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2009 AIAL NATIONAL ADMINISTRATIVE LAW FORUM, *Hotel Realm*, Canberra, 6 and 7 August 2009

On 6 and 7 August 2009, the Australian Institute of Administrative Law held the 2009 National Administrative Law Forum. The Forum was held in Canberra and organised by the National Executive Committee of the Institute. It was the 19th such Forum. The Institute has organised Forums every year since 1991. For over 15 years, the Forum venues have alternated, with Forums being held in Canberra in odd-numbered years and being held in a State or Territory in even-numbered years. All State and Territory chapters of the Institute have organised a Forum at least once.

The Forum is now Australia's pre-eminent administrative law conference. It regularly attracts high quality speakers who, in turn, attract consistently strong audiences. The 2009 Forum was no exception, with an impressive array of parliamentarians, judges, senior administrators, administrative law practitioners and academics addressing the Forum and over 200 registrants attending.

The theme for the 2009 Forum was "Administrative Law Reform". The thinking behind the theme was that it would allow those participating in the Forum to discuss contemporary issues in administrative law, share practical experiences and, in particular, consider future changes to administrative law.

The Institute was pleased that Senator the Hon Joe Ludwig, Cabinet Secretary and Special Minister of State, was able to give the keynote speech at Forum. Given his responsibility for the *Freedom of Information Act 1982* (Cth), Senator Ludwig was able to outline key aspects of the Government's reform of the FOI Act. Senator Ludwig's address also included a discussion of a number of key aspects of the reforms proposed, including the proposed role of the Information Commissioner, a revamp of the obligation on Commonwealth agencies to publish information about their operations and the introduction of a new single form of public interest test, described by the Senator as one that would be weighted towards disclosure. Senator Ludwig's address set the stage for the Forum's first plenary session on "FOI Reform or Political Window Dressing?"

Other plenary sessions held during the Forum included:

- "Whistleblower protection: A comprehensive scheme for the Commonwealth public sector";
- "Recent evolutions in Australian Ombudsmen";
- "Controlling immigration litigation";
- "Evidence (and other perspectives on fact finding) in Administrative Law"; and
- "Future directions".

Consistent with its status as the major national annual administrative law conference, other key speakers at the Forum included Simon Cohen (Public Transport Ombudsman for Victoria), Karen Curtis (Federal Privacy Commissioner), Mark Dreyfus, QC MP (Chair, House of Representatives Standing Committee on Legal and Constitutional Affairs), Chris Field (Western Australian Ombudsman), Philip Hack SC (Deputy President, Commonwealth Administrative Appeals Tribunal), Professor John McMillan (Commonwealth Ombudsman), Denis O'Brien (Principal Member, Migration Review Tribunal and Refugee Review Tribunal),

Jillian Segal (President, Commonwealth Administrative Review Council) and Dr David Solomon (Queensland Integrity Commissioner).

The Forum dinner was held on the evening of the first day of the Forum. As has been the practice for more than 10 years, the dinner featured the famous (or infamous) Administrative Law Trivia Quiz. As always, the Quiz was hard-fought. Unusually (for Canberra Forums), the Dennis Pearce Super Team did not win.

The Institute intends that selected papers from the 2009 Forum will be published in the *AIAL Forum*. It is intended that the first of those papers will appear in the next issue.

As to the 2010 National Administrative Law Forum, in line with the policy of alternating the organisation of the Forum between Canberra and the State and Territory chapters, it will be held in Sydney, on 22 and 23 July 2010. The Forum will be hosted by the NSW chapter of the Institute and will be held at the University of Sydney. The theme for the Forum will be "Delivering Administrative Justice". Preparations are already under way and a Call for Papers has recently been sent out.

I look forward to seeing as many members as possible at the 2010 Forum.

Stephen Argument
Secretary, AIAL

FAREWELL TO JENNY KELLY (AIAL SECRETARIAT)

Stephen Argument

This is an edited version of the speech given by Stephen Argument, Secretary of the Australian Institute of Administrative Law, at the 2009 annual general meeting of AIAL, on 26 November 2009.

Tonight we would like to acknowledge the retirement of the long-standing 'pillar' of our Secretariat, Jenny Kelly.

I cannot overstate the extent to which Jenny's retirement is a great loss to the Institute. As Professor Dennis Pearce acknowledged at the most recent AIAL annual conference, Jenny has been involved in every annual conference of AIAL. She was also involved in the 1987 administrative law conference that predated the establishment of AIAL. In that sense, she is one up on me.

If there's one thing that the Institute does well it's the running of the annual conference. As I said in my response to Dennis' remarks at the recent conference, most of what I have learned about how to put on a good conference has been learned from Jenny. Most of what the Institute knows about running good conferences has come from Jenny. I simply don't know how we'll manage without her. I'm sure that the members too will miss her, as they come to conferences expecting to see Jenny, as much as they expect to see any of the other 'old' faces.

When I was thinking about what I could say, it occurred to me that most (if not all) of my pleasant AIAL memories involve Jenny, or involve Jenny and Kathy Malcolm (our lovely, dear-departed friend and former Secretariat member). One of the things that has kept me going in this job is the annual conferences, which I actually enjoy. I recently realised that one of the main reasons that I enjoy the conferences is that it means two or more days of working closely with the Secretariat. It's no secret that the Secretariat and I tend to enjoy ourselves at the conferences. Indeed, one of our State chapter representatives made that observation to me after the most recent conference, pointing out that it was obvious to them that the Secretariat were actually having a good time.

It's more than just the conference. It's the 'extra-curricular' activities. We've had a tendency to turn out-of-Canberra conferences into long weekends and to stay on in the relevant State and 'see the sights'. Good times. Great memories. It just won't be the same without you Jen.

But Jenny isn't all fun. The core of the Institute's relationship with Jenny (and why she'll be missed) is her professionalism and her great organisational skills. Those skills are never more evident than in situations where things have gone wrong, such as when, on the morning of a particular conference, the 200 name tags, carefully put together over the previous few days, went missing or when 200 sets of papers turned up from the printers, on the last day, un-collated and un-stapled. These are the sorts of things that hardly anyone

else sees, or even knows about, because Jenny deals with them so skilfully and without any fuss.

I should also add at this point that I don't mean to suggest that Jenny's retirement is the end of the world for the AIAL Secretariat. I'm pleased that Jessica will still be with the Secretariat and I also look forward to working with Mark Holmes, who's taken over Jenny's job.

On a purely personal note, I struggle to think of a better friend that I've made through AIAL and I hope that our friendship continues, despite AIAL.

Thanks, Jen. I hope that you enjoy your retirement and, in particular, your extra Grandma-time with baby Zara.

FRAUD IN ADMINISTRATIVE LAW AND THE RIGHT TO A FAIR HEARING

Zac Chami*

Introduction

On 2 August 2007, the High Court of Australia handed down its decision in the case of *SZFDE v Minister for Immigration and Citizenship*.[1] In a unanimous judgment, the Court found that a decision of the Refugee Review Tribunal was not made within jurisdiction. However, *SZFDE* was very different to the previous migration cases which have occupied so much of the High Court's time in recent years. That is because, in this case, the appellants did not suggest that the Tribunal had done anything wrong.[2]

Instead, the appellants argued that the Tribunal's decision was affected by the fraud of a third party, to whom this paper will refer as Mr H. They alleged that Mr H had held himself out to them as being a solicitor and a migration agent who was entitled to represent them before the Tribunal, when in fact he had been struck off as a solicitor and deregistered as a migration agent. The first appellant paid Mr H $8,400 to act for her and her family. She trusted him and followed his advice, even against her better judgement. However, Mr H's advice was not beneficial to the appellants' application for review. In fact, by advising that the appellants decline to attend a hearing to which the Tribunal had invited them, his advice proved fatal to their application. The High Court inferred that Mr H's motive for providing this advice was to prevent the Tribunal from discovering that he had committed the criminal offence of receiving a fee for providing immigration assistance whilst not being registered as a migration agent.[3] Notwithstanding that the Tribunal was unaware of this advice, the appellants argued that Mr H's conduct constituted fraud on the Tribunal itself, with the consequence that the Tribunal's jurisdiction remained constructively unexercised. The High Court agreed.

This paper addresses three issues that arise from the High Court's decision. The first issue concerns the Court's importation of the concept of "red blooded" fraud into an administrative law context. Traditionally, the type of "fraud" which has attracted the attention of administrative law is bad faith on the part of an administrative decision maker. In this context, as the High Court observed, the words "bad faith" do not imply any deliberate wrongdoing. Instead, they designate only a conclusion that an administrator has not exercised his or her powers in adherence to the standards expected by the courts. In *SZFDE*, the High Court considered whether an administrative tribunal which had acted in good faith nevertheless erred by reason of the fraud of a person who was neither the decision maker nor the subject of the decision. In public law, the courts have dealt with fraud of this nature where a defrauded party has applied to a superior court for a writ of certiorari against an inferior court, on the basis that the inferior court's decision is affected by the fraud. In this case, the Court reviewed the authorities from various other areas of law and adapted the relevant principles to the context of judicial supervision of administrative action.

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* *Partner, Clayton Utz, Sydney.* *This paper was presented to the 2008 AIAL National Administrative Law Forum, Melbourne, 8 August 2008. The author wishes to thank Richard Baird, John Sheehy and Colin Thorpe for their invaluable assistance in the preparation of this paper.*

This represents a small, but nevertheless significant new development in the field of Australian administrative law.

Second, *SZFDE* is notable for the insights it provides into the High Court's approach towards statutory interpretation. In particular, this decision illustrates the effect that judicial notions of fairness exert upon the process of applying statutory rules to novel circumstances. In the field of migration law, the federal Parliament has taken numerous steps to limit the power of the courts to determine whether the administrators who deal with visa and related issues have afforded a fair hearing to the subjects of their decisions. It introduced a privative clause into the governing legislation to limit the jurisdiction of the courts to review many of those decisions.[4] In several instances, it replaced the natural justice hearing rule at common law with statutory codes of procedure.[5] In the case of the Migration and Refugee Review Tribunals, those statutory codes, on a strict interpretation, require only that the Tribunal invite the review applicant to attend a hearing.[6] In spite of these statutory constraints, several comments in the High Court's judgment in *SZFDE* reveal how common law notions of the right to a fair hearing animate the justices' approach to the interpretation of such legislation. However, by using policy considerations to limit the types of unfairness which will lead to error, the Court undermined the coherency of the interpretative model it adopted.

The third issue engages with the theme of the Australian Institute of Administrative Law's 2008 National Administrative Law Forum, namely "Practising Administrative Law", by identifying the practical consequences which the High Court's decision engenders for administrators, courts, lawyers who act in judicial review proceedings and their clients. As *SZFDE* expands the range of circumstances in which the courts may quash an administrative decision without any fault on the part of the decision maker, the number of successful judicial review applications will probably increase. As a party who alleges fraud must prove the relevant facts to the requisite standard in the course of litigation, a judicial review applicant who raises such an allegation must adduce persuasive evidence. The amount of time and effort dedicated by applicants, respondents and judicial officers to this evidence will often be much greater than in other judicial review proceedings, where almost all of the evidence is usually contained within a single court book. This may cause potentially significant increases in legal costs and the utilisation of court resources.

"Red blooded" fraud in administrative law

After setting out the issues to be decided in *SZFDE*, the High Court reviewed various authorities on fraud from a range of legal fields, jurisdictions and historical periods.[7] In particular, the Court observed that, in the context of public law, the terms fraud, bad faith, abuse of power, unreasonableness and acting on improper grounds do not possess their usual, everyday meaning. Rather, they "*impute no moral obliquity*".[8] That is, the courts will attach these labels to the conduct of an administrator where that conduct falls short of the standards expected by the judiciary, even in the absence of any impropriety. As the Court noted, this species of "fraud" developed out of equitable notions concerning the due discharge of fiduciary and other powers.[9] This is significant because the nature of the fraud alleged in *SZFDE* was very different to the types of fraud with which administrative law is familiar. Mr H's alleged actions took the form of "material dishonesty", that is, deliberate misconduct involving some measure of moral turpitude.[10] Previously, this "red blooded" type of fraud was primarily the province of the common law and the courts generally considered it in the course of either criminal proceedings or civil litigation between the fraudulent and defrauded parties.[11] A second important distinction between these two categories of fraud is that bad faith only gives rise to error where the decision maker is at fault, whereas red blooded fraud may lead to error regardless of who is responsible.

Accordingly, the principles which determine the consequences that flow from a finding of red blooded fraud have developed in a range of legal contexts, some of which are very different

to administrative law. Yet some of those principles have also emerged from a legal field closely analogous to judicial review of administrative action, which in facts sits alongside administrative law under the public law umbrella, namely judicial supervision of inferior courts. In this field, a superior court may be called upon to issue a writ of certiorari against an inferior court, by reason of fraud perpetrated upon the inferior court. The issue of this writ is a distinct process from that of an appeal. It is also distinct from the process of a court exercising its inherent jurisdiction to set aside its own judgments or orders where they have been obtained by fraud, whether in accordance with Rules of Court or otherwise and even after those orders have been entered.[12] As the common law determines the circumstances in which red blooded fraud by a person other than the judge or magistrate will cause certiorari to issue against an inferior court, this field has close similarities as well as differences with administrative law. The Australian and English authorities which deal with these circumstances were the subject of much discussion in *SZFDE* by the High Court[13] and by French J in the Full Federal Court,[14] whose dissent agreed with the result of the High Court's decision. Two issues of note arise from those discussions.

The first issue is that, in Australia, the courts have only ever issued certiorari in their common law jurisdiction by reason of fraud on inferior courts, rather than on administrative tribunals. Where Australian courts have issued certiorari by reason of fraud on an administrative tribunal, they have done so only on statutory grounds.[15] In England, the common law courts appear to see no obstacle to their issue of certiorari against non-judicial public officials for the same reasons as they could issue the writ against inferior courts.[16] In *SZFDE*, French J held that the English common law proposition that "*fraud unravels everything*" applies equally in Australia.[17] His Honour would have issued certiorari on that basis. Though the High Court decided the matter on statutory grounds, it cited these English common law authorities approvingly.[18] Further, it expressly left open the possibility that a finding of fraud on the appellants, as parties to the review, might have been sufficient to vitiate the Tribunal's decision, even without a finding of fraud on the Tribunal itself or the accompanying statutory consequences.[19] Thus it remains the case that no Australian court has issued certiorari in its common law jurisdiction by reason of fraud on an administrative tribunal. Nevertheless, the judgments of French J and the High Court in *SZFDE* suggest very strongly that the Australian common law recognises that certiorari may issue on this basis.

The second issue which emerges from the analyses of French J and the High Court in *SZFDE* is that no Australian court has issued certiorari in its common law jurisdiction only by reason of fraud committed by a person who is neither the decision maker nor a party to the matter. The Federal Court has on two occasions quashed the decision of an administrative tribunal by reason of the fraud of a third party who knowingly gave false evidence as a witness before the tribunal.[20] However, the Court exercised its power pursuant to a statutory provision, namely the former section 476(1)(f) of the *Migration Act 1958* (Cth), which provided as a ground of judicial review "*that the decision was induced or affected by fraud*". In the absence of any textual reason to limit the circumstances in which a decision could be said to have been induced or affected by fraud, the Federal Court on each occasion interpreted this provision broadly. In England, the courts have extended the common law to allow certiorari to issue where neither party to the proceedings is privy to the perjured evidence of a witness.[21] Although the High Court did not invoke the common law in deciding *SZFDE*, its concerns with the "*due administration of justice*" and approval of the English authorities indicate that the Australian common law will also allow certiorari to issue where the sole basis is third party fraud.[22]

In view of the High Court's approval of the English common law position in relation to fraud on administrative decision makers and third party fraud, *SZFDE* has broken new ground in the expansion of Australian administrative law. However, this growth is hardly revolutionary. Rather, in these respects, *SZFDE* represents merely a small evolutionary step in the development of Australian jurisprudence, though one that could easily be extended in future

cases decided under the common law. The more far-reaching aspects of *SZFDE* lay in the High Court's approach to statutory interpretation, which led to a finding of fraud "on" the Tribunal where the third party acted at a distance from the Tribunal's operations, and the Court's ability to reach this conclusion despite the strictures of the statutory scheme which governed those operations.

Importance of a fair hearing

The statutory scheme which governed the procedural obligations of the Refugee Review Tribunal in *SZFDE* is set out in Division 4 of Part 7 of the Migration Act. That division commences with section 422B, which states that "*[t]his Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*" The legislative intent behind the introduction of section 422B was to relieve the Tribunal from any procedural fairness obligations which it would otherwise have under the common law, so that the statutory code of procedure in Division 4 of Part 7 will comprise the entirety of the Tribunal's fair hearing obligations.[23] At the centre of that code, section 425 provides that the Tribunal "*must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review*". That is, the Tribunal must invite the review applicant to a hearing. Exceptions to section 425 provide that the Tribunal is not required to issue a hearing invitation if it makes a decision favourably to the applicant "on the papers", if the applicant consents to the Tribunal making its decision without a hearing or if the applicant has failed to reply within time to a previous invitation by the Tribunal to provide or comment on or respond to information.[24]

Significantly, nothing in the text of section 425 contains any explicit requirement that the Tribunal hold a hearing. Nor is there any requirement that any such hearing be fair. Read strictly, that section provides only that the Tribunal must invite the review applicant to a hearing. Prior to the High Court's decision in *SZFDE*, there was a difference of opinion in the Federal Court whether the language of the statute implies that an invitation must be "real and meaningful" and whether any consequent hearing must be fair. There was also a related difference of opinion whether the sole time for compliance with section 425 is when the Tribunal issues the invitation, or whether subsequent events can lead to a breach of the provision, despite the Tribunal having sent an invitation that was valid as at the date of its issue.[25] The significance of these differences of opinion becomes apparent in circumstances such as those of the appellants in *SZFDE*. There, the Tribunal had sent a hearing invitation under section 425 to Mr H, in accordance with the appellants' appointment of him as their authorised recipient for correspondence. At the date of issue of the hearing invitation, it seems that the Tribunal had complied with section 425 and the related notification provisions set out in the Migration Act and *Migration Regulations 1994* (Cth).[26] Further, notwithstanding the presence of additional complicating factors concerning the appellants' change of address, it was not in dispute that the first appellant received a copy of the hearing invitation from Mr H, signed a form by which she informed the Tribunal that she did not wish to attend the hearing and made a conscious decision not to attend the hearing.[27]

SZFDE is the first case in which the High Court has considered the workings of section 425 in circumstances where section 422B had displaced the additional procedural fairness obligations that would otherwise apply at common law. By reason of the operation of section 422B and its clear legislative intent, it was not open to the Court to find that the appellants had been denied any right to procedural fairness or to a fair hearing at common law. Instead, the Court had to consider whether the events which transpired had led to any error located in Division 4 of Part 7. The way in which the Court construed these provisions and grounded an error in section 425 illustrates the powerful influence exerted by the Court's sense of justice and fairness on its approach to statutory interpretation.

The essence of the High Court's findings in relation to the legal consequences of Mr H's fraud is encapsulated in two words: "subversion" and "stultification". With regard to subversion, the Court said:[28]

> The importance of the requirement in s 425 that the Tribunal invite the applicant to appear to give evidence and present arguments is emphasised by s 422B.
>
> ... An effective subversion of the operation of s 425 also subverts the observance by the Tribunal of its obligation to accord procedural fairness to applicants for review. Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the Constitution, the subversion of the processes of the Tribunal in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.

With regard to stultification, the High Court said:[29]

> The fraud of [Mr H] had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants.
>
> ... No doubt [Mr H] was fraudulent in his dealings with the appellants. But the concomitant was the stultification of the operation of the critically important natural justice provisions made by Div 4 of Pt 7 of the Act. In short, while the Tribunal undoubtedly acted on an assumption of regularity, in truth, by reason of the fraud of [Mr H], it was disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review. That state of affairs merits the description of the practice of fraud "on" the Tribunal.
>
> The consequence is that the decision made by the Tribunal is properly regarded, in law, as no decision at all. This is because, in the sense of the authorities, the jurisdiction remains constructively unexercised.

Ostensibly, *SZFDE* was not a case about the right to a fair hearing.[30] Yet, as these excerpts illustrate, the importance attached by the High Court to procedural fairness was central to its decision. The Court's references to the Tribunal's code of procedure as a "*legislative scheme to afford natural justice*" containing "*critically important natural justice provisions*" which provide an "*obligation to accord procedural fairness*" make this clear. If, on the other hand, the High Court had simply viewed Division 4 of Part 7 as setting out a series of procedural steps for the Tribunal to take, without drawing any inference that those steps were intended to culminate in an overall fair procedure, it is difficult to comprehend how the Court could have reached the same result. On such an interpretation, once the Tribunal had issued a valid hearing invitation, its obligations under section 425 would be at an end. Evidently, the Court was not inclined towards such a mechanical construction of the statute, which would leave no room for the incorporation of any requirement of fairness.

The High Court's interpretation of section 422B as emphasising the importance of the Tribunal's obligation under section 425 to invite a review applicant to a hearing is also revealing. Given that the federal Parliament introduced section 422B to limit the scope of the requirements imposed on the Tribunal by the common law, the Court's implication that this provision might enhance or magnify the content of the obligation created by section 425 is difficult to reconcile with the legislative intention. In this regard, though Parliament may have manifested a clear statutory intention to oust the Tribunal's common law duty to act fairly, it appears that this was not sufficient to oust the High Court's prerogative to imply a duty to act fairly into the statute.[31]

These excerpts from the High Court's judgment in *SZFDE* also disclose an interesting inversion of the concept of fraud "on" a decision making authority. The Minister had submitted that Mr H perpetrated any fraud only on the appellants, rather than on the Tribunal.[32] Without fraud either by or on the Tribunal itself, so the argument ran, there could be no breach of any of the provisions set out in Division 4 of Part 7. The High Court, in contrast, took the view that Mr H's fraud stultified the operation of those provisions and that this consequence attracted the designation of fraud "on" the Tribunal. That is, although Mr

H's fraudulent conduct operated at one level removed from the Tribunal's performance of its duties, the Court characterised the consequences of his actions as sufficient to amount to fraud "on" the Tribunal itself. This conclusion seems counter-intuitive, as it sits somewhat uneasily beside the factual premise that Mr H had not made any false statement to, or had any false dealings with the Tribunal. Nevertheless, regardless of the merits of this finding, the High Court's approach highlights its unease with the proposition that a person could be defrauded of an opportunity to attend a hearing, yet have no remedy before the courts.

In view of the importance placed by the High Court on procedural fairness and the centrality of stultification to the *ratio* in *SZFDE*, it is difficult to see why the fraud of a third party should give rise to a jurisdictional error, while mere negligence should not. Nevertheless, the Court said that:[33]

> there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made. The outcome in the present appeal stands apart from and above such considerations.

It is not clear why the policy considerations referred to by the Court should preclude the capacity of mere negligence to stultify the operation of the Tribunal's legislative scheme, when those considerations will not protect the integrity of the scheme against third party fraud. Different shades of fraudulent or negligent conduct by Mr H could, hypothetically, have caused adverse consequences for the appellants' application to the Tribunal and the fairness of the hearing to which it invited them. However, it does not follow that only fraudulent conduct could have led to the subversion of the operation of section 425 in the sense contemplated by the High Court. For instance, if Mr H had been merely negligent in advising the appellants not to attend the hearing, the consequences for section 425 and the conduct of the Tribunal's review would have been identical. Yet, in view of the High Court's comments, this would not have given rise to the stultification of the legislative scheme. This incongruity suggests that, as well as reading an implied obligation to act fairly into Division 4 of Part 7, the High Court has limited the scope of the Tribunal's statutory obligation by reference to considerations of judicial policy.

The incongruity between the capacity of fraud and the incapacity of negligence to cause the Tribunal to constructively fail to exercise its jurisdiction creates a situation whereby the validity of an administrative decision may depend upon the state of mind of a third party. The potential for surrealism which this engenders was borne out in *SZHVM v Minister for Immigration and Citizenship*.[34] In that case, the appellant gave evidence that the reason she had failed to attend a hearing to which the Refugee Review Tribunal had invited her was because her migration agent had employed her as a nanny and he had directed her to look after his daughter. Middleton J held that, as the migration agent "*was just concerned about his own interests and put them above those of the appellant*", his actions did not amount to fraud within the meaning of *SZFDE*.[35] His Honour cited the Full Federal Court's judgment in *Minister for Immigration and Citizenship v SZLIX*, where the Court took the view that "*SZFDE requires that the agent in question is fraudulent in a way that affects the Tribunal's Pt 7 decision-making process.*"[36] Given two identical scenarios, with the exception that in one scenario a third party has acted by reason of material dishonesty or moral turpitude, whereas in the other the third party has acted in the same way through negligence, it seems unsatisfactory that the third party's subjective motivation provides the determinative criterion for whether the operation of a statutory code of procedure has been stultified. Nevertheless, that appears to be the consequence of the High Court's election in *SZFDE* to construe the legislation by reference to principles of fairness, tempered by considerations of judicial policy.

Practical consequences of *SZFDE*

The High Court's decision in *SZFDE* raises several important practical implications for administrators, courts, lawyers who act in judicial review proceedings and their clients. For administrators, a greater range of circumstances can now give rise to a judicially reviewable error, even in the absence of any fault on the part of the decision maker. Sometimes, there will be little, if anything, that the decision maker can do to identify these circumstances. For instance, if an applicant before an administrative tribunal receives fraudulent advice from an advisor whose existence is unknown to the tribunal, there seems to be little that the tribunal could do to prevent this fraud from vitiating its decision. However, in other circumstances, there may be steps which a diligent decision maker could take to identify and remedy third party fraud. For instance, where a person declines an invitation to a hearing, it would be prudent for the decision maker to contact him or her by any means available and ensure that the consent not to appear is genuine. In *SZFDE*, the Tribunal had written to the appellants and Mr H upon learning of Mr H's deregistration, however the appellants no longer lived at the same address and the letter sent to them was returned to the Tribunal unopened. Subsequently, the first appellant informed the Tribunal of her new address and confirmed the address of "*My Solicitor [Mr H]*".[37] With the benefit of hindsight, when the first appellant declined the Tribunal's hearing invitation shortly afterwards, these events might have prompted an inquiry as to the appellants' reasons for not attending and whether Mr H was acting for them in a professional capacity. One can hardly be critical of the Tribunal in *SZFDE* for not taking these steps. However, in future, an awareness of the legal consequences of third party fraud and the ways in which it may arise could enable administrative decision makers to prevent the incursion of unnecessary time and expense and to avoid administrative injustice.

For lawyers who represent applicants in judicial review proceedings, the first practical implication of the High Court's decision in *SZFDE* concerns how to prove the existence of fraud. In this regard, the authorities cited approvingly by the High Court indicate that fraud must be "*distinctly pleaded and proved*",[38] "*on the balance of probabilities and with due regard to* Briginshaw v Briginshaw."[39] That is, the party who alleges fraud must particularise the facts of the conduct which is said to be fraudulent, adduce evidence to establish those facts on the balance of probabilities and persuade the court that the evidence is of a sufficient standard in view of the seriousness of the allegation. However, in many cases, the only evidence available will be the testimony of the allegedly defrauded party. In *SZFDE*, Mr H's contact details appeared in the appellants' Tribunal application form and the appellants adduced corroborative evidence in the form of letters to Mr H from the Law Society of New South Wales and the Migration Agents Registration Authority regarding the cancellation of his legal practising certificate and migration agent registration respectively.[40] As the first appellant alleged that she had paid Mr H $8,400 and lent him a further $5,000, it was also open to the appellants to adduce evidence of these financial transactions.[41]

However, in other circumstances, the evidence available may be scarce. That was the case in *Wang v Minister for Immigration and Citizenship*[42] and *SZLWS v Minister for Immigration and Citizenship*,[43] where the Federal Magistrates Court rejected allegations of fraud for which the only evidence was the affidavit and oral testimony of the respective applicants. In *SZLIX v Minister for Immigration and Citizenship*, the Federal Magistrates Court was presented with a similar paucity of evidence.[44] In that case, the applicant was in immigration detention and about to be removed from Australia, so the Court expedited the hearing. Despite the poor state of the evidence, the Federal Magistrate found that the migration agent had acted fraudulently by writing a false residential address on the Tribunal application form and failing to inform the applicant that the Tribunal had invited him to a hearing, with the consequence that the applicant failed to attend the hearing. His Honour found that these circumstances fell within the principles established by *SZFDE* and quashed the Tribunal's decision. On appeal, the Full Federal Court found that there was insufficient evidence to

support a finding of fraud.[45] Accordingly, it remitted the matter to the Federal Magistrates Court for re-hearing, with the benefit of more satisfactory evidence. After re-hearing the matter and evaluating the evidence in greater depth, the Federal Magistrate found that the applicant had not made out his complaint of fraud and dismissed the application.[46]

These early examples of how the courts have interpreted the High Court's decision in *SZFDE* illustrate the difficulty of establishing third party fraud without independent corroborative evidence. In particular, that is because an applicant's testimony alone will rarely provide direct evidence of the alleged fraudster's state of mind. As mere negligence does not amount to fraud, a judicial review applicant must be able to point to something from which the court can draw an inference of deliberate misconduct. In *SZFDE*, the appellants pointed to Mr H's motive to avoid the Tribunal's discovery of his commission of a criminal offence, namely his receipt of a fee for providing immigration assistance whilst not being registered as a migration agent.[47] However, to open this inference to the Court, first the appellants had to issue subpoenas to the Law Society of New South Wales and the Migration Agents Registration Authority to produce evidence of the cancellation of Mr H's legal practising certificate and migration agent registration.[48]

In *SZFDE* at first instance, at the Court's direction, the appellants served Mr H with copies of their affidavits and afforded him an opportunity to defend his reputation.[49] In circumstances where there is no "paper trail" relating to the conduct in question, it would be advisable to issue the person accused of fraud with a subpoena to give evidence and, if necessary, to cross-examine him or her as an unfavourable witness.[50] However, in many instances, the victim of fraudulent conduct may be unwilling or unable to identify or locate the person responsible. Further, although there is an incentive for the alleged fraudster to defend his or her reputation, there is also a disincentive to cooperation in the form of the ordeal of participating as a witness and being cross-examined in the course of litigation. Thus early experience indicates that the courts will determine whether fraud has been established to the requisite standard almost exclusively on the basis of the veracity of the applicant's evidence given by affidavit and from the witness box.

One feature which distinguishes third party fraud cases from standard judicial review proceedings is the amount of time dedicated by applicants, respondents and the courts to evidence. In most other judicial review proceedings, the entirety of the relevant evidence before the court will be in documentary form. Usually, this will comprise a small number of affidavits and a single court book containing the decision under review, other documents before the decision maker and correspondence between the relevant parties. It is fairly uncommon that oral evidence will be relevant to the issues in dispute, or that cross-examination will assist the court in the disposition of the application. This is unsurprising, as the task of the courts is to supervise administrative action, rather than the actions of the world at large. Allegations of misconduct in relation to administrative decision making are an exception to this general rule.

Where evidence is contested, it is almost inevitable that legal costs will rise. Of its nature, contested factual litigation requires additional work for solicitors and barristers alike. For solicitors, this may involve issuing subpoenas, preparing witness statements and appearing at multiple interlocutory court dates. For barristers, this may involve additional preparation for cross-examination and appearing at more lengthy hearings. In *SZFDE* at first instance, it seems likely that, after seven court dates,[51] the party-party costs would have been several times the $5,000 amount provided by the non-binding scale set out in the *Federal Magistrates Court Rules*.[52] In a standard migration case heard in the Federal Magistrates Court involving two or three court dates, a court book, one or two affidavits, perhaps a hearing transcript, written submissions and the retention of junior counsel, party-party costs of approximately $5,000 are fairly common. The *Federal Court Rules* provide for a similar amount.[53] However, the contested factual litigation prompted by allegations of third party

fraud has the potential to cause legal costs in judicial review proceedings to soar. Such litigation also carries with it increased pressure on judicial time and court resources. Though these considerations should not discourage lawyers and the courts from dealing thoroughly with allegations of fraud where they are properly raised, they do carry implications for the distribution of public funds, which court administrators and government clients should bear in mind.

Conclusion

The High Court's decision in *SZFDE* is significant, not because its contribution to the development of Australian administrative law is revolutionary, but because of what it reveals about the High Court justices' sense of justice and fairness. In particular, this decision illustrates the willingness of the Court to give effect to fundamental principles of fairness, even in the interpretation of a statutory scheme which was drafted for the express purpose of precluding the courts from doing precisely this. Although *SZFDE* concerned the operation of the particular statutory scheme which governed the operation of the Refugee Review Tribunal and although almost all of the subsequent cases to consider the High Court's decision have been migration cases, the implications of this decision extend beyond the field of migration law. Indeed, the concepts of statutory stultification and statutory interpretation by reference to judicial notions of fairness are capable of application throughout and beyond administrative law. Tax law is one possible candidate for the wider application of these concepts in future.[54] However, for those involved in the disposition of migration cases, the practical consequences of the High Court's decision in *SZFDE* have already arrived.

Endnotes

1 (2007) 237 ALR 64.
2 (2007) 237 ALR 64 at [14].
3 (2007) 237 ALR 64 at [45]; *Migration Act 1958* (Cth), section 281.
4 Migration Act, section 474; *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).
5 Migration Act, Part 2, Division 3, Subdivisions AB, C, E, F; Part 5, Division 5; Part 7, Division 4.
6 Migration Act, sections 360, 425.
7 (2007) 237 ALR 64 at [8]-[27].
8 Wade and Forsyth, *Administrative Law,* 9th ed (2004) at 416; (2007) 237 ALR 64 at [13].
9 (2007) 237 ALR 64 at [12]-[13].
10 *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at [129] per French J.
11 (2007) 237 ALR 64 at [11].
12 E.g. *Federal Court Rules* Order 35, rule 7(2)(b); *Federal Magistrates Court Rules 2001* (Cth) rule 16.05(2)(b); (2006) 154 FCR 365 at [110].
13 (2007) 237 ALR 64 at [17]-[23].
14 (2006) 154 FCR 365 at [104]-[124].
15 (2006) 154 FCR 365 at [118].
16 *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly* [1951] 2 All ER 1030 at 1034; *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712-713; *Al Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 at 895.
17 (2006) 154 FCR 365 at [121].
18 (2007) 237 ALR 64 at [19], [21].
19 (2007) 237 ALR 64 at [6].
20 *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103; *Jama v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 387.
21 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167 at 172; (2007) 237 ALR 64 at [20].
22 (2007) 237 ALR 64 at [20].
23 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); Explanatory Memorandum, Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth) at [31]-[35]; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1106, (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs). See also (2006) 154 FCR 365 at [138] and the authorities cited there. Note that subsequent legislation, namely the *Migration Amendment (Review Provisions) Act 2007* (Cth), has introduced subsection 422B(3), which provides that "*in applying this Division, the Tribunal must act in a way that is fair and just.*"
24 Migration Act, sections 425(2)(a), (b), (c).

25 (2006) 154 FCR 365 at [94], [211]-[212]; *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37]; *Minister for Immigration and Multicultural and Indigenous Affairs v SZFHC* (2006) 150 FCR 439 at [41]; *VNAA v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 136 FCR 407 at [14]-[15].
26 (2006) 154 FCR 365 at [235]; *SZFDE v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 199 FLR 1 at [56]-[57].
27 (2005) 199 FLR 1 at [4], [22]-[26]; (2006) 154 FCR 365 at [19]-[23].
28 (2007) 237 ALR 64 at [31]-[32].
29 (2007) 237 ALR 64 at [49]-[52].
30 (2007) 237 ALR 64 at [47]; (2006) 154 FCR 365 at [128].
31 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [43]; *Annetts v McCann* (1990) 170 CLR 596 at [2]; *Kioa v West* (1985) 159 CLR 550 at [31].
32 (2007) 237 ALR 64 at [6].
33 (2007) 237 ALR 64 at [53].
34 [2008] FCA 600.
35 [2008] FCA 600 at [54].
36 [2008] FCA 600 at [53]; (2008) 245 ALR 501 at [33].
37 (2006) 154 FCR 365 at [7]-[24].
38 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712-713; (2007) 237 ALR 64 at [15].
39 (1938) 60 CLR 336; (2007) 237 ALR 64 at [25].
40 (2005) 199 FLR 1 at [30].
41 (2005) 199 FLR 1 at [26].
42 [2007] FMCA 1480.
43 [2008] FMCA 840.
44 [2007] FMCA 1625.
45 (2008) 245 ALR 501.
46 *SZLIX v Minister for Immigration and Citizenship* [2008] FMCA 945.
47 (2007) 237 ALR 64 at [45].
48 (2005) 199 FLR 1 at [14], [30].
49 (2005) 199 FLR 1 at [12]-[13].
50 E.g. pursuant to the *Evidence Act 1995* (Cth), section 38.
51 https://www.comcourts.gov.au/public/esearch/file_details/Federal/P/SYG3495/2004.
52 Rule 44.15; Schedule 1, Part 2, item 1(c).
53 Order 62, rule 12; Schedule 2, item 43D.
54 See *Bonnell v Deputy Commissioner of Taxation (No 5)* [2008] FCA 991 at [29].

'SOFT LAW' AND ADMINISTRATIVE LAW: A NEW CHALLENGE

Robin Creyke*

What is soft law?

Definition of 'soft law'

Soft law – or as it was dubbed by a Commonwealth Interdepartmental Committee [1]- 'grey-letter law' – is a rule which has no legally binding force but which is intended to influence conduct.[2] As such, the expression is capable of covering multiple edicts.

Descriptions of soft law embrace instruments many of which will be familiar to the administrative law community. They include 'internal guidelines, rule books and practice manuals',[3] 'circulars, operational memoranda, directives, codes [of conduct]'.[4] Two leading English authors on this topic list eight categories of soft law: procedural rules, interpretive guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements.[5]

Given the potential breadth of these categories of instruments, it is only the content and language of the instrument which will enable the reader to know whether the document is intended to be aspirational only, for example the *APS Values*,[6] the *National Framework for Values Education in Australian Schools 2006*,[7] and the *Australian Sports Commission Statement of Intent 2007/08*[8], or to have a behaviour-changing effect.

Relying on this definition of soft law, instruments which have legal effect because they are authorized to do so by legislation can be excluded. For example, the *Permanent Impairment Guide* is statutorily required to be used to assess the amount of compensation payable by Comcare,[9] and would not be classified as soft law. If an instrument is legislative in character it can be assumed to fall outside the soft law category. However, even determining whether an instrument is legislative or administrative in character is to enter contested territory.

It might have been thought that the *Legislative Instruments Act 2003* (Cth) which distinguishes between legislative and non-legislative instruments would clarify the position.[10] That assumption would be unsafe. Not only does the definition of 'legislative instrument' itself lead to a degree of uncertainty, referring as it does to an 'instrument' as legislative if it 'determines the law' and has an 'indirect effect' on rights and interests[11] – both expansionary notions – but, in order to avoid their lack of enforceability,[12] agencies have chosen to register as legislative instruments any instruments the legislative character of which is doubtful. The result has been to include on the register many instruments which could be categorized as soft law since they are executive, not legislative, in nature.

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Nor has the ACT, the only other Australian jurisdiction which has attempted to define 'legislative instrument', taken the matter further.[13] The *Legislation Act 2001* (ACT) defines an instrument as 'legislative' if it is a 'subordinate law, a 'disallowable instrument', a 'notifiable instrument', or a 'commencement notice'. Since each category requires further defining, and no further definitions are provided, this Act too provides only limited guidance. As a consequence, identifying what is soft law as distinct from what is an instrument of a legislative character remains an uncertain task.

The matter is further complicated because there is a tendency to categorise by type of instrument, rather than its legislative or other character. Hence, some codes are specifically authorized by legislation, others are not. Any attempt to be too prescriptive is bound to fail. Nonetheless, the behaviour-changing intention of soft law instruments is a constant element and will be used for the purpose of this paper

Nomenclature: Is 'soft law' simply policy by another name?

These difficulties of definition are compounded by some skepticism about the utility of the expression 'soft law' itself. There are those who believe that soft law is no more than policy with a fashionable label. Two leading writers have attempted to meet this criticism by describing soft law as a bridge between law and policy.[14] The better view, in my view, is that soft law both encompasses policy and is also a special subset of policy instruments, distinguished by its intention to change behaviour.

Soft law and policy share other features. The essential status of an executive policy is that it is a non-statutory rule devised by the administration to provide decision-making guidance, particularly in administering legislation.[15] To the extent that 'guidance' can be equated with 'influencing behaviour', policy and soft law occupy common territory. However, policy comes in many guises. Broad general policies made by Ministers and tabled in parliament, such as the deportation policy,[16] clearly have a different legal status to informal policies such as those found in press releases, circulars or bulletins, which may do little more than describe the objectives or timelines of a program, or a guidance note which specifies the template for preparing formal advice. These policy documents have in common that they have little formal status and are unlikely to qualify as soft law.

Similarly, documents which are aspirational in nature such as the *APS* (Australian Public Service) *Values* may be core public sector policies but are not soft law. For example, statements in the *APS Values*, that 'the APS is apolitical, performing its functions in an impartial and professional manner' tell the public what they should expect of officials, but they are not prescriptive 'rules'. At the 'tabled in Parliament' end of the policy spectrum an instrument is also less likely to be categorized as soft law. In other words, policy covers a broader range of documents than soft law.

Nonetheless, there are similarities. Administrative law standards apply to soft law, as they do to policy. The orthodox view is that policy must not be inconsistent with legislation, is not binding, and must not be applied inflexibly at the expense of features of the individual case.[17] These same principles apply to soft law. For example, in *Vero Insurance Ltd v Gombac Group Pty Ltd,*[18] a case dealing with guidelines developed by the Victorian Civil and Administrative Tribunal in relation to the award of costs. Gillard J discussed guidelines – a form of soft law – in terms which could equally have applied to the legal standards which apply to policy.

Why then the distinction? The hypothesis is that the use of 'law' in 'soft law' is designed to emphasise the objective of soft law to control behaviour. The language is designed to reinforce that intention by clothing such instruments with a patina of enforceability, a

characteristic of law. Whether this hypothesis is correct and whether, too, the clothing is like the Emperor's clothes, is discussed later in this paper.

How prevalent is soft law?

There are no solid figures. An indicator, however, is that in 1997 the Grey-letter Law report which dealt with the growth of soft law in the business and regulatory environment, estimated that there were some 30,000 codes then in existence.[19] These included legislative,[20] quasi-regulatory,[21] and self-regulatory codes, which would not be classified as soft law. The number also covered 5,700 Australian standards, about half referenced in legislation, the remainder being voluntary.[22] In addition to these forms of soft law, as the earlier description indicated, there are now a host of other instruments that fall into the soft law category. That was over a decade ago. Since there has been no diminution of regulatory endeavour, the figure must now be much higher.

The consequence, as Sossin and Smith note, is that soft law has become the 'principal administrative mechanism used to elaborate the legal standards and political and other values underlying bureaucratic decision-making'.[23] As such it warrants attention.

What has led to the emergence of soft law?

In part, the answer is provided by the behaviour-changing nature of soft law. In this context, three aspects of soft law warrant attention. Public administration has moved beyond administrative law standards to develop its own higher professional standards. Further, there are practical advantages for government and the moves to managerialism and commercialisation within public administration signal pressure by agencies and companies for more tailored regulation.

Professionalism, ethics and a values-based public service

The emergence of soft law marks a new development in public administration. Regulatory and administrative law standards no longer provide the dominant standards. As the Tax Commissioner, Michael D'Ascenzo, in a paper to this forum in 2007, put it: '[I]n many respects administrative law standards are becoming the base level, not the ultimate benchmarks for the Australian public service'.[24] The complexity of government requires 'more responsive and sophisticated mechanisms'.[25] The administrative law standards with their emphasis on fairness, rationality, lawfulness, transparency and efficiency focus principally on process rather than outcomes and are no longer sufficient.[26]

While the focus remains on lawfulness, the public sector is now expected to meet ethical obligations and make official decisions with reference to a set of values.[27] The demands of a more professional, values-oriented public sector have outstripped the underlying standards prescribed by administrative law legislation and case law. Something more is required. It is here that soft law has its place.

Practical advantages

Soft law rules possess a number of practical advantages. They can be made by government without the delay and complexity associated with the creation of legislation; they are flexible, informal, cheap, and largely immune from judicial review.[28]

Soft law rules are not only easy to make but they are easy to change. The Australian Law Reform Commission in its report on censorship laws in Australia noted of censorship guidelines that they are an important way of ensuring that the classification criteria reflect community standards without the need for constant changes to the national code.[29]

In addition, soft law fosters a collaborative approach between government and those being regulated – assuming that codes and guidelines are developed in conjunction with users and those being regulated. Soft law, more than legislation, is better able to provide innovative solutions, tailored to meet the needs of individual industries or particular government agencies.[30]

Managerialism and commercialisation

Another impetus for the development of soft law has been the move within the public sector to managerialism and commercialisation. Activities which governments have contracted out include construction and operation of public highways, management of prisons and immigration detention centres, welfare assistance, building inspection, licensing and accreditation, and public sector recruitment.

These arrangements are generally based on contract, supplemented by a range of soft law instruments such as codes and guidelines. The function is often beyond the oversight of traditional administrative law, defined as it generally is to apply to decisions made under statute.

A feature of this trend to managerialism is the emphasis placed on efficiency and effectiveness as the operating ethos. For that reason, unlike the move to professionalism, this trend aimed to reduce, rather than enhance, the reliance on administrative law.

Nonetheless, in combination, these developments have taken government outside the traditional framework of administrative law accountability standards and institutions. They have been replaced by standards seen to be more appropriate to the tasks of a modern, professional, efficient, effective and ethical public sector. This realm is inhabited by soft law.

What are the problems with soft law?

Despite its growth and apparent popularity there are problems., These include government use of soft law to make law without resort to Parliament, to instruct judges on the meaning of statutes and to insulate bureaucracies from review.[31]

Practical issues of concern to government and business are that soft law is generally drafted by 'loving hands at home' with the attendant problems of lack of clarity and, in some cases, legal error, that can arise. Soft law instruments are not regularly updated and may be inconsistent.[32] As the Grey–letter Law report noted, these problems can create confusion about compliance standards. 'Voluntary and mandatory requirements are encapsulated in the one document with little distinction made between compliance obligations'.[33]

Another issue is that use of soft law leads to back-door regulation that is difficult to access, gives too much discretion to regulators, and sets higher compliance standards than are required by law. Soft law rules can also place extra burdens on consumers or businesses. For example, a guideline identifying an entity as 'high risk' may mean the entity is subject to higher levels of surveillance by regular auditing, or may face additional barriers before services can be accessed. In combination, these issues can lead to confusion and higher costs, and ultimately to litigation to resolve these uncertainties.[34]

A more significant danger is that agencies can attribute an inflated stature to their own policies. Agency policies are designed to structure discretion, provide certainty and consistency, and guide officials in decision-making. These are laudable objectives but if policies are couched in mandatory terms, this can obscure the fact that a more flexible

application of rules is permissible. For example, the overarching statement on corporate policies with the Australian Taxation Office states:

> It is mandatory for all Tax Office employees to … follow Practice Statements relevant to the tasks they are performing [except] 'where there are concerns about the application of the Practice Statement (for example, unintended consequences)'.[35]

This overstatement could lead to internal policies being applied inflexibly.

So the consensus is that while there is value in soft law, there are also dangers which need to be addressed. Whether the application of administrative law standards and mechanisms could meet these challenges is the question.

Soft law: is there an accountability deficit?

Given the prevalence of soft law, should it be governed by administrative law values, standards and accountability mechanisms? Assuming the answer to that question is a qualified 'Yes', what are the current accountability mechanisms in place?

The picture is not uniform. The legal status of an instrument can depend on a number of factors including: the text of the instrument; the purpose to which it is being put; and whether the instrument has statutory backing or authorization. The position is considered in relation to the administrative law framework and to these listed factors.

Parliamentary review

Soft law rules generally do not have to be tabled in parliament for scrutiny and may not be exposed to public consultation during development. They do not usually have the benefit of professional drafting. Scrutiny under the *Legislative Instruments Act 2004* (Cth) is a possibility but only if the instrument is tendered as a legislative instrument.

Reviewability of soft law

Where a soft law instrument (using that expression in its popular sense, rather than as defined in this paper) is authorized directly by legislation, it is often subject to the full spectrum of administrative law mechanisms including merit and judicial review. For example, the *Guide to the Assessment of Rates of Veterans' Pensions* (GARP) is, by statute, binding on those assessing rates of veterans' pensions and is fully reviewable.[36]

By contrast, where direct statutory authorization is absent, a soft law instrument and action taken in reliance on it is not reviewable under judicial review statutes since it is not 'made under an enactment'. Nor will it be merit reviewable since merit review must be provided for by statute. However, reviewability under the *Judiciary Act 1903* (Cth) remains open in some circumstances.[37]

Soft law instruments may, however, be indirectly reviewable by courts. Australian Standards, for example, are accepted in courts as having evidentiary status. [38] These standards may be used, for example, in negligence actions to set the standard against which actions are judged.[39] There is a tendency for Australian Standards to become prescriptive as the mandatory minimum standard for other purposes.[40] For example, the Australian Standards on complaint handling[41] and on whistleblowing[42] have been adopted by many government agencies and private sector bodies. In that guise the standards directly perform an administrative law or standard-setting function.

Soft law instruments may also be the basis of a judicial review claim. For example, an instrument, if couched in promissory form, may raise a legitimate expectation, which if not complied with could give rise to a breach of natural justice.[43] Failure to follow a soft law standard may also be unreasonable, be a failure to take account of a relevant consideration, or indicate that a policy has been applied inflexibly. These were all arguments raised in *Adultshop.com v Members of the Classification Review Board*,[44] a challenge to the classification of a film, *Viva Erotica*, in accordance with the *Classification Code* and authorized *Guidelines for the Classification of Films and Computer Games 2005.*[45]

The language of the soft law instrument or its source of authority may be relevant to its legal enforceability. For example, the *Public Service Act 1999* (Cth) s 13(5) (PSA) states: 'An APS employee must comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction'. Relying on that provision, endorsed corporate Practice Statements in the Australian Tax Office, for example, are expressed to be directions of the Commissioner, breach of which could lead to Code of Conduct action under the PSA, as a breach of 'a lawful and reasonable direction'. Other agencies have similar provisions.[46]

Whether a 'direction' under the PSA was intended to cover a direction in a particular case or applies generally to all soft law instruments within an agency, has not been decided. The provision does not appear to have been litigated. The courts have a tendency to prefer the narrower view.[47] In support of the courts' approach, to the extent that such instruments could be inconsistent – a distinct possibility given that they are drawn up at different times and often by different parts of an agency – to require an official to comply with both on pain of a Code of Conduct breach suggests that the courts would find the 'direction' was not intended to cover all policy or soft law instruments within the agency.

Supervision by investigative bodies

Other accountability measures include monitoring by investigative agencies of government. Some soft law instruments may come under the scrutiny of ombudsman offices. Under the *Ombudsman Act 1976* (Cth), for example, the Ombudsman can look at any dimension of an administrative action by government and commonly the Ombudsman reports on whether administrative manuals within agencies provide accurate and adequate instruction to officials.[48] Further, the Ombudsman can examine actions by private sector suppliers of services to government which may capture another significant proportion of private sector generated soft law.[49]

Similarly, the Human Rights and Equal Opportunity Commission and the Privacy Commissioner have jurisdiction over both public and private sector institutions and can recommend the introduction of, or improvements to, soft law controls.

Self-regulation

Indirectly, the executive can influence the content of soft law rules. Where government is in a position to impose legislation, absent sufficient compliance, the executive can ensure self-regulators set standards for performance. For example, the *Australian Ballast Water Management Guidelines* were introduced to avoid the introduction of legally enforceable requirements. Similarly, to have a satisfactory manual, was a condition precedent to a foreign registered aviation company gaining permission to operate in the international cargo market.[50]

What this discussion illustrates is that the enforceability of soft law lacks coherence and that the accountability mechanisms for soft law generally do not address the problems identified

earlier. It also highlights that the description of the instrument does not assist with its legal status.

Conclusion

A quiet revolution has been occurring within public administration. There is now a focus on primary decision-making, on education rather than review and on standards in addition to those provided by administrative law. This quiet revolution has seen the increasing influence of soft law at the expense of more orthodox legal standards. As Baldwin and Houghton put it, there is 'now discernible a retreat from primary legislation in favour of government by informal rules'.[51] This movement has, unaccountably, slipped under the radar of the Australian administrative law community.

It is time to start asking whether such a significant element in our regulatory environment should be examined to see whether there is a need for soft law to be more accountable. Should we, for example, develop more extensive procedures to require consultation, publicity and professional drafting in the making of soft law instruments? Should the range of instruments tabled in Parliament be extended? Should more be done to ensure that administrative law review mechanisms, remedies and grounds of review that focus on government decision-making are extended to apply to the development and application of soft law instruments? To make these changes may require re-thinking the administrative law system, and refashioning it to meet this new challenge.

Endnotes

1 Commonwealth Interdepartmental Committee on Quasi-regulation, Report *Grey-Letter Law* (1997) (Grey-Letter Law report).
2 M Cini 'From Soft Law to Hard Law? Discretion and rules-making in the Commission's State Aid Regime' (2000) *Working Paper 35*, European University Institute 4; Grey-Letter Law report, ix; L Sossin & CW Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 871.
3 M Aronson 'Private Bodes, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 3.
4 L Sossin 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in M Hertogh & S Halliday (eds) *Judicial Review and Bureaucratic Impact* (Cambridge, CUP, 2004) 130.
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6 *Public Service Act 1999* (Cth) s 10(12)(a).
7 http://www.earlychildhoodaustralia.org.au/early_childhood_news/october_2006_government_report_on_values_education.html.
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9 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 24(4), (5), 28.
10 *Legislative Instrument Act 2003* (Cth). s 5 defines a 'legislative instrument'.
11 *Legislative Instrument Act 2003* (Cth) s 5(2) (a), (b).
12 *Legislative Instrument Act 2003* (Cth) s 31.
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18 *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117
19 Grey-letter Law report, at xi.
20 eg *Trade Practices Act 1974* (Cth) s 51AE provides for industry codes made under s 51AE to be mandatory when so declared by regulations.

21 eg *Trade Practices Act 1974* (Cth) s 51ACA provides for a voluntary industry code to be binding on a person who has agreed to be bound. See, for example *Trade Practices Regulations 1998* (Cth) reg 3 which makes the Franchising Code a mandatory industry code.
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43 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396. Although the claim was not successful, the justices being divided 3:3 and the result being determined by the ruling of the most senior puisne judge, the outcome would be different today. See also *Henzell v Centrelink* [2006] FCA 1844.
44 *Adultshop.com.v Members of the Classification Review Board* [2008] FCAFC 79.
45 The Code and the Guidelines were made under the authority of the *Classification (Publication, Films and Computer Games) Act 1995* (Cth).
46 A similar provision is found in the *Parliamentary Service Act 1999* (Cth) s 13(9); the *Public Sector Management Act 1994* (ACT) s 9(i); and is repeated in various Commonwealth Agencies' guidelines such as the *Code of Conduct of the Civil Aviation and Safety Authority*.
47 *Bennett v HREOC* (2004) 204 ALR 119; *Evans v New South Wales* [2008] FCAFC 130.
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TEN CHALLENGES FOR ADMINISTRATIVE JUSTICE

John McMillan*

More than thirty years have passed since the major planks of Australian administrative law – the Administrative Appeals Tribunal (AAT), *Administrative Decisions (Judicial Review) Act 1977* (ADJR) and Ombudsman – were put in place. There have been changes in the meantime, such as the enactment of freedom of information and privacy legislation, the creation of new tribunals and oversight agencies, the introduction of a different scheme for judicial review of migration decisions, and the growth in activity and importance of the High Court's constitutional writ jurisdiction.[1]

Even so, the major themes and architecture of Australian administrative law have not changed. We still write and talk about it as a system based around external scrutiny of administrative decision making by courts, tribunals, ombudsmen and through freedom of information legislation. The list of underlying values and objectives of administrative law remain much the same: those commonly mentioned are legality, rationality, impartiality, fairness and transparency.

The theme of this paper is that there has been a dramatic change over the last thirty years in how laws and programs administered by government affect members of the public. This is necessarily relevant to administrative law, since the abiding concern of administrative law is to ensure that individuals receive appropriate consideration and protection against adverse government action. The concern, in short, is to uphold administrative justice. Taking stock of the changes in government should, therefore, be a pre-eminent concern.

How well is administrative law coping after more than thirty years development? Are administrative law standards, review mechanisms, remedies and values, well-adapted to ensuring justice for individuals in their dealings with government? Is a fresh approach required?

This paper addresses those questions by posing ten challenges to administrative justice in contemporary government. The challenges are drawn from the experience of my own office in dealing annually with over 40,000 people who approach the office, leading to approximately 4,500 investigations. The paper ends by discussing the role that Ombudsman offices, complaint handling and other mechanisms can play in addressing the challenges to administrative justice.

Ten challenges

1. Complexity

Many of the problems that people encounter with government stem from the sheer complexity of government programs. The simple (and unsurprising) truth is that people do not understand the finer details of 8,000 pages of taxation legislation, 130 immigration visa

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categories, or family tax benefit and child support schemes that require people to make a forecast or estimate of uncertain future events such as their income, work commitments and family care arrangements. Nor do people expect that their issue or problem will require them to deal with multiple government agencies or programs: an income tax return, for example, can be relevant variously to a person's taxation obligations, Centrelink entitlements, child support liability and public housing eligibility.

One result is that people get confused about government requirements and their legal obligations. In complex systems people make wrong choices, they break the rules, and they fall between the cracks of different programs. People rely heavily on government for advice about what to do, and they often ask the wrong question or misconstrue the answer.

Getting it wrong can cause frustration and irritation. Or worse, it can result in administrative penalties or loss of entitlements.

How should administrative law address this issue of complexity, which is an element of so many of the problems that people encounter in their dealings with government?

2. Administrative penalties

Breaching or failing to comply with the rules of government can attract an administrative penalty. For example, incorrect information in a taxation return can be penalised at the rate of 25%, 50% or 75% of the tax owing. Breaching an activity agreement under Welfare to Work can result in a suspension of income support benefits for eight weeks. Failing to discharge a child support liability can result in an order prohibiting a person from departing the country. Under many government programs there is an increased charge or on-the-spot fine for failing to lodge an annual return on time.

This new trend in government, towards regulation by administrative penalty, was studied in a report in 2002 by the Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. The ALRC noted that 70% of the penalty provisions in Commonwealth legislation were criminal penalties (a fine or imprisonment), 12% were civil (such as a damages award or restraining order) and 17% were administrative (a taxation penalty, licence or benefit suspension, or immigration detention fee).[2] And yet, to take welfare regulation as an example, while 2,881 people were prosecuted for welfare fraud in a particular period, 200,000 people had their benefit suspended for breaching an activity test requirement – one eighth of all recipients. Nor should it be forgotten that the tight rules, procedural safeguards and review processes that must be followed in applying a criminal penalty do not usually apply to administrative penalties.

Administrative law can review a penalty in an individual case, yet that only occurs intermittently, and often cannot undo the personal harm suffered from a benefit suspension or departure prohibition. Is more needed?

3. Consequences that cannot be undone

Many of the difficulties that people encounter with government cannot be repaired within the rule framework applying to their matter. Even where a government agency has erred by giving incorrect advice or mishandling a person's case, there may be no discretion in legislation to accept a late visa application, backdate a social support entitlement to the qualifying date, or allow customs clearance for an item that was wrongly brought into the country.

Another obstacle to undoing an adverse consequence can be that the consequence is one step removed from the original problem. A postal delivery failure by Australia Post can mean that a person is not informed of a motor traffic penalty or a share purchase option, or does not receive their passport. A person can lose a benefit or incur a liability because of an administrative error occurring in a transaction between an agency and the person's lawyer, migration agent, employer or spouse. Or, to give a particular example that my office recently dealt with, the eligibility of a disabled person to receive a sales tax deduction on a motor vehicle purchase can rely, in turn, upon a medical assessment by their private doctor, the evaluation of that assessment by a government claims officer, the lodgment of the sales tax exemption claim by the car retailer, and the acceptance of that claim by the taxation office. A simple administrative error at any stage of the process may not be simple to repair.

What remedy should administrative law provide in those instances?

4. Delay and administrative drift

Probably the most frequent complaint that people make against government is that it is too slow in making a decision, deciding an application or resolving a problem. Sometimes the criticism is misplaced because of an unavoidable delay by an agency in obtaining information from a third party, or because of inherent complexity in a decision. Frequently, however, the criticism is justified. Common causes of delay are inefficiency, misplaced priorities within government, movement of difficult files from one officer to another, or failure to shift a difficult file to a suitably experienced officer. The Ombudsman's office has coined the term 'administrative drift' to describe this problem.[3]

Administrative drift can be frustrating to government clients but it can also cause great damage. An apt example is that the initial detention of Cornelia Rau was legally justified, according to the Palmer Report,[4] because the officers properly formed a reasonable suspicion on the scanty information then available that she was an unlawful non-citizen. But the scandal exposed by the Palmer report was that ten months elapsed, in the face of mounting evidence to the contrary, before Ms Rau was correctly identified as an Australian permanent resident. Similarly, the wrongful removal from Australia of Vivian Alvarez, an Australian citizen, would have been a different story had it not taken 22 months to unravel the mystery of her whereabouts.[5]

Can administrative law play a constructive role in combating and reducing delay, both in individual cases and systemically?

5. Poor decision making and human frailty

Defective administrative decision making is frequently detected and corrected by courts, tribunals and ombudsmen. The defects include misinterpreting legislation, incorrectly analysing information or evidence, wrongly arresting or detaining people, and inappropriately applying penalties.

Administrative law review enables those errors and mistakes to be corrected in individual cases. However, this review activity cannot alleviate the underlying problem that mistakes happen frequently and in the best administrative systems staffed by the most competent administrative officers. It is routine that officers misfile documents, confuse two dates or names, overlook deadlines, wrongly address letters, or give confidential information to the wrong people.

It is human to err, but it should never be forgotten that simple errors can have dramatic consequences. To repeat an example given earlier, a postal delivery error can mean that a person does not receive their passport in time for a scheduled business or family trip, or

does not receive legal documents by a critical date. Australia Post does excellent work in handling over 60 million postal articles each year, but the overall success of this function should not distract attention from the need to have systems and remedies for dealing with occasional and simple mistakes that can cause great inconvenience or damage.

The same is true of other areas of government. Many of the cases of wrongful immigration detention examined by the Ombudsman's office stemmed from simple identification or record keeping errors.[6] Publicity has recently been given in other cases to the great trauma and damage that can be caused by inadvertent mistakes: examples include the wrong coffin being brought home in the Jacob Kovco case; withdrawal of a murder charge in Victoria because DNA samples were contaminated; and economic and other hardship being suffered by many thousands of people following the release of a single strain of the equine flu virus from a government quarantine station.

A core role of administrative law is to correct mistakes made in individual cases. Has the nature of this challenge changed: does the growth in the size and complexity of government mean that mistakes can occur more easily, more frequently, at more stages of an administrative process, and cause greater damage?

6. Computerisation

Technology has improved the speed, accuracy, consistency, transparency and reliability of decision making. It also throws up unique challenges to administrative justice. A problem highlighted in the reports of my office on wrongful immigration detention was that officers uncritically accepted erroneous information retrieved from an information technology system, or drew the wrong conclusion when information about a person could not be found on the system.[7]

Poor system design, development or implementation also causes administrative errors. A deficient information technology system can obstruct storage of relevant information, make it harder to retrieve vital information, incorrectly merge unrelated information, miscalculate a person's entitlements or liability, send letters to the wrong people or addresses, or despatch confusing and contradictory demands. Hundreds and even thousands of people can be simultaneously disadvantaged by a single computer error. By way of illustration, a police officer with faulty judgment can wrongly penalise a driver for driving through a red light, while a faulty camera can penalise thousands of drivers.

Computerisation also heightens the risk that the vast storehouse of confidential information held by government can be misused. Confidential information is within a keystroke of most officers, and it may be difficult to trace who accessed information and what they did with it. The damage that can be caused by a single lapse is also far greater. An example is the recent incident in the United Kingdom when a junior officer downloaded on to two CD discs, that were then posted and lost in the ordinary mail, the names, addresses, birth dates, national insurance numbers and bank account details of 25 million Britons.

Computerisation presents challenges for administrative law that were unknown in earlier days.[8] What response is now required?

7. Executive power[9]

There has been a steady trend in government to using executive or non-statutory power to underpin service delivery, regulation and benefit allocation.

The Financial Case Management Scheme that provides emergency financial assistance to Centrelink clients, whose benefit payments have been suspended due to activity agreement

breaches, is created by executive action. So too is the General Employee Entitlements and Redundancy Scheme that provides redundancy and other benefits to employees injured by a corporate collapse. Another example is the Scheme for Compensation for Detriment caused by Defective Administration, which authorises payment of administrative compensation to members of the public who are damaged by defective government administration.[10] Other government activities that rest on executive power include contracting, equipment procurement, disaster relief, industry incentives, business grants, skills assessment and accreditation, job seeker assistance, carer payments, water licence buy-backs and energy efficiency rebates.[11]

The move away from statutory to executive schemes is partly a response to the growing size and complexity of government and the preference within government for schemes that are flexible, responsive and simple to establish, change and dismantle. Doubtless another and less laudatory reason is that decisions made under executive schemes are not subject to review by tribunals or under the *Administrative Decisions (Judicial Review) Act 1977*. For practical purposes, the Ombudsman is the only administrative law agency that can review decisions made under executive schemes.

This limitation on external review and appeal is a central concern, since decisions made under executive schemes are often indistinguishable in importance and effect from decisions made under statutory schemes. Other problems of an administrative justice nature arise also. Under executive schemes it can be harder for a member of the public – and, indeed, for government decision makers – to ascertain the rules of the scheme, especially if those rules undergo constant change. There is a risk that the rules will not be as well drafted as legislative rules and, in addition, they are not subject to parliamentary scrutiny, disallowance or publication under the *Legislative Instruments Act 2003* (Cth).[12] The fact that the rules are interpreted and applied by the officials who drafted them also introduces a subjective element that can thwart predictability and objectivity in decision making.

Administrative law is premised on the exercise by government of powers that are conferred by statute. How should administrative law adjust to a new world in which government relies increasingly on executive power to underpin regulation, benefit distribution and service delivery?

8. Outsourced service delivery

Many government functions – including functions once thought to be core or inalienable government functions – are now discharged by non-government bodies under contract from government. The functions include prison management, airport security, benefit distribution, water and electricity supply, public transport, event management, health assessment, skills appraisal and job selection.

Government outsourcing throws up numerous challenges to traditional administrative law. The service delivery standards are likely to be set out in a contract rather than in legislation or an executive policy document. Those standards may offer less protection to the public than if the function was discharged by government. The staff of the non-government service provider, who are applying the standards, may not be as well trained in public law values or may be more focussed on the commercial imperative.

Disputes about service delivery may be harder or more complex to resolve, especially if the dispute resolution mechanism is unknown, underdeveloped, or divided between the government and non-government parties.[13] Resolving a person's problem with a service provider can become confused with or overshadowed by issues of contract and relationship management between the government agency and the non-government service provider.

The division of responsibility between government and non-government parties can also mean that no one is well placed to address a person's grievance in a timely or effective manner. The information relevant to a problem or a person's circumstances may be distributed between the parties, so that no-one sees the full picture. Similarly, the non-government party may lack full access to government data bases.

Administrative law, once again, is premised on the exercise of public sector power by government agencies. Judicial and tribunal review and freedom of information rules do not generally apply to decisions made by non-government bodies on behalf of government.[14] How does administrative law deal with this change?

9. Multiple agency action

A marked feature of contemporary government is that many different agencies can be involved in making a single decision or providing a service.

A decision to approve a visa application can rely upon health, security and skills assessments that are undertaken by other government or non-government agencies. Payment of a social support benefit requires a payment by a government agency into a private bank account that can be accessed by the recipient. Foreign postal articles can pass through the hands of postal, quarantine, customs and law enforcement agencies. The purchaser/provider model adopted within government means that a service delivery agency (such as Centrelink) delivers payments and services on behalf of other government departments that retain policy responsibility for the particular legislation or program that is being administered. Debt collection is usually outsourced, meaning that a private entity enforces a debt that is raised by a government agency.

It can be difficult for a member of the public to know which agency bears responsibility for either a decision or an error that occurred in service delivery. The situation will worsen if the agencies are equally uncertain and the client or their complaint is shuffled from one agency to another. An illustrative example investigated by my office is that the cooperation of three agencies was required to prevent a person from leaving the country without settling a child support debt. One agency had to activate the prohibition, another had to record it on a database, and a third had to check the database before allowing a person to leave the country. The agencies were quick to admit that a mistake occurred in allowing a debtor to leave the country, but after three years of haggling the agencies could not agree as to which agency made the mistake and should provide a remedy.[15]

Traditional administrative law review works best when an identifiable decision maker makes a discrete and challengeable decision. Many decisions are not of that kind. Has administrative law adjusted to this change?

10. The diversity of the client population

The shorthand description of administrative law has never changed: its purpose is to safeguard the rights that people and corporations have in relation to government. Yet the composition of the community and the way that people are affected by government decisions has changed markedly over the years, and will continue changing.

Compared to the position two decades earlier, a much larger proportion of the population are now wage earners and pay taxes and claim a growing a range of deductions and rebates. The mix of taxpayers has changed, and includes a higher proportion of women, youth, contractors and small businesses. A different and larger range of government benefits and entitlements are available to the public, with the result that a higher proportion of the population receive social security assistance. Personal and business travel is more common,

and with it immigration visa processing and border control. Government agencies deal more often now with people suffering mental illness, or with poor language or communication skills.

People's personal and financial circumstances have become more varied and complex. The nuclear family has increasingly given way to different family patterns, parenting commitments and living arrangements. The pattern of people's work and income derivation is vastly different. Superannuation and financial retirement planning is more a part of people's lives.

The occasions on which people interact with government has also changed. Applications for building approval and land development increase every year. There are more planning and environmental restrictions on what property owners and occupiers can do. Approval to import or export goods, or to undertake international transactions, is needed more often. In short, government regulation now controls or touches all areas of corporate and business endeavour.

Those changes and many others are reflected in complex laws that are administered by government agencies. There has been a dramatic growth in the volume of daily transactions between government and the public. To give but one example, in the Australian Government Human Services portfolio (including Centrelink, Medicare, the Child Support Agency, CRS Australia and Australia Hearing) there were on average on each day in 2009, 361,000 face-to-face contacts, 221,000 phone calls, 400,000 letters, and 70,000 online transactions.[16]

Every transaction by a person with a government agency or service provider can potentially throw up a unique administrative law issue. Is administrative law evolving to respond efficiently and appropriately?

Responding to the challenge of securing administrative justice

The ten challenges outlined in this paper demonstrate the need for a vibrant system of administrative law that can safeguard people in their dealings with government. External review by courts, tribunals, ombudsmen and other review and oversight mechanisms has not dwindled in importance.

On the other hand, the current challenges to administrative justice are qualitatively and quantifiably different to those that predominated when the administrative law system was devised over thirty years ago. Different in every way are the face of government, the programs it administers, the responsibilities it discharges, the way that functions are performed, the interaction between government and the community, and community expectations of government. A different administrative law response is now required.

Judicial – and, to a lesser extent, tribunal – review of individual administrative decisions has always been the keystone of administrative law. Their importance is undiminished, though review of individual decisions through adjudication of disputes can only directly address a couple of the challenges mentioned earlier. Faulty decision making can still be corrected from one case to the next and, through this process, general guidance can be provided on the correct interpretation of legislation and the principles of good decision making. Judicial and tribunal review can also shape thinking and behaviour in specific areas of government administration, and occasionally highlight problems that stem from delay, computerisation and administrative penalties.

More is needed. The quest for administrative justice now requires a fresh approach and response. One problem mentioned already is the jurisdictional problem: courts and tribunals (unlike the Ombudsman) cannot generally review decisions made under executive power or

by non-government agencies, or administrative actions that have not crystallised into a decision. Beyond that limitation is the even greater challenge of dealing with complexity, delay, computerisation, administrative penalties, cross-agency activity and the diversity of human problems. Allied to that is the need for administrative law to influence all areas of government and to reach all sectors in the community.

This paper will outline five changes that must underpin a new approach. The discussion will focus on external measures, rather than upon internal improvements in staff training, internal review and internal monitoring and quality review.

1. Complaint handling

There is, firstly, a need for broad based complaint handling through Ombudsmen and similar oversight agencies. Complaint handling is an efficient, low-cost, flexible means of handling the individual difficulties that people encounter with government. It can respond to problems that involve more than one agency, that cross program boundary lines or that arise in outsourced service delivery. Minor administrative errors can be addressed, as well as serious abuse of power. Individual complaints commonly point to more systemic problems in government administration that can then be investigated and corrected before they worsen.

Complaint handling has grown in importance in the last thirty years. The principles of effective complaint handling are spelt out in an Australian Standard and in the better practice guides published by Ombudsman and other offices.[17] It is perhaps the major way that the grievances of members of the public are raised with and settled by government agencies. Upward of 500,000 complaints are received annually by public sector and industry ombudsman offices. Agencies also commit considerable resources to complaints, by establishing their own internal complaint units and by responding to the investigations conducted by external oversight agencies.

A perennial disparagement of complaint handling is that it can only result in a recommendation and not a binding determination. The importance of that point has been greatly overstated. There is a very high rate of acceptance of Ombudsman recommendations by agencies. Furthermore, many investigations do not result in a recommendation that is comparable to the order of a court or tribunal. The most common recommendations are that an agency provide more assistance or a better explanation to a member of the public, that the agency apologise, expedite the resolution of a person's application, revise its application forms, rewrite its administrative procedures, provide better training to agency decision makers, establish better protocols for handling cross-agency issues, or obtain independent legal advice on a disputed issue.

Recommendations of those kinds are often what is needed to provide a practical remedy to a person or to improve administrative standards to reduce the risk of future error. Moreover, those recommendations often require discussion and analysis with agencies, and could not practically be fashioned into a binding Ombudsman determination. The Ombudsman does have the added advantage of being able to follow up to ensure that an agency is taking appropriate action in response to a recommendation. This power – to select the issue to pursue – is denied to courts and tribunals that can deal only with issues that litigants raise before them.

2. Remedies

A point just made warrants separate emphasis. Traditional administrative law remedies – substitution of a new decision, a declaration of the law or the rights of the parties, a direction to an agency to reconsider a matter, an injunction to restrain unlawful action, or a mandatory order to compel an agency to act lawfully – are essential at times to safeguard a person's

interests. However, those remedies are no longer adequate to deal with many of the problems that people encounter in dealings with government.

Sometimes the only remedy that is either needed or effective is for an agency to provide a person with a better explanation of how complex laws or agency requirements apply in their case. An apology may be what a person most wants if they feel wronged by an agency. Action by an agency to expedite a matter that has been delayed can effectively resolve many grievances. Conversely, the remedy needed may be the agreement of an agency to suspend or postpone adverse action while an issue is reconsidered (such as the proposed imposition of a penalty, recovery of a debt, or termination of an arrangement). Yet another way of resolving a problem is for an agency to agree to a 'work around', for example, to consider a fresh application from a person or to provide assistance of a different kind.

A trend in Ombudsman complaint handling is to promote this broader concept of remedy to assist members of the public who suffer disadvantage as a consequence of poor administrative practice.[18] One or other of those remedies was recommended by the Commonwealth Ombudsman in 75 per cent of the complaints investigated in 2008-09.

Financial remedies have also become steadily more important. The thrust of many complaints is that a complainant suffered financial damage as a consequence of maladministration or through acting on incorrect agency advice. Judicial and tribunal review cannot provide compensation as a direct remedy. Compensation is now available through an executive scheme, the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme). Under this scheme Australian Government agencies can pay compensation on a discretionary basis to individuals or groups who have suffered loss as a result of poor administration. Thousands of payments are made each year, ranging from smaller payments of a hundred dollars, to larger payments in the millions.

The Ombudsman's office plays a large role in making recommendations for CDDA payments and in scrutinising agency compensation decisions.[19] This is important, as decisions made under the CDDA scheme (an executive scheme) are not appealable to the AAT or reviewable under the ADJR Act.

Financial remedies are also important where an agency has imposed a penalty or raised a debt against a person. This is a common occurrence, and lies behind many complaints in areas such as taxation, immigration, social security and child support. A remedial issue that receives regular attention in Ombudsman oversight work is the need for agencies to consider waiver and write-off of debts and penalties, under the *Financial Management and Accountability Act 1997* ss 34 and 47 and specific waiver powers conferred by legislation upon agencies.

3. Highlighting systemic problems

It has always been an objective of administrative law to stimulate better decision making beyond the matter under review – or, as it is sometimes put, to have a systemic impact in improving the quality of administrative decision making.[20] This is important because an agency error that occurred in one case is likely to be repeated in other cases. In a court or tribunal action, the order or decision will apply directly only to the parties to the action. The ruling can have a wider precedential effect, but there is no formal mechanism for either ensuring or evaluating if that occurs.

Ombudsman offices deal with that challenge by devoting more attention to conducting own motion investigations that result in published reports. My own office now aims to publish at least twenty reports a year. Some of the issues noted earlier in this paper – agency reliance on executive schemes, payment of administrative compensation, debt waiver and write off,

unintended legislative consequences, wrongful immigration detention, postal delivery failures, administrative penalties, grant administration, and delay in freedom of information decision making – have recently been taken up in own motion reports.

A report typically commences with a handful of complaints that illustrate the nature of a problem, and then examines the administrative failures that gave rise to the problem and the reforms needed to avoid it recurring. An extensive dialogue is usually undertaken with agencies during the preparation of reports, so much so that agencies frequently correct the underlying problems before the reports are finalised. Six months after a report is published, the agency is asked by the Ombudsman to explain the steps taken to implement the report recommendations.

Another technique that is now widely used by Ombudsman offices to improve the quality of administration is to monitor and audit agency action and to conduct inspections. For example, my office conducts routine (including unannounced) inspections of immigration detention centres, we audit police complaint handling and quarantine investigations, and we regularly inspect the records of law enforcement agencies to ensure compliance with laws relating to telephone interception and electronic surveillance. Monitoring, auditing and case sampling are effective both in picking up hidden problems and in reminding agencies that their administration is under constant scrutiny.

4. Cultural and attitudinal change

The theme of this paper is that administrative law needs a rethink if it is to secure administrative justice for the public in relation to government. My abiding concern is that the changes and challenges discussed in this paper are not fully recognised, and that the discipline is too deeply rooted in traditional theories and experience. I will take as an example an assessment made of the role of the Ombudsman institution in the most recent textbook on administrative law to be published in Australia:

> [O]n the spectrum between internal and external accountability mechanisms, the ombudsman is perceived as being closer to the former than the latter pole. … The emergent picture is of an institution kept on quite a short leash, its continued flourishing perhaps unduly dependent on the good opinion of the very agencies it oversees. … [T]he location of the ombudsman firmly within the executive branch, and the ongoing, interactive relationships of trust and cooperation that underpin ombudsmen's success, seem antithetical to concepts of the rule of law on which legal accountability of government is traditionally based. … [This suggests] that the ombudsman's role is less constitutionally significant than that of bodies, such as courts and tribunals, that maintain greater distance from government and are better equipped to 'keep it honest'.[21]

I hope I am mistaken, but I fear that that stereotype is widely held and taught in Australian law schools. It reflects a view of the Ombudsman role – and, more generally, of accountability and the impact of administrative law – that has not moved in over thirty years. It takes no account of the dramatic change that has occurred in the way that government actions affect the public and can be remedied.

Nor does it comprehend the way that Ombudsman offices and other executive oversight agencies relate to government and impact upon it. Many Ombudsmen in Australia have a relatively high public profile that derives from their forthright public criticism of agency maladministration. To use my State Ombudsmen colleagues as an example, they have received extensive media coverage for their scathing criticisms of prison administration, child welfare protection, police watch-houses and freedom of information administration, to name but a few areas. Speaking personally I know that none of them has hesitated to express a view that is unwelcome to government and that many have encountered direct agency displeasure at the stance they have taken.

To suggest that executive oversight agencies are institutionally incapable of holding government to account is to ignore history. The role that administrative law can play in securing administrative justice will be hampered if we adhere to time-worn stereotypes of accountability and independence.

5. Re-thinking the constitutional framework

One way of stimulating a cultural change in administrative law is to rethink our constitutional understanding of the role of oversight agencies. There are now a great many independent agencies that are created by statute to oversight the decisions and actions of executive agencies. The list includes auditors-general, ombudsmen, privacy commissioners, human rights and anti-discrimination commissioners, public sector standards commissioners, inspectors-general and corruption commissions.

Most of those agencies (the auditor-general excluded) were created in the last thirty years in response to the changes in government and in public expectations outlined in this paper. It is conventional, for the want of any different constitutional classification, to classify them as executive agencies. Self-evidently, they do not form part of the legislative or judicial branch of government.

But is it time to rethink traditional constitutional theory? The oversight agencies are independent of other executive agencies; indeed, their function is to oversight and investigate complaints against executive agencies. Oversight bodies do not implement the policies and programs of the government in the traditional manner of the executive branch. With courts and tribunals, they enforce the rule of law in government, check the propriety of administrative decision making, safeguard vulnerable citizens against abuse of power, and ensure that remedies are provided to those who are wronged by defective agency action.

An alternative constitutional theory would take stock of this change and look at how our system has evolved over the past thirty years. It is perhaps time to acknowledge that we now have a fourth branch of government – the oversight, review and integrity branch.[22] It would enhance administrative justice to readjust our constitutional theories to take account of this new and effective system for control of government action.

Endnotes

1 Eg, *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
2 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, 2002.
3 Eg, Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007 at 14.
4 *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, 2005, at p 26.
5 Commonwealth Ombudsman, *Inquiry into the circumstances of Vivian Alvarez matter*, Report No 3/2005.
6 Eg, Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007 at 4-5.
7 Ibid at 10-11.
8 See Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46 (2004).
9 This issue was later taken up in a Commonwealth Ombudsman report, *Executive Schemes*, Report No 12/2009.
10 See Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11/2009.
11 Recent examples at the national level include the Australian Government Disaster Recovery Payment, Australian Apprenticeship Incentives Program, Rural and Regional Skills Shortage Incentive Payment, Equine Influenza Business Assistance Grant, Commercial Horse Assistance Package, Equine Workers Hardship Wages Support, LPG Vehicle conversion scheme, Environmental Management Systems Incentive Program, Tobacco Package Restructuring Grant, Murray Darling Basin Irrigation Management Grant

program, Exceptional Circumstances Exit Grant, Carer Adjustment Payment, the Department of Immigration Complex Case Support scheme (providing assistance to refugee placements), and the F-111 Deseal/Reseal scheme (providing health compensation to Defence employees).

12 For a discussion of the problems, see Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009; and J Nicholson, 'After Burn: the devastating repercussions of an F-111 cleaning program are still being felt', Australian Parliament, *About the House* (Sept 2008) at 38-41.

13 The issues are partially addressed in Commonwealth Ombudsman Fact Sheet 6, *Complaint handling: outsourcing*.

14 An amendment to the *Ombudsman Act 1976* s 3BA in 2005 conferred jurisdiction on the Commonwealth Ombudsman to investigate complaints against government service providers, that is, services provided to the public under contract with a government agency.

15 See Commonwealth Ombudsman, *Australian Federal Police and the Child Support Agency, Department of Human Services: Caught between two agencies: the case of Mrs X*, Report No 14/2009

16 The Hon Chris Bowen, Minister for Human Services, 'Service Delivery Reform: Designing a system that works for you', Address to the National Press Club, Canberra, 16 Dec 2009.

17 Eg, Australian Standard AS ISO 10002-2006, 'Customer Satisfaction—guidelines for complaints handling in organisations'; Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*.

18 See Commonwealth Ombudsman, *Providing Remedies*, Fact Sheet No 3.

19 See Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11/2009.

20 This issue is taken up in J McMillan, 'Can Administrative Law Promote Good Administration?', paper delivered as The Whitmore Lecture – 2009 to the Council of Tribunals, NSW Chapter.

21 P Cane & L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (OUP, 2008) 269-271.

22 This is further discussed in J J Spigelman, 'Jurisdiction and Integrity', AIAL National Lecture Series, 2004; and J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1.

FINALITY OF ADMINISTRATIVE DECISIONS AND DECISIONS OF THE STATUTORY TRIBUNAL

Stephen J Moloney*

The finality of any decision which affects a person's entitlement or interest engages a fundamental precept in the rule of law.

In the setting of the exercise of judicial power, there would hardly be a person in this country, let alone a lawyer, who would not both recognise and accept that a judicial determination is one which "… must stand, and, unless reversed or varied on appeal if there be an appeal, would govern the matter".[1]

But what of the position of the administrative decision and the decision of a statutory tribunal?

That question engages two competing interests[2] in respect of which I contend no clear principles have been, or perhaps are ever able to be developed. On the one hand there is the desirability for the administration to correct decisions when they are attended by error of law or fact. On the other hand, a favourable decision for an individual, if sought to be reconsidered, may and is likely to almost certainly cause a real sense of despair.

It is these two tensions which underlie the entire question of the finality of administrative decision making.

When one moves to the question of the resolution of these tensions, one must grapple with the question of the nature of the statute authorising the decision, the decision itself and the nature of the error.

Is the decision a final decision which bears the hallmarks of finality such that one would not reasonably conclude that such a decision is able to be remade? If it is, then speaking generally, the law would accord the decision finality and irrevocability.

If it bears the character of finality, the decision is only able to be re-made if it is made in jurisdictional error – for the reasons disclosed in *Bhardwaj*[3]. But the error attending the decision must be of that character. Mere error within jurisdiction may be erroneous in the general sense of the word but will not result in capacity to remake, if the decision may be properly characterised as final.

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* *Barrister-at-Law, Victorian Bar.* *This paper was presented to the 2008 AIAL National Administrative Law Forum, Melbourne, 8 August 2008. The writer wishes to acknowledge the valuable insights into these matters given by the three Senior Counsel who led him at various times in Kabourakis v The Medical Practitioners Board of Victoria [2005] VSC 493 and [2006] VSCA 301 as well as the helpful comments of Mr Jeffrey Barnes, Senior Lecturer at Law, La Trobe University. The opinions and observations in this paper are nevertheless mine and the responsibility for them rests solely with me.*

The Statutes of Interpretation are of assistance in the unlocking of these questions but they are not determinative. The answer always lies in the construction of the statute conferring the power and the subject matter of the decision. Thus it is my contention that the only sure way for the legislature to ensure that there is revocability for a decision of a decision maker or a tribunal, if that is the intention, is to expressly confer it. If that does not happen, the Statutes of Interpretation will not definitely achieve it and nor will the common law.

Further, if the contrary is the case, finality needs to be made very clear from the terms of the statute conferring the power, for otherwise the terms of the Statutes of Interpretation may result in the decision being revocable.

It is into this thicket of uncertainty that one must now descend.

It has long been stated that "an administrative decision remains good in law unless and until it is declared invalid by a court of competent jurisdiction".[4] Indeed it has been said that, save for fraud or clear statutory statements,[5] administrative decisions, once given effect by communication to the affected party, are irrevocable on the basis that the power is spent.[6]

Some note ought be taken of and appropriate recognition needs to be given to the presumption that "the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings".[7]

It is important to recognise, first, that this said presumption is a presumption only and, secondly, that "it is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside".[8]

Further, the generality of the proposition of continuing validity must now, of course, be assessed in the light of the High Court's decision in *Bhardwaj,*[9] which makes it clear that the law in this country is that any decision which is made in jurisdictional error is one which may be "seen to have no relevant legal consequences"[10] or one which in law is "no decision at all".[11] It is thus well understood in this country, at least since *Bhardwaj*, that an administrative decision which has been made in jurisdictional error is one which may be re-made by the primary decision maker, for to so then act, the original decision maker, when then acting in the manner without the attendant error vitiating the exercise of power once first exercised, will then be acting in the manner required of him or her by the enabling statute which the decision maker was first "bound to do".[12]

This paper will attempt to do the following things:

1. Address generally the scope of any power to remake a decision made within jurisdiction by reference to:

   (a) the statutes of interpretation; and
   (b) the common law in Australia, the United Kingdom and Canada.

2. Address how one is to apply the dictate of the statutes of interpretation that one must identify contrary intention.

3. Consider briefly the effect of fraud and misrepresentation.

4. Consider the relevance of any agreement to set aside a decision.

5. Look briefly at the position in Local Government.

6. Consider some practical issues that have arisen in the migration setting.

7. Provide some conclusionary comments.

Therefore, what is the position when the decision is not affected by jurisdictional error and it is to this issue which I now must turn.[13]

The decision – unaffected by jurisdictional error

It must be steadily remembered that the starting position for the status of such a decision, as expressed in *Bhardwaj*, is that such a decision is "effective for all purposes"[14] and may be regarded as binding.

When a decision which is made pursuant to a statutory power is made within jurisdiction, then there must be found to be a source of power to make the same decision again.

This is because a statute which confers a power to make a decision will be properly characterisable as one which exists for that purpose – the purpose of making the decision. When that purpose has been fulfilled, the power is "exhausted" or "spent".[15]

It is submitted that it does not matter whether this principle bears the name of the Latin term "functus officio" or whether the principle, as I submit, is to be recognised as a matter of fundamental application of the principle that the determination of matters must have a terminus.

It has been put thus:

> There was an inconvenient common law doctrine of somewhat uncertain extent that a power conferred by statute was exhausted by its first exercise.[16]

Craies also puts it thus:

> If a power is given to the Crown by statute for the purpose of enabling something to be done which is beyond the scope of the royal prerogative, it is said to be an important constitutional principle that such a power, having been once exercised, is exhausted and cannot be exercised again.17

It is important to recognise that the above expressions express the common law position and, therefore, the position against which various interpretation statutes were first enacted so as to ameliorate the consequences of that principle of law. These kinds of statutes were first passed in the United Kingdom in 1889[18] and in the colonies prior to Federation.[19]

The power to re-make a decision may either be conferred expressly by the statute or it may be implied.[20] Plainly, the Parliament may give an administrative decision whatever force it wishes.[21]

In the event that the power to re-make is expressly found in the statute conferring the power, then no difficulty whatsoever will arise.[22] Plainly the decision may be re-made. But such is not usually, if ever, the case nowadays, at least in part because of the terms of the statutes of interpretation, to which I will turn later.

Then the power may perhaps be implied from the statute itself. To discern the implication may on occasions not be an easy task; whatever the difficulty, I suggest that it is a largely unrewarding task. I say unrewarding for, as I will explain later, when the statutes of interpretation create the presumption that a power, once exercised, may be re-exercised, for myself I see little utility in engaging in the process of searching for the existence of a power that already exists subject to the existence of contrary intention. Nevertheless, if the power

to revoke may be readily implied from the statute then, as a matter of reality, that will certainly also evince a clear intention that the decision made is not a final one and, under the statutes of interpretation, may be re-made. Thus one may still engage in the exercise of analysis of the statute in those two ways in order to achieve the same result.

In *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*,[23] French, J addressed the question of the manner of approaching the implication of such a power into the statute:

> The general question whether an implication should be found in the express words of a statute has been said to depend upon whether it is proper, having regard to accepted guides to construction, to find the implication and not on whether the implication is 'necessary' or 'obvious': see F A R Bennion, *Statutory Interpretation* (1984), p 245. While implication can often be justified by necessity, it should not be limited by that condition. The question whether some power, right or duty is to be implied into a statute will depend upon the construction of the provisions under consideration having regard to their purpose and context and other traces of the convenient phantom of legislative intention. Where a statute confers a power there is ample support for the proposition that the donee of the grant will enjoy the rights and powers necessary to the exercise of the primary grant. The so called 'inherent jurisdiction' or 'implied incidental power' of a statutory court derives from that general principle: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.
>
> While it may be accepted that a power to reconsider a decision made in the exercise of a statutory discretion will have the advantage of convenience, it cannot always claim the virtue of necessity.

It should be noted that in three well-known cases[24] there was consideration of whether there was a power to revoke to be implied from the statute itself. I will turn to these cases later.

The more relevant question, in my opinion, is the scope and operation of the statutes of interpretation on the power authorising the decision.

Interpretation statutes

Section 33 of the *Acts Interpretation Act 1901* (Cth) provides as follows:

> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

All States and Territories have an analogue to this provision.[25]

The common theme amongst all such statutory provisions is that a statutory power may be re-exercised "unless the contrary intention appears".

The requirement of "contrary intention" in such statutes either arises in the very provision itself, for example as is contained in s 33(1) of the Commonwealth statute[26] or, alternatively, is found elsewhere in the interpretation statute, and thus such a provision as found in the Act governs the general power.[27]

It should also be noted that by s. 33(3) of the Acts Interpretation Act, the power to make an instrument includes a power to revoke the instrument, unless the contrary intention appears. This power also exists in State legislation.[28] It also may support an act of revocation if it is an instrument which is being considered.[29]

The power in s 33(1) is a power which has significant scope for ameliorating the effect of the *functus officio* rule. It is interesting to note that it has been observed that the power has "been overlooked in the past and [has] been rarely used".[30] Whilst I would not, with respect, necessarily entirely accept that proposition, its terms always repay attention.

One must remain mindful of the cautionary words of Sir William Wade in his famous work that these provisions give "a highly misleading view of the law where the power is a power to decide questions affecting legal rights … the same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities."[31]

There are cases which provide instances of the "contrary intention", hence the caution of Sir William Wade, and it is to that matter which I now must turn.

"Contrary intention"

It is important to recognise, first, that the interpretation statutes put on its head, the common law presumption that the exercise of power, once made, exhausts the power.

Accordingly, the position which now obtains is that a power may be re-exercised unless the contrary intention appears from the statute.

One therefore is always driven back to a construction of the terms of the statute conferring the power to decide.

The question is, does the statute either in terms or by implication mean that the decision is final and may not be re-made?

If the statute conferring the power says so expressly, then little difficulty will arise, for the contrary intention will accordingly be expressly apparent.

The difficulty nearly always exists at the level of whether the decision under the statute is impliedly final. Such an implication usually arises from the subject matter of the statute. It should therefore be remembered that the interpretative obligation is sometimes not necessarily of specific words but may perhaps be of the statute's purpose as a whole – "the convenient phantom" as Justice French puts it.[32]

Finality in any statute may arise from basic principles. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*, Gleeson CJ said –

> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration.[33]

In the High Court's decision to uphold the immunity of advocates for in-court negligence, *D'Orta-Ekenaike v Victoria Legal Ai*d, Gleeson CJ, Gummow, Hayne and Heydon JJ said that the principle that "controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances" was "a central and pervading tenet of the judicial system"[34] and that underpinning the judicial system was "the need for certainty and finality of decision".[35]

Whilst these principles were applied in *D'Orta-Ekenaike* in the sphere of judicial determination, the observation of Gleeson CJ in *Bhardwaj* is submitted to still be apposite as a guiding principle.

The decision of *Kabourakis v The Medical Practitioners Board of Victoria*[36] is the most recent authoritative decision considering these issues.

Kabourakis v The Medical Practitioners Board of Victoria

Dr. Kabourakis treated a patient in May and June 2002 for pain management following an industrial accident in December 1999. He prescribed drugs and the patient died from the inhalation of his own vomit. It was less than clear whether the death was from an overdose, but it clearly was a tragic case.

Pursuant to its powers under the *Medical Practice Act* 1994 (Vic), consequent to a notification to it, the Medical Practitioners Board of Victoria conducted a preliminary investigation and thereafter referred the question of the practitioner's conduct to an informal hearing. A hearing was conducted, the hearing considered the material supplied to it by an investigator employed by the Board and the informal panel hearing found that the Doctor had not engaged in unprofessional conduct.

The notifier was dissatisfied and complained to the Victorian Ombudsman.

The Ombudsman examined the file and recommended that the Board re-open the matter and hold a new informal hearing, because an expert medical report obtained by the Board's investigator opining on the question of the conduct of the Doctor had not been provided to the informal hearing.

The Board convened a new informal hearing and raised the same matters *ipsissima verba*.

Judicial review proceedings commenced to halt the new process. The Board conceded on judicial review, quite properly, that no jurisdictional error had been committed.

The critical statutory provisions were as follows:

> 25.(7) The Board, of its own motion, may determine to conduct (with or without conducting a preliminary investigation)
>
> …
>
> (d) an informal or formal hearing into the professional conduct of a registered medical practitioner.
>
> 38K. Outcome of a preliminary investigation
>
> (1) Upon completing a preliminary investigation into the professional conduct of a registered medical practitioner, the person or sub-committee appointed by the Board to conduct the investigation may make one of the following recommendations –
>
> (a) that the investigation into the matter not proceed further;
>
> (b) that an informal or formal hearing be held into the matter;
>
> (c) that the medical practitioner undergo a medical examination;
>
> (d) that the medical practitioner's performance be assessed by a medical practitioner or reviewed by a performance review panel.
>
> (2) The Board must determine whether or not to act on the recommendations of the person or sub-committee appointed by the Board to conduct the preliminary investigation.

42. *Conduct of an informal hearing*

At an informal hearing –

(a) the panel must bear and determine the matter before it; and

(b) the practitioner who is the subject of the hearing is entitled to be present, to make submissions and to be accompanied by another person but is not entitled to be represented; and

(c) the proceedings of the hearing must not be open to the public.

43. *Findings and determinations of an informal hearing*

(1) After considering all the submissions made to the hearing the panel may find either –

(a) that the practitioner has, whether by act or omission, engaged in unprofessional conduct which is not of a serious nature; or

(b) that the practitioner has not engaged in unprofessional conduct.

(2) If the panel finds that the practitioner has, whether by act or omission, engaged in unprofessional conduct which is not of a serious nature, the panel may make one or more of the following determinations –

(a) that the practitioner undergo counselling;

(ab) that the medical practitioner undertake further education of the kind stated in the determination and to complete it within the period specified in the determination;

(b) that the practitioner be cautioned;

(c) that the practitioner be reprimanded.

The Court of Appeal referred to the following matters in deciding that the Medical Practitioners Board of Victoria had no power to convene a second hearing and the first decision was final:

1. One must construe the statute granting the power;[37]

2. An administrative decision only has such force and effect as is given to it by the law pursuant to which it is made;[38]

3. As a rule a statutory tribunal cannot revisit its own decision simply because it has changed its mind or recognises that it has made an error within jurisdiction.[39]

4. The requirements of good administration and the need for people affected directly or indirectly by decisions to know where they stand mean that finality is the paramount consideration and the statutory scheme, including the conferring and limitation of right of review on appeal, will be seen to evince an intention inconsistent with capacity for self correction of non-jurisdictional error. In the bulk

of cases, logic and common sense so much incline in favour of finality as to permit of no other conclusion.[40]

5. If it was possible for the Board to re-open the findings of an informal hearing, there would be no end to that possibility. If not once, then twice and so forth? There must be a terminus for such a finding.

6. The finding of finality was aided by the fact that the practitioner was able to request a formal hearing under s 45 if dissatisfied but the Board was not. The Board was found to be bound by its election to take the informal hearing route.

7. There was a prospect of inconsistent findings if the Board was able to convene a second hearing and Parliament would have intended to create that state of affairs. The fact that the practitioner was found to have been cleared was irrelevant to that matter. It was expressly rejected as "facile" that a favourable finding is without legal effect.

8. Upon the construction of the Act, a notifier has a sufficient interest to review the decision of an informal panel which leads to a conclusion of finality.[41]

9. As appeal rights are given to the Board in respect of other decisions made under the Act, and as none are conferred in the case of an informal hearing, this implied that the Board does not have an overriding power to act under its own motion power under s 25(7) to commence another investigation.[42]

10. Where an apparently exhaustive group of provisions deal with a matter in a fashion which is repugnant to another provision or provisions having operation, then the latter provision yields to the former provision.[43] So in this case the own motion power of the Board under s 25(7) to re-refer the matter yielded to the effect of a finding under s 43.

11. The effect of s 40 of the *Interpretation of Legislation Act* does not enable a further exercise of power which would "annihilate the effects of a finding made by a panel in the determination of a hearing undertaken pursuant to a previous exercise of power".[44]

There are other cases that have decided that an exercise of power is final and thus exclude the operation of s 33(1) and its analogues, some of which were referred to and approved in *Kabourakis*.

Other authorities on contrary intention

In Re Denton Road, Twickenham[45] is one. There the *War Damage Act 1943* created the War Damage Commission and empowered it to pay compensation to property owners who had suffered loss from enemy bombing raids on London in 1940. The legislation provided for a regime of claims, assessments and awards. There was an analogue to s 33 at that time and Vaisey, J at 56-57 held –

> that where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affect be altered or withdrawn by that body.
>
> …

> I think that the contrary view would introduce a lamentable measure of uncertainty, and so much disturbance in the minds of those unfortunate persons who have suffered war damage that the Act cannot have contemplated the possibility of such vacillations as are claimed to be permissible in such a case as the present.

In *Walter Construction Group Limited v Fair Trading Administration Corporation*,[46] Grove J rejected an attempt to rely upon the equivalent of s 33 in relation to a decision on a claim under a statutory building insurance scheme, saying –

> I do not construe that provision as vesting a power to make and unmake decisions infinitely. If power does not stretch to infinity, there must be in the circumstances of a particular case and 'as occasion requires' a terminus. In this case it was reached with the communication of decision by the letter of 24 October 2002.[47]

Leave to appeal from the judgment of Grove J was refused by the Court of Appeal.[48] Santow JA, with whom Sheller JA and Tobias JA agreed, made specific reference, with apparent approval, to the above passage.[49]

In *Export Development Grants Board v EMI (Australia) Ltd*,[50] the Full Court of the Federal Court considered the *Export Expansion Grants Act 1978* (Cth); s 11 –

> 11.(1) The Board shall consider every claim duly made and determine whether the claimant has an incentive grant entitlement and, if so, the amount of that incentive grant entitlement.
>
> (2) Where the Board determines that a claimant has an incentive grant entitlement, there is payable to the claimant a grant equal to the amount of the incentive grant entitlement so determined.

This was held to mean that once the Board had performed the task required of it by s 11, it could not reassess the decision as it was *functus officio*:

> [W]hen the Board has determined the entitlement and the grant, its original task in relation to that claim is ended.[51]

The terms of the Act left no room for the application of s 33(1) of the Acts Interpretation Act.

In *Firearm Distributors v Carson*,[52] Chesterman J considered the nature of a power conferred on the Commissioner of Police by regulation 71(3) of the *Weapons Regulations 1996* (Qld) in respect of surrendered weapons. The regulation there provided –

> The Commissioner (of Police) is to decide the amount of compensation payable to the person under this section.

The Commissioner determined the amount of $971,160 on 21 April 1998, and subsequently varied to the reduced amount of $306,160 on 7 May 1999. His Honour found:[53]

(a) that the decision possessed the requisite degree of finality and was not amenable to reconsideration or reversal; and

(b) that the statutory equivalent of s 33 in Queensland was not available because the contrary intention appeared.

In *Ping v Medical Board of Queensland*,[54] Moynihan J considered s 164(1) of the *Health Practitioners (Professional Standards) Act* 1999, which provided as follows:

(1) As soon as practicable after completing a hearing of a disciplinary matter relating to a registrant under subdivision 2, or within 14 days after the end of the period for making a submission stated in the notice given to a registrant under section 153, the board of disciplinary committee must decide whether a ground for disciplinary action against the registrant is established.

The Medical Board of Queensland determined to conduct a disciplinary proceeding by way of correspondence and so advised the parties, but it later purported to rescind that resolution and to direct that the matter proceed by way of hearing. Having referred to *Bhardwaj*[55] and *Firearms Distributors v Carson*,[56] the Court held that the Board's election to pursue the course of determining the matter by correspondence rather than by hearing could not be abandoned and that the equivalent of s 33 had no application.[57] His Honour accepted that a purpose of the legislation was to uphold the confidence of the public in the profession, but said:

> Those general considerations have to yield to the specific provisions of the legislation.[58]

In *VQAR v The Minister for Immigration and Multicultural and Indigenous Affairs*,[59] the question was whether the Minister, having made a decision under s 501A(2) of the *Migration Act 1958* (Cth) to refuse to grant a visa on character grounds, may subsequently revisit, reconsider and set aside that decision.

In this case, the applicant overstayed his visitor entry permit and , 5 or 6 years later, was located and placed into immigration detention. Seven days later he applied for a spouse visa and about 12 months later that application was refused. The applicant sought review in the AAT and 3 years thereafter the AAT set aside the delegate's decision and ordered re-consideration. Four months thereafter the Minister himself made a decision and pursuant to s 501A(2) of the Migration Act, set aside the AAT's decision.

Section 501A(2) provided:

> The Minister may set aside the original decision and;
>
> (a) refuse to grant a visa to the person; or
>
> (b) cancel a visa that has been granted to the person;
>
> if
>
> (c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and
>
> (d) the person does not satisfy the Minister that the person passes the character test; and
>
> (e) the Minister is satisfied that the refusal or cancellation is in the national interest.

An "original decision" includes a decision of the AAT.

Following protracted litigation to the High Court challenging this decision, an application was made to the Minister to reconsider his original decision.

The question was whether s 33(1) afforded the basis for doing so.

Justice Heerey took the view that the power in s 501A(2) is not a power which may be re-made.

His Honour held that:

(a) the Act provided for a complex scheme for dealing with visa applications, with review rights, and once they are exhausted the person is to be removed from Australia;

(b) it would be inconsistent with parliamentary policy for the Minister to have a "floating inchoate power like Banquo's ghost" extending indefinitely;

(c) the fact that it/the power is a personal Ministerial power leads to finality;

(d) that there existed a power under s 501A(3) to set aside an original decision like the power under s. 501A(2) but followed by a power in s 501C(4) that the revocation power under s 501A(3) is revocable – but that power did not extend to the power under s 501A(2).

These matters led to the conclusion of a contrary intention.

Sloane v The Minister for Immigration, Local Government and Ethnic Affairs[60] was decided in 1992 under older provisions of the Migration Act.

Mr. Sloane overstayed his temporary entry permit which expired in January 1982 by ten years. He was arrested on 12 June 1991. He applied to a delegate of the Minister for an extended eligibility temporary entry permit, as he was then permitted to do.

That application was refused on 2 August 1991.

He then applied to the Immigration Review Tribunal for a review of the refusal. That application was determined to be incompetent because the applicant had been arrested on 12 June 1991 and the Migration (Review) Regulations precluded the Immigration Review Tribunal from entertaining such an application by such a person.

Accordingly, the applicant sought to have the original decision of the Ministerial delegate reviewed upon the production of further evidence.

The initial power of the delegate was exercisable under s 82(1) of the Migration Act, upon the question of whether a deportation order ought to be made. The applicant initially applied, in June 1991, for an extended eligibility temporary entry permit on the remaining relative ground and compassionate grounds, which grounds were available under regulation 131A of the then *Migration Regulations 1989* (Cth).

French, J took the view[61] that such a power, when exercised once is not re-exercisable because –

- there were no clear words in the statute so authorising;
- the presence of full judicial review rights and Regulations going to reviewability points against that conclusion;[62]
- thus there was no basis for implying in the statute that the decision may be re-exercised.

I have taken some time in dealing with *Sloane* for, whilst there are some well known and (with respect) most elegantly expressed statements by French, J in this case concerning the amenability of administrative decisions and their finality, its analysis did not give consideration to s. 33. His Honour looked to whether he could imply the power of re-consideration from the Migration Act itself.

Jayasinghe v Minister for Immigration and Ethnic Affairs[63] is another such case.

In *Jayasinghe* the question for consideration was whether the Refugee Review Tribunal was able to re-open or re-consider its substantive decision on its review of an RRT - reviewable decision – after it had published its decision.

Goldberg, J commenced his analysis of the position with an exposition of the *functus officio* doctrine, a doctrine which he held is not limited to the exercise of judicial power, by saying:

> …it is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform.[64]

The jurisdiction of the RRT at that time was to review an "RRT-reviewable decision".[65] The definition "RRT-reviewable decision" did not include a decision of the RRT itself.[66]

What enabled His Honour to conclude that a decision of the RRT is not able to be re-considered or re-opened was that there were provisions elsewhere in the Act which enabled a person to make a further review of an RRT-reviewable decision to the Tribunal[67] or to make further application to the Minister for a protection visa,[68] and the Minister is not bound by the decision of the RRT.

His Honour stated that these two provisions recognised the fact that there may be further relevant facts which emerge after the initial Tribunal decision, which may be brought before the Tribunal on a further application. All these matters pointed to a conclusion of finality of the first decision, such that there was no clear intention on a construction of the Migration Act "to imply a power in the Tribunal to reconsider or re-open a decision".

His Honour did not rely upon s 33 in his analysis but, as is clear from his reasons, it is submitted, with respect, that he would probably have also concluded that the "contrary intention" was present had he also so reasoned.

Leung and Anor v Minister for Immigration and Multicultural Affairs[69] is an important case for the following reasons:

1. It considers the approach to be taken in the light of the statutes of interpretation;

2. It considers various cases and expresses views concerning the finality of administrative decision making.

3. It gives further light as to how *Kawasaki Motors* is to be dealt with, a matter and a case I will turn to later.

It should be remembered that *Leung* pre-dates *Bhardwaj* and, interestingly, its conclusion on the treatment of a decision made in jurisdictional error was later found in *Bhardwaj* to be correct.

In *Leung,* the applicants had obtained a certificate of Australian Citizenship Order pursuant to s 13(1) of the *Australian Citizenship Act* 1948 (Cth). This section conferred no revocation power. Nevertheless the holding of the court was that the decision to grant citizenship was obtained by misrepresentation and not "in the true exercise of the power conferred by s 13(1) and could then be treated as having no effect"[70] – classic *Bhardwaj*.

Accordingly, the observations of the court on the question of the revocation of a validly made decision are obiter.[71] In this exercise, Finkelstein, J briefly refers to a variety of cases, some of which I have referred to or will refer to in this paper. What is worth noting is that His Honour states:[72]

> When one turns to consider the circumstances in which a power of reconsideration will be implied an examination of the cases shows that no coherent set of principles has as yet been developed. The courts have been required to choose between two competing interests – on the one hand there is the desirability for the administration to be able to correct decisions arrived at as a result of an error of law or an error of fact. In some cases it may also be desirable that an administrative decision be altered when there has been a change in policy. On the other hand, if a decision is favourable to an individual its reconsideration may cause a real sense of grievance.

I make some further general propositions. Until a Tribunal actually hands down its decision, or otherwise communicates it, it may not be regarded as *functus officio*.[73] Accordingly, a person may seek to approach the decision maker until that time.

The fact that a right of appeal or a right of review may exist does not alter the finality of any decision.[74] It may not be concluded that such rights take away the finality of a decision. Indeed to the contrary, they may point to the opposite conclusion.

Contrary intention – a summary

1. A decision which affects the rights of a person in some way is likely to point more to a decision presumed to be final.

2. The principal of finality is a powerful consideration and courts are well-prepared to so find when their individual personal rights are affected or even third party rights are affected.

3. When no appeal rights are conferred finality is a powerful conclusion. The presence of an appeal right does not necessarily negate the conclusion.[75] Indeed, interestingly, the existence of an appeal right may also support a conclusion of finality.

4. If the statute provides a body with an own motion power, then that power will not necessarily override the principle of finality if the statute provided for a mechanism for the determination of an issue.

5. If the tribunal is exercising judicial power under common law concepts, then the conclusion of finality may be more readily accepted. This is important in the State sphere first because State tribunals may exercise judicial power,[76]unlike Commonwealth Tribunals by reason of Chapter III of the Constitution. Common law notions of judicial power in the State setting are broader than in the Commonwealth setting.[77]

6. Accordingly, one may look to the nature of the power being exercised by a tribunal and ascertain whether the power may be characterised as judicial.[78]

7. Thus, the power needs to be examined in order to ascertain, speaking generally and not exhaustively,[79] whether:

    - there is an ascertainment of facts that fulfil conditions prescribed by law;

    - there is a decision setting for the future, perhaps between persons, but may also be of status (judgment *in rem*), a question as to the existence of a right or obligation;

- an inquiry as to the law as it is and the facts as they are followed by the application of the law as determined to the facts as determined;

- there is an imposition of liability affecting rights by a determination of itself, not by the fact determined;

- if the adjudicating body cannot exercise its power of its own motion, this points towards the judicial concept.[80]

8. There is no necessity for an *inter partes* dispute for a decision affecting a person in the way of their status may be a judgment *in rem*.[81]

9. The question of whether a body exercises judicial power is, or may be, not without its difficulty. I point to this issue so as to enable one to consider that question in the context of the statutory setting of the powers of decision maker.

10. If the decision sought to be revoked has the potential to create the result that there are two conflicting legally made decisions, particularly as to status or liability, then that conclusion tells in favour of finality of and non-revocability of the former decision.[82]

11. Should there be provisions in an Act which confer time limits for the decision making process, prescribe mechanisms for the decision making process and limited forms of judicial review, as was the case in the Migration Act, when considered in *Bhardwaj*, then such matters pointed towards a conclusion of finality.[83] It is recognised that the conclusion of the majority of the High Court in *Bhardwaj* of the consequences of a decision made in jurisdictional error meant that the s 33 question did not arise; nevertheless, the observations referred to are matters which may still be validly used to assist in another interpretative approach.[84]

12. If the statute confers an opportunity to re-apply and make a further application, then this situation tells in favour of finality of the primary decision.[85]

Common law position on the re-making of decisions

There is considerable scope for confusion on this question and certain cases which do or seem to set out a basis at common law for the re-making of a decision need to be analysed very carefully, to discern whether such cases are really speaking about a decision which is made in jurisdictional error as is now recognised. If they are, the law, as is now clear from *Bhardwaj,* may be the proper basis for understanding why such a decision is able to be made.

The observations of Justice Beaumont in *Comptroller-General of Customs and Anor v Kawasaki Motors Pty Ltd*[86] ("*Kawasaki*") are the most well-known.

In *Kawasaki* on 2 August 1984 the Comptroller-General of Customs made a Commercial Tariff Concession Order. On 4 October 1989 he purportedly revoked it. That revocation was challenged and consent orders were made on 20 July 1990 by Davies, J that the decision to revoke (made 6 July 1990) the revocation order of 4 October 1989 be set aside. Litigation followed, being the decision in *Kawasaki* which considered whether the purported revocation of the revocation order was valid.

The power to revoke the concession order existed under s 269 P (1) of the *Customs Act 1901* (Cth).

The question was whether there existed a power to revoke the exercise of the express statutory power to revoke. This question is against the setting that the original revocation order was said to be of doubtful validity on "grounds which appear to be substantial".[87]

This is critical for the 4 October 1989 revocation order was challenged in the first proceedings on the following bases; namely that:

- it was made in breach of the rules of natural justice;
- procedures required by law had not been observed;
- the decision was not authorised by the enactment in pursuance of which it was purportedly made;
- it was an improper exercise of power;
- there was an error of law;
- there was no evidence to justify the decision.[88]

Indeed an officer of Customs deposed that "it was accepted by the decision maker that the said decision was invalid".[89] For those reasons, Davies, J made the express order in earlier legal proceedings that the decision to revoke made on 4 October 1989 be set aside.

Accordingly, the status of the first revocation must be either that it was made in jurisdictional error and may be ignored or, alternatively, the order was of no effect by reason of the pronouncement of the order by Davies, J that it be set aside and was void ab initio.[90]

In either event it is my contention that the following words of Beaumont, J, which have oft been cited to support the proposition that revocation is permissible, need to be considered in that light. They are: [91]

> Some administrative decisions, once communicated, may be irrevocable. But where it appears that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision maker withdraw his or her decision.

There are a number of matters to note about this statement:

1. It recognises that at least there is a class of irrevocability.
2. It is made without any reference to or consideration of s 33 of the *Interpretation Act*
3. It is obviously made pre-*Bhardwaj*.
4. It is a statement of law that now accords with *Bhardwaj* when it refers to "acting in excess of power".
5. Proceeding on "a wrong factual basis" may well amount to a jurisdictional error and, if so, again accords with *Bhardwaj;* for example, if there is a failure to take account of a relevant consideration. Further, the phrase "proceeded upon a wrong factual basis" is somewhat uncertain as to meaning. It may have the meaning of "an error of the kind described as 'error in fact' in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication such as would ordinarily induce a tribunal to 'stay its hand if it had knowledge, or to re-open its judgment had it the

power'."[92] Hence either this discloses a tenable reference to jurisdictional error or begs the question as to the capacity to re-open on that purported basis.

6. Beaumont, J himself[93] in *Leung* agreed with the reasons of Finkelstein, J in *Leung* and Finkelstein, J stated in relation to this statement of Beaumont, J in *Kawasaki*:

> I do not consider that His Honour was seeking to lay down a principle of general application to all administrative decision-makers but was confining himself to the exercise of the power there under consideration namely the grant of a tariff concession order under Pt XVA of the *Customs Act 1901* (Cth).

7. Interestingly, Finkelstein, J then goes on to say:

> However, if it is to be taken as a statement of general principle, it has much to commend it in my opinion. There is a good deal to be said for the view that an administrative decision which is plainly erroneous should not stand.

8. Indeed, Hill and Heerey, JJ in *Kawasaki* expressed the following view:[94]

> But the question whether an administrative order can effectively be treated as void by the decision-maker without the need for any order of a court has to be considered as a matter of principle independently from the particular circumstances of the case.
>
> It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation.

9. It may be contended that these statements of Hill and Heerey, JJ in *Kawasaki* and the comments of Finkelstein, J in *Leung*, with the agreement of Beaumont, J, place a severe restriction on the scope of the use to which *Kawasaki* may be put as an authority for the proposition that an *intra vires* decision may be re-made. It may be contended that given the facts of *Kawasaki,* possibly the treatment of the entire court (and certainly Hill and Heerey, JJ) of the legal status of the decision in question and the treatment of the words of Beaumont, J in *Kawasaki*, by himself and Finkelstein, J in *Leung* make it tolerably clear that this statement may be confined to cases where there is a jurisdictional error. As *Bhardwaj* has now clarified how such decisions may be treated, indeed in a manner consistent with the sentiment, in conclusion, of all the judges in *Kawasaki* and Beaumont and Finkelstein, JJ in *Leung*, its application to *ultra vires* decisions has been clarified by *Bhardwaj,* and its application to *intra vires* decisions, because of its facts, is highly doubtful.

10. Furthermore, it is to be noted that *Kawasaki* paid no reference to the use that was able to be made if any of s. 33 of the *Acts* Interpretation Act. On the analysis given by all Judges in *Kawasaki* that is with respect entirely logical, for as was also observed to be the case in *Bhardwaj*,[95] there is no occasion for the consideration of s. 33 when the purported exercise of the power on the first occasion has not been performed in accordance with the statutory mandate. Hence, the setting for and the decision in *Kawasaki* is consistent with an approach to the consideration of the first act of revocation in *Kawasaki* being an instance of the capacity to remake a decision made in jurisdictional error and little more.

11. It is possible that the statement of Beaumont, J may be applicable to an intra vires error but such a statement would seem to ignore the preponderance of

view concerning the finality of administrative decisions and it principally relies upon *Rootkin*, a decision which I will deal with later, which would appear to have limited scope for such an expression of view.

The United Kingdom

There are cases in the United Kingdom which have been relied upon to support the revocability at common law of an administrative decision and these cases have been similarly referred to in Australia.[96] It is now necessary to refer to them so as to ascertain their application in this country.

In *Ridge v Baldwin* Lord Reid considers the consequence of a failure to follow the rules of natural justice and says:

> I do not doubt that if an officer or body realises that it had acted hastily and reconsiders the whole matter afresh, after affording to the person a proper opportunity to present his case, then its later decision is valid.[97]

Beaumont and Carr, JJ in *Minister for Immigration v Bhardwa*j[98] use this quote to support the entitlement of the Tribunal in *Bhardwaj* to act again having failed once to accord procedural fairness on the ground that it "accords with the approach taken at common law, and with the principles of good administration".[99]

Accordingly, the statement of Lord Reid, it is submitted, is really to be now seen as a statement of the consequences of the first decision being made outside jurisdiction.[100] The statement in *Ridge v Baldwin* relied upon the decision of the Privy Council in *De Vertuil v Knaggs*.[101] In *De Vertuil* an order was made in the first instance without the person affected having been heard, but that right was later granted and the primary decision affirmed. Again, *De Vertuil* may be now regarded as a jurisdictional error case.

Rootkin v Kent County Council[102] has been relied upon by Beaumont, J in *Kawasaki* and referred to by Finkelstein, J in *Leung* as affording a basis for concluding that an administrative decision may be re-made.

In *Rootkin v Kent County Council* the Kent County Council was permitted to pay the reasonable travelling expenses of a child that lived more than three (3) miles from school. The enabling power for the payment of such sums was in the following terms:

> A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at any such course or class as aforesaid for whose transport no arrangements are made under this section.[103]

A child aged 12 was given a season ticket. It was thought she lived more than three miles from school. She did not. She was 175 yards short. The season ticket was withdrawn. It was initially granted under a mistake of fact.

The Court of Appeal, per Lawton, J, found the following:[104]

> It is the law that if a citizen is entitled to payment in certain circumstances and a local authority is given the duty of deciding whether the circumstances exist and if they do exist making the payment, then there is a determination which the local authority cannot rescind. That was established in *Livingstone v Westminster Corporation* [1904] 2 K.B. 109. But that line of authority does not apply in my judgment to a case where a citizen has no right to a determination on certain facts being established, but only to the benefit of the exercise of a discretion by the said authority. The wording of section 55(2) is far removed from the kind of statutory working which was considered in *In re 56 Denton Road, Twickenham* and *Livingstone v Westminster Corporation*.

Accordingly, the court held that at best the applicant held an entitlement to the favourable exercise of discretion but that when it is established that the discretion miscarried on the basis of a false fact, the Council may revoke its decision.

Lord Justice Eveleigh put it thus:[105]

> [The] principle of irrevocability may well be applicable when there is a power or a duty to decide questions affecting existing legal rights. In *Livingstone v Westminster Corporation* itself the Council were concerned to assess compensation for loss of office to which compensation the plaintiff had a right under the *Local Government Act* 1899. Generally speaking, however, a discretionary power may be exercised from time to time unless a contrary intention appears. I can see nothing in the *Education Act* 1944 to prevent the education authority from reviewing its decisions from time to time.

It would seem that this reasoning pivotally influenced Beaumont, J in *Kawasaki* .[106] It is also noteworthy to see the presence of the "contrary intention" principle appear.

The error of fact here as made did not go to jurisdiction. The authority's jurisdiction extended to making the payment if it saw fit. The question thus remained as to whether the valid decision could be revoked. *Rootkin* is authority for the proposition that, if a valid decision is one which confers a discretionary benefit and not one which determines a right, then such a decision, if made on the basis of incorrect facts, may be revoked.

There is a contrary argument. The 3 mile limit rule was a rule which informed the exercise of the discretion under s 55(2). This rule arose from the fact that legislation gave a parent a defence to criminal charge for not ensuring a school age child regularly attends school, if the child lives more than three (3) miles from the school and no arrangements have been made by the local education authority for transport to and from school.[107] Accordingly, it had become accepted that a local education authority had a duty to pay reasonable travelling expenses.[108] The court in *Rootkin* stated that the council accepted in the appeal that, where the child lives more than three (3) miles from a school they must pay reasonable travelling expenses.[109]

Was this case, in reality, the application of a broad discretion? The Council appears to have accepted that a relevant consideration to the exercise of the power was the distance of the child from school. The Council submitted "as a matter of *policy*, that as long as the child is physically capable of walking up to three miles and there are no special circumstances, such as a hazardous route, in getting to school, then the child should walk". Was this case one of failure to take into account a relevant consideration? Perhaps. Then again, this consideration was not one which the Council was "bound" to take into account, in the *Peko Wallsend* sense,[110] when one construes s 55(2) so as to raise it to the level of a relevant consideration for the purpose of the exercise of that power. It is thus debatable whether the exercise of power in this matter in this country would have been made in jurisdictional error for failure to have taken a relevant matter into consideration. Further, the Council did take that relevant matter of the child's distance from school into account but got it wrong on the facts. Perhaps, thus, there is no jurisdictional error.

Whatever analysis may be given to the facts of the case, the Court of Appeal did not consider that the original decision was one made in excess of jurisdiction. Assuming, without deciding, that the same conclusion is open on that or any other situation in this country, then if the power exercised is a discretionary one and is not a power which mandates a result upon the satisfaction of certain criteria, then *Rootkin* is certainly authority for the permissibility of the re-exercise of that power.

A limited power on the part of a Tribunal to re-open a matter was recognised in *Regina v Kensington and Chelsea Rent Tribunal*, *ex parte MacFarlane*.[111] In this case Mr. MacFarlane rented premises and was faced with an application by his landlord for determination of his

tenancy. He was given notice of the hearing but his case was that he did not receive it. His hearing was determined in his absence. Lord Widgery CJ gave the judgment of the court and held that Mr. MacFarlane was able to "go back to the Tribunal, explain why he did not attend, and the Tribunal will then have jurisdiction if it thinks fit to re-open the matter and to re-consider its decision in the light of the representations made by the absent party". His Lordship went on to say that:

> if the Tribunal, having considered [all the arguments of the absent party], is of that opinion that it would be proper to re-open the matter, it has power in my judgment to re-open it.[112]

An explanation for the basis the power is not given in this judgment.

The parallels with *Bhardwaj* are obvious. Whether this case is authority for a free-standing power to re-open in the absence of jurisdictional error is, it is submitted, highly doubtful.

Accordingly, there is slender authority[113] for the proposition that the exercise of intra vires power may be revoked at common law but, when one examines the circumstances when that has been found to be permissible, it may be that the occasions spoken of would really now be seen in this country as occasions of jurisdictional error or, at least, arguably so.

It is my contention that there is no clear authority as relied upon in *Kawasaki* or able to be derived from *Kawasaki* for the position that at common law an intra vires administrative decision may be revoked.

Canada

The position in Canada to some extent concerning the re-making of valid administrative decisions has been noted in this country in *Leung*[114] and *Bhardwaj*.[115]

The fundamental position in Canada, as observed in *Bhardwaj*,[116] is that as expressed in *Chandler v Alberta Association of Architects*:[117]

> As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorised by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd v J O Ross Engineering Corp* [1934] SCR 186.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*.

The rule in *Paper Machinery* concerned judicial proceedings and covered: (1) the slip rule; and (2) where there was an error in expressing the manifest intention of the Court.

Leung[118] refers to *Grillas v Canada (Minister of Manpower and Immigration)*[119] as a case where a re-consideration may be made on new evidence. This case is really one where the power to re-open was expressly conferred.[120] The application of *Grillas* ought to be considered to be limited to appeals that are made on humanitarian grounds within the confines of the authorising statute. The orthodox position in Canada is that which is

expressed in *Chandler.* It is also to be noted that a decision made by the Refugee Division of the Immigration and Refugee Board of Canada, like the Immigration Appeal Board in that country, is that such tribunals have no jurisdiction to re-open an application for re-determination solely on the basis of new facts.[121] *Longia* distinguished *Grillas*, confining it to a case of an appeal on humanitarian grounds and not a refugee determination.

In *Re Lornex Mining Corporation and Bukwa*[122] the Human Rights Commission of Canada re-opened a determination of a complaint of discrimination that had been dismissed, so as to hear new evidence. Whilst acknowledging the usual rule as to finality,[123] the Court held that a re-opening of the matter for the purpose of new evidence was permitted[124] and followed the decision in *Grillas* in order to do so. There was no express authority to re-open granted by the statute in *Re Lornex*, in *Grillas* there was. *Grillas* did not purport to lay down any general ground for re-opening. It was based upon specific statutory authority. Therefore *Re Lornex* must be of doubtful authority in this country and, in my opinion, is unlikely to be followed, indeed it has been argued that it is wrong.[125]

The power in *Grillas* to re-open was said by the Court to be "equitable".[126] This term seemed to be used to describe the character of the enabling statute[127] and not any other right of such nature, whatever that right might be. Nevertheless there has developed a line of authority, seemingly emanating from *Grillas,* which continues to describe a tribunal's right to reconsider a matter in that country as equitable.[128] In *Zutter*, notwithstanding the holding in *Chandler* and express reference to it,[129] the Court construed a specific provision[130] in the *Human Rights Act* which precluded the taking of "further proceedings" under the *Human Rights Act* in relation to the subject matter of proceedings that had been discontinued or dismissed, as a provision which did not say that such decisions as made "shall be regarded as final",[131] and confined the scope of the prohibition to fresh proceedings and not the re-consideration of the same proceedings.[132] It made reference to this "equitable" jurisdiction. It would seem that the Court was greatly influenced by the fact that it was dealing with Human Rights legislation[133] and was prepared to find that the words in *Chandler* that "Justice may require the reopening of administrative proceedings in order to provide relief…."[134] to have significant effect in such case when the British Columbia Council of Human Rights (the decision-making body itself) or the Minister consider that it is in the interests of justice and fairness to re-open the original proceedings.

Accordingly, there does seem to exist some authority in Canada in such cases as decisions of tribunals dealing with Human Rights matters to permit of their re-opening. It remains to be seen whether cases of this kind are sui generis.

It is difficult therefore to discern the precise limits of the power to re-open in Canada, given that certain cases have carved out exceptions from the stated general position in *Chandler* that tribunal decisions are final.

Fraud and misrepresentation – effect on the decision

It may be accepted that if a decision is induced by fraud or misrepresentation, then the decision may be re-made on the *Bhardwaj* principle.[135] In this country, such a decision will be regarded in law as one which is no decision at all because the jurisdiction remains constructively unexercised.[136]

The following most famous words have application (although written in a different context) –

> No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...[137]

Leung is an example of the setting aside of a decision for misrepresentation. *Jones v Commissioner of Police and Anor*[138] recognises that a decision induced by fraud or actual deception enables revocation of the first decision and also relies upon a line of U.K. authorities in the migration setting for that conclusion.[139]

Of course, cases of this kind are rare in the field of public law and may not rise to the level of what the High Court terms "red blooded" fraud as is recognised in the common law.[140] The meaning of fraud, its connection with bad faith in the public law arena and other such notions are outside the scope of this paper.

Relevance of any agreement that a decision be set aside

There have been occasions, expressed in some authorities, that where all parties – being the person affected and the decision maker - do not seek to uphold the decision, then that would seem to be relevant to the status of the decision made.[141] Even in *Re 56 Denton Road* "the consent of the person or persons affected"[142] is mentioned as a requirement for revocation in the absence of express statutory power.

What is the relevance of a person's consent? To my mind, other than it being an occasion for advancing the question for consideration, none.

If a decision is made in jurisdictional error – consent is irrelevant.

If a decision possesses any of the elements of a lack of finality, then the statutes of interpretation apply or, perhaps, even the implication of revocability in the statute, may be open.

I contend that consent of the party is not legally relevant in any legal respect[143] save for one important practical matter. It is necessary for the decision maker or tribunal to acknowledge the jurisdictional error or the power to re-make in order to obtain the further course urged by the person affected. In the event that such acknowledgment is not forthcoming, it is then that the person affected would be obliged to proceed to Court for declarations.

Local government

Some case law concerning the revocability of decisions made by a local Council point towards irrevocability. If one is faced with such a decision, plainly, analysis of the conferral of power and the subject matter in the light of the principles I have referred to earlier is paramount. Some case law in New South Wales and South Australia shows a marked tendency to treat decisions of a Council as final and not revocable.[144] These authorities relate to the position concerning the grant of building approval or land subdivision approval. Circumstances of that kind point to a decision made by a Council which a person may then act upon, when made. They fit into the category of case identified in *In Re Denton Road Twickenham*.

Other cases show a capacity of a Council to rescind resolutions.[145] Such cases turn on the precise terms of the by-law or statute in question.

Some practical issues

Of course it is of vital importance to the person affected by an administrative decision, depending upon their interest, to know whether a particular decision can or cannot be re-made. That is the essence of all the cases that have been referred to.

It is also of importance in the question of good governance and, in the very actions of government, for public officials or, indeed, tribunals to know whether a decision is able to be re-made.

A recent report, in June 2007, of the Commonwealth and Immigration Ombudsman,[146] Professor John McMillan makes this apparent.

This report arose from a referral of 247 cases in 2005 and 2006 of people who had each been detained by the Department of Immigration and Citizenship (DIAC) and later released.

I refer to this report because it provides an excellent basis for looking at the difficulties that arise from the issues discussed in this paper.

Professor McMillan stated in his report that "in the absence of an express power [to revoke], DIAC historically relied upon a principle that derived from a decision of the Federal Court in *Kawasaki* to review and remake problematic decisions".[147]

Apparently a view was taken in the Department, after the insertion of the privative clause in s 474 of the Migration Act, that the *Kawasaki* principle was no longer available.[148]

The effect of the High Court's decision in *Bhardwaj* was observed.[149]

The Ombudsman also noted that there had arisen conflicting instructions concerning DIAC's ability to re-visit decisions. In some cases it was said that, as no express power to revoke existed, officers should invoke the *Kawasaki* principle and, in other cases, instructions are given which take no account of *Plaintiff S157* or *Bhardwaj*.[150]

In one case the correct view as to the DIAC's ability to re-make a decision in the light of *Plaintiff S157* was not taken until three years after that case.[151]

In six other decisions a decision was taken to set aside by applying the *Kawasaki* principle.[152]

Importantly, the Ombudsman observed an inconsistent set of practices. Officers sometimes relied on *Kawasaki*. In other cases "officers have gone down the path of greater complexity to see if there is a jurisdictional error that will facilitate a decision being set aside.[153] Professor McMillan then found that "if no such error can be found, the view taken is that there is no legal capacity to set the decision aside, notwithstanding apparent error, or unintended or harsh consequence arising from the decision".[154]

The Report demonstrates that no consideration has been given by DIAC in the cases analysed to the effect, if any, of s. 33 of the Acts Interpretation Act in the particular cases. Of course, it may be that s. 33 does not empower the re-making of the decision, depending upon the particular section of the Migration Act which is engaged. That is another matter.

These matters drive Professor McMillan to the conclusion that "this could all be avoided if there was an express power in the Migration Act that permitted any decision made under the Act to be set aside and varied. If necessary, the power could be qualified to reduce the scope of the discretion and limit the prospect of judicial review of a refusal to invoke the power. For example, the power could be limited to setting aside a decision based upon a factual or legal error".[155]

There has been no such amendment of the Migration Act to date nor, according to my researches, has one been suggested by Government.

The matters canvassed in Professor Macmillan's paper throw up real life issues of real complexity which, in many cases, are and have been hard to resolve. They graphically demonstrate the difficulty that arises in this area. They disclose the real difficulty in applying the law in this context. It is even alarming to note that, after more than a century has elapsed since statutes have been passed to ameliorate the effect of the *functus officio* rule, the Ombudsman of this country has reported on a series of troubling events arising from the difficulty of applying the law, which causes him to conclude that a power of revocation, if it is to be meaningful in the Migration context and is to exist, has to be statute specific.

Conclusion

These matters highlight the real difficulties which arise. Is it reasonable to expect an administrator to be able to discern whether a contrary intention exists when, for example, the Court of Appeal in Victoria in *Kabourakis* differed from the judge at first instance on that very question? Is it reasonable to expect an administrator to determine whether his or her decision is made in jurisdictional error? Presumably a Tribunal may be able to do it, but it may depend upon which Tribunal is being asked that question.

There is much to be said for the fact that the statutes of interpretation result in an overarching position for the exercise of all statutory power. But is this enough to ensure real justice? There are many occasions where the Courts have observed that it is in the interests of justice that certain administrative decisions ought to be able to be re-made if they are attended by error; but one is left to wonder whether that aspirational notion is able to be met, in the current state of the law. That aspirational statement has to be understood in the context of the nature of the error, the nature of the decision and the nature of the statute. Some decisions are final and ought to be, even if they are erroneous, when made within jurisdiction. Some decisions are erroneous, and the error leads to jurisdictional error, resulting in the capacity to re-make. Many decisions, even if made in some error, will still be final and irrevocable for, if within jurisdiction, they will be unable to be re-made, despite the statutes of interpretation.

The only sure way in which the revocability of a decision can be ensured, if that is the intention, is for Parliament to express it in the statute conferring the power. If that does not happen the situation may become complicated as I may have demonstrated, but it becomes a situation which is, hopefully (I say aspirationally), not insoluble.

Endnotes

1 *The Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482 at 528. *Punton v Ministry of Pension and National Insurance (No. 2)* [1964] 1 WLR 226 at 237-238.
2 I adopt and rely upon the same analysis in this regard of Justice Finkelstein as to the identification of the competing interests in *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 410.
3 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
4 *Sloane v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444. See also *Smith v East Elloe Rural District Council* [1956] AC 736 at 769-770; *Durayappah v Fernando* [1967] 2 AC 337; *Calvin v Carr* [1980] AC 574 at 589-590; *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26 at 33 (Wilcox, J).
5 *Re Petroulias* [2005] 1 Qd R 643 at [50] per McMurdo, JA.
6 See *Minister for Immigration Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.
7 *Ousley v The Queen* (1997) 192 CLR 69 at 130 per Gummow, J. See also *Hoffman-La Roche v Trade Secretary* [1975] AC 295 at 365.
8 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 646.
9 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
10 Ibid at 647[153] per Hayne, J.
11 Ibid at 616[53] per Gaudron and Gummow JJ; per Gleeson CJ at 605[15]; per Hayne at 647[154]-[155]; per Callinan, J at p. 649[163].
12 Ibid, see for example, Gleeson CJ at 605-606; Hayne J at 647[155].

13 Any analysis of this question would not be complete without at least reference to the following articles: E Campbell, "*Revocation and Variation of Administrative Decisions*" (1996) 22(1) Mon LR 30; E Campbell "*Effect of Administrative Decisions Procured by Fraud or Misrepresentation*" (1998) 5 AJ Admin L 240; R Beech-Jones "*Reopening Tribunal Decisions: Recent Developments*" (2001) 29 *AIAL Forum* 19; M Allars "*Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions*" (2001) 30 *AIAL Forum* 1; R Orr and R Briese "*Don't Think Twice; Can Administrative Decision Makers Change Their Minds?*" (2002) 35 *AIAL Forum* 11.
14 Ibid at 614[50] per Gaudron and Gummow, JJ. See also at p. 645 at [149] per Hayne, J. 603[8] per Gleeson CJ and 647[159] per Callinan, J.
15 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 400 at 410 per Finkelstein, J; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.
16 *Halsbury's Laws of England*, 1st ed, Vol. 27, p. 131, footnote (f). See also *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.
17 *Craies on Statute Law* (1963), 6th ed at 283-284. This observation was first made in 1907 in the 1st ed of that work (at 251) and appeared thereafter.
18 *Interpretation Act*, 1889, s. 32.
19 For example *Acts Interpretation Act* 1889 (Vic), s. 17.
20 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 400 at 410. *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 605-606[8] per Gleeson, CJ.
21 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 605-606[8]; *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 at [48] per Nettle, JA.
22 For an example of an express power to re-hear – see s.42A(10) *Administrative Appeals Tribunal Act* 1975 (Cth) where there may be re-instatement of an application if the application has been dismissed in error. The meaning of error is not to be limited to "administrative" error and thus may be broad – see *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 121 FCR 383 per Wilcox and Downes, JJ. The High Court had decided *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 prior to the judgment in *Goldie* and the Court in *Goldie* was referred to it – at 394. Thus s.42 A(10) would seem to have direct application to error within jurisdiction.
23 (1992) 37 FCR 429 at 443-444.
24 *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 404-405 (Heerey, J).
25 *Legislation Act* 2001 (ACT), s 197; *Interpretation Act* 1987 (NSW), s 48(1); *Interpretation Act* 1978 (NT), s 41(1); *Acts Interpretation Act* 1954 (Qld), s 23(1); *Acts Interpretation Act* 1915 (SA), s 37; *Acts Interpretation Act* 1931 (Tas), s 20(a); *Interpretation of Legislation Act* 1984 (Vic), s 40(a); *Interpretation Act* 1984 (WA), s 48.
26 See also *Acts Interpretation Act* 1915 (SA), s 37; *Interpretation of Legislation Act* 1984 (Vic), s 40.
27 *Legislation Act* 2001 (ACT), s 6; *Interpretation Act* 1987 (NSW), s 5; *Interpretation Act* 1978 (NT), s 3; *Acts Interpretation Act* 1954 (Qld), s 4; *Acts Interpretation Act* 1931 (Tas), s 4; *Interpretation Act* 1984 (WA), s 3. Whilst the construction is plain from the reading of the sections, an example of the interpretation that the contrary intention is required in the general provisions found in the ACT, NSW, NT, Qld, Tasmania and WA is *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at [62], Full Court.
28 For example sec. 41A *Interpretation of Legislation Act 1984* (Vic).
29 It is to be noted that the scope of the meaning of "instrument" is now quite wide and may embrace many forms of administrative action and not be confined to legislative instruments – see *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 313, 322, 344; *R v Ng* [2002] 5 VR 257 at 282.
30 *Kabourakis v The Medical Practitioners Board of Victoria* [2005] VSC 493, at first instance, at [44], speaking of s 40 of the *Interpretation of Legislation Act* 1984 (Vic).
31 HWR Wade and CF Forsyth, *Administrative Law*, (7th ed) 261.
32 Sloane, op cit, at 443.
33 (2002) 209 CLR 597 at 603[8].
34 (2005) 223 CLR 1 at 17[34].
35 (2005) 223 CLR 1 at 30-31[84]. See also 17-18[34]-[36]; 20-21[45] and 66-67[201].
36 [2006] VSCA 301 per Warren CJ, Chernov and Nettle, JJA.
37 at [47].
38 at [48].
39 at [48]. Citing *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 at 862 per Sopinka, J as referred to with approval in *Bhardwaj* by Gleeson CJ at 603[7] and by Gaudron and Gummow JJ at 615[52].
40 at [48].
41 at [75]. It is to be noted that the availability of merits review has also been found to point to finality – see *Sloane v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444. See also R. Orr and R. Briese, "Don't think Twice? Can Administrative Decision makers Change their Mind? *AIAL Forum* No. 35 at 34.
42 at [76] and [79].
43 at [80] and relying on *Minister for Immigration and Multicultural Affairs v Nystrom* [2006] HCA 50 at [2].

44 at [86].
45 [1953] 1 Ch 51.
46 [2005] NSWCA 65.
47 [2004] NSWSC 158 (11 March 2004) at [40].
48 *Walter Construction Group Limited v Fair Trading Administration Corporation* [2005] NSWCA 65.
49 [2005] NSWCA 65 at [53] and [108]. See also the more general observations of Santow JA at [108] and, further the concurring judgment of Sheller JA at [9] and [10].
50 (1985) 9 FCR 169.
51 at 276.
52 (2001) 2 Qd R 26.
53 At 30[36] and 32[41].
54 (2004) 1 Qd R 282.
55 Supra.
56 Supra.
57 At 284.
58 Ibid.
59 [2003] FCA 900.
60 (1992) 37 FCR 429.
61 at 444.
62 at 444.
63 (1997) 76 FCR 301.
64 at 311.
65 See s 414(2) of the *Migration Act* 1958.
66 See s 411(1) and (2).
67 See s 416.
68 Section 50.
69 (1997) 79 FCR 400.
70 at 416.
71 at 409-411.
72 at 410.
73 See *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at 28-29; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.
74 *Kuligowski v Metrobus* (2004) 220 CLR 363 at 374-375[25].
75 Ibid.
76 *City of Collingwood v State of Victoria and Anor (No. 2)* [1994] 1 VR 652 at 663.
77 *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 at 137 per Gummow, J. See also *The Commonwealth of Australia v The State of Queensland and Anor* (1975) 134 CLR 298 at 325; *Gould v Brown* (1998) 193 CLR 346 at 421[118] and 440[178]; *Re Wakim, ex parte McNally* (1999) 198 CLR 511 at 542[10], 544[17].
78 In this exercise see for example *Huddart Parker and Co Proprietary Limited v Moorehead* (1908) 8 CLR 330 at 357; *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; *Fencott v Muller* (1983) 152 CLR 570 at 608; *The Queen v Local Government Board* (1902) 2 I.R. 349 at 373, as cited in *The Queen v Davison* (1954) 90 CLR 353 at 367; *Albarran v Members of the Companies and Auditors and Liquidators Disciplinary Board and Anor* (2007) 234 ALR 618 at [16]-[35].
79 This paper does not purport to canvass all those matters which may go to the question of whether judicial power exists.
80 *R v Joske, ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 93-94.
81 *The Doctrine of Res Judicata*, Spencer Bower, Turner and Handley (3rd ed) at [234].
82 *Bhardwaj* at 603[7] per Gleeson CJ; at 615[52] and [53] per Gaudron and Gummow JJ. At common law, even inconsistent jury findings may be overturned – *Osland v The Queen* [1998] HCA 75 at [14]; [116]-[117]; *King v The Queen* (1980) 151 CLR 423 at 434.
83 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 at 265 per Lehane, J; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [113]-[119] per Kirby, J.
84 See also R Orr and R Briese "Don't think Twice? Can Administrative Decision Makers change their mind?", *AIAL Forum* No. 35 at 34 who also express the same conclusion.
85 *Jayasinghe v Minister for Immigration and Ethnic Affairs and Anor* (1997) 76 FCR 301 at 316-317. See also R Orr and R Briese, "Don't think Twice?", op cit at 34.
86 (1991) 103 ALR 661 at 667-668.
87 per Beaumont, J at 666.
88 See 668 at lines 36-46.
89 at 669.
90 per Hill and Heerey, JJ at 672.
91 at 667.
92 per Gleeson CJ in *Bhardwaj* at 605.
93 at 402.
94 at 671.

95 at 647[156] per Hayne, J.
96 See *Kawasaki* at 667-668; *MIMA v Bhardwaj* (2000) 99 FCR 251 at 260; *Leung* at 410.
97 *Ridge v Baldwin* [1964] AC 40 at 79.
98 (2000) 99 FCR 251 at 259.
99 at 259.
100 This same conclusion was also expressed in *Chandler v Alberta Association of Architects* [1989] 2 SCR at 863 per Sopinka, J.
101 [1918] AC 557.
102 [1981] 1 WLR 1186.
103 Section 55(2) *Education Act*, 1944.
104 at 1195.
105 at 1197.
106 See 667.
107 See 1193; s 39(a) *Education Act*, 1944.
108 p 1194.
109 p. 1194.
110 *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Limited and Ors* (1986) 162 CLR 24.
111 [1974] 1 WLR 1486.
112 At 1493.
113 I contend that *Livingstone v Westminster Corporation* [1904] KB 109 ought to be confined to the proposition that the Council was not entitled, nor should it be, to revoke a speciality debt. See also M. Akehurst, "Revocation of Administrative Decisions" [1982] Pub Law 613.
114 (1997) 79 FCR 400 at 411.
115 at [7] per Gleeson, CJ; at [52] per Gaudron and Gummow, JJ; at [94] per Kirby, J.
116 at [7] per Gleeson, CJ; at [52] per Gaudron and Gummow, JJ; at [94] per Kirby, J.
117 [1989] 2 SCR 848 at 861-862.
118 Op cit at 411.
119 [1972] SCR 577.
120 See s 15 of the *Immigration Appeal Board Act*, 1966-67 (Can). This section expressly enabled the Immigration Appeal Board to dismiss an appeal against deportation but, if it does so, it may still stay or quash the deportation order on compassionate or humanitarian grounds. This case was controlled by the terms of the statute there under consideration. See also *Chandler v Alberta Association of Architects (op cit)* at 870-871 per L'Heureux-Dubé, J.
121 See *Longia v Canada (Minister of Employment and Immigration)* [1990] 3 F.C. 288.
122 (1976) 69 DLR (3d) 705. Also referred to in *Leung* at 411.
123 at 708.
124 at 710.
125 See E. Campbell: Revocation and Variation of Administrative Decisions, (1996) 22(1) Mon LR 30 at 51.
126 op cit at 589 per Martland, J.
127 See *Re Scivitarro and Ministry of Human Resources et al* (1982) 134 D.L.R. 521 at 526 per Andrews, J.
128 See *Re Zutter and British Columbia Council of Human Rights et al* (1995) 122 DLR 665 at 675 (British Columbia Court of Appeal – the Court per Lambert, Wood and Prowse, JJA) citing *Re Lornex Mining Corp Ltd and Bukwa* (1976) 69 DLR (3d) 705; in *Re Ombudsman of Ontario and The Queen in Right of Ontario* (1979) 103 DLR (3d) 117, affirmed 117 DLR (3d) 613 and *Canada (Attorney-General) v Grove* (1994) 80 FTR 256, 48 ACWS (3d) 1412.
129 at 674.
130 Section 15 *Human Rights Act*, 1984.
131 op cit at 673.
132 op cit at 674.
133 at 673.
134 *Chandler* op cit at 862.
135 *SZFDE and Ors v Minister for Immigration and Citizenship and Anor* (2007) 237 ALR 64 at [51]-[52] as to fraud.
136 Ibid at [52].
137 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712.
138 (1990) 20 ALD 532.
139 See *R v Home Secretary; ex parte Hussain* [1978] 2 All ER 423; *R v Home Secretary; ex parte Khawaja* [1984] 1 AC 74.
140 *SZFDE and Ors v Minister for Immigration and Citizenship and Anor* (2007) 237 ALR 64 at [11]-[14].
141 See *Comptroller-General of Customs and Anor v Kawasaki Motors Pty Ltd* (1991) 103 ALR 661 at 671 per Hill, Heerey, JJ.
142 op cit at 56-57.
143 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 414.
144 In N.S.W. see *Shanahan and Anor v Strathfield Municipal Council* [1973] 2 NSWLR 740 at 742-744 per Street CJ, relying also upon *Ex parte Renouf* (1924) 24 S.R. (N.S.W.) 463, *Ex parte Wright; Re Concord Municipal Council* (1925) 7 L.G.R. (N.S.W.) 79; *Ex parte Forsberg; Re Warringah Shire Council* (1927) 27 S.R. (N.S.W.) 200; *Little v Fairfield Municipal Council* (1962) 8 L.G.R.A. 64; *Mosman Municipal Council v*

Bosnich (1969) 17 L.G.R.A. 74. In South Australia – see *The Queen v District Council of Berri; ex parte H.L. Clark (Berri) Pty. Ltd. and Ors* (1984) 36 SASR 404 at 417 per Cox, J with whom King CJ and Legoe J agreed.

145 See *The Queen v Corporation of the City of Mitcham; ex parte G.J. Coles and Co. Ltd.* (1980) 26 SASR 74.

146 *Report into Referred Immigration Cases: Other Legal Issues* Report No. 10/2007. Found at http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2007_10/$FILE/report_2007_10.pdf

147 Paragraph 3.3.

148 Paragraph 3.4.

149 Paragraph 3.6.

150 Paragraph 3.7.

151 Paragraph 3.12.

152 Paragraph 3.13.

153 Paragraph 3.15.

154 Ibid.

155 Ibid at 3.16.

LANE V MORRISON
[2009] HCA 29

Kathryn Cochrane*

Introduction

It was said to me after the decision in *Lane v Morrison* was handed down on 26 August 2009 that the outcome of this case was a foregone conclusion – a lay down misere.

I have to say, that came as a surprise to me and my co-counsel. I think it was more a case of, "all that is solid melts into air" (Marx).

But hindsight is a wonderful thing.

For us, when we started this case, the odds seemed so clearly against, in light of the jurisprudence in the line of cases from *Re Tracey* to *White.*

I know of one Lieutenant Commander who bet $10 we would win, but he was on his own, and thought to be a bit daft anyway. I understand he has framed the $10.

The jurisprudence prior to the decision in *Lane v Morrison* was problematic for us.

However, the result was 7 – nil for the plaintiff.

Senior counsel in the case was Sandy Street, SC, of the Sydney Bar, and a long standing member of the Royal Australian Navy Reserve. Sandy has a passion for section 80 of the Constitution – that section of the Constitution that provides that a jury trial is necessary on a trial of indictment of any offence against any law of the Commonwealth.

The question might now arise as to whether s 80 of the Constitution would allow for military juries.

Co-junior counsel was Max Duncan, also from Fullagar Chambers. Max is ex-Permanent Navy, now in the Navy Reserve. Max's capacity to not only locate – but also to remember verbatim – the obscure, the bizarre and the arcane is phenomenal. This is both good and bad! The good is finding the stuff – the bad is telling me in exquisite detail of some strange 1780s case – they were generally old and bizarre cases – more than I wanted to know, usually somewhere around midnight when burning the midnight oil. There were times…..

In this talk I will:

- outline the legislative change to the Defence Force Discipline Act that led to this case;
- outline what confronted us when we began this case;

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- give an overview of the plaintiff's arguments before the Court; and
- set out how those arguments played out in the decision in *Lane v Morrison*.

The Legislation

From federation until 1986, military discipline and courts-martial were covered by separate legislation that largely reflected Imperial legislation for the Army, Navy and Air Force. Very broadly speaking, the legislation allowed for command to convene courts-martial. Command had power to review, confirm, mitigate, quash or remit any sentence of a court martial. Paragraph 85 of the decision in *Lane* describes the court-martial proceedings:

> Although written in a different time and context, the central point to be made about these arrangements was accurately captured by Platt J of the Supreme Court of New York in the 1821 case of *Mills v Martin*[1] when he said :
>
> > "The proceedings of the Court-Martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of a Court-Martial; and, it is equally clear, that the Court could not punish without his order of confirmation."

That earlier legislation was replaced in 1986 by the *Defence Force Discipline Act* – the DFDA, which applied to the Army, Navy and Air Force, though each service had its own convening authorities.

Whatever other changes were made by that 1986 Act, it remained the case that the Act continued to provide for command convened courts martial and the retention of all the powers of review, confirmation, petition and such like. This was the jurisdiction dealt with by the cases *Re Tracey; ex parte Ryan*[2] *;Re Nolan; ex parte Young*[3]*; Re Tyler; ex parte Foley*[4] - called the trilogy of cases; *McWaters v Day*[5]*; Re Colonel Aird; ex parte Alpert*[6]*; and White v Director of Military Prosecutions*[7]*.*

In 2006, Parliament passed an Act that created the Australian Military Court. It was established to stand independently of command.

The Charges

The plaintiff was charged with the offences of:

> one count of "an act of indecency without consent" – alleged tea bagging – contrary to s 61(3) of the DFDA as applying s 60(2) of the *Crimes Act 1900 (ACT)*; and
>
> one count of "assaulting a superior officer, contrary to s 25 of the DFDA".

The offence of "an act of indecency without consent" is called "a territory offence". DFDA s 61 territory offences import criminal offences from other jurisdictions into the DFDA as "service offences".

DFDA s 61 offences are not peculiarly military in nature.

Remarking on the nature and potential scope of DFDA s 61 offences in *White's case*[8]*,* Chief Justice Gleeson referred to remarks of Alexander Hamilton in *Solorio v United States*[9] about the nature of the defence power – that it is impossible to foresee or define the extent and variety of national exigencies, or the means which may be necessary to satisfy them.

DFDA s 61 is a mechanism which allows a broad range of offences to be imported into the DFDA to cover all possible circumstances.

Chief Justice Gleeson also referred to Justices Brennan and Toohey in *Re Tracey; ex parte Ryan*[10] to the effect that, whether a DFDA s 61 offence will be a breach of military discipline or a breach of civil order, will depend not upon the elements of the offence but on the circumstances in which it is committed.

The circumstances of the offence give rise to the vexed issue of "service nexus" or "service connection"; military jurisdiction is predicated on the requirement that the prosecution of a DFDA s 61 offence can be regarded as substantially serving the purpose of military discipline.

The "service nexus" issue was NOT a ground that was referred to the Full Court for hearing in *Lane's* case, but it found its way back into the argument – an inevitability, as this has been a most controversial area of the military disciplinary jurisdiction.

By contrast, the DFDA s 25 offence is peculiarly military in nature; this offence concerns a core aspect of command relationships.

The plaintiff, Mr. Lane, was charged by the Director of Military Prosecutions on 8 August 2007. He discharged from the Navy Reserve on 23 August 2007. He was not a service member when the matter first came before the AMC court in March 2008.

Former Leading Seaman Lane denies the charges.

At that hearing before the Australian Military Court, the plaintiff did not enter an appearance and therefore did not submit to jurisdiction. The Military Judge was not greatly amused.

An application for a Notice to Show Cause was lodged in the original jurisdiction, High Court of Australia under ss 75(iii) and 75(v) of the Constitution, seeking a writ of prohibition restraining Colonel Morrison as a Military Judge of the Australian Military Court from trying the charges against former Leading Seaman Lane.

Why this case?

We thought the case was an excellent case to run for the following reasons:

- the offence was a DFDA s 61 charge;
- the particulars of the charge;
- the plaintiff had done three tours of duty in dangerous places;
- the alleged offence occurred in Roma, Queensland. Other than for DFDA s 61, the offence would be a matter for the Queensland Police, and subject to the jurisdiction of Queensland State courts by reference to the Queensland Criminal Code;
- The alleged offence occurred:
  on–shore;
  in a non-operational environment;
  in the State of Queensland;
  not on an exercise; and
  not on Commonwealth land.

- the issue of the service nexus/service status test was not raised as an issue on the facts, that concession was made at the hearing on 9 December 2008;

- the alleged conduct for which Mr. Lane was charged is at the lower end of the scale of offences which fall into the category of an act of indecency without consent. It is unlikely that the Queensland Police would have prosecuted on the facts;

- if the Queensland Police did prosecute and Lane were to be found guilty, there was the prospect of no conviction being recorded. This option was not open to the Australian Military Court under the DFDA sentencing and punishment provisions; and

- the consequence of a conviction by the Australian Military Court is a criminal conviction. Such a conviction would have a significant impact in Mr Lane's post-military life. However, the trial was by a tribunal purporting not to be a Chapter III court, per the note to DFDA s 114.

It is important to note that the public policy issues which arise for sentencing for criminal purposes are different to the public policy issues which arise for sentencing for disciplinary purposes.

Justices Brennan and Toohey in *Re Tracey* had this to say:

> Section 51(vi) does not support a jurisdiction standing outside Chapter III of the Constitution except to the extent that the jurisdiction serves the purpose of maintaining and enforcing discipline. That being the purpose which is essential to the jurisdiction, it is the purpose to which its exercise must be directed. The purpose of criminal proceedings in the civil courts is far wider, and the exercise of jurisdiction by civil courts may properly embrace considerations which have no relevance to service discipline. It is the difference between purpose of proceedings before service tribunals, and the purpose of proceedings before civil courts, that justifies the subjection of service personnel to the jurisdiction of both[11].

Our questions were:

What disciplinary effect is there in pursuing either charge against the member after he discharged from the Navy Reserve, giving rise to a criminal conviction but without the due process of the ordinary courts of the land?

What does the charge say about the way the Director of Military Prosecutions exercises her discretion by referring the charge to the Australian Military Court?

Why was this not a summary matter before a CO, where a finding of guilt for disciplinary purposes would not result in a criminal conviction?

I understand that the Director of Military Prosecutions is proceeding against Lane under the new arrangements reinstating courts martial and Defence Force Magistrates.

Where we started this case

When we started this case we were faced with two diametrically opposed propositions from *White v Director of Military Prosecutions*[12]:

Kirby J (in the minority):

> The (pending) amendments to the (*Defence Force Discipline Act 1982 (Cth)*) (i.e. the amendments introducing the Australian Military Court) - provide a warning about the importance of this decision (that

> is, the decision in *White*) for whether criminal laws might be applied outside the ordinary courts of the land to citizens who might happen to be members of the Defence Force. The Court cannot later complain that it was not warned of the next intended step in military exceptionalism[13].

In the same case Callinan J. said:

> The presence of s. 68 in the Constitution may even, arguably, have further relevance to military justice, with the result that it may not be subject to judicial supervision under Chapter III of the Constitution, and is administrable only militarily, and not by Chapter III courts, whether specially constituted or not[14].

The competing themes are, on the one hand, whether the exception to the judicial power of the Commonwealth vesting with a Chapter III Court envisages a military tribunal determining issues of criminal guilt – as opposed to the *sui generis* power of making a finding of liability for purely military disciplinary purposes – and if so, whether it encroaches on the judicial power of the Commonwealth being dispensed by a non-Chapter III Court.

On the other hand, and diametrically opposed, Justice Callinan's concern is that military discipline can never be dispensed by a Chapter III court, subject possibly only to supervision by the High Court in its original jurisdiction, because it draws its authority from s. 68 of the Constitution.

Lane v Morrison does actually reconcile the irreconcilable, but in an unexpected way.

The odds against us

The line of cases from *Re Tracey* to *White* was problematic.

All the cases have as their starting point *R v Bevan; ex parte Elias and Gordon*[15] and *R v Cox; ex parte Smith,*[16] which are authority for the proposition that the power to establish military tribunals was not in Chapter III but under s 51(vi) of the Constitution [17]; and that s 51(vi) allows for the exercise of a judicial power by courts-martial.

Bevan and *Cox* dealt with earlier legislation. Our starting place was *Re Tracey; ex parte Ryan*, as this was the first case under the DFDA which replaced the war-time legislation. The judgment of Chief Justice Mason, and Justices Wilson and Dawson in *Re Tracey* gave the Commonwealth the widest possible jurisdiction for military discipline under s 51(vi) of the Constitution, except, perhaps, the decision in *White's case.*

The terms of s 51(vi) – the Defence power – are as follows:

> That the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth, with respect to:
>
> (vi) the naval and military defence of the Commonwealth and the States, and the control of the forces to execute and maintain the laws of the Commonwealth.

In *Re Tracey, their Honours made the following comments* about the nature of the power being exercised by service tribunals:

> [At p 537] "That it was evident from the scheme of the DFDA as it stood at that time that a service tribunal had practically all the characteristics of a court exercising judicial power; the court-martial had the power to determine authoritatively the liabilities of all those charged before it, albeit subject to review or appeal (my emphasis)"; and
>
> [At p 539] "It is, however, unnecessary to prolong any discussion concerning the nature of the power exercised by a court martial. As Lord Scarman observed in Attorney-General v. British Broadcasting Corporation18: "Courts-martial ... are as truly entrusted with the exercise of the judicial power of the state as are civil courts".

That proposition is sufficiently established in a constitutional context in *R. v. Bevan* and *R. v. Cox*. In the first of those two cases it was expressly decided by Starke J. and assumed by McTiernan and Williams JJ. that the power exercised by a court martial was judicial in character. In the latter case – *Cox* – Dixon J., after referring to the fact that Chapter III of the Constitution confides the judicial power of the Commonwealth exclusively in courts of justice, observed at p 23:

> In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional (R. v. Bevan, at pp 467, 468, 481). **The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force.** But they do not form part of the judicial system administering the law of the land. It is not uniformly true that the authority of courts-martial is restricted to members of the Royal forces. It may extend to others who fall under the same general military authority, as for instance those who accompany the armed forces in a civilian capacity. To include them with members of the armed forces as liable to court-martial would involve no infringement upon the judicial power of the Commonwealth[19].

Their Honours said that the defence power is different because the proper organisation of the defence force requires a system which is administered judicially, not as part of the judicature erected under Chapter III but as part of the organisation of the force itself [p 540].

Their Honours in *Re Tracey* continued:

> No purpose can be served in this case by attempting yet another description of judicial power. No description can, in any event, be truly definitive…It is sufficient to say that no relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court. Nor do we think it possible to admit the appearance of a judicial power and yet deny its existence by regarding the function of a court-martial as merely administrative or disciplinary. Such an approach was adopted in relation to certain tribunals under the *Public Service Act 1922 (Cth)* in *R v White; ex parte Byrnes*[20], p 537.

DFDA s3(15) was modelled on a section of the Public Service Act relevant in *Byrnes case,* to make clear the offences were part of a disciplinary code between employers and employees. This section remains in the DFDA.

Argument in *Lane* was that, post amendments to DFDA s 10 and post the introduction of the Australian Military Court, DFDA s 3(15) could no longer have the effect of regulating the relationship between the Commonwealth and members of the Defence Force, that s 3(15) was no more than a legislative opinion that could not undo the consequences of the DFDA s 10. The jurisdiction now vested in the Australian Military Court was a criminal jurisdiction, at least with respect to offences under DFDA s. 61.

DFDA s 10 provides that Chapter 2 of the Commonwealth Criminal Code applies to service offences; Chapter 2 sets out the general principles of criminal responsibility.

Back to *Re Tracey, where,* their Honours went on to say:

> Of course, the end to be achieved by martial law, consistently with s 51(vi) of the Constitution, is the promotion of the efficiency, good order and discipline of the defence forces and no more. This object was made clear in *Groves v The Commonwealth*[21] [p 538].

In summary, section 51(vi) of the Constitution supports the proposition that courts martial are exercising a judicial power which is not the judicial power of the Commonwealth – the so-called exception – and that Parliament has the power to make law making any conduct which is a civil offence an offence against military law if committed by a defence member. A court-martial has the power to make authoritative findings as to liability, though the findings are subject to command review.

This was not good for us!

White's case[22] emphatically confirmed the military disciplinary jurisdiction as not being the exercise of the judicial power of the Commonwealth, thereby also allowing the exception.

The intervening cases were various refinements of the same general propositions.

It should be noted that the legislation in place at the time of *White's case* differed from that dealt with in *Re Tracey, Re Nolan and Re Tyler.* The DFDA had been amended in two critical respects:

> Act No 141 of 2001 repealed and substituted s 10 DFDA, providing that Chapter 2 of the Commonwealth Criminal Code applied to service offences. Chapter 2 of the Code sets out general principles of criminal responsibility; and
>
> Act No 142 of 2005, which introduced the statutory roles of the Director of Military Prosecutions (DMP) and the Registrar of Military Justice (RMJ), both Ministerial appointments[23] - not appointment by the Governor-General. The DMP assumed some of the role formerly undertaken by the command convening authority; that is, the DMP and RMJ retained a connection with command, though a somewhat tenuous connection.

This amending legislation was in place for *Alpert's case,* and *White's case.* This was problematic for our case!

I wish to come back to Dixon J's words in *Cox – "The exception is not real".* A lot of our attention focussed on this elusive phrase. There are two other so-called exceptions which are also not real exceptions. One is the power of the Parliament to punish for contempt. This power is found within s 49 of Chapter 1 of the Constitution, dealing with Parliament, and addressed in *R v Richards; ex parte Fitzpatrick and Browne*[24]*.* This case also involved Dixon as Chief Justice. The other so-called exception relates to s 122 of the Constitution and whether courts created in Territories exercise the judicial power of the Commonwealth, but not as Chapter III courts.

I remind you of words already quoted – that courts-martial findings as to liability were subject to review by command.

What was unknown – and the gamble in *Lane* – was whether command was the defining element of the exceptionalism of the jurisdiction afforded to the Defence Force under s 51(vi) of the Constitution.

On the jurisprudence prior to *Lane,* it might well be that the Australian Military Court was a valid exercise of Parliament's power under s 51(vi) of the Constitution, as the exercise of a judicial power as an exception to the judicial power of the Commonwealth vesting in a Chapter III Court.

It was not a foregone conclusion that the plaintiff would be successful.

The Plaintiff's arguments

There were four separate but inter-dependent arguments:

> the "command" argument;
> the "looks like a duck, quacks like a duck" argument;
> the "supplementary and subordinate " argument; and
> the "if all else fails" argument.

The following is a summary of each.

The "command" argument

Whether s68 of the Constitution precluded the creation of the Australian Military Court constituted by the appointed Australian Military judges and the statutory office of the Director of Military Prosecutions, for the trial of alleged disciplinary offences under *Defence Force Discipline Act 1982*, Part VIII Division 2, by reason of being separate from and unlawfully fettering "command", to which the law making power in s51(vi) is subject.

Essentially, the argument was that s 68 was not a "titular power"[25] (see *Commonwealth v Quince*), but had some work to do in its own right as an executive power of "command".

It was argued that s 68 was either the legislative expression of the antecedent prerogative power of the Crown[26] to maintain disciplined military forces or, alternatively, s 68 itself vested the power with the Executive to maintain disciplined military forces[27].

In point form:

- The DFDA enacted by the legislature was an empty shell until enlivened by command convening a disciplinary process.
- The apparent or 'not real' exception to the judicial power of the Commonwealth vesting in courts established under Chapter III of the Constitution[28], arises from the particular character of ad hoc service tribunals as being an exercise of command in respect of military discipline[29].
- The not real"[30] exception imposes the obligation on the Executive to act judicially, not that the Executive exercises a judicial power.
- The exercise of a judicial power by a court not constituted under Chapter III of the Constitution offends the separation of powers[31] - the *Boilermakers'* doctrine[32].
- S. 68 of the Constitution precluded the establishment of a permanent court outside Chapter III to exercise a *sui generis* judicial power for the maintenance and enforcement of military discipline.
- The Australian Military Court, not being part of command structure, has established a jurisdiction that is self-perpetuating. Such a court is not reasonably adapted to serve the purpose of command discipline.
- Any command role in discipline would now constitute contempt of court by command[33].
- In enforcing general criminal laws, the Australian Military Court is no more part of command discipline than the ordinary courts of the State or Territories.
- It was command discipline. Neither the Australian Military Court, in exercising its jurisdiction, nor the Director of Military Prosecution's pursuit or refusal to pursue charges, is within the oversight, control, direction, review and confirmation of command.

The "looks like a duck" argument

This ground argues that the Australian Military Court is a federal court[34] impermissibly created outside Chapter III of the Constitution, contrary to s 71[35] of the Constitution.

Oral argument canvassed whether the Australian Military Court as a court of record could be a court for the purposes of s 77 (iii) of the Constitution[36]; that is, IF the DFDA was a piece of State legislation, it would be a court within the meaning of s 77(iii) of the Constitution.

While purporting not to be a Chapter III court[37], the Australian Military Court had the indicia of a federal court established under Chapter III of the Constitution, *inter alia,* being a permanent[38] court of record[39], with a seal[40], and a stamp[41], and with the nomenclature of 'Chief Judge' and 'Judge'[42], and 'Your Honour'[43]. It has a 'jury' system[44], must apply the rules of evidence as a court[45] and is the final appellate court for appeals from decisions of Summary Authorities[46]. It determines criminal guilt[47] and has a power of contempt of court[48].

The judgment and punishment of criminal guilt is exclusively an exercise of the judicial power of the Commonwealth[49].

The "not subordinate and supplementary" argument

Whether the Australian Military Court is impermissibly defined and vested by *Defence Force Discipline Act 1982*, ss10, 15 – 61, 114 and 115 and Part VIII, Division 2 with a general criminal jurisdiction and a criminal judicial power that is not subordinate and supplementary to the general criminal law, because it creates a criminal jurisdiction in a court that violates the separation of powers under Chapter III of the Constitution.

It was argued that the object of military discipline law is limited to the trial of breaches of military duty[50]. The amendments to Chapter 2 of the *Criminal Code Act 1995* as picked up by s 10 of the DFDA stood in stark contrast with the earlier s10[51] and 12[52] of the DFDA, which did not involve the conviction of a disciplinary offence having a criminal effect.

If the Australian Military Court was determining criminal guilt then the offence being tried is not a disciplinary service offence but a criminal offence, with all the consequences of *autrefois convict* and *autrefois acquit* from the determination of guilt by the Australian Military Court.

The determination of criminal guilt must be the exercise of the judicial power of the Commonwealth[53].

The joint judgment of Brennan and Toohey, JJ in *Re Tracey* highlighted that the significance of the history of British naval and military courts martial lay in its explanation of the scope and history of the jurisdiction that they exercised, and in the priority which naval and military authorities were required to afford to the jurisdiction of the civil courts[54].

The historical rationale for subjecting defence members to the jurisdiction of State and Territory criminal courts, as well as naval and military discipline law, arises from the difference between the purpose of proceedings before service tribunals compared to the purpose of proceedings before 'civil criminal courts'[55].

The legislative power conferred on Parliament under s 51(vi) of the Constitution is purposive,[56] to advance the end of the maintenance and discipline of naval and military forces of the Commonwealth and, accordingly, must be confined to a disciplinary code for breaches of military duty.

The Australian Military Court was impermissibly exercising a criminal jurisdiction, parallel but not subordinate to that of the States and Territories, thereby enlivening s 109 of the Constitution[57]. This is because the alleged service offence under DFDA s 61 is really the vesting of a general criminal jurisdiction. The effect of the DFDA is to now permit executive conviction in the nature of a Bill of Attainder (see *Ferrando v Pearce*[58]).

"If all else fails"

The argument here is whether the jurisdiction defined and vested in the Australian Military Court by *Defence Force Discipline Act* ss10, 15- 61, 114 and 115 and Part VIII, Division 2 outside Chapter III is invalid by reason of being beyond the law making power found in s 51(vi) of the Constitution.

This last ground is essentially that for all the reasons stated in the preceding three grounds, this particular tribunal is beyond power.

The Decision

The Australian Military Court was found to be exercising the judicial power of the Commonwealth, although it is not a court created by s 71 of the Constitution.

The court was unanimous in its decision in favour of the plaintiff but split 2/5. Joint judgments were given Chief Justice French, and Mr. Justice Gummow, and the majority judgment of Justices Hayne, Heydon, Crennan, Kiefel and Bell.

Both judgments dealt extensively with the history of courts-martials and the earlier Imperial legislation, emphasising the review and confirmation processes of command with respect to court-martial findings and the capacity for petition; they emphasised that the earlier legislation for military justice did not administer the ordinary law of the land.

Both judgments emphasised that the stated intention in the Explanatory Memorandum for the 2006 Amendment Act was to create a body independent of command to establish independence and impartiality, these being attributes of judicial power.

The majority judgment said that it was the independence of the Australian Military Court from the chain of command that is the chief feature distinguishing it from earlier forms of service tribunals, which were held not to exercise the judicial power of the Commonwealth[59].

Being established as a "court of record" was significant, but it was this fact, together with the contempt powers, and the fact that a decision of the Australian Military Court on the trial of a charge was conclusive, that led to the result that the AMC was held to be exercising the judicial power of the Commonwealth, and therefore beyond the scope of s 51(vi) of the Constitution. Chief Justice French and Justice Gummow referred to *R v Taylor; ex parte Roach*[60]:

> By definition, contempt is confined as an offence to courses of conduct prejudicial to the judicial power and does not extend to impairments of other forms of authority. Obstructions to the exercise of legislative power, executive power or other governmental power are not within the conception of the offence of contempt of court.

The liquid nature of language was an issue, the difficulty of the various meanings of the word "court", and the shifting use of the phrases in the earlier judgments - "exercising a judicial power" and "a tribunal acting judicially". The majority judgment closed the debate:

> to speak of a court-martial exercising a species of judicial power is unhelpful if it distracts attention from the relevant constitutional question. That constitutional question was resolved in respect of courts-martial, as it was in *R v Bevan, R v Cox,* and later, *R v Tracey,* at a time when courts-martial were not independent of the chain of command of the forces[61].

Of the s 68 argument, Chief Justice French and Justice Gummow said that the exercise of command may be the subject of legislation supported by s 51(vi) of the Constitution, though the creation of the Australian Military Court apart from the command structure and thereby

purporting to exercise the judicial power of the Commonwealth, could not be sustained by the defence power[62].

The majority found it was not necessary to decide the plaintiff's submissions with respect to s 68 of the Constitution[63].

Chief Justice French and Gummow J dealt with the concept of "legislative courts".

The Commonwealth submissions were that the replacement of the courts-martial system by the creation of the AMC was but a matter of degree and not a matter of substance. The Commonwealth further submitted that Parliament may create a body styled as a court and displaying some of the features of a court, provided only that the body does not exercise the judicial power of the Commonwealth. Such was the case for the "special position" of defence in creating the AMC.

Their Honours stated that the creation of the Australian Military Court was not supported by s 122 of the Constitution as a law with respect to the government of the territories. It is interesting to note here that s 122, as a plenary power, allows for the creation of Territory courts – though whether those courts exercise the judicial power of the Commonwealth remains an open question – the other possible "so-called exception".

Their Honours referred to a capacity in the United States to have "legislative courts", which were supported by Article 1 of the Constitution, but that those courts do not exercise the judicial power of the United States.

Their Honours referred to *Boilermakers case*[64]*,* and the point that if there was no Chapter III in Australia's Constitution, then it may be supposed that at least some of the heads of legislative power under s 51 would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power".

Their Honours made it clear that there was no place for legislative courts under our Constitution.

My take on this

In effect, the High Court has:

- said that the military disciplinary jurisdiction allowed for in the Constitution is pretty much fixed by history and necessity.

  As Peter Cundall would say, "that's your bloomin' lot";

- the jurisdiction is defined by "command"; The command review role is the touchstone for the so-called exception;

- the high watermark for that military disciplinary jurisdiction is defined by the legislation applicable in *White's case* which allows for a Director of Military Prosecutions and Registrar of Military Justice undertaking some convening authority tasks;

- Senate Committee references to the UK cases such as *Findlay, Grieves* and the Canadian case of *R v Genereux* have misled the Parliament, because those decisions are given in the context of very different constitutional arrangements which do not reflect Australia's Constitutional arrangements; and

- strongly affirmed the *Boilermakers case*, and the separation of powers.

The outcome in *Lane* did not turn on the nature and scope of the DFDA s 61 "territory offences"; the military jurisdiction can extend to service offences which have an equivalent criminal offence, provided that the prosecution of these offence serves a disciplinary end. The result is that service nexus, or service connection, is likely to remain a constitutional issue.

The outcome did not turn the exercise of a judicial power or the need for a tribunal to act judicially; the latter is assumed.

Determinative was that the Australian Military Court was making final determinations as to guilt and punishment. The majority said at paragraph 98:

> that the AMC is making binding and authoritative decisions on the issues identified, without further intervention from within the chain of command is reason enough to conclude that it is the exercise of the judicial power of the Commonwealth.

The Aftermath

On 22 September 2009, the *Military Justice (Interim Measures) Act No 1 and Act No 2* passed into law.

Both Acts have in their title the words "interim measures". In the second reading speech on the introduction of the Bills into Parliament, Senator Conroy said "the Government will move to establish a Chapter III court as soon as possible"[65].

I wonder if this is possible?

Isn't it the case that it's not "the vibes", it's *Boilermakers'!* It's *Lane v Morrison!*

If the military discipline does become something to be administered by a Chapter III Court, it becomes something else other than a command relationship. It becomes a judicial process, with all the paraphernalia that a judicial process entails. It may be good for military lawyers, but is it good for military discipline?

This brings us back to Callinan J in the opening remarks. Is it the case that military discipline is not administrable by a Chapter III court?

A further question is whether a Chapter III Court wants to second guess what are essentially command relationships. To what extent are command imperatives justiciable?

I wait for the next exciting chapter in military discipline and Chapter III courts.

Endnotes

1 19 Johns 7 at 30 (1821)
2 (1988-1989) 166 CLR 518
3 (1991) 172 CLR 460;
4 (1994) 181 CLR 18;
5 (1989) 168 CLR 289
6 (2004) 220 CLR 308
7 (2007) 231 CLR 570
8 [2007] HCA 29 at paragraph 21,
9 [1987] USSC 159; US 435 at 441(1987)
10 (1988-1989) 166 CLR 518
11 *Re Tracey; ex parte Ryan* (1988-1989) 166 CLR 518 at 571.

12 [2007] HCA 29
13 [2007] HCA 29 at paragraph 89.
14 [2007] HCA 29 at paragraph 241.
15 (1942) 66 CLR 452
16 (1945) 71 CLR 1.
17 *Re Tracey*, p 534.
18 (1981) AC 303, at p 360
19 *Re Tracey,* p 539
20 (1963) 109 CLR 665
21 (1982) 150 CLR 113
22 [2007] HCA 29
23 Act 142/2005, Part XIA
24 (1955) 92 CLR 157
25 In so far as Williams J in *Commonwealth v Quince* (1943-44) 68 CLR 227 at p 255 refers to the King as the titular head of the armed forces and therefore the Governor General in this role, it does not address the work done by s 68 and confirms the power of command in its most absolute form involves the obligation of a member inferior in rank to comply with lawful orders of his superiors. Furthermore, where Deane J in *Coutts v Commonwealth,* (1984-85) 157 CLR 91 at pp 108-109 suggests that the role of the Governor General under s 68 of the Constitution is essentially titular, the remark does not accord with Constitutional principles of interpretation (see *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-368; *Reg v Coldham* (1983) 153 CLR 297 at 314; *Street v Queensland Bar Association*(1989) 168 CLR 461 at 527. The vesting of power by s 68 is real and titular office in no way derogates from command as vested by s 68 and as permissibly addressed through s 9(2) of the *Defence Act 1903.*
26 Clode's Military and Martial Law, 2nd Edition, John Murray, Albemarle Street, London, 1874, Chapter VII, page, 91, paragraph 21, Annexure 1.
27 *R v Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452 per Starke J at pp 467-468, and per Williams J at p 481; *Commonwealth v. Quince* (1944) 68 CLR 227 per Williams J.
28 See *R v Cox; Ex parte Smith* (1945) 71 CLR 1 per Dixon J at p 23.
29 See *White v Director of Military Prosecutions* (2007) 231 CLR 570 per Callinan J at p 649, paragraphs 240 and 242; moreover the distinction recognised in *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 653 that the DFDT was not exercising jurisdiction analogous to that of a Court of Criminal Appeal would no longer be sustainable in respect of appeals from the AMC as a permanent Court which is external to "command".
30 *Ibid.*
31 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
32 *R v Kirby; ex parte Boilermakers' Society of Australia* (1955-56 CLR 254 at p 270
33 Section 89 *Defence Act 1903*
34 Paragraph 50 of the Parliament of the Commonwealth of Australia House of Representatives Defence Legislation Amendment Bill 2006 Explanatory Memorandum expressly provides that the Australian Military Court is a federal court wherein it says "paragraph (38) amends the *Judges Pensions Act 1968*. Given that the AMC is a federal court, the proposed term of appointment is for ten years, an unintended consequence would see military judges being eligible for pensions under the *Judges Pensions Act 1968*.".
35 *R v Kirby; ex parte Boilermakers' Society of Australia* (1955-56) 94 CLR 254.
36 Transcript 22 April 2009, page 9, Gummow J.
37 *Defence Force Discipline Act 1982 (Cth),* s114.
38 *Defence Force Discipline Act 1982 (Cth),* s114.
39 *Defence Force Discipline Act 1982 (Cth),* s114.
40 *Defence Force Discipline Act 1982 (Cth),* s119.
41 *Defence Force Discipline Act 1982 (Cth),* s120.
42 *Defence Force Discipline Act 1982 (Cth),* ss188AA, 188AO.
43 Practice Direction No 1 of the Australian Military Court, paragraph 3, 5 November 2007, Annexure 3.
44 *Defence Force Discipline Act 1982 (Cth),* Part VII, Division 4.
45 DFDA s 146 the reference to "court" therein, and see *Evidence Act (Cth)* Dictionary, Part 1, definition of "Australian Court", Annexure 5.
46 *Defence Force Discipline Act 1982 (Cth),* Part IX. Curiously, appeal is from a court to a tribunal, the Defence Force Discipline Tribunal established under the *Defence Force Discipline Appeals Act 1955.*
47 *Defence Force Discipline Act 1982 (Cth),* in contrast to the jurisdiction of a Summary Authority per s 131B.
48 Defence Force Discipline Act, s 53(4)(d).
49 *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 27; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 per Deane J at p 608, Toohey J at p 685, and Gaudron J at p 706; *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at p 11.
50 *Groves v Commonwealth* (1982) 150 CLR 113 at pp 125 and 126 per Stephens, Mason, Aickin and Wilson JJ; *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, per Mason CJ, Wilson and Dawson JJ at p 538, and per Brennan and Toohey JJ at p 557.
51 Repealed DFDA s 10 provided:

"Subject to this Part, the principles of the common law with respect to criminal liability apply in relation to service offences other than old system offences".

Section 10 was repealed and substituted by s 40 *Defence Legislation (Application of the Criminal Code) Act 2001 ,* Act No 141 of 2001.

Section 10 now provides:

"Chapter 2 of the *Criminal Code* applies to all service offences, other than old system offences".

Note:Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Service offences under DFDA ss 15-60 were amended to reflect physical and fault elements of each offence and to identify the legal and evidential burdens of proof.

52 Repealed s 12 says that the onus is on the prosecution and the burden is beyond reasonable doubt but does not impose or provide for "criminal guilt". Section 12 was repealed by s 43 Defence Legislation (Amendment of the Criminal Code) Act 2001, Act No 141 of 2001.

53 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

54 *Ibid,* at 562.

55 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 per Brennan and Toohey at p 571; *McWaters v Day*, (1989) 168 CLR 289 at p 299.

56 *Stenhouse v Coleman* (1944) 69 CLR 457, Dixon CJ at 471; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, Fullagar J at 253; *The Commonwealth v Tasmania (The Tasmanian Dams Case)* (1983) 158 CLR 1, Brennan J at 232, Deane J at 260; *Richardson v Forestry Commission* (1988) 164 CLR 261, Deane J at 308, Dawson J at 326.

57 *Re Nolan; ex parte Young* (1991) 172 CLR 460 at p 481.

58 (1918) 25 CLR 241 at 268–270

59 Paragraph 75.

60 *R v Taylor; ex parte Roach* (1951) 82 CLR 587 at 598.

61 *Lane v Morrison,* paragraph 96-97.

62 *Lane v Morrison*, paragraphs 59 and 60.

63 *Ibid*, paragraph 116.

64 *R v Kirby; ex parte Boilermakers' Society of Australia*, (1956) 94 CLR 254 at 269.

65 Senate Hansard, Wednesday 9 September 2009, p. 18 per Senator Conroy.