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OBITUARY

ENID MONA CAMPBELL, AC, OBE 1932 - 2010

Matthew Groves*

Emeritus Professor Enid Campbell passed away on the 20th of January 2010 after a brief illness. A proper tribute to Enid would be a long one but this recollection of Enid will attempt to remind readers of the Forum of her particular contribution to the development of Australian administrative law.

Enid Campbell graduated from the University of Tasmania with first class honours and also the university medal in law. Much of Enid's early writing was about aspects of legal history, particularly land tenure, but she moved toward public law when she began her doctoral studies in political science at Duke University. Political science would certainly have seemed an odd choice for an Australian legal scholar at that time, particularly when taken at an American law school, but it proved a useful background for public law whose work focused on the structure and operation of government. When Enid returned to Australia, she joined the Law Faculty of the University of Tasmania and did so in a day when there were almost no female academics in law. Enid then moved to the University of Sydney to become Australia's first female Associate Professor of Law. In 1967 she became Australia's first female Professor of Law at Monash University.

Enid made a singular contribution to the scholarship of Australian public law and was a strong exponent of an indigenous Australian public law. Most scholars struggle to make an impression on either constitutional or administrative law, Enid was one of the few, and perhaps the only person in modern times, to master both aspects of public law. She was also Australia's leading scholar on parliamentary privilege. Enid's scholarship is too vast to summarise let alone give a full account of but it can be conveniently placed into several phases.

In the 1960s Enid was a vocal and influential scholar of rights and freedoms. This was a time when notions of rights received little attention in Australian legal literature and the proponents of rights were often viewed as unhealthy radicals. Enid's book *Freedom in Australia*, co-authored with Prof Harry Whitmore and published in 1966, was the first legal analysis of the freedoms enjoyed (or not enjoyed, as was often the case) by Australians. The book had a strong influence on other Australian legal scholars in the 1970s. In 1967 Enid published an article on public access to government documents.[1] This article marked an important step towards the idea of access to information which we now take for granted in the form of FOI legislation.

The next period of Enid Campbell's scholarship, which spans the 1970s and 1980s, focused on judicial power and the constitutional position of judges. This aspect of her work culminated in the publication in 2001, with HP Lee, of *The Australian Judiciary*. As with so many of Enid's works, this book was the first of its kind in Australia.

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The later stage of Enid Campbell's scholarship, which began in the mid 1990s, saw her return to parliamentary privilege. Enid published her first book on this topic in 1966 and published another entirely new monograph on the topic in 2003. She also published many articles on almost every aspect of parliamentary privilege. During this time, Enid returned to administrative law scholarship with renewed energy. Although Enid did not write a monograph on administrative law, she influenced this area through her publication of an enormous number of articles and book chapters. Her work typically covered the most difficult topics that others shied away from. She also set demanding standards that she imposed upon herself more than anyone else.

Enid also influenced administrative law through her teaching and mentoring of other scholars. Enid's former students included Australia's first female High Court judge, Mary Gaudron, whom Enid taught during her time at the University of Sydney. Enid also taught the current Chief Justice of Victoria, the Hon Marilyn Warren AC, who recalled Enid as a particular role model for female law students. Enid also supervised the honours thesis of Pamela Tate SC, the current Solicitor-General of Victoria.[2] Another of her notable former students was Mark Aronson, now an Emeritus Professor in the Faculty of the Law at the University of New South Wales. When Mark Aronson approached Enid for advice on possible co-authors for his treatise *Judicial Review of Administrative Action* (now in its fourth edition), Enid suggested that he contact Bruce Dyer and Matthew Groves, both of whom are now co-authors of the widely cited work. Enid, perhaps wisely, chose never to write such a lengthy book.

Like many administrative law scholars, Enid Campbell hated administrative work but did her duty when required. One such occasion was her term as Dean of the Monash Law Faculty in 1971. This was another first for a woman but one she was anxious not to repeat. Enid gained more satisfaction in the many roles she performed on royal commissions and government committees. The first was from 1974 to 1976 as a member of the Royal Commission on Australian Government, appointed by the Whitlam government and chaired by Dr H.C. (Nugget) Coombs. This landmark analysis of the operation of government led to, among other things, reforms to the powers of the Commonwealth Auditor-General, which greatly extended the powers of that office to examine administrative efficiency. These reforms marked an important advance in the role of the Auditor-General as we know it today.

Enid was also a member of the Constitutional Commission which was established as part of the bi-centennial celebrations of 1988. The work of the Commission provided an important focus for reflections upon the Constitution at the time of the bi-centennial. The Final Report of the Commission provides an enduring analysis of the Constitution and gives special attention to the question of whether the Constitution can meet the needs of Australia in modern times. That question remains no less relevant today. Enid was also a member (from 1984 to 1986) of the Commonwealth Tertiary Education Commission's Committee to inquire into the discipline of law. This was known as the Pearce Committee, in recognition of its chairman Dennis Pearce. This national review of the teaching of law in Australian universities – the first of its kind in Australia – led to revised funding and standards in law schools. Enid continued work such as this until almost the end of her life, serving as a member of the advisory committee for the Australian Law Reform Commission report on royal commissions.[3]

Enid Campbell was made a Companion of the Order of Australia in 2005 in recognition of her contribution to the law and legal education. The conferring of Australia's highest honour on Enid Campbell was fitting recognition of the singular contribution she made to Australian life.

All of these achievements illuminate only part of Enid Campbell and her life. Outside her monumental scholarship and other professional activities Enid was a quiet and shy person. She was never an active self promoter of her work but instead lived quietly and enjoyed the

company of close friends who appreciated her humour. She was hospitable and generous with her friendship. Enid will be missed by many.

Endnotes

1 Enid Campbell, 'Public Access to Government Documents' (1967) 41 *Australian Law Journal* 73.
2 That honours thesis was published as Pamela Tate, 'The Coherence of Legitimate Expectations and the Foundations of Natural Justice' (1988) 14 *Monash University Law Review* 15-81.
3 Australian Law Reform Commission, *Making Inquiries – A New Statutory Framework* (Report No 111, 2010).

RECENT EVOLUTIONS IN AUSTRALIAN OMBUDSMEN

*Chris Field**

1. Introduction

Ombudsmen[1] are involved in a wide range of activities, and most purposely take a multi-disciplinary approach to their work; however, there is no one discipline, at least from my point of view, that has more obvious relevance to the work of Ombudsmen than administrative law.

The office of the Ombudsman is not only a permanent fixture on the administrative law landscape but a fundamentally important part of the network of accountability agencies that play a vital role in maintaining and promoting the integrity of the Australian public sector.

In this paper I will largely focus on recent developments for parliamentary or "classical" Ombudsmen, not simply to set out recent organisational developments in the office of the Western Australian Ombudsman, but rather to look at larger, conceptual shifts in the work of the Ombudsman and, in particular, how the Ombudsman's role has changed and adapted to the socio-political environment in which it exists.

2. The History and modern role of the Ombudsman

The role of the Ombudsman began two hundred years ago in Sweden, in 1809, as a parliamentary inspector of the bureaucracy and, like that other Swedish creation, IKEA, has spread around the world. When I refer to the office of the Ombudsman in this paper, it is this parliamentary, or classical, Ombudsman that I have in mind.[2] Ombudsman offices first appeared in Australia in the early 1970s and there is now an Ombudsman at both the Commonwealth level and in every State and Territory. Each of these Ombudsmen is appointed for a fixed term (generally five years) and is independent of the Government of the day. The Ombudsman's principal role is to investigate and resolve complaints about public administration. Ombudsmen can also investigate complaints of their own motion. The Ombudsman's powers of investigation are significant and, generally, that of a Royal Commissioner. In finalising investigations, the Ombudsman has recommendatory, as opposed to determinative powers.

3. The Growth of the Ombudsman

The expansion of the office of the Ombudsman can largely be said to fall into three categories. The first is the migration of the Ombudsman beyond its birthplace in Sweden to other countries.

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* *Chris Field is the Western Australian Ombudsman.* *This paper was presented at the 2009 AIAL National Administrative Law Forum, Canberra, 7 August 2009. The helpful comments of Dr Peter Wilkins, Deputy Western Australian Ombudsman, in the preparation of this paper, are acknowledged.*

3.1 *Migration from Sweden to other countries*

Ombudsmen of some description can now be found in most European countries, throughout Africa and Asia, in a number of American states, the South Pacific and, of course, Australia. The office of the Ombudsman has migrated from parliamentary democracies to other forms of government, from countries with very significant public services to those with less, from the very prosperous to the very poor, from the very large to the very small. All in all, the Ombudsman has proved a particularly portable concept.[3]

3.2 *Appropriation of the term Ombudsman*

The second expansion of the office of the Ombudsman has been the widespread appropriation of the term Ombudsman.[4] As a title with understood dimensions - a provider of fair, independent dispute resolution - the Ombudsman has been appropriated from its beginnings as a parliamentary officer into many aspects of public and private administration. A reference to the office of the Ombudsman these days is just as likely to be to one of the large number of industry-based Ombudsmen (for example, the Telecommunications Industry Ombudsman), internal Ombudsmen in public sector organisations (for example, local government) or internal Ombudsmen in private companies (for example, insurance companies and banks). Suggestions for the creation of new Ombudsmen are now commonplace[5], for example, Senator Nick Xenophon has called for the creation of an Overseas Student Ombudsman.[6] In fact, there is now a veritable cradle to grave offering of Ombudsmen – from Children's Ombudsman to Aged Services Ombudsman to everything in between. A personal favourite of mine is the Florida Sinkhole Ombudsman – although I'm sure if you lived in Florida, and so happened to be proximate to a sinkhole, and your house collapsed into a suddenly appearing, rather large hole in the ground, you would be exceptionally grateful for the existence of the Sinkhole Ombudsman. Indeed, the Ombudsman has so successfully infiltrated modern culture that a US Fox News television program that uses a comedian to provide an impartial, balanced summing up of the show's commentators is called the Ombudsman.

3.3 *Increase in the scope of Ombudsmen*

While the Ombudsman has spread throughout the world, the expansion of the Ombudsman institution has not been one of just scale, but also scope. This third category of expansion has been the evolution in the scope of functions undertaken by Ombudsmen. Ombudsmen now undertake a much wider range of activities than was the case traditionally. To use my office as an example, in addition to the "classical" Ombudsman functions, we undertake inspections of telecommunications intercepts, investigation of public interest disclosures (more popularly referred to as whistleblowers' complaints), investigation of complaints from overseas students and, most recently, reviews of certain child deaths. Indeed, over the past three years, the addition of these new functions has meant that the budget for my office has doubled.

Ombudsmen are now also undertaking dual roles, combining their classical role with that of industry-based Ombudsman. For example, the Tasmanian Ombudsman and I both undertake the industry-based Ombudsman role of Energy Ombudsman. Having performed this dual role over the past two years, I am pleased to say that I think it can be made to work successfully. It is also interesting to observe, in terms of how adaptive the Ombudsman model can be, that while in my general jurisdiction I am exercising recommendatory powers, in the energy jurisdiction I am exercising determinative powers.

Finally, at a time when we are in the process of a national debate regarding the potential development of new regulatory mechanisms to recognise, protect and promote human rights, it is important to acknowledge the evolution of the role of Ombudsmen as human

rights protectors.[7] One of the reasons why I personally do not support a human rights charter is the existence of so many institutions in our society (such as the Ombudsman) who serve, within the existing regulatory framework, to protect and promote human rights with very great success.

In my view, at its very core, the Ombudsman is a human rights institution. Commonwealth Ombudsman, Professor John McMillan, has observed that "the right to complain, when securely embedded in a legal system, is surely one of the most significant human rights achievements that we can strive for".[8] As I have said earlier the Ombudsman's principal role is to receive and resolve complaints. It is sometimes said that the Ombudsman is essentially a reactive institution and that human rights agencies must have a clear proactive mandate. Whilst it is true that the complaint-handling function is largely reactive, this position is otherwise, in my view, misconceived.[9] The Ombudsman has always possessed and, I think, is increasingly exercising, a very significant proactive jurisdiction - particularly the undertaking of inspections regarding the exercise of coercive powers and the ability, of its own motion, to undertake investigations into matters that involve human rights issues.[10] Ombudsmen offices, on a daily basis, investigate how the state, through its instrumentalities, affects the rights that inherently reside in individuals to exercise their economic and personal freedoms. As one of many case examples I could give, my office is currently undertaking an own-motion investigation into the collection, protection and use of personal information by government agencies – a clearly proactive investigation into a now well accepted individual right to privacy of personal information.

3.4 *Why has the office of the Ombudsman expanded?*

Five of the many reasons that explain the expansion of the role of the Ombudsman are discussed below.

First, over the last few decades, despite considerable deregulation and privatisation, there has nonetheless been growth in government, including increasing complexity in government services. Indeed, even in those areas of deregulation and privatisation that may have removed jurisdiction from classical Ombudsmen, this jurisdiction has often been taken up by industry-based Ombudsmen.[11] University of Chicago academic, Professor Richard Epstein, has noted that "…each new extension of government power should be examined under a presumption of error".[12] While this view is unlikely to be shared completely, a growing recognition of the likelihood of error occurring with new government powers has no doubt supported the development of oversight agencies. Indeed, with this rise in government activity there has been, for the most part, a concomitant rise in the number (and scope) of accountability agencies, so much so that commentators even talk of a fourth branch of government, the integrity branch, to sit alongside of the executive, legislature and judiciary.[13] It is suggested that this integrity branch of government has been vested with the responsibility to oversight, investigate and educate the public sector in relation to corruption, misconduct, good decision making, avoiding conflicts of interest and the like. The Ombudsman has become recognised as a central pillar in this integrity structure. In Western Australia, for example, the Integrity Co-ordinating Group consists of the Auditor-General, Ombudsman, Corruption and Crime Commission and the Office of Public Sector Standards Commissioner.

Second, much of the growth of the Ombudsman concept has paralleled growth in concerns regarding access to justice and the need for fast, low-cost resolution of disputes.[14] Ombudsmen of all types have been well-placed to provide an alternative pathway for the resolution of disputes. Similarly, as concern about access to justice has grown, so too has enthusiasm for alternative dispute resolution. Once again, Ombudsmen of all types have been able to offer various methodologies of dispute resolution that has delivered very timely, highly cost-effective justice. Complaints dealt with by industry-based Ombudsmen schemes

now number in the hundreds of thousands. To use the Western Australian Energy Ombudsman as an example, 96% of complaints are resolved in 10 business days or less.

Third, the term Ombudsman has become a unique and trusted brand name. The term Ombudsman connotes impartiality, independence and fairness in dispute resolution and scrutiny. Importantly too, the Ombudsman is not seen as some passing fad or recent invention and is respected as politically bipartisan.

Fourth, the office of the Ombudsman has expanded because Ombudsmen themselves have been prepared to accept new functions that government propose.

Fifth, the Ombudsman has become an important contributor to the maintenance of the rule of law.[15] This gives greater permanency to the office of the Ombudsman in those countries that already observe the rule of law, but also makes it more likely that those countries who are moving towards this observance will establish an office of the Ombudsman. I think it also makes the Ombudsman more durable in terms of political philosophy. An Ombudsman model can easily fit with a more protective, interventionist welfare state approach (indeed, much of the growth of the Ombudsman institution this century parallels the growth of the welfare state).[16] But at the same time the Ombudsman can fit successfully with a political approach that favours more limited government, but places a central focus on the role of the state to maintain the rule of law. Nobel prize winning Austrian economist Friedrich Hayek has said of the rule of law:

> Nothing distinguishes more clearly conditions in a free country than those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all its technicalities this means that government in all its actions is bound by fixed rules and announced beforehand – rules which make it possible to forsee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[17]

The Ombudsman is a contributor to the rule of law because the role helps to ensure that transparent and accountable laws are transparently and accountably enforced.

3.5 *Benefits and problems with the expansion of the Ombudsman*

It is my view that the expansion of the role of the Ombudsman is largely a very positive one. There are, I think, numerous benefits, some of which are listed here:[18]

1. Creating high levels of community awareness of the office of the Ombudsman is both an ongoing aspiration for Ombudsmen and a perennial challenge. The expansion of the use of the term Ombudsman significantly enhances awareness of the Ombudsman in the community and of its core functions;

2. An integration of non-traditional functions into Ombudsmen offices benefits the community through the synergies created between components and allows Ombudsmen offices to achieve much greater scale and scope economies and, in my experience, achieve significantly higher quality work across all functions;

3. The 'institutionalisation' of the Ombudsmen makes them much less vulnerable to political cycles;

4. Ombudsman offices can collaborate with, learn from, and benchmark against, each other; and

5. As government powers expand and personal and economic freedoms are variously restricted, monitored, licensed or otherwise regulated by government, an expanded

right to complain about the administration of this regulation and to have it oversighted is beneficial.

The expansion of the office of the Ombudsman, and particularly of the use of the term Ombudsman, is not without problems. Once again, I simply list a few of the more obvious ones:[19]

1. There are dangers around the misappropriation of the word Ombudsman. In effect, this is a caution against allowing the word Ombudsman to be used as a confidence-inducing façade for an otherwise partial, non-independent body. Use of the word Ombudsman in this way not only risks misleading the public about the particular service they are using, but also has the potential to undermine the credibility of the Ombudsman institution generally;

2. Somewhat related to the first problem, there is the possibility of confusion that is created with so many different Ombudsmen with different jurisdictions and different methodologies. Also, as the term Ombudsman is increasingly appropriated across sectors, we must continue to be vigilant that the term does not become so generic that it becomes effectively meaningless. Ombudsmen themselves must ensure that they protect the brand name they have established; and

3. Although the desire of government to create Ombudsmen or give Ombudsmen new powers is understandable and mostly welcome, as is the desire of Ombudsmen to expand their functions to create greater wherewithal to undertake their functions, some functions suggested for Ombudsmen offices are simply not a good fit and, as independent officers, should be refused accordingly.[20]

4. Ombudsman as regulator

4.1 *Does the Ombudsman make regulation?*

Modern Ombudsmen perform many functions. They are, first and foremost, complaint resolvers. They are increasingly proactive inspectors of specific powers exercised by government institutions, they are educators about good administration, and they are investigators of potentially systemic and/or serious maladministration, conflicts of interests and abuses of power. In this way, Ombudsmen are properly characterised as watchdogs. They are also, in my opinion, regulators. Ombudsmen, in identifying mistakes in administration, and proposing new ways to administer laws (or indeed, as the case may be, suggesting the removal, variance or creation of laws) are institutions that are regulatory in their nature. In short, Ombudsmen have a role in regulating public administration, and by implication, in regulating the public.[21]

This is not to suggest that this is wrong - just as regulation is a very valuable, indeed clearly an indispensable part of modern economies, so too the regulatory role of Ombudsmen should, in my view, clearly be seen as important and valuable.

The issue here is what we have learned about the limits of regulation, including regulatory burden and how accountability agencies, including Ombudsmen, can continue to incorporate this thinking into their work.[22]

4.2 *An Evolving understanding of the limits of regulation*

Over the past few decades, in Australia and elsewhere, we have seen growing emphasis on ensuring that all aspects of our economy, including public administration, are provided as efficiently and productively as possible, including strong interest in reducing so-called red-

tape and unnecessary regulatory burden on the community. Using Australia as an example, this has been a period of the creation of new government institutions, such as the Productivity Commission and various offices of regulatory review at jurisdictional level; significant micro-economic reform, including privatisation and deregulation; numerous reports and one-off references, notably the Commonwealth Red-Tape Taskforce and a variety of jurisdictional variations of this concept; and new processes, such as regulatory impact statements prior to the passage of new regulations and recurring expectations of efficiency dividends by government agencies.

The global financial crisis and ensuing recession only serve to remind us of the need for good quality regulation without excessive cost.

Accountability agencies, as regulators, should be confident that there is very significant public value to be created from their administrative improvements. However, they need to be aware of the regulatory burdens that they can create. A very large amount of regulatory activity occurs for the right reasons – it is conceived, considered and implemented with unquestionably good intentions. Unfortunately, not all of that which is designed with good intentions actually achieves good outcomes. An oft referenced regulatory failure is American prohibition.[23] Prohibition was a perfectly well-intentioned regulation with, unfortunately, spectacularly bad results. But we don't need to go back nearly this far in history to consider examples where a regulatory intervention has at least been suggested to have unexpected consequences.

4.3 *Principles for good regulation*

I think accountability agencies, including Ombudsmen, need to be aware that no matter how well-intentioned our recommendations for administrative change, these changes may:

1. not necessarily always achieve their desired outcome;

2. have unintended consequences; and

3. result in costs that outweigh the benefits of the improvement.

In short, the Ombudsman as an institution exists to identify and suggest the remediation of mistakes in public administration – what administrative lawyers refer to as maladministration. But Ombudsmen themselves can make mistakes, including mistakes in the suggestions we make to improve public administration. The trick here is not that we will never make a mistake, but to be cognisant of the fact that mistaken judgments will occur and to have a series of principles in place to reduce our regulatory error.

The principles that I suggest utilising are as follows:

1. That there is always an evidence base that establishes the need for administrative improvement. For most Ombudsmen a ready base of evidence exists in the complaints made to their offices;

2. That these improvements will actually remedy the problem identified. Regulators must be able to demonstrate that their proposed remedies will actually address the problem at hand;

3. That the improvement is proportionate to the problem identified. Some problems are wide-ranging, whole of government problems with serious implications and deserve similarly wide-ranging solutions. Other problems may be limited or not so serious and the remedy similarly limited;

4. That we have considered the benefits and the costs of the recommendation we are making. It is surprising how often in public policy generally, when we consider improvements to a currently less than optimal system, that we give great emphasis to the benefits, but less so to the costs. These costs might be one-off implementation costs or ongoing compliance costs. Similarly, in considering cost, we do need to consider the value that the community places on the various choices that can be made with limited resources. It might be not particularly costly to fix a problem but inasmuch as expenditure of money in this area will be an opportunity cost to expenditure in an area more valued by the community, it still may not be desirable; and

5. That we have considered the unintended consequences of the recommendations we make. Many proposed improvements can in fact lead to not just undesirable consequences but sometimes completely perverse consequences, where the exact opposite of the improvement sought is actually achieved. While some unintended consequences are unforeseeable, most, with research, wide-ranging consultation, an eye to history and a good dose of humility, are avoidable.

It is also important to remember that accountability agencies do not just investigate, report on, and make recommendations about, problems in public administration, they also undertake a range of activities from education, standard-setting, and creating new regulatory mechanisms designed to limit the likelihood of these problems occurring in the first place. These types of measures will mostly be highly desirable. We do need to be mindful, though, that such approaches may add unnecessary burdensome costs to public processes – costs, of course, borne by the taxpayer. Such processes may also create undesirable inertia in government administration and dampen positive innovation through excessive risk aversion.

It is important to note that in setting out these principles, I am not suggesting that they are not observed regularly by Ombudsmen. Even a cursory scan of published Ombudsmen investigations reveals that they have long given consideration to the need for regulatory recommendations and to their costs and benefits and potential consequences (as well as listening to these arguments when they are made by public sector agencies).

In making the case for Ombudsmen to consider carefully the imposts of their proposed administrative improvements, I think it is also important to point out that the Ombudsman's powers are recommendatory only. The Ombudsman cannot compel an agency to accept its idea of an administrative improvement no matter how strongly it believes it to be correct. Having said that, I personally find the argument that because the Ombudsman only has recommendatory powers, it is therefore acceptable for the Ombudsman to pay less attention to the effects of his or her recommendations to be a particularly unsatisfactory one. It should also be kept in mind that although the Ombudsman's findings are recommendatory only they generally are considered very persuasive. Indeed, during my term as Western Australian Ombudsman one hundred percent of our recommendations for administrative improvement have been accepted by agencies. It should also be said that it not the role of the Ombudsman alone to take responsibility for any administrative imposts created by its recommendations for improvement. Clearly the agencies that are the subject of the Ombudsman's recommendations need themselves to consider the need, alternatives, costs and benefits and unintended consequences of any improvement recommended to them.

5. Conclusion

The *Ombudsman Evolution*, as much as it may sound like a hitherto undiscovered Robert Ludlum novel, does describe a very real, and equally very interesting and important

development in the modern history of justice and accountability. In the words of one commentator:

> All over the world, the very word "ombudsman" evokes feelings of security, protection and freedom. The constitutional Ombudsman concept is today intrinsically tied to the ideas of democracy, rule of law and human rights.[24]

The Ombudsman, at first a relatively minor part of the governmental framework of one Scandinavian country, has evolved, and extraordinarily so. It is now represented in over one hundred and thirty countries,[25] is an integral part of modern notions of government accountability and, indeed, I and others argue, has become fundamental to the one non-negotiable element of all government responsibilities – the creation and maintenance of the rule of law. Moreover, the Ombudsman in its more recent incarnations, and particularly as industry-based Ombudsmen, is now a significant pathway to access to justice in Australia.

If the essence of evolution is change and adaption to the environment, then the Ombudsman has evolved to meet changes in its environment, from the expansion of government power, the growth in interest in protecting human rights, the desire to promote integrity in public administration and the rise of access to justice as a major area of policy attention. There is much to celebrate in this evolution, some matters that require ongoing vigilance and a few matters that are of concern. Overall, however, perhaps the greatest strength of the Ombudsman is simply its capacity to evolve so successfully. If history is any guide, a topic at a future AIAL Forum dedicated to further evolutions in the office of the Ombudsman is unlikely to be misplaced.

Endnotes

1 In this paper, I use Ombudsmen as the plural form of Ombudsman. Given their Swedish derivation, it is generally accepted that the words Ombudsman and Ombudsmen should be considered gender neutral.

2 See Gabriele Kucsko-Stadlmayer, 'The further spread of the Ombudsman idea in Europe' for an interesting discussion about typologies of Ombudsmen, particularly at pp 5-6. This paper was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and is available from the author.

3 For further discussion of the migration of the Ombudsman, see, for example, Gabriele Kucsko-Stadlmayer, note 3 above, Brian Elwood, and 'The Ombudsman travels to the Anglo-Saxon world', Alice Tai, 'Diversity of Ombudsman in Asia'. Each of these papers was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and is available from the author.

4 See, generally, John McMillan, 'What's in a name? Use of the term Ombudsman', Presentation to the Australian and New Zealand Ombudsman Association Conference, Melbourne 22 April 2008, available at http://www.ombudsman.gov.au

5 John McMillan states that 'almost every month in the media the government is called on to create a new specialized Ombudsman office. Over the last few years I have counted at least thirty such proposals', in John McMillan, note 5 above at 2.

6 See http://www.abc.net.au/news/stories/2009/07/28/2638119.htm (viewed as at 2 August 2009).

7 See, generally, Ritta-Leena Paunio, 'The Ombudsman as human rights defender'. This paper was delivered to the International Ombudsman Institute conference in Sweden in June 2009 and is available from the author.

8 John McMillan, 'The role of Ombudsman in protecting human rights' at 3 available at http://www.ombudsman.gov.au.

9 Professor John McMillan notes that "A great advantage that Ombudsman offices have … is that we can follow-up complaints and report findings: we can be proactive, not reactive", John McMillan, note 9 above at 6. The development of new United Nations human rights conventions also highlights how the traditional proactive human rights role of the Ombudsman suits developing human rights applications: "As long ago as 1987, the European and the UN Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into being. The UN Convention's Optional Protocol (OPCAT) established a system of regular visits to all places of detention in order to prevent torture and other cruel, inhuman or degrading treatment. Visits are carried out by a new international body and by one or several of the National Preventive Mechanisms that states set up, designate or maintain. In many countries, it is the Ombudsman who has been designated as the National Preventive Mechanism that the Optional Protocol provides for. The reason for this choice is probably the fact that Ombudsman meet the requirements with

respect to independence, *but an additional fact is that they have long been overseeing and inspecting those places mentioned in the Convention* [emphasis added]" in Ritta-Leena Paunio, note 8 above at 13. On this same point see Gabriele Kucsko-Stadlmayer, note 3 above at 7-8.

10 Moreover, there is a demonstrable link between, on one hand, the strength of a country's rule of law, accountable democratic institutions and economic freedoms and, on the other, genuine respect for human rights. In this way also, as a key accountability agency, the Ombudsman protects and promotes human rights.

11 Micro-economic reform throughout the 1980s and 1990s, greater emphasis of self-regulation and market models and the rise of the organised consumer movement (who were active protagonists for these schemes) all partly explain the growth of industry-based Ombudsmen.

12 Richard Epstein, 'Why the Obama stimulus plan must fail', *Forbes*, 21 July 2009, viewed as at 2 August 2009 on the Cato Institute website at http://www.cato.org/pub_display.php?pub_id=10372

13 John McMillan, 'The Ombudsman and the rule of law' (2005) 44 *AIAL Forum* 1 at 4 and John McMillan, 'Chaos or coherence? Strengths, opportunities and challenges for Australia's integrity systems', available at http://www.ombudsman.gov.au

14 See, generally, Chris Field, 'Alternative Dispute Resolution in Victoria: Supply-side research project', February 2007 available at http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/cav_report_adr_supply_side_research_2007.pdf (viewed on 2 August 2009).

15 See, generally, John McMillan, note 14 above.

16 Roger Douglas, *Administrative Law,* (2nd ed, 2004) at 279.

17 Friedrich Hayek, *The Road to Serfdom*, (Routledge Classics, 1944) at 75-76.

18 John McMillan, 'The expanding Ombudsman role: What fits? What doesn't?' available at http://www.ombudsman.gov.au The author notes three gains from the expansion of the use of the term Ombudsman, namely, a "stimulus to good practice in complaint handling and oversight", "public awareness of the right to complain" and "guidance in our own work" at 4.

19 Professor John McMillan has observed that the expansion of Ombudsman can lead to "public confusion", public deception" and "ill considered change" in John McMillan, note 19 above at 4.

20 See, generally, John McMillan, 'The expanding role of the Ombudsman: What fits? What doesn't?' available at http://www.ombudsman.gov.au for examples.

21 In regulating the administration of regulations the work of the Ombudsman might be described as a form of meta-regulation: see *Rethinking regulation: Ideas for better governance*, ANU Regulatory Institutions Network, 2004, available at http://regnet.anu.edu.au/program/review/reports/Rethinking_Regulation.pdf (viewed at 2 August 2009).

22 Among the many disciplines that inform the practice of administrative oversight, my view is that economic analysis brings useful insights. Law and economics has had a very considerable influence on a range of legal disciplines, most notably contract and tort, but has had considerably less influence on administrative law: see, for example, Susan Rose-Ackerman, 'Progressive law and economics – and the new administrative law', 98 *Yale Law Journal* 341 at 342. An understanding of the work of the Ombudsman from this perspective is, I think, a fruitful area of endeavour.

23 Milton Friedman and Rose Friedman, *Free to Choose*, (Harcourt, 1980) at 226-7.

24 Gabriele Kucsko-Stadlmayer, note 3 above at 7.

25 John McMillan, 'Key features and strengths of the Ombudsman model – National Ombudsman Commission of Indonesia', Seminar and Training on Local Ombudsman, 22 and 25 June 2004, available at http://www.ombudsman.gov.au

FUTURE DIRECTIONS 2009 – THE OMBUDSMAN

John McMillan*

Complaint trends

There has been a marked increase across Australia in the workload and output of Ombudsman offices, in both the public and private sector. In the core function of complaint handling, there has been an average increase in complaints and approaches of over 15%. Nearly all offices report that the last year has been their busiest on record.

In 2007-08 the nine public sector Ombudsman offices together received just over 100,000 complaints and inquiries.[1] The industry Ombudsman offices were as busy. The Telecommunications Industry Ombudsman alone received over 200,000 complaints – an increase of over 50%. There was a similar increase in complaints to the Financial Ombudsman Service and some of the Energy and Water Ombudsmen. Altogether, the public sector and industry Ombudsman offices are now receiving in excess of 400,000 complaints and approaches annually.

A far greater number of complaints are made directly to agencies. For example, ATO Complaints received close to 28,000 complaints (2008-09), the Centrelink Customer Relations Unit over 53,000 (2007-08), Australia Post Customer Contact Centres 437,000 (2007), and the Department of Immigration Global Feedback Unit nearly 8,000 (2008). Complaint figures on individual topics convey the same picture. The decision of the Government, in late 2008, to make a bonus payment to four million Australians (the Economic Security Strategy Payment) generated 156 complaints to my office in a four month period, and over 6,840 requests for review to Centrelink over six months.

The Factors at work

Why is complaint handling such big business and why has it become steadily more important?

Three causes seem to be at work. The first is the seasonal and episodic events that give rise to individual complaints. Straightened economic times are presently a factor in at least some complaints, particularly those to industry ombudsmen offices. Events of that kind are significant, but they are a minor factor in the steady annual increase in complaints. New problem areas continue to arise and it is unlikely that the number of complaints will reduce as times change and events pass. There are deeper causes to consider.

The second complaint stimulus is the increased interaction that people now have with government and big business. On issues as diverse as travel, taxation, financial support, family arrangements, home extensions, medical insurance, banking, phone usage and energy supply, people are in regular contact with government agencies and businesses to obtain a permission, receive a benefit, pay a charge, query a penalty or vary an existing

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contract or arrangement. There are many more rules being applied, which are growing in complexity to match the diversity in people's lifestyles and working, family and financial arrangements. Complexity means that more things can go wrong and more things may require clarification. The result is more inquiries and complaints.

The third complaint stimulus is that community expectations have changed. People are less tolerant of mistakes and blunders in decision making and service delivery. We are an educated society and we expect systems to operate smoothly, predictably and competently. We place great store on the organisational values of accountability, transparency and integrity. People now understand that they have a right to complain if they are dissatisfied or when things go wrong. Technology has also made it easy to complain, and to do so instantly. Not only is it free to complain, no experience is required!

The Response of Ombudsman offices

Ombudsman offices have responded to those trends in three ways. The first – at the risk of being self-serving – is by working harder and smarter. There is a heavy reliance on technology in all stages of the complaint handling process – receiving complaints, allocating them for investigation, tracking progress, spotting issues and trends, and monitoring quality standards. More filtering and selection is undertaken of the complaints or issues that warrant investigation. This is a practical necessity, but justifiable also on the basis that better results can be achieved for the public if the serious, recurring or systemic problems are given priority.

A second response is that Ombudsman offices have diversified in the functions they discharge. My own office now describes itself as having five functions:

- Complaint handling remains the core function. Last year we received over 45,000 complaints and approaches, and investigated over 5,000.
- Statutory audit activity is also increasing. We inspect the records of law enforcement agencies to ensure compliance with laws relating to telephone interception, use of surveillance devices, controlled operations and access to stored communications. The number of inspections – each resulting in a report to the Attorney-General or the Parliament – has increased from 12 inspections a year four years ago, to 31 in the last financial year. This figure is likely to grow, in part because Parliament is reassured by this intensive auditing that coercive and invasive powers can be entrusted to law enforcement agencies. The compliance auditing role of the office is growing in other areas. We audit complaint handling by the Australian Federal Police and prepare a report to the Parliament.[2] We recently conducted our first inspection of the records of the Australian Quarantine Inspection Service relating to quarantine investigations. Legislation before the Parliament will require the Ombudsman to review the conduct of each examination conducted by the Fair Work Building Industry Inspectorate.[3] The proposal to confer coercive examination powers upon the building industry watchdog is a subject of heated public debate, and the Minister has noted the oversight role of the Ombudsman as an important safeguard to ensure a responsible use of examination powers. Another recent proposal by a parliamentary committee is for the Ombudsman to monitor compliance by Australian Crime Commission examiners with record keeping requirements.[4]
- Own motion inquiries that result in published reports have become increasingly important. This year we will publish as many as 20 reports on matters as diverse as visa processing, mail redirection, departure prohibition orders, administrative compensation, executive schemes, heritage protection, use of interpreters, immigration detention, re-raising tax debt, industry grant schemes, postal compensation, disability support,

taxation compliance visits, use of coercive powers, and government economic stimulus payments. Each of the published reports originated in a handful or more of individual complaints that pointed to a larger issue that needed to be addressed. Each report also culminated in a series of recommendations, which, when accepted by government, result in measurable improvements to government administration and service delivery.

- A secondary purpose of complaint investigations and compliance auditing is to stimulate improvements in public administration. That role is taken up directly in other ways. We recently published a *Better Practice Guide to Complaint Handling*, and were a joint author of two other guides on *Managing Unreasonable Complainant Conduct* and *Automated Assistance in Administrative Decision-Making*. Fact Sheets (discussed below) are published on topics such as *Administrative Deficiency, Providing Remedies, Ten Principles for Good Administration,* and *Complaint Handling*. Three times a year we publish an e-bulletin with case studies of administrative problems and the lessons for government. In the last year the office has made nearly 20 submissions to parliamentary and other inquiries on a wide variety of legislative proposals and Commonwealth administrative practices.
- The office discharges an assortment of other specialist functions. An example is the reports tabled in the Parliament on each person held in immigration detention for two years or more.[5] Over 560 reports have been prepared, contributing to a reduction over four years from 149 to 26 people detained for more than two years. In response to that change and at the request of government, the office recently commenced reporting on each person held in detention for six months. These and other specialist functions of the office are captured in the variety of specialist Ombudsman roles, such as Immigration Ombudsman, Defence Force Ombudsman, Law Enforcement Ombudsman, Taxation Ombudsman and Postal Industry Ombudsman. Three other specialist roles currently under discussion in government are Norfolk Island Ombudsman, National Health Practitioners Ombudsman and oversight of a proposed new whistleblower protection scheme.

The third response of Ombudsman offices to the complaint trends noted earlier in this paper has been to look ahead and ask: What are dominant and emerging problem areas in public administration? Are there accountability gaps that need to be discussed? I will note four themes in our work.

Basic administration

The first theme – which is perennial but still important – is the importance of basic administration. Minor and trifling administrative errors can cause great damage to individuals. This was the topic of a recent Ombudsman Fact Sheet, *Ten Principles for Good Administration*, that drew upon the reports of the office on mistakes occurring in immigration detention. Principle No 1 in the Fact Sheet was that an error as simple as misspelling someone's name, misstating their date of birth, or misfiling their application to an agency, can result in the person being wrongly detained, incurring a penalty, losing or being denied a benefit, or having legal proceedings initiated against them.

The Ombudsman e-bulletins continue this theme by using simple case studies to illustrate that administrative errors that are small in scale can cause great anguish or disadvantage to individuals. These small incidents also colour the community's perception of the efficiency, professionalism and integrity of government.

Complaints are a reminder of these points and contain a message for all of government. Lessons distilled in the e-bulletins are practical and pointed. Examples include: explain clearly to a person why a debt or penalty is being imposed; do not assume the infallibility of

automated systems; depart from standard internal procedures when necessary to achieve a common sense outcome; ensure that a proper delegation is in place and current; check the file for additional information before revoking someone's benefit; hold back on coercive action if other suitable options are available; make sure internal policies are consistent with legislation; and be sensitive to how a letter conveying unwelcome news will be received.

These examples also pose a question for the discipline of administrative law: is it well placed to play a practical role in safeguarding the community and improving public administration? The issues that arise in court and tribunal cases, while important in their own right, are not always typical of the problems that people experience with government. Most of us, for example, do not own a broadcasting licence that is revoked, are not dismissed from employment, nor denied a commercial fishing licence, refused a protection visa, or have parole revoked. On the other hand, most of us do at some time in our lives experience a problem with mail, telephone services, taxation or energy supply. Interestingly, a recent Ombudsman report that attracted considerable media interest was on mail redirection. Not only was this an experience to which most people related, they understood also that a mail redirection problem can lead to a payment notice going astray, personal mail falling into the wrong hands, or a valuable mail order item being lost.

Problems that cross agency boundaries

A second theme that arises frequently in Ombudsman complaints is that government performance is weakest when responding to problems that cross the program boundaries or the responsibilities of a single agency. An illustrative example was an investigation by my office into a decision to prohibit a person leaving the country.[6] The co-operation of three agencies was required to activate the prohibition, record it on a database and check the database before allowing a person to leave the country. It was admitted by the agencies that a mistake occurred in allowing a person to leave with an unpaid debt. Yet, three years after the problem arose there is still no agreement as to which agency made the mistake or was to shoulder the burden of a compensation claim.

Similar drawn-out problems have arisen in other complaints. Complainants to the Ombudsman have encountered difficulty in finding mail that passes in turn through the hands of the postal, customs and quarantine services; in clarifying which of the many bodies that operate in an airport is an Australian Government agency that can address their complaint; in choosing the correct agency to handle their compensation claim following a government restructure and distribution of functions among multiple agencies; in getting two agencies to agree that one had misinterpreted a policy supplied to it by the other agency; in reversing a debt imposed by one agency following a computer malfunction in another agency that shared information; and in correcting inaccurate personal information passed by one agency to another.

As those examples suggest, agencies can adopt a siloed mentality when it comes to resolving difficulties that are not strictly of their making. This can border on obstinacy if the remedy to be provided is a financial remedy that will need to be met from the budget of one or other of the agencies. The commitment to a whole-of-government philosophy can be tested when service delivery breaks down.

This issue is taken up in two Fact Sheets recently published by the Ombudsman's office, on *Complaint handling: multiple agencies* and *Complaint handling: outsourcing*. The theme of both fact sheets is that many people look upon government as a single entity, and that the responsibility rests upon agencies to break down barriers and work co-operatively to resolve problems. The same call has been taken up by others. Referring to the tension between the horizontal responsibility of government and the vertical accountability of agencies, Australian Public Service Commissioner, Lynelle Briggs, noted that 'Accountability problems arise when

performance managed bureaucracies are asked to work across organisational or jurisdictional boundaries on joint problems that are complex in the sense of being decentralised or ambiguous'.[7]

Providing an effective remedy

A third theme in recent Ombudsman work is the need to provide a suitable remedy to a person who has suffered disadvantage as a consequence of poor administrative practice. Traditionally in administrative law, the concept of a remedy is tied to a court or tribunal order that quashes an erroneous decision, substitutes a fresh decision, restrains unlawful conduct, mandates lawful action, or declares the law to be applied.

Those remedies have their place, but they are not suited to many of the problems that people now experience in dealing with government. Traditional remedies are ill adapted, for example, to assist a person who is caught by an unintended anomaly in a legislative rule, who has fallen through the cracks of a government program, is confused about the advice received from an agency, is disadvantaged by an agency's delay in addressing a complaint, or is disabled by a physical or mental impairment in understanding or accessing his or her legal rights. The problem confronting a person in each situation is real and their enjoyment of legal rights can depend upon an appropriate remedy being found.

The issue is taken up in an Ombudsman Fact Sheet on *Providing remedies*. The fact sheet adopts a more expansive concept of remedy, to include an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action. Those categories are now used by the office as a key performance statistic. In 2007-08 a remedy was recommended by the office in 75% of the complaints that it investigated. This approach to dealing with problems has supplanted the more traditional method of recording whether the investigation has upheld the agency or the complainant. That approach simply does not work anymore in evaluating how complaints against government are handled and resolved.

Financial compensation is a particularly important remedy where a person has suffered loss or damage as a result of defective administration by a government agency. Payment of administrative compensation in these circumstances can be made under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA), that applies to agencies covered by the *Financial Management and Accountability Act 1997* (Cth). The CDDA scheme is a valuable and important means of securing administrative justice in a complex system in which people rely on government for correct advice, decision making and regulation. The scheme should, however, be better known and better administered. This challenge was addressed in a recent Ombudsman report, *Putting things right: compensation for defective administration* (2009). Problems in CDDA administration highlighted in the report were unhelpful legalism by agencies, a compensation minimisation approach, unsupportive conduct by agencies, delay in deciding claims, and poorly reasoned decisions.

Another remedial topic which the office will address in a forthcoming issues paper[8] is the need for safety net discretion powers to be written into legislation. A common problem now in government is that legislation that is tightly written with rigid criteria and deadlines can exclude deserving cases and have unintended and unfair consequences. An earlier Ombudsman report on immigration detention drew attention to this problem, in reporting on an instance in which a person was held in detention far longer than necessary because the view was taken by the Department that it had no legal power to set aside a decision that was thought to be lawful though inappropriate.[9] The issue is also raised in a recent Treasury Discussion Paper, which asked whether the Commissioner of Taxation should have an 'extra statutory concession' power to alter taxation legislation to vary the way it applies to a taxpayer or class of taxpayers, so as to correct an anomaly or defect in the law.[10]

Instilling administrative law values in the new style of government

Changes in the structure and style of government inevitably throw up new challenges for administrative law. Two examples that I have taken up in another paper are the practice of outsourcing government service delivery to private contractors, and government reliance upon automated systems to make decisions and deliver services.[11] Another example discussed in Ombudsman annual reports is the division of policy and service delivery responsibilities between agencies – the purchaser/provider model, of which Centrelink is an example.[12] Each of those developments throws up novel problems that require both a different understanding of how rights can be infringed and a different approach to resolving problems and finding a remedy.

The issue is also raised in a recent report of the Administrative Review Council on complex business regulation. The report discusses the steps needed to ensure that administrative law values are upheld in the new regulatory framework of government that relies upon self-regulation, co-regulation and 'soft law' rules.[13]

A recent Ombudsman report on Executive Schemes[14] highlights the issue in yet another way. The report points to the trend in government to distribute grants, benefits and compensation under schemes that are based in agency guidelines and policy statements, rather than in legislation. There is increasing use of executive schemes because of the speed with which they can be set up and their flexibility when circumstances change. They are widely used for purposes such as payment of redundancy benefits, emergency financial assistance, drought relief, health payments, LPG conversion, farming restructure, industry incentives and administrative compensation.

The drawback is that the checks and balances that apply to legislation are missing. The rules of executive schemes are not subject to the *Legislative Instruments Act 2003* (Cth), decisions made under the scheme are not appealable to a tribunal, and judicial review is not possible under the *Administrative Decisions (Judicial Review) Act 1977*. Effectively, the right of complaint to the Ombudsman is the only external review and accountability mechanism. The absence of a full range of administrative law controls has meant that scheme rules can be ambiguous and poorly drafted, they are not always published, rule changes are applied retrospectively to reject applications that would otherwise qualify, and different versions of a scheme can be applied inconsistently within agencies.

The Ombudsman report proposes eight best practice principles to address those shortcomings. One of the principles is that agencies should establish procedures for complaint handling and internal review of decisions made under executive schemes.

Conclusion

The Ombudsman is one element only in the administrative law system. However, the complaints received by the office are emblematic of problems that people experience with government and that administrative law is committed to resolving. The overarching objective in all administrative law review is to ensure that individuals have effective access to administrative justice. The approaches and remedies that are needed to fulfil that objective are never static. That is acutely reflected in the experience of Ombudsman offices.

Endnotes

1 The statistics for Commonwealth, State and Territory Ombudsman offices are collected in the *Australasia and Pacific Ombudsman Regional Information Manual*, available at http://www.ombudsman.gov.au

2 See Commonwealth Ombudsman, *Report on Commonwealth Ombudsman's Activities under Part V of the Australian Federal Police Act 1979* (Nov 2008).
3 Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009
4 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* (Sept 2008) Rec 9.
5 *Migration Act 1958* (Cth) s 486O.
6 Commonwealth Ombudsman, *Australian Federal Police and the Child Support Agency - Caught between two agencies: the case of Mrs X*, Report No 14/2009.
7 L Briggs, 'Contemporary Government Challenges: Delivering performance and accountability and the intersections with "wicked" policy problems' (July 2009). See also Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges* (2004); and APSC, *Policy Implementation Through Devolved Government* (2009).
8 Commonwealth Ombudsman, *Mistakes and unintended consequences: a safety net approach*, Issues Paper, 2009.
9 Commonwealth Ombudsman, *Report into Referred Immigration Cases: Other Legal Issues*, Report No 10/2007 at [6.3].
10 The Treasury, *An 'extra statutory concession' power for the Commissioner of Taxation?*, Discussion Paper, May 2009.
11 John McMillan, 'Ten Challenges for Administrative Justice' (2009) 61 *AIAL Forum* 23.
12 Eg, Commonwealth Ombudsman, *Annual Report 2006-2007* at 40.
13 Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Business Regulation*, Report No 49, 2008.
14 Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009.

FAIR AND REASONABLE – AN INDUSTRY OMBUDSMAN'S GUIDING PRINCIPLE

Simon Cohen*

Industry ombudsmen are amongst the most recent of the array of institutions and arrangements that have modernised, even revolutionised, administrative law in Australia since the early 1970s.

I confess they are at first brush something of a curiosity – a fabulous monster according to one commentator[1] - an independent ombudsman funded by industry to resolve consumer complaints.

This paper collects some thoughts about "fair and reasonable", which has become something of a touchstone for industry ombudsmen when dealing with complaints and determining cases.

First, however, I will outline to some of the common attributes of industry ombudsman schemes.

Industry ombudsmen

Industry ombudsmen are independent consumer dispute resolution services. They are a fairly new initiative in Australia, with current schemes beginning in the early 1990s. For example, of the two substantial national industry ombudsmen:

- the Financial Ombudsman Service ('FOS') – which deals with banking, credit and insurance complaints – can be traced back to 1990 and the establishment of the Australian Banking Industry Ombudsman; and

- the Telecommunications Industry Ombudsman ('TIO') was established in 1993.

Today, there are also industry ombudsmen in most Australian states to deal with energy and water disputes, a Postal Industry Ombudsman and, in Victoria, the Public Transport Ombudsman, which deals with disputes about train, tram, bus and related ticketing, information and infrastructure services. Some roles – such as the Energy Ombudsman in Western Australian and the Postal Industry Ombudsman – are performed by statutory ombudsmen for these jurisdictions.

Key attributes for industry ombudsmen include the following:

- they provide an independent and external avenue to resolve complaints that customers cannot resolve with service providers;

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- they provide services at no cost to consumers; and

- they focus on informal and timely resolution of disputes, but where agreement cannot be reached, a decision, binding on the service provider, can be made.

Usually, although not always, the schemes are in the form of private companies, where the members of an industry are also members of the company providing external dispute resolution services, and bound by contract to observe the rules of the company. This includes being bound by decisions of the ombudsman.

Most often, service providers are required to be members of an industry ombudsman or external dispute resolution scheme by force or law, regulation or contract with government[2]. Industry ombudsmen exercise functions under a Charter, Constitution or Terms of Reference which specifies matters such as the complaints the ombudsman can consider, the monetary limits of jurisdiction and requirements on members to provide information.

The monetary amounts are substantial. The FOS can make awards of up to $280,000, the Victorian Energy and Water Ombudsman ('EWOV') up to $20,000 and the Public Transport Ombudsman ('PTO') up to $5,000.

While industry ombudsman company structures differ, generally there is provision for equal industry and consumer representation on the governing board or council, with an independent chairperson. This governing body will have the usual corporations law requirements in terms of financial stewardship, and also a role in advising on or setting policy, while guaranteeing the independence of the ombudsman in dealing with individual complaints.

Industry ombudsmen make a substantial footprint. In Victoria, members of industry ombudsman schemes provide many essential 'public' services – water, energy, public transport, telecommunications and banking. Members of industry ombudsman schemes provide the electricity to power your alarm clock, the power and water to poach your eggs, the phone you use to ring your mother or son, the internet you use to check your email, the train or tram you use to get to work, and the automatic debits or credit card payments you have arranged to pay for these services.

In the United Kingdom, industry ombudsman schemes are even more pervasive, with a waterways ombudsman to deal with complaints about moorings and the use of British Waterways, the property ombudsman to resolve complaints about real estate agents, related to both selling and letting properties, and the removals industry ombudsman to handle complaints from customers of removal companies.

While comparisons are often inherently odious, and the work of statutory and industry ombudsmen has as many points of difference as it does of intersection, it is worth noting that today, industry ombudsman offices in Australia are as large as or larger than statutory ombudsman offices. For example:

- In 2007-08 the TIO[3] received 173,000 contacts, including more than 149,000 complaints. It handled cases about landlines, mobile phones and internet service providers, and dealt with issues from customer service, billings and payments, to faults and contracts. It has a staff of 247[4] officers, and a budget in 2008 of more than $15 million. The Commonwealth Ombudsman, in the same year[5], has recorded around 40,000 approaches across the range of federal and ACT government activities, with a staff of 165 and a budget of $20 million.

- In 2007-08 EWOV[6] handled more than 25,000 cases about the customer service, billing, credit and other activities of electricity, gas and water providers. Its income of just over $6 million was only slightly less than the $6.7 million income of Ombudsman Victoria[7], which recorded around 16,500 approaches in its role in dealing with complaints about services provided by the Victorian Public Sector.

There is, of course, conjecture about why industry ombudsman schemes have been set up. Some schemes, such as the Insurance Ombudsman Bureau in the UK, were set up by industry itself – and without government involvement[8]. The creation of some industry ombudsmen has been said to be a direct response to the privatisation of government businesses, and the removal of traditional administrative law remedies, including statutory ombudsmen[9]. The set-up of others has been credited to pressure applied by the consumer movement, or a move to self regulation to forestall direct regulatory intervention[10].

Whatever the reason, industry ombudsmen are now an entrenched part of the landscape. I am deliberately vague here, as some would say that we are part of the public or administrative law landscape[11], others the consumer law landscape[12].

Most industry ombudsmen, and indeed most statutory ombudsmen, are members of the Australian and New Zealand Ombudsman Association ('ANZOA'). ANZOA membership is a guarantee that the ombudsman's office has been assessed against national benchmarks for independence, impartiality and effectiveness.

The second matter is the National Benchmarks for Industry–Based Customer Dispute Resolution Services[13] ('the National Benchmarks'), released by the Federal Government in 1997, which provide a consistent framework for industry ombudsman offices. The National Benchmarks are based around 6 principles: accessibility, independence, fairness, accountability, efficiency and effectiveness. Key practices in the benchmarks include some of the basic tenets of the work of an industry ombudsman:

- that customers do not pay to make a complaint or to have it investigated;
- that a non-adversarial approach – including the use of conciliation and mediation – is used to settle complaints;
- that the decision maker – the ombudsman – is independent of scheme members;
- that the ombudsman's office publishes written reports of determinations and a detailed annual report of activities; and
- that the scheme is regularly reviewed by an independent party, and the results made available.

Perhaps the best known key practice is that ombudsmen make determinations based on what is fair and reasonable, having regard to good industry practice, relevant industry codes and the law.

Fair and reasonable

Most industry ombudsman charters or terms of reference contain some requirement to deal with matters in a fair and reasonable way. The PTO, for example, is to resolve complaints and disputes '*having regard to what is fair and reasonable for the members and complainant, good-industry practice and current law*'[14].

A survey of industry ombudsman schemes, conducted for the purpose of developing the PTO's approach to the fair and reasonable criterion has shown a general consistency in the approaches taken to determine complaints:

The points of similarity include:

- the law is considered. For one scheme, this specifically includes considering judicial authorities;
- codes of practice, both self-regulatory and imposed, are taken into account;
- good industry practice is considered. One scheme specifically recognised that this may result in a standard that is above the duty or requirement owed at law;
- legal and technical advice is taken – including advice from industry specialists; and
- the particular circumstance of each case is considered. For most, this includes considering customer service performance, or what has contributed to or resulted in the complaint.

The survey also showed that schemes consider precedents. For example:

- one scheme considers previous binding decisions and also case results for similar matters that have been resolved;
- one scheme has a detailed knowledge management system to promote consistent decision making; and
- a number of schemes have or are developing position statements to inform the management of complaints, and promote transparent and consistent processes and outcomes for similar complaints. The PTO has a statement that deals with outcomes for late or no replies to complaints. The TIO has an extensive range of statements on areas such as billings and payments, mobile phones, compensation and privacy, outlining matters such as how matters will be investigated and approaches that will be taken to resolve complaints.

This idea of consistency has been said to be a key aspect of fairness, making sure like cases are treated in a like manner[15].

One scheme has a criterion that the decision could be held up to the scrutiny of scheme members, ombudsman peers and the community at large.

The final aspect universally considered was fairness, variously described as:

- what the average person would regard as a fair outcome;
- what the ordinary person in the street would think was fair; and
- allowing the tempering of a strict application of the law with considerations of equity and good conscience.

There is, however, little additional guidance to promote an understanding of the "fair and reasonable" concept.

Sometimes the approach is based on what a court would do in a similar circumstance[16]. Others have emphasised that, in making decisions, legal principles cannot be ignored and form part of the background reasoning, with an overriding obligation to make decisions that are fair and reasonable in all the circumstances[17].

In their article *In Defence of Consumer Law: The Resolution of Consumer Disputes*[18], Paul O'Shea and Charles Rickett examine the decision making of industry ombudsmen schemes. They conclude that industry ombudsmen operate on the basis of the application of flexible standards and principles. They do not contradict the general body of law but rather seek to reach outcomes by the use of open-textured guidelines which provide considerable discretion in the determination of any particular consumer dispute.

This view is reflected in the writing of Richard Nobles for the Modern Law Review[19]. His article examines a 2002 English Court of Appeal decision, *Norwich and Peterborough Building Society v The Financial Ombudsman Service*[20], and divines a division of labour between the Courts and ombudsmen schemes. Courts have the role of interpreting rules or laws. Ombudsmen assess what is fair – a broad concept where reasonable people are permitted to disagree – and Courts would only intervene if an ombudsman's decision was legally irrational. Nobles states that moving to general standards of fairness, guided by principles, overcomes some of the limitations inherent in rules. Ombudsmen, with close relationship to and good knowledge of the industry in question, are well placed to undertake this task.

The question of industry ombudsmen and their approach to decision making has been considered by the Courts on a number of occasions.

- In *Citipower P/L v Electricity Industry Ombudsman & Anor*[21], Justice Warren considered whether a decision of the Victorian Electricity Ombudsman that required Citipower to make payments to complainants to whom it supplied energy, who suffered losses as a result of interrupted power supply, was beyond the ombudsman's power.

  The Court accepted that the Ombudsman was entitled to bring into account matters within her own knowledge, here concerning the ability of Citipower to make arrangements to maintain electricity supply. The Court's reasons supported the use of accumulated knowledge by the Ombudsman to determine current law and practice that she was required to bear in mind when determining the matter.

  Citipower also argued that the Ombudsman wrongly determined that the power supply interruption at the heart of the dispute was within Citipower's control. The Court stated that it would only substitute its own view on this question if the determination of the Ombudsman was so aberrant as to be irrational.

- In *Australian Communications Authority v Viper Communications P/L*[22], Justice Sackville, in the Federal Court, considered whether provisions in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) – which required telecommunications providers to be member of the TIO, conferred judicial power on the TIO.

  In determining that there was no constitutional infringement, the Court stated that the legislation did not require the TIO to make decisions by applying settled legal principles to the facts of particular cases, and instead contemplated that in some circumstances the Ombudsman will create norms to resolve disputes. The Court noted that many of the complaints the TIO might deal with – such as back-billing and lack of telephone number portability – would be difficult to resolve by the application of established legal norms. In addition, the TIO constitution contemplated the Ombudsman taking a flexible approach

to resolving complaints, and the Ombudsman was free to create norms to resolve particular disputes or classes of dispute.

- In *Masu Financial Management P/L v Financial Industry Complaints Service and Wong (No 1)*[23], Justice Shaw of the NSW Supreme Court considered whether the Financial Industry Complaints Service ('FICS'), now a part of the FOS, exercised judicial power. The case arose from a FICS determination that the plaintiff, a financial advisor and member of the FICS scheme, refund consultancy fees and other amounts to Ms Wong.

  FICS was required under its terms of reference, in determining complaints, to do what was fair and reasonable in all the circumstances, having regard to criteria including any applicable legal rule or judicial authority, general principles of good industry practice and any applicable code of practice.

  The Court noted that while FICS was required to have regard to existing legal rights and obligations, it was not bound to apply any particular legal principle but instead to have regard to such principles. In finding that FICS exercised administrative or arbitral powers, as against judicial powers, the Court stated that FICS determinations '*create new rights and obligations designed to achieve fairness, in a broad sense, between the parties rather than amounting to the performance of the traditional task of a court, namely the ascertainment and enforcement of existing legal rights*'.

  The ultimate decision in that matter was for the complaint to be remitted to a different decision maker within FICS, on the basis that the financial advisor was not provided with procedural fairness, in that he was not given notice of a matter ultimately considered by FICS in determining the matter. The Court also found there was a deficiency in the reasons of FICS – about both the right to and amount of compensation awarded.

- Most recently, in *Wealthcare Financial Planning P/L v FICS & Ors*[24], Justice Cavanough in the Supreme Court of Victoria, in determining that FICS was not obliged to apply principles of proportionate liability when determining a complaint, noted that FICS entertains complaints, not causes, and determinations create new rights and obligations between parties rather than declaring existing rights.

  The Court accepted that FICS is required to have regard to all law – both statutory and judge made – that is relevant and capable of being applied. However, bearing in mind that the central task of FICS was to do what is fair in all the circumstances, having regard to specified matters, the Court found that the position of FICS was not more constrained that that of the TIO. FICS was not required to make determinations on the basis of the application of laws to facts as found, and is free to create norms to resolve disputes.

These Australian decisions reflect the approach more recently taken in the United Kingdom. Most notably, the Court of Appeal in *Heather Moor & Edgecomb Ltd, R (on the application of) v Financial Ombudsman Service & Anor*[25] *('Heather Moor')* considered a decision of the UK Financial Ombudsman directing a financial advisor to pay an amount of up to £100,000 for poor advice given to a soon to retire airline pilot.

The UK Financial Ombudsman is somewhat different to the Australian counterpart, in that some aspects of the ombudsman's powers are enshrined in statute. Some complaints, it is stated, are to be determined by '*what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances*'[26]. However, the rules of the ombudsman scheme reflect Australian practice, requiring the ombudsman to taken into account relevant law, regulations, regulators' rules, codes of practice and good industry practice.

The Ombudsman's determination specifically stated: '*While I have taken into account the relevant law, I have determined this complaint based on what, in my opinion, is fair and reasonable bearing in mind all the circumstances of this case*'.

The financial advisor sought judicial review, contending that the Ombudsman was required to determine complaints in accordance with the law, and not by reference to what is fair and reasonable. The Court rejected this contention, and accepted that if the Ombudsman considers that what is fair and reasonable differs from English law, then the Ombudsman is free to make an award in accordance with that view, provided the view is a reasonable one in all the circumstances. The Court cited statements of the Chief Ombudsman there, that the "fair and reasonable" jurisdiction allows the Ombudsman to look beyond the law, beyond the wording of the small print, to take into account the large print in promotional material, good industry practice, and if necessary adopt a modern and fairer approach where is it clear that the law has lagged behind.

Both judgments in *Heather Moor* make clear the obligation to take relevant laws and other defined matters into account, and the leading judgment of Lord Justice Burnston suggests that where laws are not followed, the Ombudsman should explain why.

The judgment of Lord Justice Rix notes the development by the Insurance Ombudsman in the UK of a new common law of insurance for consumer contracts – in respect of the effect of non-disclosure by policy holders. He noted that it was possible to see in the "fair and reasonable" jurisdiction an important new source of law.

Some observations

There are a number of propositions that can be drawn when considering "fair and reasonable" for industry ombudsmen:

- first, "fair and reasonable" does not equal "according to law". Relevant laws must be considered. Often, the application of these laws will result in a fair and reasonable outcome. Where legal rules are departed from, this should be explained. An ombudsman's job is not to determine and enforce existing rights, but to create new rights between the parties having regard to the fairness in the particular case.

- second, persons may differ in their assessment of what is "fair and reasonable" in a particular case. Courts appear to acknowledge the special position and industry knowledge of ombudsmen that will inform the view they take. Court decisions suggest that judges generally will not intervene where errors are made within jurisdiction. However, there is a willingness to consider intervening where the decision of an ombudsman is an irrational one, or a party has not been afforded procedural fairness.

- third, ombudsmen across very different industries appear to have adopted the same "fair and reasonable" standard, informed by the same type of criteria, when making decisions. When determining insurance disputes or public transport complaints, ombudsman will consider the same sorts of matters – the relevant law, industry codes and practice, the individual circumstances of the case, and what an average person might think is fair, when making decisions and resolving disputes. I think an important driver of this consistency has been the establishing of National Benchmarks. These provide an objective touchstone for industry ombudsmen in arranging their decision making processes and procedures.

- fourth, industry ombudsmen are approaching decision making having regard to general and flexible principles of fairness and reasonableness. This is informed by the law, and

will often result in outcomes that are the same as would have been achieved if the matter had been heard before a court. However, the use of flexible principles to guide decision making assists when dealing with disputes not readily amenable to the legal method.

- fifth, ombudsmen have been concerned, while emphasising a flexible approach, to make sure there is also a consistent approach. It is, of course, only fair that like matters have like outcomes. Ombudsman schemes have sought to achieve this through a range of methods, including publishing decisions, having regard to previous results when considering new matters, and publishing 'position statements' or similar documents to outline how different types of matters will be approached.

- sixth, that the application of "fair and reasonable" across a range of cases within an industry may lead to a new source of law, or standards, or expectations. industry ombudsman will establish new norms within an industry when dealing with complaints and determining cases, informed by what is "fair and reasonable". The result may be that changes occur within the industry as to how it approaches common causes of consumer complaints.

There is one final aspect: the role of industry ombudsmen beyond resolving individual complaints. Where a complaint raises a systemic issue – that is, the issue that affects more customers than the person who has complained – the ombudsman will look to service providers to provide a redress to all affected persons. This jurisdiction is, in my view, a logical extension of the fair and reasonable approach and a further point of distinction from court processes. It is only fair, when a service provider is aware of an issue that affects a number of persons, that steps are taken to provide redress to all, and not only the persons who complain. It is also reasonable to expect service providers to change their own practices, as part of a systemic solution to a problem that is resulting in unfair outcomes to consumers.

Fairness and reason are powerful concepts, deeply ingrained in the Australian psyche through our commitment to a fair go. This perhaps goes some way to explaining the success of industry ombudsmen in the recent past.

At the heart of administrative law lies public accountability of government and administrative justice for the individual[27]. In providing fair and reasonable outcomes for individuals in the provision of public services and new norms in the provision of those essential services, industry ombudsmen have a unique role to play in new

Endnotes

1 Paul O'Shea, 'The Lion's Question applies to Industry-Based Consumer Dispute Resolution Services' (2006) *The Arbitrator and Mediator* Vol 25/1, page 63.
2 For example:
- s 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) provides, in effect, that telecommunications carriers, telephone carriage providers and Internet Service Providers must be members of the TIO.
- s 912A(2) and 1017G(2) of the *Corporations Act 2001* (Cth) (Corporations Act) require financial services licensees and others to have membership of one or more ASIC-approved external dispute resolution schemes (such as BFSO).
- Melbourne metropolitan tram and train operators are required, by terms of their franchise agreements, to be members of the PTO scheme.
3 TIO Annual Report – 2007-08.
4 TIO Member News, July 2009.
5 Commonwealth Ombudsman Annual Report 2007-08.
6 EWOV Annual Report 2007-08.
7 Ombudsman Victoria Annual Report, 2007-08.

8 '*Is the Ombudsman Fair and Reasonable'*, speech by Walter Merricks, Chief Ombudsman, Financial Ombudsman Service (UK).
9 Anita Stuhmcke, 'Administrative Law and Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry' (1997) 4 *AIAL* 185.
10 note 2, above
11 *Masu Financial Management P/L v FICS and Wong (No 1)* [2004] NSWSC 826.
12 Paul O'Shea and Charles Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28 *Sydney Law Review* 139.
13 First published by the Consumer Affairs Division, Department of Industry, Science and Tourism, in April 1997.
14 Public Transport Ombudsman Ltd Charter.
15 note 9 above
16 FAQs – Financial Ombudsman Service (UK), http://www.financial-ombudsman.org.uk
17 *Fair and reasonable decision-making, the law and non-disclosure reform*, Karen Stevens, New Zealand Insurance and Savings Ombudsman.
18 note 11 above
19 'Rules, Principles and Ombudsmen, Norwich and Peterborough Building Society v The Financial Ombudsman Service' (2003) 66 *Modern Law Review* 781.
20 [2002] EWHC 2379
21 [1999] VSC 275
22 [2001] FCA 637
23 [2004] NSWSC 826
24 [2009] VSC 7
25 [2008] EWCA Civ 642
26 *Financial Services and Markets Act 2000* (UK), s 228.
27 Robin Creyke and John McMillan, *Administrative Law Assumptions … Then and Now*, in *The Kerr Vision of Australian Administrative Law* (The Centre for International and Public Law, Faculty of Law, ANU, 2008).

CONTROLLING MIGRATION LITIGATION

Denis O'Brien*

Introduction

Migration litigation has been a topic of currency, if not controversy, for some years in Australia. However, the discussion often fails to deal with the topic in the broader context of, first, primary decision making in the migration and refugee area and, second, international comparisons. In my view, it is instructive to spend a little time examining the broader context because it provides some sobering perspectives.

Primary decision making in migration and refugee areas

The national figures on migration and refugee decision making are startling. In relation to migration decision making, in 2007-08, 500,989 applications relating to potentially reviewable decisions were lodged with the Department of Immigration and Citizenship ('DIAC') and 461,562 such applications were granted which, when withdrawals are taken into account, gives a rejection rate of a mere 6.34%.[1] The number of review applications (which cover both refusals of visa applications and cancellations of visas) lodged with the Migration Review Tribunal ('MRT') in 2007-08 was 6,325.[2] While that number is significant it needs to be seen within the broader context, showing that favourable decisions are made by DIAC in the vast majority of cases.

Refugee status decision making is a more complex picture. The Refugee Review Tribunal ('RRT') only has jurisdiction in relation to refugee claims made "onshore", i.e. by persons who are in Australia. The figures for the wider offshore refugee and humanitarian program show that, in 2007-08, a total of 47,331 applications were made resulting in 13,014 persons entering Australia under the program.[3] During the same year, 2,215 onshore claims were granted in relation to the 3,987 initial lodgements.[4] The 2,284 applications made to the RRT in that year[5] again need to be seen in the broader context of the overall number of favourable refugee and humanitarian decisions made by DIAC.

Against this background what is the position concerning judicial review of migration and refugee decisions?

In 2008-09, 989 judicial review applications were made in respect of decisions of the RRT.[6] This means that about 40% of the RRT decisions were the subject of judicial review applications. In most cases, the applicant was the asylum seeker, as the Minister only rarely seeks review. Of the judicial reviews that were resolved in 2008-09, the RRT's decision was upheld in 84% of the cases. In the remaining 16%, the matter was remitted to the RRT for reconsideration.

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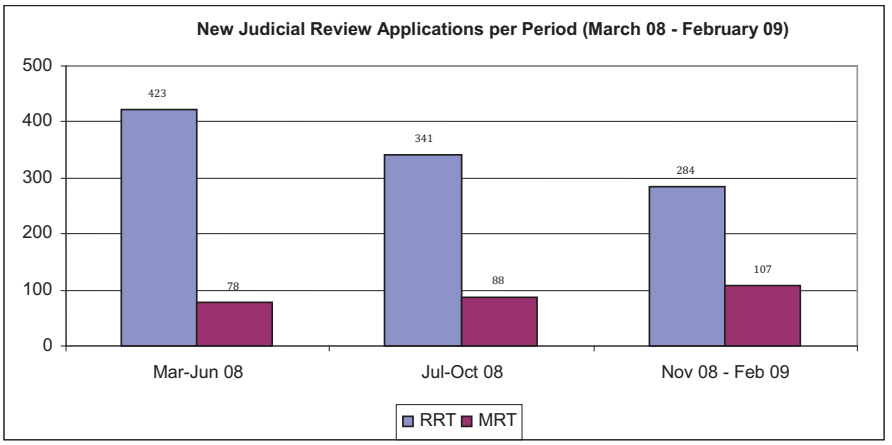
In the MRT, the overall judicial review rate since the MRT's inception in July 1999 has been 5%. In 2008-09, 253 judicial review applications were made, i.e. about 4% of decisions made by the MRT.[7] During the same period, the MRT's decision was upheld in 67% of the judicial reviews that were resolved. In the remaining 33%, the matter was remitted to the MRT for reconsideration.

Over the past 12 months the number of judicial review applications in relation to the RRT has been falling, while the like figures in relation to the MRT have remained steady, though low in comparison with the number of decisions made by the MRT. The graph below shows the figures for the 12 months to the end of February 2009.



International context

In comparison with many of our overseas immigration and refugee appeals tribunal counterparts, our judicial review numbers are small.

For instance, in Canada during 2008, 5,684 judicial review applications were filed and 2,232 remained pending as at 31 December 2008, in respect of refugee and migration matters (representing 77% of all judicial appeals filed with the Canadian Federal Court).[8] According to the figures published by the Canadian Federal Court, from 1 January 2000 to 31 December 2008, a total of 68,080 refugee and migration appeals were filed with the Court.

In the United Kingdom, ordinarily, there is no right to appeal a decision of the Asylum and Immigration Tribunal ('AIT'). The AIT makes most initial decisions through a single immigration judge. Such decisions can be "reconsidered" on the making of an application to the High Court. During 2007-08, a total of 26,561 applications for reconsideration were lodged.[9]

In Australia, by contrast with these numbers, 1,552 filings in the migration and refugee area were made in the Federal Magistrates Court in 2007-08.[10] That court is now the court before which most first instance migration and refugee judicial reviews come.

Judicial review

In the context of, first, the large numbers of favourable primary migration and refugee decisions that are made, second, the small numbers of applications for judicial review sought in relation to MRT decisions, third, the apparently declining numbers of applications for judicial review sought in relation to RRT decisions and, fourth, the small numbers of judicial

reviews in Australia in comparison with other countries, one might ask whether there are issues in relation to judicial review that need addressing in the Australian context. I suggest that there are; the present legislative structure tends to give rise to inefficiencies in the operation of judicial review and unduly focuses on form at the expense of substance. While the numbers are not unduly concerning, systemic improvements can and should be made.

Judicial review litigation in the area is of three different types:

- migration law litigation;
- refugee law litigation; and
- litigation relating to the "procedural code".

It is appropriate to say something about each in turn.

Migration law litigation

2009 marks the 20th anniversary of the commencement of the amendments to the *Migration Act*, which enabled the codification of the criteria for the various classes of visas and entry permits and introduced merits review to the jurisdiction in the form of the now superseded Immigration Review Tribunal ('IRT').[11]

Prior to the codification of the visa criteria, primary decision making under the Act was largely discretionary, with few provisions in the legislation limiting the Minister or his or her delegate in granting or refusing a visa or entry permit. Guidance to decision makers on the application of their discretionary powers was scattered across a variety of departmental handbooks. Instructions were frequently expressed in broad terms and were as lengthy as the current *Migration Regulations 1994* ('the *Regulations*'). However, as the guidance material did not create an entitlement, there was uncertainty as to outcome. That uncertainty, as pointed out by Robyn Bicket in her paper delivered to the AIAL's 1996 Administrative Law Forum, was added to by the need, under administrative law, to consider the merits of those cases which fell outside the guidelines.[12] Non-statutory Immigration Review Panels made recommendations to the Immigration Minister when appeals were made.[13]

Consequently, decision making was criticised by the public as being arbitrary and subject to day-to-day political intervention in individual cases. The government of the day responded to this criticism by spelling out in the *Regulations* the criteria a person needed to satisfy in order to be granted a visa or an entry permit. That is to say the government accepted recommendations made by the Administrative Review Council for the "structuring" of the Minister's discretionary powers. [14]

While the structuring has been a considerable advance in terms of openness, accountability and the delivery of administrative justice, the complexity of the *Regulations* and, in some instances, their poor drafting, provide ample scope for judicial review of decisions of the MRT. The decision of the Full Court of the Federal Court in *Dai v MIAC*[15] *('Dai')* provides an example of how opaque *Regulations* can give rise to large numbers of remittals on judicial review.

Dai was concerned with a category of case that forms one of the more significant areas of the MRT's work, namely student visa cancellations. In *Dai*, the Full Court of the Federal Court found that the relevant form of a condition spelled out in the *Regulations* to which student visas were subject was invalid because it was unreasonable and uncertain.[16] As a result of the decision of the Federal Court, numbers of MRT decisions which had purported

to apply the particular regulation were set aside on judicial review and remitted for re-determination.

Another example showing how construction of the *Regulations* can give rise to spikes in litigation can be seen in the circumstances which ultimately led to the decision of the High Court in *Sok v MIAC*[17] *('Sok')*, on appeal from the decision of the Full Court of the Federal Court in *MIAC v Sok.*[18] Those cases concerned the "spouse" provisions of the *Regulations* and, in particular, the provisions which allow the grant of a spouse visa despite the cessation of a spousal relationship in circumstances where domestic violence has been committed by the sponsoring spouse. The particular issue was whether the domestic violence qualification could be engaged if the first time the applicant raised the claim was in the application to the MRT.

In *Sok,* the High Court overturned the Full Federal Court judgment. In brief, the High Court held that the MRT must consider a claim of domestic violence made to it, even if no such claim was made before the Minister's delegate refused to grant the visa; and the Tribunal must invite the applicant to attend a hearing before it concludes that it is not satisfied that the applicant has suffered domestic violence. This judgment essentially returned the law to the Tribunal's understanding of it when the current domestic violence provisions were introduced in late 2005 and settles the divergence of views in lower Courts on this issue.

Since the High Court's decision in *Sok*, approximately 30 MRT decisions have been set aside on judicial review and have been remitted for reconsideration.

Conclusion

It is beyond question that the structuring of administrative discretions that led to the *Regulations* was a necessary reform and represented a huge advance in administrative justice. It is also the case, however, that the highly prescriptive form of the *Regulations* and the uncertainties of interpretation that the drafting at times gives rise to can be productive of individual judicial review challenges which, in a high volume decision making milieu, have knock-on effects.

One way of reducing the litigation would be to wind back some of the prescription and give decision makers a greater degree of discretion in appropriate circumstances. In my view, an unfortunate feature of modern Commonwealth legislative drafting is its high level of prescription. Public servants have a natural tendency to want to control outcomes but it is a tendency which, in my view, needs to be resisted because it can lead to unworkable, or at least uncertain law, which then becomes productive of court challenges. Legislative drafters need, from time to time, to take a stand against their instructors and allow decision makers scope to resolve some issues through the exercise of discretion.

Refugee law litigation

Before a person can be found to be entitled to a protection visa, he or she must be found to be a refugee within the meaning of the Refugees Convention.[19] The meaning of the term "refugee" in the Convention has been the subject of a great deal of judicial consideration over the years, both in Australia and in other countries which are signatories to the Convention. In my view, that litigation is unexceptionable and is a necessary safeguard to ensure that persons deserving of international protection under the Convention are not at risk of being condemned to persecution.

Recently, however, one of the statutory modifications in Australia to the Convention definition has been the subject of considerable litigation leading to significant uncertainty for the RRT and primary decision makers. The provision concerned is section 91R(3) of the

Migration Act. It provides that, in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister (or the Tribunal on review) that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.[20]

Both the Second Reading Speech[21] and Revised Explanatory Memorandum to the Bill that introduced section 91R(3)[22] make it clear that the provision was intended to overcome the effect of Federal Court decisions that had recognised the claims of applicants who had deliberately set out to contrive claims for refugee status after they had arrived in Australia. This line of court authority expressly rejected the existence of a "good faith" test within the Convention, finding that the fraudulent nature of any acts was simply a factual issue to be considered in determining whether the applicant satisfied the conditions of the Convention definition. [23]

Since the enactment of s.91R(3), if relevant conduct enlivens the provision, it requires decision makers to consider the applicant's motivation for engaging in the conduct. The correct application of s.91R(3) is more difficult in circumstances where the decision maker finds there was more than one reason for engaging in the relevant conduct. The courts have taken divergent approaches on this issue.

Initially, the Federal Court interpreted s.91R(3) as imposing a sole purpose test in determining whether conduct had been engaged in "otherwise than for the purpose of strengthening the person's claim to be a refugee".[24] On this basis, if the decision maker was satisfied that the conduct was engaged in for some other concurrent purpose, then the decision maker was not obliged to disregard the conduct under s.91R(3).

It has more recently been held that s.91R(3) must be construed so as to encompass conduct which has mixed motives and reasons and that the conduct may not be taken into account either as supporting or as disproving a refugee claim, unless a motive of strengthening the claim is positively excluded.[25] In other words, if the motive of strengthening the refugee claim forms any part of the purpose for engaging in the conduct, the conduct must be disregarded.

In another case, the Federal Court in *SZJZN v MIAC*[26] held that the relevant test for s.91R(3) is a dominant purpose test.

As a result of these cases, the nature of the decision maker's obligation to disregard conduct which the decision maker is not satisfied was engaged in otherwise than for the purposes of furthering the applicant's protection claims is unclear. The issue is currently before the High Court in cases *SZJGV* and *SZJXO*.

In practice the conduct in question usually involves attending Church or practising Falun Gong in Australia. In the High Court appeals, the applicants are claiming that the conduct must be disregarded for all purposes. The Minister, on the other hand, is claiming that the conduct cannot be relied upon by an applicant but can be considered by the decision maker in determining the primary facts in the case including credibility issues.

During the 2008-09 financial year, the number of remittals by the courts of RRT decisions increased markedly as a result of the *SZJGV* decision. Hopefully, the High Court's decision will clarify the meaning of the provision in a way which enables primary decision makers and the RRT to apply the law with greater certainty, thereby leading to a reduction in litigation. A possible legislative solution may be to repeal s.91R(3) and allow decision makers to undertake the "real chance of persecution" assessment in the absence of the imposed "good faith" test.

Litigation relating to the procedural code

The *Migration Reform Act 1992* established the RRT to deal with refugee related reviews.[27] The Reform Act also spelt out a detailed procedural code to be followed by the Department in relation to the making of decisions.[28] The code was elaborated in relation to the RRT and then the IRT,[29] especially concerning the information and hearing rights of applicants, by the *Migration Legislation Amendment Act (No 1) 1998* (Cth), that commenced operating on 1 June 1999.

Core features of the natural justice hearing rule were addressed in the code - how information was to be collected, what information was to be given to an applicant, and how the applicant was to be given an opportunity to present a case. The intention was for the code to replace the common law requirements of natural justice and a provision was enacted that a breach of natural justice was not a ground upon which an application could be made for review of a decision. The Act also limited the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) *('ADJR Act')* to decisions made under the *Migration Act* by formulating more restricted grounds for judicial review.[30]

According to the Explanatory Memorandum, this overhaul was necessary due to the uncertainty that existed at the time concerning the content of natural justice, as interpreted by the courts. The Reform Bill aimed to define legal rights in a precise statutory code in place of an indeterminate common law doctrine.[31]

As might have been expected, the government's approach was heavily criticised.[32]

As might further have been expected, the scheme did not achieve its purpose.[33] In two decisions the High Court, in the exercise of its jurisdiction under s.75(v) of the Constitution, declared first an RRT and then a Departmental decision to be invalid on the basis of a denial of natural justice.[34] In response to *MIMA; ex parte Miah,* [35] further amendments were introduced (*Migration Legislation Amendment (Procedural Fairness) Act 2002)* to insert into the *Migration Act* a legislative statement that the codes of procedure governing the RRT and the MRT are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. The provisions concerned are s.357A (MRT) and s.422B (RRT).

The proper construction of those provisions has been the subject of much judicial commentary.[36]

For the most part, Tribunal decisions are declared invalid by the courts because of a perceived procedural shortcoming in the way a decision was reached, i.e. as a result of non-compliance with the code.

Both the MRT and the RRT are bound by the code, which purports to be a statutory formulation of how procedural fairness is delivered to applicants. [37] In this respect the Tribunals are unique, as other merits review tribunals by and large operate under common law principles relating to the natural justice hearing rule.

Despite the intention of the Parliament in enacting the code, the judicial interpretation of its provisions, including s.359A/s.424A (the provision dealing with the putting of adverse information to the applicant) and s.359/s.424 (Tribunal's power to seek additional information), as well as other amendments to the Act designed to tie down procedural fairness, have resulted in considerable complexity in the conduct of MRT and RRT reviews.

The amendments to the *Migration Act*, which were introduced in the *Migration Amendment (Review Provisions) Act 2007* ('the *Review Provisions Act*') on 29 June 2007,[38] have

ameliorated but not overcome difficulties with the code that decisions of the courts have highlighted.

The *Review Provisions Act* was passed in order to ameliorate the onerous obligations imposed on the Tribunals by the Migration Act, as interpreted in the High Court decision of *SAAP v MIMIA* ('*SAAP*')[39] and the Full Federal Court decision of *SZEEU v MIMIA* ('*SZEEU*').[40] Those judgments interpreted the section 424A 'adverse information' notice requirements as requiring the Tribunals to put the information in writing, despite the fact that it may have been put orally in a comprehensive way to the applicant at a hearing where the applicant had the benefit of an interpreter and despite the fact that the applicant may have had no facility with English.

In *SZEEU* and *SZEWL v MIMA* it was recognised that the applicant had been given what would otherwise be regarded as an appropriate and fair opportunity to comment or respond to adverse information, and that no practical injustice had occurred.[41]

Justice Weinberg in *SZEEU* made the following observation:

> "With great respect, I doubt that the legislature ever contemplated that s424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility in this area. This desire to set out by way of a highly prescriptive code those requirements was no doubt well-intentioned, and perhaps motivated by a concern to promote consistency. However, the achievement of consistency (assuming that this goal can be attained) comes at a price. As is demonstrated by the outcome of at least some of these appeals, codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense. To put the matter colloquially, and to paraphrase, "the cake may not be worth the candle".[42]

SAAP had considerable practical ramifications for the Tribunals' operations. More than 500 matters were remitted by consent by the courts to the Tribunals for reconsideration. Most of the remitted matters related to whether the Tribunals had formally written to the applicant to invite comment on information that was relied upon. The information involved typically comprised information previously supplied by the visa applicant in connection with the decision under review such as information given in application forms or contained in passports. In most cases, and consistent with ordinary procedural fairness principles, the Tribunals had invited the applicant to comment on the information during the course of a hearing.

More recently, in 2008, a number of problematic court decisions in relation to the Tribunals' seeking information from applicants and third parties resulted in increased litigation and remittal rates for the Tribunals. These decisions once more highlighted the inflexibility of the procedural code.[43]

In *SZKTI v MIAC*,[44] the Full Court of the Federal Court considered the procedures under s.359/s.424 of the Act for obtaining additional information. In *SZKTI*, the applicant applied for a protection visa on the basis that he feared persecution in China for reason of his religion. In support of his application, the applicant provided to the RRT a letter from two church elders attesting to his activities with the church in Australia. A telephone number for one of the church elders was provided, together with an invitation from the applicant to contact the elders if the RRT had any questions. A Tribunal officer telephoned the elder and asked him about the visa applicant. The RRT then wrote to the visa applicant under s. 424A of the Act, seeking his comments on the information obtained from the elder. Ultimately, the Tribunal affirmed the decision to refuse the visa.

The Full Court of the Federal Court, in setting aside a judgment of the Federal Magistrates Court which had upheld the RRT's decision, held that the Tribunal may obtain 'information' by whatever method it considered appropriate but may only obtain 'additional information' by making a request in writing which is sent to an address provided for the purposes of the review and for which there is a prescribed period for a response. Thus, the mandatory nature of the obligations under the procedural code resulted in findings that the Tribunal's processes had miscarried.

This judgment was followed in *SZKCQ v MIAC,*[45] where the Full Court of the Federal Court held that the Tribunals have limited ability to informally ask for additional information from a person without engaging the procedures that Parliament has laid down in s.359/s.424 of the Act to obtain that information.

Prior to these judgments, the Tribunals had taken the view that ss.359 and 424 of the Act gave them broad powers to get relevant information. The only qualification was that, if the Tribunal got such information, it was required, pursuant to ss.359(1) / 424(1) to have regard to it in making a decision on the review and to put anything adverse in writing to the applicant for comment.

Following the Full Court judgments, if the Tribunal invited a person to provide information in circumstances where the invitation, or receipt of the information, could not be attributed to some other statutory power, the invitation was required be given in writing in accordance with the procedures for a ss.359(2) / 424(2) invitation. This resulted in ridiculous outcomes, as Members could not even ask orally at hearings for applicants to send in their passport, if they had forgotten to bring it with them on the day.

The *SZKTI* judgment was appealed to the High Court, which has reserved its decision.

In response to *SZKTI* and *SZKCQ*, legislative steps were also taken. Amendments were introduced in the *Migration Legislation Amendment Act (No 1) 2009*. The amendments establish that the Tribunal may now orally invite a person to provide the Tribunal with information, including by telephone, or in writing. If the Tribunal invites information orally, no particular procedure must be followed, although the proviso in s.359(1) / 424(1) would continue to apply, requiring the Tribunal to have regard to the information.

While these amendments do not place the Tribunals in exactly the same position with respect to obtaining information as existed prior to *SZKTI*, they do give the Tribunals greater flexibility in the way they obtain information in relation to reviews.

Just in case any further elaboration is necessary as to the problematic nature of the procedural code, let me refer to the very recent decision of the Federal Magistrates Court in *SZNAV v MIAC.*[46] The case concerned the standard acknowledgement letter which the RRT sends applicants following the lodgement of an application for review. That letter includes a sentence inviting the applicant to immediately send the Tribunal any documents, information or other evidence the applicant wants the Tribunal to consider. In a novel construction, the Federal Magistrate held that the acknowledgement letter fell within s.424 of the Act and, by inviting information to be provided "immediately" instead of within a prescribed period, the letter did not comply with s.424B(2). His Honour further held that the breach constituted unfairness to the applicant and that jurisdictional error had occurred. The matter has been remitted to the Tribunal to be redetermined according to law.

Might I say that His Honour's view that the error in this case caused unfairness to the applicant is one on which minds may certainly differ.

My fervent hope is that His Honour's judicial colleagues are not persuaded to His Honour's views. Otherwise, we will again be faced with a large number of remittals from the courts, arguably for no good reason in terms of the delivery of substantial justice.

Conclusion

If the procedural code ever had any usefulness, it has outlived that usefulness. It is the source of much unproductive and unnecessary litigation, with all the attendant costs to the Commonwealth which this involves. Further piecemeal amendments will only attract further litigation and further complicate Tribunal decision making, without any real benefit to applicants.

In my view, a return to decision making under common law procedural fairness obligations is necessary to align the MRT and the RRT with other federal review tribunals. Of course, common law procedural fairness would entail that, if particular country information or any other information is adverse to the applicant, he or she be informed of the substance of the information and given a reasonable opportunity to respond. In many cases the process of putting the substance of adverse material may need to be handled by letter; in other cases, it may be appropriate to put material orally, perhaps allowing an adjournment of the hearing. As is the case with the content of procedural fairness generally, the touchstone will be what fairness demands in the context of the particular case.

Such a change would overcome many of the anomalous results that are occurring in the judicial review of our decisions. The fundamental problem with the highly prescriptive code is that any minor fault in process is found by the courts to be a legal error, irrespective of whether the applicant has suffered any practical injustice.

I am further of the view that Part 8 of the *Migration Act* (dealing with judicial review and the privative clause) should be repealed and migration and refugee decision making should be brought back within the umbrella of the *ADJR Act*. The privative clause (s.474), which has been amply discussed elsewhere,[47] has not achieved its intended effect. The argument can be made that, as a result of the High Court's decision in *Plaintiff S157/2002 v Commonwealth*,[48] the privative clause has merely had the effect of returning judicial review in the area to the complexity associated with the prerogative writs and the language of jurisdictional error. That complexity was to all intents and purposes thought to be removed from the law relating to Commonwealth administrative decision making with the coming into force in 1980 of the reforms introduced by the ADJR Act.

Finally, I want to mention a relatively simple reform of the *Migration Act* which, in one step, would substantially enhance fairness for applicants and reduce the potential for litigation. I refer to the absence from the Act of a "T documents" scheme under which applicants, upon lodging a review application with the MRT or RRT are provided with a copy, prepared by the Department, of all documents relevant to the review. Currently, RRT applicants have to resort to a Freedom of Information Act request to get documents, while MRT applicants must use the facility in s.362A of the Act to get copies of papers on the Departmental file. In my view, this is unacceptable in terms of administrative justice. It puts applicants in our jurisdiction at a disadvantage by comparison with applicants in other Commonwealth merits review jurisdictions.[49] It also leads to potentially unnecessary litigation by putting the burden on my tribunals to ensure that any adverse information contained in a document on the DIAC file, e.g. information obtained by DIAC officers on a site visit made in an overseas visa applicant's country, is put to the review applicant. In my view, fairness demands that such documents should be provided to review applicants as a matter of course upon lodgement of review applications with the MRT or RRT.

Conclusion

In my view, it is time for a comprehensive review to be undertaken of the merits review architecture of the MRT and the RRT and of the judicial review framework in which they operate. Both tribunals need to be brought more within the mainstream of Australian administrative law in order to deliver greater fairness to applicants and to reduce judicial review litigation.

Endnotes

1 According to figures supplied by DIAC to the Migration Review Tribunal and Refugee Review Tribunal in March 2009.
2 Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08, p.28.
3 Department of Immigration and Citizenship Annual Report 2007-08, pp. 79-80
4 Department of Immigration and Citizenship Annual Report 2007-08, pp. 79-80, 88.
5 Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08, p.28.
6 Statistics as at 30 June 2009.
7 Statistics as at 30 June 2009.
8 See http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics.
9 See http://www.ait.gov.uk/Documents/Statistics/2007_2008/InternetStats_2007_08Oct.pdf.
10 Federal Magistrates Court Annual Report 2007-08.
11 See *Migration Legislation Amendment Act 1989* (Cth).
12 AIAL Forum 1996 Sydney, *Administrative Law: setting the pace or being left behind?* R. Bicket, 'The Migration Reform Act – Necessary Change or Overkill', p.324.
13 See Administrative Review Council ('ARC') Report No.25 (1986), *Review of Migration Decisions.*
14 ARC, op.cit.
15 [2007] FCAFC 199.
16 The appellant, Dai, failed to maintain satisfactory academic progress and was placed on academic probation by her education provider. In May 2004, the education provider notified Dai that her enrolment had been cancelled as a result of unsatisfactory academic performance. Her visa was cancelled in July 2004 pursuant to ss.116(1)(b) & (3) of the *Migration Act* and r.2.43(2) of the *Regulations* due to a breach of condition 8202(3)(b). The applicable version of condition 8202(3)(b) required the appellant to achieve an academic result that is certified by the education provider to be at least satisfactory.
17 [2008] HCA 50.
18 [2008] FCAFC 18 (French, Lindgren, Jacobson JJ, 5 March 2008).
19 *Migration Act*, s.36(2). Note, however, that the Government has announced that it intends to legislate for a scheme of "complementary protection" which will expand the class of persons entitled to a protection visa.
20 The background to the enactment of s.91R(3) was the practice that arose of refugee status applicants participating in demonstrations of protest against the governments of their countries of nationality with the purpose of manufacturing evidence for their applications.
21 House Hansard 28 August 2001 p.30422, Senate Hansard, 24 September 2001, p.27604.
22 *Migration Legislation Amendment Bill (No. 6) 2001*.
23 See *Mohammed v MIMA* (2000) 98 FCR 405 (Spender & French JJ, Carr J dissenting); *MIMA v Farahanipour* (2001) 105 FCR 277 and *MIMA v Kheirollahpoor* [2001] FCA 1306 (French J, 16 August 2001). cf *Heshmati v MILGEA* and *Somaghi v MILGEA* (unreported, Federal Court of Australia, Lockhart J, 22 November 1990) overturned on appeal on other grounds: *Somaghi v MILGEA* (1991) 31 FCR 100 and *Heshmati v MILGEA* (1991) 31 FCR 123; see also *Li Shi Ping & Anor v MILGEA* (1994) 35 ALD 557 at 580, not disturbed on appeal: (1994) 35 ALD 225, *Khan v MIMA* (1997) 47 ALD 19.
24 Authority upholding Tribunal decisions which applied a sole purpose test includes *SAAS v MIMA* (2002) 124 FCR 182 (not disturbed on appeal), also *SZIAT v MIAC* [2008] FMCA 44 (Nicholls FM, 30 January 2008) at [74]-[75].
25 *SZJGV v MIAC* (2008) 170 FCR 515. See also *SZMPJ v MIAC* [2008] FMCA 1640 (Smith FM, 17 December 2008) at [25]. Contrast *SZNAB v MIAC* [2009] FMCA 152 (Driver FM, 3 June 2009) where the Court stated that the sole purpose approach should be applied pending the outcome of the High Court appeal in *SZJGV v MIAC* and that Madgwick J's dominant purpose comments in *SZJZN v MIAC* (2008) 169 FCR 1 were *obiter*, but did not consider the decision in *SZMPJ v MIAC* or its construction of the Full Federal Court decision in *SZJGV*.
26 *SZJZN v MIAC* (2008) 169 FCR 1 at [35]. However, this was treated as *obiter dicta* in *SZMBL v MIAC* [2009] FMCA 44 (Smith FM, 10 February 2009) at [112] (not disturbed on appeal: *SZMBL v MIAC* [2009] FCA 622 (North J, 22 May 2009)) and *SZNAB v MIAC* [2009] FMCA 152 (Driver FM, 3 June 2009) at [7].
27 The RRT replaced the Refugee Status Review Committee set up by the Hawke Government in 1990.
28 The *Migration Reform Act* introduced a new Subdivision AB with ss.26T-26ZE which intended to replace the uncodified principles of natural justice with clear and fixed procedures. The basic principles underpinning Subdivision AB were that the Minister was under a duty to give a visa application a fair and proper

consideration and an applicant, who was seeking the benefit of the visa, had the obligation of doing everything reasonable to assist in the speedy consideration and determination of the application. Section 26Y imposed a requirement on the Minister to give the applicant particulars about certain adverse information that the Minister had, which would lead to the visa application being refused, and to invite a response. Equivalent provisions were not introduced for the Tribunals until 1999. The sections currently containing the code are ss.52-64 of the *Migration Act* (the Department), Parts 5 and 7 (Tribunals).

29 The IRT was established in 1989 and became the MRT in 1999.

30 See ss.166LA and 166LB of the *Migration Reform Act*, which set out seven grounds for judicial review of IRT and RRT decisions.

31 *Migration Reform Bill 1992*, Explanatory Memorandum, at [25]; see also [51], where it was stated that the Bill aims to 'replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles'.

32 See, e.g., 'An overview of Federal and State administrative law systems in Australia', paper delivered by Dr John Griffiths at the 1994 Administrative Law Forum of the AIAL, *Are the States overtaking the Commonwealth?*

33 J. McMillan, 'Judicial restraint and activism in administrative law' [2002] *Federal Law Review* 12. See also J. McMillan, 'Controlling Immigration Litigation—A Legislative Challenge' (2002) 10 *People and Place* 16.

34 See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22.

35 [2001] HCA 22.

36 See *NAQF v MIMIA* (2003) 130 FCR 456; *Wu v MIMIA* (2003) 133 FCR 221; *Moradian v MIMIA* (2004) 142 FCR 170; *SZBDF v MIMIA* [2005] FCA 1493; *VXDC v MIMIA* [2005] FCA 1388; *Antipova v MIMIA* [2006] FCA 584; *SZCIJ v MIMA* [2006] FCAFC 62; *MIMIA v Lay Lat* (2006) 151 FCR 214; *SZCIJ v MIMA & Anor* [2006] FCAFC 62; *Saeed v MIAC* [2009] FCAFC 41.

37 Many of the provisions are contained in Division 4 of Part 7, which is concerned with the conduct of reviews by the RRT, and in the mirror provisions of Division 5 of Part 5 in relation to the MRT.

38 I discuss these amendments more fully in a paper, 'The Pursuit of Quality Decision Making in the Australian Refugee Review Tribunal' presented at a conference in Prato, Italy, *Best Practice for Refugee Status Determination: Principles and Standards for State Responsibility*, May 2008.

39 (2005) 228 CLR 294.

40 (2006) 150 FCR 214.

41 *SZEEU v MIMA* (2006) 150 FCR 214 at [183] per Weinberg J; *SZEWL v MIMA* [2006] FCA 968 at [11]-[12] per Allsop J.

42 (2006) 150 FCR 214 at [183].

43 *SZKTI v MIAC* [2008] FCAFC 83; *SZKCQ v MIAC* [2008] FCAFC 119; and *SZLFX v MIAC* [2008] FMCA 451; *SZKJT v MIAC* [2008] FMCA 876.

44 [2008] FCAFC 83.

45 [2008] FCAFC 119.

46 [2009] FMCA 693 (23 July 2009)

47 See, e.g., Professor Mary Crock, 'Privative clauses and the rule of law' (1998) AIAL Administrative Law Forum, *Administrative Law and the rule of law: still part of the same package*.

48 (2003) 211 CLR 476.

49 See, e.g. s. 37(1AE) of the *Administrative Appeals Tribunal Act 1975* (Cth) which requires "T documents" to be served on applicants.

CONTROLLING IMMIGRATION LITIGATION: THE COMMONWEALTH PERSPECTIVE

Robyn Bicket*

Introduction

Controlling immigration litigation has been a pre-occupation for successive Commonwealth governments and Immigration Ministers. It is a topic which has received much attention over many years and been the subject of numerous reform attempts, the most notable being the introduction of the privative clause, which has not been successful in limiting judicial review. The reasons for this lack of success are complex. However, some preliminary conclusions may be drawn, including some relating to the motivation of litigants.

Despite the lack of success of legislative reforms in controlling immigration litigation, there has been a drastic reduction in the size of the Minister's case load. From a high of 4,097 judicial review cases on hand on 31 July 2004, the case load has fallen to 700 cases on hand as at 30 June 2009.[1] This reduction can mostly be attributed to reform efforts outside legislative change. The efforts are indicative of the future direction of reform using more innovative methods. For example, the Department is exploring the possibility of early engagement with potential litigants in an Alternative Dispute Resolution ('ADR') inspired environment, and is among the first government agencies world-wide to adopt business rules technology to improve legislative quality and decision support, with the aim of reducing the risk of "technical" litigation.

History of immigration reform

It is useful to outline some of the history of immigration reform.

This is a story of two parties, or should I say adversaries. It has almost become a traditional national dance of sorts, at least for those of us who have worked in the immigration sphere for long enough. Of course, I am speaking of the heightened tension between the Parliament and the courts, which in this sphere of administrative law that has been characterised by legislative reforms aimed at controlling litigation, has been met by assertive judicial responses.

1989 reforms

To understand this dance we begin with the 1989 reforms to migration decision-making.

The 1989 reforms replaced the previously broad and relatively unfettered Ministerial discretion to grant visas and entry permits with codified visa criteria located in regulations, which were the precursor to the modern *Migration Regulations 1994*. Prior to this

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amendment, the only constraints on the exercise of the Ministerial discretion were located in policy documents which did not have the force of law.

In terms of administrative review, the 1989 amendments created the Migration Internal Review Office ('MIRO'), an internal review body and the Immigration Review Tribunal ('IRT'), a specialist and independent merits review tribunal. This was a significant development. Both the MIRO and the IRT stood in the shoes of the decision-maker and considered the decision anew. Further, the IRT, unlike the Administrative Appeals Tribunal ('AAT'), was a non-adversarial tribunal with no right of departmental representation. Prior to this, merits review of immigration decisions was limited.

In terms of judicial review, prior to the coming into force of the *Migration Reform Act 1992* (Cth) ('*Migration Reform Act*') in 1994, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') remained the primary avenue as it had since its introduction in the late 1970s with the Administrative Appeals Tribunal and the Commonwealth Ombudsman – together comprising Australia's mainstream administrative law package. Of course, review under section 75(v) of the Constitution in the High Court's original jurisdiction was also available, but lay relatively dormant.

The 1989 reforms were in part grounded in concerns about the courts' interpretation of broad discretions. The *Report of the Committee to Advise on Australia's Immigration Policies*, chaired by Professor Stephen Fitzgerald, noted in its 1988 report that one of the major criticisms of the immigration legislation was its indiscriminate conferral of uncontrolled discretionary decision making powers. Part of the guiding philosophy behind the reforms proposed by the Committee was to create a fair system of immigration control and review that was manageable in terms of administration within realistic resource allocation.[2] Accordingly, one of the purposes of the reforms was to provide certainty for decision-makers in an environment where, arguably, court decisions were driving uncertainty.

1994 reforms

The 1989 amendments were followed, in 1994, by the coming into force of the *Migration Reform Act*, which continued the trend away from Ministerial discretion by introducing a universal visa system in the modern form. The *Migration Reform Act* also expanded the jurisdiction of the IRT to include most visa refusal decisions. It also created the Refugee Review Tribunal ('RRT') to hear and determine appeals against the refusal to grant refugee status.

The *Migration Reform Act* introduced a separate judicial review regime for immigration decisions in Part 8 of the *Migration Act 1958* (Cth) ('*Migration Act*'). Access to the *ADJR Act* and section 39B of the *Judiciary Act 1903* (Cth) were barred.

The judicial review scheme also reduced the grounds of review. It prevented review on grounds of natural justice, failure to take account of relevant considerations and taking account of irrelevant considerations (hoped to be redundant on the grounds that the criteria for grant of visas were specified in the regulations), making a decision so unreasonable that no reasonable person could have made it, and apprehended bias (replaced with actual bias).

One of the drivers for this was the increasing number of judicial review applications. In 1982-83, the Federal Court received 30 applications for judicial review of migration decisions. This increased to 192 in 1992, 404 in 1993-94, and 542 in 1995-96.[3]

The removal of review on the grounds of natural justice was also accompanied by the detailed legislative code of procedure which applied to departmental decision-making, and tribunal decision-making – in essence a codification of common law natural justice

principles.[4] This was, in part, a response to the continued uncertainty for decision-makers regarding the content of procedural fairness as interpreted by the courts.

Uncertainty

The 1980s saw a rapid rise in Australian administrative law challenges instigated by the administrative law package of the late 1970s. Among some of the seminal decisions of this time was the High Court's decision in *Kioa v West*[5] (*'Kioa')*, the legacy of which has been described as a "legal obligation of inexact dimension".[6] The Court's decision established a new rule that, in the ordinary case, the validity of a deportation decision would turn on whether there had been a proper observance of natural justice. While this proposition is, in the context of such a momentous decision that affects the life of the individual, utterly defensible, the difficulty in *Kioa* lay in extracting from the case a rule that would identify other situations to which the obligation of natural justice would apply, and what is required to discharge that obligation.

In that case, Mr Kioa faced deportation after his student visa had expired. Mr Kioa put his case against deportation briefly, at an interview with an officer of the Department and in a written submission from the Legal Aid Commission of Victoria. The submission recorded that Mr Kioa had been active in the Tongan community, providing pastoral support via the Uniting Church to other illegal Tongan immigrants and to those facing deportation. In the brief prepared internally for the departmental decision-maker this was noted and it was added that "Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern". By majority, the High Court held that this internal remark gave rise to a breach of natural justice given its highly prejudicial nature.[7]

The difficulty with this finding was that natural justice became identified by the High Court as not just concerned with relations between the agency and the public (i.e. was the person affected forewarned of a possible adverse decision and given an opportunity to respond) but also with how matters were discussed within the agency. For example, the validity of the decision could turn on the nuanced way in which an internal submission was framed by an advisor, not on the decision-maker. If an observation in an internal departmental briefing paper could be characterised as a "credible, relevant and adverse statement" (the formula of Justice Brennan that has gained support), then a second or subsequent hearing would be required.

Two examples of how *Kioa* was applied are the cases of *Taveli v Minister for Immigration, Local Government and Ethnic Affairs*[8] *('Taveli')* and *Conyngham v Minister for Immigration and Ethnic Affairs*[9] *('Conyngham')*. In *Taveli*, the Federal Court found that a comment in an internal briefing that a prohibited immigrant had "obtained Medical benefits" was a credible, relevant and adverse statement that attracted the obligation of natural justice. In *Conyngham*, the Federal Court made the same finding about a prejudicial remark in an agency file that was not included in the briefing paper sent to the decision-maker. In the Court's view the "mere possibility" that "unconscious prejudice" could permeate the preparation of the briefing paper and flow through to the decision was a serious enough breach to invalidate the decision.[10]

The difficulty with how the natural justice obligation was articulated in *Kioa* was soon also illustrated in the High Court decision of *Haoucher v Minister for Immigration and Ethnic Affairs*[11]*('Haoucher')*. In *Haoucher*, the High Court held by majority that the Minister was obliged by natural justice to give Mr Haoucher a hearing before rejecting a recommendation of the Administrative Appeals Tribunal that he not be deported. The policy instruction which outlined the Minister's task stated that the Minister was to decide if there were "exceptional circumstances" and "strong evidence" to justify rejection of the AAT's recommendation. In

essence, the policy closely resembled the Minister's current public interest powers to intervene and substitute favourable decisions in certain circumstances. The result of *Haoucher* was an extra and exceptionally burdensome step in the decision-making process.

Further cases of this period that indicate the state of uncertainty that existed for decision-makers include the Full Federal Court decisions in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*[12] and *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs*[13]. The applicants in these matters were Iranian refugee claimants. Both applicants wrote inflammatory letters to the Iranian embassy in Australia after their arrival in the country. In both cases the decision-makers disregarded the letters as a mere artifice designed to improve the applicants' chances of being recognised as refugees *sur place*. The Court held that the failure of the decision-makers to put to the applicants the doubts as to their credibility as raised by the letter amounted to a breach of natural justice.

While the fairness for and against the outcomes in these two cases can be debated and no doubt there would be force in requiring that an opportunity be given to an individual to be heard on evidence critical to their credibility, these cases do illustrate the uncertainty that was faced by decision-makers in drawing the natural justice line. This was not a case where the evidence which led to the breach of natural justice was provided by a third party. Rather, the evidence here was provided by the actual applicant in circumstances where the applicant was legally represented and therefore had the opportunity to obtain advice on the evidence and put forward submissions accompanying the evidence.

Against this background, the introduction of a limited judicial review scheme in Part 8 of the *Migration Act* and the introduction of a code of procedure appeared a sensible means by which to give decision-makers more definitive guidance, and continue to ensure access to justice for genuine judicial review claimants while reducing unmeritorious applications.

However, history has shown that these aims were not successfully achieved as immigration litigation increased dramatically, with a large proportion of that litigation being successfully defended by the Minister. In 1993-94, a total of 520 immigration-related applications and appeals were filed in the federal courts and the AAT. This number increased steadily to 2,005 applications and appeals in 2001-02. In the following two years there was an exponential rise, peaking at 5,395 applications in 2003-04. Over this period, however, the Minister's success rate was, on average, 90%.

Reforms in the last 10 years

Returning to the history of immigration reforms, the next iteration of Part 8 of the *Migration Act* was enacted in 2001 by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). The centrepiece of this amendment was the privative clause which was intended to expand the validity of decisions and to restrict the grounds of judicial review. This reform came out of the 1996 Howard Government's election platform to restrict judicial review in immigration cases to all but exceptional circumstances. A privative clause amendment was first introduced to Parliament in 1997 but did not proceed until 2001.

In 2003, the High Court in *Plaintiff S157 v Commonwealth*[14] upheld the constitutional validity of the privative clause, but construed it such that it did not operate to exclude the jurisdiction of the courts where a decision was affected by jurisdictional error.

A consequence of *Plaintiff S157* was that the time limits were no longer effective in circumstances where a decision was affected by jurisdictional error.

A further attempt in 2005 to limit the scope of judicial review by the re-introduction of time limits also failed. The *Migration Litigation Reform Act 2005* (Cth) ('*2005 Act*') was part of a

package of administrative and legislative measures that implemented the recommendations of the Migration Litigation Review, headed by Ms Hilary Penfold QC, now Justice Penfold, which reported to the Government in January 2004. The *2005 Act* introduced a definition of "purported" privative clause decision. By applying the time limits to purported privative clause decisions as well as privative clause decisions, the *2005 Act* attempted to make the time limits in the *Migration Act* meaningful again.

However, in 2007, the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[15] held that the relevant provision was invalid.

The re-introduction of the time limits was also defeated in the Federal Court by the 2007 decision of *Minister for Immigration and Citizenship v SZKKC*[16]. The Court there held that "actual notification" of a tribunal decision for the purpose of engaging the section 477 time limits requires that the client be personally handed a copy of the decision within 14 days of the handing down of that decision. Of course, as a practical matter this is just not possible and therefore the time limits were rendered ineffective.[17]

In response to these decisions the Parliament in February 2009 passed the *Migration Legislation Amendment Act (No 1) 2009*, reinstating uniform time limits for the review of immigration decisions in all courts. Importantly, the courts now have a broad discretion to extend time where they consider an extension necessary in the interests of the administration of justice, thereby overcoming any constitutional objections. These time limits commenced on 15 March 2009.

Why have attempts to control litigation failed?

Technical deficiencies

First, as many commentators, including Denis O'Brien, have argued, the code of procedure for decision-making may in large part have had the unintended effect of encouraging the courts to focus on technical deficiencies. As mentioned earlier, the aim of the code was to replace the common law rules of procedural fairness in order to give decision-makers and tribunals certainty in processing visa applications and applications for review. While some certainty was achieved, a market for litigation over technical deficiencies grew.

For the Commonwealth, this market is characterised by "fire fighting" litigation. Where the point is strong and the Minister's prospects of success are less than reasonable, the department withdraws. However, often the points are not strong and the result of a court decision favourable to the applicant would result in undesirable policy consequences. An example of this was the recent Full Federal Court decision in *Sales v Minister for Immigration and Citizenship (No 2)*[18]. In this case, the Court quashed a decision of a former Minister purporting to cancel Mr Sales' Transitional (Permanent) Visa under section 501(2) of the *Migration Act* on character grounds. The Court held that section 501 could not be used to cancel a Transitional (Permanent) Visa. This is because section 501 is a power to cancel a visa which has been "granted", whereas Transitional (Permanent) Visas were held under an operation-of-law provision which converted entry permits into visas in 1994 as part of the implementation of the *Migration Reform Act*.

This decision was undesirable from a policy perspective. It meant that decisions made by the Minister to cancel visas of this kind were invalid. These cases concerned persons who had been in Australia for long periods and therefore the decisions were not taken lightly and were often the result of very serious criminal records.

In this case, a legislative response was adopted. The gap in the coverage of section 501 was subsequently largely closed by legislative amendment.[19]

It is important to note that it is far from clear that repealing the code of procedure and returning to the common law rules of natural justice would actually have the effect of reducing unnecessary litigation such as that arising from technical deficiencies. This is because, while applications for judicial review that fall within this category of technical deficiencies are so far removed from the facts and therefore the "justice" or "merits" of the case, the applications do have the effect of delaying the resolution of the applicant's immigration status. Litigation in this jurisdiction as a means of delay is an end in itself. This is what makes immigration litigation unique. There is an inherent incentive for clients to litigate. The bridging visa granted to non-citizens with ongoing judicial review litigation achieves a version of the ultimate outcome sought – a visa to remain lawfully in Australia for an extended period of time.This "advantage" is not dependent on the code of procedure or legal rules whether legislative or common law.

Delay

Delay as a unique driver in immigration litigation has been recognised by members of the judiciary. Writing extra-judicially, Justice Lindgren has acknowledged the concern that class actions in the late 1990s were being used to encourage large numbers of people to litigate to prolong their stay in Australia.[20] In an article in 2001 reviewing the increasing number of Federal Court applications for review of immigration decisions, Justice Nicholson noted that one feature of the applications for review of such decisions was that

> normal inhibitions against initiation and continuance of court process has little or no application. The sanction of costs is not meaningful as newly arrived persons rarely have resources.[21]

He went on to note that there was an

> inbuilt motivation of any unsuccessful applicant for [refugee] status to avoid or defer repatriation to the feared country of origin and so to seek review of the decision of the Tribunal and, if not successful, to further appeal. Each step holds the possibility that some political change may occur in the feared country which will remove the basis for that fear, whether well-founded or not.[22]

Delay as a primary litigation driver is also supported by the history of reform that has taken place in immigration decision-making. Over time the Commonwealth has improved and offered further opportunities for merits review. Over the past 30 years an elaborate administrative review structure has gradually developed. For example, in the refugee sphere, the review of departmental decisions began with the Determination of Refugee Status (DORS) Committee in 1978, progressed to the Refugee Status Review Committee in 1990 and then finally to a fully independent non-adversarial RRT in 1993. Former governments have stated that the purpose of improving the quality and quantity of such review opportunities and replacing the pre-1989 broad Ministerial discretion with codified decision-making criteria, was to make recourse to judicial review less attractive.[23] These initiatives did not curb judicial review.

A potential correlation between new court applications and court processing times may also support the view that delay is a primary litigation driver. Specifically, there appears to be an intriguing correlation between the reducing number of new court applications in recent years and reduced court processing times. For example, the average time to resolve a matter at first instance (whether before the Federal Magistrates Court or Federal Court) has reduced from 347 days in mid 2006 to 143 days in mid 2009, while over the same period the number of new applications went from 599 in the last quarter of 2005-06 to 313 in the last quarter of 2008-09.[24]

This may indicate that as court processing times decrease the incentive to litigate is lessened.

Another issue faced by the Department is repeat litigants. By this I mean persons who have previously made unsuccessful judicial review applications who seek to re-agitate review of the same decision before the courts. In most cases these non-citizens have pursued their applications through the entire court hierarchy including special leave to appeal to the High Court. This results in further delay.

Another noteworthy figure which supports delay as the primary litigation driver is the Minister's overwhelming success in matters defended. Since 1993-94, the Minister has been successful in, on average, 93% of cases. This means that, putting aside cases from which we withdrew, in only 7% of cases did the affected person get a favourable decision, which may have included a rehearing by the tribunal. (Of course, whether the person actually achieved a favourable visa outcome in the end is another matter.) When the success rate is viewed together with the upward trend in applications, 1,045 total new applications in 1997-98, 1,590 applications in 1999-2000, 2,605 applications in 2001-2002 and peaking in 2002-2003 with 5,397 new applications,[25] it is clear that delay is a real factor driving litigation, and one for which there is no easy solution, let alone a legislative one.

Other efforts

Despite the failure of legislative reforms to control immigration litigation, other management efforts have been successful in reducing the Minister's case load. From a high of 4,097 judicial review cases on hand on 31 July 2004, the case load has fallen to 700 cases on hand as at 30 June 2009.[26]

At the outset, in understanding the Department's strategy to manage the case load, it is important to understand that it is not the Department's business to litigate. Early withdrawal where there are no reasonable prospects of success is a key goal of the management of the case load. Our panel firms are required under contract to provide preliminary advice on prospects within 21 days of receiving a claim. Of the 2,125 judicial review applications filed last financial year, the Department withdrew in 213.[27] Of course, the court only has jurisdiction to allow the Department to withdraw from matters initiated by applicants where a jurisdictional error has been identified.

Conversely, the Department does not hesitate to seek early dismissal of an application where it considers the applicant has no prospect of success.

Our objective is to provide real access to justice to those cases that have genuine prospects, while minimising claims that are unmeritorious or amount to an abuse of process.

It is important that these comments be understood in light of the Attorney-General's Legal Services Directions and the model litigant obligations imposed on the Department. The Department is bound by these directions and we take our obligations very seriously.

We have systems in place to record and track any complaints alleging breach of these obligations. In addition, our panel firms and Legal Officers are required to certify at the end of a matter that there was no indication, no matter how minor, of an allegation of a breach. Any allegations are immediately escalated and reported to the Office of Legal Services Coordination ('OLSC') in the Attorney-General's Department. The Department's commitment is reflected in the fact that no breaches have occurred since proceedings in 2005, and that breach related to an oversight which OLSC found had caused no detriment.

Other management efforts include the centralisation of all litigation within the Litigation and Opinions Branch in National Office. The Branch is structured along client lines to ensure the relevant client areas within the Department are provided with high quality advice and

reporting. This improves consistency across matters and, where possible, like matters are batched. This may include allocating a particular issue to one panel firm or one counsel.

The other clear advantage of centralisation is in the management of our Legal Services Panel and greater use of this resource. The allocation of work to the panel is proactively managed to ensure high quality legal services that represent value for money. Panel performance is closely monitored both on a day-to-day basis by our legal officers and via four monthly formal reviews.

The Department's key management efforts in recent years have focused on working with some key stakeholders, in particular the Attorney-General's Department ('AGD') and the courts. Regular meetings with the courts and AGD have created a strategic and co-ordinated approach to litigation caseload management. A combination of additional funding for the courts and administrative measures adopted by the courts has greatly assisted the management of immigration matters.

A long standing practice in immigration matters is that the Department prepares court books in all first instance matters. These books contain all the departmental documents that an applicant requires for the litigation process, such as their visa application and the delegate and tribunal's decision. This practice has proven to be effective by limiting reliance on the potentially time consuming and costly process of discovery or requests under the *Freedom of Information Act 1982* (Cth). Of course, the applicant in all cases has the opportunity to put forward evidence that is not in the court book.

In 2006, the Government agreed to funding for an additional 13 Magistrates to assist with migration litigation. Additionally, the courts have set disposition time goals for finalising matters and have carefully monitored the progress of matters against those goals to ensure that matters are resolved within an appropriate timeframe. Keeping tabs on outstanding judgments and monitoring the flow of cases through tribunals and courts allows the courts to predict the future case load and make appropriate plans. The courts have periodically held mass call-overs to address any emerging backlog of litigation matters and have established processes that enable certain decisions to be made on the papers.

Further, there has been some streamlining in relation to the way that matters filed in the original jurisdiction of the High Court are remitted to lower courts.

Monitoring the professionals providing advice to applicants has also made a contribution to lessening the backlog.

These efforts are reflected in the reduction in Federal Magistrates Court processing times, which has been reduced from an average of 347 days in mid 2006 to 143 days in mid 2009.[28]

Good decision-making

A related effort is the continued focus on good decision-making. The Department's commitment to producing quality decisions is evidenced by the development of Best Practice Guides on good decision-making, a joint publication of the Department and the Administrative Review Council. These guides were published in 2007 and are made widely available to staff. The guides deal with a range of issues relevant to good decision-making, such as lawfulness, natural justice, evidence, facts and findings, reasons and accountability.

In conjunction with these guides, the Department delivers Good Decision-Making training to staff across Australia on a regular basis. The Department has also recently launched eGDM, which is an introductory, on-line course for all staff on good decision-making.

These initiatives remind us that continuous improvements in decision-making can go hand in hand with reforms to control the volume of litigation.

Legal advice scheme

Another effort in recent years that has, surprisingly, not proved successful in controlling immigration litigation is the Legal Advice Scheme.

In July 2000, the then Minister established a pilot legal advice scheme following concerns expressed by some Federal Court judges on the large number of photocopied, generic and otherwise inappropriate applications for review from unrepresented clients in immigration matters. It was hoped that providing independent legal advice to unrepresented applicants, who were seeking review of RRT decisions, would provide applicants with meritorious cases with a coherent application to the court, and those whose cases were unmeritorious would be encouraged to withdraw. This would have resulted in significant savings for the Government, both in terms of litigation costs and court resources.[29]

The pilot Legal Advice Scheme commenced on 17 July 2000 in New South Wales. In October 2003 the Scheme was extended to Western Australia, although the number of cases in that state remains negligible.

Under the Scheme, unrepresented applicants who choose to participate are provided with independent legal advice on their application to the Federal Magistrates Court. The advice is provided by a lawyer from a panel consisting, in NSW, of approximately 30 legal practitioners, of whom roughly half are barristers appointed by the NSW Bar Association, and half solicitors appointed by the Law Society of NSW.

Unrepresented applicants who file applications for review of their RRT decisions in the NSW and WA District Registries are invited in writing to participate in the Scheme.

The NSW District Registry of the Federal Magistrates Court / Federal Court is responsible for the Scheme's day-to-day operation in NSW. In WA, the Scheme is administered by the Law Society of Western Australia. The Department does not have responsibility for the day-to-day operation and administration of the Scheme because this would put the Department in a conflicted position.

The Scheme is fully financed by the Commonwealth. The panel lawyer renders an invoice and forwards this to the Bar Association or Law Society. Upon receipt of the invoice, payment is made by the Bar Association or Law Society from funds periodically provided by the Department; the funds are held in a trust account.

Since its inception in 2000 the Scheme has cost around $4.12 million.

In terms of the original goals of the Scheme, the statistics indicate that it has not been successful in lowering case resolution time as compared to self-represented clients. Scheme members' cases have consistently had a longer resolution time than the self-represented litigant caseload, with the slight exception of the Scheme's first year of operation. The average difference over the life of the Scheme is a 41-day difference in favour of the non-Scheme caseload (see Figure 1).

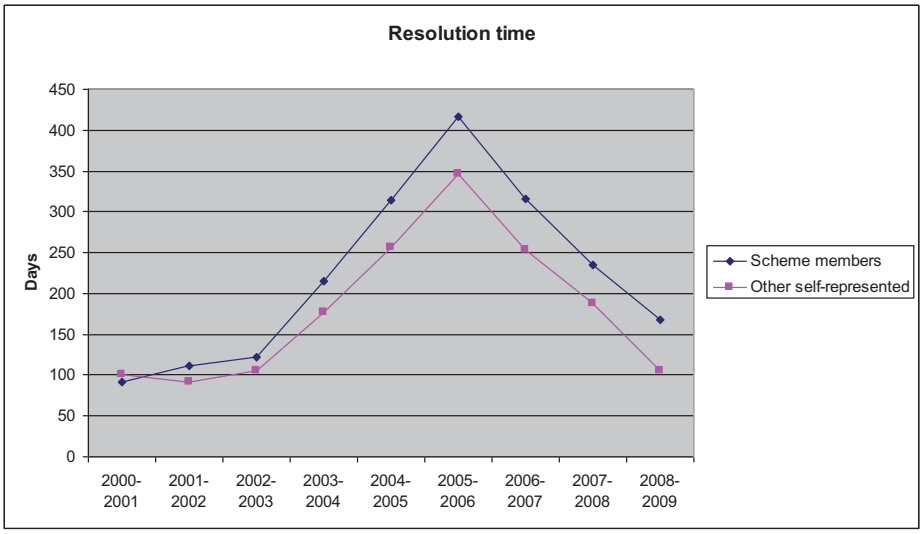

Figure 1

In addition, the Scheme has had no discernable impact on applicant withdrawal rates. While it is not possible to extract the withdrawal rate for only those cases which would fall into the subjective category of "unmeritorious", it can be assumed that the percentage of cases which could be called unmeritorious would be approximately the same between the Scheme-assisted clients and the broader self-represented caseload. There is no consistent pattern of withdrawals between these two groups – the Scheme's impact on withdrawal rates has been negligible (0.1% difference, on average) (see Figure 2).

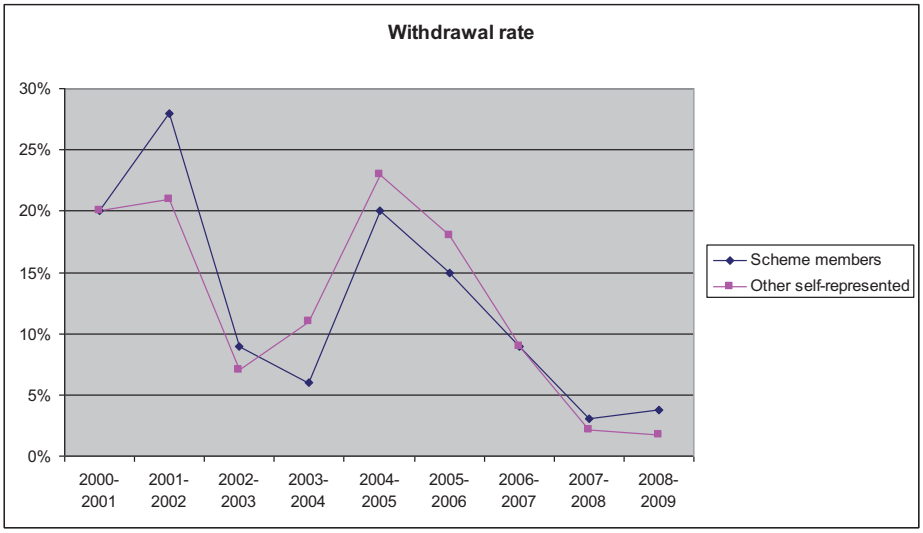

Figure 2

Minister's appeals

Another aspect of the Department's management of the litigation case load is the careful consideration given to decisions to appeal.

The decision to appeal is taken very seriously. Appeals are only filed following consideration of legal advice and extensive consultation with policy areas. Not only must there be good prospects of success but there must also be cogent policy or legal reasons to pursue an appeal, for example, if the decision holds significant precedential value. This is reflected in the fact that less than 2% of our case load constitutes Minister's appeals.

A current example is the appeal in *SZIAI*[30] which was heard by the High Court on 28 July 2009. This case raises the question of whether a failure by the RRT to undertake inquiries can ever amount to jurisdictional error. The RRT decision was quashed by the Federal Court on the basis that the RRT should have taken additional steps to resolve the authenticity of documents provided by the applicant. The principle applied by the Federal Court has the potential to impose a significant workload on the RRT. Additionally, the scope of judicial review in relation to failure to inquire is an important issue across a range of Commonwealth decision-making. The Minister's position is that failure to take some action in the course of coming to an administrative decision will not infringe any limit on the decision-maker's power in the absence of some statutory provision requiring that step to be taken. In this case, there is no provision in the *Migration Act* which requires the RRT to undertake inquiries.

Another current example of a Minister's appeal is the case of *SZIZO*[31], which was heard by the High Court on 23 April 2009. *SZIZO* concerns an invitation to an RRT hearing which was addressed to the wrong family member. A different family member had been nominated to receive the invitation. Nevertheless, the invitation was received and all family members attended the RRT hearing. The Federal Court quashed the RRT decision. The Minister argued before the High Court that minor breaches of mandatory statutory procedures should not necessarily be regarded as a jurisdictional error. In the alternative, the Minister argued that the Court should refuse to grant relief, in reliance on the Court's inherent discretion, as the error did not affect the outcome of the decision-making process.

Judgment in both *SZIAI* and *SZIZO* is reserved.

New reform directions

Putting aside these efforts, which might be described as more traditional approaches to controlling litigation, the Department is also working on other more innovative approaches.

Alternative dispute resolution

First, the failure of the Legal Advice Scheme to minimise unnecessary or unmeritorious litigation answers some questions and raises others. Logically, it could be expected that an ordinary litigant would withdraw his or her application if advised by able representation that there was no prospect of success. In the case of the matters under the Legal Advice Scheme, it is clear that this has not occurred. The reason for this might be explained by the delay incentive inherent in this jurisdiction. It could also be expected that legal representation would reduce court processing times. However, processing times in cases where the applicant was legally represented through the Scheme actually increased.

One conclusion that might be drawn is that in the vast majority of cases the litigants do not accept the legal advice given or the court's decision and, therefore, do not reach the realisation that they could decide to go home. Litigation does not resolve this hurdle.

While further work needs to be done to explore the underlying motivations of litigants in this jurisdiction, it is possible that mediation may achieve what legal advice has not. Early intervention, especially with unrepresented litigants, who make up a very substantial part of our case load, with third party mediation to explain the decision, the likely prospects of

success and possible alternative avenues, may be a way to reduce unmeritorious litigation and to get better outcomes for litigants.

The success of the Department's Community Care Pilot, which, following the 2009-10 Budget has transitioned to a complete program – the Community Status Resolution Service, may indicate the merit in this approach. This program provides active and early support for compliance clients in the community, particularly those holding a bridging visa E, until such time as they achieve a final immigration outcome. In the case of the pilot, assistance was given to 746 clients since its inception in May 2006. Of these, 53% received immigration information and counselling services. A total of 291 (or 39%) were assisted in the resolution of their immigration status.

Business rules technology

The other approach which I would like to highlight is the use of business rules technology to improve legislative and decision-making quality and to thereby reduce the risk of litigation.

As I have discussed, one source of unnecessary litigation is the focus on technical deficiencies. In some cases, the sheer complexity of the *Migration Regulations 1994* means that minor differences in drafting between provisions that were intended to be identical, can be a source of uncertainty and thus litigation.

To combat this, and achieve greater consistency across our legislation, the Department has developed and is currently populating a Business Rules Repository. A business rule is a directive that is intended to govern, guide or influence departmental business activity or define departmental business knowledge. Business rules may be used in computer assisted decision making, such as that provided in the portals being developed in the Department to assist in visa processing.

The Visa Wizard and Citizenship Wizard, two products developed by the Department and available on the Department's website, use executable business rules to quickly and accurately provide visa and citizenship information to potential applicants. Executable business rules will also be used in the Department's Generic Visa Portal, which will provide computer assisted decision-making for visa decisions.

There are three key ways in which the Business Rules Repository will help improve the quality of legislation.

First, the Repository will contain an approved set of terms and their definitions, to ensure that consistent language is used for the same idea across the Department. By harmonising our language, we can prevent duplication of ideas within our policy and legislation and adopt a consistent set of expressions for common ideas.

Second, the Repository will contain a set of business rules defining the legally approved requirements for a particular business outcome (for example, the granting of a particular subclass of visa). Where a part of a process is common to several decision processes (for example, the same requirements within several different visa subclasses), these are identified as a set of common rules to show the commonality.

Third, the Repository will provide a mechanism to show the links between the approved terms, business rules and legislation. This will enable policy and legal staff to undertake impact analysis on proposed changes to identify whether a proposed change will have unintended consequences or would diverge from an already established process without good reason.

Underlying the Repository is an approval process to ensure that the Repository is a "single source of truth" for business rules and approved terms. All business rules and terms are cleared by lawyers and business policy owners before being submitted to a high-level committee for enterprise wide approval.

As part of the analysis process to populate the Repository, a number of inconsistencies have already been identified in the language of the legislation. The business rules have adopted standard language for describing a few common concepts that are frequently expressed in different ways in legislation. For example, the business rules express a person's age consistently as "less than 18 years of age" (or other equivalents) and its opposite as "not less than 18 years of age", whereas these are expressed in numerous different ways in immigration legislation. With the inconsistencies identified and a standard expression agreed on, it is our expectation that legislative changes will adopt this approved language.

The Department is among one of the first government agencies anywhere in the world to use business rules technology. This is truly an innovative approach focusing very much on the front end of the legal process. The Visa Wizard and Citizenship Wizard, two products of the business rules technology, have been recognised through the award of first prize in the Awards for Excellence in eGovernment for 2009 at the CeBIT International Business Technology Conference in Sydney. It is our hope that the Business Rules Repository will be a key tool in the proactive management of immigration litigation.

Conclusion

It is worth reminding ourselves of the nature of litigation, which is that litigation is full of uncertainty for all parties. Regardless of what steps are taken by governments, whether legislative or otherwise, controlling the volume of immigration litigation will be a continuing battle. If the last 20 years of immigration litigation is anything to go by, external factors such as controversial and unexpected legal rulings and the behaviour of clients motivated by the unique bridging visa incentive, will continue to drive litigation in this area.

Endnotes

1 The statistics relating to the 2008-09 financial year are preliminary only.
2 Committee to Advise on Australia's Immigration Policies, 'Immigration, a commitment to Australia: the Report of the Committee to Advise on Australia's Immigration Policies', 16 May 1988, p 112.
3 Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary reform or overkill?' (1996) 18 *Sydney Law Review* 267 at 288-289.
4 Noting however that ss 359A and 424A of the *Migration Act* came into force on 1 June 1999: *Migration Legislation Amendment Act (No 1) 1998* (Cth).
5 (1985) 159 CLR 550.
6 John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335 (online AustLII ver) at 10.
7 (1985) 159 CLR 550 at 568.
8 (1989) 86 ALR 435 (Wilcox J).
9 (1986) 68 ALR 423 (Wilcox J).
10 Ibid at 432.
11 (1990) 169 CLR 648.
12 (1991) 31 FCR 100; 102 ALR 339.
13 (1991) 31 FCR 123; 102 ALR 367.
14 [2003] HCA 2; 211 CLR 476.
15 [2008] HCA 14.
16 [2007] FCAFC 105.
17 However, since then the Federal Magistrates Court has held that *SZKCC* was reversed by *SZKNX v MIAC* [2008] FCAFC 176: *SZMVQ v MIAC* [2009] FMCA 137 at [18].
18 [2008] FCAFC 132.
19 The *Migration Legislation Amendment Act (No 1) 2008* inserted section 501HA into the *Migration Act*. That section provides that the holder of a transitional visa is taken to have been "granted" a visa.
20 Justice Lindgren, 'Commentary' (2001) 29 *Federal Law Review* 391.

21 Justice RD Nicholson, 'Administrative Issues in Refugee Law' (2001) 28 *AIAL Forum* 40 at 46.
22 Ibid.
23 Philip Ruddock, 'Narrowing of Judicial Review in the Migration Context' (1997) 15 *AIAL Forum* 13 at 15.
24 The statistics relating to the 2008-09 financial year are preliminary only.
25 Department of Immigration and Citizenship, Quarterly Litigation Report: April to June 2008 and 2007/2008 Overview, Attachment B, p 1. NB: the peak figure of 5,397 applications in 2003-2004 includes the individual applications filed in the Federal Court as a result of the dismissal of the Muin/Lie class action applications, which were originally filed in the High Court in 2002-2003 and remitted to the Federal Court. The original High Court and remitted Federal Court applications have not been included in these figures.
26 The statistics relating to the 2008-09 financial year are preliminary only.
27 Ibid.
28 The statistics relating to the 2008-09 financial year are preliminary only.
29 See the comments of Wilcox J in *Mbuaby Paulo Muaby v Minister for Immigration and Multicultural Affairs* [1998] FCA 1093.
30 Appeal from *SZIAI v Minister for Immigration and Citizenship ('SZIAI')* [2008] FCA 1372.
31 Appeal from *SZIZO v Minister for Immigration and Citizenship ('SZIZO')* [2008] FCAFC 122.

THE IMPACT OF JUSTICE KIRBY ON ADMINISTRATIVE LAW JURISPRUDENCE

*John Carroll**

Introduction

Justice Kirby's impact on jurisprudence in Australia has been immense. Although his Honour's divergence from many of his colleagues on a range of issues has attracted the title of the 'great dissenter', his judgments invariably penetrate and dissect in ways that provide the reader with valuable insights and reflections. While the Gleeson court was often characterised as adopting formalist approaches which obscured, rather than revealed, the policy choices open to courts, Kirby J's judgments unapologetically tackled the underlying issues head on. Whether his great dissents have an enduring impact on the corpus of the law remains to be seen. Indeed, it may be that his greatest legacy will prove to be his transparent exposure of the shortcomings of the technical approaches of other High Court judges. Regardless, his Honour's judgments will provide a rich source of ideas and challenges for years to come.

There is no better example of his jurisprudential and methodological contribution than his judgments in administrative law cases. While the judgments of other High Court judges have relied upon highly technical approaches and distinctions to circumscribe the scope of administrative law principles, Kirby J's judgments - largely in dissent - are characterised by a purpose to reveal the underlying policy issues and mark out the court's role in keeping government accountable. One may not always agree with his Honour's conclusion, but one can always engage with his reasoning and identify the point of disagreement. The purpose of this paper is not to give an exhaustive account of Kirby J's contribution to the development of administrative law principles. Rather, it will reflect on two main points that are revealed in his key administrative law judgments: first, that his Honour had a commitment to open and transparent reasoning; and, second, his Honour displayed a commitment to government accountability. These two points will be emphasised by a consideration of his Honour's views on the distinction between jurisdictional and non-jurisdictional error; the creation of a remedy for serious administrative injustice; issues that lie at the public/private divide; and the duty to provide reasons.

The Limits of the judicial function in administrative law

Jurisdictional error

It is well understood that constitutional principles affect the legitimate scope of the judicial function in Australian administrative law. Administrative law principles at the State level have largely kept pace with federal administrative law developments and, thus, the focus on judicial power at the federal level drives much of Australian administrative law. At the federal level, s 71 of the Constitution vests judicial power in the courts, the executive power is vested in the executive by s 61. The mixture of judicial and non-judicial functions is not

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permitted and, thus, it becomes important to identify the content of 'judicial power'. Although the task of defining this concept has proved impossible, in administrative law at least, the dividing line has been calibrated to the well known division between judicial and merits review. The determination of whether federal executive action is valid or invalid is an exclusive function of judicial power, and its exercise by the judiciary assists in upholding the rule of law.[1] As Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ said in *Bodruddaza*,[2] an 'essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers'.[3]

What is involved in the judiciary exercising judicial review? How do we know when a decision is an unlawful one? For the purposes of the constitutional jurisdiction to award relief against administrative decision-makers (that is, for the purposes of s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903* (Cth)), the distinction between *jurisdictional error* and *non-jurisdictional error* has emerged from High Court jurisprudence as the guiding principle for determining the judicial function.[4] Thus, the principal constitutional remedies for *mandamus* and prohibition will be issued only where there is a jurisdictional error. Although *certiorari* is available for all errors on the face of the record - jurisdictional and non-jurisdictional - the availability of that remedy largely, although not exclusively, follows the constitutional writs. Accordingly, the jurisdictional error vs non-jurisdictional error distinction is a dominant force in current administrative law thinking.

As judges and commentators recognise, the concept is deeply problematic.[5] It has been rejected in England,[6] and has been the subject of criticism in a series of Kirby J's judgments. In an oft-cited portion of his judgment in *Miah*, his Honour commented:

> "In England, the former distinction between jurisdictional and non-jurisdictional error, once of great significance in cases concerned with the prerogative writs, has now been abandoned. The precise scope of error classified as "jurisdictional" was always uncertain. In contemporary Australian law, the boundary between error regarded as "jurisdictional" and error viewed as "non-jurisdictional" is, to say the least, often extremely difficult to find."[7]

With that distinction abolished, Kirby J has argued that the constitutional writs, and relief under section 39B of the *Judiciary Act*, should be available "to redress established errors of law", regardless of whether they would be classified as jurisdictional or not.[8]

While Kirby J has frequently called for distinction between jurisdictional and non-jurisdictional errors to be abolished,[9] his Honour was unable to convince the other members of the High Court to follow. Indeed, in apparent resignation, in *Futuris*, Kirby J noted that questions concerning jurisdictional error "*will not completely go away and the future will look after them*".[10]

Kirby J's critique of jurisdictional error is twofold: first, that the concept is indeterminate; and second, that it is meaningless. In relation to the first, there is no doubt, as Kirby J has noted,[11] that the scope of error classified as jurisdictional and the boundary between jurisdictional and non-jurisdictional errors is difficult to define. Indeed, in *Craig v South Australia*, the seminal Australian case enunciating the distinction between jurisdictional and non-jurisdictional errors, the High Court accepted that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern".[12] As to the second, Kirby J considers the term "jurisdictional error" to be "meaningless", as it has become only "conclusory" in nature.[13] Aronson, Dyer and Groves agree and, indeed, see the uncertainty of jurisdictional error as stemming from the fact that it has become conclusory.[14] There are now so many ways in which a jurisdictional error can occur. To describe a decision as infected by jurisdictional error does not explain how that decision became infected with jurisdictional error.[15] Furthermore, the concept is said to be prefatory: it explains what the consequence of an error of law will be, that is, a nullity.[16] As Aronson

explains, "...there are many sorts of jurisdictional errors but usually only one legal consequence, which is that they make the relevant act or decision null and void".[17]

As Aronson has said, even if these faults are conceded, that need not lead to the conclusion that the distinction should be abandoned.[18] Conclusory terms can be useful, as they aid in grouping together concepts that share something in common - in this case, legal errors with nullity as the end result.[19] Thus, "where nullity is important and where one has been able to establish it by proving the commission of an error which has nullity as a consequence, there is no harm and much convenience in characterising that error as jurisdictional".[20] Although Aronson agrees with Kirby J that jurisdictional error is conclusory, that, of itself, is not seen as a reason to abolish the category.[21]

There is no guarantee that Kirby J's preferred approach of focusing on legal errors would fare much better if judged by the same criteria. The distinction between jurisdictional and non-jurisdictional errors of law was once made in England but has now all but been abandoned.[22] The net result has been that jurisdictional error in England now covers almost every conceivable error of law.[23] When non-jurisdictional errors of law were first abolished, non-jurisdictional errors of fact and discretion still remained.[24] However, English courts have recently extended the concept of error of law to cover errors of fact, where the error of fact is sufficiently unfair.[25] Consequently, by seeing many errors of fact as errors of law, the English conception of error of law has arguably become so wide that, it too has become indeterminate and conclusory in nature.[26]

Any disagreement with Kirby J's preferred approach does not diminish his contribution. Ascertaining the scope of judicial power has always involved setting up markers. Those markers, however, may operate in different ways to reflect different objectives. As Aronson pointed out, the marker of jurisdictional error need not tell us everything (or even anything) about the circumstances in which an exercise of power will be unlawful. There is nothing wrong with it operating purely as descriptive of a conclusion. The importance of Kirby J's contribution here is to highlight that jurisdiction error, although a marker of invalidity, cannot be used for anything more than that. It cannot tell us what circumstances will give rise to invalidity.

A Remedy for serious administrative injustice

It was Kirby J's open acknowledgment of an assessment of underlying policies that allowed for ready critique of his Honour's judgments. One clear candidate for such critique is his Honour's suggestion that the judiciary can fashion a remedy for serious administrative injustice.

In *Applicant S20*, Kirby J suggested the existence of a residual common law remedy to correct "serious administrative injustice", which was designed to provide a safety net in judicial review cases where an applicant could not make out an established ground of review.[27] For Justice Kirby, the basis of this residual remedial power was the inherent flexibility of the common law: "Our legal system commonly rejects absolute or rigid categories. It does so out of a recognition of the requirement to secure justice in the particular case wherever possible".[28] Kirby J thus argued:

> "Courts of...review do not generally disturb...administrative evaluations of the facts and merits of a case. But, subject to the Constitution or the applicable legislation, they reserve to themselves the jurisdiction and power to intervene in extreme circumstances. They do this to uphold the rule of law itself, the maintenance of minimum standards of decision-making and the correction of clear injustices where what has occurred does not truly answer to the description of the legal process that the Parliament has laid down.
>
> ...

> It has been said that the attainment of administrative justice is not the object of judicial review. At the same time, this Court should not shut its eyes and compound the potential for serious administrative injustice demonstrated by the appellant. It should always take into account the potential impact of the decision upon the life, liberty and means of the person affected."[29]

Judicial review courts would, therefore, have a reserve power to intervene where "what has happened does not truly answer to the description of the legal process that the Parliament has laid down". That power is an exceptional one, to be exercised only in "extreme" cases, which, Kirby J argued, were to be defined with respect to both the nature of the decision-maker's error and the gravity of its consequences to the individual.[30] While this is an interesting suggestion, it raises at least two issues.

Kirby J's proposed "serious administrative injustice" remedy is "remarkably similar" to recent developments in English judicial review, where English courts have issued relief where a decision causes "conspicuous unfairness" to an individual.[31] For example, in *Secretary of State for the Home Department v R (on the application of Rashid)*,[32] Pill LJ held that the Home Department's "flagrant and prolonged incompetence" had caused conspicuous unfairness to Rashid, and that "degree of unfairness was such as to amount to an abuse of power requiring the intervention of the court".[33] For Groves, the decisive issue in *Rashid* was the degree of unfairness suffered: "If the unfairness was 'extreme', or capable of attracting similar descriptors, an abuse of power could be found".[34] However, this has been criticised for providing little legal principle to guide the intervention of courts. As Groves has said, this approach provides courts with little more than "impressionistic guidance", and provides no clear criteria to determine when unfairness has become sufficiently serious to warrant the court's intervention.[35]

The same issues arise with respect to a remedy for serious administrative injustice. Under Kirby J's approach, courts must intervene to avoid "serious" injustice, arising in "extreme" circumstances, where what has occurred does not "truly answer" the legal process prescribed by Parliament. The use of "extreme" and "serious", for example, does not clearly articulate or determine when an administrative injustice should be remedied; no clear legal principle or guidance to control the court's intervention is provided. In this respect, Groves has argued that Kirby J's suggested remedy "lacks a coherent legal principle and...simply provides a cloak for the imposition of subjective judicial impressions rather than legal doctrine".[36]

It is also arguable that the Constitution's separation of powers places insurmountable obstacles in the path of such a remedy. The High Court has articulated a narrow conception of judicial power, which prevents Chapter III courts from exercising power over the merits of administrative action. As Brennan J explained in *Quin*:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative justice or error. The merits of administrative action...are for the repository of the relevant power and, subject to political control, for the repository alone."[37]

More recently, in *Lam*,[38] the High Court reiterated the constitutional limits imposed on courts conducting judicial review. Gleeson CJ noted that the High Court's s 75(v) jurisdiction "does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration".[39] Similarly, McHugh and Gummow JJ emphasised that "[a]n aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of...the executive function of administration".[40]

Kirby J claimed that the serious administrative injustice remedy would fall within the scope of judicial power, as courts exercising it would be "uphold[ing] the rule of law…[and ensuring]...minimum standards of decision-making".[41] However, as Groves has argued, the primary basis upon which the supposed illegality of a decision under review can be judged, and hence the applicability of the remedy determined, is the merits and/or fairness of that decision.[42] Kirby J explicitly calls for courts to consider the "potential impact of the decision upon the life, liberty and means of the person affected".[43] Given the limited nature of judicial review, as described by Brennan J, and the High Court's explicit warnings against entering into the merits of decisions, the determination of the legality of administrative action with respect to a judge's opinion as to whether that action constitutes a serious administrative injustice is likely to transgress the proper limits of judicial review.[44]

A formalistic approach to the question of judicial review might have allowed Kirby J to hide this analysis within the framework of jurisdictional error. Current grounds of review might have been twisted to accommodate his Honour's extended vision of the demands of the rule of law. Such an approach might have deflected critique: what might appear to many to be an exercise of merits review might have masqueraded undetected as an exercise of judicial power by the simple device of a jurisdictional error. However, such an approach would have been disingenuous. Consistent with his other decisions, however, Kirby J eschewed reliance on such conclusory characterisations, instead preferring to explain the principle in transparent terms.

The Public/private distinction

Clearly, judicial review is concerned with the control of governmental - that is, executive power. Executive power is an aspect of sovereign authority. Exercises of power that arise from private arrangements, such as arbitration, do not involve an exercise of sovereign authority. At a time when traditional government activities were performed according to traditional government structures, the question of what was an exercise of government power was relatively straightforward. However, the premises in this proposition are increasingly becoming unstable. Over the last 20 years, various functions that were once performed by government departments and businesses have been transferred to private corporations through privatisation and outsourcing processes. Somewhat surprisingly, however, relatively few Australian cases have dealt with the question of whether decisions made by non-government, non-statutory entities - such as private corporations - are reviewable in Australian administrative law.

In England, the issue was considered in *Datafin*, in which the Court of Appeal decided that private bodies entrusted with "public power" would be subject to judicial review.[45] The case of *NEAT Domestic*[46] provided the High Court with an opportunity to consider this question in an Australian context, and in light of the English developments. Under the *Wheat Marketing Act 1989* (Cth), the export of wheat was prohibited without the consent of the Wheat Export Authority ('WEA').[47] The Act provided, however, that the WEA could not give consent to export without the written consent of AWB (International) Ltd ('AWBI'). AWBI was a wheat exporter and a wholly owned subsidiary of AWB, both companies having been incorporated under the Corporations Law of Victoria. NEAT Domestic was a trader in wheat and hence a competitor of AWBI. NEAT Domestic applied for consent to export wheat and was refused by AWBI, thus forcing the WEA to also refuse consent. Consequently, NEAT sought review under the *ADJR Act* of AWBI's refusal decision.

The issue for the High Court was whether AWBI, a private company exercising powers under the *Wheat Marketing Act*, was subject to administrative law restraints and, more particularly, whether it could exercise its power to grant and refuse export consent with reference to its own commercial interests, or whether AWBI was bound to consider the merits of each individual export application.

The majority decision of McHugh, Hayne and Callinan JJ concluded that AWBI's decision to refuse NEAT's export application was not reviewable under the *ADJR Act* and, furthermore, that the common law judicial review remedies of prohibition, *certiorari* and *mandamus* were unavailable.[48] The majority gave three related reasons for why "public law remedies" did not apply to AWBI:

> "First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors — the authority and AWBI. Secondly, there is the "private" character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests."[49]

As to the first reason, to ascertain whether AWBI's decision fell within the *ADJR Act*'s jurisdictional requirements, the majority adopted an institutional approach to administrative law's public/private distinction, examining the nature of the decision-maker (AWBI), rather than the nature of the decision itself.[50] Their Honours found that the *Wheat Marketing Act* did not confer authority on AWBI to make the consent decision, but rather, that power arose by virtue of AWBI's incorporation.[51] AWBI's decision was not, therefore, an administrative decision made under an enactment. Instead, WEA's decision to consent to an export application was "the operative and determinative decision which the [legislation] requires or authorises".[52]

The second and third reasons related more to the conclusion that judicial review was unavailable at common law.[53] In that respect, the majority held that AWBI need not pay regard to the interests of others when considering export applications. This was because AWBI's private sector profit motive could not co-exist with a requirement to consider the interests of others, especially competitor companies. From that, the majority "extrapolated from the inappropriateness of supposing a duty to consider the commercial interests of others to the general conclusion that AWBI was not governed by common law judicial review".[54]

By contrast, Kirby J found that the decision of AWBI was amenable to review under the *ADJR Act*. His Honour's judgment was premised on a desire to bolster the rule of law, by ensuring that Parliament is unable to place the exercise of public power outside the supervision of the courts. In that vein, he began his judgment by commenting:

> “This appeal presents an opportunity for this court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is "outsourced" to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules."[55]

In considering whether AWBI's decision was reviewable under the *ADJR Act*, Kirby J rejected the institutional approach to the public/private distinction adopted by the majority.[56] Rather, his Honour argued that the character of decisions of bodies assigned important public functions cannot be determined conclusively by reference to their legal structure.[57] Thus, by adopting that approach and examining the nature of the decision under review, Kirby J found (contrary to the majority) that the decision was "made...under an enactment":

> "The only way that AWBI's "decision" could take on a legal character affecting the conduct of the Authority...is by force of the Act...it is the Act that provides for, requires, and gives legal force to, AWBI's "decisions"...It is the role performed for the purposes of the Act, and not the corporate structure of AWBI, that determines the character of the "decisions" in question…"[58]

Kirby J also dealt in depth with the issue of whether AWBI's decision was of an "administrative character".[59] For his Honour, "administrative" decisions include those "made in executing or carrying into effect the laws of the Commonwealth".[60] In determining that AWBI's decision met that definition, his Honour considered the issue of whether AWBI was exercising public or private power.[61] Kirby J argued that if a decision is made pursuant to the exercise of a "public power", it is more likely to be of an "administrative character", within the meaning of the *ADJR Act*.[62] That AWBI's approval was fully integrated into the regulatory scheme so that it effectively held a veto over the exercise of statutory consent was an important reason for his Honour's conclusion. So too was the fact that the decision had an impact on much wider interests than those of an ordinary corporation. Furthermore, since remedies under the *Trade Practices Act 1974* (Cth) were not available, administrative review was the only available mechanism to hold AWBI accountable.[63]

Kirby J (along with Gleeson CJ), was in the minority, and was the only High Court judge to find AWBI's decisions to be amenable to judicial review.

It is surprising that the majority view was not driven by reference to the underlying purposes of judicial review. The majority judges had been parties to other judgments which had emphasised the centrality of judicial review to the maintenance of the rule of law.[64] How is the rule of law affected when private actors are used in regulatory schemes? In the context of determining the reach of ss 75(iii) and (iv) of the Constitution, the High Court has always taken a broad view to ensure that the jurisdiction of the courts is not subject to 'colourable evasion'.[65] The majority in *NEAT Domestic* do not wrestle with these issues. The majority approach, that looks to institutional arrangements for the exercise of power,[66] largely ignores the reality that those institutions may have, in the modern regulatory state, broken down. Thus, it is of limited utility for the purposes of disentangling various threads in public/private regulatory schemes.

Not surprisingly, the reasoning of the majority has been heavily criticised.[67] In particular, Aronson notes that the majority judgment "leaves unresolved the wider question of how far, if at all, Australia's common law of judicial review should follow England's extension to private sector bodies exercising public power".[68] Indeed, for Aronson, "the real question for common law judicial review should be whether AWBI was exercising public or private power".[69]

The judgment of Kirby J identified the broader policy considerations underlying the judicial review of public decisions made by private bodies. His decision was premised on upholding the rule of law by ensuring that such decisions could not be removed from the court's supervision. His Honour offered detailed reasons that properly engaged with the fundamental issue in the case (and common law judicial review more generally): whether AWBI was exercising public or private power.[70]

Griffith University v Tang[71] provided another opportunity to revisit these issues. The case concerned the judicial review of a decision made by Griffith University to exclude Ms Tang from a PhD program, on the basis that she had "undertaken research without regard to ethical and scientific standards".[72] Ms Tang challenged the decision under the *Judicial Review Act 1991* (Qld), alleging a denial of natural justice. The *Judicial Review Act* was framed in the same terms as the *ADJR Act*, and thus the exclusion decision was reviewable if it was, inter alia, "made...under an enactment".[73] The source of the power used to exclude Ms Tang was a Policy on Academic Misconduct, developed by the University's Academic Committee, a body established by, and permitted to exercise delegated powers of, the University Council, pursuant to the *Griffith University Act 1998* (Qld).[74] The fundamental issue was, therefore, whether the exclusion decision was "made...under an enactment".[75]

The majority judgment of Gummow, Callinan and Heydon JJ found that the University's decision to exclude Ms Tang was not made "under an enactment". Prior to *Tang*, *ADJR*'s requirement that the decision be made "under" an enactment "had spawned several tests, most of them vague, and none of them dispositive".[76] In reaching its conclusion, the majority enunciated a new approach to determining whether a decision is, in fact, made "under" an enactment, which has brought a degree of clarity to that issue:[77]

> "The determination of whether a decision is "made … under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be "made … under an enactment" if both these criteria are met."[78]

The majority adopted a broad and undemanding approach to the first requirement, holding that a decision could be "authorised" by an enactment even if there was no statutory duty to make it and even if the statutory authorisation had to be implied.[79] Consequently, the majority held that the expulsion decision was authorised by the University Act. The majority judges summarised their second requirement - a "legal right or obligation" test as:

> "[D]oes the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?"[80]

The majority held that the University's decision did not affect Ms Tang's legal rights and obligations and, consequently, could not satisfy the "legal right or obligation" criterion.[81] Consequently, the decision was not made "under an enactment", and there was no jurisdiction for the court to review the expulsion decision. The majority argued that "the respondent enjoyed no relevant legal rights and the University had no obligations under the *University Act* with respect to the course of action the latter adopted towards the former".[82] Indeed, rather surprisingly, the majority considered that no set of legal rules governed the relationship between the university and Ms Tang - the relationship was "at best...consensual" and "dependent upon the presence of mutuality.[83]

As in *NEAT*, the judgment of Kirby J drew from rule of law principles that public authorities should be accountable to act in accordance with the law when exercising public powers, and a desire to ensure that the ambit of remedial judicial review legislation, such as the *ADJR Act*, is not unduly diminished.[84] His Honour began his judgment by stating:

> "For the second time in less than 2 years, this court adopts an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power. The court did so earlier in NEAT Domestic Trading Pty Ltd v AWB Ltd. Now it does so in the present case.
>
> Correctly in my opinion, NEAT Trading has been described as a "wrong turn" in the law. Its consistency with past authority of this court has presented difficulties of explanation. Its outcome has been described, rightly in my opinion, as "alarming", occasioning a serious reduction in accountability for the exercise of governmental power. Now, the error of approach, far from being corrected, is extended. This constitutes an erosion of one of the most important Australian legal reforms of the last century [the ADJR Act]. This court should call a halt to such erosion."[85]

For Kirby J, the rule of law "renders the recipients of public power and public funds answerable, through the courts, to the people from whom the power is ultimately derived...".[86] This approach drew the public/private distinction and whether the University was exercising public power, to the centre of Kirby J's judgment.[87] Kirby J expressly rejected the majority's "voluntary association" characterisation of the relationship between Ms Tang and the University, and concluded that the decision to terminate the relationship between the parties involved an exercise of public power that was reviewable under the *Judicial Review Act*: "the reality [was] that the relevant "arrangement" between the university and [Ms Tang] consisted solely in the exercise by the university of its statutory powers under the Higher

Education Act and [the] University Acts".[88] The conclusion that the University was exercising public power was also bolstered, for example, by the recognition that Australian universities are (largely) public institutions that rely on significant government funding.[89]

As in *NEAT*, the majority's judgment is not driven by rule of law considerations. Is the rule of law objective which is said to underlie much of the constitutional writ terrain advanced or unaffected by the conclusion that the challenged decision was not subject to judicial review? The majority test which focused on whether the decision, itself, affected legal rights and obligations, was obviously an attempt to draw out the characteristics of sovereign power. However, there was little effort made to tie this to a broader assessment of the public/private context. As Mantziaris and McDonald have argued, "the appropriateness of judicial review of the exercise of a power that was arguably "private", but exercised by a body that was arguably "public" is the question that lay at the heart of *Tang*".[90] For those commentators, "the criteria for evaluating any proposed test for characterising whether decisions are "made...under an enactment" must include the capacity of the test to frankly acknowledge the policy questions which attend the public/private distinction".[91] In their view, a test examining whether a decision affects a legal right or obligation does not illuminate these issues. Indeed, that approach "is likely to conceal rather than reveal the policy considerations relevant to deciding which decisions made by public authorities should be subjected to administrative law norms".[92] By contrast, as we have seen, Kirby J explicitly dealt with the public/private distinction, finding that the University was exercising a power of a public nature.

The reasoning of Kirby J in these two cases offered a transparent assessment of the underlying policy interests that inform an answer to the question of what constitutes an exercise of sovereign power at the public/private interface and, accordingly, how far judicial review should extend. When judged by those standards, the majority judgments seem to miss the methodological mark.

A Commitment to public accountability: a duty to provide reasons

We have already seen Kirby J's explicit commitment to public accountability in his administrative law decisions. In suggesting the possibility of a remedy for serious administrative injustice and in seeking to dissect the nature of power exercised at the public/private interface, his Honour was driven by the rule of law demands of public accountability. The same administrative law value informed his decision, whilst the President of the New South Wales Court of Appeal, in *Osmond v Public Service Board of New South Wales*[93]. *Osmond* involved a public servant who had applied for promotion, which was determined by the Governor on the recommendation of the Head of the Department of Local Government and Lands. Mr Osmond was not selected and, in accordance with the *Public Service Act 1979* (NSW), appealed the decision to the Public Service Board. The Board dismissed Osmond's appeal; it did not provide reasons as it was not under a statutory duty to do so. Osmond thus sought a declaration in the New South Wales Supreme Court to the effect that reasons had to be given. At first instance, Hunt J rejected Osmond's application, considering himself bound by authority to deny the relief sought.[94] Osmond then successfully appealed to the New South Wales Court of Appeal.

Kirby P held that there existed a general duty on decision-makers to provide reasons for their decisions:

> "The overriding duty of public officials who are donees of statutory powers is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review…"[95]

His Honour saw the basis of this right as being two-fold: first, fairness in public administration required those who exercise a public power to explain its exercise; and second, being necessary for the facilitation of appeal processes and judicial review proceedings.[96] However, that right would not exist where the provision of reasons would be otiose or would disclose confidential information.[97]

As we have seen, a feature of many Kirby J's judgments is his commitment to transparent reasoning that details and discloses the underlying premises and policy considerations upon which they are based.[98] Kirby P's judgment in *Osmond* is also illustrative of that commitment. Indeed, Marilyn Pittard has commented that "[t]he judgment of Kirby P...remains a focus today for an evaluation of the rationale for the duty; and is exemplary of the possible role of the judiciary in resolving the law in favour of appropriate social and administrative good".[99] In *Osmond*, his Honour stated that:

> "There are opportunities for judicial restraint and judicial development of the law...But the consequence of this...is an obligation to consider relevant policy considerations which, consistent with legal authority, may properly be taken into account in determining whether, as in the present case, to take the next small step in the elaboration of the common law or to hold back."[100]

With that approach in mind, Kirby P discussed in detail a range of policy arguments both in favour of and against a right to reasons.[101] Despite the detailed policy reasons cited by Kirby P in support of the duty to provide reasons, the High Court, on appeal, rejected his Honour's view that the common law required reasons to be given for administrative decisions. For Gibbs CJ, writing the leading judgment, "no rule of common law, and no principle of natural justice, requir[ed] the Board to give reasons for its decision, however desirable it might be thought that it should have done so".[102] Gibbs CJ's approach was also grounded in policy, in that parliament, rather than the judiciary, was better placed to implement such a change: "even if it be agreed that a change such as he suggests would be beneficial, it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts".[103] Despite rejecting a general duty to provide reasons, Gibbs CJ acknowledged that, in "special circumstances", natural justice may require reasons to be given.[104]

Despite almost 20 years having passed, the High Court has not revisited *Osmond* and it remains the law in Australia that administrative decision-makers are not under an obligation to provide reasons for their decisions.[105] That is clearly still a matter of regret for Kirby J; indeed, in 2008 he commented that "I do not wish still to be smarting from the decision of this Court in *Public Service Board v Osmond*, but it is still on my mind".[106] Few would now dispute that it is generally desirable for decision-makers to give reasons for their decisions.[107] The real question, therefore, is how far such an obligation should extend. As Lacey has argued, "the question is not whether Kirby P's broad approach to the provision of reasons will be ultimately vindicated in Australian law, but how that approach will manifest itself in Australian common law".[108]

The English courts have also maintained the traditional common law position that there is no general duty to provide reasons, but at the same time they have been willing to require the provision of reasons in certain circumstances, stemming from the requirements of natural justice.[109] In *R v Universities Funding Council; Ex parte Institute of Dental Surgery*[110], Sedley J identified two classes of cases in which the English courts would insist upon the provision of reasons:[111] where the interests affected by the decision are so important (such as the deprivation of liberty) that reasons must be given;[112] and where the decision appears to be aberrant.[113] This English approach is incremental, developing exceptions to the general proposition that no duty to provide reasons exists, and "displaying little concern as to how

the limits of the emerging duty might be defined".[114] This can be contrasted with Kirby P's approach of requiring a broad general duty.[115]

Conclusion

Justice Kirby's impact on the Australian jurisprudence will be long remembered. His Honour's reputation as the 'great dissenter' almost guarantees that result. Whether one agrees or disagrees with his views on any particular administrative law issue, there is much to admire in his Honour's approach to resolving fundamental questions that lie at the heart of our constitutional arrangement. His commitment to developing legal principles to ensure the accountability of government pervades his Honour's judgments, as does a commitment to open and transparent reasoning. The characteristics of his approach have exposed his own judgments to critique but have also operated to expose the shortcomings in the judgments of other members of the Court. For that reason alone, his Honour's impact in the field will be enduring.

Endnotes

1 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
2 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 ('*Bodruddaza*').
3 Ibid, 668.
4 *Bodruddaza* (2007) 228 CLR 651.
5 See, eg, Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008), 164-8; Mark Aronson, "Jurisdictional error without the tears", in Matthew Groves and H.P. Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines* (2007) 330.
6 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 122-123 [211]-[212] ('*Miah*').
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504, 509 [22]. See also *Commissioner of Taxation v Futuris Corporation Limited* (2008) 247 ALR 605, 634 [130] ('*Futuris*'), where Kirby J argued that "there is no reason why the constitutional idea sustaining the writs expressed in s 75(v) (and s 39B(1) of the *Judiciary Act*) should not evolve into a broader concept of 'legal error'".
9 Most recently in *Futuris* (2008) 247 ALR 605, 634 [129].
10 Ibid, 635 [131].
11 *Miah* (2001) 206 CLR 57, 122-123 [211]-[212]
12 *Craig v South Australia* (1995) 184 CLR 163, 178. See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 (Hayne J).
13 *Miah* (2001) 206 CLR 57, 122-123 [211]-[212], *Futuris* (2008) 247 ALR 605, 634[129]. See also *SDAV v Minister for Immigration and Multicultural Affairs* (2003) 199 ALR 43 [27] (Hill, Branson and Stone JJ).
14 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 14.
15 Ibid, 227.
16 Ibid.
17 Aronson, above n 6, 333.
18 Aronson, above n 6, 333, 344.
19 Ibid, 333.
20 Ibid.
21 Ibid, 344.
22 *R v Hull University Visitor; Ex parte Page* [1993] AC 682.
23 See the discussion in Aronson, Dyer and Groves, above n 15, 218 - 227.
24 Aronson, above n 6, 337.
25 *E v Secretary of State for the Home Department* [2004] QB 1044.
26 Aronson, above n 6, 337-338; Aronson, Dyer and Groves, above n 15, 14.
27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20* (2003) 198 ALR 59, 96, 98 [161], [170] ('*Applicant S20*'); Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470, 511-512.
28 Ibid, 96 [161]. Kirby J's approach is not limited to judicial review. In *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, the High Court considered the powers of an appellate court to reverse factual conclusions reached by a primary judge. In his consideration of the issue, Kirby J argued that: *"The common law usually recoils from absolute rules of mechanical or inflexible application. It does so because its long experience illustrates too often the need to retain elements of flexibility to cover an exceptional case. Unyielding*

rules...could...become an instrument of serious injustice. That is why common law rules normally reserve a place for the exceptional case" (at [100]).

29 *Applicant S20* (2003) 198 ALR 59, 96, 98 [161], [170]
30 Mark Aronson, "Is the ADJR Act hampering the development of Australian administrative law?" (2004) 15 *Public Law Review* 202, 204.
31 Groves, above n 28, 512. See generally *Secretary of State for the Home Department v Zequiri* [2002] UKHL 3, [44] (Lord Hoffmann)
32 [2005] EWCA Civ 744.
33 Ibid, [52], [54].
34 Groves, above n 28, 488.
35 Ibid.
36 Ibid, 512.
37 *Attorney-General v Quin* (1990) 170 CLR 1, 35-36 (Brennan J). His Honour's comments were cited with approval by Gleeson CJ, Gummow, Kirby and Hayne JJ in *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152-153: Note also the comments of Gleeson CJ in *NEAT Domestic Trading Pty Limited v AWB Limited* (2003) 216 CLR 277 ('*NEAT Domestic*'): "[j]udicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function" that is being reviewed.
38 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*').
39 Ibid, 12.
40 Ibid, 24-25.
41 Groves, above n 28, 512.
42 Ibid.
43 *Applicant S20* (2003) 198 ALR 59, 98 [170]
44 Chief Justice Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the Australian Institute of Administrative Law 2004 National Lecture Series, Adelaide, 5 August 2004)
45 *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 ('*Datafin*').
46 *NEAT Domestic* (2003) 216 CLR 277.
47 For a more in depth factual background, see the judgments of Gleeson CJ, [1]-[15]; McHugh, Hayne and Callinan JJ, [31]-[35]; Kirby J [69]-[81].
48 *NEAT Domestic* (2003) 216 CLR 277, 297 [49]-[51], 300 [64]. Note that Aronson argues that the majority also found judicial review's *grounds* to be inapplicable to AWBI: Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 9.
49 *NEAT Domestic* (2003) 216 CLR 277, 297 [51]
50 Christos Mantziaris, 'A 'Wrong Turn' on the public/private distinction: NEAT Domestic Trading Pty Ltd v AWB Ltd' (2003) 14 *Public Law Review* 197, 198-199.
51 *NEAT Domestic* (2003) 216 CLR 277, 298 [54] - i.e. AWBI's power was sourced from s 124 of the *Corporations Act 2001* (Cth).
52 *NEAT Domestic* (2003) 216 CLR 277, 297 [52]
53 Aronson, above n 49, 10.
54 *NEAT Domestic* (2003) 216 CLR 277, 298-300 [57]-[64]; Aronson, Dyer and Groves, above n 15, 149.
55 *NEAT Domestic* (2003) 216 CLR 277, 300 [67]-[68]
56 Mantziaris, above n 51, 199.
57 *NEAT Domestic* (2003) 216 CLR 277, 307-308 [94]-[96]. Mantziaris, above n 51, 199.
58 *NEAT Domestic* (2003) 216 CLR 277, 315 [121].
59 As required by the definition of a "decision to which this Act applies" in s 3(1) of the *ADJR Act*.
60 *NEAT Domestic* (2003) 216 CLR 277, 310 [102], citing the decision of Ellicot J in *Burns v Australian National University* (1982) 40 ALR 707, 714.
61 *NEAT Domestic* (2003) 216 CLR 277, 310-314 [101]-[115].
62 Ibid, 314 [115].
63 Ibid, 311 [105].
64 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
65 *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J).
66 Wendy Lacey, 'Administrative Law' in Ian Freckelton and Hugh Selby (eds.), *Appealing to the Future: Michael Kirby and his Legacy* (2009) 81, 97.
67 See e.g. Aronson, above n 31, 211-212; Cane and McDonald, above n 6, 66; Mantziaris, above n 51, 198-200.
68 Aronson, above n 31, 212.
69 Aronson, above n 49, 12.
70 Lacey, above n 67, 98.
71 (2005) 221 CLR 99 ('*Tang*').
72 *Tang* (2005) 221 CLR 99, 104-105 [1].
73 Ibid, 105 [2].
74 Lacey, above n 67, 99.
75 *Tang* (2005) 221 CLR 99, 105 [5]

76 Aronson, Dyer and Groves, above n 15, 79. These tests are discussed in e.g. Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 23-26.
77 Aronson, Dyer and Groves, above n 15, 79.
78 *Tang* (2005) 221 CLR 99, 130-131 [89].
79 Aronson, Dyer and Groves, above n 15, 80.
80 *Tang* (2005) 221 CLR 99, 128 [80].
81 Ibid, 131 [91].
82 Ibid, 132 [96]
83 *Tang* (2005) 221 CLR 99, 131 [91].
84 Lacey, above n 67, 101; *Tang* (2005) 221 CLR 99, 152-153 [153]-[154].
85 *Tang* (2005) 221 CLR 99, 133 [99]-[100].
86 Ibid, 153 [154].
87 Mantziaris and McDonald, above n 77, 47; Cane and McDonald, above n 6, 65.
88 *Tang* (2005) 221 CLR 99, 155 [161].
89 Ibid, 135 [106].
90 Mantziaris and McDonald, above n 77, 46.
91 Ibid, 47.
92 Cane and McDonald, above n 6, 64.
93 [1984] 3 NSWLR 447 ('*Osmond*')
94 *Osmond v Public Service Board of New South Wales* [1983] 1 NSWLR 691.
95 *Osmond* [1984] 3 NSWLR 447, 467.
96 Ibid, 467.
97 Ibid, 468.
98 Lacey, above n 67, 86, 102.
99 Marilyn Pittard, 'Reasons for Administrative Decisions: Legal Framework and Reform', in Matthew Groves and H.P. Lee (ed) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007), 172, 178.
100 *Osmond* [1984] 3 NSWLR 447, 463.
101 *Osmond* [1984] 3 NSWLR 447, 464 - 465. See also the comments of Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105]; Marilyn Pittard, above n 100, 173-175; P.P. Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283-285.
102 *Public Service Board v Osmond* (1985) 159 CLR 656, 671.
103 Ibid, 669.
104 Ibid. See also Deane J, (1985) 159 CLR 656, 676.
105 Aronson, Dyer and Groves, above n 15, 633-634 argue that the High Court's decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 and *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 suggest the High Court will not embrace a "radical change" to its jurisprudence on the right to reasons.
106 *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* [2008] HCATrans 173.
107 Gibbs CJ acknowledged this, despite his finding that no general duty arose: *Public Service Board v Osmond* (1985) 159 CLR 656, 668.
108 Lacey, above n 67, 90-91.
109 Aronson, Dyer and Groves, above n ?, 630-633.
110 [1994] 1 All E.R. 651.
111 Ibid, 671-672.
112 E.g. *R v Civil Service Appeal Board; Ex parte Cunningham* [1991] 4 All ER 310.
113 *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531.
114 Aronson, Dyer and Groves, above n 15, 631; *Stefan v General Medical Council* [1999] 1 WLR 1293.
115 Aronson, Dyer and Groves, above n 15, 631.

NATURAL JUSTICE: PROCEDURAL FAIRNESS "NOW WE SEE THROUGH A GLASS DARKLY"[1]

Robert Lindsay*

The History of natural law

Procedural fairness has its origin in natural law. Aristotle, in discussing natural law, observed that the laws of nature are immutable and have the same validity everywhere "as fire burns both here and in Persia".

Cicero characterised it as: "the law which was never written and which we were never taught, which we never learned by reading, but which was drawn from nature herself, in which we have never been instructed, but for which we were made, which was never created by man's institutions, but which is in born in us".

St Thomas Aquinas saw it as eternal law, which man can apprehend with unaided reason but which, because it flows from God's reason and not man's, cannot be created or changed by man.

Specific principles were formulated as arising from this concept. Seneca spoke of the principle that a man must be heard before he is condemned. The rule that a person should not be judged in his own cause goes back to Roman principles. St John records Nicodemus as saying to the Pharisees, who sent officers to apprehend Jesus, "does our law judge any man before it hears him?"

In more modern times, natural law principles have been reflected in various written constitutions, inspired by the natural law principles that the philosophers Locke, Rousseau and Paine espoused[2]. The *audi alteram partem* rule (the rule that the other party should be heard) and the principle that no man should be judge in his own cause are invoked by way of judicial control of administrative and judicial functions.

Procedural fairness in administrative law

Lord Diplock has described the rules of natural justice as a legal doctrine meaning "no more than the duty to act fairly…….". Since the House of Lords decision in 1964 in *Ridge v Baldwin*, procedural fairness is no longer restricted by distinctions between "judicial" and "administrative" functions or between rights and privileges.[3] In administrative law, natural justice is a well defined concept which initially comprised essentially two fundamental rules of fair procedure: that a person may not be judge in his/her own cause; and that a person's defence must always be fairly heard. There has been some expansion of the application of "fairness" in recent times.

These rules apply to administrative power and sometimes, also, to powers created by contract[4]. A decision which offends against these principles of natural justice is a nullity.

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The Role of the Constitution

In Australia, the principle of fairness has developed from a heightened consciousness of constitutional principle. Countries with written constitutions, such as Australia and Canada, have not accepted the wider basis for judicial review that Scotland, England and New Zealand, which do not have modern written constitutions, have chosen to recognise. This is because of the constitutional context in which judicial review occurs in Australia. As Justice Gummow has said:

> "the subject of administrative law cannot be understood or taught without attention to its constitutional foundation".[5]

The separation of judicial power from legislative and executive power in Australia has meant that judicial review is anchored in the principle of ultra vires, which requires before intervention that the relevant administrative act or decision was in breach of or unauthorised by law; that it was beyond the scope of the power given to the decision maker by the law; or that the relevant decision had failed to comply with the law.

Conversely, in Scotland, England and New Zealand, the basis is essentially that the common law itself will justify and authorise courts in developing their own laws to control administrative action. The rationale for Australia's approach is that the Federal judicial power should be separate from legislative and executive power, and that this limits the power of the judiciary in relation to the functions which it can perform. The development of the common law of Australia is by reference to constitutional principle. As the late Justice Selway explains[6], the need for the common law to develop in a uniform and consistent fashion, having regard to the constitutional element, explains why on the one hand judicial deference to the legal interpretation of the administrative decision makers has been rejected by the High Court, notwithstanding that the decision was in a State and not a Federal jurisdiction. The distinction between legality and merit review, and between jurisdictional error inviting the intervention of the courts and non- jurisdictional error, which does not, may also be traced to the Constitution.

It has been strongly argued that the constitutional foundation means that because the principle of ultra vires prevails as the source of judicial review, this precludes merits review and that the jurisdiction of a court to review administrative action, at least for statutory powers, is to be found in the relevant statute. The prevailing view of the High Court is that which Brennan J stated in *Attorney General (NSW) v Quin*[7] *('Quin')*:

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

On this basis procedural fairness will not extend to courts correcting substantive unfairness.

The Source of power to correct procedural unfairness: statute or common law?

Yet within the constitutional constraint there remains a difference of view as to the source of power for procedural unfairness, though there is considerable overlap between the two.

Sir Anthony Mason has pointed to the difference in the exercise of judicial review. On the view that the foundation is to be found in the common law, it has been framed that, unless Parliament clearly intends otherwise, the common law will require decision makers to apply the principles of good administration as developed by the judges in making their decisions.

The other view, which is currently prevalent, is that statutory ultra vires is the foundation, and unless Parliament clearly indicates otherwise, it is presumed to intend that decision makers must apply the principles of good administration drawn from the common law as developed by the judges in making their decisions[8]. There is the presumption that in the event of ambiguous legislation it is not intended that common law rights should be invaded.

In regard to procedural fairness, Sir Anthony points to Byles J's dictum in *Cooper v Wandsworth Board of Works* that:

> "…….although there are no positive words in the statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature"[9].

Sir Anthony Mason has said that this may be regarded as a "Delphic utterance" which supports either statutory implication or common law creation depending upon the eye of the beholder[10]. Brennan J in *Annetts v McCann*[11] saw the starting point as the statutory basis for judicial review and this has been adopted by Gleeson CJ and Hayne J[12]. The starting point may be important in the context of judicial review of procedural fairness. Sir Anthony Mason said that if the statute is the starting point it may be easier to conclude that there is no intent to subject the decision maker to the common law principles[13].

The Application of procedural unfairness

The rapid development of procedural unfairness can be seen in the Migration cases. As late as 1977 the High Court ruled in *R v Mackellar; ex parte Ratu*[14] that the Minister, in ordering deportation of a Tongan, who had overstayed a visitor's visa, was not required to observe the principles of natural justice. However, in 1985, *Kioa v West*[15] effectively reversed the Mackellar decision. Mr Kioa was providing pastoral support to other illegal immigrants and an internal immigration department memorandum said:

> "Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's laws must be a source of concern".

It was held that the remarks were extremely prejudicial and the failure to give Mr Kioa a chance to respond to them gave rise to a breach of natural justice.

In 1990, the High Court ruled that the Minister was obliged by the rules of natural justice to provide a hearing to Mr Haoucher[16] before rejecting a recommendation of the Administrative Appeals Tribunal that he be not deported.

In 2000, an application was made under section 75(v) of the Constitution for a constitutional writ against the Commonwealth. Mr Aala was denied natural justice in that a Tribunal had indicated that it had before it earlier Tribunal and Court papers when, through an inadvertent oversight, the Tribunal did not have four hand-written documents provided by Mr Aala at an earlier stage to the Federal Court. In failing to have regard to the documents the decision maker deprived the applicant of a chance to answer by evidence and in argument adverse inferences were made relevant to credibility. Gaudron and Gummow JJ said:

> "…….if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness the officer exceeds jurisdiction……."[17].

Procedural unfairness may take other forms. In *re Minister for Immigration and Multicultural Affairs; ex parte Applicant S120 of 2002*[18] *('Applicant S120')* the comments of McHugh and Gummow JJ can be viewed as accepting that, where a Tribunal makes findings which are

"illogical, irrational, or lacking a basis in findings or inferences of fact supported on logical grounds", this may result in jurisdictional error,[19] though this would not be so where there is some evidence, albeit such evidence being regarded as insufficient, for the Tribunal to arrive at its adverse conclusion[20].

The principle expressed in *Applicant S120* has similar features to the English Court of Appeal decision in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*[21] *('Wednesbury')* which held that the exercise of a discretion will be invalid if the result is "so absurd that no sensible person could ever dream that it lay within power". In Australia, *Wednesbury* unreasonableness will only be entertained if it can be said that the Tribunal's unreasonableness is such that it should be regarded by a Tribunal as exceeding its jurisdiction. It is only the unreasonableness of the *Wednesbury* kind, and not simply "unreasonableness", that can found intervention.

Application of natural justice principles to disciplinary bodies

Much of the High Court authority is directed to migration cases, yet the doctrine may range far wider, including matters such as university disciplinary committees that report to a council senate; departmental committees that report to a minister or chief executive officer; and conduct by medical, accounting and other professional bodies, provided such bodies are governed by statutory regulation. These authorities almost invariably have their own internal rules which govern the procedures to be followed; the modes of proof and, in some cases, how far legal or other representation will be permitted. Questions sometimes arise as to whether the hearing is to be conducted orally or in writing, how far cross-examination will be permitted; and where legal representation is not allowed, whether those who face the disciplinary process, can resort to legal advice.

As Brennan J said in *Quin*, judicial review is not a free standing right of review to correct administrative error and, as a public law doctrine, a statutory or regulatory foundation for its operation has ordinarily to be found.[22]

Many of the rules governing procedural fairness are collected in J R S Forbes, *Justice and Tribunals* (Federation Press, 2002).

Jurisdictional error

As has been seen, procedural unfairness is anchored in Australia in the wider principle of jurisdictional error. In *Craig v South Australia*[23] it was said by the High Court that an Administrative Tribunal (as distinct from a Court):

> "…….falls into an error of law which causes it to identify wrongly, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion and the Tribunal's exercise or the power to exercise a power is thereby affected, it exceeds its authority or powers"[24].

These factors were not intended as an exhaustive list of jurisdictional errors[25]. However, every failure by a Tribunal to have regard to relevant considerations or to disregard irrelevant considerations does not necessarily amount to jurisdictional error. Judicial review is based on the existence of an error of law because, traditionally, judicial review has not been available simply to correct an error of fact. Conversely, jurisdictional facts are subject to judicial review because an error as to jurisdictional fact is considered to be an error of law[26]. The absence of evidence to support a finding of fact gives rise to a question of law, though insufficient evidence has not generally been regarded as grounds for review in Australia.

Judicial review remedies

Jurisdictional error is central to the operation of remedies for judicial review in the High Court, where jurisdiction is to be found in section 75(iii) and section 75(v), although neither is a source of substantive rights except in so far as the grounds of jurisdiction necessarily recognises the principles of general law, according to which the jurisdiction to grant the remedies is exercised[27].

The Federal Court's jurisdiction is derived from the *Administrative Decisions (Judicial Review) 1977 Act* (Cth) (ADJR Act) and from section 39B(1) of the *Judiciary Act 1903* (Cth). The other source of Federal Court jurisdiction is to be found under section 39B(1A) which confers jurisdiction arising under any laws made by the Parliament. Under the ADJR Act the Federal Magistrates Court has the same jurisdiction as the Federal Court, and the same original jurisdiction under the Migration Act in relation to migration decisions as the High Court has under section 75(v). This is set out in section 39B of the Judiciary Act, 1903.

The *Administrative Appeals Tribunal Act 1975* provides that where an enactment states that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by a particular enactment, or the review of decisions made in an exercise of powers conferred by another enactment, then review may lie to that Tribunal.

In summary, therefore, there are remedies by way of a writ of mandamus, prohibition and injunction vested in the High Court under section 75(v) of the Constitution where sought against an officer of the Commonwealth, and similar powers are given to both the Federal Court and the Federal Magistrates Court in regard to those remedies. All these Courts also have power to give remedies of *certiorari* and declarations in habeas corpus where these are associated with one of the nominated remedies. The High Court has powers under the Judiciary Act to give broad remedies when its jurisdiction is invoked under section 75(iii) of the Constitution. The Federal Court has power to make orders and issue writs under section 23 of the *Federal Court of Australia Act 1976*.

The *Supreme Court Act 1935* (WA) vests in the Supreme Court of Western Australia general and appellate jurisdiction, which includes judicial review of prerogative writs. Also, notably, there are provisions in the *State Administrative Tribunal Act 2004*, which allow the Tribunal to make original primary decisions as well as well as exercise review powers where an enabling act invests jurisdiction in the Tribunal[28].

The Supreme Courts of each state receive the supervisory jurisdiction of the English Courts and, therefore, do not face the same constitutional restraints as Federal Courts and the High Court.

It has been observed that a broader application of judicial scrutiny has been impeded in Australia by the restriction, contained in the ADJR Act, confining decisions subject to review to those decisions that are brought "under enactment". With the privatisation of many activities previously performed in the public sector, the Courts now face the need to develop principles as to which bodies are amenable to judicial review.

Legitimate expectation in decision making

Legitimate expectation as a form of procedural fairness has long been recognised in administrative law. In *Schmidt v Secretary of State for Home Affairs*[29], Denning MR used the expression to apply to a migrant's right to make representation to a decision maker where his permit was to be cancelled before its expiry date. In *Heatley v Tasmanian Racing and Gaming Commission*[30], the expectation on the part of members of the public was that they would continue to receive the customary permission to go onto racecourses upon the

payment of a stated fee to the racecourse owner. If members of the public present themselves at the gate of a football ground, a racecourse, or a dog racing course and tender the stated entrance fee, upon receiving permission to enter they then have what is properly called the right against all the world to remain there for the duration of the relevant event[31]. Again, in *Sanders v Snell*[32], there was a legitimate expectation that a contract would continue until terminated in accordance with the two months notice provision and it was not suggested that the subject of the lease by the respondents had to be established. It was said in *Attorney General (NSW) v Quin*[33] by Brennan J that expectation is seen merely as indicating "the factors and kind of factors which are relevant to any consideration of what are the things which must be done or afforded" to accord procedural fairness to an applicant for the exercise of administrative power.

In *Teoh v Minister for Immigration and Ethnic Affairs*[34] *('Teoh')* the legitimate expectation was of a more controversial nature. A majority in the High Court held that the best interests of the children would be a primary consideration in decisions affecting children, based upon wording of an article in the Convention on the Rights of the Child. In stating that a Convention could assist in the proper construction of a statute in which the language is ambiguous, the majority were merely adopting what had previously been said in *Lim v Minister of Immigration*[35], but Mason CJ and Deane J said such a convention could also guide the development of the common law. Conversely, a legitimate expectation does not bind the decision maker. Mason CJ and Deane J stated that:

> "Legitimate expectations are not to be equated with the rules or principles of law……..the existence of legitimate expectation does not control the decision maker to act in a particular way. That is the difference between a legitimate expectation and a binding rule of law."

Nonetheless, their Honours said that an unincorporated treaty or convention was "not to be dismissed as any platitudinous or ineffectual act"[36] and procedural fairness required that such a legitimate expectation should be considered by the decision maker. This had not been the view of the primary judge, French J (as he then was), nor of McHugh J, who dissented in *Teoh.*

Eight years later, the High Court granted leave in *re Minister for Immigration and Multicultural Affairs; ex parte Lam*[37] *('Lam')* by which time McHugh J was the only surviving sitting member of the High Court judges who had heard *Teoh*. *Lam* may be seen as standing for three principal propositions[38]. First, that legitimate expectation is not a free standing administrative doctrine, but simply an aspect of procedural fairness. McHugh and Gummow JJ said "the notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in a particular case"[39]. Secondly, there is a requirement for an expectation or, at least, there is a basis for a reasonable inference that an expectation is being created. Teoh himself would have had no expectation. Prior to *Teoh*, no-one had reason to suppose a general ratification of an incorporated treaty would give rise to an expectation. On the other hand, it was conceded that it was not merely those expectations for which there was a natural conscious appreciation that a benefit or privilege was to be conferred and that the applicant had turned his mind to the matter, that would be considered[40]. After all, in *Haucher v Minister for Immigration and Ethnic Affairs*[41] an expectation was founded in a detailed policy statement by the Minister to the House of Representatives as to what would guide the exercise by the Minister of the statutory power of deportation. But, contrary to the majority view in *Teoh*, McHugh and Gummow JJ did not see ratification of any Convention as a "positive statement" made to "the Australian people" requiring an executive government to act in accordance with the convention[42].

Thirdly, the *Lam* decision reiterated previous Australian case law which held that the concept of legitimate expectations is directed to procedure and not the outcome. To put it another way, expectation is with the decision making process and not the decision itself[43].

Legitimate expectation as a facet of procedural fairness is precisely that: procedural fairness and not a source of substantive rights.

In *Lam*, Gleeson CJ referred to the Privy Council case of *Attorney General (HK) v Shiu*[44] where the respondent had entered Hong Kong illegally. The government publicly announced its policy to deport illegal immigrants. It said that people such as the respondent would be interviewed and each case would be treated on its merits and that statement came to the knowledge of the respondent. He was made the subject of a deportation order without any consideration of the individual merits of his case. He had no opportunity to explain that he was not an employee but a partner in a business which employed several workers. At his interview he was not allowed to say anything except in answer to the questions put to him by the official who was interviewing him. The Privy Council held that the policy statement that each case would be considered on its merits meant that the respondent had a right to a fair hearing, which he had been denied, though their Lordships left open the wider question as to whether, as a matter of general principle, a person in the respondents position would ordinarily have a right to a fair hearing before a removal order was made. Their Lordships said that it was unfair that he had been denied an enquiry into the individual merits of his case and that it was inconsistent with good administration. Gleeson CJ said that if good administration was a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirements of fairness, it would not relate easily to the exercise of jurisdictions in Australia under section 75(v) of the Constitution, since the constitutional jurisdiction does not exist to allow the judiciary to impose upon the executive branch its ideas of good administration. The failure of a decision maker to take a procedural step resulted in a loss of opportunity to make representation. In Shiu's case it was the existence of a subjective expectation and reliance that resulted in unfairness.

In *Lam*, the department had advised the applicant that his visa was liable to cancellation and that he would have an opportunity to comment. The applicant was told that the matters to be taken into account would include "the best interests of any children" with whom he might have an involvement. A departmental officer later wrote to the applicant requesting contact details of his children's carers and advised that they wished to contact the carers to assess the applicant's relationship with the children. Although contact details were provided, no further steps were taken to contact the children. McHugh and Gummow JJ found that an expectation arose from the conduct of the person proposing to make recommendations to the Minister, the failure to meet that expectation did not reasonably found a case of denial of natural justice, and that the applicant had no vested right to oblige the department to act as it indicated it would, and that it did not result in the applicant failing to put to the department any material that he might have otherwise urged upon it. Nor would the carers have supplemented in any significant way what had been supplied by the applicant.

One cannot help but suspect that special leave was granted in *Lam*'s case to enable review of *Teoh*'s case following the departure of the three members of the High Court who formed the majority in *Teoh*. Lam's argument for special leave was scarcely a strong one. McHugh and Gummow JJ stated that the law of Australia should be as that expressed by McHugh J in his dissenting *Teoh* judgment, at least in so far as there is no need for any distinct doctrine of legitimate expectation[45]. It is only where natural justice conditions the exercise of legitimate expectation that it has any role to play.

Procedural fairness as against substantive protection: the English position

It can be seen that, given the current composition of the High Court, a trend in Australia towards substantive protection is unlikely. The past views about the limits of procedural fairness held by the current Chief Justice, Justice Gummow and Justice Hayne have been openly declared. The constitutional separation of powers and, most notably, *Lam*'s case,

militate against a development towards substantive protection. This attitude also has implications for any development of public law estoppel, abuse of power and proportionality as doctrines likely to be accepted in Australia.

In *Lam*, McHugh and Gummow JJ (with whom Callinan J agreed) emphatically affirmed earlier decisions of the High Court that there should be nothing "to disturb [substantive protection] by adoption of recent developments in English law with respect to substantive benefits or outcomes[46]". In 2001, the English Court of Appeal held that legitimate expectations can be enforced as substantive rights in *R v North and East Devon Health Authority*; *ex parte Coughlan*[47]*('Couglan')*. In that case, the relevant decision maker had promised a disabled person that premises to which she was being shifted would be her "own for life". Later it was decided to close those premises. It was held the disabled person should have been afforded a fair hearing before that decision was taken. However, the Court of Appeal went further. It held that a legitimate expectation could be the source of substantive rights. It based this upon the view that the failure of the decision maker to accord the expectation would involve an "abuse of power". Lord Woolf MR also referred to an earlier decision of the English Court of Appeal in which it had been said that, in its application to substantive benefits, the doctrine of legitimate expectations is "akin to an estoppel".

In *R v Inland Revenue Commissioners: ex parte Preston*[48] Lord Templeman had placed "abuse of power" in conjunction with breach of the rules of natural justice as remedies for judicial review. In *R v Secretary of State for Education and Employment; ex parte Begbie*[49] Laws LJ had spoken of "abuse of power" as the rationale for the general principles of public law.

Private law estoppel

In *R v East Sussex County Council; ex parte Reprotech (Pebshan) Ltd*[50] Lord Hoffman, in a speech concurred in by the other Law Lords, approved the Coughlan decision and said:

> "There is, of course, an analogy between a private law estoppel and the public law concept of the legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote…….it seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet".

As Sir Anthony Mason points out, these remarks indicate how the substantive protection of legitimate expectations has occupied the space in public law which is occupied in private law by estoppel[51].

In England, the common law requires that a legitimate expectation be considered by the decision maker; that effect should be given to the expectation unless there are legal reasons for not doing so; and that, if effect is not given to the expectation, fairness requires the decision maker to give reasons for the conclusion. If there are policy considerations which militate against giving effect to the expectation, the decision maker must make the decision in the light of the legitimate expectation, and failure to do so will vitiate the decision. In *R v London Borough of Newham and Bibi*[52] the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within 18 months. The Authority did not honour its promise. The English Court of Appeal held that, in coming to its decision, the Authority failed to take account of the legitimate expectation and that therefore the decision was vitiated. The Court declined to make the decision itself, but it was for the Authority to consider the matter afresh. The Court made a declaration that the Authority was under a duty to consider the applications for suitable housing on the basis that

the applicants had a legitimate expectation that they would be provided by the Authority with suitable accommodation in a secure tenancy.

The late Justice Selway said that Lord Woolf's comment in *Coughlan* that the over-riding principle he views, as supporting administrative law, is preventing "abuses of power" and that this cannot be explained by any theory based upon ultra vires[53]. In *Lam*, McHugh and Gummow JJ said that *Coughlan* is concerned with judicial supervision of administrative decision making by the application of certain minimum standards, and that this represented an attempted assimilation into the English common law of doctrines derived from European civilian systems. Furthermore, without a written constitution, there is no distinct legal concept of a State, to which distinct principles could be attached, as there is in Australia[54].

Legitimate expectation has some common features with estoppel. In both England and Australia estoppel has been held not to apply in public law. Estoppel depends upon an unambiguous representation which has induced an assumption by the applicant, and the applicant has reasonably acted in reliance upon it. Where there is evidence that the applicant would rely upon the representation which the administrator has departed from, the Courts have held in private law cases that it would be unconscionable to permit the administrator to depart from the assumption. It can be seen therefore that estoppel may form a substantive protection[55].

In *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*[56], Gummow J dismissed the concept of unfairness in a substantive sense, though French CJ speaking extrajudicially allowed that estoppels applying in public law are not foreclosed by current authority[57].

The potential for development of substantive protection in Australian administrative law: never say never

Since retiring Sir Anthony Mason, writing extra-judicially, has said:

> "If, however, one accepts that a legitimate expectation is a legal concept which is entitled protection, it is in principle unsatisfactory to restrict protection to procedural protection and to stop short of substantive protection. There are other justifications for extending judicial review to substantive protection. It is important, as a matter of good administration and integrity in government, that government and public authorities should be held to their promises and representations, excluding, presumably, election promises and representations upon which, ironically, electors are not expected to rely. Further, substantive protection, provided that the decision is ultimately left to the decision maker, does not result in the court imposing its solution on the decision maker[58]".

It is the perceived constraints flowing from the Australian separation of powers doctrine and the ultra vires doctrine that has meant that in Scotland, England, Canada and New Zealand more thorough going review is undertaken than in Australia.

Perhaps these constraints upon administrative action in Australia are more perceived than actual. After all, the Commonwealth Constitution is itself a document founded upon the common law and gives expression to common law principles. One of the common law's most ancient principles is that of natural justice, the early history of which is adumbrated at the beginning of this paper. The common law, of which natural justice is part, informs the exercise of judicial power under the Constitution. Recently French J[59] cited the comments of Mason CJ, Dawson and McHugh JJ in *Leeth v The Commonwealth*[60] where any attempt by the legislature to cause a court to act contrary to natural justice would be to impose a non-judicial requirement inconsistent with the exercise of judicial power. On 23 June 2010 in *Saeed v Minister for Immigration and Citizenship* 2010 HCA 203, in a joint judgment the High Court decided section 51A of the *Migration Act 1958 (Cth)* did not apply to an offshore applicant and therefore the Court did not determine the further argument as to whether

section 51A, which stated the section was an exhaustive statement of natural justice "in relation to the matters it deals with" was an impermissible direction to the Court undermining the exercise of judicial power under Chapter III of the Constitution.

The required observance by administrative decision makers of the principles of natural justice, breach of which can render their decisions ultra vires, ought not to be seen as an invasion of the administrative function by courts if the judicial intervention extends beyond procedural to substantive rights, as it does already in Britain. After all, *Wednesbury*'s unreasonableness, to which Australian Courts have given at least partial acceptance, has some similar features to proportionality. Proportionality requires the reviewing court to assess the balance which the decision maker has struck, and may require consideration of the relative weight given to different factors. In *R v Secretary of State the Home Department ex parte Daly*[61] the House of Lords applied proportionality where prison policy required all persons to be absent from their cells while searches, which extended to their legal correspondence, were carried out. It was held that to do so interfered with the prisoners' common law entitlement to legal professional privilege. It was considered that the interference went beyond any legitimate need to protect the public interest.

As Sir Anthony Mason says, the *Boilermakers* case[62] seems "to be set in concrete".

The incompatibility test favoured by Williams J in the *Boilermakers* case, but rejected by the Privy Council, would have enabled a court to perform administrative as well as judicial functions as long as the administrative functions are compatible with the court's judicial functions. But it should not follow that a court is performing administrative functions because it imposes upon administrative decision makers obligations to require observance of, for example, minimum standards of human rights, to require honest dealing between government, its citizens and the wider community, and to check abuse of power whatever form that abuse may take.

Substantive protection can surely be given effect within an evolving definition of what constitutes intra and ultra vires action, without incurring the accusation that the courts are invading an administrative decision maker's discretionary powers because these powers are required to be exercisable within suitable evolving common law boundaries.

Endnotes

1 Paul's letter to the Corinthians 1 Chapter 13 v 12: "For now we see through a glass darkly; but then face to face; now I know in part; but then shall I know even as also I am known".
2 See CG Weeramantry, *The Law in Crisis* (Capemoss, 1975) pp 185-187
3 *Ridge v Baldwin* [1964] AC 40
4 Sir William Wade, *Administrative Law* (Oxford University Press, 8th ed) p 436
5 Justice Gummow, 'A Permanent Legacy' (2000) 28 *Federal Law Review* 177 at [180]
6 Bradley Selway, 'The Principle behind common law and judicial review of administrative action – the search continues' (2002) *Federal Law Review* 8
7 (1990) 170 CLR 1
8 See C Forsyth, *Judicial Review and the Constitution* (Heat and Light a plea for Reconciliation ibid at [396]) (Hart Publishing, 2000)
9 1863 14 CBNS 1280 at [1295] [143ER 414 at 420]
10 Sir Anthony Mason, 'The Foundations & Limitations of Judicial Review' 31 *AIAL Forum* at p 9
11 (1992) 170 CLR 596
12 Re Minister of Immigration Multi-cultural Affairs ex parte Miah 2001 75 ALJR 889 at 896 citing Kioa v West 1985 159 CLR 550
13 Sir Anthony Mason, 'The Foundations and Limitations of Judicial Review' 31 *AIAL Forum* at p12
14 (1977) 137 CLR 461
15 (1985) 159 CLR 550 at [615]
16 (1990) 169 CLR 648
17 *Re Refugee Tribunal: ex parte Aala* [2000] 204 CLR 82 at [41]
18 (2003) 198 ALR 59
19 (2003) 198 ALR 59 at [34]

20 In *Reid v Secretary of State for Scotland* [1999] 2AC 512 at 541-2 Lord Clyde said "……the decision may be found to be erroneous….. as for example, through the absence of evidence or of sufficient evidence to support it……" (emphasis added) cited by McHugh and Gummow JJ in S120 of 2002 as representing the broader basis for the review in Britain.
21 [1948] 1 KB 223 per Lord Greene MR
22 See for example *McAleer v UWA (No 3)* [2008] FCA 1490 where Siopis J found no legal basis for staying for abuse of process disciplinary charges brought against a Professor under a collective agreement
23 (1995) 184 CLR 163
24 Craig ibid at [179]
25 MIMA v Yusuf (2001) 180 ALR 1 at [21]
26 Sir Anthony Mason, 'The Scope of Judicial Review' 31 *AIAL Forum* at [31]
27 Sir Anthony Mason, 'The Foundation and the Limitations of Judicial Review' 31 *AIAL Forum* 1-4
28 Robert Lindsay, 'The Constitutional and Statutory Breadth of Judicial Review under Australian Federal and State Law' 52 *AIAL Forum* 32
29 [1969] 2CH 149 at [170] –[171]
30 (1977) 137 CLR 487 at [514]
31 ibid Aitken J at [536]
32 (1998) 196 CLR 328
33 (1990) 170 CLR 1
34 (1995) 183 CLR 273
35 (1992) 176 CLR 1 at [38]
36 *Teoh* at [34]
37 (2002) 195 ALR 502
38 See article, Henry Burmester AO QC, 'Teoh Revisited after Lam' 40 *AIAL Forum* 33
39 Lam ibid McHugh & Gummow JJ at [105]
40 *Lam* at [91]
41 (1990) 169 CLR 648 at [681]
42 Lam Ibid at [99]
43 Lam ibid at [105]
44 [1983] 2 AC 629
45 Lam ibid McHugh & Gummow JJ at [83]
46 Lam ibid Callinan at [148]
47 [2001] QB 213 (2001)
48 (1985) AC 835 at [862]
49 (2000) IWLR 1115 at [1129]
50 (2002) UKHL 8
51 'The Scope of Judicial Review' 31 *AIAL Forum* at [40]
52 [2001] EWCA Civ 607; reversed on appeal 2002 UKHL 3
53 ibid 2002 Federal Law Review 8 at p 6
54 Lam ibid McHugh and Gummow JJ at [73] and [74]
55 See Alexandra O'Mara, 'Estoppel against Public Authorities' 42 *AIAL Forum* 1
56 *MIEA v Kurtovic* [1990] 21 FCR 193
57 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1
58 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 43
59 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) HCA 49 (12 November 2009) at [55]
60 (1992) 174 CLR 344 at [470]
61 (2001) 3 All ER 433, 446-7
62 *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254