribunal should be empowered to transmit to the appropriate Minister the opinion of the Tribunal that although the decision sought to be reviewed was properly based on government policy, government policy as applied in the particular case is operating in an oppressive, discriminatory or otherwise unjust manner.

The AAT and the other merits review tribunals adopted quite a different role in deciding whether or not to apply government policy.[53] That led to criticism both of the tribunals' independent role in determining the legality of policy, and whether its application in a particular case would result in injustice, and to charges that the tribunals were failing to consider government policy at all. Much of the force of these criticisms has waned, in part because policy guidelines are now more readily available both to tribunals and the public as a result of the requirements of Freedom of Information legislation, and advances in technology.

The call for better communication between tribunals and agencies has been consistent over the years, and has come from all quarters, including the administration,[54] the tribunals,[55] and government.[56] Tribunals must retain independence from the agencies whose decisions they review, however many tribunals are closely linked with those agencies through funding and other administrative ties. Most tribunals have established liaison procedures with relevant agencies. As the ALRC noted in the context of a tribunal obtaining information from the department whose decision is subject to review, formal and transparent links are less of a threat to independence than informal links.[57] Some tribunals now have formal agreements with their portfolio agencies.

The Memorandum of Understanding between the Department of Immigration and the MRT and RRT is available on the Tribunals' website, and includes provision for regular meetings. Much of the detail in this Agreement concerns information exchange, technology, and financial arrangements, and makes minimal reference to the organisational matters raised in *Better Decisions*. Para 3.6 rather cryptically states 'The agencies [ie, the department and the tribunals] shall endeavour to assist each other in increasing the quality and efficacy of decision-making and decision-making processes.' The Centrelink/SSAT Administrative Arrangements Agreement sets out comprehensive liaison and feedback arrangements, intended to facilitate the shared goal of making the correct or preferable decision at either the primary stage or on review.

We do have some understanding of the processes by which some agencies respond to review tribunal decisions. For example, at the 2004 AIAL National Forum, Pat Turner (Deputy Chief Executive Officer, Customer Service) outlined the processes for consideration of SSAT and AAT decisions by Centrelink and the then Department of Family and Community Services. Under those processes, there is consultation between the program branches and the Legal Services Branch in considering whether a decision of the tribunals which changes the original decision should be appealed. Centrelink makes recommendations to client agencies both as to whether a decision should be challenged, and whether policy or legislative change is warranted. Further, the SSAT receives copies of the comments on individual tribunal decisions.[58]

Overall, however, it is discouraging to note that while lawyers, administrators, tribunals and courts have been talking about these issues for thirty years, there is still limited evidence beyond the anecdotal. There is a need for a more concerted and coherent attempt to measure the effectiveness of the tribunals, and not just in terms of financial cost.[59] Creyke and McMillan have made a start, however their review of executive perceptions addressed all external review avenues, and for various reasons did not focus on outcomes for individual specialist tribunals. There remains a need for further empirical work, both to understand current feedback mechanisms, and to build on that in developing a protocol for appropriate mechanisms for dialogue between tribunals and agencies.

**Endnotes**

1 Sir Andrew Leggatt *Tribunals for Users One System, One Service* Report of the Review of Tribunals, 2001: Part II, para 6.
2 Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971, para 354
3 Ibid, para 364.
4 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39, 1995.
5 A comprehensive discussion is provided by P O'Connor 'Measuring the Quality of Administrative Justice', paper delivered to the COAT NSW Chapter 4th Annual Conference, May 2007.
6 M Adler 'A Socio-Legal Approach to Administrative Justice' (2003) 25 *Law & Policy* 323-352 at 323-4.
7 Ibid, at 328.
8 *Foreword to Second Annual Report* 1978, AGPS, ii.

9 'The Future of Public Law – the Australian Administrative Appeals Tribunal' (1979) 4 Otago Law Review 286, cited in R Balmford 'Administrative Tribunals and Sir Gerard Brennan: Some Specific Topics' in R Creyke & P Keyzer (eds) *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* 2002, Federation Press, 92 at 97.
10 'Twentieth Anniversary of the AAT' in J McMillan (ed) *The AAT – Twenty Years Forward* (1998, AIAL), at 11-12.
11 Hon M Gleeson 'Outcome, Process and the Rule of Law' (2006) 65 *Australian Journal of Public Administration* 5 at 7.
12 Adler note 6, at 331-2.
13 Productivity Commission *Report on Government Services* 2007, 1.9-1.18.
14 G Fleming 'Administrative Review and the 'Normative' Goal: Is Anybody Out There?' (2000) 28 *Federal Law Review* 61 at 63.
15 P Cane 'Understanding Judicial Review and its Impact' in M Hertogh & S Halliday (eds) *Judicial Review and Bureaucratic Impact* (CUP, 2004)15 at 32-33.
16 M Sunkin 'Issues in Researching the Impact of Judicial Review' in M Hertogh & S Halliday (eds) *Judicial Review and Bureaucratic Impact* (CUP, 2004) 43 at 47.
17 Ibid, at 71.
18 (1982) 154 CLR 25 at 70:
19 P Bayne 'Tribunals in the System of Government' *Papers on Parliament No 10* 1990, 3.
20 *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13.
21 (1995) 185 CLR 163
22 Creyke has described this as corralling tribunals into the 'to-be-watched-carefully' category: R Creyke 'The special place of tribunals in the system of justice: How can tribunals make a difference?' (2004) 15 *Public Law Review* 220 at 222.
23 P Bayne 'The Proposed Administrative Review Tribunal – Is there a Silver Lining in the Dark Cloud?' (2000) 7 *Australian Journal of Administrative Law* 86, at 98.
24 S Tongue 'An Era of Opportunities: The Role of the Administrative Review Process in Addressing Complexity, Accuracy and Consistency in Decision-Making' (1999) 93 *Canberra Bulletin of Public Administration* 54 at 54-5. As an illustration, in 2005-2006 'new information' (including financial, medical, and information about circumstances) was the basis for 37% of decisions set aside by the SSAT: *Annual Report* 2005-2006, 16.
25 The obvious example here is Centrelink, which delivers services for ten policy departments: http://www.centrelink.gov.au/internet/internet.nsf/about_us/departments.htm.
26 J Goldring, R Handley, R Mohr & I Thynne 'Evaluating Administrative Tribunals' in S Argument (ed) *Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof?* (AIAL,1994) 160.
27 R Creyke & J McMillan 'Judicial Review Outcomes – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82; R Creyke & J McMillan "The Operation of Judicial Review in Australia" in M Hertogh & S Halliday (eds) *Judicial Review and Bureaucratic Impact* (CUP, 2004) 161.
28 R Creyke & J McMillan 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163.
29 'Administrative Law: Prospect and Retrospect', Canberra 15-16 May 1987, published in *Canberra Bulletin of Public Administration* No 58, April 1989.
30 P Walsh 'Equities and Inequities in Administrative Law' (1989) *Canberra Bulletin of Public Administration* No 58, 1989, 29 at 30.
31 Centrelink's Vital Statistics, available at www.centrelink.gov.au/internet/internet.nsf/publications/co154.htm.
32 Auditor General Audit Report No 35 3004-2005 *Centrelink's Review and Appraisal System*, para 1.11.
33 Recognising that most, but not all, such decisions will be favourable to the applicant.
34 These were age pension, disability support pension, family tax benefit, newstart allowance, and parenting payment.
35 The set aside statistics for the RRT fluctuate considerably: 12% in 2001-2002, 6% in 2002-2003, 13% in 2003-2004 and 33% in 2004-2005. The relatively higher set aside rates in 2004-2005 and 2005-2006 are probably attributable to applicants from Afghanistan and Iraq representing a significant proportion of the RRT caseload in those years.
36 Hon JJ Spigelman 'Measuring Court Performance' (2006) 16 *Journal of Judicial Administration* 69 at 70.
37 S Tongue 'An Era of Opportunities: The Role of the Administrative Review Process in Addressing Complexity, Accuracy and Consistency in Decision-Making' (1999) 93 *Canberra Bulletin of Public Administration* 54 at 54.
38 *Better Decisions*, para 6.10.
39 R Creyke & J McMillan 'Executive Perceptions of Administrative Law – An Empirical Study"' (2002) 9 *Australian Journal of Administrative Law* 163.
40 R Creyke 'The special place of tribunals in the system of justice: How can tribunals make a difference?' (2004) 15 *Public Law Review* 220 at 224-5.
41 D Volker 'The Effect of Administrative Law Reforms: Primary level Decision-making' (1989) *Canberra Bulletin of Public Administration* No 58, 1989, 112 at 112-3.
42 M Sassella "Sunset for the Administrative Law Industry? Commentary" in J McMillan (ed) *Administrative Law under the Coalition Government* (1998, AIAL) 65 at 67.

43 K de Hoog "A View from the Administration" in S Argument (ed) *Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof* (AIAL, 1994) 67 at 77.
44 *Better Decisions* para 6.2.
45 *Better Decisions* para 6.18.
46 *Better Decisions* para 6.39.
47 *Better Decisions* Recommendation 73.
48 *Better Decisions* paras 6.3, 6.4.
49 Bayne, note 21 at 89.
50 R Creyke & J McMillan 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163, at 172.
51 Kerr Committee para 292. Sir Anthony Mason, one of the members of the Kerr Committee, later acknowledged that this recommendation had been a mistake, noting that while it might have encouraged public service support for the overall scheme, it would have created difficulties, in particular by subjecting the departmental representative to "an undesirable conflict": Sir Anthony Mason "Administrative Law Reform: The Vision and the Reality" (2001) 8 *Australian Journal of Administrative Law* 135 at 139.
52 Para 299
53 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
54 For example, see S Skehill 'The Impact of the AAT: The View from the Administration' in J McMillan (ed) *The AAT- Twenty Years Forward* AIAL, 1998, 56 at 61.
55 See S Tongue 'An Era of Opportunities: The Role of the Administrative Review Process in Addressing Complexity, Accuracy and Consistency in Decision-Making' (1999) 93 *Canberra Bulletin of Public Administration* 54 at 57.
56 Including former Attorney-General, the Hon D Williams: "Improving the Quality of Decision Making" Commonwealth Review Tribunals Conference 1996, in [1996] *Admin Review* 46.
57 ALRC *Managing Justice: A Review of the Federal Civil Justice System* Report No 89, 2000, para 9.94.
58 P Turner "The Normative Effect in Centrelink: Part of the Feedback Loop" in C Finn (ed) *Shaping Administrative Law for the Next Generation: Fresh Perspectives* (AIAL, 2005) 226 at 235-6
59 Hon M Kirby 'Have We Achieved RN Spann's Vision of Administrative Law?"'(1997) 56 *Australian Journal of Public Administration* 3 at 10.

# OF ALIENS AND TERRORISTS: JUDICIAL REVIEW OF EXECUTIVE ACTION IN THE THIRD MILLENNIUM

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## *I Introduction: Interesting times*

> There is a Chinese curse, which says, 'May he live in interesting times'.
> Like it or not, we live in interesting times...[1]

We do still live in interesting times, where everything old is new again. The historically rooted prerogative writs of prohibition, mandamus, certiorari and habeas corpus have been given new life revitalised as the vehicles through which delineation between executive action and judicial review are being sketched.

In the third millennium the fundamentals of our social structure, such as the separation of powers and the rule of law, previously defined in ancient Greece and Rome, and again in revolutionary Europe and America, are undergoing re-examination. Like those before it the current re-examination is taking place across a spectrum of venues - on the street, in courtrooms, the media and the houses of government and power. In what current neo-conservatives label a quest for clear boundaries between judicial and executive responsibilities which others may call a grab for unadulterated control, executive action concerning border protection programs and the 'war on terror' in particular, have become the frontline in courtroom argument of administrative law.

The highest federal courts in Australia and the United States of America (the Courts) have been repeatedly challenged to delineate the rule of law and provide continued authority for judicial review of executive action. At the centre of the current reformation of prerogative powers and writs is the eerie logic of the American and Australian executive governments whose use of laws governing both aliens (asylum seekers) and terrorists, tests the extent to which the legislative branch of government can restrict judicial review before 'our democratic values' are diminished so as to be without value.

This article considers constitutional sources of judicial review. It then examines some interesting cases which are (re)defining fundamental conceptions of law while breathing new life into ancient precepts and simultaneously weakening the possible scope of their modern application. It will be argued that when considering the issue of judicial review over an exercise of non-statutory executive powers, the judiciary in both Australia and America have made the principles of legal interpretation overly complex, in an attempt to stave off a direct confrontation with the political branches of government. Consequently, the Courts' actions have allowed governments to enact legislation that does not mean what it says thereby setting complex, intriguing and possibly bad law as precedent.

These are indeed interesting times. Perhaps, it is time for the Courts to take a bold step and strike down the Executive's encroachment upon the quasi-judicial.

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### *Judicial review and sources of power*

The Australian and American Constitutions form a blue print for their respective nations system of democratic rule. At the heart of both systems is the principle of the separation of powers, in the form of an elected legislative and executive; and an independent judiciary. The judiciaries are granted the power to review certain actions taken by the executive and legislative. Therefore, if the courts in the two countries are to retain their 'political legitimacy',[2] they must justify their power to review executive action.

To quote Gleeson CJ, 'The word legitimacy implies an external legal rule or principle by reference to which authority is constituted, identified and controlled.'[3] The source of the power to review may derive from the Constitution, legislation, the common law or a combination of the fore-mentioned. It should be noted that the common law cradles both nations' constitutions influencing how each instrument is read and interpreted. In the *Communist Party Case*,[4] Dixon J (soon to be CJ) remarked that the Constitution 'is an instrument framed in accordance with many traditional conceptions … [a]mong these I think it may fairly be said that the rule of law forms an assumption.'[5]

### *The common law influence and the rule of law*

Judicial review remedies exist at common law, having long and proud traditions. The oft-espoused principle of the rule of law is an imperative part of the common law and said to be central to political and legal philosophy in Australia and the USA.[6] It is also a principle central in administrative law. Ironically though while litigants and other social spokespeople claim to trumpet the rule of law it is a phrase which remains ill defined.

Professor Aronson[7] has said:

> [i]t is now trite law that jurisdiction to engage in judicial review on constitutional grounds is sourced ultimately to the separation of powers, and that this jurisdiction is entrenched."[8] In this respect also our Constitution is heavily influenced by the jurisprudence of Marshall CJ,[9] who once said: "The distinction between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.[10]

Justices of the Supreme Court[11] and judges of the High Court have been very fond of the rule of law. The natural inclination of judges is, unsurprisingly, to see judicial review as a paramount feature of the rule of law. It is beyond the scope and parameters of this essay to present a singular definition of the rule of law however, certain characteristics need to be discussed.

General requirements of the rule of law are that laws be prospective, general, clear, fairly stable and publicised. Further, 'the Courts [should] be able to review legislative and administrative action to ensure conformity to the rule of law'.[12] The notion that the law be clear, understandable and open is vital for democracy. A citizen should be able to engage with the law outside of the courtroom. For example, a reasonable person, if so inclined should be able to read the law and take it at its face value.

> [T]he essence of the rule of law is that all authority is subject to, and constrained by, law…authority could not satisfy the requirements of the rule of law merely by being able to point to a fundamental law which empowered it to act in an arbitrary manner.[13]

It is on this point that administrative law has experienced its rapid growth in volume of cases and in the nature of their importance.

> If [the rule of law] is recognized as an essential element of constitutional government generally and of representative democracy particularly, then it has an obvious part to play in political theory. It may be

> invoked in discussions of the rights of citizens and beyond that of the ends that are served by the security of rights.[14]

Surely being unable to take the plain meaning of the law, as is now the case in the two areas being examined by this essay is arbitrary in some manner. Especially as laws governing suspected illegal entrants and alleged terrorists (groups which are incontestably vulnerable to discrimination) strike at other fundamentals of not only our legal and political systems but also our humanity.

### *Prerogative writs*

The old prerogative writs, which were born out of England's battles between Crown and Parliament, represent a check placed on government authority through the courts. In England, the courts examination of the legality of government action is an *inherent power,* quite separate from normal jurisdiction.[15] Thus the 'common law empowers superior courts of record to grant the prerogative writs.'[16] These historic moments progressively brought the power of the executive within the constraints of the rule of law.[17] The historical gains were implanted in Australia and America through colonisation. This is the view espoused by Brennan J (later CJ) in *Church of Scientology v Woodward,*[18] when he said:

> [j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the power and functions assigned to *the Executive* by the law and the interests of the individual are protected accordingly.[19]

In Australia and America prerogative (or constitutional) writs, including prohibition, mandamus, certiorari and habeas corpus are sourced from the relevant constitution. The legislature can *theoretically* remove any legislative or common law source of power to review. The legislature cannot without great difficulty remove any powers of review guaranteed under the constitution. The presumption of reviewability[20] and canons of statutory construction designed to avoid preclusion, have given rise to countless ingenious judgments in courts throughout Australia and America designed to avoid such preclusion.[21]

A notable difference between the American and Australian constitutions is that the American Constitution was drafted to include the 'suspension clause' concerning habeas corpus which states:

> ...the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.'22

In Australia habeas corpus is not mentioned in the constitution. Traditionally therefore it is not seen as a form of judicial review.[23]

The mention of habeas corpus in the American Constitution and its availability against the President[24] means that it has been available in circumstances beyond the reach of the *Administrative Procedure Act* (US)[25] or any other remedy.

### *Marbury v Madison: A case on the American Constitution*

No case is more important to the powers of judicial review under a federal constitution than *Marbury v Madison*.[26]

On 3 March 1801, John Adams was the President of the United States of America; John Marshall was his Secretary of State. Whilst President, Adams had nominated four men, including William Marbury, to newly created offices as justices of the peace, with the advice and consent of Congress. He had signed the commissions. They had been sealed but they had not been delivered.

On 4 March 1801 Thomas Jefferson was inaugurated as President of the United States America; James Madison was his Secretary of State. John Marshall was Chief Justice of the Supreme Court. Jefferson and Madison refused to deliver the commissions, claiming they were 'nullities'. Marbury sought to compel Madison to deliver his commission.

Marshall CJ delivered the opinion of the Court. It has been described as 'a Solomonic blend of diplomacy and defiance.'[27]

He concluded that Marbury had a right to the commission. The appropriate remedy was by writ of mandamus. However, mandamus is issued by courts exercising original jurisdiction. The Court held that the conferral upon it by the *Judiciary Act 1798* of the power to issue a writ of mandamus contradicted the Constitution, which did not *in those circumstances* confer original jurisdiction on the Court.

The Constitution was the original and supreme will of the people of America. It organised the government into separate departments. It prescribed limits on the powers of each department. A law passed by parliament, but repugnant to the Constitution, was void. It was 'emphatically the province and duty of the judicial department to say what the law is'.[28] The Constitution bound all departments of government. The Constitution could not be overlooked no matter how compelling the case. Mr Marbury had filed in the wrong court despite it being the highest court of the land.

### *The Australian Constitution*

Almost a century later**,** *Marbury v Madison* would have a profound impact in shaping the Australian Constitution. The majority of founders saw it as necessary to avoid the lack of jurisdiction experienced in *Marbury v Madison*. The High Court as a similar creature to the Supreme Court, namely a creature of the Constitution for whom the Constitution is the source of its jurisdiction, was judged to need its original jurisdiction guaranteed.

Hence s 75(v) of the Australian Constitution was drafted. It provides that in:

> all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth … the High Court shall have original jurisdiction.

The debates surrounding s 75(v) show that some of the framers saw its inclusion as unnecessary but prudent [29] while some saw it as dangerous.[30] There was concern about the omission of habeas corpus which was seen as being enshrined in the US Constitution by the suspension clause.[31] Therefore, 'f]rom an administrative-law point of view, the most significant provision is s 75(v), which confers the High Court with 'original jurisdiction'.'[32]

It was undoubtedly beyond the forecast of the founders that the importance of these words would be argued a century on, most often in relation to aliens who would come to Australia's shore without invitation.

## *II Alien cases*

Two recent immigration cases - one in the Supreme Court of America, one in the High Court of Australia – highlight the examined legislative clauses which purported to remove all review jurisdiction from the Courts. In each case, this raised the question whether there was some core constitutional guarantee of judicial review of executive action.

### *Plaintiff S157 v Commonwealth[33]: background*

Since 1992 Commonwealth Parliament had been progressively restricting the courts jurisdiction of judicial review.[34] By emphasising economic rationalism, tribunals were advocated by the Government as a cheaper quicker alternate to courts. Arguably, there were those in government who believed tribunals were where the rushed and questionable decisions of departments would face less scrutiny than in the courts. Tribunals and further restriction of judicial review were in vogue.

Also, the *Migration Act 1958* (Cth) had become perhaps the most litigated statute in Australian administrative law.[35] Migration was seen as a perfect area to push for further limitations of judicial review, as the electorate was disengaged and uninterested if not hostile to would be migrants petitioning for rights. The political cynic might suggest that keeping unwanted migrants out of *our* courts would only enhance public relations with the electorate. After all 'today invasions don't have to be military. They can be of diseases, they can be of unwanted migrants'.[36]

In an apt summary of the development of s 75(v) of the Constitution, McHugh and Gummow JJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002:*[37]

> Section 75(v) of the Constitution entrenches a minimum measure of judicial review. The parliament may legislate to provide in a broader measure for federal review. In some respects, the parliament did so when enacting the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) and conferring jurisdiction thereunder on the Federal Court. Subsequently, the parliament legislated to contract the scope of the ADJR Act has attached added significance to s 75(v).

Against this background and in wake of the 'Tampa crisis',[38] discussed below, the Prime Minister of Australia told parliament; it was critical that the removal of boats from Australian waters 'not be challenged in any court' because 'the protection of our sovereignty…is a matter for the Australian government and this parliament.'[39]

The Australian Government had passed legislation to preclude review by any court of decisions made under the *Migration Act 1958*.[40] A privative clause provided that a decision made under the Act 'must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'[41] Interestingly, there was no mention of the writ of habeas corpus.

### *Plaintiff S157 v Commonwealth: the case*

Plaintiff S157 had received a decision from the Refugee Review Tribunal, affirming a decision of a delegate of the Minister of Immigration, refusing him a refugee protection visa. He commenced proceedings in the High Court, contending that the privative clause was invalid.

Gleeson CJ applied well-known principles of statutory construction to the privative clause: courts do not impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms unless that intention is 'clearly manifested by unmistakeable and unambiguous language';[42] and the legislature is presumed not to intend to deprive citizens of access to the courts, other than to the extent expressly stated or necessarily implied.[43]

He also cited two former chief justices of the High Court in saying that the Australian Constitution is framed upon the assumption of the rule of law, and judicial review is the enforcement of the rule of law over executive action. Section 75(v), he said, 'secures a basic element of the rule of law.'

The Court found that judicial review of executive decisions infected by jurisdictional error was guaranteed by the Constitution. Three aspects of the Constitution supported this finding: the inclusion of s 75(v); the conferral of the judicial power of the Commonwealth upon the courts by Ch III; and the assumption of the rule of law upon which it was framed. The majority said of s 75(v):

> [it] is a means of assuring all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.[44]

If such a privative clause were given full effect, the majority reasoned:[45]

> [It] would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.

The plaintiff argued that the clause ought to be read literally. It contradicted s 75(v) of the Constitution's guarantee of the enumerated remedies. It was therefore invalid.

The Court made use of the principle that legislation should be read in a way which does not contradict the Constitution, where such a reading is fairly open.[46] The Court then pronounced that decisions infected by jurisdictional error were not decisions 'made under' the Act; they were not protected by the privative clause. Therefore, the privative clause did not breach the Constitution and was allowed to stand. On reading this seems like a refusal to acknowledge the obvious.[47]

The question of whether such a reading was *fairly open* in relation to the privative clause contested in *Plaintiff S157* will be debated for a long time to come. The decision in itself and through its application of *R v Hickman; Ex parte Fox*[48] also raises concerning questions about how explicit parliament must be for a 'fairly open reading' not to be available.

Requiring the Parliament to be *so* blatant in its intent to remove an individual's right to seek judicial review and/or bypass the Constitution seems naive if not irresponsible. History is littered with acts of government subversion of constitutions and over zealous legislation; they rarely started with blunt declarations of intent.

Counsel for the plaintiff in *Plaintiff S157* have compared the decision to *Marbury v Madison* because of the courts adroit avoidance of a direct confrontation with the executive.[49] Although somewhat biased, the comparison is apt. The latter decision enshrined the role of the Supreme Court and, by inheritance, the High Court, in examining the constitutionality of legislation. The former has done the same thing for the High Court in relation to judicial review of administrative action.

### *Calcano-Martinez v INS; INS v St Cyr: background*

In 2001, the US Supreme Court faced a similar problem to that surrounding *Plaintiff S157*. Tension had been building over the effect of 'jurisdiction-stripping' provisions in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[50] The growing number of individuals crossing into America had become a political hotcake. The Court decided to hear *Calcano-Martinez v INS*[51]*(Calcano-Martinez)* and *INS v St Cyr*[52] (*St Cyr)* together. The two cases concerned illegal immigrants' right to judicial review.

Jurisdiction to grant writs of habeas corpus is conferred upon the Supreme Court and federal district courts by 28 USC § 2241. Amendments to the *Immigration and Naturalisation Act* (INA) in 1961 set up an exclusive scheme of judicial review for exclusion and deportation orders, effectively removing judicial review under the *Administrative Procedure Act* (US)

(APA). [53] The scheme specified an exception for review by habeas corpus: 'any alien held in custody pursuant to an order of deportation *may obtain judicial review thereof by habeas corpus proceedings'.* [54]

Reacting to the Oklahoma bombing Congress enacted the *Antiterrorism and Effective Death Penalty Act* (AEDPA).[55] Section 507(e), entitled 'Elimination Of Custody Review By Habeas Corpus' removed the habeas corpus exception. Section 1252 of IIRIRA, enacted later in 1996, provided for judicial review of final orders only. Section 1252(a)(2)(c) stipulated that 'no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an enumerated offence. An enumerated offence could fall under the AEDPA.

***Calcano-Martinez v INS; INS v St Cyr: the cases***

In *Calcano-Martinez*, three permanent residents with past criminal convictions had each filed a petition for review in the Second Circuit Court of Appeals and a habeas corpus petition in the District Court. The Government argued that no court had jurisdiction to hear any action for judicial review. The petitioners argued that constitutional considerations and principles of statutory construction required that they be afforded some form of judicial review. The majority[56] agreed, stating that 'leaving aliens without a forum for adjudicating claims would raise serious constitutional questions.'[57]

As in *Plaintiff S157*, the petitioners argued that the amendments, if read literally would exclude all review including habeas corpus. As a result the suspension clause, Article III or the due process clause, all Constitutional guarantees would be violated. The Court agreed. Congress had intended to preclude review by direct petition but had 'not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions.'[58] The Court did not pronounce what would constitute sufficient clarity if not the current facts.

In *INS v St Cyr*, the majority explained that where an interpretation of a statute 'invokes the outer limits of Congress' power, a clear indication is required.'[59] Similarly, if an interpretation raised serious constitutional problems, and an alternative construction which was 'fairly possible' did not, the latter was to be preferred.[60] The 'fairly possible' in *INS v St Cyr* bears striking similarities to *Plaintiff S157's* idea of 'fairly open' and both leave the commonsensical interpretation of the relevant legislation to the side.

The majority cited an early migration case, *Heikkila v Barber*,[61] for the proposition that some judicial intervention in deportation cases was required by the Constitution. This principle, in combination with the suspension clause, required an interpretation, if possible, which did not remove habeas corpus jurisdiction otherwise the law would have to be struck down as unconstitutional. Once again nimble movement and poise was shown by the Court to forestall a row with Congress.

In 1953, Professor Davis wrote that the effort to distinguish habeas corpus from judicial review in *Heikkila* was futile because it ran against the habits of courts and lawyers. He pointed out that judicial review in § 10(b) of the APA, the provision then under consideration, explicitly included habeas corpus as a form of judicial review.

Ironically, the majority in *St Cyr* relied upon *Heikkila* for the proposition that habeas review was distinct from 'judicial review.'[62] The court found sufficient lack of clarity to avoid confronting the constitutional question. Habeas review was not precluded.

Scalia J was indignant in his dissent: '[t]he Court's efforts to derive ambiguity from this utmost clarity are unconvincing'.[63] The doctrine of constitutional doubt did not excuse violating the statutory text. That doctrine was 'a device for interpreting what the statute says

– not for ignoring what the statute says in order *to avoid the trouble of determining whether what it says is unconstitutional*'.[64]

The approach of Scalia J lacks tact, but seems to be correct. One can only wonder what he would say of the High Court's manoeuvres in *Plaintiff S157*, which was surely a clearer statement still by the legislative. The canons of construction applied in both cases were very similar, if not identical. Marshall CJ stated in *Marbury v Madison,* 'It is emphatically the providence and duty of the judicial department to say what the law is'.[65] But surely when such legalistic gymnastics are employed the judicial department is not saying what the law is but rather what the law will be in order to avoid the trouble created when a law (on such a politically contentious issue) is declared unconstitutional.

Adding to Jeremy Kirk words 'aided by hindsight it can be said that the approach by Dixon J [in *Hickman,* the High Court in *Plaintiff S/157* and the Supreme Court in *Calcano-Martinez v INS; INS v St Cyr*] represented a wrong turning in Australian [and American] law'.[66] These cases represent a turn when plain meaning was removed from interpretation of the law. These cases represent a turn towards appeasement rather than engagement.

## *III Case studies: some recent habeas corpus cases*

### *The factual matrix: when alien and meets terrorist*

The repeated failure of governments to acknowledge the distinction between government and sovereignty has justified many questionable political causes.[67]

On 26 August 2001, John Howard was Prime Minister of Australia; Philip Ruddock was his Minister for Immigration. At the request of Australian authorities Captain Arne Rinnan of the MV *Tampa* (a Norwegian container ship) led his crew to rescue 433 Afghan refugees from a sinking wooden boat.[68] Captain Rinnan tried to land the MV *Tampa* on Christmas Island. He was refused permission to land by the Australian Government.

On 31 August 2001, Eric Vadarlis and the Victorian Council for Civil Liberties Incorporated, acting for the refugees, sought orders from the Federal Court in the nature of writs of habeas corpus and mandamus against Ruddock and the Commonwealth.

On 11 September 2001, North J made the orders sought. Subject to appeal, the Government was to bring the refugees to the mainland of Australia.[69]

On the same day George W. Bush was President of the United States of America; Donald Rumsfeld was Secretary of Defence; and nearly 3,000 American civilians were killed.[70] The day came to be better known as 9/11. The world at large was told, re-told and told again that things would never be the same. Across western democracies the not so new world order turned to parliament to enact special measures which would allow antiquated military responses to terrorism on the home fronts. A week after 9/11, Congress passed a resolution, the Authorization for Use of Military Force (AUMF),[71] authorising President Bush to;

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

On 13 September 2001, the then Minister for Defence Peter Reith, in an interview on 3AK radio unashamedly suggested terrorists pose as asylum seekers to gain entry to Australia.[72] Under the popular alarm of 9/11 the American Congress passed AUMF. On the same day the Full Australian Federal Court overturned the decision of North J.[73] By this time the

Government had authored the 'Pacific Solution'. Claims for refugee status would be assessed 'offshore' in Nauru, an independent nation which was not a signatory to the *Refugees Convention*.[74]

On 7 October 2001, the President of America 'dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime[75]'. American and British forces began air strikes on Afghanistan. The 'war on terror' had begun.

On 13 November 2001, President Bush issued a military order to govern the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' (*November 13 Order*).[76] It applied to any non-citizen if the President determined there was reason to believe that they had engaged or participated in terrorist activities harmful to the United States of America. Such individuals were to be tried and sentenced by military commission.[77]

From July 1994, the US Government began housing Haitian refugees at its military base in Guantanamo Bay, Cuba.[78] The base is on land leased from Cuba under a 1903 agreement. The agreement states that America has 'complete jurisdiction and control over' the base however Cuba retains 'ultimate sovereignty'.[79]

Between November 2001 and June 2002, numerous people were captured in Afghanistan and detained by American forces. America began transporting those detained to the U.S. naval base at Guantanamo Bay, Cuba on 11 January 2002.[80] Included amongst those transferred were: David Mathew Hicks and Mamdouh Habib, Australian citizens; Shafiq Rasul and Asif Iqbal, UK citizens; Salim Ahmed Hamdan, a Yemeni citizen; and Yaser Esam Hamdi, an American citizen.

On 3 July 2003, President Bush announced his determination that Hamdan, Hicks and four other detainees were subject to the *13 November Order*, and therefore could be tried by military commission.

The next day, in his Independence Day message, President Bush said:

> We are winning the war against enemies of freedom, yet more work remains. We will prevail in this noble mission. Liberty has the power to turn hatred into hope.
>
> …
>
> Drawing on the courage of our Founding Fathers and the resolve of our citizens, we willingly embrace the challenges before us.81

One of those Founding Fathers, Alexander Hamilton, had served as chief of staff to George Washington during the Revolutionary War. He wrote 52 of the *Federalist Papers*.[82] In the eighth of these, Hamilton wrote:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.83

### *Ruddock v Vadarlis[84]: Prerogative power*

The first section of Ch II of the Australian Constitution is s 61. It says:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

In *Ruddock v Vadarlis*, the Full Court of the Federal Court decided by 2-1 majority that the section included a prerogative power to repel aliens at the border during peacetime. This was so despite the extensive provisions of the *Migration Act 1958* which appear to exhaust the prerogative through their detail and scope. The majority found that the prerogative power was central to the sovereignty of the executive.[85] Short of clear abrogation by statute, the prerogative power lived on in s 61.[86] The majority therefore found s 61 empowered the executive to detain the refugees for the purpose of repelling them.

In his dissenting judgment, Black CJ identified sources of executive power under s 61: it can derive from the prerogative power or be conferred by statute. By reference to ancient and modern authorities, he demonstrated that statutes eat away at the prerogative power, and that once it is gone it does not return.[87] He referred to British opinion already over 100 years old: 'whether they be innocent immigrants or sojourners or fugitive criminals of the deepest dye, their right to land or remain upon British soil depends not upon the will of the Crown but upon the voice of the legislature'.[88]

The *Migration Act 1958* is detailed and extensive. On its face *Migration Act 1958* is clear. If the *Migration Act 1958* does not eat away prerogative power the question must be put; what will?

### *Rasul v Bush[89]: jurisdiction of aliens*

In February 20002, The Centre for Constitutional Rights filed for writs of habeas corpus in the District of Columbia Circuit Court in respect of; Hicks and Habib (Australian); Rasul and Iqbal (British); and others (Kuwaiti citizens).[90] They alleged that the *November 13 Order* violated the Constitution as it authorised indefinite detention without due process.

The legal director of the Centre for Constitutional Rights, Bill Goodman outlined the historical perspective of *Rasul v Bush:*

> From the abuses of the Alien and Sedition Acts to Haymarket Square to the Palmer Raids to the McCarthy period, fears of foreigners and of real and imagined dangers, have fuelled attempts to do unreasonable and unnecessary harm to the Bill of Rights. For that reason, we are participating in this attempt to require the President of the United States to articulate a sound legal basis for holding these prisoners.[91]

The Bush Administration's primary argument was that *Johnson v Eisentranger*[92]applied to deny U.S. courts jurisdiction over the 'enemy combatants' being held at Guantanamo Bay. The Administration argued that in *Eisentrange* the Supreme Court had held that U.S. courts lacked jurisdiction in cases concerning non-US miliatary prisioners. The prisoners in *Eisentrange* were German soldiers caputred and tried in China and imprisioned in Germany by US forces. At no time had the soldiers been on American sovereign territory. The District Court and District Circuit Court of Appeals accepted this argument. The case was appealed to the Supreme Court.

The majority of Supreme Court rejected the Administrations application of *Eisentrange.* The majority distinguished the petitioners in *Eisentrange* from those in *Rasul* stating:

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. [93]

In essence, the Court found that the petitioners were being held in custody by the US Executive, contrary to US law. Consequently, 28 US § 2241 conferred habeas jurisdiction upon federal courts.[94] The Court held U.S. district courts also had jurisdiction to consider challenges by habeas corpus to the legality of foreign nationals captured abroad and detained at Guantanamo Bay under 28 U.S.C. § 1331 and § 1350, the Alien Tort Statute. It cited *INS v St Cyr* for the proposition that the writ had, at its historical core, served to review the legality of executive detention. It was in that context that its protection was strongest.[95]

On 9 March 2004, Shafiq Rasul and Asif Iqbal were flown to London at the request of the British Government. The next day they were released without charge.[96] Ironically, a little over a month later, on 28 June 2004, the decision in *Rasul* recognising their right to seek habeas corpus was handed down.[97] The petitions requesting the release detainees, among many others, remain pending before the District of Columbia District Court[98].

### *Hamdi v Rumsfeld[99]: rule of law in detaining the home grown*

Upon learning that Hamdi was an American citizen, in April 2002 the US transferred him to a naval brig in Norfolk, Virginia.[100] In June 2002, his father filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Virginia.[101] The majority in *Hamdi* found that his detention was authorised by the AUMF. However they found that due process was required and applied the balancing test in *Mathews v Eldridge*[102] to arrive at appropriate requirements.

The primary position of the Administration was that the Executive possessed 'plenary authority to detain pursuant to Article II of the Constitution.'[103] This was rejected. The second position was that separation of powers required the courts to, at most, apply a very deferential 'some evidence' standard,[104] but preferably to focus only on the legality of the broader detention scheme, not on the features of the individual case.[105] The majority also rejected this position. They said such an approach would have the effect of condensing power into a single branch of government.[106]

In regard to the rule of law (due process) the majority held that a 'citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and fair opportunity to rebut the Government's factual assertions before a natural decision maker.'[107]

Scalia J held in dissent that Hamdi was entitled to be released unless criminal proceedings were brought immediately. He accused the majority of a 'Mr Fix-it mentality' for providing the necessary due process ingredient to avoid finding his detention unconstitutional.[108]

Thomas J, also in dissent, found that the detention fell 'squarely within the Federal Government's war powers' and that the Court therefore lacked any authority to review it.[109]

### *Hamdan v Rumsfeld[110]: the legality of the system*

*Hamdan's case* received global publicity.[111] It was claimed Hamdan had been Osama Bin Ladin's driver. He faced the charge of conspiracy.[112] On 6 April 2004, Hamdan's counsel filed a petition for writs of mandamus and habeas corpus.[113]

On 30 December 2005, the President signed the *Detainee Treatment Act* (DTA)[114] making it law. The DTA sought to restrict judicial review of detention at Guantanamo Bay to limited review of a final decision of the military commission.

Section 1005(e) of the DTA purported to remove jurisdiction from all courts to hear habeas corpus applications. Hamdan argued that s 1005(e) was an unmistakably clear statement

which if given a literal reading had the effect of being constitutional repugnant.[115] The Court applied a process of statutory construction to read the preclusion clause as not applying to pending cases.[116]

The majority of the Supreme Court found the military commissions set up under the *November 13 Order* to be unlawful. The Government had argued that the courts lacked jurisdiction to hear the matter, at least until the commission process was complete.[117] It failed to convince the court.

Scalia J, dissenting, referred to an 'ancient and unbroken line of authority' that statutes unambiguously ousting jurisdiction apply equally to pending cases.[118] He would have found that the Court lacked jurisdiction.[119] Thomas J, also in dissent, agreed. The fact that the President was exercising wartime commander-in-chief authority under Ch II, with the support of Congress, meant that Congress conferred a wide discretion on him. The Court according to Thomas J should have regarded that discretion with the greatest deference.[120]

In response to this decision, Congress passed the *Military Commissions Act 2006* (MCA),[121] which the President signed into law on 17 October that year.

### *Boumediene v Bush[122]: the MCA background*

The MCA grants jurisdiction to the military commission to try any offence made punishable by the MCA 'or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.[123]" The MCA applies to those deemed 'unlawful enemy combatants'.

Section 7 (e)(1) of the MCA states:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

### *Boumediene v Bush: the case*

In the Federal Appeals Court in Washington D.C additional briefs were filed by plaintiffs in two related cases challenging detentions at Guantanamo, *Al Odah v Bush[124]* and *Boumediene v Bush[125]*. Counsel argued that the MCA's apparent habeas-stripping provision did not apply to pending cases. They further argued that even if the *Military Commissions Act 2006*, § 7[126] were deemed to apply to existing cases, it would be unconstitutional. The arguments were rejected. The Court found that the MCA had stripped the US federal courts entirely of jurisdiction to hear habeas corpus petitions.[127]

Concerned that proceeding through the usual course of action would leave the petitioners without remedy for longer than was necessary (or for that matter for longer than was in the interest of justice) counsel for Al Odah and Boumediene filed petitions for a writ of certiorari and an expedite argument hearing in the Supreme Court.[128]

Four justices of the Supreme Court are required to vote in favour of a request to expedite argument for it to be heard.[129] Justices Breyer, Souter and Ginsburg voted in favour of the petitions. The case will now proceed through the usual course of action delaying remedy for the petitions by at least one year.

The majority for whom Stevens and Kennedy JJ wrote, stated;

> Despite the obvious importance of the issues raised in these cases, we are persuaded that traditional rules governing our decisions of constitutional questions and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for a writ of hhabeas corpus, make it appropriate to deny these petitions at this time.[130]

Only ten of the roughly 385 detainees at Guantanamo Bay have been charged. The decision of the majority appears to only delay the inevitable. The Supreme Court will have to answer the questions raised in *Boumediene v Bush* as the DTA strikes at the nub of the right to court access.[131]

### *Hicks v Ruddock[132]: homecoming*

On 6 December 2006, John Howard was still Prime Minister of Australia, Philip Ruddock was Attorney-General and Alexander Downer was Minister for Foreign Affairs. After being held for over five years by American forces, Hicks filed a statement of claim in the Federal Court of Australia, seeking declarations and a writ of habeas corpus against Ruddock, Downer and the Commonwealth of Australia.

On 8 March 2007, Tamberlin J of the Federal Court of Australia dismissed an application by the Commonwealth for summary judgment *Hicks v Ruddock*.[133]

Hicks was seeking declarations that the Australian Government had taken into account legally irrelevant factors in considering whether to take steps to protect him by seeking his release from Guantanamo Bay and repatriation to Australia.[134]

He was to seek an order in the nature of mandamus to compel the Attorney-General and Minister for Foreign Affairs to reconsider making a request without taking into account legally irrelevant factors. He also was to seek an order for relief in the nature of habeas corpus against the Commonwealth, on the basis that they have the power to successfully request the US authorities to release him.[135]

His argument was that the duty of the executive to protect its citizens, whilst being an imperfect obligation, is exercised under s 61 of the Constitution. Being an exercise of constitutional jurisdiction, it could be judicially reviewed. Tamberlin J accepted that the point was arguable.[136]

The Government argued that the matter was non-justiciable.[137]

Heavy reliance was placed upon the decision of the English Court of Appeal in *Abbasi v Secretary of State*.[138] In *Abbasi* an English citizen detained in Guantanamo Bay had sought to compel the Foreign Office to make representations to the United States in accordance with his request for assistance. The Court rejected the claim because the United Kingdom authorities had considered the request. Also, after having regard to extensive evidence, they concluded that if the Foreign Office were to express a view as to the legality of the detention, it might undermine the negotiations which were then underway. Abbasi had been in detention for eight months.

Tamberlin J noted the sharp distinctions between that case and the one before him. It is well known in Australia that the Government has not requested the release of David Hicks, who has remained in Guantanamo Bay longer than five years.

The case is now moot owing to the guilty plea entered by Hicks at the military commission. However it serves to offer a sliver of light on the future of judicial review. The law is fighting back and government action reviewed.

***Judicial review of executive action beyond statutory ultra vires***

In *Abbasi*, the Court referred to the House of Lords decision in *CCSU v Minister for the Civil Services*.[139] In that case, their Lordships pronounced that considerations of reviewability of prerogative powers should focus not on their source but on their subject matter and suitability for review by a court. The Court in *Abbasi* observed that the process of considering whether to make the request was in this sense justiciable, and therefore not immune from judicial scrutiny.

In *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd*,[140] the Full Court of the Federal Court applied *CCSU* in the Australian context. Wilcox J pointed out that a matter might be justiciable in the *CCSU* sense, but contain some feature, such as a relationship to national security concerns, which rendered judicial review inappropriate.[141]

In *Re Refugee Review Tribunal & Anor; Ex Parte Aala*[142], the High Court examined the writs listed in s 75(v). Henceforth, the Court pronounced, they should be called 'constitutional writs'.[143] The power to issue the writs derived not from the prerogative, but from the Constitution.

Gaudron and Gummow JJ mentioned in passing that 'an officer of the Commonwealth may be restrained by prohibition in respect of activity under an invalid law of the Parliament *or of activity beyond the executive power of the Commonwealth identified in s 61 of the Constitution.'* [144] For example:

> where an officer of the Commonwealth executes an executive power, not a power conferred by statute, a question will arise whether that element of the executive power of the Commonwealth found in Ch II of the Constitution includes a requirement of procedural fairness.145

In *Re Ditfort: Ex parte Deputy Commissioner of Taxation*,[146] a decision relied upon in *Hicks v Ruddock*,[147] Gummow J noted that s 61 empowers the executive to undertake appropriate action in areas such as international relations. If a plaintiff could establish standing, he could see no reason why such a matter, being a dispute under the Constitution, should not be justiciable by the courts.

In *Hicks v Ruddock*, Tamberlin J noted that the justiciability of executive action under s 61 in the area of foreign relations was far from settled. Indubitably, another case allowing that discussion to take place in the High Court will arise before too long. At such a time the Court should take the opportunity to enunciate some principles about the role of judicial review of action executed solely under s 61 authority.

Section 75(v) entrenches judicial review in the Australian Constitution. Under the US Constitution, habeas corpus is the only writ mentioned.

In the cases examined, one can see a strong parallel between the jurisprudence in Australia around the 'constitutional writs' and that in the US around the 'great writ'. This is to be expected. Separation of powers and the rule of law are philosophical concepts which can justify judicial review in the abstract, but the mention of these writs in the respective Constitutions gives courts a peg to hang their justifications upon.

The scope of review under habeas corpus is undoubtedly no different to that conducted under other heads of judicial review. However, as Scalia J has asserted,[148] there is no reason to exclude it from categories of judicial review. The considerations are often the same: for example, whether the executive is acting within a validly conferred power. Its focus upon the detained individual rather than the government allows the court to look at executive action which might otherwise fall outside the scope of judicial review.

In 1627, Charles I was King of England and had dissolved Parliament. He arrested Sir Thomas Darnel and four other knights who had refused to give him money under a system of compulsory 'loans', not authorised by statute. They sought the writ of habeas corpus. The court refused to issue the writ on the basis that they were held at the King's command.

This upset the Parliament. Eventually, as Julian Burnside so elegantly put it in a recent piece he did for ABC's Radio National[149]:

> Tensions between the king and the parliament increased; Charles eventually declared war on his parliament. He lost the war, the crown and his head.

The reverse holds true in recent US history. The Supreme Court has found that habeas corpus can be issued despite the fact that people are held at the President's command. With the MCA, Congress has (for the moment) legislated to remove the habeas corpus jurisdiction. The High Court's jurisdiction to review executive action by the constitutional writs has been assured. The Supreme Court will surely issue certiorari in *Boumediene v Bush*.

Congress has responded to the Supreme Court's construction of the DTA preclusion clause in *Hamdan v Rumsfeld* by making it clear that the MCA preclusion clause applies to all review of pending decisions. As the Court of Appeals said, '[I]t is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all' we mean all – **without exception**!'[150] The question will arise whether the suspension clause implies a core constitutional guarantee of habeas review of executive action. It remains to be seen whether the Supreme Court will sidestep the issue by some contorted method of construction or whether they will address it head on, as the High Court eventually did in *Plaintiff S157*.

In his dissent in *Hamdan*, Thomas J opined that the Court should respect a wide discretion granted by Congress upon the President in relation to a traditional executive head of power. The same considerations were evident in the majority opinion in *Hamdi*, finding the military commissions to be authorised by the AUMF.

In the *Communist Party Case*, the High Court held invalid legislation which conferred a wide discretion upon the executive because it effectively allowed the executive to decide upon 'constitutional facts', the existence of which determined Parliament's power to pass the law in the first place.[151]

Having opined that the Parliaments of the United Kingdom or the Australian States, wielding plenary power, could validly have passed the Act, Fullagar J said:

> If the great case of *Marbury v Madison* had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; …
>
> [I]n our system the principle in *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organs must accord to opinions of the legislative and executive organs.152

### *Conclusion*

*Is it a bird? A plane? No it is…interesting law*

It is not always true that great cases and hard cases make bad law.[153] In fact as we have seen above they make interesting law. Students of legal history will know in interesting times come interesting cases and often in interesting cases constitutional jurisprudence develops.

It is fascinating that the source of power to review was, in all the cases discussed here, derived from the old writs. The ADJR and the APA are easily removed, whereas the old writs have found a home in the written constitutions. More fascinating still is the fact that the legal professionals acting in these cases have in some circles been labelled radical.

It has been shown that the old tenants of the law carry practical ramifications for the individual as well as a nation's democratic will. 'Identifying the scope and boundaries of judicial review lies at the heart of the separation of powers'.[154] Adam Tonkins has written that the rule of law 'governs the relationship of the executive to the law. The rule of law provides that the executive may do nothing without clear legal authority first permitting its actions.'[155]

Professor Aronson has remarked that '[j]usticiability is an issue which can arise whether the power in question be constitutional, statutory, or prerogative or common law'.[156] He argues that the concept of justiciability should be reframed so that government decisions are only immune where there are sufficient political reasons, including the need for the Court not to devalue its own currency, or where courts are ill-equipped to engage in review of a particular decision.[157] The source of the power itself should be irrelevant. He gives a good example of why this is so. If a prerogative power is truly non-justiciable, it is difficult to see what difference its transformation into the statute books should make.[158] He also makes the point that s 61 of the Australian Constitution may render some areas of executive power justiciable which would not be so in England.[159] The same point applies in the United States, albeit through the lens of habeas corpus review.

In decisions of both the High Court and Supreme Court references have been made to separation of powers and the rule of law as justifying judicial review. If these constitutionally enshrined principles require judicial review, why should there be a distinction between executive action pursuant to statute, and that empowered solely by Chapter II or Article II of the relevant Constitution?

In interesting times society turns to its institutions for clear guidance. It is time for the Supreme Court and High Court to provide clarity (as they are instructed to do under their respective Constitutions). In *Marbury v Madison*, Marshall CJ enshrined the role of the Supreme Court as ultimate arbiter of the Constitution. In *Plaintiff S157*, the High Court said:

> In any written constitution, where there are disputes … there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function.[160]

*Boumediene v Bush* presents the Supreme Court with the opportunity to make explicit a constitutional foundation of habeas review of executive action, which cannot be removed except by congressional suspension. In *Hamdi*, the Court cited their opinion in *St Cyr* in support of the proposition that:

> Unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.161

In *Aala*, the Court interred the 'prerogative' in 'prerogative writ'. It is possible they will also take the 'prerogative' out of the s 61 power, reducing it to a constitutional source. The High Court will again have to adjudicate on the power of the Executive's prerogative concerning aliens. Hopefully when that time comes the court will offer a clear reading of the law rather than one which is 'fairly open' by disregarding plain English.

Since Charles I lost his head, there has been movement away from prerogative powers towards written laws. This journey was recounted by Black CJ in his dissent in *Ruddock v Vadarlis*. The written Constitutions are part of this process. The Courts are the voices of the

Constitutions. In time they will surely find a holistic approach to judicial review of all executive action, whether exercised pursuant to statutory or non-statutory authority, based solely upon amenability to judicial process and overt political considerations.

> Eventually, the courts have to engage in a tidying-up exercise to fit as many of the pieces as possible together (and discard or explain away the others). If not, the cost to the community in uncertainty eventually outweighs the benefits in terms of flexibility[162].

We live in interesting times when interesting law is being made. The definition of interesting does not have to include complex and absurd. It can be interesting to state the obvious, let us hope the Courts will.

**Endnotes**

1 Robert F Kennedy, Cape Town, South Africa, 7 June 1966.
2 Cf F G Brennan, 'The purpose and scope of judicial review' in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986), 18-19.
3 Gleeson, 'Courts and the Rule of Law' (The Rule of Law Lecture Series), Melbourne University (7 November 2001), <http://www.highcourt.gov.au/speeches/cj/cj_ruleodlaw.htm>
4 *Australia Communist Party v Commonwealth* (1951) 83 CLR 1.
5 Note 4, 193.
6 Note 3.
7 A pre-eminent Australian administrative law academic.
8 Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd edn, 2004), 15.
9 See for example former Chief Justice Owen Dixon, 'Marshall and the Australian Constitution' (1957), in Dixon, *Jesting Pilate* (1965), 166.
10 The seminal early work on the Australian Constitution was written by John Quick and Robert Garran. In explaining separation of powers in the context of Chapter III, they give this quote. John Quick & Robert Garran, *The Annotated Constitution of the Australian* Commonwealth (1901, reprinted 1979), 719; citing Marshall CJ in *Wayman v Southard*, 10 Wheat. 46.
11 See Richard Fallon, 'The Rule of Law' as a Concept in Constitutional Discourse', 97 *Columbia Law Review* 1. Fallon breaks rule-of-law discourse down into four categories, and provides examples of each category from the jurisprudence of various Supreme Court Justices.
12 Note 11, 39.
13
14 Evans S, 'The Rule of Law, Constitutionalism and the MV Tampa', (2002) June, 13 *Public Law Review*, 94-101 at 95 quoting Judith Shklar.
15 Lord Woolf 'Droit Public', *Public Law* 1995, SPR, 57-71.
16 O'Donnell B, 'Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Austalian Constitution', (2007) 26 *Australian Bar Review*, 291-335 at 292.
17 Note 17.
18 (1982) 154 CLR 25.
19 Note 18, 70.
20 *Abbott Laboratories v Gardner*, 387 US 136 (1967).
21 See for example *Johnson v Robison*, 415 US 361 (1974); *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, and subsequent cases adopting the principle there set down by Dixon J.
22 United States Constitution art 1, § 9, cl 2.
23 It has been largely neglected in efforts to modernise the prerogative writs by allowing for 'orders in the nature of prohibition' etc.
24 For example, *Rasul v Bush* 542 U.S. 466 (2004).
25 5 U.S.C.A. §§ 551-706.
26 5 US (1 Cranch) 137 (1803).
27 A R Blackshield, 'The Courts and Judicial Review', in S Encel, D Horne and E Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (1977), 118.
28 *Marbury v Madison*, above n 26, 173.
29 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879 (Isaacs).
30 Note 29, 1877 (Kingston).
31 Note 29, 1879 (Quick).
32 Cane P, 'The making of Austalian administaruve law' (2003) 24 *Australian Bar Review*, 1-20 at 6.
33 *Plaintiff S157 v Commonwealth of Australia* (2003) 211 CLR 476 *(Plaintiff S157)*.
34 Note 16 at 293 provides succinct explanation of developments.
35 Note 16 at 293.
36 Solicitor General David Bennett in the Federal Court. Quote taken from Marr D and Wilkinson M, *Dark Victory*, Allen & Unwin, Sydney, 2003 p145.

37 A [2003] HCA 30 (17 June 2003)
38 An apt metaphor – the crisis, like a largo cargo ship, ploughing through the waters of Australian law.
39 Commonwealth Hansard; Hof R 29 August 2001 p30569.
40 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), introducing the new s 474, *Migration Act 1958* (Cth), entitled: 'Decisions under Act are final'.
41 Section 474(1)(b)-(c) & (2), *Migration Act 1958*.
42 Note 33, 492.
43 Note 33, 492-3.
44 Note 33, 514.
45 Ibid, 505, citing *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415.
46 *Plaintiff S157*, above n 26, 504, citing *Hickman*.
47 Basten J QC, 'Constitutional elements of judicial review' (2004) 15 *Public Law Review* 187, 187- 201.
48 (1945) 70 CLR 598 at 615.
49 Duncan Kerr & George Williams 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 233.
50 See 8 USC 1252. See Gerald L Neuman, 'Jurisdiction and the rule of law after the 1996 Immigration Act' (2000) 113 *Harvard Law Review* 1963, 1989-1998.
51 533 US 348 (2001).
52 533 US 289 (2001).
53 5 U.S.C.A. §§ 551-706. Neuman, above n 36, 1968, and Scalia J in *St Cyr*, above n 38, 329.
54 *St Cyr*, note 52, Scalia, 329.
55 110 Stat 1214 (1996).
56 (Stevens, Kennedy, Souter, Ginsbourg and Breyer JJ)
57 *Calcano-Martinez*, above n 37, 351.
58 *Calcano-Martinez*, above n 37, 351-2.
59 Note 52, 299.
60 Note 52, 299-300, citing *Crowell v Benson* 285 US 22 (1932), 62.
61 345 US 229 (1953).
62 Note 52, 311; cf Scalia J in dissent at 331.
63 Note 52, 329.
64 Emphasis added, Note 52, 336.
65 *Marbury v Madison*, above n 26, 177
66 Kirk J, 'The entrenched minimum provision of judicial review' (2004) 12 Australian Journal of Administrative Law, 64-72 at 65.
67 Note 14, 97.
68 The word refugee is used intentionally. A person is a refugee before a particular government determines them to be so. A message was sent to the Australian Government via the Norwegian ambassador from 'Afghan Refugees'.
69 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.
70 For example, *Hamdi v Rumsfeld* 124 S.Ct. 2633 (2004) at 2635.
71 115 Stat 224.
72 Note 36, 151.
73 *Ruddock & Ors v Vadarlis & Ors* (2001) 110 FCR 491.
74 *Convention relating to the Status of Refugees*, 1951.
75 Extratct from the Brief for the Respondents in Opposition filed in the Supreme Court in *Rasul v Bush* No 03-334 at p2.
76 66 Fed.Reg. 57833 (2001).
77 Note 76, 57834.
78 In 1981, President Reagan issued Executive Order 12324, entitled 'Interdiction of Illegal Immigrants'. It authorised the Secretary of State to enter into cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea. It authorised the Secretary of the Department responsible for the Coast Guard to issue appropriate orders to the Coast Guard to enforce the suspension of entry of undocumented aliens and the interdiction of any vessel carrying such aliens.
79 See *Rasul v Bush* 542 US 466 (2004), 471.
80 Human Rights First website, <http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_gitmo1.htm>.
81 Weekly Compilation of Presidential Documents, July 7, 2003, Volume 39, No. 27, at 877, see <http://origin.www.gpoaccess.gov/wcomp/v39no27.html>.
82 See <http://thomas.loc.gov/home/histdox/fedpapers.html>.
83 http://thomas.loc.gov/home/histdox/fed_08.html.
84 [2001] FCA 1329
Note 84, 543.
86 Note 84, 545.
87 Note 84, 501.
88 Note 84, 500.

89 542 U.S. 466 (2004)
90 See for example http://www.ccr-ny.org/v2/rasul_v_bush/home.asp.
91 Note 90.
92 *Johnson v Eisentranger* 339 U.S. 763 (1950)
93 Note 89, 466.
94 Note 89, 483.
95 Note 89, 474, citing *St Cyr*, 301.
96 For example, BBC News, 'Timeline: Guantanamo Bay Britons', published 27 January 2005, available for download at http://news.bbc.co.uk/2/hi/uk_news/3545709.stm.
97 Note 89.
98 Note 80.
99 *Hamdi v Rumsfeld (Hamdi)* 542 US 507 (2004).
100 Note 99, 510.
101 Note 99, 511.
102 424 US 319 (1976).
103 Note 99, 516-7.
104 Note 99, 527.
105 Note 99, 535.
106 Note 99, 536.
107 Note 99, 531.
108 Note 99, 576.
109 Note 99, 579.
110 126 S.Ct. 2749 (2006).
111 A simple Google search reveals numerous reports from all major national new services; See <http://en.wikipedia.org/wiki/Salim_Ahmed_Hamdan>.
112 See charge sheet available at < http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.
113 *Hamdan v Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004), 155.
114 119 Stat 2739 (2005).
115 Note 113, 2763-4.
116 Note 113, 2764.
117 Note 113, 2763.
118 Note 113, 2810.
119 Note 113, 2810-11
120 Note 113, 2823-4.
121 120 Stat 2600 (2006).
122 476 F.3d 981 (2007).
123 S. 3930 § 948d. Jurisdiction of military commissions.

124 476 F. 3d 981 (2007).
125 Note 124.
126 Pub. L. No. 109-366, 120 Stat. 2600 (*id.* 87a-88a).
127 Note 124, 994.
128 Docket 06-1195, http://www.supremecourtus.gov/docket/06-1195.htm
129 549 U. S. ____ (2007) (yet to be published in printed court reports) available at <http://www.supremecourtus.gov/opinions/06pdf/06-1195Breyer.pdf>.
130 Note 129.
131 Michael Ratner President of the Centre for Constitutional Rights see Note 90.
132 [2007] FCA 299 (8 March 2007, unreported).
133 Note 132, for example para 3.
134 Note132 para 9.
135 Note 132.
136 For example, Note 132, para 62.
137 Note 132, para 60.
138 [2002] EWCA Civ 1598.
139 [1985] AC 374.
140 (1987) 75 ALR 218.
141 Note 140, 249.
142 (2000) 204 CLR 82.
143 Note 142, 93.
144 Note 142 (emphasis added).
145 Note 142, 101.
146 (1988) 19 FCR 347.
147 *Hicks v Ruddock*, para 20.
148 Note 99, 2296.
149 *Lingua Franca,* ABC Radio National, 3 March 2007. Transcript available at http://www.abc.net.au/rn/linguafranca/stories/2007/1859567.htm. Paragraph 92 is based upon the information in his piece.

150 Note 124, 986.
151 Note 4.
152 Note 515, 262-3.
153 To paraphrase Holmes J in dissent in *Norther Securities Co V U.S.* 197 (1904), 363.
154 Note 47, 194.
155 Adam Tomkins, *Public Law* (2003), 78.
156 Note 8, 142.
157 Note 8.
158 Note 8.
159 Note 8, 143.
160 Note 33, 514.
161 Note 70, 536.
162 Note 16, 333.

# 'NO EVIDENCE' AND 'MISTAKE OF FACT': A RECONSIDERATION

***Andrew Pinchin****

## *I Introduction*

With the advent of the separation of powers doctrine impliedly arising from the Commonwealth Constitution, it has become trite law that the federal judiciary may only exercise federal judicial power.[1] The implication is that the federal judiciary may not concern itself with the exercise of administrative power by the Executive branch of the Commonwealth and today this principle remains stalwart, ensuring the judiciary's determinations of its own limitations accord with its constitutional foundations.

However, a need to ensure the Executive's administration is not exercised arbitrarily but rather in accordance with the law prescribed by parliament has given rise to a corresponding need for judicial intervention. One ground for checking potentially capricious Executive activity originally derived from the common law and now also statutorily enacted, arises when the executive is considered to make a decision in the absence of evidence to support it. This 'no evidence' ground raises particular attention because its sole concern with the degree of evidence supporting a decision means that the ground reflects the extent to which the judiciary can classify otherwise legally correct and commonplace decisions as erroneous in law. In this way it also raises the issue of the extent to which the judiciary should intervene in a particularly acute form and in doing so exposes the tensions underlying a constitutional system of government premised on both a tripartite separation of powers doctrine and the principle that its people are to be ruled by legislation and not individual arbitrariness – an integral aspect of the rule of law.[2]

This paper explores the present limits to and problems with the 'no evidence' doctrine in Australia as it manifests itself in the form of both a lack of evidence ground (hereafter the 'no evidence' ground) and a 'mistake of fact' ground. This is the composition of Parts II, III and IV. Part V comprises an examination of the analogous provisions in domestic jurisdictions overseas for the purpose of considering whether alternative formulations of the ground could legitimately resolve any of the problems with Australia's formulations. The final part returns us to the theoretical foundations for judicial review in Australia and re-examines the present grounds for both doctrines in this context and in light of the law overseas. It is concluded that the common law doctrine should be abrogated and that the two doctrines should instead be re-codified in the *Administrative Decisions (Judicial Review) 1977* (AD(JR)) Act with new formulations and as separate, distinct heads of review.

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*II 'No evidence' and 'mistake of fact' at common law*

*A. The 'no evidence' doctrine*

At common law, the leading High Court case on 'no evidence' in Australia is *Australian Broadcasting Tribunal v Bond*[3]. The facts are well known, but will be worth iterating here.

Bond held a shareholding in a company that conferred on him the capacity to determine the boards of directors of Bond Media Ltd. and several subsidiary companies possessing commercial licences under the *Broadcasting Act 1942* (Cth). Upon inquiring into certain transactions Bond was involved in through his subsidiaries, including the settling of a libel claim with the then Queensland Premier and an alleged threat made to an AMP Society executive, the Tribunal made five preliminary findings of fact from which it concluded that Bond was guilty of improper conduct and accordingly not a 'fit and proper person' to hold a broadcasting licence under the Act.

Bond sought judicial review for 'error of law' under s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[4] in regard to *inter alia* the finding that the licensee companies were not fit and proper persons to hold licences. In this regard it was held that it was *not* the case that there was 'no probative evidence' or any other error of law in the tribunal's preliminary finding that Bond deliberately misled their 1986 inquiry.[5] In what has been considered the case's leading judgment,[6] Mason CJ (with whom Brennan J agreed) in this case accordingly concluded that the Federal Court erred in setting aside the Tribunal's decision that the licensees were relevantly unfit persons.

In reaching this conclusion Mason CJ observed that 'the making of findings and the drawing of inferences in the absence of evidence is an error of law',[7] however:

> at common law, according to Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.8

It is submitted that the degree of evidence Mason CJ specifies that a decision-maker is required to possess for his or her decision to avoid being considered an error of law is ambiguous in this passage. On one view, Mason CJ's assertion that 'want of logic is not synonymous with error of law' indicates that consideration of the decision-maker's reasoning ('logic') will not found an error of law, despite how implausible it is considered to be; it is only when there is a complete absence of evidence (facts) from which that reasoning proceeds that such an error exists.

Alternatively, Mason CJ's requirement there be '*some* basis' may suggest Mason CJ meant that there must be *more* than 'a little' or 'a scintilla' of evidence. Similarly, his reference to the requirement that the relevant inference must be '*reasonably* open' may suggest that he is stating that it is not enough if the inference proceeding from the evidence is merely open, it has to be *reasonably* open, even if there is 'some' evidence from which the inference could be drawn.

Nor is this ambiguity resolved by Mason CJ's reference to the need for there to be some 'probative evidence' before the decision-maker:

> In accordance with what I have already said, a finding of fact will then be reviewable on the ground that there is *no probative evidence* to support it and an inference will be reviewable on the ground that it was not *reasonably open* on the facts, which amounts to the same thing.[9]

Again it may seem to make sense to interpret 'probative' with some positive content for the alternative would treat the inclusion of 'probative' as meaning no more than evidence that 'tends to prove the existence or non-existence of some fact', therefore adding nothing to the meaning of 'evidence' which denotes this already.[10] Accordingly, 'probative evidence' would possess a higher probative value than mere evidence: it being only the existence of the former that suffices to avoid committing an error of law.

However the *Evidence Act 1995* (Cth) defines 'probative value' in neutral terms: 'probative value' is '*the extent* to which the evidence *could* rationally affect the assessment of the probability of the existence of a fact in issue'.[11] It accordingly says nothing about what that extent is or whether that extent is positive[12] and so 'probative evidence' indeed may be tautologous given the above definition of 'evidence'.[13]

Furthermore, the ground providing for review where an inference is not 'reasonably open' has been interpreted strictly so as to be equivalent to 'unreasonable' in the *Wednesbury* sense.[14] Such an interpretation would consistently also suggest a narrow reading of 'some basis' and 'no probative evidence'. With similar implications, the Full Federal Court has also cautioned against a liberal interpretation of the term 'reasonable', noting in adopting the words of Phillips JA in *Powley v Crimes Compensation Tribunal*[15] that the term may actually be distracting:

> The word 'reasonable' is used in this context, I suggest, just to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily. The danger of using the word 'reasonably' lies in its being taken to suggest that a finding of fact may be overturned, on an appeal which is limited to the question of law, simply because that finding is regarded as 'unreasonable'. That is not the law as I understand it, at least in Australia.16

Given this authority and given Mason CJ expressly states that 'want of logic is not synonymous with error of law', it seems that if a narrower interpretation of the terms 'some basis' and 'probative evidence' is viable it should adopted.[17]

This view is also consistent with comments Mason CJ's has since made *ex curially* where it is clear that Mason CJ considers 'no evidence' to mean 'complete absence of' evidence in contradistinction to 'insufficient' evidence:

> Likewise, absence of evidence ('no evidence') to support a finding of fact either gives rise to a question of law or is reviewable as such on that specific ground. Insufficient evidence has not generally been recognised as a ground of review.[18]

It is submitted then that it is only when there is no basis at all for a particular finding or inference, because there is a complete absence of evidence that judicial intervention on the ground of 'no evidence' will arise according to Mason CJ.

As in Mason CJ's judgment, the immediate context of Deane J's use of the adjective 'probative' does little to identify whether his Honour intended the term to import some additional positive probative value to the 'material' that the finding must be supported by:

> It would be both surprising and illogical if such a duty [a duty of procedural fairness] involved mere surface formalities and left the decision-maker free to make a completely arbitrary decision. If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were *not supported by some probative material or logical grounds*, the common law's insistence upon observance of such a duty would represent a guarantee of little more than a potentially futile and misleading façade.[19]

However compared to Mason CJ, Deane J's interpretation of the requirement that there be some 'probative and relevant material' derives from the common law duty 'to act judicially' or

in accordance with 'procedural fairness' - a requirement, Deane J emphasises, that extends to a consideration of the 'substance as well as form' of the decision.[20] Moreover, Deane J's separate judgment is significant because it resembles his leading remarks in an earlier Federal Court case, *Minister for Immigration and Ethnic Affairs v Pochi*[21], where his Honour elaborated on the 'no evidence' ground:

> …any conduct alleged against Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some *rationally probative evidence* and not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, *while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had*.[22]

In stating that evidence relied on must be 'rationally probative' and not leave the tribunal in a situation where they could only conclude that a fact *may* have occurred Deane J's test assumes that certain evidence will *not* be said to give rise to some findings of fact. In turn, this means that certain types of reasoning on the basis of such evidence will be 'illogical' and reviewable, making it clear that his Honour is not merely concerned with whether there is *any* evidence present but also with the probative value arising from it in relation to the intended fact.

Despite Deane J's affirmation of this determination in *Bond*, Mason CJ expressly advises that this view, so far, has not been accepted.[23] The High Court has since had the opportunity to clarify the standard of the common law ground of 'illogicality' in *Re Minister for Immigration and Multicultural Affairs; ex parte Application S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs*[24] however the issue before the Court there was whether illogicality arose because of a failure to attribute weight to evidence supporting the contrary conclusion, not whether illogicality arose because of insufficient evidence to support the decision made. Accordingly, four justices did not consider the issue of the degree of evidence required in detail.[25] Furthermore Gleeson CJ seems to have affirmed both views:

> If, in a particular context, it is material to consider whether there has been an error of law, then it will not suffice to establish some faulty inference of fact: Bond per Mason at 356. On the other hand, where there is a duty to act judicially, a power must be exercised "according to law, and not humour"… and irrationality of the kind described by Deane J in Bond at 367 may involve non-compliance with the duty.[26]

Accordingly, as Jackson QC observes the law since *S20* still remains uncertain, at least at the High Court level.[27]

At the Full Federal Court level the law has been stated clearly. In a unanimous, but ultimately unpersuasive judgment in *Minister for Immigration and Multicultural Affairs v Epeabaka*[28] the Court reversed a decision by Finkelstein J in the Federal Court where his Honour followed the decisions of Brennan and Deane JJ in the two *Pochi* cases.[29] The Full Court[30] agreed with an earlier determination[31] that affirmed Mason CJ's reasoning in *Bond* rather than affirming 'what might be seen as the broader position articulated by Deane J in *Pochi* and relied upon by the learned primary Judge in this case…'.[32]

Their Honours also noted that although want of logic in drawing inferences will not of itself constitute an error of law, 'it may sound a warning note to put one on inquiry as to whether there was indeed any basis for the inference drawn.'[33] However the court did not explain why they disagreed with Finkelstein J's determination that Mason CJ in *Bond* did not go so far as to overrule *Pochi* nor did their Honours justify their authoritative regard for Mason CJ's judgment.

Nevertheless, since *Epeabaka* there has been a line of unanimous Full Federal Court authority citing their Honours' judgment as authority for the proposition that Mason CJ's judgment is correct and that illogicality in drawing an inference of fact will not of itself constitute an error of law.[34] Notably, in *NACB v Minister For Immigration & Multicultural & Indigenous Affairs*[35] the Full Court considered whether there was reason to determine the Full Court was 'clearly wrong' in this approach. Their Honours concluded after referring to *S20* that 'there is nothing in these remarks which would warrant a departure from the earlier line of decisions in this Court to the effect that illogical reasoning does not of itself constitute an error of law or jurisdictional error.'[36] Given it is likely the High Court will treat such a line of unanimous cases as at least persuasive it is submitted that regardless of the view one adopts such an outcome is unfortunate given the lack of explanation of the Court's preference of Mason CJ in *Bond* and *Bond* over *Pochi* in the initiating case of *Epeabaka*.

*B. The 'mistake of fact' doctrine*

As the doctrine of separation of powers limits the scope of judicial review to a review of the legality of executive decision-making and not its factual findings it is commonly cited that 'there is no reviewable error simply in making a wrong finding of fact'.[37] However where the decision-maker *based* his or her decision on an incorrect fact it has been held that a reviewable ground arises.[38] There is scant authority for the doctrine in Australia principally because the ground has been codified[39] and such mistakes of fact may arise in any event under the grounds of relevant consideration[40] and unreasonableness.[41]

## *III 'No evidence' and 'mistake of fact' under the AD(JR) Act*

Two provisions relevantly arise under the AD(JR) Act potentially encapsulating the 'no evidence' and 'mistake of fact' doctrines. In s 5(1)(f) a person aggrieved by a proper decision may apply to the Federal Court for an order of review on the ground of 'error of law'.[42]

In contrast, s 5(1)(h) provides for review on the ground:

> (1)(h) that there was no evidence or other material to justify the making of the decision.

This provision is to be read in accordance with paragraph (3) of the same section:

> (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
>
> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which s/he was entitled to take notice) from which s/he could reasonably be satisfied that the matter was established; or
>
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.[43]

In *Bond*, Mason CJ advised that it had been accepted prior to the AD(JR) Act that 'the making of findings and the drawing of inferences in the absence of evidence is an error of law.'[44] Accordingly, his Honour reasoned that the strict common law interpretation of 'no evidence' arises in s 5(1)(f) and not s 5(1)(h)[45] and this, it is submitted, is a desirable interpretation given the inclusion of certain requirements in (1)(h) that are unfamiliar to the common law doctrine.[46]

In analysing s 5(1)(h) and 5(3) several issues arise, the most significant being whether applicants have the burden of proving (1)(h) in addition to either paragraph (a) or (b) in s 5(3). In *Bond* Mason CJ commented that '[t]he effect of s 5(3) is to limit severely the area of

operation of the ground of review in s 5(1)(h).'[47] As McHugh and Gaudron JJ note it is unclear what Mason CJ meant by this[48] and in any event Mason CJ's comments on s 5(1)(h) in *Bond* were *obiter dicta* as the applicants in that case relied on s 5(1)(f).

For this reason, the leading High Court judgments on ss 5(1)(h) and 5(3) derive from *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[49] where the Court was required to interpret identical provisions in the Migration Act.[50] In *Rajamanikkam*, Gleeson CJ (with whom Callinan J agreed on this point[51]) observed:

> Black CJ [in *Curragh Qld Mining Ltd v Daniel*52] also pointed out, however, that it is not enough to satisfy the requirements of s 5(3)(b) alone, as to do so would ignore the language of the ground provided for by s 5(1)(h). In relation to the Act, it is s 476(1)(g) that provides the ground of review. That provision is qualified by s 476(4), but satisfaction of s 476(4)(a) or s 476(4)(b), while necessary, is not sufficient.53

In contrast, in their joint judgment McHugh and Gaudron JJ opined that the provisions in the Migration Act on this point could be distinguished from the provisions in the AD(JR) Act because the provision for 'error of law' in the Migration Act could not be expressed to include the common law doctrine of 'no evidence' as espoused by Mason CJ in *Bond*. The corollary for their Honours was that s 476(1)(e) (the 'error of law' provision) could not attribute meaning to s 476(1)(g) and it therefore need not be approached on the basis that it was 'limited' by the paragraphs in s 476(4). Accordingly, their Honours concluded:

> The better approach, in our view, is to treat the words of s 476(1)(g) as having introduced a new and discrete ground of review, with its precise content identified in s 476(4) of the Act.[54]

Kirby J's view has been subject to various interpretations on this point,[55] however at [110] his Honour's opinion is clear:

> Secondly, as I would read the interaction of s 476(1)(g) with s 476(4), *the latter is not a qualification of the application of the "primary" requirement for judicial review stated, as such, in s 476(1)(g), so much as a statement of the content of that application, that is, an exposition of the particular circumstances in which, for these statutory purposes, a "no evidence" ground is taken to apply*. Viewed in this light – which appears to be the way Mason CJ treated the AD(JR) Act equivalent ground in Bond – the statutory "no evidence" ground of judicial review is both wider and more specific than was the case with "no evidence" grounds for judicial review at common law. *This does not read s 476(1)(g) out of the Act. It simply gives that paragraph particular content.*[56]

From the segments emphasised, it appears clear that Kirby J adopted a view similar to McHugh and Gaudron JJ, accordingly forming a 3:2 majority in favour of a liberal interpretation of the provision.

However, in again a line of authorities in the Federal and full Federal Court the judiciary has proceeded by adopting a restrictive interpretation.[57]

It is nevertheless submitted that the more liberal interpretation is preferable. Aronson comments that if (1)(h) is to be proven in addition to either of paragraphs (a) and (b) then 'it would seem to be a pointless piece of drafting, because a literalist version of 'no evidence' would seem to be subsumed by s 5(1)(f)'s "error of law" ground.'[58] To the extent that (1)(h) provides for a strict ground of review it would seem this is correct. This is especially the case given that in *Re Minister For Immigration & Multicultural & Indigenous Affairs; Ex Parte Applicants S134/2002*[59] the High Court endorsed Kirby J's assertion in *Rajamanikkam* that the AD(JR)'s no evidence provisions were meant to expand the common law remedy of want of evidence;[60] this could not be the case if the standard in (1)(h) nevertheless *expressed* that strict common law standard *in addition* to requiring proof of either paragraph (3)(a) or (b).

With respect, however Aronson's view seems to overlook the possibility that s 5(1)(h) may, if required to be proven, demand a more liberal standard than its common law counterpart. As Aronson himself notes the phrase 'to justify' in (1)(h) may import a less rigid standard to the criterion.[61] Such an interpretation however raises it owns problems upon a closer analysis of the requirements of (3)(b).

For this provision, 'particular fact' is interpreted as meaning a fact 'critical to the making of the decision'[62] and will arise if it is but a 'small factual link in a chain of reasoning… and there are no parallel links.'[63] Accordingly, it is not just any fact that the decision will be based on that will give rise to proof of (3)(b), the fact has to be *critical* in the sense that it is a finding of fact 'without which the decision in question either could not or would not have been reached.'[64] When this is the case however it would already seem that by definition there could not then be 'sufficient evidence' to justify the decision. Proof of (1)(h) would be a corollary of proof of (3)(b), rendering the separate establishment of (1)(h) unnecessary even on the liberal interpretation.[65] Thus, the construction it is suggested that the High Court adopted in *Rajamanikkam* is not only consistent with the AD(JR) Act's intention to expand the common law ground but also makes sense of the provision given the stringent requirements of (3)(b).

In examining the content of (1)(h) as then exhaustively defined in s 5(3), it is to be noted that s 5(3)(a), is only satisfied in a case where the establishment of a particular fact 'is a precondition in law to the decision',[66] where a fact existing as only one of a number of factors that may be considered will not give rise to a 'necessary precondition'.[67] It is however unclear whether a complete absence of evidence of that particular matter is required or whether insufficient evidence of the matter will suffice.

In *obiter dictum* Mason CJ in *Bond* advised:

> Within the operation of par (a) it is enough to show an absence of evidence or material from which the decision–maker could reasonably be satisfied that the particular matter was established, *that being a lesser burden* than that of showing an absence of evidence (or material) to support the decision.[68]

It is uncertain from this in what way paragraph (a) exacts a lesser burden. It is possible it is a lesser burden to prove (a) than the common law test because 'no evidence' need only be shown in regards to the particular matter and not the decision as a whole.

Alternatively, or indeed additionally, it may impose a lesser burden because the actual standard requires 'sufficient' evidence of that particular matter rather than proof of a complete absence of evidence. In this regard it may be thought that firstly, if Mason CJ meant it was a lesser burden for both reasons one would think he would have expressly referred to this. Secondly, it may be thought that given Mason CJ expresses the strict common law test in similar language – 'that the particular inference is reasonably open' – his use of 'reasonableness' here may similarly be no more than a distraction as the court warned in *Epeabaka*. In any event the use of similar language suggests that for Mason CJ paragraph (a) does not exact a lesser burden by imposing a more liberal standard of 'no evidence'. Accordingly, it is submitted that his Honour meant it was a lesser burden because a complete absence of evidence need only be shown with respect to the relevant precondition.[69]

The content of paragraph (b) largely reflects the doctrine of 'mistake of fact' arising in the law overseas and slenderly authorised in Australian common law. As Wilcox J notes in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[70] the explanatory memorandum to the AD(JR) Bill states that:

> The inclusion of this ground as formulated may have the effect of widening the grounds on which the courts would grant relief in Australia. The formulation is intended to embody the reasons for decision of the House of Lords in the *Tameside* case.[71]

*'Tameside'* refers to *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[72] wherein the Minister for Education purported to overrule the Tameside Council's decision to postpone changes to five grammar schools that would transform them into 'comprehensive' schools. Under s 68 of the Education Act the Minister could give directions to any local education authority if satisfied that they acted 'unreasonably' with respect to any power conferred on them.[73] The Minister thought that changes to the five schools had gone too far ahead to be reversed and to try to do so would create 'considerable difficulties'[74] – namely in selecting 240 pupils to attend the grammar schools. Accordingly, the issue before the House of Lords was whether the decision to postpone the changes was 'unreasonable', such that the Minister could be satisfied of this.

In considering this question Wilberforce LJ, in an oft-cited passage, laid down the basis for reviewing such a decision:

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge…[75]

Wilberforce LJ concluded that as several of the points made by the Minister in support of continuing with the changes were 'completely exploded',[76] the only possible remaining factual basis supporting the Minister's decision was the view that in the time remaining it would not be possible to select 240 students. In turn, the only possible factor preventing selection being possible would be the continuing non-compliance of a number of teachers' unions. In this regard however it was held that given the teachers are public servants and possess responsibilities to the children, it was unlikely that their unions would continue their non-compliance after their Lordships decision and accordingly, the Council's decision could not be said to be unreasonable.

If s 5(3)(b) *is* intended to embody the *ratio decidendi* in *Tameside* it may be used to shed light on a prevailing issue with the provision. Where a conclusion is not reached by progressing through a linear chain of facts, but is rather simply deduced from the existence of a combination of factors, *Rajamanikkam* is authority for the proposition that the lack of proof of two of eight factors will not necessarily mean that the decision is flawed for mistake of fact. There is however a compelling reason to consider otherwise. As Kirby J remarks in his dissenting judgment in that case to consider the remaining six factors as still providing a sufficient basis for the decision is to make a factual assessment, and this seems to be correct.[77] If this issue is considered in light of the reasoning in *Tameside* however it seems the majority's interpretation on this point in *Rajamanikkam* should prevail for it is clear from Wilberforce LJ's judgment in *Tameside* that where a decision is 'based on' several factors, proof of the lack of substance of some of those factors may not necessarily render the decision flawed.[78]

### *IV Critique*

It can be seen from the foregoing review that the law on 'no evidence' and 'mistake of fact' in Australia raises a number of problems. The availability of both a common law and legislative provision for 'no evidence' means that applicants can establish there was 'no evidence' in one application and not in another. Furthermore, there are still fundamental problems involved in interpreting the AD(JR) provision. Both of these problems can be rectified by an

amendment to s 5(1)(h) and the abrogation of the common law grounds. However the fact that the common law ground was retained at all is evidence the law is uncertain of how to develop. The problem therefore remains as to whether in regards to the 'no evidence' doctrine a complete absence of evidence is preferable to a ground providing for a test of 'sufficient' or 'substantial' evidence.

### *V 'No evidence' and 'mistake of fact' overseas*

#### *A. England*

In England there is authority for the 'no evidence' doctrine at common law, however the precise test remains uncertain. In the significant case of *Edwards (Inspector of Taxes) v Bairstow*[79] the proposition was established that an inference based on a complete absence of evidence will give rise to a misdirection in law. In *Edwards,* Radcliffe LJ opined:

> But, without any such misconception appearing ex facie, *it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law…80

Since *Edwards* it has appeared that the House of Lords have expanded this basis for intervening to one where they are presently willing to intervene where the relevant evidence alleged to be absent is not 'sufficient'.[81] In *Armah v Government of Ghana and Another*[82], Reid LJ in a 3:2 majority conducted an extensive review of the authorities in this regard before concluding: 'the court can and must interfere if there is insufficient evidence to satisfy the relevant test…'[83] While Reid LJ's determination is still to be followed in case law, *Armah* has been referred to as authority for this point in *Bond*[84] and the test of sufficient evidence has more recently been confirmed in the House of Lords.[85]

Moreover the proposition that the 'no evidence' doctrine arises from procedural fairness as determined in *R v Deputy Industrial Injuries Commissioner; ex p Moore*[86] has also more recently been affirmed by the House of Lords in *Mahon v Air New Zealand Ltd*[87]. In that case their Lordships also stated that decisions:

> must be based on *some material* that *tends logically to show the existence of facts* consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.88

As the phrase 'tends logically to show the existence of' is, like 'probative evidence', open to multiple interpretations it is considered here that this test is still open to a strict interpretation synonymous with that of the common law in Australia. However their Lordships application of the test suggests they intended it to require intervention even if there was *some* evidence for the relevant inference: in *Mahon* it was accepted that certain witnesses gave false testimony, however their Lordships determined that this finding could not give rise to the inference that there was a cover up.[89] Accordingly, whether or not the House of Lords goes on to consider 'no evidence' as deriving from the principles of procedural fairness, *Mahon* can also be taken as further authority for the separate existence of a 'no sufficient evidence' doctrine.[90]

Similarly, the doctrine of 'mistake of fact' has been slow to find influential judicial support despite its elucidation in *Tameside*. In part this is due to authority still maintaining that it is the duty of the court to leave decisions of fact to the relevant repository except where they are acting perversely.[91] It is however clear that the court will consider the relevant fact if it constitutes a condition precedent.[92]
It also seems clear as Bradley and Ewing observe[93] that with the advent of the *Human Rights Act 1998* the courts will have the authority to control essential findings of fact in

respect of tribunal decisions affecting civil rights.[94] Moreover in recent years the courts have accumulated ample authority for both the existence of the ground and for its authority as a separate head of review.[95] Indeed as Wade notes: '[the doctrine] is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy.'[96] The House of Lords have quoted this very passage[97] in *R v Criminal Injuries Compensation Board; ex parte A*[98] where Slynn LJ (with whom four members of the House of Lords agreed) determined that there was jurisdiction to quash the Board's decision on the ground of 'material error of fact',[99] but ultimately his Lordship preferred to decide the matter on the ground of procedural unfairness.[100] *CICB* has also relevantly been unanimously affirmed by the Court of Appeal in *E v Secretary of State for the Home Department*[101] where their Lordships also expressed their view of the content of the ground:

> Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake.102

Given such authority and the relevant literature that also supports the doctrine as an independent ground[103] it seems that if the ground does not exist yet, the law is certainly moving in that direction.

*B. Canada*

At the federal level in Canada the doctrine of 'no evidence' exists both at common law and statutorily. In the leading case of *Skogman v The Queen*[104], a 4:3 majority determined that the 'no evidence' doctrine requires that there be 'some evidence' on all points essential to making the relevant determination:

> [A] committal of an accused at a preliminary, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. [105]

The Court however continued, the result in *Skogman* implying that this requirement will not be easily established:

> This evidence approaches the traditional expression "a scintilla of evidence" but falls short of what may be classified as fanciful. Consequently, there can be gleaned from the record 'some evidence' to support the action of committal.[106]

The common law in Canada has therefore adopted a threshold similar to the common law in Australia of absolutely no evidence.[107] However, as *Skogman* requires there be some evidence on 'all the essential elements'[108] relevant to the finding, ultimately the test will be more liberal than the present common law in Australia. Under *Skogman* applicants need only show that there was no evidence with respect to one essential point of the decision to succeed compared with an applicant in Australia who is required to show that there was no evidence for the whole decision. Accordingly, the test in *Skogman* is more similar to s 5(3)(a) of the AD(JR) Act as interpreted in this paper.[109]

Unlike in Australia, the federal statutory provisions in Canada have been interpreted, albeit at a provincial level, as going no further than what was permissible under the common law doctrine of 'no evidence'.[110]

Section 18.1(4) of the *Federal Court Act 1990* specifies that:

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal-
>
> …

> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;…

In *Kershaw (P.) v Canada*[111] the Court of Appeal followed the *ratio* of *Edwards*, concluding that where there is an absence of evidence to support a tribunal decision the Court may assume that the tribunal erred in law.[112] Thus, it would seem that s 18.1(4)(c) includes errors of the kind appearing in *Skogman*. In any event it has been noted that the grounds in s 18.1(4) overlap and that a decision based on a finding of fact that is not supported by any evidence is also liable to be set aside on the ground that it was without jurisdiction (s 18.1(4)(a)) or, possibly, in breach of the rules of natural justice (s 18.1(4)(b)).[113]

Section 18.1(4)(d) in contrast authorises review under what has been entitled here the doctrine of 'mistake of fact'. However, it has been cautioned that under s 18.1(4)(d) the Court cannot merely substitute its view of the facts for that of a board.[114] For this reason the finding of fact must be 'truly'[115] or 'palpably'[116] erroneous and be made capriciously or without regard to the evidence. Furthermore the decision must be *based* on the erroneous finding.[117]

*C. The United States*

The law in the United States is derived from the *Federal Administrative Procedures Act* (APA). Provision 5 USCS §706 states:

> To the extent necessary to decision and when presented [sic], the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-
>
> (1)…
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> …
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or…

Grounds (2)(A) and (2)(E) are closely related, though treated separately. The standard of 'arbitrary' or 'capricious' in (2)(A) requires that the relevant agency's decision have a 'rational basis in law'.[118] To uphold agency action, the court must ensure that the agency has demonstrated a 'rational connection between facts found and choice made'.[119] It therefore seems that this ground encompasses the 'no evidence' doctrine for whether there is a rational connection between the facts found and the relevant decision depends on the existence of the relevant facts (i.e. evidence) for that decision. Indeed to an extent the US judiciary have embraced this approach: the ground arises where 'an agency's explanation for its decision runs counter to evidence before the agency'.[120] This however in itself seems to prescribe a more difficult standard to establish compared to the common law 'no evidence' doctrine in Australia for it requires positive evidence against the decision-maker's explanation for their decision.

However, it has been held that the 'abuse of discretion' standard expressed in (2)(A) will be found 'only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law'.[121] Moreover, in this context the term 'no evidence' 'cannot be interpreted to mean "any" evidence no matter how little.'[122] Rather, if there is not some 'reliable evidence' an abuse of discretion will arise.[123] Thus it seems that quite apart

from (2)(E) there is a ground of review available at least where the applicant can show that there is less than some 'reliable evidence', available for the relevant decision.

It also appears that (2)(A) provides a ground of relief for a doctrine similar to that of 'mistake of fact'. It has been determined that an agency will be considered to have acted arbitrarily and capriciously if it has 'entirely failed to consider an important aspect of the problem'[124] or where there is a 'clear error in judgment'.[125] In this regard however it is again commonly cautioned that courts may not substitute their judgment for that of an agency rather the 'Court's inquiry must be searching and careful, especially in highly technical cases'[126] and that the scope of review under arbitrary and capricious standard of 5 USCS § 706 is 'narrow' and to be 'deferential.'[127] The corollary has been that something more than mere error is necessary to meet the test of arbitrary and capricious.[128]

The ground in (2)(A) then contrasts with (2)(E) in a number of significant ways. Firstly, (2)(E) only applies to cases subject to ss 556 and 557, ultimately cases subject to formal proceedings.[129] However, in *Citizens to Preserve Overton Park, Inc. v Volpe*[130] a decision in a hearing determined by the Court to be 'nonadjudicatory' and 'not designed to produce a record' was still required to conform to the standard prescribed by s 706(2)(A).[131] Accordingly, decisions made in informal proceedings and proceedings without a hearing are still required to be based on some 'reliable evidence' and to avoid 'clear errors in judgment'.

Secondly, judicial inquiry on the ground in (2)(E) is limited to determining whether such findings are supported by 'substantial evidence'.[132] The meaning of this standard has since been clarified in its interpretation under the APA as meaning 'something between the weight of the evidence and a mere scintilla'[133] and something more than 'hearsay alone, or… hearsay corroborated by a mere scintilla.'[134] However before the APA it was relevantly interpreted to mean 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'[135] and this interpretation has also remained authoritative.[136]

As Schwartz notes,[137] this latter interpretation led to a test of 'reasonableness':

> The finding will be based on substantial evidence when having considered the evidence reflected on the record as a whole an inference of the existence of the fact may be drawn reasonably.[138]

Furthermore the possibility of drawing two inconsistent conclusions from the evidence will not preclude one such conclusion from being drawn 'reasonably'.[139] Despite this, it is still said that the court is only concerned with whether there is evidence to support the finding and not with the weight to be attributed to it.[140] The courts stress that they are only concerned with the *reasonableness* of the decision and not with the *rightness* of the decision, thus leaving room for a difference in opinion.[141] However, in interpreting whether or not a reasonable inference can be drawn from the evidence the courts must firstly *weigh* the evidence to determine that it amounts to more than a 'scintilla' and the reason this is typically left to the executive is because ascertaining the quality of the facts is tantamount, if not identical to, fact-finding itself. Indeed it is *a fortiori* in the US where determining whether there is substantial evidence or not for a decision, requires not only evaluating the evidence in favour of the finding to see if it is 'substantial' but also in evaluating that evidence that is unfavourable to see if it sufficiently detracts from the weight of the evidence.[142] Thus, it is submitted that just because the judiciary's consideration of the evidence leaves room for opinions to differ on the relevant conclusions to be drawn from it does not mean that they have not exercised a function typically reserved for the administration.[143]

### *VI On limiting the scope of 'no evidence' and 'mistake of fact'*

At the outset it was determined that the judiciary could not engage in administrative functions in Australia without infringing the principle in *Boilermakers*: a principle which Mason CJ has since advised seems 'to be set in concrete.'[144]

Indeed there are other good reasons the judiciary should refrain from engaging in the fact-finding process:

- Firstly, insofar as the executive is concerned, it has been observed that extensive judicial review or the demand of exactitude would reduce the efficiency of government.[145]

- Secondly, as Bennett QC notes, some executive decisions go beyond a consideration of the interests of the immediate parties concerned to policy decisions.[146] Given that the executive is ultimately responsible to parliament they are more suitable than the judiciary to make such determinations.

- Thirdly, tribunals often possess an expertise and experience in their defined field when assessing issues of credibility, reliability and the technicality of evidence during the fact-finding process that is not to be equated with the lay opinion of a jury.[147] The courts should accordingly be more wary for this reason of intervening in findings of fact.[148]

- Fourthly, the preservation of the role of fact-finding for the executive gives effect to the doctrines of representative and responsible government as it allows the government to live up to its mandate.

- Also, insofar as the judiciary is concerned, as Mullan notes, by refusing to concern itself with fact-finding, the judiciary avoids subjecting its scarce resources to matters of comparatively small significance thereby also preserving the integrity of the judicial process.[149]

- Finally, such a refusal also preserves the judiciary's integrity by ensuring the judiciary does not engage in political decisions that may give rise to an apprehension of bias.[150]

The foregoing considerations in addition to the doctrine of separation of powers have accordingly led to a distinction being drawn between the legality and the merits of proceedings:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[151]

As Bennett QC notes however, while the law in this regard is commonly cited the distinction it forms is not easily observed.[152] This is because the nature of the judicial process and administrative decision-making is one in which the relevancy of the facts to be found is determined by the law; the two are inextricably linked. To assist the court for this reason a general distinction is drawn between primary and secondary facts. As Denning LJ asserts:

> Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them.[153]

The inferences deduced from reasoning from primary facts are accordingly considered 'secondary' facts. Thus, for example, in *Bond* it will be recalled the Tribunal made five preliminary findings of fact in relation to the evidence adduced, including that Mr Bond deliberately gave misleading evidence to the Tribunal in an earlier inquiry. This finding would be a finding of primary fact, while the inference from this and the other preliminary findings - that Bond was guilty of improper conduct - and the further inference that he was accordingly not a fit and proper person, would be findings of secondary fact.

The problem with classifying certain findings as giving rise to either errors of law or fact can therefore be seen in regard to secondary findings. While these findings of fact are found (or inferred) - that Bond was not a 'fit and proper person' – they are only inferred because the relevant law requires there be a 'fit and proper person'. Accordingly such findings are also on one view conclusions of law: a view that has provoked disagreement as to whether this should be the case.[154]

However the difficulty of determining whether such findings should amount to an error of law or not is a concern beyond the scope of this paper and the more relevant question of whether two specific grounds of review should be available can be considered instead.

*A. 'Mistake of fact' reconsidered*

There is authority for the 'mistake of fact' doctrine in all the jurisdictions considered so far. It is expressly appreciated in Canadian legislation and similarly interpreted into the standard of 'arbitrary, capricious or abuse of discretion,' in the US. It has developed more tentatively in England and indeed in New Zealand,[155] no doubt because of a concern for the doctrine of separation of powers. However, as Brennan J notes, review of the fact-finding procedure is permitted contrary to the separation of powers doctrine in relation to assessing whether the decision is unreasonable.[156] Moreover it can be seen that the other reasons for limiting the scope of review noted above are less convincing in light of a consideration of the purported elements of the doctrine and indeed regardless of whether the finding is primary or secondary.

Firstly, in regard to the executive, deferring to the decision-maker's determination because of their relative experience and expertise becomes irrelevant because the mistake has been proven. Moreover, the concerns for the judiciary interfering with the ideal of a representative and responsible government and executive policy development do not arise because the decision-maker's determination is based on different findings of fact. The efficiency of government would still be impeded but this is controlled: the consensus in the jurisdictions considered limits reviewable findings to those that are in some way 'critical' to the decision.[157]

Insofar as the judiciary is concerned, there is less reason for being concerned that the matter will be of small significance because the doctrine requires positive proof of a mistake so it will therefore be clear that there has been an error. Due to the same requirement, public confidence in the judicial system would hardly diminish if the judiciary intervened and remitted the matter back to the decision-maker to re-determine the case without making the same mistake. Indeed public confidence could diminish in certain cases if the judiciary declared it *did not* have the power to rectify factual errors.

Accordingly, it is submitted that where the mistake is proven and critical the judiciary should intervene even if the error is considered to be one of fact and even if intervention would be considered to encroach upon the ground of the executive.

*B. 'No evidence' reconsidered*

The doctrine of 'no evidence' also arises in some form in the jurisdictions considered. In England there is authority for a doctrine of 'sufficient evidence' which may resemble the ground enacted in the APA in the US that requires the decision-maker's conclusions be supported by 'substantial evidence' for formal hearings. Conversely, in New Zealand a strict interpretation of *Mahon* was adopted in *Isaac v Minister of Consumer Affairs*[158] and so only a complete absence of evidence will suffice to establish a ground of judicial review as is similarly the case in Canada. The problem with determining that anything more than 'some' evidence is required was considered in respect of the US approach where it was concluded that such a ground fails insofar as it purports to consistently maintain that it is not for the judiciary to weigh the evidence. Those considerations are reinforced in regard to findings of primary fact.

> The decision-maker will usually have advantages over the reviewing judge in evaluating evidence and submissions. Those advantages will include the conventional ones of seeing any parties and witnesses who are heard and having time to reflect upon all of the material.[159]

These advantages apply *a fortiori* to expert tribunals and cannot accordingly be transferred to a court conducting judicial review by recourse to transcripts of the evidence.

Thus, in regard to findings corresponding to evidence proven by oral testimony it is inappropriate for the judiciary to attempt to weigh the evidence to any extent and accordingly inappropriate to allow review where the decision-maker's conclusions are based on at least some evidence. The only appropriate ground for intervention would accordingly be where there is a complete absence of evidence, as Denning LJ concluded above. While such occurrences will likely be rare: 'only when it appears that no witness whatever has said a thing… will it fall to be discussed',[160] it is submitted it is preferable to limit the scope of intervention in this way to avoid the courts weighing evidence they did not have the privilege nor the same experience in witnessing themselves.

Compared to primary findings, findings of secondary fact are not concerned with issues of credibility but rather more concerned with a process of reasoning from primary findings: a process therefore more akin to the functions of the judiciary.[161] As with the doctrine of 'mistake of fact' however the clear deterrent of the 'insufficient evidence' doctrine is a concern for infringing the doctrine of separation of powers by engaging in a process of weighing up whether there is more than 'some' evidence available.[162] The strict standards of 'absolutely no evidence' under the common law and in s 5(3)(a) of the AD(JR) Act also reflect this concern. It is however submitted that this concern *alone* is uncompelling. An infringement of the doctrine is already built into the Westminster system of government, by the executive being a part of the legislature[163] and it is clear that the courts are willing to find or imply there is an error of law for fact-finding in other circumstances.[164] Moreover, the doctrine of 'substantial evidence' has been operating in the US since 1912 without an attenuating amendment[165] and so it would seem that instead of blindly adhering to the separation of powers doctrine, the other policy considerations favouring the maintenance of the executive's independence should be evaluated as well.

In regards to the Executive, it has firstly already been noted that the decision-maker's relative expertise and experience is of less relevance to findings of secondary fact. Indeed as Blackwell observes, a more general expertise and further detachment from the type of cases the decision-maker is used to considering can be more beneficial.[166] This it is submitted would be especially so when it comes to reviewing secondary inferences that rely more on skills of reasoning than evaluations of evidence.

Secondly, while judicial intervention may interfere with the government's capacity to be properly representative and responsible, in regard to secondary inferences, the argument is again less convincing. It may not, for example, necessarily be assumed that the public intended that inferences drawn on an insubstantial or insufficient primary fact basis could be so 'representative'.

Thirdly, it is arguable that for the very reason that the Executive may use individual cases as a basis for policy development it is preferable that this is grounded in a basis of substantial evidence rather than in a scintilla of it. By doing so it protects both the individuals concerned to the case and those ultimately affected by the policy.

Insofar as the judiciary is concerned, as long as it confines its remarks and evaluation to one concerned with weighing up whether there is more than a scintilla of evidence available for the purportedly erroneous inference it would seem the court could remain apolitical. Finally, while it may be regarded by some that the court would be engaging in cases that were comparatively small, this would be a matter of perception. Indeed it may in any event be preferable for the courts to have the power to intervene, so that where the stakes were high, as for example in the issuing of protection visas, the judiciary could, upon application, analyse the relevant inferences being drawn.

On this analysis a concern for impeding the efficiency of government would still arise as it always will when it is contended that a ground of judicial review needs expanding. Ultimately however if the field of primary findings is already exclusively assigned to the Executive, then the real basis for checking the capriciousness of government activity is in the realm of secondary findings. The problem with a test demanding no more than 'some' evidence for a relevant inference is that 'some' evidence can almost always be found to support a decision, as both Joseph and Schwartz argue.[167] This is especially so given that as Radcliffe LJ noted in *Edwards*: 'many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur'.[168]

Accordingly, it is submitted that as most cases of an erroneous fact-finding will arise where there are nevertheless (neutral) facts that could be interpreted to give rise to a scintilla of evidence, the threshold should concern itself with ensuring that there is at least *more* than a scintilla of that evidence available.

### *VII Conclusions*

The separation of powers doctrine is a bulwark of constitutional law and one of the 'twin pillars'[169] of judicial review. However the error of law and fact distinction that has traditionally followed from it fails to clearly demarcate the scope of judicial review. Indeed even if the 'mistake of fact' and 'no evidence' doctrines were considered to transgress the principle, it is a principle derived from a Constitution that expressly transgresses it as well and so it cannot be seen as absolute. In this context it can be seen that other policy reasons for justifying a conformation with the law and fact distinction are also diminished in light of objective proof of mistakes of fact and in light of the process of determining secondary inferences.

The distinction accordingly drawn between primary and secondary facts is not uncommon in the literature,[170] but it fails to be expressly enacted in legislation in Australia and overseas. This may be because the distinction itself is too technical, yet it is a distinction that has been employed at common law in Australia in *Bond*,[171] and in Canada,[172] and indeed the case law in England has gone further and distinguished between different types of secondary findings for the purpose of determining whether an 'error of law' in general has arisen.[173]

Given these considerations a revised provision for 'no evidence' and 'mistake of fact' can be submitted:

S 5(1) A person who is aggrieved by a decision… may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:

…

(h) that in relation to:

(i) primary findings of fact there was a complete absence of evidence and other material to justify the making of the decision.

(ii) secondary findings of fact there was not substantial evidence or other material to justify the making of the decision.

(i) that the person who made the decision based the decision on the existence of a particular and critical fact that has been proven not to exist and in circumstances where it was not the applicant who caused the decision-maker's mistake as to that fact.

…

s 5(3) For the purposes of s 5(1)(h) and s 5(3):

(a) 'primary findings of fact' means findings determining the existence or non-existence of a fact in relation to oral evidence.

(b) 'secondary findings of fact' means findings drawn on the basis of primary or secondary findings of fact.

(c) 'substantial evidence' means any evidence of greater probative value than a scintilla of evidence.

(d) 'probative value' has that definition assigned to it in the Evidence Act 1995 (Cth).

**Endnotes**

1 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1956) ALR 163 ('Boilermakers').
2 Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (8th ed. London: Macmillan, 1959) at 183-84; Mason, Sir A. 'The Tension Between Legislative Supremacy and Judicial Review' (2003) 77 *Australian Law Journal* 803 at 805.
3 (1990) 170 CLR 321; (1990) 94 ALR 11 ('Bond').
4 Hereafter the 'AD(JR) Act'.
5 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 364; (1990) 94 ALR 11 at 44.
6 See *Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411* at [22] and [23].
7 That the making of findings and drawing of inferences amount to an error of law is in fact controversial as discussed in Part VI, but for present purposes it will suffice to indicate that as an 'error of law' such findings and inferences will fall within the province of the judiciary and be capable of review if also within the court's jurisdiction.
8 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38 (emphasis added).
9 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-60; (1990) 94 ALR 11 at 40 (emphasis added).
10 Martin, E.A. & Law, J. (eds.) *Oxford Dictionary of Law* (6th ed. Oxford: Oxford University Press, 2006) at 205.
11 *Evidence Act 1995* (Cth) Schedule: Dictionary (emphasis added). See also Garner, B.A. (Chief ed.) *Black's Law Dictionary* (8th ed. US: Thomson West, 2004), at 1240 and Nygh, P.E & Butt, P. (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths: 1998) at 350 for similar neutral definitions.
12 Indeed Garner's definition: 'tending to prove or disprove' accordingly admits the possibility that 'probative' evidence may disprove the alleged fact. Garner, B.A. (Chief ed.) *Black's Law Dictionary* (8th ed. US: Thomson West, 2004), at 1240.
13 Creyke, R. also makes this point: 'the adjective "probative" is superficially appealing, because it means "affording proof".' See Creyke, R., McMillan J. & Reynolds, R. *Control of Government Action: Text, cases and commentary* (Sydney: Butterworths, 2005) at 675.
14 *Nuchapohn Detsongiarus v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, delivered 19 September 1990 SCACT per Pincus J).
15 (1996) 11 VAR 146.
16 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [24].
17 Cf. Bayne who suggests that Mason CJ equates the 'no probative evidence' test with a 'no sufficient evidence' test where Mason CJ states: 'It remains to be seen whether these statements [statements

supporting a no 'sufficient evidence' test] convey any more than a "no probative evidence" test' (at (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38). In this regard it is submitted that in this quoted passage Mason CJ is not equating the two for the purposes of his judgment in *Bond*, but merely noting the possibility that those 'no sufficient evidence' statements may not possess their perceived meaning in the judgments they are stated in. Thus in both contexts the 'no probative evidence' test remains for Mason CJ a test of whether there is a complete absence of evidence or material supporting a specified decision. See Bayne, P. 'Administrative Law: Judicial review of questions of fact' (1992) 66 *The Australian Law Journal* 96 at 96.

18 Mason, A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) Nov. (2001) 21 at 32.

19 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366; (1990) 94 ALR 11 at 46 (emphasis added).

20 Ibid (1990) 170 CLR 321 at 368; (1990) 94 ALR 11 at 47.

21 (1980) 44 FLR 41 at 67; 31 ALR 666 at 689 ('Pochi').

22 Ibid (1980) 44 FLR 41 at 62 (emphasis added).

23 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357; (1990) 94 ALR 11 at 38.

24 (2003) 198 ALR 59 ('S20').

25 McHugh and Gummow JJ merely state that the R.R.T.'s decision was not illogical or irrational without specifying the relevant standard of evidence required to avoid illogicality. Kirby J similarly affirms the doctrine of illogicality without elaborating on the specific test to be applied. Callinan J agreed with McHugh and Gummow JJ. Cf. Gillard J 'the law has moved on since 1990. The High Court in [S20] considered the question and four of the five judges held that extreme irrationality or illogicality in a decision maker's fact finding process can amount to a jurisdictional error' *Byrne v Law Institute of Victoria* [2005] VSC 50 at [81]. Indeed his Honour in that case concludes that despite the existence of some evidence for the inference that there was no costs agreement, the L.I.V.'s reasoning process leading to this conclusion was illogical.

26 Ibid at [9].

27 Jackson QC, D.F. 'Development of Judicial Review in Australia Over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22 at 29.

28 (1999) 84 FCR 411.

29 *Re Pochi & Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482; (1979) 26 ALR 247; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.

30 Black, von Doussa and Carr JJ.

31 per Batt J in *Roads Corporation v Dacakis* [1995] 2 VR 508.

32 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [23].

33 Ibid at [26]. See also *R v Board of Stevedoring; Ex parte Melbourne Stevedoring Pty Ltd* (1953) 88 CLR 100 at 120.

34 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 per Heerey, Goldberg & Weinberg JJ*; Wade of 2001 v Minister for Immigration & Multicultural Affairs* (2002) FFC per Branson, Goldberg and Allsop JJ; *Gamaethige v Minister for Immigration & Multicultural Affairs* (2001) 109 FCR 424 per Hill, Finkelstein and Stone JJ; *WAJW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 330 per Nicholson, Jacobson and Bennett JJ. See also *Lark v Nolan* [2006] TASSC 12 and *Gombac Group Pty Ltd v Vero Insurance Ltd.* [2005] VSC 442.

35 [2003] FCAFC 235.

36 Ibid at [29].

37 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J; affirmed in *Bond* per Mason CJ: (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38.

38 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; Affirmed in *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 71 FLR 198 at 201; (1982) 46 ALR 123 at 127 per Smithers J.

39 See Part III ''No Evidence' and 'Mistake of Fact' under the AD(JR) Act'.

40 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; 66 ALR 299.

41 See Mason, Sir A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) November 2001: 21 at 29: 'It is legitimate, in demonstrating unreasonableness, to show that a material fact has been wrongly found.' On this point see also: Griffiths SC J. 'Commentary on Professor Aronson's article "Is the ADJR Act hampering the development of Australian administrative law?" (2005) 12(2) *Australian Journal of Administrative Law* 98 at 99 and McMillan, J. 'Developments under the ADJR Act: The Grounds of Review' [1991] 20 *Federal Law Review* 50 at 60 where the author contends that the mistake of fact doctrine should be incorporated into the ground of 'unreasonableness' to confine its application to exceptional cases.

42 AD(JR) Act s5(1)(f).

43 AD(JR) Act ss5(1)(h) and 5(3). See also s6(1)(h) and 6(3). Similar provisions appear in the Judicial Review Act 2000 (Tas), ss17(2)(h) and 21; AD(JR) Act 1989 (ACT) ss5(1)(h), 5(3); Judicial Review Act 1991 (Qld) ss20(2)(h), 24.

44 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6; (1990) 94 ALR 11 at 37-8.

45 Ibid (1990) 170 CLR 321 at 358; (1990) 94 ALR 11 at 39.

46 That (1)(h) provides a ground of review that differs from the common law ground of 'no evidence' was also recently affirmed by the ARC Report No. 47 (April, 2006) at 13. It is to be noted however that there is a second school of thought that reasons that an allowance for review on the ground of 'no evidence' under (1)(f) would render s 5(3) superfluous (*Western Television Ltd. v Australian Broadcasting Tribunal* (1986) 69

ALR 465 at 479). This is supported by Mason CJ's opinion that the specific heads of review in s 5(1) should be read in the context of the others and not as free-standing grounds (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358; (1990) 94 ALR 11 at 39). However given that s 5(3) demands certain requirements that are unfamiliar to the common law doctrine it would seem that s 5(3) could only be superfluous if the very same common law test overshadowed s 5(3), as possibly in (1)(h). This however as will be demonstrated is ultimately an implausible interpretation of (1)(h). See below at pp 11-12.

47 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357; (1990) 94 ALR 11 at 39.

48 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [51] ('Rajamanikkam').

49 (2002) 210 CLR 222.

50 Note, these were considered analogously applicable to the AD(JR) provisions: *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [34] per Gleeson CJ; at [53] per McHugh and Gaudron JJ.

51 Ibid at [151].

52 (1992) 34 FCR 212. *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [34]

54 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [53]-[54].

55 *NALF of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 348; Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) cf. *VAAW of 2001 v Minister of Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 202; *SGFB v Minister For Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 422 ('SGFB').

56 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [110]-[111] (emphasis added).

57 *Dunstan v Human Rights and Equal Opportunity Commission (No 2)* [2005] FCA 1885; *MLC Investments Ltd v Commissioner of Taxation* (2003) 137 FCR 288; (2003) 205 ALR 207 per Lindgren J; *VAAW of 2001 v Minister of Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 202 (unanimous per Spender, Tamberlin and Kenny JJ); *SGFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 422 (unanimous per von Doussa, O'Loughlin and Selway JJ). Unfortunately space restrictions prevent the inclusion of an analysis of the two Full Federal Court interpretations here. Suffice it to say that in regards to *VAAW* the Full Court's emphasis at [36]-[37] on Kirby J's statement, as evidence for the need to separately consider (1)(h), omits the significance of 'that is', in the emphasised section, as expressing an identity relationship rather than being used as a coordinating conjunction and as an identity relationship it does not expressly incorporate the requirement for proof of (1)(h). In regards to *SGFB*, the inconsistency alleged to arise from Kirby J's caution against engaging in 'merits review' and Kirby J's former paragraph cited above dissipates once it is seen that Kirby J was referring to 'merits' in the sense of reviewing a critical fact rather than the decision as a whole. It then becomes clear that his Honour meant that review via par (b) does not amount to merits review because the court is not substituting its decision for that of the decision-maker – but rather setting it aside to refer to the decision-maker to make the 'true decision', as his Honour goes on to say in that passage. See *SGFB* at [20].

58 Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) at 241.

59 (2003) 211 CLR 441; (2003) 195 ALR 1.

60 Ibid per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ (2003) 211 CLR 441 at [36]; (2003) 195 ALR 1 at [36].

61 Aronson, M., Dyer, B., & Groves, M. *Judicial Review of Administrative Action* (3rd ed. NSW: Lawbook Co., 2004) at 241.

62 per Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357-8; (1990) 94 ALR 11 at 39 unanimously affirmed by the High Court in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; (2002) 190 ALR 402.

63 *Curragh Qld Mining Ltd v Daniel* (1992) 34 FCR 212; 27 ALD 181 at 188.

64 per Gaudron and McHugh JJ in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; (2002) 190 ALR 402 at [56].

65 Similarly, the Supreme Court of Canada has ruled that if there is no evidence of an essential element of an alleged crime there could not be 'sufficient evidence' of that crime either. *Skogman v The Queen* [1984] 2 S.C.R. 93.

66 Television Capricornia Pty. Ltd. v Australian Broadcasting Tribunal (1986) 13 FCR 11; (1986) 70 ALR 147 at 151 per Wilcox J.

67 Ibid (1986) 70 ALR 147 at 155; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [577].

68 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358; 94 ALR 11 at 39 (emphasis added).

69 See Jones, T.H. & Thomas, R., 'The 'No Evidence' Doctrine and the Limits to Judicial Review', *Griffith Law Review* 8(1) (1999) 102 at 114-5 where the authors contend that the it is difficult to classify paragraph (a) as either expansive or limiting in relation to the common law test. On this analysis it is both expansive and limiting: it is expansive insofar as 'no evidence' need only be shown with respect to a particular matter and not the decision as a whole, and limiting insofar as the decision must require that the particular matter be established as a precondition in law.

70 (1986) 13 FCR 511; (1986) 70 ALR 147.
71 Ibid (1986) 13 FCR 511 at 520; (1986) 70 ALR 147 at 156.
72 [1977] AC 1014; [1976] 3 All ER 665.
73 Ibid [1976] 3 All ER 665 at 681.
74 Ibid [1976] 3 All ER 665 at 683.
75 Ibid [1976] 3 All ER 665 at 681-682.
76 Ibid at 684.
77 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [125]; (2002) 190 ALR 402 at [125].
78 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 All ER 665 at 684.
79 [1956] AC 14; [1955] 3 All ER 48 ('Edwards').
80 Ibid [1955] 3 All ER 48 at 57 (emphasis added).
81 *Armah v Government of Ghana and Another* [1966] 3 All ER 177; *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 505; [1999] 2 WLR 28 at 54 per Clyde LJ.
82 [1966] 3 All ER 177 ('Armah').
83 Ibid at 188.
84 per Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; (1990) 94 ALR 11 at 38.
85 *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 505; [1999] 2 WLR 28 at 54 per Clyde LJ. See also *Coleen Properties Ltd v Minister of Housing* [1971] 1 All ER 1049 where while Denning LJ's view on this point is still open to interpretation, Buckley LJ's view at 1055 clearly favours a test requiring the decision-maker have sufficient evidence.
86 [1965] 1 All ER 81 at 94.
87 [1984] AC 808; [1984] 3 All ER 201 ('Mahon').
88 Ibid [1984] 3 All ER 201 at 210 (emphasis added).
89 Ibid at 213.
90 For academic support for the doctrine of 'no sufficient evidence' in England see Wade, HWR & Forsyth CF *Administrative Law* 9th ed (Oxford: OUP, 2004) at 473 and De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995) at 561.
91 *Pulhofer v Hillingdon London Borough Council* [1986] 1 AC 484 at 518 per Brightman LJ (with whom Keith, Roskill, Brandon and Mackay LJJ agreed).
92 *Khera v Secretary of State for the Home Department; Khawajah v Secretary of State for the Home Department* [1984] 1 AC 74. Here it was decided that the detention and removal of a person entering the country with *ex facie* valid permission could only be ordered if it was established the person was an 'illegal entrant'. Interestingly, Wilberforce LJ held that the Court could intervene where the evidence of the condition 'does not justify the decision reached' (at 105). Accordingly in *Khera*, while there was some evidence that Khera was an 'illegal entrant' it was 'not sufficient' to establish the condition precedent.
93 Bradley, A. W. & Ewing, K.D., *Constitutional and Administrative Law* 13th Ed. (Harlow: Longman, 2003) at 710.
94 This accordingly ensures compliance with Art 6(1) European Convention on Human Rights.
95 *R v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330; *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295*; E v Secretary of State for the Home Department; R v Secretary of State for the Home Department* [2004] QB 1044; [2004] 2 WLR 1351. See also *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351; *The Trustees of the Bristol Meeting Room Trust v Secretary of State for the Environment* (unreported) Dec. 13 1989 (Q.B.D) as cited in Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507 at 516.
96 Wade, H.W.R. & Forsyth, C.F. *Administrative Law* 9th ed. (Oxford: OUP, 2004) at 277. Also quoted variously elsewhere: *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at [165] per Kirby J; Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507 at 512; Southey, H., *Judicial Review: A practical guide* (Bristol: Jordans, 2004) at 74.
97 Notably, Wade, in turn, has also acknowledged this in his latest edition, ultimately concluding that 'it now seems clear it [the doctrine of mistake of fact] has arrived.' Wade, H.W.R. & Forsyth C.F. *Administrative Law* 9th ed (Oxford: OUP, 2004) at 278.
98 [1999] 2 AC 330 ('CICB').
99 Ibid at 344.
100 Slynn LJ has also affirmed his own view in *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295 where Clyde and Nolan LJJ also acknowledge the court's competence to review mistaken facts.
101 [2004] 2 WLR 1351 per Lord Phillips MR, Mantell & Carnwath LJJ.
102 *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 per Lord Phillips MR, Mantell & Carnwath LJJ at [66].
103 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995) at 288; Jones, T.H. 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507; Bradley, A. W. & Ewing, K.D., *Constitutional and Administrative Law* 13th Ed. (Harlow: Longman, 2003) at 702; Southey, H., *Judicial Review: A practical guide* (Bristol: Jordans, 2004) at 74; Mason, Sir A. 'Lecture 2: The Scope of Judicial Review', *AIAL Forum* (31) November 2001: 21 at 34.

104 [1984] 2 S.C.R. 93 (SCC) ('Skogman'). Subsequently affirmed by the Supreme Court of Canada in *Hawkshaw v The Queen*, [1986] 1 S.C.R. 668 at 676 and *Russell v The Queen* [2001] 2 S.C.R. 804 at [48].
105 *Skogman v The Queen* [1984] 2 S.C.R. 93 (SCC) at 108.
106 Ibid at 109.
107 The Canadian literature also supports the proposition that only a complete absence of evidence is reviewable. See Mullan, D. *Administrative Law* (Toronto: Irwin Law, 2001) at 80, 92; Blake, Sara, *Administrative Law in Canada* (Toronto and Vancouver: Butterworths, 1990) at 179; and Elliot, D.W. '"No Evidence": A Ground of Judicial Review in Canadian Administrative Law?' (1972) 37 *Saskarian Law Review* 48 at 73-74 where the author observes that almost all of the Canadian cases recognising 'no evidence' since *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 refer to the doctrine in terms of 'some' or 'no' evidence instead of 'sufficient' or 'insufficient' evidence.

108 *Skogman v The Queen* [1984] 2 S.C.R. 93 (SCC) at 108.
109 i.e. that s5(1)(h) does not need to be proven separately per McHugh, Gaudron and Kirby JJ in *Rajamanikkam* and that the requirement in s5(3)(a) - that the decision-maker '*reasonably* be satisfied that the matter was established' - is interpreted narrowly. See Part III: 'No Evidence' and 'Mistake of Fact' Under the AD(JR) Act at pp.10-13.
110 In *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.) the original provisions specifying grounds for judicial review (now replicated in the Federal Court Act 1990) were interpreted accordingly.
111 [1992] 1 C.T.C. 301; 140 N.R. 382; 46 D.T.C. 6240 (Fed. C.A.).
112 Ibid 92 D.T.C. 6240 at 6244. In *Hristova v Canada (Minister of Employment & Immigration)* (1994), 23 *Immigration Law Review* (2d) 278, as well the court held that s18.1(4) allows review of a federal board's evidentiary findings where there was no evidence to support the findings, or where on an assessment of the evidence as a whole, the findings are unreasonable.
113 *C.U.P.W. v Healy* (2003), 311 N.R. 96.
114 *Javadimia v Canada (Min. of Citizenship & Immigration)* (2002), 23 Immigration Law Review (3d) 126.
115 *Rohm & Haas Can. Ltd. v Anti-dumping Tribunal* (1978), 22 N.R. 175, at 178.
116 *Javadimia v Canada (Min. of Citizenship & Immigration)* (2002), 23 Immigration Law Review (3d) 126 at 131.
117 *Rohm & Haas Can. Ltd. v Anti-dumping Tribunal* (1978), 22 N.R. 175, at 178.
118 *Hurley v United States* 575 F2d 792 at 799 (1978, CA).
119 *Wawszkiewicz v Department of Treasury* 216 US App DC 138 at 144 (1981, App DC).
120 Id.
121 *Song Jook Suh v Rosenberg*, 437 F.2d 1098 at 1102 (9th Cir. 1971). Affirmed in *Jaimez-Revolla v Bell*, 598 F.2d 243 at 246 (1979).
122 *Digilab, Inc. v Secretary of Labor*, 357 F Supp 941 at 942 (1973).
123 *First Girl, Inc. v Regional Manpower Administrator of U. S. Dept. of Labor*, 499 F.2d 122 at 123 (C.A.7 (Ill.) 1974).
124 *RSR Corp. v Environmental Protection Agency* 588 F Supp 1251 at 1255 (1984, ND Tex).
125 *Western & Southern Life Ins. Co. v Smith* 859 F2d 407 at 410 (1988, CA6 Ohio).
126 *American Paper Institute v Train* 177 US App DC 181, 543 F2d 328 at 329 (1976, App DC).
127 *County of Rockland v U.S. Nuclear Regulatory Commission* 709 F2d 766 at 776 (1983, CA).
128 *Plaza Bank of West Port v Board of Governors of Federal Reserve System* 575 F2d 1248 (1978, CA).
129 5 USCS § 554.
130 401 US 402 (1971).
131 Id.
132 First stated in *ICC v Union Pac R.R* 222 US 541 at 548 (1912).
133 *Consolidated Edison Co v National Labor Relations Board* 305 US 197 at 217 (1938, USSC) per Hughes CJ.
134 *Willapoint Oysters, Inc. v Ewing* 174 F2d 676 at 678 (1949, CA9).
135 *Consolidated Edison Co v National Labor Relations Board* 305 US 197 at 217 (1938, USSC).
136 *Consolo v Federal Maritime Commission* 383 US 607 (1966).
137 Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 599-600.
138 *Stork Restaurant Inc v Boland* 282 NY 256 at 273 (1940).

139 *St. Elizabeth Community Hospital v Heckler* 745 F2d 587 at 592 (1984, CA).
140 *Alabama Highway Express, Inc. v United States* 241 F Supp 290 at 293 (1965).
141 *Cusson v Firemen's and Policemen's Civil Service Commission of San Antonio*, 524 SW 2d 88 at 90 (1975).
142 *Universal Camera Corporation v NLRB* 340 US 474 (1951).
143 Cf. Schwartz 'Under the substantial evidence rule, the court should not ask, "Should we have found the same fact?" but only whether there is room on this record for a reasonable finding such as that made by the agency: Could the agency fairly and reasonably find the facts as it did?' Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 601.
144 Mason A. 'Lecture 1: The Foundations and the Limitations of Judicial Review' *AIAL Forum* (31) November 2001: 1 at 13.
145 Creyke, R., McMillan J. & Reynolds, R. *Control of Government Action: Text, Cases and Commentary* (Sydney: Butterworths, 2005) at 661.

146 Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 7.

147 *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at [58] per McHugh and Gummow JJ; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481 at 506 per Kirby J; Sackville J 'The limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315; Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22.

148 See Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 Dec 1983: 193 where Flick indeed argues that greater consideration should be paid to tribunals' expertise before judicial intervention occurs.

149 Mullan, D. *Administrative Law* (Toronto: Irwin Law, 2001) at 482.

150 Mason, Sir A. 'Lecture 1: The Foundations and the Limitations of Judicial Review', *AIAL Forum* (31) November 2001: 1 at 13-14.

151 *Attorney General v Quin* 170 CLR 1 at 35-6 per Brennan J; cited by majority *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481.

152 Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 3.

153 *Metropolitan Borough of Battersea v British Iron and Steel Research Association; British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 434; [1949] 1 All ER 21 at 25 per Denning LJ (with whom the Court agreed).

154 On this point see Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22 where the author outlines the problems concerning both what has been entitled the 'analytic' view and the 'pragmatic' view towards classifying secondary inferences as errors of law. Indeed in this regard, Beatson concludes that the problems with both views are so serious that the distinction between errors of law and fact should be discarded. See also: Endicott, T. 'Questions of Law' (1998) 114 *The Law Quarterly Review* 292; Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 Dec 1983: 193; Emery & Smythe 'Error of Law in Administrative Law', (1984) 100 *The Law Quarterly Review* 612; Caldwell, J. 'Judicial Review: Review of the Merits?' *New Zealand Law Journal* October 1995: 343.

155 The oft-cited case in New Zealand in this regard is *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 ('Daganayasi') where Cooke J (as he then was) followed Scarman LJ in *Tameside* declaring at 149 that an administrative decision could be 'invalid on the ground of mistake'. However, at 132 and 149 Richmond P and Richardson J respectively, reserved their opinion, stating the law was 'far from settled'. Cooke J has since reaffirmed his view in several cases but the unanimity of the court has not yet been obtained. See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; *Budget Rent A Car Ltd. v Auckland Regional Authority* [1985] 2 NZLR 414 at 417; *NZ Fishing Industry Association Inc. v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552*; Auckland City v Minister of Transport* [1990] 1 NZLR 264 at 293; *Southern Ocean Trawlers Ltd v DG of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 61. cf. *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) per Richardson P at 568.

156 *Attorney-General v Quin* (1990) 170 CLR 1 at 36. See also: Sackville J 'The Limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315 at 321; Bennett QC, D. 'Balancing Judicial Review and Merits Review', *Administrative Review* 53 September 2000 3 at 8.

157 With the exception of New Zealand, which is yet to confirm the 'mistake of fact' as a reviewable ground, the doctrine is similarly restricted in the other states reviewed here. In England the mistake 'must have played a *material*… part' in the decision (emphasis added) *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 at [66]; In Canada the decision must be 'based' on the erroneous finding per s18.1(4)(d); In the US, aside from the relevant consideration ground, there must be a 'clear error of judgment', though something more than mere error is necessary *Plaza Bank of West Port v Board of Governors of Federal Reserve System* 575 F2d 1248 (1978, CA8).

158 [1990] 2 NZLR 606.

159 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 136 ALR 481 at 506. See also Legomsky in Bayne, P. 'Administrative Law: Judicial review of questions of fact' (1992) 66 *The Australian Law Journal* 96 at 100: 'One who adjudicates many cases in the same field might acquire familiarity with the more frequently employed expert witnesses and thus an enhanced accuracy in judging credibility. Expertise can permit more knowledgeable assessment of technical data drawn from fields like economics, science, medicine, or engineering. Even in non-technical fields the repetition can bolster the decision-makers' understanding of the common sources of evidence in the particular subject area and the degree to which the source influences the weight that the evidence deserves'.

160 *R v Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, at 149-50 per Sumner LJ.

161 Indeed Taylor states that in regards to 'reasoning processes' courts are by definition superior to the authority reviewed except where the evidence admits of more than one available conclusion or where 'there is something about the authority being reviewed, or the subject-matter it works with' such as for example where the authority is a specialist in its area. Taylor, G.D.S. *Judicial Review: A New Zealand Perspective* (Wellington: Butterworths, 1991) at 317-8.

162 Mason, Sir A. 'Administrative Review: The Experience of the First Twelve Years' [1989] 18 *Federal Law Review* 122 at 126.; Elliot, D.W. '"No Evidence": A Ground of Judicial Review in Canadian Administrative Law?' (1972) 37 *Saskarian Law Review* 48 at 70-71; Tracy RR S 'Absence or Insufficiency of Evidence and Jurisdictional Error', *Australian Law Journal* 50 (11) November 1976: 568 at 573; McMillan, J. 'Developments under the ADJR Act: The Grounds of Review' [1991] 20 *Federal Law Review* 50 at 59.

163 s64 of The Commonwealth of Australia Constitution Act 1900 (UK) requires members of the Federal Executive Council to sit in parliament.

164 Consider for example, the doctrine of unreasonableness, jurisdictional fact, mistake of fact and notably the doctrine of complete absence of evidence.

165 Indeed in 1946 its scope was expanded with the enactment of the APA. Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 599.

166 Blackwell, J. 'A Discussion of the Duty and Jurisdiction of the Courts to Review Administrative Decisions', (2003) Vol 3 No. 1 *QUTLJJ* 182 at 187.

167 Joseph P.A. *Constitutional and Administrative Law in New Zealand* 2nd Ed. (Wellington: Brookers, 2002) at 822; Schwartz, B. *Administrative Law* (2nd ed. Boston: Little, Brown, 1984) at 598.

168 [1955] 3 All ER 48 at 57-58.

169 Sackville J 'The limits of Judicial Review: Australia and the United States' (2000) 28 *FLR* 315 at 315.

170 Flick, G.A., 'Error of Law or Error of Fact?' *University of Western Australia Law Review* 15 (3 and 4) December (1983) 193; Endicott, T. 'Questions of Law' (1998) 114 *The Law Quarterly Review* 292; Emery & Smythe 'Error of Law in Administrative Law', (1984) 100 *The Law Quarterly Review* 612; Beatson, J. 'The Scope of Judicial Review for Error of Law', Vol. 4 No.1. *Oxford Journal of Legal Studies* 22; Taylor, G.D.S. *Judicial Review: A New Zealand Perspective* (Wellington: Butterworths, 1991) at 316-7. Indeed Basten QC argues that the distinction is already implicit in s5(3) of the AD(JR) where 'particular matter' in s5(3)(a) refers to both primary and secondary findings, but where 'particular fact' in s5(3)(b) only refers to primary findings of fact. While this distinction as applied to the content of s5(3)(b) may be contentious, it is significant that the distinction is considered operable. Basten QC, J. 'Judicial Review: Recent trends.' *Federal Law Review* 29 (3) 2001: 365 at 384.

171 per Mason CJ (1990) 170 CLR 321 at 355-6; (1990) 94 ALR 11 at 37-8; per Deane J (1990) 170 CLR 321 at 367; (1990) 94 ALR 11 at 46.

172 *Re Pasqua Hospital and Harmatiuk* (1983), 149 D.L.R. (3d) 237 (Sask. Q.B.). The Court here following Denning LJ's distinction between inferences and findings of primary facts cited (n 182).

173 *Metropolitan Borough of Battersea v British Iron and Steel Research Association; British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 434; [1949] 1 All ER 21 at 25 per Denning MR.

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