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ENHANCING AUSTRALIAN DEMOCRACY WITH A FEDERAL CHARTER OF RIGHTS AND RESPONSIBILITIES

The Hon Kevin Bell*

The subject of my address is enhancing Australian democracy with a Federal charter of rights and responsibilities. I address that subject from the perspective of a judge of a State Court – the Supreme Court of Victoria – and the President of Australia's largest tribunal – the Victorian Civil and Administrative Tribunal.

I think is it important for State judicial officers[1] to contribute to the debate about a Federal charter. The State courts are part of the national legal framework, the State courts and tribunals would be affected by a Federal charter and State judicial officers, particularly those in Victoria, which has the *Charter of Human Rights and Responsibilities Act 2006*, have something significant to contribute to the debate from their unique perspective. Of course, the same may be said of judicial officers in the Australian Capital Territory, which has Australia's first charter, the *Human Rights Act 2004* (ACT).

Australian democracy is constituted by a Federal system under a Constitution founded on the pre-existing State frameworks, which includes their judicial systems. It is supported by a federal legal system in which the Federal and State components usually exercise different jurisdictions. But the Constitution allows the Commonwealth to enlist the State courts for the exercise of its judicial power and it has frequently done so. Thus, as Gaudron J put it in *Kable v Director of Public Prosecutions (NSW),*[2] 'one of the clearest features' of the Australian Constitution is 'that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth'.

Judges of the State courts are often conscious of administering the State component of a Federal system. They might conduct the trial of a person accused of a federal crime, enforce the standards of trade and commerce stipulated in federal trade practices legislation, hear and determine purely federal proceedings under the cross-vesting legislation and interpret and apply federal legislation in countless respects. Their active engagement with federal law gives State judges a legitimate interest in the debate about a Federal charter, for a charter would impact on the content and interpretation of federal legislation which they help to administer.

Their exercise of the judicial power of the Commonwealth integrates the State courts into the federal judicial system in other important respects. The State courts are not governed by the separation of powers doctrine enshrined in Chapter III of the Commonwealth Constitution, which applies to the Federal courts. However, by reason of their exercise of federal judicial power, the State courts must conform to certain fundamental organising principles which are derived from the Commonwealth Constitution. Those principles apply to a State court as a court whatever be the jurisdiction it is exercising.[3] Thus the judges of the State courts have a little federal blood in their veins. They have a stake in debate about the laws which influence the overall operation of the federal legal system, as would a charter.

* *Justice, Supreme Court of Victoria; President, Victorian Civil and Administrative Tribunal. Speech delivered to the Australian Institute of Administrative Law (Vic Chapter), 20 November 2008.*

The judicial officers of the State tribunals have the same stake for related reasons. When conferred by State legislation, as is the case with the civil jurisdiction of VCAT,[4] the State tribunals can and do exercise the judicial power of the States. But, not being courts (except perhaps for specific statutory purposes),[5] they cannot exercise the judicial power of the Commonwealth, for that can only be exercised by a court and not a tribunal.[6] Thus the State tribunals do not administer federal law as do the State courts. Nevertheless, the State tribunals play a very important role in Australia's national justice system. The judicial officers of the State tribunals frequently apply federal law in exercising their civil and administrative jurisdictions. Federal law is often the source of relevant rights and obligations in State tribunal proceedings. Interpreting federal legislation is an everyday occurrence in the State tribunals. If a federal charter with an interpretative principle were enacted, it would probably apply to everybody interpreting federal legislation, including the judicial officers of the State tribunals.

The State and Federal tribunals are not integrated like the State and Federal courts, but they interact strongly in organisational and legal respects. The State and Federal tribunals are members of the Council of Australasian Tribunals, which is very active in supporting the professional development of both members and staff. The State and Federal tribunals administer some legislation that is very similar, such as freedom of information and privacy legislation. There is developing a common body of tribunal jurisprudence, which is referred to by State and Federal tribunals when deciding cases in these areas. The enactment of a Federal charter would influence the administration of Federal tribunals and their interpretation of federal legislation, which would have downstream effects on the work of the State tribunals. Therefore the judicial officers of the State tribunals also have a legitimate interest in the debate about a Federal charter.

Victoria has the *Charter of Human Rights and Responsibilities Act 2006*. It is the first State to have a Charter. As a judge of the Supreme Court of Victoria, and more recently as the President of VCAT, I have been able to observe the effects of the Charter on the operation of the law and the conduct of government in this State, albeit for a relatively brief period. I will draw on this experience in the comments I will now make.

How ironic it is that the loudest criticism of a charter is that it is undemocratic, yet the main reason for enacting a charter is to enhance the operation of democracy. Enhancing democracy was indeed the main reason for the enactment of the Charter in Victoria, as was made clear in the principles identified in the preamble as founding the Charter and in Attorney-General's second reading speech in the Legislative Assembly.

The first principle on which the Preamble states the Charter is founded is that –

> human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;…

This is the first paragraph of the second reading speech: [7]

> This is an historic day for Victoria. Today the government fulfils its commitment to provide better protection for human rights for all people in Victoria through the enactment of a charter of rights and responsibilities that will strengthen and support our democratic system.

That a charter can be seen by some persons committed to democracy as a democratic negative and others having that same commitment as a democratic positive exposes the real issue in the debate, which concerns the nature of the democratic system itself.

In general terms, democracy is the election by the people of a Parliament that will govern for the people. It is the Parliament's responsibility to make laws for which it will be politically accountable to the people. Similarly, the due conduct of the Executive – by which I mean all facets of public administration – is the responsibility of the elected government of the day.

Those elements of democracy are of fundamental importance and form the basis of Australia's parliamentary system of government. Some say a charter would impair the operation of democracy so defined. If that were true, it would be a sufficient reason for not having a charter. While retaining and respecting the fundamental elements of the parliamentary system, a charter appeals to a broader, more inclusive and empowering concept of democracy, one wherein every member of the community knows what to expect from their government and how they should treat others.

That, in broad terms, is the foundation of the *Human Rights Act 1998* of the United Kingdom, which was followed in the ACT and Victorian legislation. Thus the Charter in Victoria is ordinary legislation of the Parliament, and can be amended in the usual way. It is an expression of the democratic will, and it could be repealed or amended by the expression of that same will. The courts and tribunals (and everybody else) are required to interpret legislative provisions compatibly with the stipulated human rights, so far as it is possible to do so consistently with their purpose.[8] But, once interpreted, and whether it is compatible with human rights or not, legislation cannot be declared invalid, and must be applied. This protects the constitutional primacy of parliament-made law in the legal system.

Under the Charter, the Supreme Court of Victoria has been given a power to examine legislation so that, through a declaration process, it might refer to Parliament legislation that cannot be interpreted consistently with human rights. Such a declaration does not make the legislation invalid, but it triggers an important parliamentary process by which the Minister administering the legislation must respond.[9] By this process, a dialogue is facilitated about the content and operation of the legislation – hence this is sometimes called the 'dialogue model'.

This model doesn't please all proponents of human rights charters. Many would prefer the constitutional charter that has been adopted in Canada. Nobody is interested in the model adopted in the United States of America, whose historical antecedents Australia doesn't share. Interestingly, Canada began with a legislative model and later adopted a constitutional model.

Nobody suggests the Victorian Charter is a perfect instrument. No doubt there are aspects of its operation that might be improved. These can be examined in the review which the Attorney-General must cause to be carried out by 2011.[10] The Parliament has, in the Charter, already determined that the review must include consideration of some of the key issues, such as the inclusion of additional human rights[11] and the improvement of the Charter system of enforcement.[12]

Despite its arguable limitations, the Charter is indeed historic legislation. I would note the conclusion of the Victorian Equal Opportunity and Human Rights Commission in its 2007

report on the operation of the Charter that the community can be 'confident that a strong foundation has been laid for the successful implementation of the Charter and the emergence of a human rights culture across government in Victoria.'[13]

Now, a strong case can be made that democracy in Victoria has been enhanced by the adoption of the Charter. This does not mean that those relying on human rights arguments always succeed. Indeed, as we shall see, and depending on the context, the Charter requires careful judgements to be made, case by case, about whether limitations on human rights are justified in a free and democratic society. Still, the positive benefits that might be obtained by the adoption of a federal charter can be illustrated by reference to the operation of the Charter in Victoria. I would highlight these features of the Charter from the administrative, legislative and judicial spheres of its application:

- government agencies must act consistently with the Charter unless legislation specifies otherwise;

- new legislation must be compatible with human rights unless the Parliament makes an override declaration;

- all legislation must be interpreted compatibly with human rights so far as possible consistently with its purpose, and can be identified by the Supreme Court if it cannot.

Debate among lawyers about a charter is usually focussed on the interpretation of legislation, the concept of proportionality and the change 'of some of the rules of engagement'[14] between parliament and the courts. Important as these questions are, there is another dimension to the operation of a charter which greatly influences the lives of ordinary people - improving the conduct of public administration so as ensure it respects and promotes of human rights.

The philosophy behind the Charter is that, when individuals see their human rights respected by government, this is of value in itself – human rights are 'human' rights, and respecting them builds respect for the rule of law and society's democratic institutions. The idea is that, at the level of the individual, people are more likely to be conscious of their responsibilities to society if they find respect for and vindication of human rights in its public administration and laws, and individuals who are more empowered and conscious of their own human rights are more likely to be conscious of their responsibilities to others. At the level of society, the idea is that, when the relationship between government and the community is made by a charter to reflect human rights values, society is encouraged to become more rights-respecting and tolerant. This is a fundamental objective of a charter, one which gives effect to an evolved concept of democracy. But I repeat, for the reasons I gave earlier, it does not mean everybody with a human rights argument wins. Democratic interests may justify limitations imposed on human rights under law.

Of course, Victoria has existing legislation which offers protection of specific human rights, the equal opportunity[15] legislation being a good example. The Commonwealth Parliament has enacted similar legislation. But the purpose of a charter is to provide protection that is systematic and comprehensive, which specific legislation is not.

The Victorian Charter implements this purpose by s 38(1), which provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Most State government officers and agencies in Victoria are 'public authorities'[16] under the Charter and are thereby bound to act consistently with the stipulated human rights.[17] Since the Charter was enacted in 2006, the government has undertaken an extensive internal program of human rights auditing, compliance and training. The program has encompassed the entire Victorian public service, which includes, for example, public hospitals and schools, government welfare service providers, the Office of Housing, the Director and Office of Public Prosecutions, Victoria Police,[18] and local councils, their councillors and staff.[19]

Courts and tribunals also are public authorities 'when … acting in an administrative capacity'.[20] In preparation for the commencement of the Charter, the staff of the courts and tribunals have also engaged in human rights training. As occurred in the United Kingdom, appropriate training of judicial officers has been provided. This was done independently by the Judicial College of Victoria, and under the guidance of an advisory committee comprised of representatives from the Supreme Court, County Court, Magistrates' Court and VCAT, which I have chaired on the invitation of Marilyn Warren CJ.

Australia has a complex and diverse multi-cultural community. As in Victoria, a federal charter would promote tolerance and inclusiveness in society. The Federal government and its many agencies make a vast array of decisions that affect human rights. If a federal charter were to be enacted, the benefits of improving the public administration that have been achieved in Victoria could be achieved on a national scale.

Under the Charter's new mechanisms for introducing and passing legislation, proposed legislation must be accompanied by a statement of compatibility with human rights[21] and be examined by a parliamentary committee, who must report on whether it is incompatible.[22] The Parliament can make an override declaration under which legislation will have effect despite being incompatible.[23] The Charter states Parliament's intention that 'an override declaration will only be made in exceptional circumstances.'[24]

The statement of compatibility must be made by the Member 'who proposes to introduce a Bill into a House of Parliament'.[25] It must state whether, in the Member's opinion, the Bill is compatible with human rights and how, and whether it is incompatible and if so how.[26]

It cannot be contended that every statement made in Victoria so far is of the same quality. Nor can it be contended that the contents of a statement must be accepted as incontrovertible. Only the Supreme Court can finally determine the human rights compatibility or incompatibility of legislation. But having to make the statement focuses the mind of the proposing member, who will usually be the Minister responsible in the government of the day, on the human rights implications of a Bill. How this can influence the preparation of proposed legislation is amply demonstrated by the Attorney-General's statement of compatibility with respect to the Assisted Reproductive Treatment Bill 2008.[27] It is very detailed and sets out a careful analysis of its human rights implications.

The Parliamentary committee is the Scrutiny of Acts and Regulations Committee established by the *Parliamentary Committees Act 2003.* The Charter extended the functions of that Committee to considering whether proposed legislation was directly or indirectly 'incompatible with the human rights set out in the Charter'.[28] The value and importance of the work of this Committee should not be underestimated. It is a powerful Committee that

can carefully examine proposed legislation against the Charter and produce a considered report on the subject. It publishes a regular Alert Digest which collects the reports for the general information of the Parliament and the community. I would give the Committee's Charter Report on the Assisted Reproductive Treatment Bill 2008, the Prohibition of Human Cloning for Reproduction Bill 2008 and the Research Involving Human Embryos Bill 2008[29] as a good example of the performance of the Committee's scrutiny function.

In these ways, the Parliament has chosen to place a new discipline on members of parliament who propose new legislation, and on the Parliament itself, to consider its human rights impact. In doing so, it has created more effective means by which it can address that impact, and make any necessary modifications, at an early stage. Alternatively the Parliament can make an override declaration with respect to incompatible legislation, for which it would accept direct political responsibility. By these new mechanisms, the Victorian Parliament has enhanced its own consideration of human rights, which is a powerful democratic statement in itself.

Arguably, Commonwealth legislation has an even greater capacity to impact on human rights than state legislation, and of course it is national in scope. The case for considering human rights at an early stage is very strong in the development of federal legislation. The statement of compatibility and committee scrutiny mechanisms adopted by the State Parliament under the Charter in Victoria could equally be adopted by the Commonwealth Parliament under a federal charter, with the same potential benefits.

The new obligation on public authorities demonstrates the application of the Charter in the administrative sphere. The new parliamentary mechanisms demonstrate the application of the Charter in the legislative sphere. In the new principle governing statutory interpretation, and also new the procedure in the Supreme Court for identifying legislation that cannot be interpreted compatibly with human rights, we can see the application of the Charter in the judicial sphere.

Under the interpretative principle, all statutory provisions – the entire Victorian statute book – must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.[30]

The first actual application of the principle, in Victoria if not in Australia, was in VCAT. In *Guss v Aldy Corporation Pty Ltd,*[31] the Tribunal was concerned with a person's statutory right to a rehearing when an order is made at a 'hearing' at which they did not appear.[32] The applicant was the subject of an order made in her absence at a 'compulsory conference' at which the tribunal may make orders in the absence of parties.[33] Senior Member Vassie held the right to a rehearing of orders made at hearings extended to orders made at compulsory conferences. A reason he gave for this conclusion was that one of the human rights stipulated in the Charter was the right to a fair hearing.[34] He said the more generous interpretation of the provision giving the right to a rehearing was compelled by the interpretative principle in the Charter.[35]

In Victoria, it is early days with the interpretative principle. The court has not yet considered many important questions that arise with respect to its interpretation and application. What the principle does, at the least, is to bring human rights immediately to the mind of everybody involved in statutory interpretation, whether they be a judicial officer, government official or legal practitioner. When State legislation of any kind is examined to ascertain its meaning, there must always be a question about whether the legislation affects a human

right, and whether it can be interpreted compatibly with that right, consistently with its purpose. Of course, there are existing rules, under both the common law[36] and statute,[37] with respect to the significance of purpose in statutory interpretation, as well as existing rules of the common law with respect to interpreting statutes[38] and exercising judicial powers and discretions[39] consistently with international human rights. But the interpretative principle stands apart as a definite and particular legislative directive about how Victorian statutory provisions should be interpreted. This can only strengthen the human rights compatibility of Victorian statutory law.

Speaking generally, whether a statutory provision is compatible or incompatible with human rights depends on two considerations. First, whether the provision engages a human right – such as by impairing or limiting its exercise. If the provision did not engage a human right, no question of compatibility would arise. If it did, the next consideration would be whether the impairment or limitation was justified – which is why it is sometimes said that a human rights framework creates a culture of justification. For some, that is a negative. I think it is a positive, because the exercise of fundamental human rights should not be limited without demonstrable justification.

'Justification' in the human rights context has a special meaning of central importance. Under the Charter, human rights are not absolute. An action of a public authority or a statutory provision is not incompatible with human rights for the reason only that it limits those rights. It will be incompatible only if the limitation is unjustified. A good example of the application of the justification test is in the statement of compatibility concerning the Assisted Reproductive Treatment Bill 2008. It sets out several respects in which the Bill limits human rights and why, in the opinion of the Attorney-General, the limits were justified.

The test of justification is known in the international jurisprudence as 'proportionality'. It requires a range of public interest considerations to be balanced. Under the Charter, this test is set out in s 7(2). As the Attorney-General said in the second reading speech, this 'general limitations clause embodies what is known as the "proportionality test".'[40] Section 7(2) is much more detailed and helpful than its equivalent in other jurisdictions, and provides this:

> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> (a) the nature of the right; and
> (b) the importance of the purpose of the limitation; and
> (c) the nature and extent of the limitation; and
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Victorian parliament spoke in s 7(2) – which is the crucible in which so many human rights issues are resolved – with carefully chosen words that, like the principles expressed in the Preamble, make an express link between human rights and the operation of democracy. Human rights can only be subjected under law to 'such reasonable limits as can be demonstrably justified in a free and democratic society'. The idea is that human rights enhance democracy, but must give way to a demonstratively greater democratic interests expressed under law.

The court has not yet considered the proportionality test in s 7(2), so any observations I make must be tentative. Again speaking generally, and without intending to foreclose

argument on the subject, the proportionality test would appear to have three main spheres of operation. First, the test may be relevant when working out the limits within which a discretionary action or decision of a public authority may be taken or exercised compatibly with human rights. Next, under the interpretative principle in s 32(1) of the Charter, the test may be relevant when working out how far it is possible to interpret a provision (consistently with its purpose) compatibly with human rights. Whether that is correct, and the precise point that s 7(2) might come into the application of the interpretative principle, has not been decided and I express no view about it. Lastly, when the Supreme Court is determining whether to issue a declaration of inconsistent interpretation with respect to a statutory provision, the test will be relevant in working out whether any limitation imposed by the provision is justified so that, if not, the provision will be incompatible with human rights. I have said enough about the operation of the test in the first two spheres. I will conclude by making some observations about its operation in the third.

The Supreme Court has issued no declarations of inconsistent interpretation. But the possibility is there as part of the framework created by the parliament in the Charter for working out difficult problems that might potentially confront Victoria as a modern State democracy. It gives the Supreme Court a significant role to play and responsibility to exercise, for which it is well suited, because it is impartial and independent, and because, over time, and with the assistance offered by the national and international jurisprudence,[41] it will develop valuable expertise in the interpretation and application of human rights law. The paramount position of the Victorian parliament is protected because, to repeat, under the Victorian model, the court cannot decide, and a declaration of inconsistent interpretation does not decide, that legislation is invalid. The dialogue created by this mechanism does, however, greatly strengthen the capacity of the parliament to address human rights issues. This, it can be strongly argued, has significantly enhanced Victorian democracy. So too, it can be strongly argued, would Australian democracy be enhanced, with a federal charter.

Endnotes

1 By judicial officers I mean the judges, magistrates and members of the State courts and tribunals.
2 (1995) 189 CLR 51, 102.
3 See generally *Kable v Director General of Public Prosecutions* (1995) 189 CLR 51.
4 See for example s 108(1) of the *Fair Trading Act 1999*, which confers jurisdiction on the Tribunal to hear and determine consumer and trader disputes and small claims.
5 See eg *Australian Postal Commission v Dao* (1986) 6 NSWLR 497 (Equal Opportunity Tribunal of New South Wales held to be a 'court' for the purpose of the *Suitors' Fund Act 1951* (NSW)). VCAT has been held to be a 'court' for certain statutory purposes: see eg *Treverton v Transport Accident Commission* (1998) 14 VAR 150 (the *Evidence Act 1959* (Vic)) and *Sherman v One.Tel Ltd (in liquidation*) [2001] VCAT 1896 (the *Corporations Act 2001*).
6 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
7 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289 (Mr Rob Hulls, Attorney-General).
8 *Charter of Human Rights and Responsibilities Act 2006*, s 32(1).
9 See s 37.
10 Section 44(1).
11 Section 44(1)(a) includes for consideration (non-exhaustively) the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Right of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*. At present, the rights specified in Part 2of the Charter are derived from (but do not exactly replicate) the rights specified in the *International Covenant on Civil and Political Rights.*
12 Section 44(1)(f) includes for consideration whether further provision should be made in the Charter for bringing proceedings and awarding remedies in respect of acts for decisions of public authorities that are unlawful because of the Charter.
13 Victorian Equal Opportunity and Human Rights Commission, *2007 Report on the operation of the Charter of Human Rights and Responsibilities* (2008), 68. The Commission is required to report on the operation of the Charter annually by s 41(1).

14 Chief Justice Murray Gleeson, 'The meaning of legislation: context, purpose and respect for fundamental rights', Victoria Law Foundation Oration, 31 July 2008, 29.
15 *Equal Opportunity Act 1995.*
16 The definition is in s 4(1) and includes 'a public official within the meaning of the *Public Administration Act 2004*' (par (a)), and 'an entity established by a statutory provision that has functions of a public nature' (par (b)). There is a power to declare by regulation an entity is not a public authority: see s 4(1)(k).
17 By s 38(2), this does not apply if under a Victorian or Commonwealth statutory provision, or otherwise 'under law', the public authority 'could not reasonably have acted differently or made a different decision.'
18 Victoria Police is defined as a public authority by s 4(1)(d).
19 Councils within the meaning of the *Local Government Act 1989*, and their councillors and staff, are defined as a public authority by s 4(1)(e).
20 Section 4(1)(j). Acting in an 'administrative capacity' means exercising administrative power in the common law sense as compared with judicial power: *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [119]-[126] per Hollingworth J.
21 Section 28.
22 Section 30.
23 Section 31(1).
24 Section 31(4).
25 Section 28(1).
26 Section 28(3).
27 Victoria, *Parliamentary Debates,* Legislative Assembly, 10 September 2008, 3436-3441 (Mr Rob Hulls, Attorney-General).
28 Section 17(a)(vii) of the *Parliamentary Committees Act.*
29 See Scrutiny of Acts and Regulations Committee, *Alert Digest No 14 of 2008*, 3.
30 Section 32(1).
31 [2008] VCAT 912.
32 Section 120(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.
33 Section 87 of the *Victorian Civil and Administrative Tribunal Act 1998*.
34 Section 24(1).
35 [2008] VCAT 912, [36].
36 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408.
37 Section 35 of the *Interpretation of Legislation Act 1984.*
38 *Dietrich v R* (1992) 177 CLR 292, 306; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273, 287; *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 363; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; and see generally DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 38-42, 176-177.
39 See eg *Tomasevic v Travaglini* (2007) 17 VR 100, 114; *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1, [66].
40 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Rob Hulls, Attorney-General).
41 Section 32(1) of the Charter expressly allows reference to international law and to the judgments of domestic, foreign and international courts relevant to human rights when interpreting a statutory provision.

ADMINISTRATIVE LAW AND ENVIRONMENTAL DISPUTES

Alan Bradbury*

Environmental disputes have provided the context for the development of a wide range of administrative law principles. Indeed, the Chief Judge of the NSW Land and Environment Court has recently suggested that they have been 'at the forefront of development of administrative law'[1].

The reason for this has a lot to do with the absence of opportunities for merits review of environmental decisions and, in particular, environmental decisions that are, or have the potential to be, controversial. When members of the public are unhappy with a decision that is likely to impact on their environment and do not have an adequate opportunity to seek merits review of the decision, they are inevitably drawn to looking for other means of challenging the decision. While this will often involve the use of political lobbying and public awareness campaigns, many ultimately turn to the law for assistance with the result that judicial review has become a common response to delay or overturn controversial environmental decisions.

Inevitably, as applicants are generally really seeking to prevent an unwanted development proposal from going ahead rather than seeking to ensure compliance with administrative law principles for their own sake, the arguments put forward by applicants often stray into questioning the merits of proposals. This is particularly so where decisions are challenged on the grounds that a decision-maker has failed to take a relevant matter into account or that a decision is so unreasonable that a reasonable decision-maker could not have come to it.

The courts, however, are generally anxious to avoid being drawn into a consideration of the merits of a proposal under challenge in judicial review proceedings. An explanation of the difference between merits review and judicial review and an example of an oft heard warning against Courts straying into merits review under the guise of judicial review is to be found in the following passage from the judgement of Wilcox J in *Williams v Minister for the Environment and Heritage*[2]. His Honour said:

> First, the essential difference between judicial review and merits review is that, in merits review cases, but not judicial review cases, a court may substitute its own view about the facts of the case for that of the original decision-maker. In judicial review cases, determination of the relevant facts is solely for the original decision-maker. In the course of considering a ground of review that is made available to an aggrieved party by common law or statute - for example, by section 5 of the ADJR Act - it may be necessary for a Court to consider carefully the decision-maker's reasoning which led to the findings of fact. However, under the guise of doing this, it should not substitute its own view of the facts for that taken by the original decision-maker. The rationale of this rule was explained by Spigelman CJ, of the New South Wales Supreme Court, in *Bruce v Cole* (1998) 45 NSWLR 163 at 184-185. His Honour said:
>
> 'it is necessary to avoid the temptation to express a conclusion in terms of one of the recognised grounds for judicial review, whilst in truth making a decision based on the merits. In a democratic society such conduct transgresses the proper limits of judicial intervention. It will, if often repeated, undermine the basis for judicial independence and the fundamental role which judicial impartiality plays in the social stability of the nation and the maintenance of personal freedom of its citizens'.

* *Partner, Minter Ellison. This paper was presented to the 2008 AIAL National Administrative Law Forum, Melbourne, 8 August 2008.*

As well as oft repeated warnings along the same lines, it is also common to find statements in judgments about the validity of controversial decisions expressly stating that in coming to a conclusion on the legal issues that have been raised, no view is being expressed on the merits of the particular decision. For example, in handing down the Court's decision in relation to a challenge to the decision to go ahead with the channel deepening project in Port Phillip Bay[3], North J said[4]:

> A final observation should be made in view of the public profile of this case. The channel deepening project has attracted much public attention, particularly in Melbourne. Some people hold very strong views opposed to the dredging on environmental and other grounds. It is important to emphasise that in this case, the Court was not called upon to make a judgment as to whether the channel deepening project is a good thing or a bad thing or whether it is harmful to the environment or not.
>
> State and Federal laws provide for a very elaborate process of assessment of those matters. The law then requires the Minister to evaluate the benefits and detriments of the proposal. The Court has a limited function. It can only consider challenges to the process by which the Minister made his decision and determine whether the Minister acted in accordance with the law. In this case, the Court has determined that the arguments raised by the applicant in that regard cannot be sustained.

Challenges to controversial environmental decisions have been based on most of the usual grounds of administrative law challenge. Environmental decisions have been attacked on the basis that the decision-maker has failed to consider relevant matters (or sometimes has taken into account irrelevant matters), that objectors have been denied procedural fairness in the way the decision has been made, that the decision-maker has acted for an improper purpose or failed to comply with a legislative condition precedent before making the decision. When all else fails, manifest (or *Wednesbury)* unreasonableness has also been raised, albeit without much success. Environmental disputes have also played an important role in the development of principles of practice and procedure such as the award of costs in public interest litigation and, of course, the rules of standing.

Unfortunately, however, while the traditional grounds of judicial review can sometimes focus on the issues that are actually of concern to the community (this is often the case when a decision-maker is said to have failed to consider relevant matters), more often than not they do not, and focus on technical grounds that, while they can delay or overturn the environmental decision in dispute, generally leave unaired the real reasons underlying public opposition to the decision.

This paper will consider the contribution some recent environmental disputes have made to the development of administrative law principles.

Failure to consider

The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is perhaps the most common basis on which a dissatisfied objector in an environmental dispute may seek to challenge the validity of a decision to allow a project to go ahead. In the Commonwealth jurisdiction the ground is to be found in s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* but this is substantially declaratory of the common law[5].

Not every failure to take a relevant matter into account will lead to the invalidity of an administrative decision. The relevant principles were explained by Mason J in the following well known passage in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [6]as follows:

(a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he or she is bound to take into account in making that decision.

(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

(c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

(e) Failure to consider relevant factors – was the decision-maker obliged to consider the factors said to have been overlooked?

In *Your Water Your Say Inc v Minister for the Environment Heritage and the Arts*[7], Heerey J was faced with a challenge to a proposed desalination plant on the Gippsland Coast near Wonthaggi. The project involved the desalination of seawater which was then to be piped some 85km to Melbourne.

The project was referred to the Commonwealth Environment Minister by the Victorian Department of Sustainability and Environment but in terms that expressly excluded from the referral, certain works referred to as 'the Preliminary Works'. These involved preliminary investigation works to obtain information for the purpose of project design, location and environmental assessment. The Preliminary Works included drilling and sampling, the construction of offshore structures above the seabed for seawater intake and discharge, the construction and temporary operation of seawater sampling units and the installation and operation of pre-treatment and/or desalination pilot units of a limited maximum capacity (6 ML/day).

Apart from the inlet and outlet pipes, all of the works were temporary and were to be removed at the completion of the testing regime. The applicant, a community group opposed to the project, sought review of the Environment Minister's decision to exclude the Preliminary Works from the environmental assessment of the project. One of the grounds of challenge was that in deciding what made up the controlled action for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Delegate had failed to take into account a relevant consideration, namely, linkages between additional greenhouse gas emissions associated with the power generation required for the project. This argument was briefly dismissed by the Court, Heerey J saying (at para [22]):

> To establish the ground that a decision-maker has failed to take a relevant consideration into account (AD(JR) Act s5(2)(b)) it must be shown that he or she was bound by law to have regard to the particular consideration: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. The question of greenhouse gas emissions was not such a matter.

Determining the scope of factors required to be taken into account by an examination of the relevant legislation

By way of contrast, another argument that a decision-maker was impliedly required to take the principles of ecologically sustainable development into account met with more success before the Land and Environment Court of NSW in *Walker v Minister for Planning*.[8] In that

case, the NSW Minister for Planning had approved a concept plan for a residential subdivision and a retirement village development at Sandon Point north of Wollongong. A report by the Director-General of the Department of Planning to the Minister did not contain material as to whether climate change flood risk was relevant to the project.

The Minister's decision was challenged on a number of grounds, one of which was that the Minister failed to take implied mandatory considerations into account, namely, ecologically sustainable development and the impact of the proposal on the environment. In relation to this ground, the applicant argued that the Minister failed to consider whether the impacts of the proposed development would be compounded by climate change and, in particular, whether changed weather patterns would lead to an increased flood risk in connection with the proposed development in circumstances where flooding was already identified as a major constraint on development of the site. These arguments were accepted by the Court despite the fact that climate change flood risk was not specifically mentioned in the relevant legislation as a matter the Minister was required to take into account. Biscoe J concluded:

> In my opinion, having regard to the subject matter, scope and purpose of the EPA Act and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function[9].

Did the failure to take a relevant factor into account have a material effect on the decision?

In *Lansen v Minister for Environment and Heritage*[10], Mansfield J was concerned with a challenge to the validity of an approval given by the Commonwealth Environment Minister under the EPBC Act for the McArthur River Mine in the Gulf Region of the Northern Territory. The approval related to a proposal to alter the mine from an underground mine to an open cut mine. The proposal involved a significant diversion of the McArthur River and the Environment Minister was concerned about the impact the proposal might have on migratory bird species as well as on the endangered species called the freshwater sawfish.

Before granting approval, the Minister required the potential environmental impacts of the proposal to be assessed and the results of the assessment to be reported to him. The assessment process was undertaken through the Northern Territory Minister for the Environment and Heritage, in accordance with a Bilateral Agreement between the Commonwealth and the Northern Territory which came into force on 19 March 2003.

The assessment process involved the preparation of an environmental impact statement, its exposure to public comment, and the proponent's response to the public comments. The results of that process were conveyed to the Commonwealth Minister by the NT Minister on 25 February 2006 by an Assessment Report. The Minister then asked for further information from the proponent concerning the potential impacts of the proposal on the freshwater sawfish and migratory bird species and how those impacts might be better minimised and monitored. After receiving the response, the Minister decided to approve the proposed action subject to a number of conditions.

The Minister's decision was challenged by seven native title claim groups with native title claims over land in the vicinity of the mine. One of the principal grounds of challenge was that the Minister was required to, but did not, take into account the conditions imposed by the Northern Territory on the proposal. These conditions related generally to the mine development and its environmental impacts.

Section 134(4)(a) of the EPBC Act states that in deciding whether to attach a condition to an approval, the Minister must consider 'any relevant conditions that have been imposed under a law of a State or self-governing Territory or another law of the Commonwealth on the taking of the action'. The applicants submitted that the NT conditions that were not considered by the Minister included conditions requiring compliance with commitments made by the proponent in its Mining Management Plan, maintaining an up-to-date Mining Management Plan, providing a sum of money as security to the Northern Territory Government, as well as a number of further detailed conditions for independent monitoring assessment of the environmental performance of the mine.

The Court held that these conditions were relevant and required to be taken into account by the Environment Minister by s 134(4)(a) of the EPBC Act. It also found that they were contained in an amended mining authorisation that the Minister did not see before he made his decision to grant the approval.

Mansfield J then went on to consider whether, adopting the formulation in *Peko-Wallsend*, it could be shown that the failure to take the conditions imposed by the Northern Territory into account could have materially affected the Minister's decision to grant the approval. His Honour proceeded to make a detailed comparison of the conditions imposed by the Environment Minister with those contained in the amended mining authorisation. The Commonwealth conditions included detailed requirements for the preparation of a Management and Monitoring Plan for the Freshwater Sawfish.

The Northern Territory conditions covered a wider range of things but in a more general way. They dealt with management systems, infrastructure, the diversion of the river, waste management, tailings storage, surface water quality, flood protection, groundwater, heritage, social impact, rehabilitation and closure of the mine, environmental management and biodiversity offsets. More relevantly, the Mining Management Plan contained various commitments under the heading 'Biology'. They include proposed monitoring and surveys of migratory birds in the area and of fish distribution, abundance and migration, aimed at establishing the effect of the river diversion.

Mansfield J found that while there was clearly some overlap between the conditions imposed by the Environment Minister and those contained in the Northern Territory approval, the Commonwealth Minister's conditions had, as would be expected, a greater focus on the subject matter of the controlling provisions, namely, the freshwater sawfish, which is a listed threatened species. His Honour noted that the Commonwealth Minister's conditions incorporated the commitment made by the proponent but also required additional measures such as drafting contingency plans in advance, rather than reviewing the diversion design if problems arise. This led the Court to hold that the Minister's decision would not have been materially different if he had considered the NT conditions.

The channel-deepening project

The environmental assessment and approval for the channel deepening project in Port Phillip Bay was the subject of consideration by the federal Court in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*[11] . The proceedings also raised issues about whether the Minister had failed to consider relevant matters, again raising the issue of whether the decision had been made having proper regard to the principles of ecologically sustainable development.

The environmental assessment process began in 2002 when the proponent referred the project to the then Commonwealth Environment Minister for a decision under s 68 of the EPBC Act as to whether the proposal was a 'controlled action'. A delegate of the Minister decided that it was as it was acknowledged that the dredging would or may have an

environmental effect on specified matters of concern to the Commonwealth, namely, declared Ramsar wetlands, listed threatened species, listed migratory species and Commonwealth land.

The Minister decided to approve the project in accordance with s 133 of the EPBC Act.

The applicant challenged the Minister's decision, arguing, inter alia, that:

(a) he had failed to take into account the principles of ecologically sustainable development in breach of s136(2)(a) of the EPBC Act;

(b) he had failed to take into consideration other relevant matters required to be taken into account by s136(1)(a).

In relation to the first ground, s 136(1) of the EPBC Act requires the Minister, in deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, to consider (amongst other things) social and economic matters and s136(2)(a) expressly requires the Minister in so doing to take into account the principles of ecologically sustainable development.

The principles of ecologically sustainable development are set out in s 3A as follows:

> **3A Principles of ecologically sustainable development**
>
> The following principles are principles of ecologically sustainable development:
>
> (a) decision-making processes should effectively integrate both long-term and short-term
> (b) economic, environmental, social and equitable considerations;
> (c) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent
> (d) environmental degradation;
> (3) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
> (f) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
> (g) improved valuation, pricing and incentive mechanisms should be promoted.

The applicant contended that the evidence provided by the text of the statement of reasons showed that the Minister did not take into account the principles of ecologically sustainable development when considering the social impact of the channel deepening project.

In the statement of reasons, the Minister stated 'I took into account . . . the principles of ecologically sustainable development as required under s 136(2)(a) of the Act'. The applicant contended that under s 136(2)(a) the Minister's obligation was to take the principles of ecologically sustainable development into account in his consideration of social and economic matters. It went on to argue that the Minister's statement did not mention social matters and hence could not be read as a statement that ESD principles were applied in the consideration of social matters.

The applicant also argued that although the Minister had said in the statement of reasons that he had carefully considered all the information before him that related to social matters relevant to the proposal, there was no specific reference to him doing so by reference to the principles of ecologically sustainable development.

The Court rejected the applicant's contentions. North J pointed out that in the statement of reasons, the Minister explained that he took into account the principles of ecologically sustainable development and that he did so for the purpose of deciding whether or not to

approve the proposed action. This was a reference back to the opening words of s 136(1) which referred specifically to social matters. On this basis, the Court was not prepared to accept the applicant's contention that the Minister had failed to consider the principles of ecologically sustainable development in evaluating the social impact of the proposed action.

The applicant also argued that the Minister had failed to take into account other matters he was required to consider under s 136(1)(a) of the Act. That section required the Minister, in deciding whether or not to approve the channel-deepening project, to consider matters relevant to the approval of the project. The applicant argued that the Minister failed to consider three specific matters which were said to be relevant. These were the impact of maintenance dredging, the impact of oil or chemical spills and the impact of the removal and disposal of toxic sediment in the north of Port Phillip Bay. The applicant also contended that the Minister failed to consider these matters taking into account the principles of ecologically sustainable development contrary to s 136(2)(a) of the Act.

The applicant argued that the Minister's obligation to take these matters into account arose by implication from the subject matter, scope and purpose of the Act. After referring to the principles laid down in the *Peko-Wallsend* case, North J concluded that:

> Section 136(1)(a) left it to the Minister to decide what were the matters relevant to the protected matters which he should take into account. The section does not suggest that there was a defined set of specific matters to be taken into account such as might be intended if the section had referred to 'all matters relevant' or 'the matters relevant'.
>
> In his statement of reasons, the Minister discussed each of the protected matters, namely, the listed threatened species, the listed migratory species, the Ramsar wetlands of international significance, and the environmental impact on Commonwealth land in the area. In this discussion, he considered matters which he had determined to be relevant to those protected matters.
>
> There is nothing in the subject matter, scope or purpose of the Act which required the Minister to take into account the impact of maintenance dredging, the impact of oil or chemical spills or the impact of the removal and disposal of toxic sediment in the north of the Bay[12].

The Court also rejected the applicant's argument that the Minister had failed to properly consider these matters in accordance with s 136(2) when taking into account the principles of ecologically sustainable development. After reviewing the Minister's statement of reasons, North J concluded that not only had the Minister expressly stated that he had taken the principles of ecologically sustainable development into account but there was actually 'little scope to apply those principles to the consideration of the protected matters because in nearly all instances the Minister made an express finding that the protected matter would not be significantly affected by the channel-deepening project'[13].

Taking irrelevant factors into account

In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*[14], the Full Federal Court was asked to review a decision by the Commonwealth Environment Minister that an action comprising the construction and operation of an open cut coal mine and colliery facility at Anvil Hill in the Hunter Valley of New South Wales was not a 'controlled action' for the purposes of s 67 of the EPBC Act.

The action was referred to the Environment Minister to decide whether it was a controlled action. An action is a controlled action if it has or is likely to have a significant impact on a matter protected by Part 3 of the Act. The Minister's decision that it was not enabled the project to go forward without the need for approval or further environmental assessment under the EPBC Act (the environmental assessment of the proposal would then have taken place entirely under the relevant NSW legislation).

The applicant argued that the Minister's decision was based on 'irrelevant considerations'. The irrelevant considerations were whether that in considering whether the project would have a significant impact on 'a listed threatened ecological community' namely the 'White Box – Yellow Box, Blakely's Red Gum Grassy Woodlands' the Minister had improperly taken into account descriptions of ecological communities which were not published pursuant to the Act but were contained in a separate, privately maintained classification system.

The Full Court rejected the attack. The applicant argued that 'White Box – Yellow Box, Blakely's Red Gum Grassy Woodlands' was a community listed as critically endangered under the EPBC Act and that any decision about whether a particular community fell within that description was required to be made under the EPBC Act itself. It necessarily followed that reliance on a private classification system to make such a decision involved the taking into account of an irrelevant consideration. At first instance, Stone J had held that to fall within the listed community as defined in the listing the area must have a dominance of White Box, Yellow Box or Blakely's Red Gum and that as these species were not present in sufficient numbers to form the listed community this led to the conclusion that a significant impact on listed ecological communities was not likely. The Full Court found that there was no error of law disclosed by this reasoning.

Breach of a precondition to the exercise of power

The *Anvil Hill* case also raised an argument that the Minister had failed to comply with an essential precondition to the exercise of his discretion. This required the Court to consider whether a precondition to the Minister's exercise of discretion under s 75(1) of the EPBC Act was that the proposed action has, will have or is likely to have, a significant impact on a matter protected by Part 3 of the EPBC Act. Section 75(1) is in the following terms:

> (1) The Minister must decide:
>
> (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
> (b) which provisions of Part 3 (if any) are controlling provisions for the action.

The Court also rejected this ground of challenge. The Court held that the language of s75 and the related provisions did not require any objective factual determination as a condition precedent to the exercise of the Minister's power to make a decision as to whether an action is a controlled action. The Court pointed out that there are no references in the legislation to expressions such as 'Where there is a significant impact, the Minister may…. ' or, 'If there is likely to be a significant impact, the Minister may…. ', each of which may suggest the existence of a condition precedent to the exercise of the power by the Minister.

Instead, the Court noted that s 75 imposes an obligation on the Minister to decide whether a proposed action is a controlled action. In making this decision, the Minister must take into account the elements of a controlled action as defined by s 67 which involves a determination of whether the proposed action has, will have or is likely to have, a significant impact on a matter protected by Part 3 of the Act. The Court concluded that[15]:

> The duty to make this determination is assigned to the Minister. It is not given to a court or tribunal and is not expressed as an objective matter. As a result the performance of the duty is not properly to be regarded as a condition precedent to the exercise of the power in s 75.

Using similar reasoning, the Full Court also rejected an argument that the question of whether a proposed action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act was a 'jurisdictional fact' which could be reviewed by the Court[16].

Breach of rules of procedural fairness

In *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*,[17] the Full Federal Court considered an appeal relating to the approval of the proposal by Gunns Limited to develop a bleached Kraft pulp mill at Bell Bay in northern Tasmania. Two of the grounds of challenge were that:

- the Minister denied the applicant procedural fairness by setting a period of only 20 days for public comment on the assessment report for the project

- the Minister had acted for an improper purpose by taking into account Gunns' commercial imperatives in setting a 20-day period for comment on the assessment report for the project.

Gunns referred the proposal to construct and operate the pulp mill to the Minister for Environment and Water Resources for the Minister's decision whether or not the proposal was a 'controlled action' within the meaning of the EPBC Act. The EPBC Act prohibits a person from taking a controlled action without an approval under Pt 9 of the Act[18].

The Minister made the following decisions under s 75(1) of the EPBC Act:

- the proposal to construct and operate the pulp mill was a controlled action; and

- the relevant controlling provisions of Pt 3 of the EPBC Act were those concerned with listed threatened species and communities (ss18 and 18A), listed migratory species (ss 20 and 20A) and Commonwealth marine areas (ss23 and 24A).

The Minister also decided under s 87 of the EPBC Act that the assessment approach to be used for assessment of the relevant impacts of the controlled action was an assessment on preliminary documentation under Pt 8 Div 4 of the EPBC Act.

The Minister required Gunns to publish the information that it had provided on the proposed action to allow for public consultation on the potential impacts of the project. The Minister directed that the information be available for third party comment for 20 business days and this was done.

On 17 May 2007, the Wilderness Society Inc instituted proceedings in the Federal Court seeking judicial review of the Minister's decision. The challenge raised a number of arguments about the proper interpretation of provisions of the EPBC Act. It also raised arguments about procedural fairness and improper purposes.

In relation to procedural fairness, the applicant argued that, by setting a period of only 20 days for public comment on such a significant proposal, the Minister had denied members of the public a reasonable opportunity to make comments to inform the Minister's decision as to whether to approve the project. This was argued to amount to a denial of procedural fairness.

The Court rejected the attack on this ground. Branson and Finn JJ (with whom Tamberlin J agreed on this point) began by carrying out a close examination of the relevant provisions of the EPBC Act. While their Honours accepted that the purpose of the provisions requiring public comment was to promote informed decision making by the Minister, they noted that a major 'preoccupation' of the Act was on efficient and timely decision-making, or what their Honours described as an approach of 'studied haste'[19].

This, the Court observed, could be expected to create some tension between the conduct of the assessment processes (including the involvement of the public) and the expeditious finalisation of the approval process.

Having regard to the scheme of the Act, the Court rejected the applicant's contention that the Minister was under an obligation to afford objectors procedural fairness when fixing the time allowed for comment. Their Honours explained[20]:

> In our view, the appellant's submission on this ground of appeal misconceives the nature and purpose of the provision for public comment in the scheme of the Act. The submission simply assumes it enshrines a statutory procedural fairness requirement of sorts. Whether this is so, indeed whether it is at all helpful to resort to the language of procedural fairness in relation to the public comment provisions, is questionable. Irrespective of whether the duty to accord procedural fairness is properly to be characterised as a common law duty subject to a contrary statutory intent or as an implied legislative qualification on a statutory discretion, it is clear that, in either case, any consideration of whether such a duty exists at all in a given instance and, if so, what is its content, depends first and foremost upon a critical examination of the statutory framework within which the statutory power in question falls to be exercised. Such an examination of the EPBC Act leads inevitably to a rejection of the appellant's submission.

Improper purpose

The applicant in the *Gunns* case also argued that that the Minister had made his assessment approach decision under s 87 and determined a period of consultation under s 95(2)(c) for the purpose of satisfying Gunns' commercial imperative to have these decisions made no later than August 2007. This, it was argued, was a substantial operative purpose of the Minister when making his decisions, and was extraneous to the purpose for which the decision-making power was conferred under those sections of the Act.

The applicant relied on a number of matters to support this contention but principally on the Minister's request to his Department that it should agree with Gunns on a timetable for completion of the assessment of the project, the agreement on the timetable and the fact that the relevant decisions were in fact made in accordance with the timetable

In relation to this aspect of the case, the Court's reasons were given by Tamberlin J (with whom Branson and Finn JJ agreed). His Honour reiterated the comment made by the trial judge, Marshall J, that an allegation of improper purpose ' is a serious one which should not be lightly inferred'.[21]

His Honour went on to say that, in his view, the matters referred to by the applicant, considered either individually or collectively, were not sufficient to support any inference of improper purpose. At most, the matters complained of established that the Minister fulfilled his obligations under the Act while also endeavouring to cooperate with Gunns' request, to the extent that his duties under the Act allowed him to do so. This did not meet the test of substantiality necessary to establish improper purpose.[22] His Honour concluded that there was no evidence to suggest that the Minister agreed to assist Gunns 'in such a way as to compromise or depart from the purpose of his statutory powers in the Act'.

In reaching this conclusion, Tamberlin J referred to evidence given before the trial judge by a Departmental officer that the Minister had discussed with him the assessment approach decision, and had asked him why the assessment was to be done on preliminary documentation rather than through a more onerous environmental impact statement. Tamberlin J observed that the fact that the Minister had considered different options for his assessment approach decision, and raised at least one of these options with his Departmental advisers, suggested that there was no improper collaboration between the Minister and Gunns to accommodate the latter's commercial requirements. His Honour concluded that the Minister's cooperation in seeking to meet Gunns' timetable was entirely

consistent with the stated objective in s 3(2)(d) of the Act that the process for deciding the assessment approach should be 'efficient and timely'[23]. Having regard to these matters, the Court did not accept that the Minister took into account or gave substantial weight to any improper purpose when making his decisions.

Manifest unreasonableness

When all else fails, objectors trying to overturn a decision to approve an unwanted project will turn to a challenge based on the ground that the decision is manifestly unreasonable - one that no reasonable decision-maker in the same situation could have come to. Of all the grounds of challenge potentially available this is the one that carries the most risk that a Court will be drawn into a consideration of the merits of the decision under challenge. Perhaps because of the Court's general reluctance to do so, the law reports are littered with examples of environmental cases in which the ground has been raised but ultimately rejected by the Courts[24].

One example is the channel-deepening case. There, the Minister was obliged by provisions of the EPBC Act to inform 'any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action' of the Environment Minister's proposed decision[25]. In challenging the validity of the Minister's decision, the applicant argued that the material before the Minister established that there were tourism and climate change issues involved in the channel-deepening project and the decision by the Environment Minister to inform neither the Minister for Tourism nor the Minister for Climate Change of his proposed decision to approve the project was so unreasonable that a reasonable Minister could not have formed that belief.

North J observed that in order to succeed in such an argument, the applicant must establish that the Minister's conclusion, when viewed objectively, was 'so devoid of any plausible justification that no reasonable [person] could have reached [it]'.[26]

The applicant noted that the Administrative Arrangements Order provided that the two Ministers had administrative responsibilities for tourism and climate change respectively and argued that the relevant statutory provisions did not require that the administrative responsibilities be great or small, but simply that they exist. In these circumstances, it was argued that the Minister was effectively compelled to form the belief that the two Ministers had administrative responsibilities relating to the channel-deepening project and any decision otherwise was unreasonable.

The Environment Minister filed an affidavit made by Vicki Middleton, the Assistant Secretary in the Department of Environment, who had reported on the proposal to the Minister. In her affidavit, Ms Middleton explained the basis for her belief that the two Ministers did not have administrative responsibilities relating to the project. She said, in relation to the Minister for Tourism:

> I formed the view that I would not advise the Minister to invite the RET Minister's comments. In forming that view, I took into account that the identified potential impacts on local tourism operators were of a temporary nature. I also took into account that the RET Minister's principal role is to promote Australia as a tourist destination internationally, with no direct regulatory role in relation to local or specific tourism operations.

And she said in relation to the Minister for Climate Change and Water:

> I formed the view, however, that the Minister for Climate Change had a broader policy portfolio, rather than any direct regulatory or approval responsibilities in relation to the proposal, and on that basis I decided that I would not advise the Minister to invite the Minister for Climate Change's comments.

North J observed that the interpretation of the concept of administrative responsibilities adopted by Ms Middleton required that the Ministers have direct regulatory or approval roles in relation to the channel-deepening project. Whether right or wrong, his Honour found that this approach was tenable and not so unreasonable that a reasonable Minister could not adopt it. His Honour went on to say:

> Further, in relation to the Minister for Tourism, Ms Middleton had regard to the temporary nature of the impact of the project on tourism. Behind this consideration seems to lie a view that a long term impact might give rise to administrative responsibilities, whilst a short term impact may not.

The applicant did not seek to demonstrate that such an approach was completely untenable. The applicant's challenge based on unreasonableness cannot be upheld[27].

Misleading conduct

While well settled as a potential source of invalidity, it has been (perhaps thankfully) a rare thing for an environmental decision to be challenged on the grounds of bad faith or fraud. In a recent case, however, the NSW Land and Environment Court was required to consider something close to such a claim – an allegation that misleading conduct by a developer might provide grounds for a successful challenge to a development consent.

In *Anderson v Minister for Infrastructure, Planning & Natural Resources*,[28] a challenge was made to the validity of a development consent framed broadly in terms of *Wednesbury* unreasonableness but which alleged that the decision was manifestly unreasonable because it was made as a result of misleading conduct by the developer and its environmental consultants. The applicants did not allege, however, that the alleged failure to provide the information was fraudulent, deliberate or in bad faith.

The proceedings were brought by Aboriginal elders on behalf of the Numbahjing Clan within the Bundjalung Nation. The proceedings involved a challenge to the validity of a development consent granted by the Minister for Infrastructure, Planning and Natural Resources for a housing subdivision on land at East Ballina in Northern New South Wales.

A key issue in the proceedings was an allegation that the consent was invalid because the Minister did not consider an historically recorded massacre of Aboriginal people in about 1854 in the area in which the subject land was located. It was argued that, when the Minister made his decision, he knew that the land was of 'high significance' to Aboriginal people but it is said that he did not know why, nor that the main reason was the massacre.

The applicants submitted that the Minister’s decision was invalid because the consultant and the developer misled the Minister by not providing relevant information in their possession to the Minister as to why the land was culturally significant to the Aboriginal people. This information was said to have been contained in documents held by the consultant and the developer.

Biscoe J noted that it was well settled that an administrative decision may be void in circumstances where there has been 'fraud or misrepresentation' on the part of the person benefited by the decision[29]. His Honour observed however that the question whether the phrase 'fraud or misrepresentation' should be read disjunctively so that an innocent misrepresentation may of itself result in invalidity had not been clearly answered.

The respondents submitted that there was no room for a concept of innocent misrepresentation within the ambit of administrative law. They submitted that the phrase 'fraud or misrepresentation' should be interpreted as 'fraud or deliberate misrepresentation' and referred to a number of cases in the Federal Court that had considered the effect of

'fraud or misrepresentation' upon a decision to issue a search warrant. His Honour referred to a Queensland decision concerning the setting aside of a search warrant[30] in which Chesterman J had said[31]:

> It is not clear from the authorities whether 'fraud or misrepresentation' where it operates to allow a decision to be re-opened is limited to fraudulent misrepresentations or whether an innocent misstatement will suffice. On the basis that a mistake as to the facts is not sufficient to overcome the prohibition against re-making decisions, it may well be that an innocent misrepresentation is not enough. The word 'misrepresentation' should perhaps be understood as referring to fraudulent misrepresentation and 'fraud' as referring to dishonesty of a more general kind, so that only conduct of that kind will vitiate a decision and allow the power to be exercised afresh.

Biscoe J was content to follow the same reasoning to hold that 'misleading conduct which is not characterised by fraud, bad faith or the like is, at least generally, insufficient to vitiate an administrative decision'[32].

Standing

The judicial review of decisions concerning environmental disputes has also made a significant contribution to the development of principles of practice and procedure and, in particular, in relation to the rules of standing and the award of costs in public interest proceedings. In relation to standing, while legislative reforms in many jurisdictions enable judicial review proceedings to be brought by 'any person'[33] or by individuals or organisations able to demonstrate involvement over a period of time in environmental activities,[34] the common law rules of standing developed through a series of environmental disputes in the 1980s and 90s continue to be of relevance in jurisdictions in which statutory reforms have not been implemented.[35]

The starting point for any discussion of the rules of standing is the decision of the High Court of Australia in *Australian Conservation Foundation Inc v The Commonwealth of Australia.*[36] In that case, the Court considered the continuing relevance of the well-known second limb of the test of standing laid down in *Boyce v Paddington Borough Council*.[37] It will be recalled that in that case Buckley J said:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

In the *ACF* case, the High Court was asked to expand the 'special damage' requirement to include the special interest the Australian Conservation Foundation had in the protection of the environment. While the ACF failed to persuade the Court that it should be given standing in the particular matter before the Court (a challenge to the approval of a large tourist resort at Farnborough in Queensland), the judgments laid the foundation for the development of the rules of standing in future cases in a way that has made it considerably easier for conservation groups to challenge environmental decisions.

Rather than 'special damage', the Court accepted that it was sufficient for a plaintiff to show what Gibbs J described as 'a special interest in the subject matter of the action'.[38]

In a well-known passage, Gibbs J said[39]:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain

> some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

The concept of special interest was developed further by the High Court's decision in *Onus v Alcoa of Australia Ltd*.[40] In that case, the descendants and members of a particular group of Aboriginal people were custodians of the relics of those people. It was held that they had standing to bring proceedings to restrain the defendant from carrying out work which would interfere with the relics of their people, allegedly in breach of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). As guardians of the relics, according to their laws and customs, the appellants were held to have a special interest in their preservation. Stephen J made the following observations concerning special interest:[41]

> …the distinction between this case and the ACF case is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of 'special interest' supplies no such rule. As the law now stands, it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter. The present appellants are members of a small community of Aboriginal people very long associated with the Portland area; the endangered relics are relics of their ancestors' occupation of that area and possess for their community great cultural and spiritual significance. While Europeans may have cultural difficulty in fully comprehending that significance, the importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance. It is to be distinguished, I think, and will be perceived by courts as different in degree, both in terms of weight and, in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection. Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalized, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be found standing to sue.

In *North Coast Environment Council Inc v Minister for Resources*, [42] Sackville J undertook a comprehensive survey of the development of the authorities on standing since and including *Australian Conservation Foundation Inc v the Commonwealth*. . Based on that survey, his Honour identified the following general principles:[43]

- The plaintiff must demonstrate a 'special interest' in the subject matter of the action. A 'mere intellectual or emotional concern' for the preservation of the environment is not enough to constitute such an interest. The asserted interest 'must go beyond that of members of the public in upholding the law … and must involve more than genuinely held convictions'.
- A plaintiff may be able to demonstrate a special interest in the preservation of a particular environment. An intellectual or emotional concern is no disqualification from standing to sue.
- An allegation of non-compliance with a statutory requirement or an administrative procedure is not enough of itself to confer standing.
- The fact that a person may have commented on environmental aspects of a proposal does not of itself confer standing to complain of a decision based on an environmental assessment process.
- An organisation does not demonstrate a special interest simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.

Applying those principles, Sackville J held that the North Coast Environment Council, an incorporated environmental protection group, had standing to challenge a decision by the Minister to grant an export licence for the export of wood chips. The factors his Honour considered relevant were that:[44]

- North Coast was the peak environmental organisation in the north coast region of New South Wales, having 44 environmental groups as members. Its activities related to the areas affected by the operations generating the woodchips that were the subject of the export licence.
- North Coast had been recognised by the Commonwealth since 1977 as a significant and responsible environmental organisation. This recognition had taken the form of regular financial grants for the general purposes of the organisation. While the grants had been modest, they were recurrent and reflected acceptance by the Commonwealth of the significance of the role played by North Coast in advocating environmental values.
- North Coast had been recognised by the Government of New South Wales as a body that should represent environmental concerns on advisory committees. The most important form of recognition for present purposes had been membership of North Coast's nominees on the Forestry Policy Advisory Committee, the role of which was to advise the State Minister on forestry matters, including the management of State forests. This and other forms of participation in official decision-making processes showed that the State government had accepted North Coast as a representative of environmental interests.
- North Coast had conducted or coordinated projects and conferences on matters of environmental concern, for which it had received significant Commonwealth funding. While these had not specifically concerned forest management or wood chipping, they reflected North Coast's standing as a respected and responsible environmental body.
- Finally, it had made submissions on forestry management issues to the Resource Assessment Commission and had funded a study on old growth forests, focusing upon the Wild Cattle Creek State Forest. Similar principles were applied by Sackville J in *Tasmanian Conservation Trust Inc v Minister for Resources*.[45]

The acceptance of the standing of groups like the North Coast Environment Council and the Tasmanian Conservation Trust to bring proceedings to challenge environmental decisions represents a significant departure from the narrow rules laid down in *Boyce v Paddington Borough Council*[46]. What is clear is that to satisfy the common law rules of standing an environmental group needs to do more than simply demonstrate a general interest in or commitment to the protection of the environment. As Bates has observed[47], what is relevant is the ability of the association to properly represent the public interest and this will depend upon the degree of closeness the association can demonstrate with the subject matter of the decision sought to be challenged.

Costs

While courts are generally given a discretion as to what orders for costs will be made on the conclusion of a piece of litigation, the traditional rule is that the successful party is entitled, in the absence of disentitling conduct, to expect to receive an order that its costs be paid by the unsuccessful party. The relaxation of the traditional rules of standing both by the cases discussed above and by legislative reforms, however, may well be an 'empty gesture'[48] if environmental groups are still faced with the prospect of substantial costs orders if proceedings brought to challenge environmental decisions are unsuccessful.

The Land and Environment Court of NSW has for many years been prepared to depart from the usual order for costs where a party could demonstrate that proceedings had been brought in the public interest rather than to protect a private interest of their own. This approach was challenged in *Oshlack v Richmond River Council*[49], enabling the High Court to review the Land and Environment Court's approach.

In that case, a majority of the High Court upheld the discretion to refuse to make an order for costs in appropriate cases and upheld the trial judge's decision to take into account that the unsuccessful party's motivation in bringing the proceedings had been to enforce compliance with the relevant environmental law and the preservation of an endangered koala habitat, the fact that a significant number of members of the public shared that view, and that the basis of the challenge was arguable.[50] It is fair to say, however, that while the decision of the High Court in *Oshlack's* case opened the door for environmental groups to resist costs orders a little, the Courts will generally still take a good deal of persuading that the usual rule as to costs should be departed from.[51]

A similar approach has been taken by the Federal Court. For example in *The Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources*[52], the Full Federal Court was prepared to take into account[53] that:

- the issues raised concerned the proper construction of the EPBC Act and were of general importance to both the Minister and the general public;
- the applicant was concerned, along with a large segment of the Australian community to avoid harm to the Australian environment;
- the applicant was not seeking financial gain from the litigation but had sought to resolve a dispute concerning the proper administration of the EPBC Act in the Court rather than elsewhere.

In that case, the Court ordered the applicant to pay only 70% of the Minister's costs of the appeal and 40% of the costs incurred by Gunns Limited.

The application of these principles was considered again recently by Heerey J in a round of the channel-deepening project litigation[54] in circumstances reminiscent of the well known movie 'The Castle'.

His Honour having concluded that the application for relief must be dismissed, went on to consider an application by the respondents that the usual rule should apply and Blue Wedges should be ordered to pay the respondents' costs. After reviewing the principles set out above, his Honour then considered the particular circumstances of the applicant:

> Blue Wedges represents the interests of over 65 community and environment groups. It has been actively campaigning to raise public awareness of threats to the environment of Port Phillip Bay over many years. As such, it qualified for the express conferral of standing to bring proceedings such as the present one conferred by s 487(3) of the Environment Act. (The respondents in their defences objected to Blue Wedges' standing but did not pursue such objections at the hearing.)
>
> Blue Wedges' solicitor, Mr Michael Morehead, also acts for a number of businesses, such as diving schools, who fear they will be commercially damaged by the project. He had notified to the PoMC potential claims for compensation on their behalf. Nevertheless, this commercial element of the case does not gainsay the public interest which lies at the base of the present application.
>
> Mr Morehead initially had the services of counsel acting pro bono in a directions hearing in December but was unable to obtain such assistance for the hearing which, because of the urgency, took place during the holiday period. So Mr Morehead, who runs a one-man practice at Portsea, conducted the case himself. Against the combined resources of the Commonwealth and the State of Victoria, who were able to retain five barristers, including four senior counsel, Mr Morehead, on his own, advanced serious and competent argument, for which the court is grateful. He frankly informed the court that his

> appearance was not pro bono. Nevertheless, I doubt if his earnings from this case will propel him into the Australian Financial Review list of top fee earners.
>
> In my view, however, this is a clear case for the application of the *Oshlack* approach. The condition of Port Phillip Bay is a matter of high public concern, and not only for the four million or so Victorians who live around it. As might be expected, the project has attracted much controversy. On Saturdays, the Melbourne Age publishes a list of which it considers to be the 'Five Big Issues' of the week. Last Saturday, 12 January, Port Phillip Bay channel deepening was third, topped only by Andrew Symonds in the Sydney test and Hillary Clinton in New Hampshire.
>
> Although, as has been said in another context, there is a difference between what is in the public interest and what is of interest to the public…. in the present case, the two happen to coincide. There is a public interest in the approval decision itself, and equally in whether it has been reached according to law. Also, the application raised novel questions of general importance as to the approval process under the Environment Act.

Heerey J concluded that while the application would be dismissed, he would make no order as to costs.

Endnotes

1 'The Environment and its Influence on the Law', The Hon. Justice Brian J Preston, Keynote Address to Legal Aid New South Wales Civil Law Conference, 26 September 2007
2 (2003) 74 ALD 124 (at para [28])
3 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399
4 At paras [127] to [131]
5 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (at 39 – 40 per Mason J)
6 ibid
7 [2008] FCA 670, 16 May 2008
8 (2007) 157 LGERA 124
9 At para [166]
10 [2008] FCA 903, 13 June 2008
11 (2008) 157 LGERA 428
12 At paras [115] to [117]
13 At para [124]
14 (2008) 244 ALR 87
15 At para[26]
16 See *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55
17 (2007) 243 ALR 241
18 See Pt 3 of the EPBC Act.
19 At para[84]
20 At para[80]
21 At para [126] citing *Industrial Equity Ltd v DCT* (1990) 170 CLR 649 at 672 ; per Gaudron J
22 Referring to *Thompson v Randwick Corp* (1950) 81 CLR 87 at 106
23 At para [128]
24 For a rare example of the ground having been successfully raised see *Belongil Progress Association Inc v Byron Shire Counci*l [1999] NSWLEC 271 at [37]
25 Paragraph 131(1)(a)
26 Citing Lord Diplock in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821
27 At para [106]
28 (2006) 151 LGERA 229
29 Citing *Lego Australia v Paraggio* (1994) 52 FCR 542
30 *Firearm Distributors v Carson* [2001] 2 Qd R 26
31 At para [44]
32 At para [79]
33 For example, s123 of the *Environmental Planning and Assessment Act 1979* (NSW)
34 s 487 of the EPBC Act
35 For a recent example see *Friends of Elliston – Environment & Conservation Inc v South Australia* [2007] SASC 19
36 (1980) 146 CLR 493
37 [1903] 1 Ch. 109 (at 114)
38 (1980) 146 CLR 493 at 527
39 at 530–531
40 (1981) 149 CLR 27
41 at 42
42 (1994) 55 FCR 492

43 at 512
44 at 512 to 513
45 (1995) 55FCR 516
46 [1903] 1 Ch. 109
47 Bates, G, *Environmental Law in Australia*, 5th ed, 2002, at p. 157
48 *Oshlack v Richmond River Council* (1998) 152 ALR 83 (per McHugh J at [114])
49 (1998) 152 ALR 83
50 at paras [20 and [49] per Gaudron and Gummow JJ and at [133] and [136]–[144] per Kirby J
51 cf, for example, the refusal of the Court to depart from the 'usual rule' in *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411 and *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411 at [5] to [6] per Kirby J
52 [2008] FCAFC 19
53 at para 53s [8] to 10]
54 (2008) 245 ALR 584

RECENT DEVELOPMENTS

Alice Mantel*

Make a date for the AIAL National Administrative Law Forum

The theme for this year's National Forum is 'Reforming Administrative Law' and recent developments in State and Federal legislation and policy changes in areas such as FOI, privacy, whistleblower protection and immigration are expected to be topics under scrutiny. The conference will be held in Canberra on 6 and 7 August and proposals for papers should be sent to Conference Director, Stephen Argument by 6 April 2009.

Law Council welcomes new President's order to close Guantanamo Bay

The Law Council has welcomed newly-inaugurated US President Barack Obama's swift moves to close detention facilities at Guantanamo Bay.

In one of his first official actions as President, Mr Obama has ordered that the Guantanamo Bay prison be closed within one year and there be a review of the cases of all detainees.

Welcoming this historic development, Law Council President John Corcoran urged the Australian Government to lend its support. 'The detention facility at Guantanamo Bay has become symbolic of the erosion of fundamental individual's rights that has occurred at the hands of Governments around the world in the name of the 'war on terror'. The Law Council looks forward to the Australian Government supporting these important moves to restore respect for human rights principles when combating terrorism,' Mr Corcoran said.

During the review, the US administration will take steps to ensure that current military commission hearings against detainees are suspended and no further hearings are commenced. The review will look at options for releasing detainees or transferring them to other countries or US facilities. It will also look at the option of court prosecutions. It has been reported that the President has made a commitment to end the use of abusive techniques when interrogating terrorist suspects.

Mr Corcoran said the Law Council had long advocated for the closure of Guantanamo Bay, which has symbolised the US administration's violation of the principles of international law. These violations include detaining suspects for years without charge, torturing prisoners, denying access to US Courts and trying prisoners, including Australian David Hicks, in military commissions which failed to meet fair trial standards.

23 January 2009

Consultation a watershed opportunity to protect human rights says AHRC President
The President of the Australian Human Rights Commission, Catherine Branson QC, said the national consultation into human rights, announced by the federal Attorney-General was an

* *Editor, AIAL Forum*

important opportunity for Australians to give consideration to what these rights mean to them and whether their rights are adequately protected.

Attorney-General Robert McClelland marked the 60th Anniversary of the Universal Declaration of Human Rights by launching the National Human Rights Consultation to seek the community's views on human rights in Australia.

The Consultation will be conducted by a Committee of four eminent Australians:

- Father Frank Brennan SJ AO (Chair)
- Mick Palmer AO APM
- Mary Kostakidis, and
- Tammy Williams

'Sixty years ago today the Universal Declaration of Human Rights came into existence, and Australia not only assisted in its drafting, but had earlier helped found the United Nations itself – so it is a matter of some surprise that, almost a decade into the 21st Century, human rights continue to remain inadequately protected in our own country,' President Branson said.

Ms Branson said she was particularly conscious that Australia is the only liberal democracy in the world without a charter or bill of rights. 'Our daily work at the Commission reveals laws and policies that inadequately protect rights, and every day we hear from individuals who feel that their rights have been breached.'

Ms Branson said the Commission will draw on its considerable expertise in the promotion and protection of human rights, not only to assist Australians to take part in the consultation, but also to make its own contribution to the consultation by proposing new strategies for improving human rights protection in Australia. The Committee will report to the Government by 31 July 2009. Information and materials about a charter of rights and how to participate in the national consultation are available on the Commission website at www.humanrights.gov.au/human_rights/charter_of_rights/index.html.

9 December 2008

Charities and not-for-profits face major overhaul

The Senate Standing Committee on Economics has released its report into the governance, accountability and transparency of Australia's charities and not-for-profit organisations. After receiving submissions from 183 organisations and individuals, the Committee has recommended sweeping changes to the regulation of not-for-profit organisations designed to increase transparency and accountability in the use of public and government funds.

Key recommendations include:

- the creation of a single independent national regulator for not-for-profit organisations modelled on UK laws and responsible for:
    - administering a compulsory register for not-for-profit organisations which would provide key facts and figures about the work and finances of each organisation;
    - securing compliance with relevant legislation;
    - investigating complaints;
    - developing best practice standards;

  - educating the public about the role of not-for-profit organizations.
- a single, mandatory, specialist legal structure be adopted for not-for-profit organisations to replace the current use of different legal structures such as companies limited by guarantee, incorporated associations, trusts, co-operatives, statutory corporations;
- an examination of taxation measures affecting not-for-profit organisations to be included in the ongoing Henry Review of Australia's future taxation system including the rules governing the award of public benevolent institution (PBI) and deductible gift recipient (DGR) status;
- the development of national fundraising legislation to replace the current inconsistent State and Territory regulatory systems;
- the adoption of a reporting and disclosure system with differing levels of disclosure related to revenue thresholds and an emphasis on narrative and numeric reporting to properly inform the range of stakeholders in such organisations.

The recommendations are intended to simplify, co-ordinate and make consistent the complex legislation and regulation affecting not-for-profit organisations throughout Australia and would improve transparency and confidence in, and increase funding to, the sector.

Not all groups in the not-for-profit sector are supportive of the proposed reform and it has been suggested that such proposals may seriously disadvantage small organisations which may not have the resources to comply with more onerous disclosure and reporting requirements. The Committee also recommended the establishment of a Taskforce to implement its recommendations.

ICAC recommends changes to RailCorp to combat corruption

The NSW Independent Commission Against Corruption (ICAC) has made 40 recommendations to combat corruption at RailCorp after one of the largest investigations in the Commission's history.

The investigation uncovered almost $19 million in improperly allocated contracts that were awarded to companies owned by RailCorp employees, their families and/or friends in return for more than $2.5 million in corrupt payments.

In the eighth and final report on its *Investigation into bribery and fraud at RailCorp*, the Commission says that the investigation has exposed an 'extraordinary extent of public sector corruption. Corrupt employees appeared to be confident that they would not be caught or if they were, that not much would happen to them.'

'Corruption in RailCorp is not a few "bad apples",' ICAC Commissioner the Hon Jerrold Cripps QC says in the report. 'The very structure of the organisation and the way it operates allows and encourages corruption. The Commission is of the opinion that the decision to outsource the provision of certain goods and services in an environment of dysfunctional markets, a lack of internal firewalls within procurement positions, the inability of management to effectively manage the procurement process, and the weak oversight of the RailCorp Board of an activity fraught with corruption risks, worked in concert to allow the widespread corruption to develop,' the report says.

'The investigation and findings entitle the Commission to infer that the type of corruption exposed extends beyond those individuals identified in this investigation,' the report notes. 'Therefore the conclusions have applications throughout RailCorp and for other agencies involved in procurement.'

The report described record-keeping at RailCorp as 'shambolic' and that its form of contracting, process design, reporting arrangements, management competence, culture and oversight arrangements all contributed to endemic corruption in the organisation. The ICAC identified four critical areas for reform, recommending that RailCorp:

- reduce procurement risk by ensuring that it buys only what it can adequately monitor;
- create firewalls that remove end-to-end control of procurement by single individuals;
- improve overall managerial effectiveness in the Asset Management Group (the focus of this investigation);
- improve oversight, especially by ensuring that corruption risk management strategies are implemented.

The report said that since 1992 the Commission had conducted six previous major investigations into RailCorp, all of which found corruption. 'Much of the corruption found previously was similar in nature to that exposed in this investigation'.

'All the recommendations (in this report) need to be implemented if RailCorp is to reduce corruption. Beyond the Asset Management Group, it is clear that the importance of preventing corruption in RailCorp was not a priority for the senior executive team or part of the standard oversight framework of the organisation,' the report says.

'Ultimately, responsibility for preventing corruption in this critical public organisation is shared by RailCorp's CEO, the RailCorp board and the Minister for Transport,' the report said. 'It is encumbent on them to break with past practices and improve oversight and action regarding corruption prevention.'

The Commission recommended that the responsibilities of the proposed RailCorp Advisory Board, the RailCorp CEO and the Minister for Transport be reviewed to determine whether there needs to be a restructure to better ensure financially responsible management that would limit the opportunity for corruption. Other recommendations include:

- a skill profile for the proposed Advisory Board as a whole be developed;
- that management position descriptions be revised to help prevent corrupt conduct;
- the contract of the CEO should be revised to incorporate performance targets relating to corruption prevention that can be independently audited, and the achievement of performance targets be linked to consequences.

The Commission will monitor the implementation of the recommendations made as a result of this investigation.

15 December 2008

New High Court Justice appointed

Justice Virginia Bell has been appointed as a Justice of the High Court of Australia with effect from 3 February 2009.

Justice Bell will be the fourth woman appointed to the High Court since Federation. Her Honour's appointment will follow the retirement of the Hon Justice Michael Kirby AC CMG after 13 years of outstanding service to Australia's highest court.

Justice Bell will join two current women judges in the High Court – Justices Susan Crennan and Susan Kiefel. Beginning her legal career at the Redfern Legal Centre in 1978, Justice Bell practised as a lawyer for over 20 years before being appointed a Judge of the NSW Supreme Court in 1999 and then appointed as a judge of Appeal of the NSW Supreme Court. Her Honour's time in practice included service as a Public Defender, as Counsel Assisting the Royal Commission into the NSW Police Service, and as a part-time Commissioner of the NSW Law Reform Commission. Most recently her Honour has also served as President of the Australasian Institute of Judicial Administration.

15 December 2008

Referees may provide expert assistance to Federal Court

Attorney-General Robert McClelland has introduced legislation to assist judges to reduce the cost and length of trials for litigants.

The Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 contains a range of reforms to improve the efficient operation of the federal courts and tribunals. One key measure gives the Federal Court the power to refer questions arising in proceedings to a referee for inquiry and report.

The measure will allow Federal Court judges to refer all, or part, of a proceeding in the Court to an appropriately qualified person for inquiry. That person would then provide a report to the Court on the matter. This will assist cases where technical expertise is required and it is neither a cost effective, nor an appropriate use of a judge's time to gain the necessary in-depth expertise in a particular science or trade.

The Bill also amends the Federal Court Act to allow a single judge of the Court to make interlocutory orders in proceedings that would otherwise be required to be heard by the Full Court. This will allow the Court to more efficiently manage cases and avoid unnecessary delay for litigants.

3 December 2008

New report focus on accountability in business

The Administrative Review Council has released a new report, *Administrative accountability in business areas subject to complex and specific regulation*.

The report investigates the increasing complexity of regulatory regimes which apply to Australian business and proposes a set of guidelines to ensure accountability and transparency in the application of business rules. It covers regulation by government agencies, as well as self-regulation by industry bodies and other non-government entities.

Launching the report, the Attorney-General, Mr McClelland said, 'The report provides a useful framework for those involved in drafting and making decisions on the basis of business rules. If followed, it should help bureaucrats from both the business and public sector become facilitators. The administrative law values of lawfulness, fairness, rationality, openness and efficiency should be elements of all business rules, not only those housed in legislation applied by government agencies.' Copies of the report may be obtained by calling the Council's Secretariat on 02 6250 5800 or on the Council's website at: http://www.law.gov.au/arc.

28 November 2008

Native title discussion paper released

Attorney-General Robert McClelland and Minister for Indigenous Affairs Jenny Macklin have released a Native Title discussion paper that examines options for improving the native title system. The paper canvasses legislative and non-legislative proposals to make better use of payments to Aboriginal communities under mining and infrastructure agreements and includes specific options for making more effective and sustainable agreements as well as more general alternatives for the role of government and the resources industry.

Ms Macklin said that 'Properly structured property rights to land should be key for expanding commercial and economic opportunities in Indigenous communities. The Government wants to find ways to harness the economic benefits to native title for the long-term benefit of communities and generations of Indigenous communities.'

More than 60 per cent of mineral operations in Australia adjoin indigenous communities. This provides an important opportunity for governments, industry and traditional owners to address entrenched economic and social disadvantage suffered by indigenous Australians.

The release of the discussion paper coincides with the publication of a report conducted by the Government's Native Title Payments Working Group. The Working Group, comprised of experts from the indigenous community, mining industry, academia and the legal profession, has made important recommendations on how native title payments can be better harnessed to support Indigenous Australians.

The Native Title Working Group report, discussion paper, and information on how to make submissions and comments on the discussion paper are available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements and http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/programs-native_title_discussion_paper.htm.

Historic same-sex laws passed

Attorney-General Robert McClelland has welcomed the passage through Parliament of historic legislation that will remove same-sex discrimination from a wide range of Commonwealth laws. The legislation removes discrimination in areas including superannuation, social security, taxation, Medicare, veteran's affairs, workers' compensation, and educational assistance.

Mr McClelland said 'The changes provide for equality of treatment between same-sex and opposite-sex de facto couples. I think that the general feeling within the Australian community is that these reforms are appropriate and should have been introduced a long time ago.'

In areas such as social security and taxation, the reforms will be phased in to allow time for couples to adjust their finances and for administrative arrangements to be implemented. All changes are expected to be implemented by mid-2009.

Commonwealth Acts that are amended by the legislation are:

Attorney-General's Department

- *Acts Interpretation Act 1901*
- *Administrative Decisions (Judicial Review) Act 1977*
- *Age Discrimination Act 2004*
- *Australian Federal Police Act 1979*
- *Bankruptcy Act 1966*
- *Crimes Act 1914*
- *Crimes (Superannuation Benefits) Act 1989*
- *Customs Act 1901*
- *Family Law Act 1975*
- *Federal Magistrates Act 1999*
- *High Court Justices (Long Leave Payments) Act 1979*
- *Judges (Long Leave Payments) Act 1979*
- *Judges' Pensions Act 1968*
- *Law Officers Act 1964*
- *Passenger Movement Charge Collection Act 1978*
- *Proceeds of Crime Act 2002*
- *Service and Execution of Process Act 1992*
- *Sex Discrimination Act 1984*
- *Witness Protection Act 1994*

Department of Agriculture, Fisheries and Forestry

- *Australian Meat and Live-stock Industry Act 1997*
- *Farm Household Support Act 1992*

Department of Broadband, Communications and the Digital Economy

- *Australian Postal Corporation Act 1989*
- *Broadcasting Services Act 1992*
- *Telstra Corporation Act 1991*

Department of Defence

- *Defence Force (Home Loans Assistance) Act 1990*
- *Defence (Parliamentary Candidates) Act 1969*
- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Royal Australian Air Force Veterans' Residences Act 1953*

Department of Education, Employment and Workplace Relations

- *Education Services for Overseas Students Act 2000*
- *Higher Education Support Act 2003*
- *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984*
- *Safety, Rehabilitation and Compensation Act 1988*
- *Seafarers Rehabilitation and Compensation Act 1992*
- *Student Assistance Act 1973*

Department of Families, Housing, Community Services and Indigenous Affairs

- *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
- *Child Support (Assessment) Act 1989*
- *Child Support (Registration and Collection) Act 1988*
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
- *A New Tax System (Family Assistance) Act 1999*
- *A New Tax System (Family Assistance) (Administration) Act 1999*
- *Social Security Act 1991*

Department of Finance and Deregulation

- *Commonwealth Electoral Act 1918*
- *Medibank Private Sale Act 2006*
- *Members of Parliament (Life Gold Pass) Act 2002*
- *Parliamentary Entitlements Act 1990*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*

Department of Foreign Affairs and Trade

- *Australian Passports Act 2005*
- *Export Market Development Grants Act 1997*
- *Trade Representatives Act 1933*

Department of Health and Ageing

- *Aged Care Act 1997*
- *Health Insurance Act 1973*
- *National Health Act 1953*
- *Prohibition of Human Cloning for Reproduction Act 2002*
- *Research Involving Human Embryos Act 2002*

Department of Immigration and Citizenship

- *Australian Citizenship Act 2007*
- *Immigration (Education) Act 1971*
- *Immigration (Guardianship of Children) Act 1946*
- *Migration Act 1958*

Department of Infrastructure, Transport, Regional Development and Local Government

- *Airports Act 1996*
- *Civil Aviation (Carriers' Liability) Act 1959*
- *Navigation Act 1912*

Department of Innovation, Industry, Science and Research

- *Pooled Development Funds Act 1992*

Department of Prime Minister and Cabinet

- *Governor-General Act 1974*
- *Privacy Act 1988*

Treasury

- *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999*
- *Corporations Act 2001*
- *Financial Sector (Shareholdings) Act 1998*
- *Foreign Acquisitions and Takeovers Act 1975*
- *Fringe Benefits Tax Assessment Act 1986*
- *Income Tax Assessment Act 1936*
- *Income Tax Assessment Act 1997*
- *Income Tax (Transitional Provisions) Act 1997*
- *Insurance Acquisitions and Takeovers Act 1991*
- *Life Insurance Act 1995*
- *Retirement Savings Accounts Act 1997*
- *Small Superannuation Accounts Acts 1995*
- *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*
- *Superannuation Industry (Supervision) Act 1993*

Department of Veterans' Affairs

- *Defence Service Homes Act 1918*
- *Military Rehabilitation and Compensation Act 2004*
- *Veterans' Entitlements Act 1986*

27 November 2008

Former law dean takes up UN role

A former Dean of the Faculty of Law at the University of Sydney has been elected to the United Nations as one of 12 experts in the first monitoring committee for the Convention on the Rights of Persons with Disabilities.

Professor Ron McCallum AO, an expert in industrial law, won the position from a large pool of candidates and will take up the role at the UN's headquarters in New York. Professor McCallum will be the only Australian currently serving on a UN treaty body.

Human Rights Commissioner Graeme Innes said Professor McCallum's appointment was a great honour for Australia and will assist progress towards a national disability strategy to allow Australians with disability to have equal access to participate as full citizens in all aspects of life.

The Commissioner added that Professor McCallum was the first totally blind person to be appointed to a full professorship in any field, at any university in Australia and New Zealand. Still a law professor, Professor McCallum is also deputy chair of the Board of Directors of Vision Australia, chair of Radio for the Print Handicapped and president of the Australian Labour Law Association. He was awarded an Order of Australia for services to academia and Australia's disability sector in 2006.

Australia ratified the convention in July this year to acknowledge the need for specific human rights for the 600 million people around the globe living with disability.

19 November 2008

Commitment to women's rights reaffirmed

On the eve of the International Day for the Elimination of Violence Against Women, Australia has formally moved to become a party to the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Although Australia has been a party to CEDAW since 1983, the previous Government declined to sign the Optional Protocol when it was adopted in 2000, despite countries such as the United Kingdom, Canada, New Zealand and a number of Asia-Pacific countries doing so.

Attorney-General Robert McClelland and Minister for the Status of Women Tanya Plibersek said that by becoming a party to the Optional Protocol, the Government is making a powerful statement that discrimination against women in any form is unacceptable.

Under the Optional Protocol, women in Australia will be able to make a complaint to the UN Committee on the Elimination of Discrimination Against Women about alleged violation of Australia's obligations under CEDAW. This can only occur after domestic legal options have been exhausted. The protocol also permits a UN investigation process.

The Optional Protocol will enter into force on International Women's Day, 8 March 2009.

Uniform statutory declarations initiated

The Standing Committee of Attorneys-General has announced a uniform approach to statutory declarations. The move will attempt to redress the fragmentation of the current

system, which has different forms in use across the country, and eight different legislative regimes regulating who can witness a statutory declaration.

Attorney-General Robert McClelland said it was imperative that jurisdictions agreed on a harmonised approach to statutory declarations, given the complexity of current arrangements. Under the new regime, a national uniform statutory declaration form will be developed. Attorneys-General also requested that a consolidated list of authorised witnesses be compiled for their approval at the next meeting.

19 November 2008

New report highlights immigration detention

Releasing the 2008 report on conditions in immigration detention, Human Rights Commissioner Graeme Innes called on the government to translate its 'new directions' for Australia's immigration detention system into policy, practice and legislative change as soon as possible.

'While it is true we have seen improvements in the way Australia treats immigration detainees, our report shows we are still seeing children being held in detention facilities, people being detained for prolonged and indefinite periods and dilapidated detention centres being used for accommodation, said Mr Innes, 'and now we also have the disturbing reality that the massive prison-like Christmas Island facility is open for business.'

Commissioner Innes said the major recommendations in the report include that:

- minimum standards for conditions and treatment of persons in immigration detention should be legislated ;
- the Migration Act should be amended so that immigration detention is the exception rather than the norm and the decision to detain a person is subject to prompt review by a court;
- detention of people on Christmas Island should cease;
- the recommendations of the national inquiry into children in immigration detention should be implemented by the government.

Mr Innes said he was particularly concerned that, while children are no longer held in immigration detention centres, they are held in other closed detention facilities on the mainland and Christmas Island and he called on the government to amend Australia's immigration laws to ensure they comply with the Convention on the Rights of the Child.

Commissioner Innes said he also had serious concerns that, despite the end of the so-called 'Pacific solution', asylum seekers are still being detained and processed on the very remote Christmas Island – 2600 km from the nearest Australian capital city.

The *2008 Immigration detention report* covers inspections of the immigration detention facilities around Australia, including Christmas Island, between June and September 2008. In addition to those listed above, the report contains a comprehensive set of recommendations about Australia's immigration detention system. The full report can be downloaded from www.humanrights.gov.au/human_rights/immigration/idc2008.html.

13 January 2009

ALRC revisits the legal rights of children and young people

The Australian Law Reform Commission (ALRC) has released *Reform* Issue 92, 'Children and Young People' which examines the current treatment of children and young people in the legal process, against the backdrop of the recommendations made in the ALRC and HREOC Report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84, 1997).

A little over ten years ago, the ALRC and the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) released the landmark report *Seen and Heard* represented the culmination of a major two-year inquiry exploring how children and young people were treated by Australia's legal system and Australia's international obligations under the Convention on the Rights of the Child.

Articles in this edition of *Reform* address such issues as:

- the rights and life chances of indigenous children;
- the changes made to the Family Court and the family law system over the last decade and the positive outcomes for children and young people in family dispute resolution and legal proceedings;
- the changing legal framework for inter-country adoption;
- the effectiveness of the legal process in protecting children and young people as consumers;
- bullying and violence against young people in the workplace; and
- the legal, social and ethical issues associated with genetic testing of minors.

Reform 92 also explores the progress made by federal Governments since the release of the ALRC's Report and discusses youth participation in the democratic process and the 2020 Youth Summit; legal regulation of the work of children and young people; and children and the law in the Solomon Islands.

Copies of *Reform* Issue 92 Children and Young People are available for purchase from the Australian Law Reform Commission.

THE GOVERNANCE OF PRIVACY: SPEAK SOFTLY AND CARRY A BIG STICK

Dr Anthony Bendall*

Introduction

Speak softly and carry a big stick; you will go far

US President Theodore Roosevelt used this phrase on a number of occasions as a description of his foreign policy[1]. It refers to the 'Monroe doctrine' of the early years of the twentieth century, by which diplomatic and multi-lateral approaches were initially preferred, backed up by the existence of an extremely effective and large military force. However, the phrase coined by the late President could just as easily refer to the various functions of a privacy commissioner.

Charles Bennett and Charles Raab in their book *The Governance of Privacy*[2] identify a number of roles that traditionally characterise privacy and data protection authorities around the world. These are:

- ombudsman;
- auditor;
- consultant;
- educator;
- policy advisor;
- negotiator; and
- enforcer.

The functions of the Privacy Commissioner under the *Information Privacy Act 2000* (Vic) [IPA] embrace all these roles (as do the functions of the Federal Privacy Commissioner and other privacy regulators in the region and around the world).

This paper will examine these roles in the context of a regulator and the challenges posed by having to juggle the different roles, especially where they potentially conflict.

Although the paper is presented from the perspective of a (Deputy) Privacy Commissioner, the functions of the Privacy Commissioner under the Information Privacy Act mirror those of other regulators who face similar challenges.

In the words of Bennett and Raab[3]:

> …it has become more and more difficult to classify [privacy and] data protection agencies according to any one model. They each perform an intricate blend of functions that appear in various mixes, and with different emphases, in different regimes. Through these activities, the framework laid down in statute, reflecting the data protection [or privacy] principles, is fleshed out, bringing the regulatory body into contact with a large number of public and private bodies, and with the public as well.

* *Deputy Victorian Privacy Commissioner. Paper to the 2008 Australian Institute of Administrative Law National Forum, Melbourne, 8 August 2008*

The Victorian Privacy Commissioner is appointed under the IPA to administer the regime created by that Act for the collection and handling of personal information by the Victorian public sector[4]. Any discussion about the role of the Privacy Commissioner necessitates an understanding of the independence and accountability of the Commissioner within the public sector[5]. The IPA provides for the Privacy Commissioner to be independent of the public bodies she regulates in a number of ways. As will be seen when I discuss the functions of the Commissioner, this independence is critical to the successful operation of the IPA.

The Commissioner is appointed by the Governor in Council (s 50(1) IPA)) and has her salary and allowances determined by Governor in Council (s 51). There are specific provisions for the removal, suspension and resignation of the Commissioner (ss 53 and 54). Apart from some automatic removal provisions such as conviction for an indictable offence, the Commissioner may only be suspended by Governor in Council, but unless both Houses resolve the Commissioner be removed within 20 sitting days of suspension, she must be restored to office (s 54(4)).

The Commissioner is a separate employer under s 16 of the *Public Administration Act 2004* (Vic) and a department for the purposes of the *Financial Management Act 1994* (Vic). Under the Financial Management Act, the Commissioner is required to submit the Commissioner's financial statements for the financial year to the Auditor-General and to provide the Auditor-General with a report of the Commissioner's operations during the financial year[6]. In addition s 46(1) of the Financial Management Act requires the Commissioner to cause a report of operations and audited financial statements to be laid before both Houses of the Victorian Parliament.

Functions of the Commissioner

The functions of the Privacy Commissioner are extensive and are listed in s 58 of the IPA. There are 23 listed functions in all. These can be summarised as follows:

- to promote an understanding and acceptance of the ten Information Privacy Principles (IPPs) and their objects [function (a)];
- to assess and approve codes of practice submitted by public sector agencies, and
- to review and recommend, where necessary, amendment or revocation of approved codes of practice where necessary [functions (b), (c) and (w)];
- to issue guidelines to assist agencies as they respond to Freedom of Information requests, transfer personal information outside Victoria and develop their own privacy codes of practice [functions (d), (e) and (f)];
- to examine agencies and audit their records of personal information to ensure their records and practices are consistent with the IPPs or an approved code of practice [functions (g), (i), (j) and (t)];
- to receive complaints relating to alleged breaches of privacy by public sector agencies,
- and try to settle them through conciliation [function (h)];
- to gather information, monitor developments in data processing and computer technology and report on the adequacy of safeguards for users of technology in order to minimise any adverse effects of developments on personal privacy. [functions (k), (m) and (v)];
- to advise government on legislation and policies relating to issues of personal privacy [functions (l) and (n)];

- to promote privacy protection through awareness programs and public statements, by listening to the concerns of the public and by co-operating with other privacy watchdogs [functions (o), (p), (q), (r) and (s)];
- to make suggestions to any individual or organisation about action in the interests of personal privacy [function (u)];
- under Part 6 of the IPA, where serious or flagrant breach, or 5 breaches within 2 years issue a compliance notice that is enforceable [function (i)].

Under s 60 of the IPA the Commissioner must have regard to the objects of the IPA[7] when carrying out her functions and powers. The objects of the Act are:

- to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information in the public sector;
- to promote awareness of responsible personal information handling practices in the public sector;
- to promote responsible and transparent handling of personal information in the public sector.

There is one important function that the Victorian Privacy Commissioner does not have, unlike counterparts at the Federal level, in New South Wales and a number of other jurisdictions[8] – the power to make a public interest determination to modify any of the information Privacy Principles (IPPs) to enable information to be handled in a way that is inconsistent with the IPPs. The Privacy Commissioner's role is limited to enforcing the standards set by Parliament in the IPA.

Consideration will now be given to the powers and functions of privacy commissioners in general, and the Victorian Privacy Commissioner in particular, according to the seven roles described by Bennett & Raab[9].

Commissioner as ombudsman

All data protection or privacy commissioners are responsible for the receipt, investigation and resolution of complaints from individuals who believe their privacy has been breached or interfered with[10]. A traditional role of the ombudsman, the resolution of complaints is central to any effective oversight of personal information and privacy, even though it can also be time-consuming and a significant drain on resources. The system for complaints-handling needs careful consideration and the specification of powers necessary for this function to be performed. Although subject to variations across jurisdictions, these powers normally include the power to enter premises, to require records to be produced and to summon the appearance of relevant persons. One issue is whether or not the commissioner should be expressly empowered to conduct 'own motion' investigations in the absence of a complaint. Some offices have this power.

The Victorian Privacy Commissioner does not have this 'own motion' power, but can only receive written complaints from individuals that their privacy has been breached. A breach of privacy occurs when an organisation fails to comply with one or more of the IPPs when handling an individual's personal information. The definition of 'personal information' under the IPA[11] requires the information to be recorded information, and includes opinion, whether true or not. The individual concerned must be identifiable from the information, or his /her identity must reasonably be ascertained from the information. This can include matching with other information[12].

The Privacy Commissioner will only accept a matter as a formal complaint if on the face of it the complaint involves personal information within the meaning of the IPA and it appears to involve possible breach of one or more of the IPPs.

The Commissioner's complaint handling role is that of conciliator. She has no power to determine whether a breach has occurred. However, the Commissioner has a discretionary power to 'decline to entertain' a complaint under s 29 of the IPA. Section 29 lists the circumstances that the Commissioner can decline to entertain a complaint. These include:

- no interference with privacy;
- the complainant hasn't complained to the respondent;
- the respondent has dealt, is adequately dealing with the complaint, or hasn't had an opportunity to deal with it;
- the complaint was made 45 days after the complainant became aware of the alleged breach of privacy;
- the complaint is frivolous, vexatious, misconceived or lacking in substance;
- the subject matter of the complaint is, or has been adequately dealt with under another enactment.

The Commissioner must make a decision to decline to entertain the complaint within 90 days of receiving the complaint. If the decision is made to decline the complaint then notice of the decision and reasons for it, are served on the complainant and respondent. The complainant may then request in writing that the complaint be referred to the Victorian Civil and Administrative Tribunal for determination.

The decision that there has been no breach of privacy involves some assessment of the complaint. For example, when responding to a complaint of disclosure, an organisation may be able to demonstrate to the satisfaction of the Commissioner that the disclosure was permitted under IPP2.1. In that case the Commissioner may decline to entertain the complaint.

The Victorian Privacy Commissioner has published a number of case notes about complaints received, in a de-identified form. A number of these case notes are about complaints the Commissioner has declined to entertain. They can be found on the website, www.privacy.vic.gov.au and on www.worldlii.edu.au. They demonstrate how the Privacy Commissioner has applied the IPA and interpreted the IPPs.

If a complaint is not declined, but conciliation is not possible, or was attempted but unsuccessful, then the Commissioner gives notice to both parties to that effect and the complainant has the right to require the Commissioner to refer the matter to VCAT.

Although Part 5 of the IPA sets out the process for handling complaints, the approach of the office is to encourage conciliation at all stages. Complainants will always be encouraged to deal direct with a respondent organisation first, it they have not already done so. Early resolution – before consideration is given to the application of s 29 – is explored.

The Commissioner can also refer complaints to other bodies such as the Ombudsman, the Health Services Commissioner and the Federal Privacy Commissioner if it appears the matter will be dealt with more appropriately by another regulator.

As this process is basically one of conciliation, it requires the Commissioner and her staff to be scrupulously unbiased, fair and open minded in their approach to complainant and

respondent. The Commissioner's role is basically to facilitate resolution between the parties, rather than to make a determination that there has been a breach or to impose an outcome.

Commissioner as auditor

Complaint investigation and resolution are inherently reactive processes[13]. However, Commissioners may have concerns about the privacy and personal information handling practices of a particular organisation that arise from a number of sources, leading to the conduct of more general audits of the organisation or of a particular practice or technology. Audits are not only more systemic, but they may be less confrontational than an investigation into the circumstances of a specific complaint. Audits are a powerful tool for a regulator. They can be used when the regulator is on notice that an organisation's handling of personal information may fall short of standards required, but not so serious as to warrant enforcement action (see below). They can be used to scope how an organisation or sector is handling information in a particular situation and they can be used to review whether assurances given about the protection of privacy in relation to a particular project have been adhered to[14].

They are also an educative tool, for the regulator, the public, and the organisation. Results of an audit can identify issues and guide organisations. The first audit carried out by the Victorian Privacy Commissioner was on a sample of 100 public sector websites, including local councils. As a result of the audit, organisations audited had an opportunity to engage in a 'webinar' to discuss matters arising out of the audit, and the Privacy Commissioner published website guidelines[15] to assist the public sector to be compliant with the IPA. Two years later, a follow up audit was carried out which showed a marked improvement in compliance overall.

Again, this process requires the Commissioner to act fairly and in an unbiased manner. However, following such an audit, it is open to the Commissioner to make statements and recommendations about the adequacy of privacy practices in a particular organisation or sector. Indeed, such statements or recommendations are actively encouraged and expected by certain stakeholders (e.g. privacy and civil liberties advocates) For these reasons, this power needs to be exercised judiciously and with a great deal of discretion, balanced by a firmness of purpose.

Commissioner as consultant

With or without audit powers, commissioners also constantly give advice to regulated organisations on how to comply with privacy principles[16]. The implementation of privacy law is inherently as much a consultative effort as a regulatory one, regardless of legislative powers. Much can be achieved in anticipation of policy and system development if privacy protection is built in at the outset, rather than 'retrofitted' at the end. Consultation and advice are highly preferable to adversarial relationships between commissioner and regulated, where conflicts can be expensive and unproductive, given commissioners' mission to encourage privacy cultures in organisations and to educate those who handle personal information as much as to ensure formal compliance.

Thus, privacy commissioners expect to be consulted when new systems are being developed which have privacy implications. Organisations will often want to know, in advance of significant resource commitment, whether proposals are in compliance with applicable law. This consultative function tends to occur outside of public scrutiny, as often quite sensitive issues have to be addressed. Commissioners also need to be quite careful that their advice does not prejudice their independence if subsequent complaints arise about the organisation concerned.

The Victorian Privacy Commissioner may examine and assess the impact on privacy of any proposed act or practice of an organisation regulated by the IPA. This means that proposed policies and projects can be looked at and advice given as to any potential adverse impact on privacy. To assist in this process, organisations are encouraged to carry out Privacy Impact Assessments (PIAs)[17] on proposals at an early stage. PIAs identify privacy risks and give organisations the opportunity to address and minimise them. This in turn may minimise the risk of an unintended breach of the IPA in the future.

As this process requires a great deal of good will on both sides, it requires the Commissioner to act in some ways as a partner with the agency seeking consultation, without compromising her independence or being afraid to differ from the organisation where required. Given the confidential and often sensitive nature of the discussions, a great deal of discretion is also required.

Commissioner as educator

There is a fine line between advisory responsibilities – generally conducted in confidence – and the performance of broader educational, awareness raising and research roles[18]. The analysis of wider privacy and surveillance questions and the continuous education of regulated organisations and the general public can do much to anticipate problems and encourage citizens to protect their own privacy. Most commissioners are given this role, the interpretation of which varies from office to office.

To an increasing extent, many commissioners see their roles not only in relation to public policy, 'big issues' and 'big events', but also in encouraging a culture of privacy protection throughout society, the economy and government in an era of widespread adoption of new and privacy-invasive information technologies. Thus, resources are often invested in instilling an understanding of the rules, and a privacy culture, in more accessible ways than can be done through the interpretation and application of legal rules in particular cases.

Commissioners also devote considerable resources to producing guidelines and advice on paper and in electronic form, from public platforms and through the media. In addition, commissioners are expected to give frequent speeches and presentations concerning the importance of privacy. Moreover, some offices commission special studies relating to specific privacy issues and others occasionally sponsor public opinion surveys[19] The Victorian Privacy Commissioner has a range of functions to promote understanding and protection of personal privacy[20]

These functions require some degree of public and media profile on the part of the Commissioner, which can at times be seen to be in conflict with the impartiality and discretion required for some of the other functions discussed in this paper. For this reason, commissioners need to be extremely judicious in the way they promote a culture of privacy.

Commissioner as policy advisor

Most legislation imposes responsibilities on commissioners to comment on the privacy implications of proposed legislation[21]. The Victorian Privacy Commissioner has a function to provide advice to the Attorney-General on proposed legislation and the impact it may have on personal privacy. When passing the IPA, Parliament recognised the importance of a regulator assessing the impact on privacy of proposed legislation. It gave the Privacy Commissioner this function and extended the functions of the Scrutiny of Acts and Regulations Committee (SARC) to include consideration as to whether a proposed Act or Regulation unduly authorises acts or practices that might have an adverse impact on personal privacy within the meaning of the IPA[22]. The Privacy Commissioner has made a number of submissions to SARC resulting in an alert being issued on major legislation[23].

As can be readily seen, this advice function may well bring the Commissioner into conflict with the policies of the government of the day and the bureaucracy charged with implementing those policies. Sometimes she will be obliged to give unpalatable advice. But it is an important part of the checks and balances of the democratic process and underscores the need for the Commissioner to be independent.

High-profile legislative changes to that involve radical implications for the processing of personal information are often that circumstances under which consultation can be most important, but conversely most fraught. Commissioners also frequently make submissions and give evidence to legislative hearings and publish their responses to government policy documents where privacy interests are affected.[24] Media statements and interviews also provide vehicles for giving responses to issues as they arise.

Even where this function is exercised judiciously, it can to an extent undermine the cooperative relationship between the government and the commissioner, on which the role of consultant in particular is reliant. An overly aggressive or strident approach to policy advice and discussion of issues in the media could undermine the consultative process completely.

Section 40A of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT*)* gives the Privacy Commissioner the power to intervene at any time in a proceeding under the IPA. It is not a power that is subject to a grant of leave by VCAT. When deciding whether to exercise this power, the Privacy Commissioner generally considers whether the case meets certain criteria. These include:

- whether the case requires an interpretation of provisions of the IPA that would impact beyond the immediate facts of the case;
- whether the intervention would assist the development of privacy law in Victoria;
- whether there is a public interest involved beyond the particular facts of the case which warrant an intervention.

The Privacy Commissioner does not consider it is her role to intervene to support one party or the other. The role is considered to be one of 'counsel assisting' VCAT, in effect a policy or legal advisor to the Tribunal. Therefore she would not intervene in a case simply because she believed there had been a breach of privacy which a respondent was denying, unless the denial was based on an interpretation of the IPA which the Privacy Commissioner believed to be incorrect.

The Privacy Commissioner has only intervened in one matter referred to VCAT by the complainant. That is the case of *Smith v Victoria Police*[25]. Mr Smith was charged with a number of offences. While in police custody he was photographed by police. Photographs taken of persons in custody are commonly known as 'mug shots'. He subsequently pleaded guilty to a number of offences including two counts of rape and was imprisoned for a total of 10 years.

Victoria Police received a request under the *Freedom of Information Act 1982* (the FOI Act) for access to Mr Smith's 'mug shot' from a local newspaper writing a story about the case from the victim's perspective. Section 33 of the FOI Act provides documents that contain personal information be exempt where disclosure would unreasonably interfere with a person's privacy. It has provision for a person whose personal information is to be released to be given notice. He/she has the right to challenge a decision to release in VCAT. It is the precursor to privacy laws. Victoria Police did not follow that procedure. Rather, it released under s 16(2) of the FOI Act which states that the Act is not intended to prevent or

discourage access being given to documents (including exempt documents) where they can properly do so or are required by law.

Section 6(2) of the IPA provides that the provisions of the IPA give way to the operation of the FOI Act. On the facts of the case, it may well have been appropriate for Victoria Police to have released the mug shot. But there were wider issues to consider. Victoria Police, since the provisions of s 33 of the FOI Act had been enacted requiring individuals whose personal information was to be released to be given notice, and giving them the right to appeal to VCAT, had adopted a policy of using s 16(2) of the FOI Act where a person had pleaded guilty or been found guilty of an offence and the appeal period had passed. This deprived individuals whose personal information was involved the right of appeal to VCAT.

Victoria Police also relied on the partial exemption provided by s 13 of the IPA which allows a law enforcement agency not to comply with certain IPPs, including the use and disclosure provisions, if it believes on reasonable grounds that non-compliance is necessary for law enforcement functions or community policing functions[26]. This case, in terms of the wider public interest, involved the following:

- Did the application of s 16(2) of the FOI Act oust the jurisdiction of the IPA by virtue of s 6(2) of the IPA?
- Was the release of the photographs 'proper' within the meaning of s 16(2) of the FOI Act in the light of Victoria Police's obligations under the IPA?
- What is the proper application of the exemption provided by s 13 of the IPA?
- What does 'community policing' mean?
- Should Victoria Police generally have a policy of releasing 'mug shots' to the media after conviction and the appeal period is ended when such publication will result in the photograph remaining forever in the public domain?

The matters outlined above raised matters of considerable importance, both in the interpretation of the IPA and its interaction with the FOI Act, and matters of public interest as to whether 'mug shots' should routinely be released. It should be born in mind that 'mug shots' are taken compulsorily at a time when a person has been arrested and for minor offences as well as serious matters. The subsequent publication has the potential to do serious harm to the individual. It was not to the point that in this particular case the offences were extremely serious and publication may well have been justified. For all these reasons the then Privacy Commissioner considered that this was an appropriate case to exercise the right to intervene.

Again, the power to intervene in VCAT proceedings needs to be exercised judiciously and with scrupulous care against the possibility of advocacy on the part of either party, otherwise the other policy advice and consultant functions of the Commissioner could be fatally undermined.

Commissioner as negotiator

Some commissioners have responsibilities to negotiate privacy codes of practice[27]. Codes of practice have historically been instruments of self-regulation, although in Victoria and a number of other jurisdictions, including New South Wales, New Zealand and the Australian Commonwealth private sector jurisdiction, they must be made by a Minister in consultation with the commissioner and have the force of law.

Part 4 of the IPA provides a process that allows organisations regulated by the Act to substitute for one or more of the Information Privacy Principles (IPPs) with a Code of Practice approved by the Governor in Council. A code may modify any one or more of the IPPs, provided the standards in the code are at least as stringent as the standard set by the IPPs. The code can apply to a particular type of information, a particular class of organisations or a specific type of activity. The role of a code of practice may be to have a purpose built regime for a particular activity, where the IPPs, which are generic by nature, need to be adjusted to fit the activity. A code can also prescribe how a particular IPP applies to a particular situation.

An organisation seeking approval of a code of practice under Part 4 must first of all submit it to the Privacy Commissioner, who in turn may advise the Attorney-General to recommend to the Governor in Council to approve the code, provided that the code:

- is consistent with the objects of the IPA; and
- prescribes standards at least as stringent as the IPPs.

The Privacy Commissioner, before deciding whether to advise the Attorney to approve a code, may consult any person she considers appropriate and must have regard to the extent the public have been given the opportunity to comment on the proposed code. This is consistent with a code substituting for the IPPs and having the force of law insofar as it replaces them. Where Parliament has set standards in legislation it is appropriate that the public have the opportunity to comment on any proposed change to them. There have been no codes made under the IPA since it came into force in 2001.

Commissioner as enforcer

There is a clear distinction between the powers of commissioners to investigate and recommend and enforcement powers that can mandate changes in behaviour. Virtually all commissioners have the former type of powers and functions; only some (including the Victorian Privacy Commissioner) have the latter.

The more advisory approach is often preferred because it avoids the adversarial relationships that arise when enforcement powers are used or threatened[28]. However, the ability to negotiate with regulated organisations is arguably enhanced by the existence of enforcement powers, even (or perhaps especially) if they are rarely used.

The strongest powers of the Victorian Privacy Commissioner are contained in Part 6 of the IPA which sets out the procedure for the Privacy Commissioner to serve a compliance notice[29] on an organisation where she decides:

- a serious or flagrant breach of one or more of the IPPs has occurred; or
- an act or practice in breach of one or more of the IPPs is one that has been engaged in by an organisation on at least 5 separate occasions in the last 2 years.

The second ground on which a compliance notice could be issued is one that does not have to be serious or flagrant, just persistent. It is likely to become apparent through complaints.

Provisions under Part 6 envisage that a compliance notice may be served following a complaint as s 44(5) provides that when deciding to serve a compliance notice the Privacy Commissioner can act on her own initiative or on application from a complainant. Section 44(6) provides that when deciding whether to serve a compliance notice, the Privacy

Commissioner can take into account the extent that an organisation has complied with any order of VCAT under Part 5.

Part 6 of the IPA gives the Privacy Commissioner significant powers to obtain information and documents when investigating matters that may give rise to the service of a compliance notice. These include being able to summon witnesses and examine them under oath. Failure to comply with a compliance notice makes an organisation liable to prosecution (s 48 of the IPA). An individual or organisation affected by a decision to serve a compliance notice has the right to apply to VCAT for a review (s 49).

Although these are the strongest powers of enforcement, they are the ones that are least used to date. Only two compliance notices have been served[30].

The first of these notices involved the Office of Police Integrity and 'Jenny's case'. A report by the then Privacy Commissioner about this matter was tabled in State Parliament on 28 February 2006. The report was the result of an investigation into the mistaken dispatch in 2005 of an original file by the Office of Police Integrity (OPI) to a complainant in country Victoria who is known as 'Jenny' to protect her privacy and the privacy of others. Jenny's case illustrates longstanding issues affecting the security of Law Enforcement Assistance Program (LEAP) data and effective auditing of use of the LEAP system by police. The report explains LEAP, the sensitivity of its data, its legitimate role in policing, and the importance of LEAP data being used properly and being kept secure.

The main points of the 82-page report are:

- Inadequate facilities and procedures led to the mistaken dispatch of the file.
- OPI did not intentionally deceive Jenny, but OPI's inadequate handling of her complaint had the effect of misleading her.
- A fresh audit by the Privacy Commissioner of access by police to data about Jenny in LEAP over the period September 2002 to May 2005 produced results that require further investigation and were referred to the Chief Commissioner of Police and to OPI.
- Personal information relating to 90 identifiable persons was in the OPI file, but it is not likely that notifying those persons would alleviate more harm than it would cause. The breach was limited, the data was secured, and attempts to notify would carry a significant risk of causing more privacy breaches[31].

The second notice also involved the security of personal information held in the Victoria Police database (LEAP) and this time the Department of Justice E*Justice database. It is known as 'Mr C's case'. A report of the investigation was tabled in State Parliament in August 2006.

Mr C was an employee of Corrections Victoria. He became concerned that there had been unauthorised access to LEAP information about him that may have been circulated in the prison system, putting him at risk. He asked management at Corrections Victoria to investigate. As a result, Victoria Police were requested to audit who had accessed personal information in LEAP about Mr C. Subsequently, the results of the audit were sent by unencrypted email to Mr C and a Department of Justice manager. The audit had generated information about persons with names the same or similar to Mr C. The investigation focused on Information Privacy Principle 4 which requires organisations to take reasonable steps to keep secure the personal information they hold and to protect it from misuse, loss, unauthorised access, modification or disclosure. The report reflected several years work by the office of the Privacy Commissioner relating to the security of information in LEAP.

In the course of the investigation into Mr C's case, information indicated that there were data security problems in relation to the database known as E*Justice, a part of the Criminal Justice Enhancement Program (CJEP), for which the Department of Justice is responsible. E*Justice contains data obtained from LEAP. Authorised personnel can use E*Justice to get access to LEAP data and increasingly Victoria police can use E*Justice for certain functions.

An analysis of the data security of E*Justice with a special focus on LEAP data was conducted for the Privacy Commissioner by an independent expert and significant weaknesses identified. The report concluded that, in order to secure personal information in LEAP, it is necessary to ensure that E*Justice is secure and that access to LEAP by E*Justice can be audited. The investigation found that the procedures and technology for LEAP audits were not adequate to provide the protection needed for the amount and sensitivity of personal information held in LEAP. Steps were being taken by the Chief Commissioner of Police to improve the security of LEAP data but further reasonable steps were required to better protect the personal information.

The report concluded that the Secretary of the Department of Justice was taking steps to improve procedures and systems to secure the personal information in E*Justice and audit the use of E*Justice. Some of those steps would need to be taken in conjunction with, or just after, the improvements being implemented by the Chief Commissioner.

As can be seen from the outlines above, the power to serve compliance notices has been used sparingly and only in very serious matters. This is indicative of the preferred approach of the Privacy Commissioner of education through advice and guidance, rather than enforcement through the powers provided. Overuse of these strong powers could undermine the trust and cooperation between the Commissioner and regulated organisations which allow a number of the other functions to be exercised.

Ultimate redress in most jurisdictions is vested in the courts, and each law outlines the circumstances under which disputes can be reviewed at the judicial level. In the belief that courts are not necessarily the most suitable institutions to deal with comparatively specialised and technical issues, some countries have established specialist tribunals. In[1] Britain, for example, the *Data Protection Act 1998* (UK) established a Data Protection Tribunal to which complainants or respondents may appeal a decision of the Information Commissioner; this body is constituted from a panel of experts as necessary.

In other jurisdictions, including Victoria, New South Wales and the Commonwealth of Australia, reviews are conducted by a generalist tribunal. As outlined above, in Victoria, this is VCAT. If a complaint under Part 5 of the IPA is not declined, but conciliation is not possible, or was attempted but unsuccessful, then the Commissioner gives notice to both parties to that effect and under s 37(3), the complainant has the right to require the Commissioner to refer the matter to VCAT. VCAT's hearing is not a review of the Commissioner's decision, but a de novo hearing to establish whether there has been a breach of the IPPs and if so, what remedy should result.

Conclusion

As can be seen from the discussion above, effectively exercising all of the various responsibilities, functions and powers vested by legislation is an extremely difficult balancing act for privacy commissioners. If the Commissioner is too compliant, her effectiveness in promoting and building a culture of privacy and in enforcing the provisions of privacy legislation in the case of repeated or serious breaches will be non existent. Conversely, if

she is too aggressive or strident, her ability to consult, persuade and negotiate with regulated organisations and the government will be equally undermined.

Endnotes

1 The phrase apparently originated in a letter from Roosevelt to Henry L. Sprague on January 26, 1900, when Roosevelt was Governor of New York. In this instance, Roosevelt was referring to his success in forcing New York's Republican committee to retract support from a corrupt financial adviser. Later usages, when Roosevelt was President, referred to US foreign policy under the Monroe Doctrine.
2 C. Bennett, C. Raab, The Governance of Privacy: Policy instruments in global perspective, (Ashgate, Hampshire, 2003), Chapter 5, pp. 95- 120;
3 Ibid., p. 107;
4 Section 9 of the IPA lists organisations regulated by the Act. These include Ministers, Parliamentary Secretaries, local councils, Victoria Police, courts and tribunals
5 For a full discussion of the independence of the Privacy Commissioner see: Appendix E, OVPC, Annual Report 2001/2002;
6 Section 45(3A) Financial Management Act 1994 (Vic)
7 Section 5 IPA
8 Part VI Privacy Act 1988 (Cth); s 41 Privacy & Personal Information Protection Act 1998 (NSW)
9 See note 1, above
10 Bennett & Raab, op.cit., pp.109-110;
11 Section 3 Information Privacy Act 2000 (Vic)
12 In *WL v La Trobe University (General)* [2005] VCAT 2592 (8 December 2005) Deputy President Coghlan ruled that the word 'ascertained' allowed for some resort to extraneous material and an individual may be identified when information held by an organisation is combined with other material. But the element of reasonableness about whether the person's identity can be ascertained will depend on the circumstances of the case.
13 Bennett & Raab., op.cit., p. 110
14 The Victorian Privacy Commissioner has published an audit manual to guide auditors and auditees on how privacy audits are conducted: See Privacy Audit Manual, November 2007, Edition.02;
15 See OVPC, Website Privacy - Guidelines for the Victorian Public Sector, May 2004
16 Bennett & Raab, op.cit., pp. 110-111
17 See OVPC, Privacy Impact Assessments - a guide, Edition 1, August 2004
18 Bennett & Raab, op.cit., pp. 111-112
19 For example, Office of the Privacy Commissioner (Australia), 2001, 2004, 2007, available at http://www.privacy.gov.au/publications/index.html#R, last accessed 25 July 2008
20 See IPA, s.58(a) and (o);
21 Bennett & Raab, op.cit., p.112
22 Section 17(a)(iv) *Parliamentary Committees Act 2003* (Vic)
23 See, for example: OVPC, submission to SARC in relation to the Terrorism (Community Protection) (Amendment) Bill 2005 - 23 January 2006; OVPC, Justice and Road Legislation Amendment (Law Enforcement) Bill 2007: submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, August 2007, which raises concerns over the legislative response to the Smith case.
24 See, for example, the series of submissions made by the Victorian Privacy Commissioner to successive Senate Inquiries into the Human Services (Enhanced Service Delivery Bill) 2007, which proposed the collection of a large amount of personal information from virtually the entire Australian population and mandated the use of an 'Access Card':, including a micro-chip and photograph, in order for Australian citizens to obtain government services or concessions, available at www.privacy.vic.gov.au>publications>reports and submissions>submissions;
25 *Smith v Victoria Police (General*)[2005]VCAT 654 (19 April 2005); see case summary at [2005] AUPrivCS 36.
26 Section 13 Information Privacy Act 2000
27 Bennett & Raab, op.cit., p.113
28 Ibid., pp. 113-114
29 See OVPC, Procedure for Service of Compliance Notices, under s 44 Information Privacy Act, July 2003.
30 See: OVPC, Report 03.06 Mr. C's Case: Report of an investigation pursuant to Part 6 of *the Information Privacy Act 2000* into Victoria Police and Department of Justice in relation to the security of personal information in the Law Enforcement Assistance Program (LEAP) and E*Justice databases, July 2006; OVPC, Report 01.06 Jenny's case: Report of an investigation into the Office of Police Integrity pursuant to Part 6 of *the Information Privacy Act 2000*, February 2006;
31 See also OVPC, Responding to Privacy Breaches, Guide Edition 1, May 2008; Responding to Privacy Breaches - Checklist, Guide Edition 1, May 2008;

RECENT DECISIONS

Alice Mantel*

What facts can the AAT consider when reviewing a decision?

Shi v Migration Agents Registration Authority [2008] HCA 31 (30 July 2008**)**

The recent decision of the High Court in *Shi v Migration Agents Registration Authority* considered whether a Tribunal is limited to reviewing a decision with reference to circumstances that existed at the time it was originally made or could it take into account events which occurred up to the date of its own review.

The appellant, Mr Shi, was a migration agent whose registration had been cancelled by the Migration Agents Registration Authority (MARA) after finding a number of defects in Mr Shi's dealings with clients. The MARA found that Mr Shi had breached the Code of Conduct under s 303(1) *Migration Act 1958* in relation to applications for protection visas and was satisfied that Mr Shi was not a fit and proper person to provide immigration assistance.

On 31 July 2003, Mr Shi successfully applied to the Administrative Appeals Tribunal for a stay of the cancellation decision, subject to a condition that he not engage in any business relating to protection visas. On 2 September 2005, the Tribunal set aside the decision of the MARA to cancel Mr Shi's registration as a migration agent and instead issued a caution. In reaching this decision, the Tribunal found no evidence that Mr Shi had breached the Code since the MARA's decision of 31 July 2003 and that his recent rate of success had been very high. The Tribunal based its decision on evidence existing at the date of its own decision, rather than the date of the MARA's decision in 2003.

The MARA appealed to the Federal Court which ruled in its favour and was confirmed by the majority of the Full Court of the Federal Court on appeal.

Facing the High Court on appeal was the question of whether the Full Court erred in finding that the Tribunal was limited to the facts and circumstances that existed at the time of the MARA's decision. Could the Tribunal consider the facts and circumstances that existed at the time of its own decision?

The MARA argued there was a presumption of law which applied to bodies such as the Tribunal where the rights of parties to a review application are determined on the basis of the materials that existed at the time of the original decision. The Court rejected this contention in four separate judgments which were relatively unanimous on the question of the 'temporal element' as it applied to merits review. Each judgment supported the principle that the rights of parties to an application for review, under s 43 AAT Act, are to be determined by the Tribunal on the basis of the facts and circumstances present at the date of its decision (absent some indication to the contrary).

An 'indication to the contrary' is ascertained by reference to the enactment under which the original decision was made, and the nature of the particular decision in question. Accordingly, each judgment focused upon the terms of s 303(1) Migration Act which enables the MARA to cancel or suspend the registration of a migration agent.

In Kiefel J's view (with whom Crennan J agreed), the language of subsection (f) suggested a determination was to be made in the present tense, meaning that the agent's intervening conduct between the date of the original decision and the date of the Tribunal's determination could be taken into account. Her Honour was of the view that the second of these grounds involved statutory language suggestive of a fixed point-in-time and that a decision to cancel a migration agent's licence could occur if the MARA becomes satisfied that the agent had not complied with the Code. Her Honour determined that part of the MARA's decision relating to subsection (h) was referable to conduct which had occurred to a fixed-point-in-time and accordingly, the Tribunal was restricted to a consideration of events as they existed at the time of the MARA's decision when determining whether there had been compliance with the Code.

In a joint judgment, Hayne and Heydon JJ held that once it is accepted that the Tribunal is not confined to the record before the primary decision-maker the material before the Tribunal will include information about conduct and events that occurred after the decision under review. Their Honours held that the AAT Act did not provide a temporal limitation in relation to the material for consideration although it could be found by recourse to the enactment under which the original decision was made.

Justice Kirby held that each of the grounds in s 303(1) were expressed in the present tense, which necessarily allow the Tribunal to take into account supervening events in its determination under s 43 and therefore the language of the section clearly contemplated that the circumstances may change between the MARA's initial decision and a subsequent decision of the Tribunal.

Court takes a step closer to finding a right to privacy

Giller v Procopets [2008] VSCA 236

In handing down its decision on 10 April 2008, the Victorian Court of Appeal considered two possible causes of action: a tort of privacy and the tort of intentional infliction of harm causing mental distress.

The Court held that the plaintiff, Ms Giller was entitled to equitable compensation for breach of confidence by her former partner (the defendant), who showed a video of their sexual encounters to her friends, family and employer. The case represents a closer step towards recognising a right to privacy in Australia at common law and has ramifications for informants and media outlets who publish material that was originally created in the confidence of a sexual relationship and they may be liable for a breach of an equitable duty of confidence.

While the traditional view (in *Victoria Park Racing v Taylor* [1937] 58 CLR 479) is that there is no tort of invasion of privacy in Australia, more recent cases such as *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 have held that there was no Australian authority that stood in the way of developing a tort of invasion of privacy.

In this case, the defendant filmed himself and the plaintiff engaging in sexual relations, at first using a hidden camera, and later with the plaintiff's knowledge. When the relationship ended, the defendant threatened and attempted to distribute the tapes to the plaintiff's friends, family and employer, claiming that she was immoral, unethical and a prostitute. In separate criminal proceedings, the defendant was convicted of stalking and breaching an intervention order which restrained him from distributing the videotapes.

The plaintiff then brought a civil action against the defendant for assault, interests in property and chattels, and for distributing the videotapes. She pleaded three causes of action related to the tapes, namely: breach of confidence; intentional infliction of emotional distress; and invasion of privacy.

At first instance, Gillard J of the Victoria Supreme Court held that a relationship of confidence exists between sexual partners indulging in a sexual activity in the privacy of their own home and that such relationship is not to be divulged to others without the consent of both parties. However, his Honour held that although the defendant intended to cause harm and the plaintiff had suffered distress, annoyance and embarrassment, there could be no equitable damages for mere distress arising out of the breach of confidence that fell short of a psychiatric injury. He rejected the other two causes of action, saying that English and Australian law had not recognised a cause of action based upon breach of privacy or intentional infliction of emotional distress.

On appeal, the Victorian Court of Appeal relied on *Lenah Game Meats* and extended privacy protections through existing causes of action. It unanimously accepted that there was a relationship of confidence in a sexual relationship. In doing so, Neave J quoted Gleeson CJ in that case who stated:

> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case… There would be an obligation of confidence upon the persons who obtained [film], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained.

Further, the Court unanimously overturned the trial judge's decision that equitable damages were not available to Ms Giller and that damages could be awarded for 'mere distress' not amounting to psychiatric injury due to breach of confidence. The Court noted that the case for equitable compensation is clearer where commercial advantage was gained by publication. Compensatory damages may be awarded if the plaintiff had been embarrassed by the exposure of private information, rather than the defendant had profited from the wrongful use of the information. Analogies were drawn with torts of defamation and deceit, where damages for upset and distress may be awarded.

In her judgment, Neave J (with Maxwell P agreeing) adopted a line of English authority, including *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22*,* where model, Naomi Campbell successfully sued in breach of confidence for distress suffered when a newspaper published details and photographs of her attendance at Narcotics Anonymous meetings. Her Honour also cited *Douglas v Hello! Ltd* [2005] EWCA Civ 595*,* where unauthorised wedding photographs of actors, Michael Douglas and Catherine Zeta-Jones' wedding were found to have been published in breach of confidence, resulting in distress.

President Maxwell would have allowed the plaintiff's claim for intentional infliction of harm to succeed as the next logical step in the cause of action recognised in *Wilkinson v Downton* [1897] 2 QB 57, known as the tort of intentional infliction of injury. His Honour stated that there need not be a high threshold for the severity of conduct or distress required for such a tort and cited English authority. He considered that there was no decision in Australia or any comparable jurisdiction which would mean the claim was untenable and noted that it had been 70 years since the High Court had considered the *Wilkinson* tort.

Justice Neave did not make a specific finding but noted that the English courts were moving towards the American position of recognising such a tort and stated that if the Australian courts were to follow suit, the test must be actual and not merely imputed intention to inflict harm. She suggested that such a tort could potentially be applied to a broad range of situations including harassment based on race, gender and sexual orientation, bullying,

practical jokes and the insensitive management of medical patients, employees and consumers. However, given there was other legislative redress, her Honour concluded that it would be better for the legislature to determine how the balance should be struck between providing compensation for victims and recognising the exigencies of life.

Process of conducting an investigation

Joan Royle v Cheetham Salt Limited [2008] AIRC 709 (3 October 2008)

In the recent Australian Industrial Relation Commission (AIRC) decision of *Joan Royle v Cheetham Salt Limited* the employer was found to have grounds to terminate Mrs Royle. However, the AIRC decided that because of unfairness in the investigation procedure, Mrs Royle was still entitled to compensation.

In this case, the AIRC found that an investigation may not provide a 'fair go all round' if: an employee is not given fair warning about the potential consequences of a meeting before being asked whether they want a witness present open ended questions are asked which do not clearly put the allegations to an employee. The AIRC found that there needs to be a balance between clarity of the allegations and the desire to obtain a general account of matters from an employee. The process does not provide the opportunity for the parties to consider or discuss the allegations before responding if the employee is provided with allegations and dismissed in the same meeting.

The AIRC found that if there had been a break between the first meeting and the employer reaching its decision it may have been more balanced. The letter of termination failed to give a complete account of the reasons for termination. In this case the reasons provided to the employee were 'generic' and less detailed than those provided to the Union. The AIRC observed that the employer had the resources to implement 'impeccable' procedures.

ASIC investigations and waiver of privilege

AWB Limited v Australian Securities and Investments Commission [2008] FCA 1877 (23 December 2008)

A recent Federal Court decision considered ASIC's obligations when it receives privileged material from employees or former employees of a company under investigation.

The case was an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for a review of ASIC's decision to make information obtained during an investigation available to the Australian Federal Police ('AFP'). At issue was whether ASIC could disclose to the AFP information that might be subject to a claim for privilege by the company. The Court held that ASIC could pass on the privileged information to the AFP.

ASIC was investigating the activities of AWB Ltd ('AWB') and others in connection with wheat sales to Iraq under the United Nations Oil for Food Programme. As part of its investigation, and pursuant to s 19 *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), ASIC examined a number of current and former AWB employees. Other employees and former employees also voluntarily provided witness statements. It was accepted that the examinees (not being officers or directors) did not have the authority to claim or waive AWB's privilege. AWB was concerned, however, that an examinee might inadvertently or deliberately disclose privileged information to ASIC and AWB's lawyers sought to attend the examinations for the limited purpose of seeking to protect AWB's privilege, but this was not permitted.

The AFP requested that ASIC provide it with copies of the witness statements and examination transcripts. AWB learned of AFP's request not from ASIC, but from some of the examinees. AWB made submissions to ASIC regarding any possible claims of privilege it might have over the statements and transcripts, including suggestions for safeguarding that privilege. In accordance with its power under s 127(4) of the ASIC Act, ASIC disclosed the material to AFP. While certain conditions were attached to the disclosure, none of AWB's suggestions were adopted.

AWB sought a review of ASIC's decision. Central to AWB's claims against ASIC was its argument that, if a person might disclose to ASIC material over which another person claimed privilege, ASIC must give that other person an opportunity to protect that privilege.

Gordon J held that s 127(4) of the ASIC Act permitted ASIC to provide the AFP with information over which AWB might have a claim of privilege, even where ASIC had obtained that information from someone other than AWB. Her Honour noted that the ASIC Act does not abrogate privilege (as established in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543), so ASIC cannot compel a s 19 examinee to disclose information over which the examinee claims privilege. However, the examinee may waive that privilege in the course of the examination by disclosure inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. ASIC has no obligation to prevent this waiver.

The decision leaves companies whose employees or former employees provide information to ASIC in a difficult position, particularly as the company may not be aware that the employee or former employee is doing so. While the employee may not be able to waive privilege on behalf of the company, and ASIC should not seek to compel disclosure of privileged material, such material may still be disclosed and used by ASIC and other parties to whom ASIC gives the information.

A 'solution' suggested by Gordon J was for a company to authorise an examinee or other person providing information to ASIC to assert the company's privilege, though her Honour noted that this could only occur where the third party has prior notice of the examination or other exercise of power by ASIC. One disadvantage with this approach is that authorising a person to assert privilege would also give them the power to waive the company's privilege and the company, not being represented at the examination, would have no control over this.

Court required to inspect document before making decision

Marjorie Heather Osland v Secretary to the Department of Justice [2008] HCA 37 (7 August 2008)

The High Court of Australia held that the Victorian Court of Appeal, in considering whether public interest overrode legal professional privilege attaching to advice that Mrs Osland should not be pardoned for murder, should have inspected the documents in question before making its decision.

In 1996, Mrs Osland was convicted of murdering her husband, Frank Osland in 1991, allegedly after years of violence. She was sentenced to 14 1/2 years' imprisonment, with a non-parole period of 9 1/2 years. The High Court dismissed her appeal against conviction and sentence in 1998. Mrs Osland then submitted a petition for mercy to the Victorian Attorney-General, seeking a pardon from the Governor.

On 6 September 2001, Attorney-General Rob Hulls announced that the Governor had refused the petition. In a press release Mr Hulls noted that legal advice had been received from three senior counsel (including Susan Crennan QC, now a Justice of the High Court,

who did not hear this appeal). Mrs Osland sought access under the Victorian *Freedom of Information Act* (FOI Act) to various pieces of advice related to her request for a pardon. The Department of Justice refused access to the documents, both initially and upon internal review saying the documents were exempt from disclosure by reason of s 30 (relating to internal working documents) and s 32 (relating to legal professional privilege) of the *Freedom of Information Act 1982* (Vic).

That decision was overturned by the President of the Victorian Civil and Administrative Tribunal, Morris J. He found that the documents fell within s 32, but that the 'public interest override' provided by s 50(4) of the FOI Act nevertheless required access be given to all the documents in dispute. The Secretary successfully appealed to the Court of Appeal. In that appeal, Mrs Osland maintained her action only in relation to the advice from the three senior counsel, known as Document 9. The Court of Appeal held that Morris J correctly decided that legal professional privilege had not been waived in respect of Document 9 but erred in dealing with the public interest override. He had inspected the documents but the Court of Appeal did not.

Mrs Osland appealed to the High Court. She argued that Mr Hulls had waived the legal professional privilege of Document 9 because his press release disclosed the substance and gist of the advice and the conclusions reached in it. Mrs Osland argued that the Court of Appeal erred in concluding that there was no basis for applying the public interest override under s 50(4) without having inspected the documents for itself.

The Court, by a 5-1 majority, allowed the appeal. It held that legal professional privilege had not been waived in relation to Document 9 by Mr Hulls' press release, but that the Court of Appeal should have examined the documents in question before deciding that, in the circumstances of the case, there was no basis for the application of s 50(4). It remitted the matter to the Court of Appeal for further hearing to enable it to inspect the documents to consider whether public interest overrode legal professional privilege.

ACMA finds that TCN 9 breached child's privacy

The Australian Communications and Media Authority (ACMA) has found the licensee of TCN, TCN Channel Nine Pty Ltd, breached the *Commercial Television Industry Code of Practice 2004* (the Code) by broadcasting material that invaded the privacy of a child.

ACMA received a complaint in relation to the broadcast of a segment of *A Current Affair* on 30 May 2005 regarding truancy amongst school children. ACMA first received a complaint about the matter in July 2007. The segment featured footage of the complainant's twelve year old son at home and in a skate park, as well as an interview with the complainant and with other children.

ACMA found the licensee breached clause 4.3.5 of the Code as it did not exercise the special care required by clause 4.3.5.1 of the Code before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child and that there was no identifiable public interest reason for that material to be broadcast.

In response to the breach finding, the Nine Network (Nine) has undertaken to implement a number of new procedures for similar stories, including the important precedent of obtaining formal written consent where a story involves children. It will also explore further measures to ensure compliance with clause 4.3.5.1 of the Code, such as pixelating or otherwise masking the identity of children. It will provide full training to all relevant news and current affairs staff on the specific findings of ACMA's investigation and the measures required to comply with the provisions of the code relating to the privacy of children.

ACMA noted that Nine's last breach of the privacy provisions of the Code occurred three and a half years ago and did not involve footage of children. ACMA will monitor Nine's future compliance to ensure that the above measures are, firstly, implemented and secondly, result in heightened sensibilities in dealing with matters of privacy.

A copy of ACMA's *investigation report 1882* is available on the ACMA website.

28 November 2008

When charity does not begin at home

Walsh v St Vincent de Paul Society Queensland (No.2) [2008] QADT 32

This case tested one of the exemptions under the *Anti-Discrimination Act 1991* (Qld), being the requirement that under s 25(1) a person may impose genuine occupational requirements for a position, being that a person be of the Catholic faith to carry out the duties of a position.

Ms Walsh, the complainant, had been a voluntary worker with the St Vincent de Paul Society of Queensland lay organisation since 1997 and had been elected President of the Migrants and Refugees Logan Conference for three years in 2004. Ms Walsh had always admitted she was not of the Catholic faith but said she had a Christian belief in Mary, the Holy Trinity and the Holy Catholic Church. Her voluntary duties involved distributing furniture and household items to assist refugees. In early 2004, the Society's Gold Coast diocesan president gave Ms Walsh an ultimatum that she either had to become a Catholic, resign her position or leave the Society. Ms Walsh put in a complaint to the Queensland Anti-Discrimination Commission that she was being discriminated against on the basis of her religious belief.

In its submissions, the Society relied on its constitution, entitled 'Society St Vincent de Paul The Rule' (1991 edition) but there was no specific requirement therein that the President of a Conference be a Catholic. In 2005 The Rule was amended to make it a requirement that such a President be of the Catholic faith.

The Tribunal found that the Society was not a religious body but that it was a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) being a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they helped and earn grace themselves for their common salvation. The Tribunal was of the view that was not enough to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).

The Society was ordered to pay Ms Walsh compensation including an amount for depressive disorders brought on by the discrimination she had suffered and costs.

JUDICIAL REVIEW IN TAX MATTERS: THE IMPACT OF THE FUTURIS DECISION

James Meli*

In *Federal Commissioner of Taxation v Futuris Corporation Ltd* ('Futuris'),[1] the High Court effectively overturned its decision in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* ('Richard Walter')[2] as to the application of the *Hickman* principles in tax matters. In hindsight, this outcome was inevitable given the significant changes to the administrative law landscape over the interim. This paper examines the major decisions in this space and through them, the history as to the construction of privative clauses generally. It concludes that although *Futuris* simplified the law in rejecting the cumbersome reconciliation process in tax matters in favour of a more direct approach to statutory construction more broadly, it will rarely, if ever, result in substantive changes in outcome, at least since the decision in *Plaintiff S157 v The Commonwealth* ('Plaintiff S157').[3]

The legislative framework

As far as substantive liability to tax is concerned, a taxpayer may challenge an assessment under Pt IVC of the *Taxation Administration Act 1953* ('TAA 1953'). Here, the taxpayer must prove, on review or appeal,[4] that the assessment was 'excessive'.[5] This requires the taxpayer to prove, on the balance of probabilities,[6] that not only is the assessment incorrect, but in addition, what the correct assessment should be.[7] Athanasiou argues that the Pt IVC process is onerous and clearly biased towards the revenue.[8] In the writer's experience, where in the taxpayer's opinion, there has been an excessive assessment, unsuccessful objections or appeals are more often the result of poor record-keeping and inadequate substantiation than any inherent bias in the system, at least at the individual level. However, the criticism is not without merit. Given the time and expense of tax litigation, it is not difficult to imagine pragmatic taxpayers, even with strongly arguable positions, settling disputes with the Commissioner rather than pursuing a pyrrhic victory in the courts. No doubt, this stifles the development of the law; however, this is beyond the immediate scope of this paper.
In relation to provisions said to oust judicial review, s 175 of the *Income Tax Assessment Act 1936* ('ITAA 1936') states:

> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with

In addition, s 177(1) of the ITAA 1936 states:

> The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Pt IVC of the Tax Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct

Together, these provisions were said to operate with privative effect.

Pursuant to s 75(v) of the Constitution, the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the

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Commonwealth. Section 39B of the *Judiciary Act 1903* ('Judiciary Act') is drafted in almost identical terms, giving it the same jurisdiction in similar matters.[9]

As a preliminary matter, it is important to note that there has been some suggestion that s 177 of the ITAA 1936 is evidentiary only and does not operate with jurisdictional effect. Jones argues that:[10]

> s177 is not a privative clause of the nature considered by the High Court in Hickman and subsequent cases . . . [as it] does not seek to exclude or restrict a court's jurisdiction of judicial review

It is true that there are a variety of privative clauses, from 'finality clauses'[11] and 'shall not be questioned clauses'[12] to the comprehensive privative clause the subject of *Plaintiff S157*, outlined below. However, 'conclusive evidence' clauses have a long and successful history of ousting judicial review in particular circumstances, evidencing that they do in fact have jurisdictional effect.[13]

The *Hickman* principles and Dixon J's 'second step'

In *R v Hickman; Ex parte Fox and Clinton* ('Hickman'),[14] the High Court was called upon to interpret a privative clause under an industrial relations statute. Up until this point, the High Court had always unambiguously affirmed that s 75(v) of the Constitution could not be curtailed by legislative action.[15] Although the High Court did not technically depart from this line of authority, Dixon J held:[16]

> a [privative] clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, *provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body* [emphasis added]

These became known as the *Hickman* principles, which legislators have subsequently misinterpreted as authority for the proposition that satisfaction of this three-pronged test provides a safe harbour from judicial review. However, almost immediately after *Hickman*, Dixon J himself set about expanding, or at least clarifying, his judgment in that case by adding that where there is an inconsistency between individual provisions within a legislative document, it should be resolved by interpreting the document as a whole by first applying the three-pronged test in *Hickman*, followed by an assessment as to whether:[17]

> [any] particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action

This process became known as 'reconciliation,' while the subject of this second (or fourth?) step has been described as the identification of 'inviolable limitations'.[18] This has caused much confusion as to what constitutes an inviolable limitation in a particular legislative context. Spigelman CJ has argued that this is linked to the doctrine of jurisdictional error.[19] No doubt this is true; however, while the decision in *Craig v South Australia*[20] (Craig) may be an appropriate reference point in this regard, the very contextual nature of the reconciliation process means that there can be no hard and fast rules.[21] To quote Jordan CJ in *Hall v Jones*,[22] everything depends on the subject matter and the context.

Richard Walter

In *Richard Walter*, the High Court was asked whether, upon production of a notice of assessment, s 177 of the ITAA 1936 operated so as to preclude any challenge or review under s 39B of the Judiciary Act.

Deane and Gaudron JJ for the majority held that, in its application to proceedings against the Commissioner from acting on the basis that an invalid assessment is valid or enforceable, s 177 of the ITAA 1936 is more than merely procedural and goes to jurisdiction.[23] Their Honours argued this point on the basis that s 177 of the ITAA 1936 purported to diminish the jurisdiction of the court under s 75(v) of the Constitution.[24]

Their Honours added that s 177 of the ITAA 1936 is to be read with s 175 of the ITAA 1936 and the definition of an 'assessment' under s 6 of the ITAA 1936.[25] It was held that the minimum requirements to be satisfied before there will be an 'assessment' to which s 175 of the ITAA 1936 can attach were the three-fold Hickman principles outlined above.[26] Failing this, the protection afforded by s 175 of the ITAA 1936 will not be available to the Commissioner.[27]

Specifically in relation to the interplay between the ITAA 1936 and s 39B of the Judiciary Act, their Honours held that based on the ordinary rules of statutory construction under *Goodwin v Phillips*,[28] the latter overrode or amended s 177 of the ITAA 1936 to the extent that it purported to operate in circumstances where one of the *Hickman* principles was argued to apply.[29]

Brennan J stated similarly in relation to application of the three-fold *Hickman* principles to the purported assessment.[30]

Curiously, Mason CJ, while agreeing with Deane, Gaudron and Brennan JJ as to the outcome, held that despite the authorities outlined above in relation to the jurisdictional encroachment of 'conclusive evidence' privative clauses:[31]

> [i]t is scarcely accurate to describe the effect of the subsection as purely jurisdictional. The subsection leaves the jurisdiction of the relevant court intact but requires the court in the exercise of its jurisdiction to treat the notices of assessment as having been duly made

With respect, if the validity of a notice of assessment was absolute and the court was unable to determine, based on the *Hickman* principles, its validity according to law, was this not abrogating the jurisdiction of the court, at least in part? Further, if a notice of assessment was to be treated as having been duly made, what else was left for the court to do in a judicial review context as distinct from the substantive tax arguments dealt with separately under Pt IVC of the TAA 1953?

It is clear that the rule of law forms a necessary assumption under the Australian Constitution.[32] The rule of law is a common law construct encapsulating the separation of powers doctrine and judicial review.[33] No doubt, the High Court has adopted a rather conservative approach to the interpretation of privative clauses and judicial review generally, resulting in a broader application of such clauses vis-à-vis their English counterparts. This is clear from the rejection of the *Anisminic* doctrine[34] in *Craig* where the jurisdictional/non-jurisdictional error distinction was maintained in Australia. However, with respect, Mason CJ (and the minority judges on this point) could not simply assume the validity of a notice of assessment as this ignored Dixon J's crucial second step. Though involving little practical difference, applying the second step to arrive at a conclusion that there were no inviolable limitations and therefore, holding a privative clause effective, is quite different to the slavish acceptance of validity per se. Note, even Brennan, Deane and Gaudron JJ assumed a three-pronged version of the *Hickman* principles which was rejected in *Plaintiff S157*.

Project Blue Sky v Australian Broadcasting Authority

In *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* ('Project Blue Sky'),[35] the issue was whether a program standard made by the Australian Broadcasting Association ('ABA') was invalid for failing to comply with relevant provisions of the *Broadcasting Services Act 1992* ('BSA 1992'). The legislation permitted the respondent to determine standards for commercial and community television provided they were consistent with Australia's obligations under international conventions to which it was a party.

The joint judgment for the majority[36] held that the impugned clause of the relevant program standard was not in accordance with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to the Trade Agreement and therefore, the ABA had breached the BSA 1992. The question then became whether such a breach invalidated the impugned clause, in relation which, the High Court found:[37]

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

Their Honours added that there were no decisive rules in this regard[38] and, after highlighting the traditional mandatory/directory dichotomy,[39] concluded:[40]

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid . . . [i]n determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute

Applying this test to the particular legislative framework under the BSA 1992, the majority held that although the impugned clause was made in breach of the relevant section, it was not a purpose of the statute that such a breach was intended to invalidate any act done in breach of that section. It was, however, unlawful and a declaration was made to that effect.

Plaintiff S157

The circumstances giving rise to the introduction of the comprehensive privative clause in s 474 of the *Migration Act 1958* (Cth) are well known. The facts of *Plaintiff S157* are not particularly relevant here. What is important, however, is that the High Court, particularly Gleeson CJ, finally settled the confusion surrounding the *Hickman* principles and the process of reconciliation between a privative clause provision and the statute at large.

Gleeson CJ held that the matter was to be decided as an exercise of statutory construction looking at the Act as a whole,[41] and offered the following guiding principles:[42]

(1) Where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations, in cases of ambiguity a court should favour a construction which accords Australia's obligations.

    Gleeson CJ gave *Minister for Immigration and Ethnic Affairs v Teoh*[43] as authority, however, this principle is of a much older vintage. As early as 1908, O'Connor J held:[44]

    > every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law

(2) Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such intention is clearly manifested by unmistakable and unambiguous language. In this regard, general words are rarely sufficient, the court must be satisfied that the legislature had turned its attention to the rights and freedoms in question and consciously decided to abrogate or curtail.

Gleeson CJ cited *Coco v The Queen*[45] as authority. Pearce and Geddes[46] highlight that in interpreting statutes generally, various presumptions exist in favour of fundamental rights, including common law rights and access to the courts. Gleeson CJ in fact noted that the Migration Act, in so far as it relates to protection visas, affects fundamental human rights and necessarily involves Australia's international obligations.[47] Apart from the obvious relationship to the separation of powers doctrine and judicial review, such presumptions have long formed part of the common law of Australia. Again, it was O'Connor J who, this time in *Potter v Minahan*,[48] held:[49]

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

More recently, the High Court held:[50]

> it is in the least degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness

Bennett has argued that in adopting s 474 of the Migration Act in identical terms to the relevant provision judicially considered in Hickman, that one would be hard pressed to think of a case in which the existence legislative approval was clearer.[51] Similarly, the Commonwealth in *Plaintiff S157* argued that s 474 of the Migration Act was enacted with principles of judicial interpretation in mind. With respect, Bennett's argument appears to ignore the need for the legislature to show that it turned its attention to the particular rights and freedoms in question. If everything depends upon the subject matter and the context, without more, the wholesale adoption of a privative clause judicially considered in an industrial relations context cannot evidence that the legislature considered its particular implications in the migration area. Perhaps it is the political ramifications of complying with such an interpretative principle which prevents various governments from introducing legislation of the requisite clarity. However, this is of no concern to the courts. Further, the common law principles of statutory construction are so well known that legislative draftsmen could not be in any doubt they would be applied.[52]

(3) The Australian Constitution is framed upon the assumption of the rule of law.

Gleeson CJ based this finding on the decision of Dixon J in *Australian Communist Party v The Commonwealth*,[53] and Brennan J in *Church of Scientology v Woodward*,[54] where it was held:[55]

> Judicial review [entrenched under section 75(v) of the Constitution) 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.

(4) Privative clauses are construed 'by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts.'

This presumption in favour of judicial review forms part of the rule of law and arose in the decision in *Public Service Association (SA) v Federated Clerk's Union*.[56] Equally relevant under this head however is Dixon J's judgment in *Magrath v Goldsbrough, Mort & Co Ltd*,[57] where, specifically in relation to privative clauses, it was held that statutes are not to be interpreted as depriving superior courts of the power to prevent an unauthorised assumption of jurisdiction without clear and unmistakable words.[58] The arguments under Gleeson CJ's second principle are apposite.

(5) A consideration of the whole Act is required and an attempt to achieve a reconciliation between the privative clause and the Act at large.

This principle derives from the Dixon J's judgment in *Hickman* and its progeny.[59] Clearly, like the rule of law principles they enshrine, there is much overlap.

Callinan J concurred though highlighted, without ultimately deciding, that it may be that:[60]

> to attract the remedies found in s75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice

Bennett argues that Callinan J's dictum suggests that s 75(v) of the Constitution may only apply to a limited form of natural justice.[61] This relates back to arguments surrounding jurisdictional error. If Bennett's interpretation is correct, the particular statutory provision must comply with Gleeson CJ's second principle in any event, and even then, would only operate to the extent that it does not purport to oust the jurisdiction of the High Court under s 75(v) of the Constitution.

The joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ held that the *Hickman* principles were not substantive rules but simply rules of construction.[62] This meant there could be no general rules as to the meaning or effect of a privative clause as it will take its meaning from its particular statutory context.[63] Their Honours did acknowledge, however, that a breach of the requirements of natural justice may result in a finding of jurisdictional error under s 75(v) of the Constitution in a particular legislative context.[64] This accords with Gleeson CJ's pronouncement that visa applications within the migration area involve fundamental common law rights entitling applicants to more than good faith.[65]

This decision affirmed the 'Darling Casino' theory as to the operation or effect of privative clauses.[66] This theory is based on the decision of Gaudron and Gummow JJ in *Darling Casino v New South Wales Casino Authority*,[67] where their Honours concluded that unless a relevant authority satisfies any necessary conditions to the exercise of its power, the decision cannot be protected by the relevant privative clause for it will not have made a decision 'under the Act'.[68] Clearly, such a principle may logically extend to whether a purported assessment is an 'assessment' for the purposes of the ITAA 1936.

Plaintiff S157 authoritatively clarified the position first outlined in Hickman as to the process of reconciliation. Despite the fact that the majority in *Richard Walter* appeared to apply the three-pronged *Hickman* test rejected in *Plaintiff S157*, there was little practical difference between the two in tax matters, as outlined below.

***Futuris*: The end of *Hickman*?**

In *Futuris*, the High Court was called upon to assess the bona fides of the Commissioner in a judicial review context. The facts surrounded the issue of a second amended assessment involving, in the taxpayer's opinion, a deliberate 'double counting' of a particular amount by the Commissioner. The High Court ultimately found that there was no failure of due

administration on the evidence and that even if there were such an error as argued by the taxpayer, it was within, rather than beyond jurisdiction with the matter more appropriately dealt with under Pt IVC of the TAA 1953.

The matter was decided on the basis of the proper construction of s 175 of the ITAA 1936 rather than whether or not s 177 of the ITAA 1936 had determinative effect.[69] In reaching its decision, the majority held that in *Richard Walter*:[70]

> Reference was made to the then accepted distinction between mandatory and directory provisions, and to what seems to have been some doctrinal status afforded to Hickman. As to the first matter, Project Blue Sky has changed the landscape [that is, the relevant test is now whether a purpose of the legislation is that an act done in breach of a provision is invalid] and as to the second, Plaintiff S157/2002 has placed 'the Hickman principle' in perspective [that is, simply a rule of construction]. Hence, this appeal [Futuris] should be decided by the path taken in these reasons and not by any course assumed to be mandated by what was said in any one or more of several sets of reasons in Richard Walter.

That is, the authority of *Richard Walter* had been impacted by changes to the assumptions upon which, or the context within which, it was made.

The High Court reiterated that s 175 of the ITAA 1936 must still be read together with s 177 of the ITAA 1936, however, as part of the process of statutory construction under *Project Blue Sky* rather than *Hickman*. While there is obvious overlap between the two, specifically as to 'inviolable limitations' and jurisdictional errors, the High Court adopted the former as:[71]

> not only [was section 177 of the ITAA 1936] not a privative clause, but there [was] not the conflict or inconsistency between s177(1), s175 and the requirements of the Act governing assessment which [called] for the reconciliation of the nature identified in Plaintiff S157/2002 v The Commonwealth.

With respect, while this appears to ignore a long line of authority treating 'conclusive evidence' clauses as a subset of privative clauses more broadly,[72] the *Hickman* principles are no longer relevant in tax matters, at least where the relevant decision is not impacted by jurisdictional error. Therefore, to the extent of any inconsistency, the authority of *Richard Walter* has now been superseded.

Will the decision in *Futuris* lead to substantive changes in outcomes?

In the writer's opinion, once it was accepted that recourse must be made to Dixon J's second step after *Plaintiff S157,* it was extremely unlikely that 'inviolable limitations' existed in tax matters in any event. The reason for this is two-fold:

- unlike the migration context, tax matters will rarely, if ever, involve fundamental rights; and

- Part IVC of the TAA 1953 provides a comprehensive merits review procedure

Fisher argues, in opposition to the first proposition above, that tax matters may indeed involve fundamental rights.[73] Citing the facts in *Darrell Lea Chocolate v Federal Commissioner of Taxation*,[74] he argues that some tax statutes carry criminal sanctions and custodial sentences and this necessarily involves fundamental rights.[75]

In response to Fisher on this point, it is necessary to canvass the decided cases in jurisdictions where fundamental rights have been raised in tax matters and argue by way of analogy. Although not authoritative in Australia, these cases give valuable insight into whether, and if so, to what extent, fundamental rights are relevant in tax matters generally.

In continental Europe, there are broad-based presumptions in favour of fundamental rights under the European Convention on Human Rights (Civil) ('ECHR'). In the recent decision in *Ferrazzini v Italy*,[76] dealing with Article 6 of the ECHR involving the right to a fair trial, the majority concluded:[77]

> The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant . . . It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effect which they necessarily produce for the taxpayer

Ferrazini is now authority for the proposition that disputes over the liability or quantum of a tax assessment generally fall outside the scope of Article 6 of the ECHR.[78] There are, however, a number of European cases involving penalty provisions in tax legislation that have been held to constitute a 'criminal charge' and enliven the protections of Article 6 of the ECHR.[79]

The scope and application of Article 6 of the ECHR has also been considered in England. In *Cartz v Commissioners of Customs and Excise*,[80] the relevant tribunal heard an appeal against a disputed assessment for VAT. The taxpayer did not appear and the issue was whether his fundamental rights would be impinged if it were to continue in his absence. It was decided that as it was a civil rather than a criminal matter, there would be no such breach of the appellant's fundamental rights. In addition, there is English authority for the proposition that assessments of tax for individuals[81] and corporations[82] do not involve fundamental rights.[83]

Admittedly, there has been some suggestion that tax matters may involve fundamental rights importing the protections afforded under Article 6 of the ECHR, at least in a VAT context.[84] However, in a direct tax context, specifically fraudulent or negligent self-assessment by a taxpayer, Jacob J in *King v Walden (Inspector of Taxes*)[85] held that this does not involve fundamental rights despite the criminal nature of the offence.[86]

Clearly, based on the abovementioned authorities, even in jurisdictions layered with various glosses and presumptions in favour of fundamental rights, courts have largely refused to accept that they apply in tax matters, especially in relation to liability and quantum. In this regard, if Australia was to follow that path after *Plaintiff S157*, it would have been be a very slow process.

Fisher also pointed to the reference to jurisdictional error in *Plaintiff S157* as an aid for taxpayers seeking judicial review.[87] He noted that jurisdictional error is broadly interpreted under the High Court decision in *Craig*, that is, that a jurisdictional error will arise where a tribunal identifies the wrong issue, asks itself the wrong question, ignores relevant material or relies on irrelevant material.[88] However, with respect, this argument wholly failed to appreciate that after *Plaintiff S157* there was a critical distinction between jurisdictional errors or 'inviolable limitations' in a particular statutory context. The writer agrees with Spigelman CJ who, speaking extra-judicially, declared that the overall process of interpretation will determine the element of essentiality in the particular circumstances.[89] His Honour's views implicitly acknowledged that different legislative provisions involve or touch upon different rights and in this manner, an error which may be considered jurisdictional in one context, may not necessarily be so in another. A corollary of this is that the decided cases outside the tax context could provide little guidance other than as to process.

In relation to the second proposition outlined above, the Administrative Review Council commented, in the wake of the decision in *Plaintiff S157*:[90]

> It is difficult to predict the effect the decision in Plaintiff S157 will have in other areas currently subject to privative clauses. For example, use of such clauses in the industrial relations context has been

> relatively uncontroversial and therefore effective. It may be significant that this is a context in which there have often been extensive alternative review and appeal rights to which the courts have paid regard when considering the scope and effect of privative clauses applying to industrial disputes

The Council continued:

> the Income Tax Assessment Act provides a comprehensive scheme of review and appeal rights in which a taxpayer can have their tax liability finally determined by a court. This makes it relatively easy for a court to give wide-ranging effect to section 175

This indicated that the existence of comprehensive merits review and appeal processes went to the decision as to whether fundamental rights are at stake in a particular context.

Therefore, although the reconciliation was rejected by the High Court in tax matters, Dixon J's second step and the more direct process of statutory construction under *Project Blue Sky* each have their genesis in the jurisdictional/non-jurisdictional error dichotomy. Applying the decision in *Plaintiff S157* to tax matters pre-*Futuris*, the *Hickman* principles could rarely apply to protect taxpayers given the lack of fundamental rights involved coupled with the comprehensive review and appeal process. Although *Futuris* changed the process via which these matters are dealt with, the very foundations of the enquiry remain and will yield similar results going forward.

Conclusion

The decision in *Richard Walter* was overturned in *Futuris* and the cumbersome reconciliation process under Hickman was rejected in favour of the test in *Project Blue Sky*. However, *Plaintiff S157* had already reduced the *Hickman* principles to a simple rule of construction. Applying the reconciliation process to tax statutes after *Plaintiff S157* would rarely provide taxpayers any comfort for the reasons outlined above, at least, no more than can now be gained from the direct application of the threshold test in *Project Blue Sky*.

Endnotes

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3 (2003) 211 CLR 476
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5 Section 14ZZK(b) and 14ZZP(b), *Taxation Administration Act* 1953
6 *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 13 ATR 825
7 *Trautwein v FCT* (1936) 56 CLR 87-88; *FCT v Dalco* (1990) 20 ATR 1370
8 A Athanasiou, 'Privative Clauses' (2007) 42(1) *Taxation in Australia* 39
9 Note 8
10 B L Jones, 'Section 39B, Section 177 and the Hickman Principle' (2000) 29 *Australian Tax Review* 231 at 234
11 *R v Plowright* (1686) 3 Mod 94; *R v Moreley* (1760) 2 Burr; *R v Medical Appeal Tribunal Ex p Gilmore* [1957] 1 QB 574 cited in PP Craig, *Administrative Law*, 5th ed (2003) at 847
12 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 cited in Craig, *above*, at 849
13 *Ex p Ringer* (1909) 73 JP 436; *Reddaway v Lancs CC* (1925) 41 TLR 422; *Minister of Health v R Ex p Yaffe* [1931] AC 494; *R v Registrar of Companies Ex p Central Bank of India* [1986] QB 1114 cited in PP Craig, *Administrative Law* 5th ed (2003) at 850
14 (1945) 70 CLR 598
15 *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161
16 Note 14 at 615
17 *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 400 per Dixon J
18 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J
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21 Note 19

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24 Note 23
25 Note 23
26 Note 23 at 49-50
27 Note 26
28 (1908) 7 CLR 1 at 7
29 (1995) 127 ALR 21 at 52
30 Note 29 at 41
31 Note 29 at 30
32 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193
33 J Raz, 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195 at 200-201
34 *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147
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36 McHugh, Gummow, Kirby and Hayne JJ
37 Note 35 at 388-389
38 Note 35 at 389 citing *Howard v Bodington* (1877) 2 PD 203 at 211
39 See *R v Loxdale* (1958_ 1 Burr 445; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Mark v Australian Broadcasting Tribunal* (1991) FCR 476; *Townsend's Case* (1554) 1 Plowden 111; *Maloney v McEacharn* (1904) 1 CLR 77; *Sandvik Australia Pty Ltd v Commonwealth of Australia* (1989) 89 ALR 213; *Stallwood v Tredger* (1815) 2 Phill Ecc 287; *Clayton v Heffron* (1960) 105 CLR 214; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454; *Woodward v Sarsons* (1875) LR 10 CP 733*; Scurr V Brisbane City Council* (1973) 133 CLR 242; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234
40 Note 35 at 390-391
41 Note 3 at 491
42 Note 3 at 492-493
43 (1995) 183 CLR 273
44 *Jumbunna Coal Mines NL v Victorian Coal Mines Association* (1908) 6 CLR 309 at 363
45 (1994) 179 CLR 427 at 437
46 Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006)
47 Note 3 at 492
48 (1908) 7 CLR 277
49 Note 48 at 304 cited in Pearce, *above*, at 183
50 *Bropho v Western Australia* (1991) 171 CLR 1 at 20
51 D Bennett AO QC, 'Privative clauses – an update on the latest developments' (2003) 37 *AIAL Forum* 20
52 Hon J Spigelman AC, *above*
53 (1951) 83 CLR 1
54 (1982) 154 CLR 25
55 Note 54 at 70
56 (1991) 173 CLR 132
57 (1932) 47 CLR 121 cited in Pearce, *above*, at 191
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59 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208
60 (2003) 211 CLR 476 at 534
61 Note 51 at 30
62 Note 3 at 501
63 Note 62
64 Note 3 at 496 citing *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82
65 Note 3 at 494
66 See Hon D Kerr, 'Privative clauses and the courts: why and how Australian courts have resisted attempts to remove the citizen's right to judicial review of unlawful executive action' (2005) 5 *QUTLJ* 195
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77 Note 76

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79 See *Vastberga Taxi Aktibolag v Sweden* (2002) 5 ITLR 65; *Jussila v Finland* (2006) 9 ITLR 662; *Bendenoun v France* (1994) 18 EHRR 54

80 Case No 16905 (MAN/99/509), decision 24 October 2000 cited in P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at http://www.taxbar.com/articles.html (accessed 28/01/2009)

81 *Sher Ali (Trading as the Bengal Brasserie) v Commissioners of Customs and Excise* Case No 6952 (MAN/96/699), decision of 20th November 2000 in P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at http://www.taxbar.com/articles.html (accessed 28/01/2009)

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BOOK REVIEW: EVERY ASSISTANCE & PROTECTION: A HISTORY OF THE AUSTRALIAN PASSPORT

Dr Genevieve Ebbeck*

Every Assistance & Protection: A history of the Australian Passport
By Jane Doulman and David Lee, The Federation Press

Every Assistance & Protection is a comprehensive history of the Australian passport, a work commissioned by the Department of Foreign Affairs and Trade. It starts with the origins of the modern passport, which is sourced in documents such as the *sauf conduit* (safe-conduct) and the King's Licence and traces the emergence of the Australian passport to the present-day biometric passport.

Fundamentally, it is an historical examination of the Australian passport, rather than a legal text upon passport law. It does not, for example, examine legal issues such as ownership of a passport in the case of dispute between governments, or between a citizen and his/her government. Nevertheless it assists in understanding the current legal position regarding challenges that may be brought to decisions made under the *Australian Passports Act 2005* (Cth) and the scope of administrative review available in respect of decisions refusing to issue, or cancelling, passports.

The book is written in a style that engages the reader and it proves to be interesting reading despite what might appear to many readers to be a very narrow topic. Indeed, one of the strengths of the book is the way it links its topic to broader social issues relevant in Australia over the course of last century.

Overall, it is a work that brings significant new knowledge to the field of Australian history, including Australian legal history. It is likely to prove worthwhile reading for those people interested in such history, as well as be a valuable resource to lawyers needing to research particular issues about Australian passports.

Early chapters of the book are flavoured with rivalry between the newly-formed Commonwealth Government and the Australian State governments. The holder of the first Australian Commonwealth-issued passport is identified as a Melbourne businessman, John Edward Briscoe, who applied for passports for himself and his sister in April 1901 in order to travel to Europe. No record can be found of another Commonwealth-issued passport until 1908. The States continued their practice of issuing travel documents, also known as passports.

It was not until the outbreak of World War 1 that the Commonwealth gave serious attention to regulating the movement of persons by way of passport control. The Commonwealth pressed for a centralised passport system, which necessitated the States agreeing to refrain from issuing passports. The States resisted strongly, arguing that the Commonwealth lacked

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the transport and communication infrastructure to support a centralised passport system, and also that they as State governments were better able to judge which applicants for passports from their jurisdictions should be granted them. Finally persuaded that the issue was one of national security, the States capitulated, but on the understanding that it would be a temporary emergency measure for the duration of the war. In fact, of course, the Commonwealth retained centralised control from that point on.

The passport was used by the Commonwealth Government as a means of controlling and monitoring the most valuable wartime asset, namely manpower. In November 1915, passports became compulsory for all males of military age. It appeared to be assumed that civilian males applying for passports were attempting to evade military service, and the onus was put on them to prove otherwise. The authors go so far as to state that the passport interview became 'tantamount to an interrogation … [and] the application process intensified pressure on men to enlist'. The compulsory passport requirement was in due course extended to women and then the application fee was increased significantly as a practical deterrent to persons wanting to leave Australia.

There was significant public opposition to the need to obtain a passport. A compulsory passport had previously been associated only with 'perceived police-states' and was seen to be an affront to the freedom of British subjects to move within the Empire at will. Nevertheless, the Australian passport was to become 'one of the war's most visible legacies', assisting emerging modern nation-states to determine 'who was 'in' and who was 'out''.

In the years following World War 1, the passport was to be used as a tool to try to curb social, economic and political unrest. By 1919, for example, Russians of any class or persuasion were banned from entering Australia in order to try to curb the spread of international communism. The authors write that the decision of the Hughes government to pass Australia's first distinct passport legislation in 1920 owed much to the perception that foreigners were the root cause of industrial unrest, high unemployment and emerging anti-imperial sentiment.` Chapter 3 of the book examines the linkages between passport regulation and immigration controls.

Also of interest throughout the book is the discussion of how the Australian passport was used to shore up various social or moral standards. By the mid-1930s, for example, passports could be and were refused to a single girl wanting to accompany a man on a trip abroad, or a single girl desiring to go abroad for the purpose of getting married against the wishes of her parents. Women began to challenge the use of the passport regime to police women's lives.

Interestingly, from an administrative law perspective, is the discussion of the challenge made in 1934 to the Minister's authority to withhold the issue of a passport. The opinion of the then Solicitor-General, George Knowles, was sought and he confirmed that the legislation did not specifically confer power on any authority to issue or withhold passports. He and the Attorney-General's Department took the view that there was an implied duty to issue a passport given its mandatory nature, and legislative amendment was needed to clarify the grounds for refusing to issue a passport. The extent of any discretionary power to withhold the issue of a passport was examined by the High Court in *The King v Paterson; Ex parte Purves* [1937] Argus LR 144, and this case is discussed in Chapter 4. New legislation in 1938 finally dealt with the discretionary issue, amongst other issues such as the surrender of a passport obtained by false or misleading statements.

A contentious issue during World War 2 was whether passports should be issued to the wives, fiancées and families of AIF men posted overseas in countries such as Egypt and Palestine. After a somewhat briefer discussion of the role of the passport during World War 2

as compared with World War 1, the book turns to focus on what occurred during the Cold War. This discussion is also of particular interest from an administrative law perspective.

The holders of passports issued by **C**ommunist countries were viewed with suspicion by government agencies such as ASIO, as potential enemies of Australia. There was also a keen desire to identify subversives within Australian society, and 'between 1950 and 1956, therefore, the most aggressive and public use of passport policy as a national security tool was against Australian citizens'. The crucial legal issue was whether Australian citizens were to be issued with passports as 'a matter of right', ie a right possessed by all Australian citizens, or whether the Government could curtail their movements by, for example, refusing to grant passports to known Communists or to persons intending to proceed to Communist territory without good and sufficient reason. In April 1955, Taylor J of the High Court ruled in favour of the Government, upholding the conditional nature of the passport in the matter of *R v Holt and Dwyer; ex parte Glover* (unreported) and there is discussion of the case in Chapter 5. Then, Chapter 6 concentrates on the 17 year struggle of the journalist Wilfred Burchett to have an Australian passport issued to him.

Chapter 7 examines the Australian passport in the context of the creation of a statutory Australian citizenship in 1948, and related issues such as dual citizenship. It also continues to examine the use of the passport as a tool for enforcing broader government policies such as compliance with national service obligations. During the 1970s, there was increasing public attention on international human rights as set out in the UHDR, ICCPR and ICESCR. Both the ICCPR and the ICESCR asserted the right of individuals to travel freely, subject to restrictions provided by law, which led some to argue that a passport was an inalienable right. There was renewed interest in ensuring that the reasons for which the issue of an Australian passport may be denied be expressly embodied in the *Passports Act*. The *Passports Amendment Act 1979* (Cth) articulated the ground on which authori**s**ed officers might, unless directed by the Minister, refuse passports. It was not until 1984 that legislative amendment made decisions under the *Passports Act* reviewable by the AAT and further clarified the ministerial discretion to refuse to issue a passport.

The final chapter in the book discusses the development of internationally recognized biometric technology and the 2005 introduction of Australia's ePassport and enactment of the *Australian Passports Act 2005* (Cth). Biometric technology was developed in order to combat international crimes such as drug trafficking and terrorism. Biometric methods of validating identity include fingerprints, face recognition, hand geometry and iris recognition. The authors note that Australia has been an active participant in the framing of international standards for biometric passport. From 24 October 2005, the Commonwealth has issued the ePassport, which embeds a digitised photograph stored in a computer chip. The ePassport also incorporates security features to prevent anyone from changing or accessing the computer chip forming part of the passport.

Subsection 7(1) of the *Australian Passports Act 2005* provides that an Australian citizen is *entitled*, on application to the Minister, to be issued with an Australian passport by the Minister. Understood against the history of the previous century, and the struggle between discretion and entitlement, this is a milestone in the development of the Australian passport. This new Act clearly sets out the bases upon which the Minister may refuse to issue, or cancel, a passport, and such decisions are reviewable under the *Administrative Appeals Tribunal Act 1975* (Cth).

As its title indicates, the book is an historical examination of the development of the Australian passport, rather than passports generally and particular types of passports. For example, there is only brief mention made in the book of the development of the international passport, via League of Nations conferences, and of the Nansen Passport for stateless persons. (The Nansen Passport was the first refugee travel document issued, and it

developed after the Russian Revolution for Russian refugees.) These issues are not examined in any detail in this work. Furthermore, as noted at the outset of this review, it is primarily an historical examination of the passport rather than a legal analysis of passport law and the Australian passport in particular. It is a well written, interesting and comprehensive analysis that clearly meets its goal of being a history of the Australian passport.

THE DISCRETIONARY GRANT OF CONSTITUTIONAL WRITS

Relevant principles and circumstances for grant or refusal

Zac Chami*

Section 75(v) of the Constitution confers upon the High Court original jurisdiction in all matters '[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. For most of the twentieth century, the two writs mentioned in s 75(v), mandamus and prohibition, were referred to as prerogative writs, since as public law remedies they were historically issued at the prerogative of the Crown.

More recently, they have come to be known as the constitutional writs, since the source of the High Court's jurisdiction to issue the writs is s 75(v), rather than any royal prerogative.[1] The High Court has affirmed that the conferral of jurisdiction to issue these writs implies the conferral of authority to issue another writ, that of certiorari, as a form of incidental or ancillary relief.[2] In this paper, although it is not a constitutional writ *per se*, mention of the constitutional writs will also include a reference to certiorari.

In the context of judicial review of administrative decision-making, the effect of the constitutional writs can be summarised briefly: prohibition will prevent officers of the Commonwealth from enforcing or acting upon a decision (or a purported decision), mandamus will force a decision-maker to make a decision and certiorari will quash a decision (or a purported decision). Where a decision-maker has purported to make a decision and a person adversely affected by that decision seeks judicial review, these writs will be available if the decision-maker has made an error affecting the exercise of his or her jurisdiction. In particular, the High Court has held that unless its operation has been validly excluded by statute, breach of the common law duty to afford natural justice, or procedural fairness as it is more commonly referred to, will enliven the jurisdiction conferred by s 75(v).[3]

The intention of the framers in including s 75(v) in the *Constitution* is revealed in a speech by Sir Edmund Barton in the Convention debates, to which Gleeson CJ referred in the seminal s 75(v) case of *Plaintiff S157/2002 v Commonwealth*.[4] That intention was to provide a means:

> ... to obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his duty, or to restrain him in the performance of some statutory duty from doing some wrong ... so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made

Thus, as the High Court has emphasised, s 75(v) 'secures a basic element of the rule of law' and 'introduces into the Constitution of the Commonwealth an entrenched minimum

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provision of judicial review.'[5] Section 75(v) is therefore of fundamental importance to Australia's claim to be a free society. Access to the remedies it provides is not constrained by geography, thus anyone with the requisite standing can initiate proceedings against an officer of the Commonwealth (or have proceedings initiated on his or her behalf), regardless of where on earth that officer is located. Standing is not restricted to Australian citizens, hence s 75(v) ensures that the operation of the rule of law extends to non-citizens as well. Most importantly, the jurisdiction of the High Court conferred by s 75(v) is entrenched by the Constitution and cannot be removed by the Parliament.[6] There is no equivalent in either the American or Canadian constitutions.[7] If an equivalent provision had been drafted into the Constitution for the United States of America, the detainees at Guantanamo Bay might not now be held in a legal black hole.

Given the significance of s 75(v), it might be thought that relief should follow automatically whenever a case for one or more of the remedies it provides is established. However, in *Re Refugee Review Tribunal; Ex parte Aala*, the High Court held that the issue of the constitutional writs is always discretionary.[8] This paper identifies several grounds upon which the constitutional writs may be refused in the exercise of judicial discretion, upon review of administrative decisions. It then discusses the principles that govern the exercise of that discretion, and examines how those principles will affect the circumstances in which constitutional relief will be granted or refused. In particular, this paper discusses the consequences and potential consequences of two recent High Court migration cases on the discretionary grant of the constitutional writs.

Other applications of s 75(v) discretions

Before moving on to those topics, however, it is worth noting that the discretionary considerations discussed below are not exclusive to judicial review by the High Court in its s 75(v) jurisdiction. The High Court is empowered to remit certain s 75(v) matters to the Federal Court or the Federal Magistrates Court.[9] Those courts also each have their own original jurisdiction defined in the same terms as s 75(v), though with some statutory exceptions and limitations, and they can transfer certain matters between each other.[10] Consequently, the discretionary considerations relevant to the High Court's exercise of its s 75(v) jurisdiction will be similarly relevant to the exercise by the Federal Court and Federal Magistrates Court of their equivalent jurisdictions.

Rights of appeal from these lower courts also exist, hence the High Court can issue these writs in its appellate jurisdiction as well as its original jurisdiction.[11] In this paper, mention of the constitutional writs will also include a reference to writs of the same name, and to orders in the nature of those writs, that are available in the Federal Court and Federal Magistrates Court (or on appeal in the High Court) in their equivalent jurisdictions.

Another related area in which these discretionary considerations will be relevant is judicial review pursuant to ss 5-7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act). Section 16 of that Act empowers the Federal Court or Federal Magistrates Court to make certain orders in the exercise of its judicial review function, and provides that the relevant court may exercise those powers 'in its discretion', but does not list any grounds upon which that discretion may be exercised. Section 10 of the AD(JR) Act provides an additional set of discretionary grounds upon which the court may refuse to grant an application for review, but does not list any considerations that will be relevant to when those grounds should be applied.

Accordingly, the discretionary considerations relevant to the grant or refusal of the constitutional writs will undoubtedly be relevant to the making or the refusal to make orders under the AD(JR) Act. The different statutory context of such review must of course be taken

into account, but the similarities between judicial review of administrative decisions under s 75(v) and under the AD(JR) Act will ensure that a substantial portion of s 75(v) jurisprudence will also be relevant to AD(JR) Act review.

Function of judicial review

In *Corporation of the City of Enfield v Development Assessment Commission and Another*, Gaudron J said:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[12]

This interpretation of the function of judicial review provides a powerful argument against the constitutional writs being discretionary at all, or at least against their refusal in all but the most limited circumstances. There is, as Lord Justice Bingham has observed, something quizzical about the idea that a remedy for an abuse of official power might be withheld, thus allowing the abuse to stand.[13] This approach adopts the traditional view that judicial review is primarily a means for keeping those who exercise the executive power of government within the legal limits imposed on the scope of that power.

A more recent variation on this traditional view was expressed by Gaudron and Gummow JJ in *Aala*, where their Honours noted that whereas the doctrine of *ultra vires* is concerned with the character of an administrative decision, the conditioning of a statutory power on adherence to the duty to afford procedural fairness is instead concerned with the procedures followed in making that decision.[14] Upon their Honours' variation, the focus of judicial review remains centred on the duties of administrative decision-makers, but the point of focus is shifted slightly back in time to before the decision was made.

Yet, as Gleeson CJ has observed, there has been a shift of emphasis in Australian administrative law from the duties of administrators to the rights of citizens.[15] Taking the perspective of a person adversely affected by an administrative decision, there is much force behind the proposition that a person who has been denied fair procedure or access to a fair hearing in the making of that decision should be entitled to have the decision re-made. Such a person's rights have not been treated with the respect they deserve and in those circumstances administrative justice will not be seen to have been done.[16] Upon either this rights-based approach or the traditional duties-based approach, the constitutional writs should not be lightly refused. It is for this reason that prohibition has been held to issue 'almost as of right'.[17]

Effect of *Bhardwaj*

An additional argument against refusing constitutional relief arises from the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (*Bhardwaj*).[18] In that case, Gaudron and Gummow JJ said that '[a] decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.'[19] Their Honours went on to say that if a decision is affected by jurisdictional error, the decision-maker's duty will remain unperformed and that there will be no legal impediment to the decision being re-made, without any requirement for judicial intervention.[20]

It has been argued that, as a result of *Bhardwaj*, discretionary considerations affecting the grant of relief may now be less important, since once the presence of jurisdictional error has

been established, no court order is necessary to dispose of the decision under review.[21] However, whilst that consequence may follow as a matter of logic, it does not appear to have followed as a matter of practice. The Full Federal Court recently heard a submission that, following *Bhardwaj*, the Court had no discretion to refuse relief. It dealt with this submission peremptorily. Besanko J, with whom Moore and Buchanan JJ agreed, bluntly rejected this argument and noted that several decisions of the High Court, both before and after *Bhardwaj*, affirm the proposition that the constitutional writs are always discretionary.[22]

A related logical consequence of the High Court's decision in *Bhardwaj* concerns the removal of unlawful non-citizens from Australia. Pursuant to s 198(6) of the Migration Act, an unlawful non-citizen must be removed if certain criteria have been met. One criterion is that the non-citizen's application for a visa has been refused and that application has been 'finally determined'.[23] Section 5(9) of that Act states that an application is 'finally determined' when 'a decision that has been made in respect of the application' cannot or can no longer be reviewed under either Part 5 or Part 7 of the *Migration Act*, which provide for review by the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) respectively.

Following *Bhardwaj*, if a court finds that a decision of the relevant Tribunal is affected by jurisdictional error, the Tribunal will not have made a decision at all and its duty will remain unperformed. If the Tribunal's duty has not been performed, then the 'decision that has been made in respect of the application' will still be subject to review, hence the application for a visa will not have been finally determined and the non-citizen cannot be removed pursuant to s 198(6). Therefore, if a court makes a finding of jurisdictional error but refuses relief, it follows from the High Court's decision in *Bhardwaj* that this would leave an unlawful non-citizen in a state of legal limbo.

Thus *Bhardwaj* and judicial discretion to refuse relief co-exist uneasily. After all, decisions are 'social facts', even if they are legal nullities.[24] Since an adversely affected person usually needs a court order to declare an administrative decision invalid and to prevent reliance by others on it, the notion that such a decision is a nullity has diminishing utility.[25] Strictly speaking, if a court finds that an administrative decision is affected by jurisdictional error, but nevertheless refuses relief, the consequence of *Bhardwaj* is that the rights of the applicant will have been determined by something that lacks the status of a legal decision. Any official action taken in reliance upon that purported decision, such as the removal of an unlawful non-citizen from Australia, will therefore lack a firm legal basis and could be unlawful. Nevertheless, the Full Federal Court has demonstrated that these considerations will not influence the exercise of judicial discretion to refuse relief.

Discretionary grounds

The judgment of Gaudron and Gummow JJ in *Aala* discussed the history of the constitutional writs in some depth, and that of prohibition in particular, and identified several considerations relevant to the discretionary grant of those writs. Quoting previous High Court authority on mandamus, they held that constitutional relief may be refused if there is a more convenient and satisfactory remedy, if it would not lead to any useful result, if there has been an unwarrantable delay or if the applicant has acted in bad faith.[26] Quoting a judgment of Lord Denning MR that dealt with certiorari and declarations, they held that relief may be refused if an applicant has acquiesced in the invalid administrative action, has waived his or her right to complain, has not applied for relief with due diligence or has been guilty of disgraceful conduct and suffered no injustice.[27]

In respect of an applicant suffering no injustice, it appears that Lord Denning MR was referring to a ground for refusal similar to that of bad faith, and meant that it is not unjust for one to suffer some harm as a result of one's own disgraceful conduct. However, Gaudron

and Gummow JJ directed their attention to a different meaning of 'no injustice', similar to the ground of refusal for no useful result ensuing. Referring to authorities from throughout the Commonwealth, they listed various circumstances in which relief will be refused for this reason, each of which possessed the essential element that a court will not grant relief if to do so would be futile.[28]

Thus the constitutional writs can be refused both for reasons that are personal to the applicant and for reasons that are objective.[29] In this regard, delay, bad faith, waiver and acquiescence fall into the personal category, while futility and the availability of a preferable remedy fall into the objective category. This list is not exhaustive and several of these grounds for refusal, in particular futility, can be divided into a number of sub-grounds. This paper now examines recent developments in the migration jurisdiction that will affect discretionary refusal of relief on the grounds of futility and delay.

Futility

There are a number of related grounds for the discretionary refusal of constitutional relief that each possess the central element that the grant of relief would be futile.[30] The existence of this ground owes more to pragmatics than to any deeper principle governing the operation of judicial review. Consider, for instance, a situation whereby a decision-maker fails to afford an applicant procedural fairness but a court refuses relief on the ground of futility. In that situation, the decision-maker's invalid exercise of power will be allowed to stand and the applicant's rights will not have been treated with the respect to which they are entitled. These constitute two significant harms to the principles that underlie judicial review. However, the remedy for these harms could cause material harms of its own, in the form of wasted time, effort and expense for everyone concerned. Thus, in deciding whether to refuse relief for futility, the reviewing court must weigh up the harm that would be done to principle by refusing relief against the material harms that may result from granting relief. Given that far greater harm would result if an applicant was deprived of the chance of a successful outcome, it follows that relief will only be refused if the court is absolutely convinced that to grant it would be futile, which will be no easy task.[31]

One unresolved issue concerning the refusal of relief for futility is whether futility should be measured at the past time of the original decision or at the future time of the proposed re-making of the decision. In most circumstances, either test will yield the same result.[32] However, occasionally a decision-maker will be bound to make a decision based on the circumstances at the time of the decision, and those circumstances may change between the time of the original decision and the time of the proposed re-making of the decision. Any such change might be favourable or unfavourable to the applicant, or it might have no effect on the decision at all. If the change is favourable to the applicant, assessing futility at the future time might put the applicant in a better position than he or she would have been in if the original decision had been valid, while assessing futility at the past time might deprive the applicant of some benefit to which he or she would otherwise be entitled. Since assessing futility focuses on practical outcomes, rather than on processes, rights or duties, considerations concerning the function of judicial review offer little guidance. Though there is authority to the effect that a change in circumstances favourable to the applicant will not give rise to any ground for remitting a matter to an administrative decision-maker, the cases are divided as to whether a court may take such a change into account in the exercise of its discretion by assessing futility at a future time.[33] Where this situation arises, then, the reviewing court may be left to seek whatever guidance can be obtained from the relevant statutory scheme.[34]

Discretionary refusal of relief for futility was discussed in *Stead v State Government Insurance Commission*.[35] In that case, the High Court heard an appeal from a State

Supreme Court, in which the appellant had at trial been stopped from making submissions on a point of law that was subsequently decided unfavourably to him. The High Court held that the appeal must fail, since despite the denial of natural justice at trial, the point of law in issue must inevitably have been decided unfavourably to the appellant, hence to order a new trial would have been futile.[36] Although this case involved appellate review of a judicial decision, the judgments of the High Court in *Aala* demonstrate the applicability of its governing principle to judicial review of administrative decisions as well.[37] Some of the circumstances identified by the High Court in *Aala* as giving rise to refusal for futility, despite a denial of natural justice, include where no different result would have been reached on the merits, where the decision-maker was bound by the governing statute to refuse the application and where the decision 'turned on an issue different to that which gave rise to the breach of natural justice.'[38] Since that decision, a number of migration cases have explored one particular variation of the ground of futility, namely that relief may be refused in the court's discretion if there is a separate independent basis for the administrative decision under review that is unimpeached by any reviewable error. To illustrate this concept, something must first be said about the history and the statutory context in which these cases have arisen.

History and statutory context

At the time *Aala* was decided in 2000, the MRT and the RRT were bound by the common law duty to afford procedural fairness and the constitutional writs were available to remedy a breach of that duty.[39] The following year, the federal government introduced a privative clause into the Migration Act, in an attempt to restrict judicial review of MRT and RRT decisions under s 75(v) to the greatest degree constitutionally possible. That clause stated that particular decisions 'made ... under this Act', could not be the subject of judicial review in any court.[40] However, in 2003, the High Court read down that privative clause, so that a decision involving jurisdictional error, including a failure to afford procedural fairness at common law, was not a decision 'made ... under this Act' and therefore remained reviewable under s 75(v).[41] Nevertheless, in 2002, the government had also approached the policy goal of reducing migration litigation from another angle by introducing ss 357A and 422B into the Migration Act. Those provisions state that the procedures in the Migration Act to be followed by the MRT and RRT respectively are taken to be an exhaustive statement of the natural justice hearing rule. Consequently, in the situation of an application to the MRT or RRT made after the commencement of those provisions, any breach of the common law duty to afford procedural fairness will not give rise to jurisdictional error and therefore will not be reviewable, because those Tribunals are not bound by any such duty.

One of the 'centrepieces' of the statutory regime of procedural fairness that replaced the common law duty to afford procedural fairness is s 424A of the Migration Act.[42] That provision requires the RRT to give to the applicant, subject to specific exceptions, 'particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.' In the case of *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court held that breach of s 424A of the Act by the RRT (or, inferentially, of its MRT equivalent s 359A) constitutes jurisdictional error.[43] Breach of these provisions is now responsible for a significant proportion of successful applications for constitutional relief.

Separate independent basis

Primarily as a consequence of *SAAP*, a number of cases in the migration jurisdiction have considered the relationship between breach of the common law and statutory duties to afford procedural fairness and discretionary refusal of relief for futility. These cases have held that in particular circumstances involving a separate independent basis for a decision of the MRT

or RRT, there may be no breach of the relevant duty, or relief may be refused on the grounds of futility.[44] Due to the highly technical nature of this area of administrative law, the cases dealing with a separate independent basis for a decision tend to be fact-specific and statute-specific. Further, most of the relevant authority derives from judgments of the Federal Court, while the High Court authority is predominantly *obiter*. However, the High Court has recently heard the case of *SZBYR v Minister for Immigration and Multicultural and Indigenous Affairs* (*SZBYR*), and is expected to hand down its decision in the near future.[45] Hopefully, this decision will resolve much of the confusion in this area.

SZBYR concerned a decision of the RRT to affirm a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs that the applicant was not entitled to a protection visa. On the simplest possible interpretation of the RRT's reasons, it disbelieved the applicant's story of events ('the first finding'), but said that even if the applicant had been telling the truth, those events would not amount to persecution for the purposes of the Migration Act ('the second finding'). The first finding was based in part on a piece of information ('the information'), which would have attracted the obligation in s 424A, if the court determined that the information was the reason or a part of the reason for the RRT's decision. The RRT did not give particulars of the information in writing to the applicant, as s 424A would have required if the court made that determination. The High Court was asked to answer three questions: did s 424A apply; if so, did the Tribunal fall into jurisdictional error; and if so, should relief be refused in the court's discretion?

On one view of the scenario in *SZBYR*, the RRT's first and second findings constituted two separate and independently sufficient bases for the RRT's decision.[46] On this view, it is arguable that the information attracted the obligation in s 424A, since it formed a part of the reason for a finding upon which the RRT's decision was based. Then, since even a trivial breach of s 424A will give rise to jurisdictional error, as the High Court held in *SAAP*, the RRT's decision was invalid.[47] However, it is also arguable that the information did not attract the obligation in s 424A, or alternatively, that any breach of s 424A did not give rise to jurisdictional error, since the first finding was not material to the RRT's decision. This argument derives support from decisions relating to s 5(1)(f) of the AD(JR) Act, which provides for judicial review if a decision 'involved' an error of law. In *Australian Broadcasting Tribunal v Bond*, Mason CJ said that for this requirement to be made out, the error must be material to the decision, 'so that, but for the error, the decision would have been, or might have been, different.'[48]

Applying the 'but for' test of materiality to the obligation in s 424A: but for the first finding, the RRT's decision would still have been the same on the basis of the second finding; therefore, the first finding was not material to the RRT's decision; therefore, the information was not a part of the reason for the RRT's decision; therefore, s 424A did not apply. Alternatively, applying the 'but for' test of materiality to jurisdictional error: but for any breach of s 424A, the RRT's decision would still have been the same on the basis of the unimpeached second finding; therefore, the breach was not material to the RRT's decision; therefore, there was no jurisdictional error. Admittedly, though, the argument that an immaterial breach of s 424A will not give rise to jurisdictional error, although a trivial breach of s 424A will, distinguishes *SAAP* on a very narrow basis.

However, on this same view of the scenario in *SZBYR*, it would remain arguable that, if the information did in fact attract the obligation in s 424A and if the RRT's breach of s 424A did in fact give rise to jurisdictional error, relief should nevertheless be refused in the court's discretion on the ground of futility, since the RRT would inevitably have reached the same decision on the basis of the second finding. The particular structure of the Migration Act lends support to this argument. As a consequence of several provisions of that Act, the RRT must refuse to grant a protection visa if it is not satisfied that the applicant is entitled to that

visa.[49] The existence of the second finding would mean that the RRT could not possibly be satisfied that the applicant is entitled to a protection visa, regardless of whether it accepted the applicant's story of events. Therefore, the RRT would be bound by the governing statute to make the same decision, irrespective of any error affecting only the first finding.[50] This legal obligation is significant, because the High Court has expressed some discomfort with the proposition that relief may be refused on the basis that a decision-maker would have made the same decision solely on the merits, rather than because he or she was legally bound to make that same decision.[51] That proposition sits uneasily with the principle that the role of judicial review is not to re-evaluate the merits of the administrative decision.

On an alternative view of the scenario in *SZBYR*, it is logically impossible to argue that the events narrated by the applicant never took place, but that when they did take place, they did not amount to persecution.[52] Therefore, the second finding could not have formed a basis for the Tribunal's decision, but was akin to an alternative, hypothetical basis. On that alternative view, the information would undoubtedly have attracted the obligation in s 424A and the RRT's breach of s 424A would undoubtedly have given rise to jurisdictional error. Further, the Tribunal would not have inevitably reached the same decision, since its second finding was merely hypothetical. Nevertheless, it would remain arguable that relief should be refused in the court's discretion on the grounds of futility, since the RRT would almost certainly have reached the same decision.

In any particular case involving a separate independent basis for a decision, the correct view as to whether either or both findings formed a basis or bases for the decision will depend upon the interpretation of the decision-maker's reasons in the circumstances of that case. In such a case, the court's investigations into whether there has been a common law or statutory procedural fairness breach, whether there has been jurisdictional error and whether relief should be refused for futility will each cover substantially the same territory. To further complicate matters, administrative decisions will rarely disclose a clear demarcation between their various findings and those findings will often rest upon several pieces of information, only some of which may attract a particular procedural fairness obligation at common law or under statute.

Therefore, the process of interpreting administrative decisions and determining what consequences follow from them will rarely be straightforward, as *SZBYR* demonstrates. Nevertheless, the questions of whether there has been a breach, whether that breach gives rise to jurisdictional error and whether relief should be refused are distinct and must be dealt with separately. That is because the question of breach is directed at the correct processes to be followed, the question of reviewable error involves interpreting the legislative purpose behind the relevant statutory scheme and the question of discretionary refusal for futility invites a focus on practical outcomes that the High Court has emphasised is irrelevant to the first two questions.[53]

Delay

If a person adversely affected by an administrative decision has failed to seek judicial review of that decision within an amount of time deemed appropriate by the reviewing court, the court may withhold constitutional relief. It may also refuse relief for a delay in expediting proceedings that have already commenced.[54] The competing sets of harms to be weighed by the court in deciding whether to refuse relief for delay are different to those that are relevant to refusal for futility. On the side of refusing relief, there is the injustice of conferring any benefit on an applicant whose tardiness constitutes blameworthy personal conduct and the public interest in having proceedings finalised promptly and with certainty. On the side of granting relief, there is the right of an applicant to be afforded procedural fairness, the public

interest in administrative decision-makers acting within power and the possibility that the reviewable error has cost the applicant an outcome to which he or she is entitled.

In other contexts, statutes of limitation will often prevent the commencement of proceedings beyond a certain time, so that parties can plan for the future in the knowledge that a matter has been finalised. As a matter of good administration, those exercising administrative and policy-making functions require similar finality in administrative matters.[55] To this end, the AD(JR) Act and the Migration Act impose time limits on how long applicants have to apply for judicial review of certain administrative decisions.[56] Similarly, various rules of Court impose extendable time limits on the availability of appeals from those and other cases.[57] It is difficult to see how an application made within the applicable time limits could ever involve any undue delay, while an application made either outside of those time limits, or beyond such further time as the court will allow (where available), will be barred by statute. Consequently, where an application to the Federal Court or Federal Magistrates Court is made under the AD(JR) Act, or under the Migration Act in respect of a migration decision (as defined by that Act), the reviewing court will only exercise its discretion to refuse relief on the ground of delay in exceptional circumstances.

Bodruddaza

In the recent case of *Bodruddaza v Minister for Immigration and Multicultural Affairs* (*Bodruddaza*), the High Court held s 486A of the *Migration Act* to be invalid.[58] That provision purported to impose a time limit of 28 days, with a discretionary 56 day extension, on applications to the High Court under s 75(v) for judicial review of migration decisions. The Court found it unnecessary to decide whether a fixed time limit could ever be valid, but stated that 'a law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure, as explained in *Plaintiff S157/2002*.'[59] Noting that the circumstances giving rise to jurisdictional error might only become known after the expiry of a fixed time limit, the Court said that the preferable way to deal with untimely s 75(v) applications is through the rules of Court, which the justices author, and through the exercise of judicial discretion.[60]

Therefore, unless and until a constitutionally valid time limit is imposed, the constitutional writs will remain available under s 75(v) indefinitely, for judicial review of both migration and other classes of administrative decisions. Consequently, a litigious applicant could extinguish all available avenues of review and appeal, then commence fresh proceedings in the High Court's original jurisdiction for review of the same decision. In those circumstances, the court might dismiss the application on the grounds of *Anshun* estoppel or *res judicata*, or as an abuse of process. If such a matter did proceed to a hearing and reviewable error was established, relief might then be refused for delay.

Relief was not refused on this basis in *Aala*, where the applicant had waited until after receiving an unfavourable judgment in his Full Federal Court appeal, from an application for judicial review under the Migration Act, before commencing proceedings under s 75(v).[61] However, the existence of wider review grounds under s 75(v) than under the Migration Act as it then stood had only been established while judgment was reserved by the Full Federal Court, hence the only relevant period of delay was between the handing down of that decision and the applicant's High Court application.[62] The review grounds available in a judicial review application of a migration decision under the Migration Act and under s 75(v) are now identical, while those available under ss 5-7 of the AD(JR) Act are less restrictive than those under the Migration Act as it applied in *Aala*. Therefore, in similar circumstances

today, the relevant delay would probably be measured from the time of the original decision and might constitute a sufficient reason for the discretionary refusal of constitutional relief.

The decision in *Bodruddaza* will also allow applicants who fail to apply for judicial review to the Federal Court or Federal Magistrates Court before the expiry of the prescribed time limits to commence alternative proceedings in the High Court's original jurisdiction, in effect circumventing those time limits. Since the exercise of discretion to grant or refuse relief logically takes place subsequent to the determination of the existence of reviewable error, delay cannot be invoked at the commencement of proceedings to dismiss an untimely application. Nevertheless, the availability of this ground may encourage judicial review applicants to be diligent in asserting error, to the general benefit of the wider public through improved administration.

Other considerations

The content of the duty to afford procedural fairness will be informed by the statutory context of the power being exercised.[63] It does not necessarily follow that the discretion to refuse relief will be informed by that statutory context. Nevertheless, the Parliament has set time limits for review of particular decisions and the effect of invoking the High Court's original jurisdiction will be to circumvent those time limits so that an otherwise time-barred application may be heard. It is plausible that the existence of those time limits may exert some influence on the exercise of judicial discretion to refuse relief by reason of delay. If that is the case, in circumstances where an applicant is time-barred from seeking judicial review under statute and applies for judicial review under s 75(v), but has no explanation for his or her delay, the reviewing court may be more willing to refuse relief than it would otherwise have been in the absence of those time limits.

The public interest in having proceedings finalised promptly and with certainty is, by itself, far less significant than the considerations favouring the grant of relief. However, if an applicant fails to assert his or her rights by applying for judicial review of an invalid decision within a reasonable time, the reviewing court may make a negative assessment of the applicant's personal conduct, which in extreme circumstances may outweigh these competing considerations. Accordingly, the court's assessment of the applicant's conduct will be of great importance in deciding whether to refuse relief for delay. The circumstances in which such conduct will be so blameworthy as to convince a court to refuse constitutional relief for delay are exceedingly rare. Nevertheless, as this ground is available as a matter of principle, the threat of its invocation may tacitly encourage greater diligence in applying for judicial review, thus advancing one of the policy objectives that forms a justification for its availability.

Conclusion

The constitutional writs serve the vital purposes of ensuring that administrative decision-makers exercise their powers in accordance with the law and of upholding the rights of those adversely affected by such decisions to be afforded procedural fairness. Because of the comprehensive nature of judicial review under the AD(JR) Act, only rarely will they be sought in respect of an administrative decision where review under that Act is available. Through the operation of the privative clause in s 474 of the Migration Act, these writs offer the only available form of relief in respect of judicial review of migration decisions. However, the grounds upon which they may be granted in this context are very narrow. Nevertheless, the function of the constitutional writs in 'secur[ing] a basic element of the rule of law' and 'introduc[ing] into the Constitution of the Commonwealth an entrenched minimum provision of judicial review'[1] remains of fundamental importance.[64]

In the near future, the High Court is expected to clarify a great deal of the uncertainty surrounding the refusal of constitutional relief for futility. The consequences of there being a separate independent ground for the making of an administrative decision illustrate the complex relationship between breach of a decision-maker's duty, the existence of jurisdictional error and refusal of relief for futility. Hopefully, the decision in *SZBYR* will reduce some of the confusion in this area. As a consequence of the High Court's decision in *Bodruddaza*, the courts may more often be called upon to refuse relief for delay in migration cases, which may involve a difficult assessment of the competing interests attaching to judicial review. Irrespective of the forthcoming decision in *SZBYR* and the likely consequences of *Bodruddaza*, however, the circumstances for the discretionary refusal of the constitutional writs will remain extremely narrow, as is proper for remedies of such great significance.

Endnotes

1 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ("*Aala*") at [21] per Gaudron and Gummow JJ, at [86] per McHugh J at 93, at [144] per Kirby J, at [165] per Hayne J.
2 *Aala* (2000) 204 CLR 82 at [14] per Gaudron and Gummow JJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*) at [80] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
3 *Aala* at [41] per Gaudron and Gummow JJ.
4 (2003) 211 CLR 476 at [5] per Gleeson CJ.
5 *Plaintiff S157* (2003) 211 CLR 476 at [5] per Gleeson CJ, at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
6 *ibid* at [53] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
7 *Ibid* at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
8 (2000) 204 CLR 82 at [5] per Gleeson CJ, at [43]-[62] per Gaudron and Gummow JJ, at [145]-[150] per Kirby J, at [172] per Hayne J, at [217] per Callinan J.
9 *Judiciary Act 1903* (Cth) s 44; *Migration Act 1958* (Cth) s 476B.
10 *Judiciary Act* s 39B; *Migration Act* ss.476, 476A; *Federal Court of Australia Act 1976* (Cth) s 32AB; *Federal Magistrates Act 1999* (Cth) s 39.
11 Constitution s 73(ii); *Federal Court of Australia Act* ss.24, 25, 33.
12 (2000) 199 CLR 135 at [56] per Gaudron J.
13 Lord Justice Bingham, 'Should Public Law Remedies be Discretionary?' [1991] *Public Law* 64, 65.
14 (2000) 204 CLR 82 at [59].
15 Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 178, 186.
16 Bingham, above n 15, 73.
17 *Aala* (2000) 204 CLR 82 at [51] per Gaudron and Gummow JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ.
18 (2002) 209 CLR 597.
19 (2002) 209 CLR 597 at [51].
20 (2002) 209 CLR 597 at [53].
21 Alan Robertson, "Administrative law remedies: Some discretionary considerations" (2002) 22 *Australian Bar Review* 119, 127.
22 *Lee v Minister for Immigration and Citizenship* [2007] FCAFC 62 (11 May 2007) ("*Lee*") at [46].
23 *Migration Act* s 198(6)(c)(ii).
24 Roger Douglas, *Douglas and Jones's Administrative Law* (5th ed, 2006), 786, 651.
25 Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 618-619.
26 (2000) 204 CLR 82 at [56]; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.
27 (2000) 204 CLR 82 at [57]; *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320.
28 (2000) 204 CLR 82 at [57]-[58]; *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 at 42; *Cinnamond v British Airports Authority* [1980] 1 WLR 582 at 593; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1595; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228.
29 Robertson, above n 23, 119-120.
30 Michael Izzo, *High Court on procedural fairness: SAAP and VEAL* (2006) 13 Australian Journal of Administrative Law 186, 190-192.
31 *Aala* (2000) 204 CLR 82 at [104] per McHugh J, at [131] per Kirby J, at [211] per Callinan J; *Stead v State Government Insurance Commission* (1986) 161 CLR 141 ("*Stead*") at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.

32 *Stead* (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ; *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151 at 164-166 per Lindgren J, at 176-179 per Merkel J; *Lee* [2007] FCAFC 62 (11 May 2007) at [49]-[51] per Besanko J.
33 *SZECD v Minister for Immigration and Indigenous and Multicultural Affairs* (2006) 150 FCR 53 at [47] per Bennett J; *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343.
34 *Lee* [2007] FCAFC 62 (11 May 2007) at [51] per Besanko J.
35 (1986) 161 CLR 141.
36 (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.
37 (2000) 204 CLR 82 at [58] per Gaudron and Gummow JJ, at [104] per McHugh J, at [131] per Kirby J, at [211] per Callinan J.
38 (2000) 204 CLR 82 at [57]-[58] per Gaudron and Gummow JJ, at [104] per McHugh J.
39 *Aala* (2000) 204 CLR 82 at [41] per Gaudron and Gummow JJ.
40 *Migration Act* s 474.
41 *Plaintiff S157* (2003) 211 CLR 476 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
42 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 (*SAAP*) at [77] per McHugh J.
43 (2005) 215 ALR 162 at [77] per McHugh J, at [173] per Kirby J, at [208] per Hayne J.
44 *Aala* (2000) 204 CLR 82 at [58] per Gaudron and Gummow JJ, at [104] per McHugh J, at [131] per Kirby J, at [211] per Callinan J; *WAFV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 280 at [5] per Lee and Nicholson JJ; *SAAP* (2005) 215 ALR 162 at [80] per McHugh J; *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 (27 June 2005) at [33] per North J; *SZCJH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1660 (24 November 2005) at [23] per Sackville J; *SZECD v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 53 at [41] per Bennett J; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [231]-[233] per Allsop J; *SZGGD v Minister for Immigration and Multicultural Affairs* [2006] FCA 1138 (28 August 2006) at [70]-[71] per Jessup J; *SZCVD v Minister for Immigration and Multicultural Affairs* [2006] FCA 1456 (8 November 2006) at [16] per Conti J.
45 No. S3 of 2007.
46 [2007] HCA Trans 83 (28 February 2007) at 32 per Mr Beech-Jones.
47 (2005) 215 ALR 162 at [83] per McHugh J.
48 (1990) 170 CLR 321 at 353.
49 *Migration Act* ss.36, 65, 91R, 411.
50 *Aala* (2000) 204 CLR 82 at [58] per Gaudron and Gummow JJ; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228.
51 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 at [123] per Kirby J; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at [84] per Kirby J.
52 *SZBYR* [2007] HCA Trans 83 (28 February 2007) at 21 per Mr Reynolds.
53 *Aala* (2000) 204 CLR 82 at [59] per Gaudron and Gummow JJ.
54 *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408 at 434 per Wilcox J.
55 *Plaintiff S157* (2003) 211 CLR 476 at [176] per Callinan J.
56 AD(JR) Act s 11; *Migration Act* ss.477, 477A.
57 Federal Court Rules O 52 R 15, O 3 R 3; High Court Rules regs 41.02.1, 4.02.
58 (2007) 234 ALR 114 at [60] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.
59 *Bodruddaza* (2007) 234 ALR 114 at [53] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.
60 ibid at [59] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Judiciary Act 1903* (Cth) s 86; *High Court Rules 2004* (Cth) reg 25.06.1.
61 (2000) 204 CLR 82 at [82] per Gaudron and Gummow JJ.
62 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.
63 *Kioa v West* (1985) 159 CLR 550 at 633 per Deane J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652-653 per Deane J.

64 *Plaintiff S157* (2003) 211 CLR 476 at [5] per Gleeson CJ, at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ