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FUNDAMENTALS, PRINCIPLES AND DOCTRINES

Matthew Groves
H. P. Lee

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Australian administrative law

The growth of administrative law in Australia has continued in an unabated form since the introduction of innovative reforms in the mid-1970s. The centre plank of these reforms was the establishment of the Administrative Appeals Tribunal with follow-on reforms relating to the Ombudsman, judicial review and freedom of information legislation. The impact of these reforms has been vast and significant. *Australian Administrative Law: Fundamentals, Principles and Doctrines* seeks to take stock of the growth and development of administrative law principles. Particular attention is paid to the important cases and key doctrines which provide the theoretical underpinnings of these principles.

In this book, a team of highly respected administrative law scholars and jurists aim to provide a lucid exposition of the relevant case law, principles and doctrines. The book illuminates the fundamental features of Australian administrative law and will prove useful to students and practitioners interested in this field.

Matthew Groves is Senior Lecturer in Law at Monash University.

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Australian administrative law

Fundamentals, principles and doctrines

Matthew Groves

H P Lee



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Foreword

The Hon M E J Black AC
Chief Justice of the Federal Court of Australia

The large, complex and evolving field of administrative law is of special importance to lawyers and indeed to all concerned with Australia's democracy. This is not only because administrative decision-making can, and increasingly does, touch upon almost any aspect of our lives but, more fundamentally, because administrative law is one of the primary means by which our commitment to the rule of law is applied. This commitment to the rule of law may be seen at its most direct in the field of judicial review. As a former Chief Justice of Australia has written:

*Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.*¹

Australian administrative law has its own distinctive character. Its influences include the Commonwealth's legislative reforms of the 1970s and early 1980s. These reforms covered a wide field, and included the establishment of a simplified process of judicial review before the newly created Federal Court of Australia. No less importantly, the reforms provided for merits review before a new and independent tribunal of high standing, the Administrative Appeals Tribunal. It would be a serious mistake to underestimate the importance of merits review by tribunals and other non-judicial aspects of administrative law, for tribunals are usually the first and most accessible avenue for Australians seeking review of executive decision-making. The reforms also created the office of the Commonwealth Ombudsman, and the Administrative Review Council to keep the new system under review and the reforms maintained. All this occurred against the rich background of the common law and its institutions and in the constant presence of Australia's Constitution – often unnoticed but, on occasion, stamping its own authority on the development of this body of law.

In this excellent new book, distinguished scholars from academia, the practising legal profession, and the judiciary explore and explain Australian administrative law, its theories, the ideas and the principles upon which it rests.

The intended readership includes tertiary students and to them I would commend the quality of the scholarship and the enthusiasm for the subject that the writing conveys; as lawyers they will have an important role to play in promoting an understanding of the fundamentals of our system of government.

Administrative law, and its interaction with constitutional law, should be one of their special responsibilities. Also, although students will no doubt concentrate on particular chapters, I would urge them to read and consider the work as a whole, for administrative law is an area in which a clear understanding of the broad field – which the book provides in full measure – is needed for a proper understanding of the individual parts.

I am delighted to have the opportunity of writing the foreword to this very valuable contemporary work on administrative law in Australia.

M E J Black
Owen Dixon Commonwealth Law Courts
Melbourne
19 February 2007

Preface

The development of administrative law is a prominent feature of the Australian legal landscape. The importance of this subject is highlighted by the fact that it is stipulated as a 'core' subject in the syllabi of many, if not most, law schools. One needs only to peruse the cases reported in the main law reports to appreciate its significance as a large area of legal practice.

In this volume of essays, the contributors examine a number of fundamental topics of practical and doctrinal importance. The contributors (who are drawn from academia, the judiciary and the legal profession) have sought to provide a lucid exposition of the relevant case law and principles and explore the doctrinal dimensions and theoretical underpinnings of those principles.

We hope this volume will be of great relevance and value to tertiary courses in Australian administrative law, the Australian legal system and government. As it will be concerned not only with the lucid exposition of the principles, but also with the scholarly exploration of doctrines and theories underpinning the subject, we expect that the volume will be of great interest to tertiary students, members of the judiciary, practitioners and legal academics.

We wish to record our gratitude to a number of persons who assisted us greatly in bringing this book to fruition. First and foremost we are extremely indebted to Enid Campbell, Emeritus Professor at Monash University and the undoubted doyenne of public law in Australia. Enid generously reviewed all the contributions and provided us with invaluable comments. Jill Henry and Kate Indigo at Cambridge University Press and Carolyn Leslie were most helpful and, fortunately for us, very patient as we sought to complete the editing of the book amidst our many other pressing commitments. We also would like to thank Maryanne Cassar and Audrey Paisley who provided us with efficient and chirpy secretarial assistance and the Monash Law Faculty for providing us with a grant to enable us to organise a symposium where a number of the draft chapters were discussed.

Last, but not least, we are indebted to the Honourable Michael Black, Chief Justice of the Federal Court of Australia, for his encouragement and for writing the foreword to the book.

Matthew Groves and H P Lee

About the contributors

Geoff Airo-Farulla is Assistant Commonwealth Ombudsman, Brisbane. He was previously a foundation member of staff at the Griffith Law School, where he was a Senior Lecturer and Director of the Governance and Regulation Program in the Socio-Legal Research Centre. Dr Airo-Farulla has also previously been a part-time member of the Social Security Appeals Tribunal, and a member of the Queensland Gaming Commission.

Stephen Argument is a government lawyer working in Canberra, and has also worked extensively in private legal practice for mainly government clients. Prior to commencing work in private legal practice in 2000, Stephen worked in the Australian Public Service where his positions included Secretary to the Senate Standing Committee for the Scrutiny of Bills. Stephen is co-author of the third edition of Professor Dennis Pearce's text *Delegated Legislation in Australia*. He has been the National Secretary of the Australian Institute of Administrative Law for over sixteen years. Stephen is the Legal Adviser (Subordinate Legislation) to the Australian Capital Territory Legislative Assembly's Scrutiny of Bills and Subordinate Legislation Committee.

Mark Aronson is Emeritus Professor of Law at the University of New South Wales. He has written extensively on issues in law, Crown liability, evidence and procedure. He is planning to begin work on a fourth edition of Aronson, Dyer and Groves' *Judicial Review of Administrative Action* (2004), which is currently in its third edition.

Colin Campbell is Lecturer at the Faculty of Law, Monash University. Prior to this he was a solicitor and a judge's associate. Colin holds masters degrees in law from the University of Melbourne and Cambridge University. Colin was recently awarded a PhD by Cambridge University for his doctoral dissertation, 'The Conception of Public Power in Judicial Review'.

Mary Crock is Associate Professor and Associate Dean (Postgraduate Research) at the Faculty of Law, University of Sydney. Mary teaches and researches in migration and refugee law. Her books and edited collections include: *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia* (2006); *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) (with Ben Saul and Azadeh Dastyari); *Immigration and Refugee Law in Australia* (1998). Mary

has held many appointments related to migration and refugee issues including adviser to the Australian Senate (Inquiry into Australia's Refugee and Humanitarian Program, 2000) and consultant to the Human Rights and Equal Opportunity Commission (on immigration detention).

Robin Creyke is Professor of Law in the College of Law at the Australian National University, where she teaches mainly administrative law and military law. Her main research interests are in administrative law, notably the impact of judicial review cases and the position of tribunals in our system of government. Robin's publications include *Veterans' Entitlements Law* (2001, with P Sutherland) and *Laying Down the Law* (6th edn, with several co-authors) and *Control of Government Action* (2005, with J McMillan). Robin has held many positions in both government and the private sector. She is currently President of the Australian Institute of Administrative Law, a member of the Administrative Review Council (which advises the federal Attorney-General on administrative law issues) and is also a Special Counsel for Philips Fox Lawyers (where she advises on government and corporate issues).

Roger Douglas is Associate Professor at La Trobe University Law School, where he teaches administrative law, civil procedure, equity and trusts. His recent research examines the use of law to control political dissent. Roger's publications include numerous articles in law, sociology and criminology journals, and books including: *Dealing with Demonstrations* (2004), *Douglas and Jones' Administrative Law: Cases and Commentary* (5th edn 2006), and *Social Aspects of Law* (1973).

Alison Duxbury is Senior Lecturer at the Faculty of Law, University of Melbourne and a member of the Asia-Pacific Centre for Military Law. She holds bachelor degrees in Arts and Laws (Hons) from the University of Melbourne, and a Master of Law from Cambridge University. She has taught a variety of subjects, including constitutional and administrative law, international law, and military administrative law. Her main research interests include international law, human rights law, and the intersection between international law and public law.

Chris Finn is Senior Lecturer in Law at the Law School of the University of Adelaide. He teaches and researches in the areas of administrative law and competition law and has published in relation to Freedom of Information legislation, government contracting, privatisation and utility regulation (including the Australian National Electricity Market).

Justice Robert French was appointed to the Federal Court of Australia in 1986, and he is based in Perth. From May 1994 to December 1998, he also held the office of President of the National Native Title Tribunal. He was, until recently, President of the Australian Association of Constitutional

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Stephen Gageler SC is a leading member of the New South Wales Bar, where he maintains a practice in constitutional, administrative and revenue law with emphasis on appeals mainly in the Federal Court and the High Court. Before he was called to the Bar, Stephen worked in both private practise and government and was Associate to Sir Anthony Mason. He has also published widely in the areas of public law and federal jurisdiction.

Matthew Groves is Senior Lecturer in Law at the Faculty of Law, Monash University where he teaches public law, legal ethics and succession law. Matthew is co-author of Aronson, Dyer and Groves', *Judicial Review of Administrative Action* (3rd edn, 2004) and has published widely on administrative law, prison management and military law.

Bill Lane is the Clayton Utz Professor of Public Law at Queensland University of Technology, having previously taught law at La Trobe University, Melbourne and the University of Queensland. He is joint author of Lane and Young: *Administrative Law in Queensland* (2001); joint editor of Lane and Young *Queensland Administrative Law* and the editor of the *Queensland Administrative Reports*. He is also a part-time Senior Member of the Veterans Review Board (Cth) and Member of the Non State Schools Accreditation Board (Qld).

HP Lee is the Sir John Latham Professor of Law at Monash University, where he is currently Deputy Dean of the Faculty of Law. He teaches and researches in Australian constitutional law and comparative constitutional law. His major works include HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003), E Campbell and HP Lee, *The Australian Judiciary* (2001), HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (1995) and HP Lee, *Emergency Powers* (1984). He is also currently the Vice-Chairman of the Australian Press Council.

Maria O'Sullivan lectures in administrative law at Monash University. She completed a BA/LLB (Hons) degree at the Australian National University in 1995, and a LLM in International Human Rights Law at the University of Essex in 2001. She has worked in various legal positions, including as a Policy Officer at the Human Rights and Equal Opportunity Commission, a researcher with Matrix Chambers, London, and a legal adviser with the Refugee Review Tribunal. Her primary research interests are administrative and refugee law. She is currently completing a doctorate on the cessation of refugee status.

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Cameron Stewart is Associate Professor of Law at Macquarie University. He is a solicitor and barrister of the High Court of Australia and a legal practitioner of the Supreme Court of New South Wales. He has degrees in economics, law, jurisprudence and a doctorate from the University of Sydney on end-of-life decision-making. He has published widely on medical decision-making and is currently researching Australian guardianship law and practice.

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Australian administrative law: The constitutional and legal matrix

Matthew Groves and HP Lee

Administrative law is difficult to define, and we will not attempt to do so in an exact way. For most Australian scholars, administrative law might simply mean the parts of public law that do not include constitutional law – but many chapters of this book demonstrate that constitutional law and its consequences can never be entirely separated from administrative law. That said, administrative law can still be defined in part by reference to constitutional law. Constitutional law is largely concerned with the nature and scope of the powers held by each arm of government within the Constitution. Administrative law is all about what the agencies of the executive government (ministers, departments, agencies and the individual officials who work within these bodies) can and cannot do. More particularly, administrative law encompasses the different mechanisms and principles that enable people to question or challenge the decisions of these agencies of government.

While the courts play a significant role in these processes (principally through the exercise of their judicial review jurisdiction and, to a lesser extent, through their appellate jurisdiction over many other administrative decisions), they form only one part of the picture. A defining feature of administrative law is the important role played by non-judicial bodies, such as tribunals and Ombudsmen, who receive many more complaints than the courts. Another defining feature of administrative law is the different remedies offered by its different institutions. Some can provide a new decision (tribunals are the notable example), while others can quash or set aside a decision but cannot make a new decision (this is a hallmark of judicial review). Others can do neither (Ombudsmen have a recommendatory power and cannot either set aside or remake a decision no matter how unfair or unlawful it might be). Other avenues cannot possibly affect a decision (freedom of information [FOI] legislation facilitates access to information,

which does not itself affect the decision or action to which the information relates).

The common theme in these different mechanisms of administrative law is an emphasis on the control of government power. That desire for control is guided by a range of values that are often gathered under the heading of 'administrative justice'. That term is often treated as a doctrine in its own right,¹ but administrative justice is best understood as the sum total of the values or goals of administrative law. These values include transparency, accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms.² These values might sometimes be vague or all-encompassing, but they are useful to explain the underlying purpose of administrative law. Administrative law does not exist in a vacuum or operate according to purely legal principles (if there is such a thing). It is always driven by a concern for fair and proper treatment, even if that concern is not always openly discussed.

The influences that have shaped Australian administrative law are as diverse as the values that have driven this process, but three are of particular importance. One influence is our English common law heritage, from which fundamental common law doctrines and interpretive principles are drawn. The Australian model of judicial review originated from the principles that governed English courts in their exercise of their supervisory jurisdiction to conduct judicial review. Australian and English judicial review have become increasingly different, particularly with the radical effect that the Human Rights Act 1998 (UK) has had on English public law, but Australian administrative law still cannot be fully understood without reference to its English heritage. The Commonwealth Constitution is another important influence upon Australian administrative law. The adoption of a written constitution marked a crucial point of difference between Australia and England. The Constitution introduced a division or separation of powers that underpins the role of the courts and many other consequences that flow from that separation, such as the constitutional limitations on judicial power. A further key influence is the body of reforms, known as the 'New Administrative Law', which were adopted at the Commonwealth level in the 1970s and replicated in whole or in part in most states and territories. These reforms signalled the birth of a uniquely Australian system of administrative law that continues to evolve.

A starting proposition: All power has its limits

Administrative law is mostly about power and discretion. The 'power' aspect of administrative law includes those principles which require public officials to either establish the source of their authority or force them to remain within the scope of that authority. Authority and similar concepts, such as jurisdiction, are central to administrative law because they underpin the focus upon the need for public officials to explain the exercise of their powers. The 'discretion' aspect of

administrative law comes into play after the ‘power’ issues are satisfied. Discretion means choice – namely, that an official who is granted power to act or decide is also granted the freedom to choose from a range of possible outcomes which an exercise of that power might allow. But administrative law has long decreed that this freedom is not absolute. Even the most discretionary powers are not taken to be arbitrary powers. This is a statement of the obvious in a country in which the ‘rule of law’ is recognised as an ‘assumption’ among the ‘traditional conceptions’ buttressing the Australian Constitution.³ Even as far back as 1891, Lord Halsbury in *Sharp v Wakefield*⁴ asserted this distinction in the following terms:

. . . when it is said that something is to be done within the discretion of the authorities (then) that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.⁵

The High Court of Australia has repeatedly adopted a similar view.⁶ The idea that public powers are subject to implicit or unspoken limits is one example of the wider influence that fundamental common law principles and rules of interpretation can exert on discretionary powers. These principles and rules provide a background against which the courts can both interpret and control discretionary powers. Professor Denis Galligan explained:

Any official exercising power does so within a framework of legal and political principles, and that these principles are important in the justification and legitimation of decisions . . . One principle, of particular importance in democratic systems is that officials to whom powers have been delegated must account for their actions to the community. The underlying assumption is that all government powers, whether the sovereign powers of legislatures or the delegated powers of administrative officials, are held on behalf of the community and therefore account must be made to it. Because of the difficulties in large and complex societies of requiring accountability in any direct or populist sense, a network of principles and practices develop which mediate between the exercise of powers by officials and the community, and thus provide accountability in a more indirect way.⁷

The leading works on judicial review adopt a similar view when they argue that all public powers have implicit limits.⁸ This view taps into a deeper and more important aspect of administrative law, which is the notion that the power of parliament – and the officials who act under the authority of laws enacted by parliament – is subject to unspoken limits. Many of these limits are political in nature. These are the rules and conventions by which governments act. They are usually created and enforced in the political arena but other limits on public power are created and enforced in the legal arena, and this is the province of administrative law.

The implicit nature of these limits upon public power can be particularly useful to judicial review. Importantly, it enables the courts to enforce those limits even when not expressly included within legislation (which is usually the case).

It also places the onus squarely upon the legislature to restrict or remove these underlying assumptions.⁹ But it would be wrong to conceive of the implicit limits on public power as a concept for judicial review alone. The notion that public power is limited in nature and that its exercise should always be able to be justified according to principles of reason and justice underpins every aspect of administrative law.¹⁰

The Constitutional backdrop

The Australian polity is a federal entity. The primary focus of the framers of the Commonwealth Constitution was the division of legislative powers between the Commonwealth and the entities comprising the six states. Legislative powers are exercised in Australia today by a federal parliament, six state parliaments (all are bicameral, except for Queensland) and legislative assemblies in the Australian Capital Territory and the Northern Territory. Within these arrangements lie some foundational principles that have exerted considerable influence over the form of Australian administrative law.

The role of responsible government

The Commonwealth Constitution provided for a system of representative government. Members of all parliaments are elected by popular vote. In *Australian Capital Television Pty Ltd v Commonwealth*¹¹ Mason CJ said:

The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives . . . The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.¹²

At federal level, the executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. However, the Governor-General exercises the executive power on the advice of the Federal Executive Council which comprises Ministers of State who 'shall hold office during the pleasure of the Governor-General'.¹³ Ministers of State are drawn from the House of Representatives and the Senate, thus giving expression to the principle of responsible government.¹⁴ Ministers are collectively responsible to parliament. A government which ceases to command the confidence of the House of Representatives would have, as a matter of constitutional convention, to resign. Ministers of State are also individually responsible to parliament in their administration of their assigned governmental department. They are answerable to parliament

for the failings of their departments. The courts have recognised that these basic elements of responsible government underpin all Australian governments,¹⁵ but they have also accepted that the various Australian constitutions give direct effect to few if any of the requirements of responsible government.¹⁶

Doubt is often expressed about elements of responsible government, particularly whether ministerial responsibility provides an effective form of accountability.¹⁷ The courts have largely avoided this debate though it is clear that they do not generally accept the availability of ministerial and other forms of political accountability as a sufficient reason to refrain from exercising their supervisory jurisdiction. At the same time, however, it is clear that the scope and intensity of judicial review can be affected by the possible role of political mechanisms of accountability, particularly for decisions with a high political content. *Prisoners A to XX inclusive v NSW*¹⁸ is an example. That case involved a decision refusing to give condoms to prisoners. The issue had been hotly argued in parliament, laws were passed to empower prison authorities to issue condoms but they ultimately decided not to. The court refused to consider an application for judicial review of this decision for the following reason:

The power to direct and manage prisons conferred on the Commissioner [of Corrections] . . . is subject to the direction and control of the Minister . . . who in turn is a member of the Cabinet and as such is answerable to Parliament, and through Parliament to the electorate. Such is the nature of our democratic process that the determination of government policy often involves political considerations, and if the courts were to assume the power to review decisions of government policy, political power would pass from Parliament and the electorate to the courts.¹⁹

The absence of a Bill of Rights

The framers of the Commonwealth Constitution did not opt for the incorporation into the constitutional framework of an express Bill of Rights. Such an omission is becoming more conspicuous given that other western democracies, such as Canada, New Zealand and the United Kingdom, have adopted either constitutionally-entrenched or statutory Bill of Rights. It was felt that the adoption of the principle of responsible government precluded the necessity for the incorporation of express guarantees of individual rights. In *Australian Capital Television Pty Ltd v Commonwealth*²⁰ Mason CJ remarked:

The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.²¹

The reluctance to adopt a national Bill of Rights is being slowly eroded by the adoption of a statutory Bill of Rights in the Australian Capital Territory and Victoria.²² The full impact of these instruments remains to be seen but, if the experience of other common law jurisdictions is any indication, a Bill of Rights might greatly invigorate those jurisdictions to which it applies. The English courts have recently

suggested that the enactment of the Human Rights Act 1998 (UK) has strengthened the position of the courts because the Act essentially provides a crucial role for the courts (which is to declare and enforce the Human Rights Act) that parliament cannot easily, if at all, diminish. English courts have also begun to question whether parliament is absolutely sovereign.²³ These propositions are not radical to Australia because they have long been accepted as ones arising from our written constitution, but they would prove radical if transplanted to the non-federal jurisdictions that have enacted or are considering a Bill of Rights. There are several other consequences an equivalent of the Human Rights Act 1998 (UK) could have in any Australian jurisdiction. One is the extraordinary intensity with which judicial review applies to decisions that affect fundamental rights.²⁴ Another is the acceptance of proportionality as a separate ground of judicial review, which could blur or even collapse the distinction between judicial and merits review.²⁵ Yet another consequence might be the apparent willingness of the English judiciary to enter politically sensitive areas.

The separation of powers

A full understanding of Australian administrative law must also take account of another essential facet of the constitutional framework, namely the separation of powers. The Commonwealth Constitution does not expressly spell out the existence of a separation of powers doctrine but the High Court held that the compartmentalisation of the legislative, executive and judicial powers into Chapters I, II and III of the Constitution respectively led inevitably to the proposition that Australia's constitutional framework dictated a separation of powers.²⁶

The separation of powers doctrine does not operate in a strict fashion in Australia. The Westminster system of responsible government was grafted by the framers of the Australian Constitution onto a federal framework modelled on the United States Constitution. A conspicuous feature of the Westminster system is the absence of a sharp separation of powers between the legislature and the executive. Ministers of the Crown are drawn from the ranks of parliamentarians or those who become members of parliament within a short time after their appointment as ministers. Responsible government means that the executive branch of government holds a mandate to govern as long as it commands the confidence of a majority of members of the lower house of parliament. The federal parliament is permitted to delegate its law-making power to the executive.²⁷ Given the complexities and demands of modern-day life, delegated legislation is a common route for legislative implementation of schemes proposed by the executive arm of government.

The separation of powers doctrine provides a system of 'checks and balances on the exercise of power by the respective organs of government in which the powers are reposed'.²⁸ Although the courts have accepted an intermingling of legislative and executive powers, they have nevertheless insisted on a strict separation of the judicial function from the other functions of government in order to advance

two main objectives – ‘the guarantee of liberty and to that end the independence of Chapter III judges’.²⁹

The evolution of the separation of judicial power doctrine stemming from the ‘seminal’ judgment of Isaacs J in the *Wheat* case³⁰ to the decision in *Alexander*³¹ and to *Boilermakers* case resulted in the formulation of a two limb proposition: (i) that federal judicial can be vested in only a Chapter III court, and (ii) that only federal judicial power, apart from a power which is ancillary or incidental to the exercise of judicial powers, can be invested in a Chapter III court.

An important consequence of the separation of judicial power doctrine is that it becomes crucial for the true nature of a particular power to be identified as a judicial power or a non-judicial power. In this connection, the ‘classic’ definition of judicial power formulated by Griffith CJ in *Huddart Parker and Co. Pty Ltd v Moorehead*³² is often invoked:

The words ‘judicial power’ as used in s71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.³³

It is universally acknowledged that the definition of judicial power lacks precision.³⁴ Despite the fact that judicial power is an elusive concept, it is crucial that the true nature of a power be identified for that identification is pivotal in determining the validity of legislation which is alleged to violate the separation of judicial powers doctrine. This difficult task has been recognised by the High Court in *Brandy v Human Rights and Equal Opportunity Commission*.³⁵ The court explained:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic.³⁶

Over the course of time, the High Court has tempered the rigidity of the *Boilermakers* doctrine by giving judicial recognition to a number of ‘exceptions’ to the doctrine. Thus, a parliament’s power to cite contempt of itself, while undoubtedly a judicial power, is valid. Similarly, the High Court has also acknowledged the constitutionality of courts martial and defence service tribunals. Historical considerations provide the justification for these ‘exceptions’ to the separation of judicial power doctrine. An exception of especial significance in the administrative law arena relates to what is often described as the *persona designata* doctrine.

The *persona designata* doctrine enables the courts to uphold legislation which seeks to confer administrative functions not incidental to the exercise of judicial functions upon a federal judge acting in a ‘personal capacity’ rather than as a judge of a court. In 1979, the Federal Court rejected a challenge to the competency of

a federal judge (Davies J) to be appointed to the position of Deputy President of the Administrative Appeals Tribunal to hear and determine an application for review.³⁷ Bowen CJ and Deane J said:

There is nothing in the Constitution which precludes a justice of the High Court or a judge of this or any other court created by the Parliament under Ch III of the Constitution from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature.³⁸

The *persona designata* doctrine was applied by the High Court in *Hilton v Wells*³⁹ in which the validity of s20 of the *Telecommunications (Interception) Act 1979* (Cth) was challenged. The impugned section required judges of the Federal Court to entertain and determine applications for the issue of warrants authorising persons to intercept communications made to or from a telecommunication service. It was contended that this amounted to a conferral of a non-judicial power on the Federal Court in violation of the *Boilermakers* doctrine. The majority justices (Gibbs CJ, Wilson and Dawson JJ) said:

Although the Parliament cannot confer non-judicial powers on a federal court, or invest a State court with a non-judicial power, there is no necessary constitutional impediment which prevents it from conferring non-judicial power on a particular individual who happens to be a member of a court.⁴⁰

On the construction of s20, they found that s20 designated the judges as individuals who were particularly well qualified to fulfil the sensitive role envisaged by the section. Mason and Deane JJ dissented on the construction of s20. They demanded 'a clear expression of legislative intention' before it could be concluded that the functions entrusted to a judge of the Federal Court were to be exercised by the judge 'personally'.⁴¹

The High Court, ten years down the track, was called upon in *Grollo v Palmer*⁴² to deal with the *persona designata* issue again in the context of an amended *Telecommunications (Interception) Act 1979* (Cth). The amendments to the Act took into account some of the criticisms in the joint dissent of Mason and Deane JJ in *Hilton v Wells*. There was now a requirement that the federal judge had to consent to be nominated as an 'eligible' judge in order to perform the functions under the Act and to be so declared by the minister.

In *Grollo v Palmer*,⁴³ it was submitted to the High Court that 'the conception of *persona designata* should be abolished to maintain the integrity of the *Boilermakers* principle'. In rejecting this submission, Brennan CJ, Deane, Dawson and Toohey JJ prescribed the following two conditions which should be attached to the power to confer non-judicial functions on judges as designated persons:

First, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, second, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with

the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ('the incompatibility condition').⁴⁴

They explained that the incompatibility condition:

... may arise in a number of different ways. Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth. So much is implied from the separation of powers mandated by Chs I, II and III of the Constitution and from the conditions necessary for the valid and effective exercise of judicial power.⁴⁵

In *Grollo v Palmer*, a majority of the Court held that the power to issue warrants under the Act was not incompatible with the performance of judicial functions by the federal judges. The incompatibility test was applied a year later in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.⁴⁶ In that case, a Federal Court judge (Matthews J) accepted nomination as a 'reporter' under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Court found that there was incompatibility between Matthews J's performance of her non-judicial and judicial functions. Matthews J was appointed as a judicial officer of the Commonwealth and, therefore, could not accept an administrative position in an inquiry. The *Wilson* decision affirmed that the separation of powers doctrine prohibits judges appointed under Chapter III of the federal Constitution from exercising non-judicial functions, but the principles can also apply in the reverse to prevent a non-judicial officer or body from exercising judicial power.

That restriction and the problems it can present to administrative tribunals were highlighted in *Brandy v HREOC*.⁴⁷ In that case, the High Court held parts of the *Racial Discrimination Act 1975* (Cth) invalid because they invested the Human Rights and Equal Opportunity Commission (HREOC) with judicial power. HREOC was an administrative body granted power to receive and determine complaints about discrimination. It was not empowered to enforce its determinations, no doubt because the enforcement of orders is a hallmark of judicial power. The Act instead provided that HREOC determinations enforceable when registered in the Federal Court. The High Court held this regime unconstitutional on the ground that it did not involve an independent exercise of judicial power by the Federal Court. On this view, the Act impermissibly attempted to extend the enforcement powers of a judicial body to the decisions of an administrative body.⁴⁸

The requirements of the separation of powers doctrine do not generally apply at the state level. The High Court has clearly held that here is no separation of powers doctrine in the state constitutional systems. Until 1996, it was not possible to challenge successfully the vesting of a non-judicial function in a state judge. A decision of the High Court in that year has led to a limitation on the legislative capacity of state parliaments. The 'Kable principle' enunciated in *Kable v Director of Public Prosecutions (NSW)*⁴⁹ led to the invalidation of the *Community Protection Act 1994* (NSW) which empowered the Supreme Court of New South Wales to make an order for detention of Kable in prison for a specified period if it was satisfied on reasonable grounds that Kable was 'more likely than not to commit a serious act of violence', and that it was appropriate 'for the protection of a particular person or the community generally' that he be held in custody.⁵⁰

Invoking notions of incompatibility, the High Court held that the Act was invalid because it purported to vest functions in the Supreme Court of New South Wales that were incompatible with the Court being a receptacle of the judicial power of the Commonwealth. Section 71 of the Commonwealth Constitution provides expressly for the vesting of federal judicial power in, inter alia, 'such other courts as it invests with federal jurisdiction', which embraces the state courts. Underpinning the *Kable* principle was the concern to protect public confidence in the judicial system and to negate the perception 'that the Supreme Court was an instrument of executive government policy'.⁵¹ The subsequent case of *Fardon v Attorney-General (Qld)*⁵² has undermined the importance of the *Kable* principle and has largely restricted its application to future cases involving legislation which would be identical to the legislation in *Kable*.⁵³

The limits on the judicial role imposed by the separation of powers doctrine

The separation of powers doctrine imposes limitations on the judicial function which are crucial to the shape of judicial review. According to the separation of powers doctrine, the role of the judiciary is to declare and apply the law.⁵⁴ It follows that the role of the judiciary is to pronounce on the scope and limits of discretionary powers, but not assume control of those powers. The classic modern statement of this principle was made by Brennan J in *Attorney (NSW) v Quin*,⁵⁵ where his Honour explained:

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 injustice, so be it; but the court has nor 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 and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.⁵⁶

There are numerous other instances in which the High Court has stressed that the Constitution does not grant it a general jurisdiction to enforce its own view of how a discretionary power should be exercised.⁵⁷ While this approach might suggest that the separation of powers doctrine imposes rigid limits upon the role of the courts, the courts do not function in a vacuum. This approach is not as strict as might first appear. Kirby J, for example, recently accepted that the role of the court in judicial review did not extend to the attainment of administrative justice but he suggested that the court 'should not shut its eyes and compound the potential for serious administrative injustice . . . It should always take account the potential impact of the decision upon the life, liberty and means of the person affected'.⁵⁸ The point that Kirby J clearly sought to make was that, while the courts are always constrained by their constitutional limits and cannot therefore step into the shoes of a decision maker or order that a discretion be exercised in a particular way, they can and should be aware of the potential impact of their decisions.

The constitutionally entrenched position of the High Court

Although the separation of powers doctrine imposes significant restrictions on the nature and form of judicial and non-judicial bodies, the Constitution provides some protection to judicial review. In this connection, it is instructive to note that the judicial powers of the Commonwealth are confined to matters specified in ss75 and 76 of the Commonwealth Constitution. These sections provide as follows:

75 In all matters –

- (i) Arising under any treaty;
- (ii) Affecting consuls or other representatives of other countries;
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) Between States, or between residents of different States, or between a State and a resident of another State;
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76 The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

- (i) Arising under this Constitution, or involving its interpretation;
- (ii) Arising under any laws made by the Parliament;
- (iii) Of Admiralty and maritime jurisdiction;
- (iv) Relating to the same subject-matter claimed under the laws of different States.

The jurisdiction granted by s75(v) is a curious one, because it provides a constitutional right of judicial review in a truncated manner.⁵⁹ The section grants the High Court power to issue certain writs (mandamus, prohibition and injunction) but says nothing about the grounds upon which those writs may be issued. It is now clear that the common law grounds apply to orders granted under s75(v),⁶⁰ which enables the High Court to draw upon and contribute to the evolution of

the grounds of judicial review, at least at common law, in the exercise of its jurisdiction under s75(v).⁶¹

The constitutionally entrenched position of the High Court means that the original jurisdiction of the court cannot be restricted or abolished except in accordance with the Constitution itself. The High Court has made clear that s75(v) introduces ‘an entrenched minimum provision for judicial review’ and that the ‘centrality and protective purpose’ of this jurisdiction ‘places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action’.⁶² This jurisdiction has assumed new importance in recent years as successive federal governments have limited or excluded rights of statutory judicial review. McHugh and Gummow JJ recently explained:

The contraction of the operation of the ADJR Act has attached significance to s75(v). The decisions upon s75(v), which extend across the whole period of the court’s existence, may have been overlooked or discounted by administrative lawyers as being largely of immediate concern for industrial law. That . . . can now no longer be so.⁶³

Several important consequences flow from the increased role of s75(v). One is that there clearly exists a right of judicial review that the federal parliament cannot limit or exclude except in accordance with a referendum. A second point, which is explained in the chapter by Crock and Santow (see page 363–7), is that the extent to which the federal parliament might be able to limit the jurisdiction of s75(v) remains unsettled. The uncertainty surrounding that issue suggests that s75(v) will provide the focus of many key battles in administrative law. A related point is the extent to which legislative efforts to restrict or evade the scope of s75(v) might prove counterproductive. The history of privative clauses suggests that attempts to limit or exclude judicial review frequently achieve the opposite result, often seeming to encourage rather than limit litigation. It could be possible that the natural hostility courts demonstrate to privative clauses might be stronger when those clauses are aimed at a constitutionally entrenched jurisdiction. One can only guess how the High Court might respond.

The New Administrative Law

In the late 1960s, there was widespread acknowledgement that Australia’s system of administrative law required fundamental reform. Judicial review was seen as overly complex and in need of complete reform, and it was also accepted that the system of administrative review should include other avenues of redress. The committee established to investigate reforms – known as the Kerr Committee – provided a blueprint for comprehensive reform that extended well beyond judicial review. The Kerr Committee recommended the establishment of a general merits review tribunal (which later became the Administrative Appeals Tribunal [AAT]), the introduction of legislation to provide members of the public with a general right of access to information held by government (which was the basis of FOI legislation), statutory reform to judicial review (which later took effect as the

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)) and the establishment of an Ombudsman with power to receive and investigate complaints about government administration.⁶⁴

Each part of the New Administrative Law package provided an important reform, but the full impact of the package came from the combined effect of the different parts of the package. The ADJR Act introduced a general right to reasons for decisions that were amenable to review, a single test for standing, codified the grounds of review and swept aside most of the procedural technicalities of common law judicial review.⁶⁵ The AAT legislation also provided a right to reasons for decisions that were amenable to review, a simplified process of merits review and the right for people to gain a new decision. The Ombudsman legislation did not provide the right to gain a new decision, but instead granted the Ombudsman considerable powers to investigate individual complaints about public administration and to conduct wider investigations into systemic problems in government administration. The combined effect of these rights shifted the balance of power between people and government. The New Administrative Law made government more transparent and accountable by granting people a comprehensive system of rights to obtain information from government agencies and to challenge decisions that affected them.⁶⁶

But for all its innovations, this new system of administrative law reflected the constitutional and common law influences that had long shaped Australian administrative law. The courts were not, for example, granted the power to conduct merits review because such a step would breach the separation of powers.⁶⁷ That power was vested in the AAT which exercises power under Chapter II rather than Chapter III of the Constitution. The codified grounds and remedies of judicial review introduced by the ADJR Act were clearly modelled on the grounds and remedies of the common law, while the codified remedies were clearly modelled on those available at common law.

The New Administrative Law was long regarded as a major leap forward but it has recently come under criticism.⁶⁸ Freedom of information legislation is often said to provide too many exemptions for governments and too little protection for the general right of access to information.⁶⁹ The AAT has been criticised as too formal and adversarial, and adopting a model of merits review that is difficult to distinguish from judicial review.⁷⁰ Even the ADJR Act, which was long regarded as setting the pace for judicial review, has been criticised on the basis that its codified grounds of review inhibit the growth of new or existing grounds of review.⁷¹

The Chief Justice of Australia recently offered a quite different assessment of the New Administrative Law. Gleeson CJ asserted that the underlying values upon which the package was based have 'taken deep root' in our legal and political systems. He also offered an important rejoinder to the criticisms that Australian principles of judicial review were timid or had not grown with the vigour of other jurisdictions. Gleeson CJ suggested that Australia's comprehensive system of merits review:

... relieves the judicial branch of pressure to expand judicial review beyond its proper constitutional and legal limits. Federal courts can mark out and respect the boundaries of judicial review more easily where there is a satisfactory system of merits review. This has beneficial consequences for the relations between the three branches of government, and relations between the judicial branch and the public. All forms of independent review have implications that are, in the widest sense, political. In that sense, acceptance of the legitimacy of the exercise of judicial power is a political matter which cannot be ignored.⁷²

Two comments can be made about this passage. First, the scope of judicial review in Australia can only be fully understood in conjunction with the role played by merits review bodies. The two forms of review usually operate in tandem in the sense that one will often apply when the other does not.⁷³ Secondly, the acceptance by the courts of the formal legal doctrines such as the separation of powers rests on both legal and political foundations. These doctrines might be technical and give rise to many problems, but they underpin a division and balance of political and legal power that the courts are unlikely to discard or alter radically.

In her book, *Introduction to Australian Administrative Law*, Professor Margaret Allars referred to the reforms in administrative law in Australia and observed:

The power to review administrative decisions has been distributed amongst a variety of institutions and access to the relief available from such institutions made available to a broad range of individuals. Although general legal principles can still be discerned, their content has become uncertain as courts and tribunals struggle to fashion responses to the challenge of the expansion and complexity of the executive branch of government. New principles, of good administration, are developing in the context of review by tribunals. On account of this blurring of the boundaries between principles whose sources are clearly legal and those which are regarded traditionally as sourced in other disciplines, the scope of administrative law defies neat definition.⁷⁴

The excitement arising from the reforms of the 1970s has ceased over the course of time and these developments have constituted the corpus of administrative law in Australia today. The unifying thread in all these developments is the primary importance accorded to the over-arching core value of the rule of law with the implication that those who exercise power do so within and under the law, not above it.

2

Administrative law in Australia: Themes and values

Justice Robert French

Underlying simplicities

Nature demonstrates that apparent complexity can be generated by uncomplicated rules. Fractal forms based on simple iterations are to be found in plants, animals, clouds, snowflakes, population patterns and galaxies. The Mandelbrot set, one of the most complex mathematical forms known, is based on a simple mathematical relationship.¹ Like organic and inorganic forms in nature, the apparent complexities of different areas of the law, whether they be statutory or judge-made, are frequently generated by a few underlying principles.

These are propositions not always acknowledged within the legal profession of the common law world. In Australia, as in England and other like jurisdictions, there is a well-developed enthusiasm for specialisation. Specialist lawyers and their professional symbiotes in numerous fields assert the market's need for their existence and for specialist judges and courts or divisions of courts.² But whatever evolutionary forces drive this speciation, it is difficult to think of any ecological niche in which such practitioners can find shelter from the pervasive influence of public law and that branch of it known as administrative law. There seem to be few, if any, aspects of economic activity in contemporary society that are not supervised by some kind of statutory regulator with powers to grant, withhold, suspend or cancel licences to engage in such activity and to approve or withhold approval for particular transactions. The business columns of daily newspapers are replete with stories of the sometimes fractious exchanges between the private sector and public regulators such as the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Takeovers Panel, the Australian Prudential Regulatory Authority and like bodies. In the area of intellectual property, the Commissioner of Patents and the

Registrar of Designs and of Trade Marks make important administrative decisions affecting valuable intellectual property rights and, in the case of the first two officials, describe themselves as 'An Administrative Tribunal'.³ Beyond these are the legions of ministers, officials and tribunals whose decisions, in a variety of ways, can affect the lives, liberty, welfare and opportunities of countless individuals and organisations. Administrative law defines the proper scope of governmental executive power. It is the ether in which private law moves in a regulated society. Despite the anti-authoritarian elements of some of its public discourse, Australia is a much regulated society. In such a society, no legal practitioner can afford to be unaware of the salient features of administrative law.

Although administrative law can be difficult in its application, it should not be necessary for its student to overburden himself or herself with the arcane baggage of the ages. An understanding of the origins and history of contemporary principles and remedies is necessary but need not embroider those principles and remedies with undue complication. As Sir Robin Cooke wrote in 1986: 'Obscure concepts hinder progress. So to attempt more direct and more candid formulations of principle has more than a semantic purpose.'⁴

In administrative law, it is possible to identify simply stated themes and values which should engender at least an instinctive awareness that a public law question has arisen. They can also inform a wider understanding of the way in which the rule of law operates in contemporary society. A law degree should not be necessary to appreciate their core meanings. They are lawfulness, good faith, rationality and fairness. They can be taken as reflecting community expectations that representative and responsible government in a democracy will act within the law, honestly, sensibly and fairly in its dealings with the people of that democracy. These requirements are closely related to the grounds upon which administrative decisions may be reviewed in the courts. They closely resemble the requirements suggested by Sir Robin Cooke that:

... the judicial role is not to resolve the issues but to act as a check or keep the ring, trying to ensure that those responsible for decisions in the community do so in accordance with law, fairly and reasonably.⁵

When the field of administrative law is more widely defined than by reference to judicial review, there are larger themes and values which come into play. They include accessibility, openness, participation and accountability.⁶ As Professor Paul Craig has written,⁷ there is much diversity of opinion about the nature and purpose of administrative law:

For some it is the law relating to control of government power, the main object of which is to protect individual rights. Others place great emphasis upon rules that are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others see the principal object of administrative law as ensuring government accountability, and fostering participation by interested parties in the decision-making process.⁸

Wade and Forsythe take as the first approximation to a definition of administrative law the statement that ‘it is the law relating to the control of governmental power’.⁹ Their second approximation is that it is ‘the body of general principles which govern the exercise of powers and discretions by public authorities’. The latter more narrowly focused approach is consistent with that taken in this chapter.

It is the purpose of this chapter to offer an overview of these thematic and normative ideas in contemporary administrative law in Australia. As with most taxonomic exercises, the choices are open to debate. The value of the exercise lies in providing an occasion for reflection upon the nature of administrative law, the simplicity of the principles which underlie it and the desirability of their connection to widely-held community values. Each of these themes, however, finds its place under the overarching concept of the rule of law which, in Australia, is supported by constitutional remedies against unlawful official action.

Administrative law and the rule of law

The Australian legal system operates upon the assumed application of the rather numinous concept of the rule of law.¹⁰ It is a term descended from English constitutional discourse. Parliamentary sovereignty and the rule of law were described by Professor AV Dicey as two characteristic features of the political institutions of England since the Norman Conquest. Parliament inherited the royal supremacy. The rule of law was expressed in what Dicey called ‘the old saw of the courts’:

‘La ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera’¹¹

The Diceyan vision involved ‘at least three distinct though kindred conceptions’. They were (in summary):

1. . . . no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.¹²
2. Every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.¹³
3. . . . the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting), are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.¹⁴

Dicey’s formulation has been much criticised, but judicial elaboration of the rule of law has been described rightly as ‘[p]erhaps the most enduring contribution of our common law’.¹⁵ Jeffrey Jowell, who so described it, sees the rule of law as supplying the foundation of a new model of democracy in Britain that

limited governmental powers in certain areas, even where the majority preferred otherwise:

It is a principle which requires feasible limits on official powers so as to constrain abuses which occur even in the most well-intentioned and compassionate of governments. It contains both procedural and substantive content, the scope of which exceeds by far Dicey's principal attributes of certainty and formal rationality.¹⁶

The dominant requirement of the rule of law in Australia is that the exercise of official power, whether legislative, executive or judicial, be supported by constitutional authority or a law made under such authority. A secondary principle is that disputes about the limits of legislative and executive power in particular cases can only be determined in a final and binding manner through the exercise of judicial power.

The rule of law operates within a framework set by written constitutions. The Commonwealth Constitution defines, separates and limits the legislative, executive and judicial powers of the Commonwealth. Each of the states has its own constitution inherited from that which it had as a colony before Federation, which was supported by specific or generic Imperial statutes, and which was continued in force by s106 of the Commonwealth Constitution. The state constitutions do not provide in a formal way for the separation of powers. Generally, it is applied by way of convention. It has been suggested that it may be possible for state legislatures to confer judicial power upon themselves and/or the Executive.¹⁷ However, there may also be irremovable implications in state constitutions which prevent their parliaments from so doing.¹⁸

In the *Australian Communist Party*¹⁹ case, Sir Owen Dixon spoke of the Commonwealth Constitution as framed in accordance with many traditional conceptions, some of them given express recognition and effect. An example is the separation of judicial power from other functions of government. Other traditional conceptions are assumed. Dixon CJ said: 'Among these I think that it may fairly be said that the rule of law forms an assumption.'²⁰ The rule of law is constitutionally guaranteed, in respect of official decision-making, by s75(v) of the Constitution which directly confers upon the High Court original jurisdiction in all matters: 'In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.'²¹

The subject is thus provided with a mechanism to challenge the lawfulness of the exercise of official power. Its construed extension to ministers of the Crown also provides the states with 'a significant means of requiring observance by the Commonwealth of the federal system'.²²

It is fundamental to the rule of law that there is no such thing as an unfettered discretion. Any Commonwealth statute conferring discretionary power is confined by the requirement that it be a law with respect to a head of legislative power conferred by the Constitution. A statute conferring an unfettered power upon an official would be unconstitutional, for an unfettered power would know not even constitutional limits. The laws of the states and territories are not limited

to specific heads of power as are those made by the Commonwealth Parliament. But they must operate within the limits imposed by the Commonwealth Constitution on the legislative competence of the states and the legislative supremacy of Commonwealth laws established by s109 of the Constitution. They must also operate within their entrenched limitations at least as to manner and form of making certain classes of law. All laws, Commonwealth and state, are affected by interpretive principles which prevent, as a matter of their internal logic, the creation of unfettered discretions.

Every statutory power is confined, under its inherent logic, by the subject matter, scope and purpose of the legislation by which it is conferred.²³ This inescapable interpretive principle has a constitutional dimension for the subject matter, scope and purpose of a statute within which power conferred by it must be exercised, define the criteria by which the constitutional legitimacy of the statute can be measured. As Kirby J has observed: ‘No Parliament of Australia could confer absolute power on anyone.’²⁴

Even absent a written Constitution, discretions conferred by law are necessarily limited by the laws which confer them. When the British Minister of Agriculture claimed an unfettered discretion under the Agricultural Marketing Act 1958 (UK), his claim was rejected by the House of Lords. It spoke of the judicial control over the Executive:

. . . namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.²⁵

And as Lord Denning MR observed in a later case:

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law.²⁶

It has sometimes been contended by the Executive in both England and Australia that the exercise of prerogative or executive power is not justiciable. But as Gummow J pointed out in 1988:

. . . even in Britain, the threshold question of whether an act in question was done under the prerogative power will be for the court to decide, the point being that if it was, the court may then decide it will not inquire further into the propriety of that act . . . To decide whether a question is ‘non-justiciable’ is not to decide the alleged non-justiciable question itself.²⁷

Under the Commonwealth Constitution, the executive power of the Commonwealth is conferred by s61. It takes the place of the prerogative. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The question of its justiciability was raised in a sequel to the well-known *Tampa* decision of the Full Federal Court.²⁸ In the primary decision of the Full Court, it was held by majority that the Commonwealth Government operated within its executive power in interdicting the landing, in Australia, of asylum

seekers on board the Norwegian vessel *Tampa*. The debate about the costs of the proceedings that followed included a contention which was successful, that because of the nature of the proceedings brought on behalf of the asylum seekers, including the public interest dimension, costs should not follow the event. An argument was advanced by the Commonwealth that the litigation was not a matter of public interest because the Commonwealth was exercising an aspect of executive power central to Australia's sovereignty as a nation. The litigation was said to be 'therefore an interference with an exercise of executive power analogous to a non-justiciable "act of state"'. The Full Court by majority rejected that proposition, saying:

The proposition begs the question that the proceedings raised. That question concerned the extent of Executive power and whether there was a restraint on the liberty of individuals which was authorised by the power. It is not an interference with the exercise of Executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope. Even in the United Kingdom, unencumbered by a written constitution, the threshold question whether an act is done under prerogative power is justiciable.²⁹

The constitutional framework

The great common law remedies against unlawful official action came to Australia from the courts of England. The prerogative writs, certiorari to quash jurisdictional error, mandamus to require the performance of official duty and prohibition to restrain excess of official power together with habeas corpus against unlawful restraints on liberty, form an historical foundation for administrative justice in Australia. The prerogative principles underpinning their application have a constitutional character which does not depend upon the existence of a written constitution. They are concerned with enforcing limits on governmental power. In the ninth edition of Wade and Forsyth's *Administrative Law*, it is said that 'The British Constitution is founded on the rule of law and administrative law is the area where this rule is to be seen in its most active operation'.³⁰

There are three species of official power for which the Australian Constitution provides. The first is the law-making power vested, under Chapter 1, in the Federal Parliament. The second is the executive power, vested under Chapter 2, in the Queen and exercisable by the Governor-General through his or her appointed Ministers of State. The third is the judicial power vested, under Chapter 3, in the High Court, such other federal courts as the Parliament creates and such other courts as it invests with federal jurisdiction.

In the constitutions of the states of Australia, which trace their ancestry to colonial constitutions predating Federation, there are delineations of legislative, executive and judicial power similar to those found in the Australian Constitution, but not so well-defined in their separation one from another. The state constitutions inherited the 'United Kingdom model under which the extent to which a

separation of powers was observed was conventional rather than compelled by any constitutional mandate'.³¹

The vessels of administrative law – administrative and judicial review

Administrative law is particularly concerned with the exercise of executive power whether conferred by statute or derived from a constitution or Crown prerogative. The exercise of such power is subject, in Australia, to various kinds of checking when challenged. In the front line, and bearing the highest volume of decision-making, are mechanisms of administrative review primarily concerned with ensuring that when official decisions are disputed, the decision made on review is the correct or preferable decision having regard to the relevant law, the facts of the case and any applicable policy. Many government departments and authorities have internal review procedures which may not have a specific statutory basis. External administrative review may be provided by tribunals and there may be more than one level of such review. A multi-tiered process applies to decisions under the *Social Security Act* which may be reviewed by the Social Security Appeals Tribunal and thereafter by the Administrative Appeals Tribunal. Decisions under the *Veterans Affairs Act* may also go through multiple stages of such review which end in the Administrative Appeals Tribunal. Similar administrative review arrangements exist in a number of the states.

Tribunals which provide administrative review are themselves subject to judicial review. Judicial review may be expressly provided for in the statute establishing the relevant tribunal and may be on specified or limited grounds. It may be left to the prerogative writs (in state jurisdiction) or the constitutional writs (in Commonwealth jurisdiction) of mandamus, prohibition and certiorari. These general remedies and those of the declaration and injunction may co-exist with specific statutory remedies.

Administrative review is sometimes generically referred to as 'merits review' and distinguished from 'judicial review'. Ultimately, both are concerned with the merits of the case. A decision which is bad in law is bad on its merits. A better distinction might be drawn by using the terms 'factual merits review' and 'legal merits review'.

The principal object of judicial review is to ensure that when official action affecting the subject is challenged in the courts, it has been taken within the boundaries of constitutional, statutory or executive power and to set it aside and require its reconsideration if it has not. Judicial review may apply to first line decision-making such as that of a minister or the minister's delegate. It may apply to a tribunal which has made a decision in the exercise of an administrative review function. There are some species of judicial review which have a factual merits review character about them. Examples are statutory 'appeals', so-called from administrative decision makers to the Federal Court in the exercise of its original

jurisdiction. Appeals from the Commissioner of Taxation, the Commissioner of Patents and the Registrar of Trade Marks fall into that category. The review by the Federal Court of decisions of magistrates, acting administratively, about eligibility for extradition, although confined to the materials before the magistrates, has a merits review aspect in that it is not confined to review for error of law or failure to follow necessary procedures.

The principal limitation of the judicial review function was described by Brennan J in *Attorney-General (NSW) v Quin*:³²

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.³³

The function of judicial review, which reacts to particular applications invoking it, has been properly described as 'inevitably sporadic and peripheral'.³⁴

Judicial review can be constrained by specific statutory provisions. These may take the form of privative clauses which seek to exclude or limit its scope. They may seek to codify the grounds of review. In the *Migration Act 1958* (Cth), there are sections which are calculated to limit the content of procedural fairness by confining the natural justice hearing rule to specific mechanisms for which the Act expressly provides. In its previous form, Pt VIII of the Act set out the grounds for judicial review of migration decisions in the Federal Court. As enumerated, these excluded 'apparent' or 'ostensible' bias as a ground of review.

Administrative law operates within a constitutional framework. Judicial review of administrative action requires a focus upon that framework in a way that does not arise to the same extent with factual merits review. Review by administrative tribunals, albeit reactive to application by aggrieved parties, is part of the continuum of administrative decision-making. In one sense, it is more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision. It can do so more economically and expeditiously than judicial review. The tribunal may act in an inquisitorial rather than adversarial way. It may not necessarily be bound by the rules of evidence. It can also address questions of legality, but not in a way that delivers a final and binding determination.

While the focus of this chapter is on judicial review, it is important for lawyers concerned with administrative law not to let its power and trappings 'divert their gaze from more fundamental, if less glamorous mechanisms to redress citizens' grievances and call government to account'.³⁵ The assessment of the state of administrative justice in Australia requires acknowledgement of the full range of 'less glamorous mechanisms'. Professor Robyn Creyke has recently written that the Australian administrative law system 'provides a wide variety of remedies

with different levels of access and costs for users'. And picking up the different functions of its components:

Judicial review of legality with its precedential value is matched by merits review and its ability to provide substantive outcomes. Alongside these adjudicative bodies are institutions which operate principally by means of investigation and recommendation, such as ombudsmen, information, privacy and other commissioners. Finally, there are particular rights – such as the right to reasons, to access information and to require government to keep to itself personal information supplied by an individual – which protect important interests. The system can be said to provide a comprehensive package of institutions and principles, each component designed to provide 'justice to the individual'.³⁶

Neither judicial review nor tribunal-based factual merits review are means by which administrative policies can be developed. They do not provide mechanisms for general supervision or review of administrative programs. They are remedial in character and respond to particular disputes about or challenges to official action. Courts can only hear and decide the disputes which are brought before them. They are necessarily reactive. Federal jurisdiction, whether exercised by Federal courts or by state courts, only arises if there is a 'matter' before the court for determination. That is to say, there must be a 'controversy'. State courts exercising jurisdiction under state laws or the common law are similarly, but not as tightly, confined because of their character as judicial institutions.

Judicial review, however limited in its accessibility, supports in the most direct way the basic themes and values of administrative law identified earlier. It provides, in a way no other process can, the mandate to executive authorities to be lawful, to act in good faith, to be fair and to be rational.

Themes and values – A taxonomical choice

Ultimately administrative justice, reflecting the rule of law, requires official action to be authorised by law. Put another way, all official action must lie within the boundaries of power created by law. This is perhaps the most fundamental theme of administrative law from which all others may be derived. Within that framework themes and values of administrative justice in the sense administered by the courts may be identified as follows:

1. Lawfulness – that official decisions are authorised by statute, prerogative or constitution.
2. Good faith – that official decisions are made honestly and conscientiously.
3. Rationality – that official decisions comply with the logical framework created by the grant of power under which they are made.
4. Fairness – that official decisions are reached fairly, that is impartially in fact and appearance and with a proper opportunity to persons affected to be heard.

The identification of these elements of administrative justice is a little like the identification of 'fundamental' particles in physics. When pressed they will transform one into another or cascade into the traditional grounds of review developed at common law.³⁷ A decision maker may be affected by actual bias which constitutes a breach of the requirements of procedural fairness. Such bias, if directed against an attribute of the person affected by the decision, such as race or gender or sexual orientation, may mean that the decision is made by reference to irrelevant considerations or for improper purposes and therefore is beyond power. A serious enough bias may lead to dishonest decision-making. Bad faith has a similar character. Professor Craig has written of it as '... synonymous with improper purposes or relevancy', and that it is difficult to conceive of bad faith that would not automatically render applicable one of those two traditional grounds of review. Lack of rationality may manifest in illogicality that fails to take into account mandatory relevant considerations. In such a case, there may be an error of law for failure to apply statutory criteria or an improper exercise of power. Or it may yield a decision so unreasonable that no reasonable person could have made it. A factual finding without any evidentiary base may be irrational and reviewable on the so-called 'no-evidence' ground. Unfairness following from a failure to hear from a party to be affected may also constitute a failure to comply with express statutory procedures conditioning the exercise of the power.³⁸ These examples indicate the interdependence of the themes and values set out above. They nevertheless form a convenient taxonomy not least because they are capable of being broadly understood by a wider audience than lawyers or judges, in terms of widely accepted community values.

Statutory interpretation – Where themes and values are embedded

The themes and values of administrative law are brought to bear upon its practical application first through the process of statutory interpretation. In Australia, most official decisions affecting the subject are taken in the exercise of a power conferred by a statute or some form of subordinate legislation. In such cases, the question whether an official has acted within the limits of his or her power will depend upon the interpretation of the statute or delegated legislation conferring that power. A decision to grant or refuse a benefit or privilege will require a consideration of statutory criteria and conditions to be satisfied before such grant or refusal is made. The lawfulness of the exercise of the power will depend critically upon the interpretation of its scope and limits. Good faith, rationality and fairness all apply within the framework and to the extent defined by the statute. In administrative law statutory interpretation is always a threshold issue, even if not contested.

Whether a statutory power is exercised in good faith will depend upon whether there is an honest and conscientious attempt by the decision maker to discharge the function conferred by the statute. That necessarily involves identification of the function by reference to the interpretation, informed by legislative purpose, of the statute. Every exercise of power under a statute must be carried out in accordance with its internal logic which defines the range of considerations relevant to the exercise of the power. That is a matter of interpretation and imposes a framework of rationality within which the decision maker must operate. So too, the application and content of the requirements of procedural fairness in the exercise of the power will depend upon the nature of the function conferred by the statute and the extent to which explicitly or implicitly it qualifies, limits, excludes or codifies those requirements.

Those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. This is a rule of fairness. So the courts, as a rule, take as their starting point the ordinary and grammatical sense of the words used:

... that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.³⁹

Statutory words are a direct expression of the outcome of parliamentary deliberation. Their binding interpretation is a judicial function. It requires the application of statutory and common law rules of interpretation. A purposive approach is mandated by Commonwealth and state Interpretation Acts. Closely related to purpose is the concept of legislative intention. That is a fiction. It is an attributed intention based on inferences drawn from the text and context of the statute itself.⁴⁰ It may be assisted by reference to extrinsic materials where constructional choices treated as dependent upon 'purpose' and 'intention' are open. In a sense, the discovery of purpose or intention is a persuasive declaration after the event that the proffered interpretation of the statute is legitimate. That legitimacy, when claimed by a judicial interpreter, relies upon the use of rules of construction known to parliamentary drafters and, at least by attribution, to Parliament and to the executive. Although such rules may yield a range of possible outcomes, they are generally understood and accepted and so can serve as criteria of the acceptability of the result which follows from their application.

The themes and values of administrative law, reflecting as they do broadly accepted community values, are part of the background of interpretation. As McHugh J said:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.⁴¹

Part of this background is the concept of the rule of law.

Legislative power is exercised in Australia, as in the United Kingdom from which it has drawn much of the common law relevant to judicial review, in the setting of a 'liberal democracy founded on the traditions and principles of the common law'.⁴² The importance of those traditions and principles in statutory interpretation in Australia is reflected in the interpretive approach to the interaction between statute law and common law. This may be traced back to the judgment of O'Connor J in *Potter v Minahan*⁴³ in which he cited the fourth edition of Maxwell on *The Interpretation of Statutes*:⁴⁴

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

A presumption against the modification or abolition of fundamental rights has been repeatedly restated by the High Court of Australia over the years.⁴⁵ A particular example is the interaction between statute law and the rules of procedural fairness or natural justice as it is still sometimes called. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,⁴⁶ McHugh J spoke of the common law rules of natural justice as part of the background principles upon which legal texts depend: 'They are taken to apply to the exercise of public power unless clearly excluded.'

The conservative approach to interpretation resembles the 'principle of legality' asserted by the Courts of the United Kingdom. It is formulated as a strong presumption that broadly expressed discretions are subject to the fundamental human rights recognised by the common law. Lord Hoffman explained it thus:

The principle of legality means that parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the Courts of the United Kingdom, though acknowledging the sovereignty of parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.⁴⁷

This approach confers a certain 'constitutional' status on rights and freedoms without according to them the status of limits on legislative competence. The interpretive principles applicable in Australia have a similar juristic character although in a country which operates under written Constitutions there would be a reluctance to call those rights which they protect 'constitutional rights' and a readiness to emphasise the lower case 'c' if they are. Perhaps a high water mark of this characterisation of common law principles, in the context of statutory

interpretation, is to be found in the judgment of Laws LJ in the *Metric Martyrs*' case.⁴⁸ Following the conversion of the United Kingdom to a metric system of weights and measures, four food sellers, the Metric Martyrs, continued to sell food by imperial measures contrary to law. Although their appeals were dismissed, Laws LJ discussed what he called rights of a constitutional character recognised by the common law and statutes which had a constitutional character.

Laws LJ said that the abrogation of a 'constitutional' common law right by statute would require that the legislature's actual intention, as distinct from imputed constructive or presumed intention, was to effect the abrogation. The test could only be met by express words or words so specific that the inference of an actual determination to effect the result contended for was irresistible.⁴⁹ This development of the common law which applied not only to 'constitutional rights' but to 'constitutional statutes' gave 'most of the benefit of a written constitution in which fundamental rights are accorded special respect'. But it preserved the sovereignty of the legislature and the flexibility of the unwritten British Constitution.⁵⁰

There is relevance in these observations for Australia for, although Australia's statutes are made under written constitutions, none of them guarantee common law rights and freedoms against legislative abrogation. The dicta of Laws LJ were strongly stated, but seem to have gone no further than a strongly stated interpretive principle. That principle may be less strongly stated in Australia but the principle itself can properly be regarded as 'constitutional' in character even if the rights and freedoms which it protects may not.

In the context of administrative law it is helpful to go back to Wade and Forsythe for a useful statement of the way in which interpretive principles affect the limits of administrative power:

It is presumed that Parliament did not intend to authorise abuses, and that certain safeguards against abuse must be implied in the Act. These are matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that is passed. They may be taken for granted as part of the implied conditions to which every Act is subject and which the courts extract by reading between the lines. Any violation of them, therefore, renders the offending action *ultra vires*.⁵¹

The rules governing the interpretation of statutes and particularly those which raise barriers against the abrogation of common law principles and rights and freedoms under common law, mean that the themes and values of administrative law are logically anterior to the way in which official power is exercised. Some aspects of those themes and values emerge from the very nature of statutes which does not depend upon common law principles. Others concerned with the requirements of procedural fairness and the limits of power against fundamental common law rights and freedoms will require the assistance of the interpretive principle described above. The themes and values of administrative law have a part to play in defining the terms of the instruments by which power is conferred

and so are linked to the societal origins of those statutes which in Australia is a representative democracy governed by the rule of law.

Good faith

Good faith is difficult to define, but is entrenched in statutes, the common law and in equity. It appears in no less than 154 Commonwealth Acts. It has a core meaning, in ordinary usage, of honesty, with fidelity and loyalty to something – a promise, a commitment or a trust.⁵² It is therefore a relational concept. But its elements do not diminish from one legal application to another. In the United States Second Restatement of Contracts, par 205 it was said:

Good faith performance or enforcement of a contract emphasises faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterised as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.

This statement can be seen as an application of the ordinary meaning of the term.

Good faith is to be found in the common law and equity in relation to contracts and the discharge of fiduciary duties. It is imposed as a statutory obligation upon company directors and officers. It conditions, in bankruptcy, the validity of certain antecedent dispositions of property. It has long been identified as a positive obligation attaching to the exercise of official power. In 1905, Lord McNaghten said of the exercise of statutory power by a public body:

It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.⁵³

Good faith and honesty of purpose are closely linked. Sir Owen Dixon spoke of good faith as 'an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the power of the tribunal in relation to something that might reasonably be regarded as falling within its province'.⁵⁴

Bad faith is generally taken to imply dishonesty, but is often regarded as akin to an allegation of fraud by a decision maker. The requirement of good faith is not satisfied by mere absence of dishonesty. So much appears from Lord McNaghten's reflection upon the interdependence of good faith and reasonableness. This has given rise to confusion when public authorities are found to act in bad faith because they have acted unreasonably or on improper grounds:

Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words they import no moral obliquity.⁵⁵

This criticism has been echoed in some English decisions.⁵⁶ Good faith has not figured prominently in Australian administrative law, save as a ground which

could defeat privative clauses which seek to exclude judicial review.⁵⁷ There has been debate about its scope. It has been equated to a requirement for ‘. . . an honest or genuine attempt to undertake the task’.⁵⁸ A wider formulation proposed that recklessness and capriciousness in decision-making will demonstrate its absence.⁵⁹ On that wider view, an honest attempt to exercise official power is not demonstrated merely by the absence of dishonesty or malice. What is required is an honest and conscientious approach to the statutory task.⁶⁰ A decision maker who deliberately makes no attempt to conform to statutory duty will not be acting in good faith.⁶¹

The term ‘good faith’ appears in so many statutory contexts that, notwithstanding its relational character, it must be seen by those who draft statutes as having a core meaning capable of a degree of practical application. Applying its essential elements good faith requires, in the exercise of a statutory power, honest action and fidelity to the purposes and criteria that govern the exercise of the power. Good faith therefore requires that attention be paid by the decision maker to those criteria and purposes. This requires at least an honest and conscientious attempt to exercise the relevant power as required by the legislature.

To wilfully and deliberately make a decision without attempting to carry out the relevant statutory duty, such as tossing a coin without reading the file or finding in favour of every third applicant or rotating applicants from different countries would amount to a want of good faith.⁶² In these examples, want of good faith is expressed in conduct which would support judicial review on other grounds. A decision made on the toss of a coin is likely to be a decision made by reference to an irrelevant consideration. So too would be a decision based on the chance fact that the favoured applicant is the third in line after the last favoured applicant. A process of rotational choice would also indicate an irrational basis for decision-making because founded on irrelevant considerations.⁶³

The obligation of good faith in administrative law is therefore an honest and conscientious endeavour to exercise power in accordance with the requirements of the relevant statute.

Rationality

Rationality has been described as ‘a common law standard of good administrative decision-making’.⁶⁴ It may be put higher than that. In the exercise of statutory power rationality is demanded by the very assumptions upon which the power rests.

Administrative decision-making requires the identification of the relevant rule of law, the ascertainment of facts which engage the application of the rule and the application of the rule to the facts. That application may involve or precede the exercise of a discretion. If there is a discretion, its exercise will be confined in all cases by the purposes of the statute and, in some cases, by a specific requirement

to have regard to particular matters. Rationality here reduces to lawfulness, that is, compliance with the legal requirements for the exercise of statutory power.

Rationality, in the sense of decision-making according to law, does not necessarily permit only one possible outcome, although there may be cases in which it does. Nor does it mandate a single pathway of reasoning for any particular case. Rationality at this level is an envelope which can cover a family of alternative pathways, each of which may lead to what could properly be called a rational decision.

The High Court has drawn a distinction between judicial and administrative decision-making so far as it relates to the ascertainment of fact:

Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law.⁶⁵

The materials before a decision maker may permit more than one inference to be drawn about matters of fact. If an inference on a matter of fact relevant to the decision is drawn by the decision maker, the fact that another inference is open and may even be preferable or more persuasive from the point of view of a court does not render the decision maker's inference irrational. Some people apply the words 'irrational' or 'illogical' to inferences with which they disagree. But if a challenged inference is open on the materials, then it cannot be said to fall within either of those categories. It might be thought that an inference open on the materials before the decision maker is necessarily a logical or rational inference. But there is authority for the view that such an inference may be illogical yet unreviewable. So it has been said a person affected by a decision cannot show error of law simply by showing that the decision maker inferred the existence of a particular fact by illogical reasoning:

. . . at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.⁶⁶

Whatever 'illogicality' means in this context it has to be consistent with the existence of logical links between material and inference. Perhaps the passage cited means nothing more than that, where a logical chain connects evidence to inference, the fact that the decision maker followed an illogical chain to the same result does not expose the decision to review.

Where there is no evidence to support a particular finding of fact by a decision maker, then the factual finding will involve an error of law. The question whether there is any evidence of a particular fact is treated as a question of law. Whether

a particular inference *can* be drawn from facts found or agreed is also treated as a question of law. For, before the inference is drawn a preliminary question arises whether the evidence reasonably admits a different conclusion. So making findings and drawing inferences in the absence of evidence is an error of law which is judicially reviewable.⁶⁷

In Australia, 'unreasonableness' is a ground for judicial review only where the decision is so unreasonable that no reasonable decision maker could have made it.⁶⁸ But it does not appear to extend to grossly unreasonable fact-finding.⁶⁹

The *Wednesbury* test is one of those tests that defines at least leeways of choice, if not a category of meaningless reference. It allows for curial visitation upon an administrative decision where the decision is, on the face of it, absurd. No underlying error needs to be identified in order to characterise such a decision as beyond power simply because it is beyond the pale. The language of the test imposes a constraint. It is only to be applied in extremist and therefore in rare cases.

Rationality is an inescapable requirement of official decision-making which underpins most of the traditional grounds of review. An irrational decision will often be unlawful because it fails to comply with the substantive requirements of the decision-making power as defined explicitly or implicitly by the statute which is its source.⁷⁰

Fairness

When a statute empowers a public official to adversely affect a person's rights or interests the rules of procedural fairness regulate the exercise of the power unless excluded by plain words.⁷¹ It is a matter which goes to power:

... 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 afford procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s75(v) of the Constitution.⁷²

Procedural fairness supports rational decision-making in two ways. As already noted, bias in a decision maker is likely to inform reviewable error. A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision maker who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power. As the Full Court of the Federal Court said in 2000:

Fairness is not a moral fetter on efficiency. Fairness, expressed in recognition of the right to be heard and want of bias on the part of the decision maker, operates in aid of informed decision-making that has regard to relevant criteria and so advances the statutory purpose. So equity serves efficiency.⁷³

The requirements of procedural fairness, particularly in relation to the right to be heard, are ambulatory. They will vary from one legal context to another and from one fact situation to another.⁷⁴ They must be practical. They do not require the imposition on administrators of highly prescriptive requirements of the kind appropriate to a judicial proceeding. The assumption that the methods of natural justice are necessarily those of the courts is 'wholly unfounded'.⁷⁵

Procedural fairness may apply where there is a legitimate expectation of a particular approach to decision-making based, for example, upon a statement or undertaking or regular practice followed by the decision maker.⁷⁶ That is to say, a decision maker who has committed himself or herself to a declared procedure or policy or a regular practice may not fairly depart from that commitment, policy or practice without first giving persons to be affected an opportunity to be heard on the question whether there should be a departure. This is a process requirement. It does not create, in Australia, substantive rights to the subject matter of the expectation.⁷⁷

The extension of the legitimate expectation principle to compliance, by Australian officials, with obligations under international conventions to which Australia is a party was made in *Minister for Immigration and Multicultural Affairs v Teoh*⁷⁸ but has been called into question in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*.⁷⁹ Indeed, the whole concept of legitimate expectation has come under scrutiny in that case.⁸⁰

In the end, legitimate expectation is something of a fiction best regarded as a tool for the analysis of the requirements of procedural fairness in particular classes of case. It may go the way of 'proximity' in the law of negligence without effecting any substantive change to the requirements of procedural fairness. In the light of comments made in the *Lam* judgments, 'practical unfairness' is likely to be the touchstone of review for alleged want of procedural fairness in relation to the right to be heard.

Fairness is sufficiently valued as an attribute of an administrative decision-making that a decision can be quashed for want of fairness even though the decision maker has acted entirely fairly. The unfairness may be attributable to the conduct of a third party. An official who is expected to provide a tribunal with all papers in the possession of the government department responsible for the primary decision may, deliberately or inadvertently, withhold material favourable to the applicant for review. In that case, unfairness can result despite the fact that the tribunal is unaware of the true situation. Alternatively, a third party may present misleading material to a tribunal or decision maker without its knowledge. As Gleeson CJ said in *Hot Holdings Pty Ltd v Creasy*,⁸¹ 'procedural unfairness can occur without any personal fault on the part of the decision maker.'

In another case a decision of the Administrative Appeals Tribunal was set aside where there had been unfair cross-examination of an applicant based upon a common misapprehension about the completeness of the document on which he was being cross-examined. Neither the Tribunal nor the applicant were to blame.⁸² And where, without the knowledge of a tribunal, an applicant did not

receive notice of the hearing date before the hearing, the resulting decision was set aside. Gray ACJ and North J said:

The fact that the Tribunal was unaware of the absence of notice to the applicant when it made its decision does not negate the denial of procedural fairness. It is not a necessary element of a denial of procedural fairness that it be the result of intentional conduct, or even of negligence. It is enough that it occurred.⁸³

The law does not however operate to protect persons from unfairness resulting from the negligence of their own advisers.⁸⁴

Fraud and circumstances analogous to fraud may also vitiate administrative decisions which they affect notwithstanding that there is no fault on the part of the decision maker or of the party affected by the decision. Of course it is also true that a decision procured by the fraud of the party benefited by it will be a nullity. Generally speaking third party fraud adversely affecting the subject of a decision necessarily involves procedural unfairness. But fraud has its own long-established vitiating quality. Fraud 'unravels everything'.⁸⁵ It is, however, difficult to establish. The case law on administrative decisions induced or affected by fraud is sparse.⁸⁶ The vitiating quality of fraud is, in a sense, implicit in the themes and values of administrative law already identified, although for the most part they relate to the standards imposed upon official decision makers.

The themes and values of administrative law identified in this chapter are useful heads for the discussion of its essential elements. Perhaps more importantly, they form a bridge of intelligibility between what administrators, judges and lawyers do in the pursuit of administrative justice and what the wider community is entitled to expect of them. The pursuit of intelligibility through simple statements of basic themes and values is important to establish and maintain confidence in administrative justice in contemporary Australian society.

The public/private distinction in Australian administrative law

Colin Campbell

Judicial review is commonly assumed to be available solely in respect of the exercise of power that may be described as ‘public’.¹ Until recently, Australian courts have been of the view that the source of a power would be determinative of whether the power was public in the requisite sense: only power which derived from statute or the prerogative would be public for the purposes of judicial review.

That view, however, is beginning to change. Over the last two decades, and beginning with the seminal Court of Appeal decision in *R v Panel on Take-overs and Mergers, Ex parte Datafin*,² the English courts have moved away from relying exclusively on the *source* of power as determinative of whether that power is public. Rather, power that does not derive from statute or the prerogative may nonetheless be public, and therefore amenable to the court’s review jurisdiction, if it may be determined to be public by virtue of its nature or character.³ This notion that power may be public as a result of its nature is of increasing significance for judicial review in Australia. The notion is of most immediate relevance in the context of the review jurisdiction that the state Supreme Courts were granted upon being established, and which mirrored the jurisdiction possessed at the time by the superior courts at Westminster.⁴ Pursuant to such jurisdiction, still possessed by the Supreme Courts, and generally referred to as their common law review jurisdiction,⁵ exercise of power will be subject to judicial review if the power is determined by the court to be public.⁶ In some of those jurisdictions, judges have already followed *Datafin* in finding exercises of non-statutory and non-prerogative power to be public, and therefore subject to judicial review.⁷

However, the notion that a non-statutory power may be public is also of significance in the context of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and the state Supreme Courts’ statutory review jurisdictions.⁸ Hence, and somewhat peculiarly, in the recent *NEAT* decision,⁹ Kirby J held that if

a decision is made pursuant to the exercise of power that is public in the requisite sense, that decision is more likely than would otherwise be the case to be 'administrative' for the purposes of s3 of the ADJR Act.¹⁰ More broadly, one commentator has argued that the 'under an enactment' requirement in the ADJR Act should be removed, and replaced with a requirement that would render amenable to judicial review 'decisions . . . in breach of Commonwealth law imposing restraints on . . . the exercise of *public power*'.¹¹

The coherence of the tests relied upon by the courts to determine whether power is public for the purposes of judicial review is of significant practical importance. The determination by the court of whether a particular exercise of power is public, for instance, may be crucial to the ability of an individual adversely affected by the exercise of the power to obtain relief. Hence, in the absence of a pre-existing legal relationship between two persons – as would exist, for example, if they were parties to a contract, or fiduciary and beneficiary¹² – judicial review may be the *only* basis upon which one party may seek to challenge the actions of the other that have adversely affected him or her. If, for instance, the issue in contention was the refusal of one party to provide a service to another, or to grant him or her permission to engage in some activity, it is difficult to think of a private law avenue of redress that would be of assistance. In these circumstances – and if the power in question could not be determined coherently to be public, and therefore subject to judicial review – even the equitable remedies of declaration or injunction would be of no assistance to the person adversely affected. A declaration does not alter the legal relationship between the parties to which it pertains, but merely serves to declare their legal rights and obligations with respect to each other.¹³ But in the absence of a private law cause of action there would be no relevant legal rights or obligations that could be declared. Similarly, an injunction serves to protect an individual's legal rights or equitable interests.¹⁴ But, again, in the circumstances described, there would be no such rights or interests. The only avenue of redress that might be available would be judicial review. And, as far as the courts are concerned, judicial review is available only in respect of the exercise of public power.

The coherence of the tests used by the courts to determine precisely when, as a result of its nature, power will be public for the purposes of judicial review has been rendered all the more important in the present context by the widespread implementation by both the federal government and state governments of programs of privatisation.¹⁵ Under such programs, functions previously carried out pursuant to statute – and so plainly subject to judicial review – have been transferred to *Corporations Act* companies that are not creatures of statute.¹⁶ The power will be public, and so subject to review, if at all, only by virtue of its nature.

The purpose of this chapter is to illustrate some of the difficulties that the courts have faced – and will continue to face – in seeking to determine whether power, by virtue of its nature, is public and therefore subject to judicial review. The chapter will be divided into three main parts. In the first part, two of the tests articulated by English jurists, and which purportedly permit a determination to

be made of whether power is public by virtue of its nature, will be examined. Attention will be drawn to the problems inhering in the tests, and a possible explanation mooted for the existence of at least some of these problems. In the second part of the chapter, tests that have been relied on by Australian courts, and which purportedly permit a determination to be made of whether power is public, will be subjected to scrutiny. It will be concluded that these tests are just as deficient as their English counterparts. In the third part of the chapter, a possible explanation will be provided as to why the Australian courts, like the English courts, have had difficulty in arriving at a coherent test to determine whether power, by virtue of its nature, is public. Finally, a tentative suggestion will briefly be made as to a test that the Australian courts might rely on to determine whether power, by virtue of its nature, is public.

English efforts

One test commonly referred to by the English courts, which supposedly permits the courts to determine whether power, by virtue of its nature, is public for the purposes of judicial review, is known as the ‘but-for test’. Pursuant to that test power exercised in the carrying out of a particular function will be public if, in the absence of a non-governmental body to carry out that function, the government itself would almost invariably undertake the function.¹⁷

The but-for test has two main problems: it is very difficult to apply coherently in practice, and it lacks an attractive normative basis. The test is difficult to apply coherently in practice because, although it requires the court to ascertain whether the government would invariably undertake a particular function in the absence of a non-governmental body to perform the function, English law provides no criteria by reference to which the court can determine whether or not the government would in fact invariably undertake a particular function. That absence, contends John Allison, reflects the absence, in turn, of a ‘prevailing and well-developed theory of the State’¹⁸ in English law. English law does not contain a prevailing and well-developed theory of the state, claims Allison, ‘due to the lateness and limited extent of administrative centralisation’¹⁹ in England, and the ‘theoretical insularity of the English legal profession’.²⁰

The absence of criteria of the relevant kind has a number of consequences for the operation of the but-for test. One is that judges purport to apply the test while actually giving effect to their own intuitive and largely unexamined notions of what is appropriately regarded as governmental. Hence, in *R v Football Association Ltd; Ex parte Football League Ltd*,²¹ Rose J declined to subject the Football Association to judicial review, at least in part because football is a ‘popular form of entertainment and recreation’.²² The notion is implicit in Rose J’s analysis that the government would not invariably become involved in the administration of an activity which exists for the purposes of entertainment and recreation. But his judgment contains nothing by way of theoretical analysis (or even empirical

evidence) to support such a conclusion. This is the case even though football might be thought to occupy a special position in England. It is, in the words of the judge himself, a sport which 'thousands play and millions watch',²³ and in respect of which 'millions of pounds are spent by spectators, sponsors, television companies and also clubs'.²⁴

Another possible consequence of the absence of criteria by reference to which it can be determined, for the purposes of the but-for test, whether the government would invariably undertake a particular function, is judicial anxiety about applying that test. Hence in *R v Code of Practice Committee of the British Pharmaceutical Industry; Ex parte Professional Counselling Aids Ltd*,²⁵ for instance, Popplewell J commented that the but-for test is especially difficult to apply,²⁶ and subjected the Practice Committee to the court's review jurisdiction, but only with 'the greatest reluctance'.²⁷

And it is probably not going too far to suggest that many judges are even more concerned than was Popplewell J about the capacity of the but-for test to be coherently applied. There are a number of recent decisions involving applications for the judicial review of the exercise of a non-statutory power that the courts have resolved, somewhat conspicuously, without determining whether the power in question was public to begin with.²⁸ Rather, the courts assumed for the purpose of the applications that the power was governmental, and then held that no grounds of review were made out.²⁹ Accordingly, the courts did not need to ascertain whether they had review jurisdiction in the first place, in order to resolve the disputes before them. It is not suggested that the judges' conclusions that the relevant grounds were not made out were in any way influenced by a desire to avoid the need to determine whether the court's review jurisdiction was engaged. However, the apparent readiness of some English judges to side-step the need to determine whether they had jurisdiction to hear the very matters before them is in itself troubling.

However, even if the but-for test could be applied coherently in practice, the test is normatively unattractive. It is simply not apparent why the provision of protection to people against activity undertaken in contravention of the principles of good administration should depend upon the hypothetical preparedness of the government to undertake the function in respect of which the power is exercised.³⁰ There is no suggestion, for example, that even if functions could be characterised as governmental, that power exercised in the carrying out of such functions, would necessarily affect individuals any more seriously, or qualitatively differently, from power exercised pursuant to so-called private functions.³¹ Indeed, in recent work Oliver has suggested that the exercise of public power may impinge upon the same individual interests as may the exercise of private power.³²

The very consequence, however, of the courts' reliance on the but-for test is that individuals are deprived of judicial review's protection on the basis that the court is unprepared to find that the but-for test is satisfied. The court is unprepared, in other words, to find that if the non-governmental body in question did not perform a function in respect of which administrative activity is taken,

that the government would invariably undertake that function. So, for instance, in *R v Chief Rabbi; Ex parte Wachmann*³³ the court declined to subject to judicial review the Chief Rabbi's decision to declare Wachmann 'no longer religiously and morally fit to occupy his position as rabbi', for the reason that it could not, in the court's view, be suggested that 'but for [the Chief Rabbi's] offices, the government would impose a statutory regime'.³⁴ The government 'could not and would not seek to discharge' the Chief Rabbi's functions, 'were he to abdicate his regulatory responsibility'.³⁵ It is not contended here that the decisions of religious bodies should necessarily be subject to judicial review, although some prominent commentators have suggested that the decisions of such bodies should be.³⁶ Rather it is contended that if such bodies are to be immune from judicial review, it must be on a basis other than that their role fails to be in some vague fashion governmental.

There are other normative difficulties with the but-for test, too. Hence, the government of the day may not be prepared to perform a particular function because of 'political ideology or history'³⁷ or efficacy. But it would be bizarre if the political ideology or history of the ruling party, or that party's considerations as to what is politically efficacious, were to play a determinative role as to the availability of judicial review. Quite apart from anything else, none of these matters bears any relation to the extent to which, or the manner in which, administrative action taken in contravention of the principles of good administration may impact upon those affected. There is also the possibility, pursuant to the adoption of the but-for test, that a function may shift in and out of the court's review jurisdiction with changes in government, or even as a result of one government's changes in policy.³⁸

It is not just the courts who have encountered difficulties in arriving at a satisfactory test for determining, for the purposes of English judicial review, whether power will be public by virtue of its nature. Leading English academics have also faltered in this regard. Lord Woolf and Professor Jowell, for instance, contend that a body should be regarded as exercising public power when it seeks to 'achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so'.³⁹

Quite apart from anything else, however, this collective benefit test cannot be coherently applied. Certainly it seems intuitively correct to suggest that a public function must be directed at obtaining some collective benefit. But in the absence of a theoretical underpinning of the notion of 'collective benefit' which, as Allison claims, would 'be at home in a theory of the state',⁴⁰ it is impossible to determine with any certainty when particular actions may be regarded as having been undertaken for 'a collective benefit' in the requisite sense. Hence, it can be argued that any publicly listed company seeks to achieve a collective benefit for a section of the public. Such companies seek, inter alia, to do well financially, so as to maximise financial returns for their shareholders, clearly a section of the public.

It is acknowledged that it is unlikely that Woolf and Jowell intend ‘collective benefit’ to be interpreted so broadly – indeed they may regard such an interpretation as bizarre. But without a particular *a priori* understanding of ‘public function’ such an interpretation could be ruled out only arbitrarily. Nor is this interpretation of the application of the collective benefit test hindered by the requirement, as part of the test, that the body in question must be ‘accepted by the public or [the relevant] section of the public as having authority’⁴¹ to carry out the function in question. Simply by acquiring shares in the company, the shareholders would be evincing their approval, in general, of the activities undertaken by the company.

Australian attempts

In light of the unsatisfactory efforts of English courts and academics to arrive at tests to ascertain whether power is public for the purposes of judicial review, it might have been hoped that the Australian courts would have been especially careful in arriving at any such tests upon which they proposed to rely. It does not appear, however, that that has been the case. Australian courts have determined power to be public by virtue of its nature in at least five cases so far, and the approaches relied on in each have been no more satisfactory than those employed in England.

It is proposed to examine each of the relevant judgments and to identify its deficiencies. As a preliminary matter, it should be noted that it is not being argued that the judges’ conclusions in these cases that the power in question was public, and therefore appropriately subject to judicial review, are necessarily wrong, a matter that will be touched on again in the conclusion to this chapter. The point is simply made here that the particular bases upon which the judges determined the power to be public were flawed.

Typing Centre of New South Wales v Toose and Others

The first Australian judge to hold a power that did not derive from statute or the prerogative to be public for the purposes of judicial review, by virtue of its nature, was Matthews J in *Typing Centre of New South Wales v Toose and Others*.⁴² In the case, the applicant was seeking review of a determination made by the respondents, as members of the Advertising Standards Council, to uphold a complaint that one of the applicant’s advertisements had breached the Council’s Code of Ethics. A finding by the Council that an advertisement had breached its Code would have the result, in practice, that no proprietor of commercial media in Australia would accept the advertisement for publication.⁴³

Her Honour relied on a number of ad hoc factors in concluding that the decision of the Council was made pursuant to the exercise of public power, all of which are problematic. The judge regarded it as significant, for instance, that the

Council 'has power, through its complaints procedures, to interpret and mould the various advertising Codes in precisely the same way as the courts can interpret and mould Acts of Parliament'.⁴⁴ It is not at all apparent, however, why a resemblance between the Council and courts of law, bodies which are by and large not subject to judicial review, should have the consequence of rendering the Council and its activities public in the sense of being subject to review. A more useful comparison might have been between the Council and statutory tribunals, bodies which interpret and give effect to legislation, but which, unlike courts, generally are subject to judicial review. Nonetheless, it is unlikely that the Advertising Standards Council is sufficiently similar to statutory tribunals for the resemblance between the two to have formed the basis of an argument that the Council is public in the relevant sense.

Hence, for instance, a normative justification for the subjection of statutory power to judicial review, advanced by prominent commentators, operates by way of analogy with the law of trusts. It is contended that, just as title to trust property is conferred by the settlor of the trust onto the trustee to be used for the benefit of the beneficiaries, statutory power may be presumed to have been conferred upon the executive by the legislature to be exercised in the public good.⁴⁵ The subjection of the exercise of statutory power to the principles of good administration, by way of judicial review, would at least reduce the likelihood of that statutory power being exercised for a purpose other than the public good, just as the subjection of a trustee to the various duties that the law imposes on him serve, *inter alia*, to reduce the likelihood of his dealing with the trust property for a purpose other than that of benefiting the beneficiaries.

The analogy with the law of trusts, however, cannot be comfortably applied to the Advertising Standards Council and its decisions. Hence it is questionable whether the Council has had power of any sort *conferred* upon it. The ability of the Council to hear complaints about advertisements simply vests within the Council as a result of its own complaint procedures,⁴⁶ and the power to decline to publish advertisements that have been found to contravene the Council's Code of Practice lies not with the Council, but with particular media proprietors.⁴⁷ Furthermore, statutory power would presumably be regarded as having been conferred by the legislature on the executive to be exercised in the public good because the legislature is elected by the public to act for the public's benefit. But any power which the Advertising Standards Council possesses does not derive in any meaningful or specific way from the populace at large.

In determining that the decision of the Advertising Standards Council under consideration was subject to judicial review, Matthews J also accorded weight to the fact that an advertiser 'need do no more than insert a single media advertisement in order to attract the ASC's jurisdiction'.⁴⁸ It is difficult to ascertain precisely why the judge thought that this matter should be of significance in determining whether the Council's decisions should be subject to judicial review. One possibility is that the judge was concerned that the Council could affect the

Typing Centre unilaterally, without the Typing Centre in any way agreeing to be governed by the Council's decisions. Indeed, at the time the offending article was placed, the plaintiff was not aware of the provisions that it was said to have contravened.

However, any suggestion that an exercise of power should be subject to judicial review because that exercise of power may unilaterally affect a person is novel and, if given effect, would massively expand the scope of judicial review. Hence, for instance, every time a corporation decides that a commercial concern – such as a factory, or a bank – should be closed down or should move from a particular area, those who live and work in the area may be unilaterally affected by the corporation's decision. But as judicial review is currently conceived, there is no suggestion that corporations would be subject to judicial review in respect of such decisions.

Finally, the judge indicated that she would be prepared to subject the Council's decisions to judicial review because of the 'centrality of advertising in our society'⁴⁹ and the 'importance of advertising in our community'.⁵⁰ But again, subjecting decisions to judicial review merely because they were made in respect of matters central to our society would be a novel approach, and one that would massively expand the province of judicial review. Hence it is difficult to avoid the conclusion that pursuant to that approach decisions in respect of the sale and purchase of food and other commodities – certainly a matter central to our society – would be subject to judicial review.

And even if the judge intended this 'central to society' criterion to subject to judicial review only decisions made by bodies that *administer* matters central to our society, and the use of the criterion were so limited, the expansive effect upon judicial review would remain substantial. It is not going too far to say that sport is central to our society. If decisions made by bodies that operate in an administrative capacity with regard to sport were subject to review, then an enormous number of decisions made by bodies ranging from the AFL to little athletics organising committees would be rendered amenable to judicial review.

The State of Victoria v the Master Builders' Association of Victoria

The next relevant Australian case is *The State of Victoria v the Master Builders' Association of Victoria*.⁵¹ The Victorian Attorney-General had established a non-statutory body, the Building Industry Task Force, to deal with collusive tendering and other corrupt practices in the building industry. The task force distributed to all government departments and agencies, and to all municipal councils, a black list of contractors who were not permitted to tender for government contracts. The Master Builders' Association brought a review application on behalf of its members who had been blacklisted, claiming that they had not been given an opportunity to explain why they should have been blacklisted.

Large portions of the various judgments in *Master Builders* were devoted to a consideration of whether power that has its *source* in the prerogative is for that reason subject to review and, if so, whether the compilation and distribution of the black list was undertaken pursuant to prerogative power.⁵² However, the court did not limit itself to considering just that issue. Rather, both Tadgell J and Eames J had regard to whether the power exercised by the task force in carrying out its activities was, by virtue of the *nature* of those activities, public. The power was public, said the judges, because, inter alia, the compilation and distribution of the black list took place pursuant to the performance of a public duty.⁵³

It is suggested, however, that a determination that a particular function is undertaken under a public duty is unlikely to be of great assistance in determining whether the function is public for the purposes of judicial review. Such a determination is much more likely to follow as a *consequence* of the identification of the function as public, than it is to be a useful guide as to whether the function is public in the first place. In the absence of provisions in the documents constituting the body that exercises the function expressly stating that the body must act on behalf of the public, it is difficult to know how it could be ascertained, in advance of a function's classification as public, that it would be carried out under a public duty.

It is acknowledged that the judgments of Tadgell J and Eames J are not silent as to how it may be determined that a particular function will have been carried out pursuant to a public duty. The judges suggest that that will be the case – and so review will be available – when the function in question relates to a matter of ‘public significance’⁵⁴ or ‘public importance’.⁵⁵

To the extent that the judgments of Tadgell J and Eames J effectively render the public significance or importance of a function determinative of whether the judicial review is available in respect of decisions made pursuant to that function, they are deficient. The judgments make no attempt to provide any general criteria by reference to which it can be determined whether matters are of public significance or public importance, and fail entirely to explain why decisions relating to matters of public significance or importance should be subject to judicial review. Decisions by petrol companies as to the price that they will charge for petrol, by sporting bodies as to when they schedule matches and by bodies engaged in medical research to seek a cure for one disease rather than another all plausibly relate to matters of public importance. But it is unlikely that the court would accept that decisions like these should be subject to judicial review. A test for the availability of judicial review that makes the public significance or public importance of the subject-matter of a decision ultimately determinative of whether the decision, in turn, is public in the requisite sense must either provide a strong normative basis for why the sorts of decisions referred to above are appropriately subject to judicial review, or be sufficiently nuanced not to categorise them as public to begin with.

NEAT Domestic Trading Pty Ltd v AWB Limited and Masu Financial Management P/L v FICS and Julie Wong

Two further cases relevant to the current discussion are *NEAT Domestic Trading Pty Ltd v AWB Ltd (NEAT)*⁵⁶ and *Masu Financial Management P/L v FICS and Julie Wong (No 1) (Masu Financial Management)*.⁵⁷ *NEAT* involved a challenge by NEAT Domestic Trading Pty Ltd to a decision by the Australian Wheat Board (International) Limited (AWBI) to decline to give its approval for NEAT to make bulk exports of wheat to Italy and Morocco. As a consequence of AWBI's declining to give that approval, and pursuant to provisions of the *Wheat Marketing Act 1989* (Cth), the Wheat Export Authority was obliged not to consent to the export of the wheat. The result was that any exporting of the wheat by NEAT would have been illegal.

The principal issue was whether AWBI's refusal to approve the export of the wheat was amenable to the court's jurisdiction under the ADJR Act, and so was a decision of an administrative character made under an enactment. But the public/private distinction also arose. As mentioned above,⁵⁸ Kirby J held that if a decision is made pursuant to the exercise of public power, the decision would be more likely, than would otherwise have been the case, to be administrative in character.⁵⁹

In *Masu Financial Management*, the applicant, Masu, sought judicial review of a decision by the Financial Industry Complaints Service that Masu had provided Ms Wong with deficient financial advice. The Financial Industry Complaints Service is a corporation that acts 'as a complaints resolution body' in respect of 'the financial services industry' and which deals with 'complaints arising from transactions involving members of the public and participants in the industry'.⁶⁰

Both Kirby J in *NEAT* and Shaw J in *Masu Financial Management* held that the decisions in question were made pursuant to the exercise of public power, and there is substantial overlap between the reasoning in the two judgments. Both judges held that the decisions in question were public essentially because the decisions were made pursuant to functions that were enmeshed in governmental concerns. Hence in *Masu Financial Management (No 2)*,⁶¹ Shaw J stated that the Financial Industry Complaints Service exercised public power because, variously: 'the federal government was responsible for appointing a substantial proportion of the members of the board of FICS';⁶² 'the federal government was involved in the appointment of two-thirds of any panel appointed by FICS to hear a complaint';⁶³ 'the scheme was constituted in compliance with the policy statement issued by the federal government';⁶⁴ 'the scheme was established under the umbrella of a regulation made by the Australian executive government under statute';⁶⁵ and 'failure to comply with a decision of FICS could result in the federal government cancelling a licence and exposing the licensee to prosecution if it continued to conduct a business'.⁶⁶

In *NEAT*, Kirby J did not advert to specific aspects of AWBI, as a result of which AWBI could be said to be enmeshed in the concerns of the government. But he did list certain features of the Panel on Take-overs and Mergers as a result of which it could be said that the Panel was enmeshed with governmental activity, and upon which Lloyd J had relied in *Datafin* in determining that the activities of the Panel were public. Hence, for instance, some legislation ‘assumed [the] existence’⁶⁷ of the Panel, and the Panel’s ‘chairman and deputy chairman were appointed by the Governor of the Bank of England’.⁶⁸ Kirby J then stated that when ‘applied to the circumstances of the current appeal’ all the criteria identified in, inter alia, *Datafin* pointed ‘to the conclusion that AWBI’s decisions were made pursuant to governmental authority’.⁶⁹

The enmeshment approach is unsatisfactory for determining whether a body’s activities are public for the purposes of judicial review. It provides very little by way of specific guidance to courts or prospective litigants as to whether a body’s functions will be found to be public for the purposes of judicial review. At least as articulated so far, the approach does not indicate what *degree* of enmeshment is necessary in order for a body’s functions to be subject to judicial review. Accordingly, it can be argued that the regulation of an activity by statute, or the granting of governmental funding in respect of the carrying out of an activity, results in the enmeshment of that activity with governmental concerns. But it is impossible to determine on an *a priori* and principled basis whether any particular instance of regulation or funding would result in sufficient enmeshment to render the activity in question public for the purposes of judicial review. Consequently, it is likely that reliance by the courts on the enmeshment approach would result in substantial inconsistency, as judges gave effect to their (largely) uninformed intuitions about whether particular acts are (or are not) public. This problem with the enmeshment approach was as much as admitted by Lord Woolf, in an English context, when he contended that the application of the approach will provide ‘no clear demarcation line which can be drawn between public and private . . . functions’.⁷⁰ Rather, he said, whether or not an act is public, pursuant to the application of the enmeshment approach, will be ‘very much’ a matter of ‘fact and degree’.⁷¹

Kirby J in *NEAT* also relied on observations made previously by members of the High Court in *Forbes v New South Wales Trotting Club Ltd*⁷² – not a judicial review case – in determining that the power exercised by AWBI was public. However, the observation of Gibbs J that ‘trotting is a public activity in which quite large numbers of people take part’,⁷³ quoted by Kirby J,⁷⁴ provides minimal assistance in arriving at general criteria for determining whether power is public for the purposes of judicial review. The natural reading of Gibbs J’s language is that his Honour was simply asserting that trotting is a public activity – there is no reason to think that he is suggesting that trotting is a public activity because ‘quite large numbers of people take part’ in it. However, even if Gibbs J did mean to say that trotting is a public activity *because* many people participate in it, difficulties remain. Quite apart from the lack of precision inherent in a criterion that renders

review available in respect of activities in which ‘quite large numbers of people’ partake, it is likely that the adoption of such a criterion would massively expand the scope of judicial review. Kirby J’s reliance on the suggestion of Gibbs J that decisions made in respect of trotting are public because they may prevent a person from ‘carrying on his occupation or performing the duties of his employment’⁷⁵ is similarly problematic. The adoption of such a criterion for the availability of judicial review would be novel (at least if applied to situations where the employer in question was not a monopoly employer),⁷⁶ and if given broad effect would, again, massively expand the scope of judicial review.

Nor can assistance be gained in arriving at general criteria to determine when review is available from the contention of Murphy J, also relied on by Kirby J,⁷⁷ that

A body . . . which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee, is exercising public power.⁷⁸

Hence, to begin with, the judge provides no explanation as to why the racecourse in question was public. Further, it could not plausibly be the case that the offering of a service would be public in the requisite sense simply because either governmental permission was required before the service could be offered, or the provision of the service carried a fee. Indeed, even if the judge intended that only those services would be public the offering of which required governmental permission *and* in respect of which a fee was payable, the expansion of the scope of judicial review would be substantial. Pursuant to such a criterion, the activities of public houses, licensed grocers, licensed restaurants, cable television stations and taxi companies would all be subject to judicial review.

D’Souza v The Royal Australian and New Zealand College of Psychiatrists

The most recent decision in which the court considered whether power that did not derive from statute or the prerogative might nonetheless, by virtue of its nature, be public is that of Ashley J of the Victorian Supreme Court in *D’Souza v The Royal Australian and New Zealand College of Psychiatrists*.⁷⁹ The plaintiff was a medical practitioner who was seeking review of the College’s decision to fail him with respect to his ‘clinical viva’. As a consequence of failing the viva, the applicant was prevented from practising psychiatry as a consultant, although he was not prevented from practising psychiatry altogether.⁸⁰

Although the judge determined ultimately that the College’s decision to fail D’Souza was not public because of the existence of a contract between the College and D’Souza,⁸¹ he held that the College’s decision to fail D’Souza was *prima facie* public, and in the absence of the contract between D’Souza and the College, would have been subject to judicial review.⁸²

But once again, the basis on which the court found the decision to be public – or *prima facie* public in this case – is unsatisfactory. The judge’s reasoning that the decision in question was public, and, therefore, amenable to judicial review, consists of little more than assertions that rhetorically invoke the word ‘public’ in a variety of different contexts. Hence the respondent’s decision to fail the plaintiff in his clinical viva and, therefore, not to elect him to membership of the Fellowship had ‘public consequences’.⁸³ This was in part because the ‘treatment of mental illness is a public health issue, and the ability to practice in that field as a specialist is of public importance’.⁸⁴ But a test which renders the public importance of a function determinative of whether decisions made pursuant to that function are subject to judicial review is subject to the objections that have been made above in the context of *Toose* and *Master Builders*.

A theory of the state in Australian law

One question prompted by these cases is why the Australian courts have encountered difficulties in arriving at a conception of public power that can coherently be applied in practice. As observed above,⁸⁵ Allison has contended that the English courts have been unable to arrive at a coherent test for determining whether power will be public for the purposes of judicial review because of the absence of a well-developed theory of the state in English law. A well-developed theory of the state seems similarly absent from Australian law. Such an absence provides a persuasive explanation as to why the Australian courts have been unable to arrive at a coherent test for determining whether power, by virtue of its nature, is public. In the absence of a well-developed theory of the state, conceptions of that which are public must necessarily be vague and ad hoc.

There are difficulties, of course, in demonstrating that something is absent. Furthermore, it is not possible here to consider the absence of a well-developed theory of the state in Australian law in the same depth as Allison devotes to his analysis in his book on the public private/divide. As a starting point, however, it is worth noting that it would be surprising if Australian law *were* to contain a well-developed theory of the state, while English law does not. The presence of a well-developed theory of the state in Australian law would be surprising because for:

... much of Australia’s constitutional law, and for even more of its ‘constitutionalism’, the historical framework was provided by the institutions, traditions and practices of British (and especially English) constitutional government.⁸⁶

Australian constitutional law is not the same as English constitutional law. One of the main structural differences is that Australia has a written Commonwealth Constitution and state Constitutions, whereas England does not have a written constitution. But the fact that Australia has written constitutions has not resulted in the presence of a well-developed theory of the state in Australian constitutional law. Indeed, certain aspects of Australia’s constitutions may be

seen as contributing to the absence of a well-developed theory of the state in Australian law.

The 'abstract concept of the Crown',⁸⁷ for example – a notion that Allison argues exemplifies, and in turn contributes towards, the 'traditional neglect of the state administration'⁸⁸ – 'pervades'⁸⁹ the Commonwealth Constitution.⁹⁰ Thus the preamble to the Constitution states that the people of the various colonies have agreed to unite in 'an indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland'. The 'executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor General',⁹¹ who is appointed as the Queen's representative in the Commonwealth.⁹² Departments of state of the Commonwealth are administered by 'the Queen's Ministers . . . for the Commonwealth',⁹³ and the ministers' salaries are 'payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth'.⁹⁴ The position just described, too, reflects that which Allison describes as the 'traditional preoccupation with official persons to the exclusion of a concept of the state'.⁹⁵ And the notion of the Crown also generally plays a role in state constitutions.⁹⁶

Although 'the structure of the Commonwealth Constitution suggests a tripartite separation of the principal functions of government',⁹⁷ the High Court of Australia has 'established in a series of cases that the principle of separation of powers [has] little or no impact on the delegation of legislative power to the executive'.⁹⁸ Such an approach, argues Winterton, is necessitated by the 'Commonwealth Constitution's acknowledgment of the system of responsible government', which in turn 'depends on the close integration of the Parliament and the executive government'.⁹⁹ It does not seem overly controversial to suggest that such an acknowledgment has resulted in the notion of the state receiving less attention in Australian jurisprudence than it might have, had the High Court been required to consider closely the difference between the executive and the legislature.¹⁰⁰

The absence of a well-developed theory of the state in Australian constitutional law is made most apparent by the uncertain nature of Australian law with respect to certain matters, a proper explanation of which would depend upon the existence of a comprehensive theory of the state. Finn J has spoken of 'two rather significant fissures in Australian jurisprudence'.¹⁰¹ One 'concerns the constitutional status and standing [in Australian law] of statutory corporations . . .'¹⁰² – do these 'fall within the Executive'¹⁰³ or are they, alternatively, a 'fourth arm of government'?¹⁰⁴ The other, according to his Honour:

... raises the extent to which the manner of scrutiny of the formally 'non-governmental' action of a statutory corporation (ie entering into a 'commercial' contract) can or should be affected by the considerations that it nonetheless is a public body that is so acting and that in so doing it is exercising a public function.¹⁰⁵

In similar fashion, the Australian High Court has declined to 'assert the possibility of drawing a clear and fixed distinction between those functions that are properly or essentially governmental and those that are not'.¹⁰⁶

Finally, the test, in the Australian common law, to determine whether a decision maker is bound by the rules of natural justice¹⁰⁷ is limited to ‘what can loosely be described as “governmental” decision-making’.¹⁰⁸ But this qualification is unexplained¹⁰⁹ and cast in very imprecise language.¹¹⁰

While none of these areas of confusion alone permits us to determine decisively that there is no well-developed theory of the state in Australian law, they do, in combination, point strongly towards that conclusion. And, absent a theory of what the state is in Australian law, and what it is appropriate for the state to do, it is difficult to derive meaningful criteria by which to label a decision or an activity public or governmental.

It has been argued in this chapter that the tests relied on by the Australian courts to determine whether power is public by virtue of its nature are deficient. If that argument is accepted, and the courts continue to purport to rely on the nature of power in determining whether the power is public and, therefore, amenable to judicial review, it will be necessary to devise a more satisfactory test.

Although the matter will not be developed in any depth here, one possible solution might be for the courts to conceive of public power as being synonymous with monopoly power. While no-one has previously suggested that nature of power as monopolistic should be determinative of whether the power is regarded as public for the purposes of judicial review, there have been some suggestions by judges in an English context that monopoly power is appropriately the subject of judicial review,¹¹¹ and at least some hints to that effect by Australian judges.¹¹²

An approach pursuant to which public power is regarded as being synonymous with monopoly power for the purposes of judicial review has two main virtues. One is that such an approach has a plausible normative basis. If a body exercises monopoly power, it will not be under the competitive pressure to act in accordance with the principles of good administration to which a body that operates in a competitive environment may be subject. Pursuant to the monopoly power conception of public power then, judicial review can perhaps be regarded as a kind of corrective mechanism that serves, in certain respects, to simulate the effects of competition upon the exercise of monopoly power.

The other virtue is that the monopoly power conception of public power is largely consistent with the circumstances in which courts have held power to be public and, therefore, subject to judicial review. Certainly this is the case with respect to the decisions, referred to above, in which Australian courts have held power, by virtue of its nature, to be subject to judicial review. Although none of the determinations in those cases that the relevant power was public relied on any sort of express monopoly power test, each of the relevant forms of power was plausibly monopolistic.

And it is not only non-statutory power which has been held to be public that is monopolistic. Perhaps the paradigmatic case of judicial review is review of a decision by a statutory decision maker to refuse a person permission to engage in

an activity which, in the absence of the permission, would be illegal. However, in circumstances where statutory decision makers can grant such permission, they are invariably the only bodies that are permitted, pursuant to the terms of the statute, to do so.

Accordingly, the adoption of a monopoly power conception of public power would not only provide a coherent basis upon which it could be determined whether power that did not derive from statute or the prerogative was nonetheless public for the purposes of judicial review. It would also conceivably permit the same test to be employed to determine whether instances of the exercise of statutory and even prerogative power were public in the requisite sense. The result may well be, overall, that a single test could be employed by the courts to determine the amenability to review of any exercise of power.

Australian administrative law: The human rights dimension

Ben Saul

Public officials and government agencies possess wide and often discretionary powers which profoundly affect the rights and liberties of people in Australia. In the absence of an Australian statutory or constitutional Bill of Rights, it is inevitable that human rights claims will attempt to infiltrate existing branches of Australian law and clothe themselves in their language and causes of action. On one hand, writing about the human rights dimension of Australian administrative law is like writing about the human rights dimension of the law of torts, contract or crime. Every branch of law has incidental effects on the protection or infringement of human rights, whether by constraining or enabling actions which affect other people.

Administrative law is, however, particularly vulnerable to the permeation of human rights claims, since, like human rights law, it primarily constrains the exercise of public power, often in controversial areas of public policy, with a shared focus on the fairness of procedure and an emphasis on the effectiveness of remedies. Nowhere is this trend more apparent than in decisions about refugee status, where failed applicants have often sought judicial review to advance what are essentially human rights claims. The perceived generosity of the courts in the migration area, through an expansion of the scope of natural justice and other grounds of judicial review,¹ and a blurring of the legality/merits distinction,² provoked a series of political attempts (not always successful) to restrict the quality or availability of review.

Establishing the human rights dimensions of administrative law depends to an extent on where the boundaries of administrative law are drawn. If, for instance, anti-discrimination law, privacy law or implied constitutional freedoms are classified as discrete areas of law,³ touching on but remaining distinct from administrative law, then much of the human rights dimension of administrative law is

carved out. Indeed there is now a large and distinctive body of Commonwealth and state/territory anti-discrimination law which partly implements, and in some cases extends, Australia's international human rights obligations.⁴ Further, once the doctrine of legitimate expectation developed in *Minister for Immigration and Ethnic Affairs v Teoh*⁵ is taken out of the picture,⁶ it might be thought that a mere skeleton of human rights issues remains within the ambit of Australian administrative law.

Unlike English public law after the enactment of the *Human Rights Act 1998* (UK),⁷ Australian administrative law has not undergone the same fundamental transformation of the administrative law grounds for review of discretionary administrative decision-making. Bills of Rights may, for example, require public authorities to exercise discretions compatibly with human rights, or direct courts to interpret legislation compatibly with rights. Australian administrative law has remained isolated from the impact of such developments, which are commonplace in most comparable common law jurisdictions and which have become a global meta-narrative in the evaluation of governmental action. While the Australian Capital Territory enacted Australia's first *Human Rights Act* in 2004, and Victoria adopted its own Charter of Rights and Responsibilities in mid-2006, these developments are likely to remain localised and unlikely to influence Australia's single common law.⁸

Without a Bill of Rights to bring human rights and administrative law together, the Australian relationship between the two is a contradictory story of convergence and divergence. While there are some important basic similarities between both areas of law, at the same time each area is both more advanced and less sophisticated than the other in significant respects. This chapter first traces and compares the values underlying both areas of law, before exploring a number of specific issues spanning both areas such as the concept of proportionality, the public/private distinction, and the 'right' to administrative justice. The chapter then examines how interpretive principles are employed by the courts to safeguard rights, at least where they are not expressly limited by statute. The final part of this chapter focuses on two institutional mechanisms which assist in protecting human rights: the Commonwealth Ombudsman, and scrutiny of Bills by parliamentary committees. The aim of this chapter is not to comprehensively examine every human rights issue arising in Australian administrative law, but to outline some of the key trends and patterns.

Convergence and divergence of human rights and administrative law

At an abstract level, there is a consonance of fundamental values underlying human rights law and administrative law.⁹ Both systems of law aim to restrain arbitrary or unreasonable governmental action and, in so doing, help to protect

the rights of individuals. Both share a concern for fair and transparent process, the availability of review of certain decisions, and the provision of effective remedies for breaches of the law. The correction of unlawful decision-making through judicial review may help to protect rights.¹⁰ On one view, the values underlying public law – autonomy, dignity, respect, status and security¹¹ – closely approximate those underlying human rights law.

Moreover, each area of law has been primarily directed towards controlling ‘public’ power, rather than interfering in the ‘private’ realm, despite the inherent difficulties of drawing the ever-shifting boundary between the two. A culture of justification permeates both branches of law, with an increasing emphasis on reasons for decisions in administrative law¹² and an expectation in human rights law that any infringement or limitation of a right will be justified as strictly necessary and proportionate. There is also an ultimate common commitment to basic principles of legality, equality, the rule of law and accountability. The principle of legality underlying both administrative and human rights law asserts that governments must not intrude on people’s lives without lawful authority.¹³

Further, both embody concepts of judicial deference (or restraint) to the expertise of the executive in certain matters. In administrative law, for example, this is manifest in a judicial reluctance to review the merits, facts or policy of a matter, the leeway given to administrators in deciding which factors are relevant in exercising a discretion,¹⁴ and in the generous latitude accorded to decision makers by the standard of *Wednesbury* unreasonableness.¹⁵ At the same time, there are counter-movements (such as the reading down of privative clauses which purport to oust review of migration decisions).¹⁶ In human rights law, courts allow an often wide ‘margin of appreciation’ towards executive judgments on the circumstances and manner in which rights may be justifiably limited. At the same time, concern has been expressed in both areas of law that the degree of deference is at once too large and too small.¹⁷

One area in which deference is most pronounced in both systems concerns the availability of exceptional procedures which restrict the ordinary application of each area of law. Human rights law treaties contain derogation provisions which enable the suspension of many human rights in times of public emergency threatening the life of the nation.¹⁸ In administrative law, privative clauses in legislation may preclude judicial review of certain decisions, including in urgent or emergency situations.¹⁹

Other points of commonality between administrative law and human rights law include the concept of proportionality, a distinction between public and private power, and the idea of a right to ‘administrative justice’. Each of these areas is considered in more detail below. It is sufficient to note here that in each of these three areas, there are more differences than similarities between administrative law and human rights law, despite the *prima facie* parallels.

In other ways too, there are marked differences between the two areas of law. Human rights law is principally concerned to protect and ensure substantive rights and freedoms, whereas administrative law focuses more on procedure and

judicial review attempts to preserve a strict distinction between the legality and the merits of a decision. Human rights law protects rights as a substantive end in themselves, whereas administrative law focuses on process as the end and it may be blind to substantive outcomes, which are determined in the untouchable political realm of legislation or government policy. It is perfectly possible for good administration to result in serious human rights violations (and conversely, compatibility with human rights law does not preclude gross maladministration). Indeed, before statutory intervention, there was no anti-discrimination principle in administrative law,²⁰ although rational justification for differential treatment may be necessary.²¹ Further, unlike civil law systems, there is also no abuse of rights doctrine in public law.²²

Human rights law is underpinned by the paramount ideal of securing human dignity, whereas administrative law is more committed to good decision-making and rational administration.²³ The three broad principles said to underpin Australian administrative law are largely neutral on substantive outcomes: administrative justice, executive accountability and good administration.²⁴ Further, the statutory grounds of judicial review in Australia are 'totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security'.²⁵ Deference to administrative determinations of which factors are relevant and irrelevant in exercising discretions may result in the exclusion of human rights issues.²⁶

The traditional emphasis of administrative law on remedies over rights²⁷ reverses the direction of human rights law, which may provide damages for the breach of a right, whereas this 'is not the natural consequence of invalid action' in administrative law.²⁸ At the same time, administrative law remedies may still guarantee essential human rights; an action for release from unlawful detention (habeas corpus) can secure freedom from arbitrary detention, and an associated declaration by the courts may provide a basis for pursuing compensatory damages in a tortious claim for false imprisonment.

Moreover, the availability of remedies in human rights law depends on how domestic legal orders incorporate international human rights treaties, which require that states provide 'effective remedies' for rights violations.²⁹ In Australia, neither the Australian Capital Territory nor the Victorian human rights models establish new causes of action for human rights violations. Instead, the Victorian approach limits remedies to situations where some other existing cause of action can be pleaded,³⁰ while the Australian Capital Territory legislation is silent on remedies. Over time, the Australian Capital Territory courts may, however, develop an independent cause of action, as occurred in New Zealand. In *Simpson v Attorney-General (Baigent's case)*,³¹ the execution of a search warrant against the premises of a wrongly-identified person clearly interfered with rights to property and privacy, yet did not amount to the common law tort of maliciously obtaining a warrant without reasonable and probable cause.³² The injustice was a catalyst for the development of an independent right to a remedy for a breach of the *Bill of Rights Act 1990* (NZ),³³ despite that Act not expressly providing for such a right.

The concept of proportionality

While the notion of proportionality surfaces in both areas of law, it is far more established as a discrete principle in human rights law. It is well accepted that any limitation on a human right must be proportionate, defined in the seminal Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*³⁴ as testing whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.³⁵

Likewise, in administrative law there has been some development of the notion of proportionality,³⁶ particularly in considering the validity of subordinate legislation³⁷ and whether it should inform understanding of *Wednesbury* unreasonableness.³⁸

Reviewing administrative action for disproportionately interfering with individual rights has, however, been attacked from three different and somewhat contradictory directions. Firstly, it is suggested that proportionality imposes a higher standard of review and inevitably crosses over into merits review, thus interfering in the separation of powers³⁹ and indulging in improper judicial activism. Secondly, importing proportionality into administrative law is said to introduce unnecessary vagueness, and it is thought better ‘to eschew standards that do not have self-apparent meaning’, since overly elastic concepts may result in the same problem of encouraging merits review.⁴⁰ A third criticism is that the idea of proportionality expresses ‘much the same ideas’ as the existing concept of *Wednesbury* unreasonableness in administrative law.⁴¹

Clearly, the idea of proportionality cannot simultaneously impose a higher standard of review while expressing similar concepts to those already found in administrative law. It is difficult to see how proportionality is little different from *Wednesbury* unreasonableness, which allows decision makers a wider freedom of lawful action. Decisions can lack proportionality without being ‘so unreasonable that no reasonable authority could even have come to it’.⁴² As Lord Steyn observed in *R v Secretary of State for the Home Department; Ex parte Daly*⁴³ of the differences between proportionality and the grounds of judicial review:

- First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.⁴⁴

While the traditional grounds of judicial review overlap with the proportionality test in human rights law, the proportionality test is more ‘precise’, ‘sophisticated’

and 'intense' than the judicial review grounds.⁴⁵ In Lord Steyn's view: 'This does not mean that there has been a shift to merits review. On the contrary . . . the respective roles of judges and administrators are fundamentally distinct and will remain so.'⁴⁶

To an extent, whether the proportionality test trespasses on the merits of a decision depends on the approach taken to the conceptual validity of the legality/merits distinction. On one view, like proportionality, concepts such as *Wednesbury* unreasonableness and procedural unfairness are equally 'judicial creations' which 'owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins'.⁴⁷ On this view, the grounds of judicial review are 'not morally colourless' but 'constitute ethical ideals as to the virtuous conduct of the state's affairs',⁴⁸ designed to protect democracy from its destruction by governments. Once the inevitability of judicial creativity is acknowledged – every precedent originated somewhere – the real argument becomes about the width of, and constraints upon, judicial creativity, and not whether it exists at all.

The public/private distinction

In both human rights law and administrative law, there has been much angst about constructing, defending and destabilising the boundaries of public and private power.⁴⁹ Historically, neither human rights law nor administrative law normally addressed the decisions or actions of private actors, since both were limited to controlling excessive or arbitrary governmental power. The modern devolution of public power to private entities, through measures of privatisation, commercialisation and contracting out, has generated a great deal of concern in both areas of law about how best to control and hold accountable the activities of private or hybrid entities. While there is also a shared concern about the conceptual validity of the distinction between public and private power – since 'one may shade into the other'⁵⁰ – it has been conditionally accepted in both areas of law as a working premise for delineating different types of powers, albeit increasingly blurred in practice.

Under international human rights treaties, only states expressly owe legal obligations to protect rights. In contrast, private persons are not parties to human rights treaties, which do not have 'direct horizontal effects' in international law and are not regarded as substitutes for domestic criminal law.⁵¹ For this reason, most national Bills of Rights are limited to controlling rights violations by public authorities, in order to implement international treaty obligations. In some jurisdictions, there is considerable debate about the scope of the meaning of a 'public authority', and in particular whether it encompasses hybrid bodies spanning the public/private divide.⁵²

Nonetheless, in implementing the duty to 'ensure' rights, states must also protect individuals from private violations of rights 'in so far as they are amenable to application between private persons or entities'.⁵³ This may require states to take

positive measures of protection (through policy, legislation and administrative action), or to exercise due diligence to prevent, punish, investigate or redress the harm or interference caused by private acts.⁵⁴ These duties are related to the duty to ensure effective remedies for rights violations.⁵⁵ Thus non-state actors such as individuals or corporations are indirectly regulated by human rights law, by virtue of the duties on states to 'protect' and 'ensure' rights. Consequently, '[m]uch of the significance of the State/non-State (public-private) distinction with respect to the reach of international law . . . collapses'.⁵⁶ Even so, where a private act is not attributable to the state, the state cannot be held responsible for the act itself, but only for its own failure to exercise due diligence in preventing the resulting rights violations or responding appropriately to them.⁵⁷

While private persons are not directly legally responsible for rights violations, neither are they left entirely unregulated. The preamble to the Universal Declaration of Human Rights (UDHR) states that 'every individual . . . shall strive . . . to promote respect for these rights and freedoms . . . to secure their universal recognition and observance', reiterated in UN resolutions.⁵⁸ Article 29(1) of the UDHR further recognises that 'everyone has duties to the community', and the *travaux préparatoires* support the view that individuals must respect human rights.⁵⁹ Similarly, the preambles to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state that 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of . . . rights'. While these preambular injunctions and UDHR provisions are not binding, common article 5(1) of the ICCPR and ICESCR states, however, that nothing in those treaties:

. . . may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for.

That provision is legally binding and, like humanitarian law instruments directed towards controlling individual conduct, is addressed directly to individuals and groups. Developments in customary human rights law have also tended towards increasing control of private actors in relevant situations.

If the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. The criminal law and civil law remedies will not always provide sufficient redress for the violation of rights by private actors, and it is vital that individuals can seek remedies against private violators. One method to achieve this is the example set by the 1996 Constitution of South Africa, which provides that a provision of their Bill of Rights 'binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.⁶⁰

In Australia, arguments to extend the reach of administrative law to private bodies have not met with much success. Mechanisms such as the Ombudsman and freedom of information legislation are generally limited to government departments, agencies or prescribed authorities,⁶¹ although, as explained below, there was some expansion of the Commonwealth Ombudsman's powers in 2005. In addition, new National Privacy Principles in 2001 extended the reach of federal privacy law beyond Commonwealth government agencies to regulate private sector bodies.⁶² Generally, however: 'The private sector has been quarantined from the strict requirements of public law, and governed primarily by market principles, self-interested relations between individuals, and the limited intervention of the private law'.⁶³ In contrast, following the *Datafin* decision, the English courts have been more willing to expand the remit of administrative law, in that case finding that judicial review was available in relation to a body exercising regulatory powers in deregulated capital markets.⁶⁴ Similar efforts by Australian judges, such as Justice Murphy in *Forbes v NSW Trotting Club Ltd*⁶⁵ have remained in the minority.⁶⁶ Under the *Judiciary Act 1903* (Cth), the jurisdiction of the Federal Court is limited to actions involving public elements such as where an action is against an officer of the Commonwealth or arises under a law of Parliament,⁶⁷ although the latter category may authorise actions against private individuals, and in both cases the Court has an inherent accrued and/or associated jurisdiction which may cover private individuals.⁶⁸ The High Court's original jurisdiction under s75(v) of the Commonwealth Constitution is similarly limited to matters where remedies are sought against an officer of the Commonwealth, although the Court also has pendent jurisdiction to decide the whole of a matter brought before it and to do 'complete justice' between the parties so as to avoid multiple proceedings.⁶⁹ Such extended jurisdiction may enable the court to grant relief against private individuals.

Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is limited to administrative decisions made 'under an enactment' or by a Commonwealth authority or officer.⁷⁰ The phrase 'under an enactment' has been narrowly construed to generally exclude the exercise of private power. For example, in *NEAT Domestic Trading Pty Ltd v AWB Ltd*,⁷¹ the quasi-regulatory role of a private company, AWBI, in consenting or refusing consent to wheat exports by companies other than itself was not considered to be a decision of an administrative character made under an enactment. AWBI was a private entity incorporated under the Corporations Law, for the purpose of making profit, and the High Court thought 'it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests'.⁷² Similarly, in *Griffith University v Tang*,⁷³ a disciplinary decision to exclude a student from enrolment at university was found not to be a judicially reviewable decision made under an enactment, since the disciplinary proceedings did not affect legal rights or obligations and had no explicit statutory basis. In that case, private law remedies were also unavailable, since the relationship between the university and the student did not give rise to any contractual obligations.

Kirby J dissented in each case and argued that public law remedies should be extended to bodies exercising powers of the kind in issue in each case. In *NEAT*, Kirby J found that AWBI's decisions were given legal effect by statute and AWBI enjoyed powers arising under statute which were wider than those enjoyed by ordinary companies. In his view:

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.⁷⁴

Similarly, in *Tang*, Kirby J thought that the majority took 'an unduly narrow approach to the availability of statutory review directed to the deployment of public power'.⁷⁵ There was an elaborate statutory regime creating and regulating the university and the absence of specific statutory authority for disciplinary decisions could not detract from the public nature of the university's powers.

While private law may provide remedies in some situations where private bodies are exercising public powers, public law remedies clearly ask different (and often more intense) questions to those posed in private law, particularly in an emphasis on values such as fairness. Private actors can affect people's lives in ways which cannot be challenged by public law remedies, and in relation to which private law remedies may be insufficient to ensure accountability. This is not to suggest that attenuating the scope of administrative law is always preferable. There are different ways to ensure accountability⁷⁶ and in some cases the better approach may be to adapt private law remedies, as in tort or contract.⁷⁷ Contracts in areas such as immigration detention can, for example, specify expected service delivery standards,⁷⁸ although those most affected by breaches of a contract may not be parties to it and possess no enforceable contractual rights. Industry ombudsmen schemes may also enhance accountability of private actors (as in the telecommunications and banking sectors), though there are inherent limitations to self-regulation.

A right to administrative justice?

In approaching the human rights dimension of administrative law, some authors have articulated a human right to 'administrative justice' and then explained how Australian administrative law already secures such a right.⁷⁹ The right is said to comprise a right of individuals to seek judicial review of government decisions adversely affecting them; a right of appeal (with suspensive effect) on the merits to a tribunal or a court; and a right of judicial review on the law and merits on matters of special importance.⁸⁰ Australia is thought to satisfy these requirements because there exists a right of judicial review on questions of law; a right of merits review to various tribunals (which may incorporate a human rights perspective

in substituting the ‘correct or preferable decision’); the ability to complain to the Ombudsman (who examines whether administrative action was ‘unreasonable, unjust, oppressive or improperly discriminatory’); and complaints mechanisms (such as the Human Rights and Equal Opportunity Commission) for dealing with rights violations and discrimination by government agencies.⁸¹ In addition, freedom of information legislation and privacy laws protect the associated human right to information under article 19 of the ICCPR.

While this approach helpfully illustrates some of the ways in which Australian administrative law pursues the goal of administrative justice, such analysis proceeds from a mistaken (and overly optimistic) premise. There is no recognised right to administrative justice in international human rights law, and its purported grounding in European human rights jurisprudence is speculative or aspirational at best. Article 14(1) of the ICCPR establishes only that in the determination of a ‘criminal charge’ or ‘rights and obligations in a suit at law’, a person is ‘entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. The difficulty is that a ‘suit at law’ was historically understood as meaning a civil action in court, and did not extend to encompass administrative decisions or actions.

In part, this limitation reflects the historical circumstances, 1945–1966, in which the human rights treaties were drafted, when the full effects on individuals of the explosive growth of the modern regulatory state were not yet felt. Civil or criminal proceedings were still considered the primary means by which legal rights and interests were affected, and the importance of safeguarding the individual from bureaucratic oppression and maladministration was not fully recognised. This is perhaps surprising, given that arbitrary, cruel or capricious administrative action was a hallmark of Nazi and fascist rule in occupied Europe during World War II. The omission may be explained by the reality that in aspiring to universality, the human rights treaties had to find common ground across the whole spectrum of national legal systems. Some states were simply not willing to countenance binding procedural rights against governmental action, while in other states the issue was not thought relevant given the primitive state of development of administrative processes.

While there may be good policy reasons for extending minimum procedural guarantees to administrative decision-making, international human rights law has not yet developed to this point. Despite increasing international interest in the concept of a ‘global administrative law’,⁸² such a concept is at best emergent or aspirational, and is not reflected in state practice at the domestic level. While European countries have developed farthest in this direction, it is difficult to transpose that experience to the Australian context, given the absence of Australian participation in any similar regional human rights system (such as the European Convention on Human Rights and associated institutions) or supra-national governance arrangement (such as the European Union). Moreover, the fair hearing provision in the European Convention on Human Rights, article 6(1), is worded more broadly than the ICCPR equivalent, referring to ‘civil rights and

obligations' unlimited by the need for a 'suit at law'. As such, it may be easier to infer a right to administrative justice from an expansive reading of the European Convention than from the ICCPR. The further 'right to good administration' in the Charter of Fundamental Rights of the European Union of 2000 has not been similarly articulated anywhere outside the EU.

Only in rare cases, such as the 'right to justice' in article 27 of the New Zealand Bill of Rights, have entitlements to natural justice and judicial review been elevated to the status of human rights.⁸³ In the aftermath of the Fitzgerald Inquiry, the Electoral and Administrative Review Commission of Queensland recommended including an equivalent 'right to procedural fairness' in its draft Queensland Bill of Rights, in situations where a 'decision by a tribunal or other public authority . . . may affect the person's rights'.⁸⁴ Unlike the New Zealand approach, the Commission's draft article 31 (non-exhaustively) particularised the content of procedural fairness to include (a) a reasonable opportunity to present a case, (b) the impartiality of the tribunal or authority, and (c) a logically probative evidence rule. Such a right was not, of itself, thought to be essential to human dignity, but is 'a process which protects other fundamental rights' and so was considered appropriate for inclusion.⁸⁵

The significance of this analysis is to show that analysing Australian administrative law for compliance with a human right to administrative justice puts the cart before the horse. In some ways, Australian administrative law is more advanced than international human rights law, since it provides both merits review and essential judicial guarantees of procedural fairness in administrative decision-making, supplementing the human rights guarantees of fair process which apply in the more limited situations of criminal or civil proceedings. Moreover, the very extensive grounds of judicial review in Australian administrative law are far more comprehensive than the meagre requirement in human rights law of a fair and public hearing by a competent, independent and impartial tribunal. While criminal cases attract far more detailed due process rights, nothing more is specified in civil cases. The price of universality in human rights law is that the content of some rights is reduced to the bare minimum acceptable to all contracting states. The Australian administrative law system surpasses these lowest common denominator standards in these important respects.

Interpretive principles and human rights

Judicial approaches to interpretation can play an important role in protecting human rights. While principles of interpretation cut across all areas of law and are not peculiar to administrative law, the way in which the courts interpret legislation and the common law will circumscribe the legal boundaries of administrative action and signal the permissible range of discretionary choices. There is no 'no general legal requirement in Australia that a statutory discretion be exercised in accordance with human rights norms',⁸⁶ and the principle of parliamentary

supremacy must be respected in interpreting legislation and in setting the boundaries of the common law. Within these limits, a number of principles of statutory interpretation contribute to protecting human rights in Australia.

Non-interference with fundamental rights

First, as the High Court stated in *Coco v R*:⁸⁷ ‘The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose.’⁸⁸ In that case, legislation authorising a magistrate to issue listening device warrants was held not to permit warrants authorising entry and trespass upon private property. Strictly construing statutes to protect individual rights reflects a kind of moral law underpinning the role of the judiciary,⁸⁹ and is also designed to ‘enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.’⁹⁰ The dialogue between Parliament and the courts which the principle generates is a manifestation of the broader principle of legality pursued by the courts.⁹¹ There is, however, no broader doctrine allowing the courts to invalidate legislation which is incompatible with fundamental rights.⁹²

Clearly, the fundamental rights principle may have a similar effect to a statutory Bill of Rights requiring the courts to interpret legislation consistently with human rights,⁹³ as is now the case in the Australian Capital Territory and Victoria.⁹⁴ However, the common law emphasis on protecting individual rights and liberties does not necessarily equate with the protection of human rights, which cover a wider territory than common law rights. Conversely, the common law emphasis on property rights goes further than international human rights law, which contains no express right to property (although such a right is incidentally protected by rights to privacy and non-interference with the home and family life). In some cases, an insistence on protecting property rights may overshadow countervailing individual rights of greater importance.

The fundamental rights principle has been criticised for its elasticity, both in identifying what constitutes ‘fundamental rights’ and when an intention to interfere with rights is manifested.⁹⁵ In part, such critiques are borne of suspicion of ‘judicial activism’ and the democratic deficit which is thought to characterise such an affliction. Some Australian judges have cautioned that ‘the scope of judicial review must be determined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.’⁹⁶ Even so, the notion of fundamental rights is deeply rooted in precedent, and is arguably no more ill-defined than other subjective concepts routinely invoked and applied by judges. Factors such as ‘[h]istory, tradition and international norms have important roles to play in the justification and legitimation of value inquiry’ and in ‘combating eclecticism and subjectivity in the identification of “fundamental” rights’.⁹⁷

*Al-Kateb v Godwin*⁹⁸ illustrates the difficulty in determining when statutory language is sufficiently ambiguous to trigger the application of the principle. The case concerned the lawfulness of the possible indefinite detention of a non-citizen who could not be presently removed from Australia under the *Migration Act 1958* (Cth). In the majority, McHugh J found that the words of the statute – requiring a person’s removal from Australia ‘as soon as reasonably practicable’ – were unambiguous and were ‘too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights’.⁹⁹ In contrast, the dissenting judges found that more explicit language was necessary to signal an intention to interfere with personal liberty, considered the most fundamental individual right. Gleeson CJ observed:

In a case of uncertainty, I would find it easier to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding.¹⁰⁰

This suggestion comes close to covertly replicating a human rights analysis of the problem, which would require that any restriction on liberty must be justified as objectively necessary and as a proportionate means of securing a legitimate aim (such as protecting the community or preventing absconding).

While there was no dispute about the importance of personal liberty, McHugh J doubted the wisdom of the rule that statutes contain an implication that they should be construed in conformity with international law. In his view, the large number of international treaty and customary rules means that the rationale for such a rule ‘bears no relationship to the reality of the modern legislative process’, though he conceded that the rule is ‘too well established to be repealed now by judicial decision’.¹⁰¹ In contrast, Gleeson CJ firmly endorsed it and tapped into a broader rule of law discourse underpinning the principle: ‘In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament’.¹⁰² Kirby J similarly articulated a strong presumption at common law ‘in favour of liberty, and against indefinite detention’.¹⁰³

Differences in the appreciation of statutory ambiguity are an inherent consequence of language and are hardly unique to the application of the fundamental rights principle. As others have noted, the notion of ambiguity itself is ambiguous;¹⁰⁴ or as McHugh J previously wrote: ‘Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong’.¹⁰⁵ Underlying approaches to interpretation necessarily inform how interpretive principles are applied. As Mason J has said: ‘Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context’.¹⁰⁶ *Al-Kateb* exposes not so much a deficiency in the fundamental rights principle so much as an arguable error in its application to a particular case. The decision should also signal to Parliament the importance of precision in statutory drafting, particularly when depriving people

of liberty. It is noteworthy that McHugh J thought 'desirable' a Bill of Rights,¹⁰⁷ to make human rights more secure.

Interpretation of ambiguous statutes

The second principle of interpretation relevant to protecting human rights from administrative infringement is the presumption that ambiguous statutes should be interpreted consistently with international obligations,¹⁰⁸ particularly human rights. In *Teoh*, the High Court stated that 'there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction that is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail'.¹⁰⁹ An extension of the principle is that 'so far as the language of a statute permits, it should be interpreted and applied in conformity with the established rules of international law'¹¹⁰ generally, although the application of the principle to interpreting the Commonwealth Constitution remains controversial, even 'heretical'.¹¹¹ The presumption is that Parliament intends to legislate in conformity with international law, unless otherwise indicated. In a more limited way, s15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth) provides that a treaty referred to in a statute may be used as extrinsic material in interpreting that statute, to confirm the ordinary meaning of a provision, or where the provision is ambiguous or obscure, or where its ordinary meaning would lead to a manifestly absurd or unreasonable result.

Again, there is a similarity with provisions in statutory Bills of Rights which require legislation to be interpreted consistently with enumerated human rights. In both situations, there may be a lacuna where the executive is not acting pursuant to statutory powers, but under prerogative powers, powers exercisable as ordinary legal persons, or through the use of non-statutory policies.¹¹² A significant difference between the two approaches is that the language of treaty provisions may be indeterminate and expressed as goals rather than as rules,¹¹³ whereas the domestic enactment and codification of such treaties may involve a higher degree of specification of rights during the parliamentary process.

Even so, suspicion of the indeterminacy of human rights treaties is sometimes founded on a lack of familiarity with human rights concepts¹¹⁴ thought to be alien to the domestic legal order, and even a certain blindness to the lack of precision inherent in many existing legal concepts in national law. There is a rich international jurisprudence on the interpretation and application of rights, and the feared indeterminacy of rights is (partly) cured by reference to comparative sources. As one commentator notes,

The challenge is to persuade public administrators that international human rights standards are important, finite and helpful. Rather than shrink from them, they can be harnessed to achieve the goals of certainty, smooth administration and effective management. This is particularly necessary where decision-making involves significant discretionary powers and the use of 'personal, idiosyncratic values'.¹¹⁵

The more difficult challenge to the application of rights is the much larger debate about whether rights are really just political claims masquerading as law,¹¹⁶ and which should be left to Parliament, not least in order to respect the separation of powers and so as not to transfer political decision-making to the less accountable judiciary.¹¹⁷ There is also a concern that prioritising rights in curing ambiguity may fail to adequately acknowledge other relevant public interests or values, although it might be countered that human rights discourse has developed sophisticated techniques for weighing up, balancing and limiting rights, in relation to competing rights and competing public goods.¹¹⁸

Developing the common law

A third relevant principle of interpretation is the broader idea that international law is, as stated in *Mabo v Queensland (No 2)*,¹¹⁹ a 'legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.¹²⁰ It has also been asserted that human rights treaties help to indicate contemporary values and the public interest.¹²¹ In *Mabo (No 2)*, the development of modern human rights treaties (along with statutory anti-discrimination law) was one factor informing the Court's decision to revisit the legal foundations of land title in Australia and to recognise the persistence of native title.¹²²

The problem of indeterminacy afflicting human rights is amplified if international law as a whole is considered a relevant influence on the common law. Once a relatively small and coherent field of rules applicable between states, international law has grown markedly over the past century, becoming highly specialised, somewhat fragmented, and increasingly affecting relations between individuals and other non-state legal entities. Nonetheless, as far as it is permitted by Parliament, it makes sense to seek to harmonise Australian law with international norms, at least where such norms would progressively develop (rather than regress) Australian law. In the main, a relatively small number of international rules will be relevant to administrative decision-making in Australia, and coalesce in key human rights treaties. Many international rules will be of little relevance to individuals in Australia as they principally continue to apply between states.

Legitimate expectations

The relevance of international law in administrative decision-making reached its apotheosis in the High Court's decision in *Teoh* in 1995,¹²³ which is considered in detail in chapter 19. The traditional position at common law, noted in *Simsek*, was that until enacted by Parliament into domestic law, international treaties (even if ratified by Australia) 'have no legal effect upon the rights and duties of the subjects of the Crown'.¹²⁴ In *Teoh*, however, it was found that Australia's ratification of an international treaty is not merely 'platitudinous' but creates a 'legitimate expectation' that administrative discretions will be exercised in accordance with

the provisions of the treaty. A further implication was that such treaties might in future be regarded as mandatory relevant considerations prior to making a decision.¹²⁵

The decision led to accusations that the courts were introducing international law through the back door, by-passing the Parliament and interfering in Australia's sovereignty. A series of legislative proposals to overturn the decision were not adopted. Despite the profound controversy sparked by the decision, it is notable that the decision did not entitle individuals to assert substantive human rights claims, but merely required decision makers to take human rights into account, remaining free to exercise their discretion contrary to human rights. In later cases, the High Court confined the scope of the doctrine much further, signalling a deliberate departure from emerging English jurisprudence. In *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*,¹²⁶ it was held that:

... the failure to meet that expectation does not reasonably found a case of denial of natural justice. The notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in this particular case . . . in a case such as this, the concern is with the fairness of the procedure adopted rather than the fairness of the outcome.¹²⁷

Similarly, in *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs*,¹²⁸ it was said that 'what must be demonstrated is unfairness, not merely departure from a representation'.¹²⁹ There is no wider notion of estoppel or substantive doctrine of abuse of power in Australian administrative law.¹³⁰ The High Court has explicitly rejected developments growing out of the human rights-based evolution of English administrative law,¹³¹ such as substantive doctrines of legitimate expectations or proportionality.¹³²

Political anxiety about the implications of *Teoh* did, however, help to encourage constructive reform of the Australian treaty-making process. With the power to sign and ratify treaties coming within the executive power of the Commonwealth under s61 of the Constitution (and which 'is of the same character as, and is no narrower in scope than' the same prerogative power of the Crown),¹³³ concern about a democratic deficit in treaty making (and the consequences of treaties for administrative decision-making) prompted greater participation by Parliament in treaty making. A Joint Standing Committee on Treaties (JSCOT) was established in 1996, and empowered to inquire into and report on 'matters arising from treaties' and proposed treaty actions presented to Parliament.¹³⁴ The reforms also require the relevant government department to prepare a National Interest Analysis of the treaty, which is considered by JSCOT. While JSCOT improves the transparency of the treaty-making process, it has no explicit mandate to consider human rights issues, its powers are only advisory, and in practice it has seldom recommended against ratifying particular treaties.¹³⁵ It has also shown a lack of independence from government policy on controversial treaties such as the Rome Statute of the International Criminal Court and the Optional Protocol to

the 1984 Convention against Torture.¹³⁶ The absence of any statutory footing for JSCOT possibly contributes to its capacity for independence.

Customary international law

As with treaties, the Australian courts have held that customary international law does not automatically form part of Australian law, and legislative incorporation is necessary.¹³⁷ Further, no doctrine of legitimate expectations can arise in relation to customary law since unlike the act of ratifying a treaty, customary international law does not require any expression of consent (or representation) by individual states that they will be bound. While the rejection of custom in domestic law puts Australia at odds with comparable common law countries, it means that customary human rights law struggles to find direct expression in Australian administrative practices, other than pursuant to developing the common law or interpreting ambiguous statutes.

The place of customary international law in Australian law has not been comprehensively settled by the High Court, and is ripe for reconsideration. Most recently in *Nulyarimma v Thompson*,¹³⁸ two judges of the full Federal Court rejected an argument that the customary international crime of genocide was part of Australian law. Although the majority extensively reviewed the relevant authorities, ultimately it could not find any binding precedent compelling their conclusion to exclude custom. Instead, the majority made a deliberate policy choice not to recognise a criminal offence in circumstances where its elements and penalties had not been enacted and defined by the Parliament.

While this position is understandable, it might equally be argued that there is an overriding policy interest in prosecuting an international crime which has been universally repudiated since 1948, hardly inducing any unfairness in an accused. Moreover, if the extreme example of a criminal prosecution for genocide is set aside, it is arguable that in cases concerning customary human rights there is a compelling policy interest in recognising such rights, since their protection does not trigger consequences as serious as criminal prosecution and imprisonment. Parliamentary sovereignty would still be preserved, since it would always be open to Parliament to legislate to expressly override or limit the operation of customary rights.

‘Beneficial construction’

Complementing the principle that statutes are interpreted so as not to infringe fundamental rights is the less well established notion that statutes should sometimes be beneficially construed in favour of individuals,¹³⁹ particularly the vulnerable. Some judicial decisions have emphasised moral obligations or values of compassion, humanitarianism, generosity, civility, liberalism, humanity or citizenship¹⁴⁰ in determining the scope of an administrative discretion, the statutory purpose, or relevant considerations. Beneficial constructions have been

particularly prominent in refugee decisions, sometimes manifesting in more rigorous review of administrative decisions.¹⁴¹ In *Abebe v Commonwealth*,¹⁴² the High Court asserted that: 'It is necessary to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself'.¹⁴³

Criticism of a humanitarian approach in refugee decision-making centres on the problem of identifying what the content of such an approach rationally means,¹⁴⁴ beyond its rhetorical assertion. One example is a generous approach to interpreting the requirement in refugee law to show a 'well-founded fear' of persecution. In *Chan v Minister for Immigration and Ethnic Affairs*,¹⁴⁵ the High Court accepted a relatively low standard of proof in refugee claims in finding that the denial of refugee status was unreasonable where there were objective and subjective grounds for a well-founded fear of persecution, based on the existence of a genuine fear founded on a 'real chance' (including less than fifty percent) of persecution on return to the country of nationality.¹⁴⁶ In turn, this has informed the approach of the courts to evaluating the sufficiency of evidence in refugee claims. In *Minister for Immigration and Multicultural Affairs v Rajalingam*,¹⁴⁷ the Full Court of the Federal Court asserted that:

the RRT must frequently make its assessment on the basis of fragmented, incomplete and confused information. It has to assess the plausibility of accounts given by people who may be understandably bewildered, frightened and, perhaps, desperate and who often do not understand either the process or the language spoken by the decision maker/investigator. . . . Even applicants with a genuine fear of persecution may not present as models of consistency or transparent veracity.

In this context, it is not always possible for the decision maker to be satisfied as to whether alleged past events have occurred with certainty or even confidence. When the RRT is uncertain as to whether an alleged event occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question.¹⁴⁸

Such an approach is consistent with international standards suggested by the United Nations High Commissioner for Refugees, which argues that the benefit of the doubt should be given to claimants to reflect the humanitarian purpose underlying asylum.¹⁴⁹ The more difficult criticism of beneficial constructions is that other relevant policy considerations, determined by government, may be of overriding public importance and yet conflict with approaches favouring the individual. It is at this point that beneficial construction may impinge on governmental priorities.

Legislative scrutiny of Bills

Moving on to an institutional level, since its establishment in 1981, the Senate Standing Committee for the Scrutiny of Bills plays an important role in

highlighting the human rights implications of legislation. Its terms of reference allow it to report on whether Bills before the Senate or Acts of Parliament expressly or impliedly '(i) trespass unduly on personal rights and liberties; (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; [or] (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.¹⁵⁰ The lack of definition of 'rights' and 'liberties' permits a wide inquiry into potential infringements not only of common law, statutory and constitutional rights, but also of wider human rights concerns. A legal adviser to the Committee assists in identifying potential rights implications, which are then outlined in the Committee's weekly *Alert Digest* (also tabled in the Senate).

On the other hand, the absence of any express articulation of human rights may, depending on the composition and political persuasion of particular committees, result in an emphasis on more traditional rights and liberties, at the expense of human rights analysis. The other tasks allocated to the Committee may also divert attention from a human rights focus, since it must also consider whether Bills: '(iv) inappropriately delegate legislative powers; or (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny'.¹⁵¹ In contrast, since the adoption of the *Human Rights Act 2004* (ACT), the relevant standing committee of the Australian Capital Territory Legislative Assembly 'must report to the Legislative Assembly about human rights issues raised by Bills'.¹⁵² The Victorian Scrutiny of Acts and Regulations Committee, established in 1992, similarly 'must report to the Parliament as to whether the Bill is incompatible with human rights'¹⁵³ after the Victorian Charter enters in force in 2007. The same Committee is also required to review all statutory rules and report any incompatibility with rights to Parliament.¹⁵⁴

In practice, the Senate Standing Committee has raised concerns about the rights impact of controversial Bills on matters such as terrorism, workplace relations, indigenous people, law enforcement and citizenship. It particularly draws attention to Bills which would operate retrospectively. While the six-member Committee is comprised equally of government and opposition parliamentarians, its technical focus has largely avoided the overt politicisation of its work. Its relative neutrality may enhance the acceptability of its views and thus its effectiveness, although in some cases it may conversely mean that its findings are too tepid or inconclusive. Certainly Bills have been amended in the Senate in response to the Committee's concerns.

Procedurally, concerns flagged in a *Digest* are drawn to the attention of the responsible minister and any ministerial response (which is usually forthcoming),¹⁵⁵ along with the Committee's further views, are promptly published in a *Report*. While *Reports* are tabled in the Senate, the Committee does not express conclusive views on the incompatibility of Bills with Rights or suggest amendments, leaving such determinations to the Senate. Committee reports may be brief and often simply draw attention to a potential rights impact, without

engaging in any detailed further analysis of the problem. Ultimately its views can be ignored unless there is a political culture of respect for human rights, and time pressures may also affect the quality of scrutiny.

Scrutiny committees also operate in other jurisdictions, as in Queensland where, after the Fitzgerald Inquiry, a Scrutiny of Legislation Committee was established in 1995 with a mandate which particularises in much greater detail (than at the Commonwealth level) the rights and liberties which will be considered.¹⁵⁶ A Victorian committee similarly enjoys an extended mandate to consider whether, for instance, legislation has an undue adverse effect on personal privacy or the privacy of health information.¹⁵⁷ In 2002, however, New South Wales deliberately chose to follow the less prescriptive Commonwealth approach in reconstituting the mandate of its Regulation Review Committee (established in 1987) as a Legislation Review Committee, after an inquiry distinguished the special circumstances of police corruption in Queensland.¹⁵⁸ The creation of the New South Wales Committee was partly motivated by concern about the arbitrary punishment of Gregory Kable, under legislation passed to prevent his release from prison after his sentence expired.¹⁵⁹ Other reasons for its establishment included that it would raise parliamentarians' awareness of human rights and introduce rights into political debate, encourage dialogue rather than adversarial legalism in implementing rights, and identify repeat problems in Bills.¹⁶⁰ The standard of scrutiny of Bills under human rights law may be more intensive than the equivalent process in existing scrutiny committees. Under the *Human Rights Act 2004* (ACT), the Attorney-General must prepare and present a written statement to the Legislative Assembly about whether, in his or her opinion, each Bill is consistent with human rights, also explaining how any inconsistent Bill is not consistent.¹⁶¹ In Victoria, any member of Parliament (not just the Attorney-General) who plans to introduce a Bill into either house 'must cause a statement of compatibility to be prepared in respect of that Bill',¹⁶² which must be laid before the relevant house before giving a second reading speech.¹⁶³ The standard of scrutiny is higher than in the Australian Capital Territory, since the member must not only state whether the Bill is compatible with human rights, but also how it is compatible.¹⁶⁴ In addition, the 'nature and extent' of any incompatibility must also be explained.¹⁶⁵

In both jurisdictions, the procedure is additional to the independent consideration of a Bill by the relevant scrutiny committee, and thus provides for a dialogue between the Parliament and the executive on compatibility. To an extent, the effectiveness of pre-scrutiny will depend on the degree of political commitment to it, given that non-compliance with the procedure does not affect the validity, operation or enforcement of any law.¹⁶⁶ It remains to be seen how detailed, sophisticated and objective pre-scrutiny reports will be; those who sponsor bills necessarily have an interest in presenting them in the best light, and both rights and the permissible range of limitations upon them are elastic to a point and thus ripe for lawyerly arguments.

Role of the Commonwealth Ombudsman

The classical focus of the office of Ombudsman was on ensuring administrative justice and/or countering official corruption, although there has always been great variation in the functions and powers of different national or sub-national ombudsmen. A comparatively recent trend is the emergence of hybrid Ombudsmen with human rights responsibilities, particularly in the Iberian countries, Latin America and Eastern Europe, but also in the context of post-conflict transitional administrations such as Bosnia Herzegovina.¹⁶⁷ The manner in which such bodies consider human rights issues depends on the status of human rights treaties in the particular domestic legal order and there is a spectrum of different approaches. Some bodies are human rights commissions or institutions with Ombudsman-like functions, while others are Ombudsmen with some degree of jurisdiction over human rights issues.¹⁶⁸ Particularly in Europe and the Americas, there is often also a fertile relationship between the national body and the regional human rights system.

The benefits of hybrid institutions are said to include reduced administrative costs, a higher profile and a concomitant measure of protection from political interference, the concentration of expertise and resources, and the ability to adopt an integrated approach to multiple problems of administrative injustice and human rights violations.¹⁶⁹ Whatever their composition, the effectiveness of such bodies depends on factors similar to those affecting more traditional ombudsmen: their independence, breadth of jurisdiction and powers, public accessibility, and political support for taking their recommendations seriously.¹⁷⁰ The extent to which they can review the activities of private actors wielding public power is a further relevant issue.¹⁷¹

Commonwealth countries have tended to preserve a stricter separation between the office of Ombudsman and national human rights institutions,¹⁷² although human rights bodies may be subject to Ombudsman oversight. On one hand, classical Ombudsmen 'are geared primarily towards the accountability of "the system" rather than towards upholding the rights of the single individual'.¹⁷³ The emphasis on administrative justice means human rights concerns may only arise incidentally and not as the substantive focus of an investigation.

Yet, incidental effects are not necessarily insubstantial and the correction of procedural errors or administrative delays can considerably improve human rights, whether in the fields of prisoner complaints, social welfare, access to education, or the provision of accurate information.¹⁷⁴ Recent areas of interest to the Commonwealth Ombudsman which have considerable implications for protecting human rights have included the management of minors in the Australian Defence Force, inspections of the records of law enforcement agencies (to ensure compliance with statutory requirements on telephone interception, surveillance devices and controlled operations),¹⁷⁵ and specialist Ombudsman roles in defence, taxation, immigration, the postal industry and law enforcement.¹⁷⁶

Similar trends are evident at the state level. For instance, in late 2005, following race riots in south Sydney, the New South Wales Ombudsman was empowered to review the exercise of new police public order powers to establish roadblocks and cordons, to stop and search people or vehicles, to require disclosure of identity, to seize items, and to create alcohol-free zones.¹⁷⁷

Moreover, the philosophical foundations of Ombudsmen and human rights discourse are substantially attuned, 'with each sharing a common goal of protecting citizens against unjust governmental actions'.¹⁷⁸ In many cases, Ombudsmen can function 'to assist the disadvantaged, the underprivileged, the poor, the weak and the frightened, who do not understand the ways of public bureaucracy'.¹⁷⁹

In Australia, the Commonwealth Ombudsman has wide statutory powers to form the opinion, following an investigation, that an action taken by a government department or prescribed authority was: (i) contrary to law; (ii) unreasonable, unjust, oppressive or improperly discriminatory; (iii) lawful but unreasonable, unjust, oppressive or improperly discriminatory; (iv) based on a mistake of law or of fact; or (v) otherwise, in all the circumstances, wrong.¹⁸⁰ In addition, the Ombudsman may find that a discretionary power was exercised: for an improper purpose or on irrelevant grounds; taking irrelevant considerations into account or failing to take relevant considerations into account; or failing to furnish reasons.¹⁸¹ The Ombudsman can thus make findings on bases far wider than the grounds of judicial review.

The power to find that an action was unreasonable, unjust, oppressive or improperly discriminatory plainly allows the Ombudsman to fault administrators for breaching some human rights standards. Non-discrimination is a cardinal principle of human rights law,¹⁸² while notions of unreasonableness, injustice and oppression have, for example, been deployed in human rights jurisprudence to interpret the meaning of freedom from 'arbitrary' detention.¹⁸³ At the same time, these standards are both wider and narrower than the scope of human rights law. An action may be unjust or unreasonable but nonetheless comply with human rights law; while an action may strictly violate human rights law but may not, in the circumstances, be considered unjust, unreasonable or oppressive.

Given the breadth and indeterminacy of standards such as unreasonableness, injustice and oppression, explicit recourse to human rights norms can provide the Ombudsman, administrators and complainants with greater certainty in identifying the range of conduct which may be impugned on these grounds. On occasion, human rights norms may even constitute relevant considerations (with similar relevance to judicial review) where the statutory framework so permits.

There is, however, a case for making the link between human rights and the Ombudsman more explicit and moving closer to the hybrid models operating in many foreign jurisdictions. An example of movement towards such a model in Australia is related to Victoria's adoption of a state Charter of Rights and Responsibilities in 2006. A number of submissions to its community consultation process argued in favour of a human rights Ombudsman of some sort in Victoria.¹⁸⁴ In response, the Human Rights Consultation Committee recommended that the

range of matters the Ombudsman may consider should be clarified to include Charter rights, and this approach was endorsed by the Victorian Government. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) consequentially amends s13(1) of the *Ombudsman Act 1973* (Vic) to include 'the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities'.¹⁸⁵

This power is additional to the Ombudsman's existing power to find that an action was 'contrary to law', which would include some circumstances where rights under the Charter were unlawfully infringed. The Charter does not allow the courts to invalidate legislation that infringes rights, instead providing only for a weaker 'declaration of incompatibility' that does not affect the lawfulness of the statutory provision. However, 'public authorities' are required to comply with the Charter,¹⁸⁶ such that a failure to comply, where not explicitly authorised by legislation adopted under the Parliament's power to override Charter rights, is 'contrary to law'.

Remedies, however, depend on satisfying the existing grounds of judicial review and the requirements for the issue of an existing remedy (such as a declaration),¹⁸⁷ and the Charter establishes no freestanding cause of action or right to damages. Grounds that may trigger judicial review include, for example, a failure to take into account a Charter right as a relevant consideration, or to exercise a power for the improper purpose of deliberately and consciously violating a person's Charter rights. The 'catch all' provision enabling the Ombudsman to review administrative action for incompatibility with rights could cover situations where a rights violation is not contrary to law, such as where the infringement is explicitly authorised by statute. The Parliament's sanction of such infringements does not alleviate the burden of the infringement experienced by the rights-holder, and in individual cases the Ombudsman may have an important role in recommending ways of moderating the strict application of lawful infringements in deserving or compassionate cases.

Empowering the Ombudsman to review human rights infringements may help to alleviate the pressure of human rights claims in the courts and potentially resolve a large number of human rights cases in the manner characteristic of the Ombudsman – speedy, informal, cheap, and based on 'cooperative compliance' rather than an adversarial approach. In Victoria, the power complements the establishment of a Human Rights Commissioner within the Victorian Equal Opportunity Commission, with educative and reporting functions falling short of individual complaints handling. Thus while both the Ombudsman and the human rights body in Victoria are charged with human rights responsibilities, duplication is avoided and institutional separation and independence are preserved.

There is potential for a similar hybrid scheme to operate at the Commonwealth level. Even in the absence of a federal Bill of Rights – unlikely to be forthcoming any time soon – the Commonwealth Ombudsman's power to review administrative action in s15(1) of the *Ombudsman Act 1976* (Cth) could be extended

to encompass any action that 'was inconsistent with the enjoyment of a human right'. For the sake of certainty, the relevant rights could be expressly identified as those arising under Australia's international human rights treaty obligations, or, at a minimum, those in the twin International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Just as the Ombudsman currently performs the role of specialist Ombudsman in a variety of areas, so too could 'Human Rights Ombudsman' be added, supported by appropriate resources and staff. There would be considerable synergies with the Ombudsman's existing role as the specialist Immigration Ombudsman.

The difficulty at the federal level is the risk of duplication. The Human Rights and Equal Opportunity Commission is already empowered 'to inquire into any act or practice that may be inconsistent with or contrary to any human right' and to attempt to conciliate the matter or report it to the Minister.¹⁸⁸ HREOC also has specialist anti-discrimination commissioners, power to intervene in court proceedings on rights issues, and broader powers to initiate inquiries into and make recommendations about systemic human rights issues, and to educate the community about rights. There are obvious resource implications in duplicating the mandates of HREOC and the Ombudsman, and HREOC has already built up considerable expertise in the area.

At the same time, HREOC has faced considerable political criticism and resistance from successive Australian governments precisely because of its mandate to consider violations of (often controversial) treaty rights which have not been made binding by enactment into Australian law (the ICCPR is merely scheduled to the legislation creating HREOC and no enforceable remedies are available for a breach of any of its rights). While conferring a human rights mandate on the Ombudsman may politicise government perceptions of the Ombudsman, such a mandate could nonetheless complement and strengthen the voice of HREOC on human rights matters, as the authority and independence of the Ombudsman is asserted and deployed to protect human rights. Signalling such a commitment to human rights is particularly important in the absence of any federal Bill of Rights.

Effective coordination and referral arrangements between the two bodies could ensure that human rights complaints are dealt with by the most appropriate forum, depending on the subject matter, respective institutional expertise, and resource and case load implications. Cases of administrative injustice with incidental human rights aspects are best corrected by the Ombudsman, while human rights complaints with incidental administrative errors should lie with HREOC. An important advantage in empowering the Ombudsman to consider human rights issues is that, since 2005, the office has had jurisdiction over private service providers to government, potentially encompassing areas such as the management of immigration detention centres, Job Network providers, and family counselling.¹⁸⁹ As the Ombudsman stated in 2006: 'we have crossed the public/private divide in a manner that other administrative law review mechanisms have not'.¹⁹⁰ In contrast, HREOC is unable to consider violations of treaty rights by private entities or individuals.

The risk of duplication has not prevented the Commonwealth Ombudsman being tasked with oversight of areas such as immigration, where specialist merits review bodies such as the Refugee Review Tribunal are already well established. The layering of different levels of scrutiny can improve decision-making, although relative institutional competence and resource implications require careful management. Since 2005, the involvement of the Ombudsman in immigration matters has assumed particular importance in the protection of the human rights of citizens and non-citizens alike, following the unlawful deportation of an Australian citizen, Vivian Alvarez, to the Philippines, and the prolonged detention of a lawful permanent resident, Cornelia Rau.

At the request of the government, the Ombudsman took over the investigation of the Alvarez case from former Victorian Police Commissioner Neil Comrie, and as at June 2006 had 248 cases of possible unlawful detention under investigation. The Ombudsman has identified common areas of maladministration in immigration decision-making (both on detention and visa processing) such as delay, inactivity, data processing problems, and defective inquiries and identification procedures.

Further, under s486 of the *Migration Act 1958* (Cth), the Ombudsman was empowered in 2005 to review the detention of any person in immigration detention for two years or more and to report to the minister as soon as practicable, who must then table the report in Parliament within fifteen days. The Ombudsman issues reports every six months where a person remains in detention after the two-year period. In implementing its mandate, the Ombudsman has prioritised the cases of those who have been in detention the longest, and where there are mental health concerns, family separation, or children in detention. Reference has also been made in the Ombudsman's reports to the international human rights standard of considering the best interests of children in decision-making. The Ombudsman also visits detention centres (including unannounced) to monitor the conditions and standard of care in detention, including access to services, health care, and detainee well-being.

While the Ombudsman's recommendations are not binding, in practice they are reasonably influential in shaping administrative behaviour. Of sixty-nine reports made by the Ombudsman in the immigration area, containing 109 recommendations, the minister addressed 105 of the recommendations, agreeing to forty-eight (forty-six percent), disagreeing with thirty-one (twenty-nine percent) and delaying decision on twenty-six (twenty-five percent).¹⁹¹ At the same time, there are considerable limitations on the effectiveness of the Ombudsman role. There is no jurisdiction to review ministerial action, but only to recommend that the minister consider certain issues. While the Ombudsman is not constrained by government practice or policy, he considers that 'it is ordinarily more appropriate for major or sensitive policy issues to be debated and determined in the parliamentary and public forum',¹⁹² particularly on issues such as mandatory detention and removal policies.

Moreover, the Ombudsman is 'not well placed to undertake merit review of all the issues concerning a person's detention' although he can 'draw attention to aspects of a claim that may not have been tested in earlier proceedings or that may have changed'.¹⁹³ The Ombudsman faces time and resource limitations, and may not have the specialist expertise necessary to consider all aspects of a claim, while tribunal or court proceedings may still be on foot. The Ombudsman strives 'to provide an independent but balanced comment upon issues arising in government administration' but avoids 'becoming an advocate' for individuals.¹⁹⁴

In the absence of a national Bill of Rights, Australian administrative law remains sequestered from the human rights influences which invigorate other common law systems. There is a long history of unsuccessful attempts to expressly incorporate human rights into Australian law, including rights clauses during the drafting of the Commonwealth Constitution, two Bills of Rights drafted by federal Labor governments in 1973 and 1985, and referenda on incorporating key rights into the Constitution as in 1942 (to incorporate US President Roosevelt's 'four freedoms' – freedom of speech and expression, religious freedom, and freedoms from fear and want) and 1988 (departing from more ambitious recommendations by a Constitutional Commission of 1985–1988).¹⁹⁵ More recently, private member's Bills have attempted to enliven the cause of a federal Bill of Rights, as have community lobby groups.¹⁹⁶ The ongoing absence of a Bill of Rights will continue to generate pressure on administrative law to accommodate human rights claims. Such pressure manifests itself in different ways, whether at the level of underlying values, interpretive principles, the concept of proportionality, the public/private distinction, or the emerging right to administrative justice. At the same time, institutional mechanisms such as the Ombudsman and legislative pre-scrutiny committees have also flexibly incorporated human rights concerns to some degree. As a New Zealand court noted, 'administrative law develops and changes according to current perceptions of what is required of the Courts in their distinctive judicial function . . . At times it becomes necessary to give especial weight to human and civil rights'.¹⁹⁷

There are, however, necessary limits to the congruence of human rights law and administrative law, not least of which is the foremost emphasis of Australian administrative law on lawful procedure rather than substantive rights-based outcomes. Some commentators have warned of the danger of going 'further down the path of regarding human rights standards as a separate or stand-alone feature of administrative law', since doing so would 'cloud the role of courts in public law by requiring that the legality of government action be judged by reference to standards that are inherently elastic and value-driven'.¹⁹⁸

Even so, a rigid constitutional separation of powers does not demand that Parliament has an exclusive role in settling normative controversies about values, including human rights. As noted earlier, the development of the grounds of judicial review was itself a story of inevitable judicial creativity and judges

routinely deal with other concepts that are equally elastic and value-laden. The federal judiciary already applies human rights standards in some contexts, such as in exercising a discretion (under uniform evidence law) to exclude improperly or illegally obtained evidence where the impropriety or illegality was 'contrary to or inconsistent with a right' in the ICCPR.¹⁹⁹ Lack of familiarity with human rights standards and jurisprudence is no reason to shun them – nor to preserve the desiccating isolation of Australian administrative law from outside influences.

Administrative tribunals

Robin Creyke

Australia has a developed system of administrative tribunals, a unique feature being its generalist merit review tribunal. At the same time, Australia has experimented with most forms of tribunals and tribunal process. There are various reasons for this use of adjudicative bodies other than courts. Tribunals generally have more speedy processes and less formal procedures than courts, including an absence of any requirement to follow rules of evidence. Tribunals are generally cheaper than courts and there may be limits on legal representation in tribunal hearings. In other words, tribunals are constituted and function differently from a court. These features have meant it is common for the merits review function to be committed to a tribunal. A tribunal is more suited than a court to undertake the merit review task, that is, to examine whether a decision is substantively correct, after consideration of all relevant issues of law, fact, policy and discretion, than is a court.

Another incentive for the Commonwealth to rely on tribunals arises from the constitutional separation of powers doctrine. The Commonwealth Constitution prevents the High Court and other federal courts from exercising non-judicial power. As a consequence, there has been a necessity for the merits review function, which has non-judicial elements, to be undertaken by tribunals. The constitutional impetus does not apply to state courts. Nonetheless, the advantages of tribunal review have also seen the advent of numerous tribunals in the states and territories.

Although there is no definitive list of state and territory tribunals, the picture is replicated in those jurisdictions. The multiplicity of tribunals is reflected in their names. The terms 'board', 'council', 'commission', 'agency', 'authority', and 'committee' are commonly used to denote a body with tribunal-like functions or

characteristics. The picture indicates the importance of tribunals to the relationship between government and citizen.

What is a tribunal?

It is difficult to define an administrative tribunal, at least in a way that distinguishes a tribunal from a court or other review agency.¹ A useful definition is one which differentiates tribunals from courts.² There have been legislative attempts at identifying what is distinctive about tribunals. Section 2 of the *Administrative Law Act 1978* (Vic) defines a ‘tribunal’ as:

... a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

The *Legislation Act 2001* (ACT) Sch 1 – *Dictionary* defines ‘tribunal’ to include ‘any entity that is authorised to hear, receive and examine evidence’. Neither definition is prescriptive. Both definitions are capable of applying to ministers, officials and other public decision makers as well as Ombudsman offices and dispute resolution bodies in the private sector. Only the Victorian definition attempts to exclude courts.

The Council of Australasian Tribunals (COAT), which is the peak coordinating body for tribunals in Australasia, has not taken the matter further. The COAT Constitution defined ‘tribunal’ as:

... any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.

These attempts suggest that the categorisation of tribunals is unlikely to be solved by etymological means.

If a functional approach is adopted, as L Curtis noted, the question should be ‘what are the functions, in a free and democratic society, which require substantial independence from the executive and legislative functions of government and how should the bodies which perform those functions be organised’.³ It is clear, however, that the range of functions performed by tribunals varies widely.⁴ An attempt was made to categorise tribunals into two: ‘court substitute’ and ‘policy-oriented’ bodies.⁵ Court-substitute tribunals exhibit the following features:

- (a) they provide to each party appearing before them a reasonable opportunity of being heard;
- (b) they carefully weigh the evidence and material put before them;
- (c) they interpret and apply the law;

- (d) they expose their reasoning processes to the parties; and
- (e) they avoid actual bias or the appearance of bias.⁶

Policy-oriented tribunals include the Australian Broadcasting Authority and the Australian Securities and Investment Commission, and at the state level the Independent Competition and Regulatory Commission of New South Wales. These are bodies which develop policies applicable to their area of expertise and advise government accordingly.

Such a broad classification needs further refinement to be useful. Some tribunals, such as guardianship and administration bodies, are primary decision makers; others, such as the Patent and Trade Marks Attorneys Professional Standards Board, are advisory bodies; some have quasi-legislative functions, like the Repatriation Medical Authority; others still, including the Statutory Fishing Rights Allocation Review Panel, are review bodies. Further categories include investigative and law enforcement bodies such as the National Crime Authority (now the Australian Crime Commission) and state anti-corruption bodies;⁷ mediation or conciliation bodies like the Human Rights and Equal Opportunity Commission; bodies which deal with future rather than pre-existing rights such as the National Native Title Tribunal and the Australian Industrial Arbitration Commission;⁸ and private sector tribunals which decide party/party disputes over tenancy, employment and consumer matters, as well as disciplinary functions for a range of occupational and professional bodies. Generally these functions are carried out by tribunals, although they may previously have been performed by courts.

It is apparent that it is difficult to distinguish a tribunal from a court.⁹ What is clear is that, since tribunals are created by statute, there is room for great variety and flexibility in their composition, powers and functions. For the purposes of this chapter, 'tribunal' is usually a body which closely parallels the conventional court.

Categories of administrative tribunals

Tribunals can be classified into specialist and generalist or multi-purpose tribunals, into first and second tier tribunals, into public and private (or domestic) tribunals, and into primary decision-making or review tribunals.

Specialist tribunals

These are tribunals that specialise in one or more nominated areas of activity. For the most part, specialist tribunals have been established in high volume decision-making areas. An example is the Australian Capital Territory's Essential Services Review Council, which hears complaints about gas and electricity providers and adjudicates hardship claims for money owing to a supplier of gas or electricity.

Another example is the New South Wales Consumer, Trader and Tenancy Tribunal. At the Commonwealth level the best-known specialist tribunals include the Social Security Appeals Tribunal (SSAT) (income support decisions), the Veterans' Review Board (VRB) (veterans' entitlements matters), and the eponymous Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT). In the states and territories, typical specialist tribunals are anti-discrimination bodies, guardianship tribunals, and tribunals dealing with consumer matters.

Generalist and multi-purpose tribunals

Tribunals with jurisdiction across government are known as generalist or general jurisdiction tribunals. The Commonwealth Administrative Appeals Tribunal (AAT) is the best-known. The AAT, for example, reviews decisions under over 400 different pieces of legislation.¹⁰ Matters covered are as diverse as income support, the pharmacy restructuring scheme, fish stock management, aviation safety, freedom of information, workplace compensation, diesel fuel rebates and the defence employer support payment scheme.¹¹ In the states, there may be a mix of private and public sector matters heard by one tribunal. These are more accurately described as multi-purpose rather than general jurisdiction tribunals. Typically multi-purpose tribunals hear civil (or party-party) matters such as consumer, tenancy and credit-related matters, alongside disputes between the citizen and government in fields such as licensing, tax, building registration, and the environment. The amalgam of civil and administrative disputes handling tribunals is a 'one-stop shop' approach to adjudication. Advantages of having a single tribunal are the sharing of membership, registries, administrative staff, library, computer networks and, when appropriate, procedures. Tribunal members can also sit in more than one division, thus reducing the likelihood of their taking a narrow approach to legal issues, or becoming 'captured' by special interest groups. An example is Western Australia's State Administrative Tribunal (SAT).

Single/two tier tribunals

In many jurisdictions, there is only one opportunity for tribunal review. In high volume areas, however, it is common to find two tiers of decision-making by tribunals. The lower tier is designed either to filter out the majority of review applications in a relatively efficient and quick manner or, in some cases, such as guardianship matters, for primary decision-making. The final or 'superior' tier offers further, more authoritative, review of the lower tier decision. The final tier tribunal is often a general jurisdiction or multi-purpose tribunal. In the states and territories, the picture becomes more complex. Both first and second tier decision-making may be conducted within the one multi-purpose tribunal, akin to a first instance and appellate structure for superior courts. An example is the New South Wales Administrative Decisions Tribunal, which offers a second tier of review – but only by leave.¹²

Public/private dispute tribunals

Most tribunals considered in this chapter deal with administrative disputes between people and governmental agencies. These are bodies which carry out a mix of judicial or quasi-judicial and administrative tasks, notably to adjudicate disputes about entitlements to or infringements of pre-existing legal rights. Tribunals of this kind have a central role in the machinery of government in Australia. For example, the typical caseload of the major Commonwealth tribunals – the AAT, the migration tribunals, the VRB, and the SSAT – is generally in excess of 35 000 applications a year. By comparison, the federal courts – including the High Court, the Federal Court, and the Federal Magistrates Court – hear only about 11 000 matters in total a year, a proportion only of which are administrative law applications.¹³ However, equally common are tribunals which hear private sector disputes about matters such as tenancy, employment, child support, and consumer matters. Although this chapter focuses on public sector tribunals, the same issues arise for both public and private sector tribunals. These include, for example, procedural style, independence, membership and accessibility. Moreover, the lines between the two are increasingly blurred. For example, superannuation claims are decided by a Superannuation Complaints Tribunal, a partially public body, and child support disputes are to be heard by the SSAT.

Primary decision maker/review body

Some tribunals make the initial decision in relation to disputes. The best-known examples are the guardianship and management of property tribunals in all states and territories. Formerly this jurisdiction was invested in courts, but since 1986 progressively the jurisdiction has been handled by tribunals. Most of the tribunals considered in this chapter are review bodies, reconsidering initial decisions made usually by officials.

Tribunals in the system of government

The placement of tribunals in the tri-partite system of government – legislative, executive and judiciary – is a vexed issue. In the United Kingdom, it is firmly established that tribunals are part of the judicial arm of government. Indeed, the expression ‘tribunal judges’ is commonly used, and these tribunal members are seen by those involved as part of the judiciary.¹⁴ Despite an early adherence to that model,¹⁵ Australia has abandoned this position, but without necessarily finding a satisfactory place for tribunals. Curtis has suggested that tribunals occupy a ‘no-man’s land’.¹⁶ Bayne suggested they straddle both the executive arm, in that they decide appeals against decisions of officials involving discretionary judgment, while also operating in a judicial manner in deciding matters impartially and

by an adversarial process.¹⁷ Another view is that they reside in a fourth arm of government.¹⁸ That view has recently been endorsed in a study which may well provide the solution to this conundrum,¹⁹ since it developed a methodology to examine the interrelationships between the institutions and processes in government.

The significance of the study is that it posits a fourth, integrity, arm of government which includes the tribunal system. Tribunals and the other bodies listed in the fourth arm all sit uneasily within the tripartite model. The virtue of the theory is that it gives due recognition to the need for impartiality and independence to bodies included. The acceptance of the concept is not yet assured, but it provides the most satisfactory explanation yet devised of the place within government of these agencies.

Tribunals in Australian jurisdictions

There are a large number of administrative tribunals established in each Australian jurisdiction. In the states and territories, tribunals often review decisions concerning occupational licensing, land planning and liquor licensing. The following summary of the position in each jurisdiction refers to some unique features of the Australian tribunal system, such as the presence of general jurisdiction or multi-purpose tribunals, which have a special place in the study of administrative law. There are significant differences between the systems operating in each state and territory and the Commonwealth, since the constitutional restrictions on the exercise by Commonwealth tribunals of federal judicial power²⁰ does not apply to the states and territories.²¹

The concept of a general jurisdiction merit review tribunal was the most innovative recommendation of the report of the Commonwealth Administrative Review Committee (the Kerr Committee report).²² The report explained:

... we have taken the view that at a time when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision . . .

The basic fault of the entire structure is . . . that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' – and this is usually what the aggrieved citizen is seeking.²³

The tribunal was to be called the 'Administrative Review Tribunal'. The subsequent Bland Committee report²⁴ recommended there be three tribunals – a General Administrative Tribunal, a Medical Appeals Tribunal, and a Valuation and Compensation Tribunal. The compromise solution in the *Administrative Appeals*

Tribunal Act 1975 (Cth) was a single tribunal – the Administrative Appeals Tribunal (AAT) – with three divisions but with a broad merit review jurisdiction as the Kerr Committee had recommended.²⁵

The states and territories have been slow to follow suit. But uninhibited by separation of powers, they have devised a form of tribunal which differs in some respects from the first Commonwealth AAT model in that they combine the exercise of judicial, often primary decision-making functions, with administrative review or decision-making. Examples are found in the Australian Capital Territory (an ACT AAT), New South Wales (the Administrative Decisions Tribunal [ADT]), South Australia (the Administrative and Disciplinary Division of the District Court), Tasmania (an Administrative Appeals Division of the Tasmanian Magistrates Court), Victoria (the Victorian Civil and Administrative Tribunal [VCAT]), and Western Australia (the State Administrative Tribunal [SAT]). Only the Northern Territory and Queensland have failed to introduce a general jurisdiction or multi-purpose tribunal.²⁶ As the list indicates, in some states the jurisdiction is exercised by a division of a court, rather than a body called a tribunal. However, the court when reviewing administrative decisions is required to follow procedures which replicate those in tribunals. Each jurisdiction also has a range of specialist tribunals which deal with matters as diverse as fisheries management, professional disciplinary matters, the environment and mental health.

Merit review and tribunals

Features of tribunals which set them apart from most courts are that tribunals generally make decisions on the merits, that is, taking into account law, facts and policy. Courts, by contrast, are generally confined to reviewing for legality, or for error of law. Merits review of administrative action is closer to the administrative than to the judicial process, particularly in its primary emphasis on the application of the law to the facts. Indeed, such a focus is impermissible for a court exercising judicial review. While attention is paid to the legal basis for a decision and to compliance with legal principles and procedures, the principal issue in merits review is whether the decision under review is substantively correct. The review will commonly extend to the factual basis for the decision in the context of the relevant law and may also take heed of any policies that explain the decision. Should the review body disagree with the decision that was reached, it can ordinarily substitute a new decision. As the AAT noted in *Re Staffieri and Commonwealth*²⁷ of its powers on review: ‘Once an application for review of a determination is before the Tribunal, it must determine whether the decision before it was objectively the right one to be made’.²⁸

It is notable, however, that the term ‘merits review’ does not appear in the AAT Act. Nor was the expression elaborated in the Kerr Committee report.²⁹ The definition of merits review has largely been undertaken by the AAT itself.³⁰ The powers of the Tribunal which are the source of its merits review function are as follows:

43(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- (a) affirming the decision under review;
- (b) varying the decision under review; or
- (c) setting aside the decision under review and:
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

A similar section is found in the legislation setting up many tribunals.³¹

Clearly, merits review involves the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker.³² Alternatively, the matter may be remitted to the original decision maker for reconsideration, as the section provides, in accordance with any directions or recommendations by the tribunal.

The merits review function does not mean that the Tribunal has a roving brief to use the review process as an opportunity to consider new claims or aspects of the application not previously taken into account. The Tribunal's review jurisdiction is statutorily defined and generally limited by the matters referred to in the original claim or application for internal or first tier review. In *Drake v Minister for Immigration and Ethnic Affairs*,³³ for example, the Federal Court held that in reaching this position, adherence by tribunals to government policy would be more tenuous than is the case with first instance decision-makers.

It is also clear from s43 that the tribunal has all the powers and discretions of the primary decision maker: the tribunal 'stands in the shoes' of that person. Brennan J, when President of the AAT, said of this section:

So the question for the Tribunal is the same question as that which faces the primary administrator: What is the correct or preferable decision in this case? The question is answered by reference to the elements of an administrative decision: the facts of the case, the applicable law, and (if appropriate) the exercise of a discretion. Before the Tribunal intervenes to set aside or vary a decision under review it must come to the view that—

- the facts are different from what they were believed to be by the primary administrator;
- the law applies differently from the way in which the primary administrator applied it; or
- if there be a discretion, there is a way of exercising it preferable to the way in which the primary administrator exercised it.

In order to perform its functions, the Tribunal was armed with different powers from those possessed by the primary decision maker. The powers with which the Tribunal was armed are the powers ordinarily vested in courts, but not ordinarily vested in administrators. It is not surprising, then, if the same question is answered in a different way by the Tribunal, which is differently constituted, has different powers, and may have a different approach to the exercise of a discretion.³⁴

Merit review requires the tribunal to consider what was the correct or preferable decision on all of the evidence, not whether the findings of the primary decision maker were open on the evidence. While the second option is the approach for judicial review, it is not the appropriate role for the Tribunal.³⁵

Merit review is generally *de novo*

The grant of the same powers and discretions as the original decision maker is expressed in the aphorism that the tribunal ‘stands in the shoes’ of the decision maker.³⁶ But the ‘standing in the shoes’ metaphor may be misleading because another common feature of merits review is that it is a review which is *de novo* or afresh. That is, the tribunal may make its decision on new material which was not before the original decision maker. In *Drake v Minister for Immigration and Ethnic Affairs*³⁷ Bowen CJ and Deane J explained that when a Tribunal was required to make the correct or preferable decision:

The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

In these circumstances, the material before the review body may bear little resemblance to that before the original decision maker.

Not all tribunals are granted power to conduct a *de novo* review. Often, the statute granting the right of review will restrict the material available to the review body or limit the powers of reconsideration. The terms of the statute are critical in each case. Nonetheless, unless the legislation specifies otherwise, review will be taken to be *de novo*. The Full Court of the Federal Court in *Re Coldham; Ex parte Brideson*³⁸ in the course of its reasons explained:

. . . it is well settled that, when the legislature gives a court the power to review or hear an ‘appeal’ against the decision of an administrative body, a presumption arises that the court is to exercise original jurisdiction and to determine the matter on the evidence and law applicable as at the date of the curial proceedings. Nevertheless, whether the right of appeal against an administrative decision is given to a court or to an administrative body, the nature of the appeal must ultimately depend on the terms of the statute conferring the right.³⁹

Justification for this position is the absence of a hearing before the original decision maker and the powers granted to tribunals to elicit evidence under compulsion.⁴⁰

Merit review is of the decision, not the reasons for the decision

Administrative decision makers are commonly required to provide reasons for their decisions.⁴¹ An issue arose early in the life of the AAT as to whether this

indicated that the review powers of the Tribunal were restricted to reviewing those reasons. The Tribunal in *Re Greenham and Minister for Capital Territory*⁴² rejected that suggestion in the following passage:

True it is that those reasons may form an important part of the Tribunal's consideration, but the scope of the review function exercisable by the Tribunal is no more limited on the one hand by the statement of reasons of the decision maker than it is on the other by the statement of reasons lodged by an applicant. It is the decision itself which falls for review in the light of the reasons advanced by the decision maker and the applicant, together with any other facts, circumstances or considerations which are relevant to the decision under review and which emerge during the Tribunal's consideration of that decision.⁴³

There were several reasons for this conclusion. The function of the Tribunal was administrative review, hence its process was not to be formalistic. That was further indicated by the requirement that the Tribunal was to conduct its proceedings 'with as little formality and technicality . . . as the requirements of [the relevant legislation] and a proper consideration of the matters before the Tribunal permit'.⁴⁴ Nor should the Tribunal be hampered in its review powers by inadequate statements of reasons, for example, because they have been formulated by unskilled officials. Further, the Tribunal had been given extensive powers to discover the actual reasons, to summons witnesses and, in s43, to exercise 'all the powers and discretions that are conferred' on the primary decision maker. These powers would be unnecessary if review was confined to the statement of reasons.⁴⁵ So unless the statute specifically restricts the grounds which can be raised or considered on review, the Tribunal may consider the whole of the evidence and every aspect of the case for the purpose of the review.

A further difficulty, in particular for federal tribunals, is that if a tribunal's jurisdiction is limited, the jurisdiction might more closely align with the jurisdiction of the courts; for example, if the jurisdiction is limited to deciding whether the decision or the reasons for the decision were 'reasonable or defensible', such an expression comes close to deciding legality, not merit, issues. That might lead tribunals to trespass on the courts' domain and this could be constitutionally impermissible.⁴⁶

The jurisdiction of tribunals

The jurisdiction of a tribunal is limited to the review of decisions that are defined by its legislation. Generally this is confined to a specific subject area, such as immigration, veterans' affairs, guardianship, land planning, or occupational licensing. General jurisdiction or multi-purpose tribunals have broader powers, but again their authority to act is limited to those powers granted by legislation. Accordingly, a tribunal may only hear a matter if it comes within its statutory remit. The first issue in any tribunal hearing is the extent of the tribunal's decision-making powers in relation to the matter before it. As the Full Court of the Federal Court

noted in *Crompton v Repatriation Commission*:⁴⁷ '[T]here is nothing . . . that precludes the finding that the tribunal can, and indeed must, re-decide the question of its jurisdiction in each case before proceeding to merits review'. Ensuring that a tribunal has kept within its jurisdictional limits, that is, has not committed a jurisdictional error, is a prime function of the courts exercising judicial review. As the High Court explained in *Craig v South Australia*:⁴⁸

At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law.

The task of deciding the ambit of the jurisdiction of a tribunal depends on the nature of the decisions it can review. Legislation often defines what is a 'reviewable decision' with some precision.⁴⁹ Such decisions are usually listed in the referring legislation. In the absence of such a definition, the statutes setting out the general powers of tribunals like the AAT define 'decision' expansively.⁵⁰ As in the AAT Act, a definition which refers 'to a litany of activities of both a positive and negative nature culminating in "doing or refusing to do any other act or thing"' allocates a broad jurisdiction.⁵¹ Another element of the decision under review is whether it is the original decision of the agency that is under review or any decision reconsidering that decision either within the agency or by an external review body. For example, the *Social Security (Administration) Act 1999* (Cth) s179 and the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss60(1), 64 provide that it is the reconsideration decision that is reviewable by the AAT. In others, the legislation conferring jurisdiction provides that it is the original decision as affirmed, varied or substituted on reconsideration that is reviewable by the AAT, as in the *Veterans' Entitlements Act 1986* (Cth) s175.

In line with the broad definition of 'decision' in the AAT Act, the Full Federal Court in *Collector of Customs v Brian Lawlor Automotive Pty Ltd*⁵² rejected an argument that 'decision' in the AAT Act s25 in the context of the tribunal's power to 'review . . . decisions made in the exercise of powers conferred by [an] enactment' meant a valid, not an invalid decision. As Bowen CJ reasoned:

In the *Administrative Appeals Tribunal Act* a wide meaning is given to the word 'decision' by s3(3). In s25 it appears to me that the word simply refers to a decision in fact made, regardless of whether or not it is a legally effective decision. The difficulty lies in interpreting the words 'made in the exercise of powers conferred by that enactment'. This may mean that it must be shown there was a decision made: (a) in pursuance of a legally effective exercise of powers conferred by the enactment; or (b) in the honest belief that it was in the exercise of powers conferred by the enactment; or (c) in purported exercise of powers conferred by the enactment. Interpretation (c) appears to me to be consistent with the context in the *Administrative Appeals Tribunal Act*.⁵³

Section 25 of the AAT Act provides:

25(1) An enactment may provide that applications may be made to the Tribunal:

(a) for review of decisions made in the exercise of powers conferred by that enactment. . . .

(4) The Tribunal has power to review any decision in respect of which application is made to it under any enactment.

The result has been to preclude any jurisdictional impasse on the basis that review of decisions which may be unlawful is not permitted. Purported decisions which are potentially invalid may be reviewed by the Tribunal. In *Brian Lawlor*, that meant the Tribunal had jurisdiction to reconsider the purported revocation of a licence which could not be revoked but only because the purported revocation was an intended exercise of powers conferred by legislation.

When jurisdiction to review is granted to the general jurisdiction of multi-purpose tribunals, the grant is often a combination of the broad statutory definition in the framework of legislation as modified by the subject-specific legislation allocating the jurisdiction to review. For example, 'decision' was simply defined in the *Veterans' Entitlements Act 1986* (Cth) s5Q(1) as 'a determination and an assessment'. Since 'decision' was not further defined, and there is a right of review of veterans' entitlements decisions by the Commonwealth AAT, the meaning of 'decision' in the *Administrative Appeal Tribunal Act 1975* (Cth) s3(3) applies to all reviews of veterans' entitlement matters. In *Director-General of Social Services v Hales*⁵⁴ Lockhart J described this combination of sources of jurisdiction as follows:

The Administrative Appeals Tribunal has jurisdiction to review decisions made in the exercise of the powers conferred by particular statutes, not by the *Administrative Appeals Tribunal Act* itself. Those statutes are many and diverse. They include the *Social Services Act 1947*, the *Migration Act 1958*, the *Compensation (Commonwealth Government Employees) Act 1971*, the *Repatriation Act 1920*, the *Customs Act 1901* and the *Insurance Act 1973*. Each of the statutes conferring jurisdiction on the Administrative Appeals Tribunal covers a wide range of decisions.

The definition of 'decision' in s3(3) seeks to embrace them all by its ambulatory character. One cannot therefore look to the definition in s3(3) to determine definitively the meaning of the word 'decision'. It must take its colour and content from the enactment which is the source of the decision itself. No narrow or pedantic approach is called for in determining whether a decision falls within the scope of review by the Administrative Appeals Tribunal.⁵⁵

Does 'decision' encompass procedural as well as substantive determinations?

A broad meaning of 'decision' would cover both procedural and substantive determinations. At the same time, such an interpretation has the potential to fragment and to lengthen administrative proceedings. From a systemic view, since judicial review of 'conduct' – essentially matters of process – is permitted, it would seem

sensible that the procedural issues should also be amenable to tribunal review.⁵⁶ That view has not been accepted unequivocally.⁵⁷ Nonetheless, it has been common to permit review of procedural issues, at least when they can be categorised as jurisdictional and part of the overall decision.⁵⁸

Scope of *de novo* review jurisdiction

The standard rule is that, statutory exception aside, a tribunal reviews an application looking at the facts, the law, and the policy at the date of the review. As Deane J in *Drake v Minister for Immigration and Ethnic Affairs*⁵⁹ expressed this principle in relation to review by the AAT:

The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for determination of the Tribunals is whether that decision was the correct or preferable one on the material before the Tribunal.⁶⁰

This is referred to on occasions as contemporaneous review. Indeed, any change to a decision is often said to be because the applicant has produced further evidence, not available to the primary decision maker. Changes to the law, the facts or the policy, however, are not always for the benefit of an applicant. Rules have been developed to handle this situation.

For example, the legislation may provide expressly or by implication that the facts are to be assessed at the date of the original decision. For example, a decision to cancel a person's income support payment because the person no longer qualified does not depend on whether at a later date the person was again eligible. In those circumstances, by implication the review is restricted to a consideration of whether the person's eligibility at the time of the initial decision had lapsed.⁶¹ The normal *de novo* rule applies, however, to the refusal of an income support payment.⁶² The principle is subject to any contrary statutory intention.⁶³

An intervening change in the law attracts other rules. The ordinary principle is that the tribunal should rely on the law as at the date of the tribunal's review decision, unless there are statutory transition rules in place.⁶⁴ Should the change in the law disadvantage the applicant, rules in statutory interpretation legislation, echoing a common law presumption to this effect,⁶⁵ are that accrued rights are not diminished by a change in the law.⁶⁶ The rules differentiate between procedural and substantive rights, the former generally not attracting the exception, the latter doing so. Notably, however, a procedural requirement which impacts on rights will come within the principle.⁶⁷ These distinctions are not always easy to make.

Tribunal, procedure and evidence

Defining merits review is as much about the way in which disputes are settled, and about who is to settle them, as it is about the criteria that are applied in settling

those disputes. In other words, the procedural features of tribunals are critical in establishing what amounts to merits review. The more distinctive features of the procedural and evidentiary rules applying to tribunals are as follows. These rules do not apply universally. There is a spectrum of procedural models from an adversarial, court-like model, to those which rely solely or heavily on alternative dispute resolution methods such as arbitration or mediation, to those which decide solely on the papers. In many tribunals the accent is upon flexibility and informality in procedure. Two aspects of their procedure flow from this feature: it is common for legislation setting up a tribunal to stipulate that the tribunal is to operate informally and is not bound by the rules of evidence; and that the tribunal should operate in an investigative (often called inquisitorial) rather than adversarial manner.⁶⁸

Evidence

Tribunals are generally not bound by the formal rules of evidence and their proceedings are to be informal.⁶⁹ As Gleeson CJ and McHugh J noted in *Minister for Immigration and Multicultural Affairs v Eshetu*⁷⁰ of the 'no evidence' provisions in the *Migration Act 1958* (Cth):⁷¹

They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.⁷²

The consequence is that while the discretion of tribunals is not unfettered 'it is a wide one and the tribunal will not err in law merely because it acts on evidence which would not be admissible in a court or because there is no legally admissible evidence to support any of its findings'.⁷³ Nonetheless, the provisions do not mean that any material the applicant wishes to produce can be admitted, so that the hearing is a 'free-for-all'. In practice, in the absence of other guidance, tribunals tend to rely on rules of evidence as the method of inquiry 'best calculated to prevent error and elicit truth'.⁷⁴ As Woodward J noted in *McDonald v Director-General of Social Security*:

. . . a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in consideration of natural justice or common sense, than in the technical rules . . . developed by the courts. However, these may be of assistance in some cases where the legislation is silent.⁷⁵

The procedural freedom accorded tribunals by the 'no evidence' provisions is often balanced by a requirement that the tribunals 'shall act according to substantial justice and the merits of the case'.⁷⁶ This is a standard statutory formula which has been taken to indicate simply that a tribunal has flexible procedures.⁷⁷

Consideration of evidence must comply with procedural fairness

Generally, the admission of evidence must meet the basic standards of fair process imposed on tribunals by the rules of procedural fairness. As Mason J said in *Kioa v West*⁷⁸ of the exercise of a statutory power, it:

. . . must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.⁷⁹

What are basic standards of fair process will depend on the statutory context. Hence, in the context of the *Migration Act 1958* (Cth), Part 8 of which excised the rules of natural justice, except actual bias, as a ground of review, it is clear that the common law rules of natural justice are excluded when applications are based on that statute. Part 8 does not free tribunals from complying with the procedural code contained in the Act.⁸⁰ Nor, when, applications are made under the Constitution s75(v) or the *Judiciary Act 1903* (Cth) s39B do these provisions exclude even the common law rules.⁸¹ With the passage of amending legislation, however, review of migration decisions is now confined to the statutory analogue of natural justice.⁸² Nonetheless, even in the majority of tribunals which must generally comply with the common law rules, the rules of natural justice apply.⁸³ Whether those rules are sufficiently precise to be helpful is another question.⁸⁴

Evidence must be probative

The evidence must at least be probative of the issue for which it is tendered. To be probative, evidence must tend 'logically (to) show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant'.⁸⁵ Whether a failure to decide on probative evidence is legally flawed on the basis that such a decision is irrational or 'Wednesbury unreasonable' or amounts to another ground of review such as error of law has not definitively been determined.⁸⁶

Tribunal review is often investigative rather than adversarial

Court process in Australia is generally based on an adversarial model. That is, the adjudicator acts as an umpire between two opposing parties and it is principally the parties who have the responsibility of choosing what evidence to present and how best to run their case. By contrast, investigative tribunals are expected to take a greater role in the conduct of the proceedings and the tribunal is required to obtain relevant information whether prior to, at, or after the hearing.⁸⁷

Australian tribunals come within a spectrum of styles ranging from adversarial to a more inquisitorial or investigative model. Rarely does the statute overtly indicate that a tribunal is to operate in an investigative manner. Of the major Commonwealth, state and territory tribunals, it is only the ADT Act which contains such a provision.⁸⁸ Even then the reference is oblique, being a requirement that the ADT 'ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings'.⁸⁹ The AAT Act has no similar provision. The nearest equivalent is s33(1)(c) of the AAT Act, which authorises the Tribunal to 'inform itself on any matter in such manner as it thinks appropriate'. While the Tribunal has occasionally exercised its power to summon its own witnesses it has done so rarely and with some circumspection. It generally relies on what is put before it by the parties to determine whether it has sufficient information for its purposes.⁹⁰

The Immigration Review Tribunal, a precursor of the Migration Review Tribunal, was often described as an inquisitorial body, although this is not spelled out in the *Migration Act 1958* (Cth). The Committee for the Review of the System for Review of Migration Decisions (CROSROMD) said of the inquisitorial style of the IRT:

The most obvious characteristic of the IRT as a non-adversarial tribunal, when compared with a more traditional tribunal such as the AAT, is that there is no direct confrontation at a hearing between parties and between their lawyers. In an adversarial system, there are commonly two parties, each represented by lawyers, who argue the issues of law and fact to be resolved, and challenge the contentions of the opposing party. In the IRT, however, it is usually only the applicant who attends any 'hearings', and he or she is often not represented by anyone else, whether a lawyer or otherwise. Tribunal members themselves are responsible for actively assisting the applicant to present his or her case, identifying all the relevant issues, thoroughly testing the evidence and protecting the interests of both applicant and the Department or Minister.⁹¹

The inquisitorial nature of the IRT's process was evident in the absence of an opposing party with the consequence that the evidence-gathering and testing role fell on the tribunal. Other features of the non-adversarial process were the absence of formal rules of evidence, and the adoption of procedures designed to minimise legalistic approaches, achieved principally by the refusal of legal representation.⁹² Although lawyers could accompany applicants to tribunal hearings, they could only address the tribunal in exceptional circumstances and could only contribute if information was sought from them by the tribunal. These features have been retained by the successor of the IRT, the MRT, although there is no equivalent provision concerning legal and other assistance before the Refugee Review Tribunal (RRT).⁹³ Other provisions which indicate that the process is not to be adversarial are that the Tribunal is capable of calling witnesses or parties, and may examine and cross-examine witnesses. Express provisions which give the Tribunal power to control its proceedings are that it may decide that evidence will be written or oral, and may impose time limits on parties.⁹⁴

In *Bushell v Repatriation Commission*,⁹⁵ Brennan J described the investigative procedure of the AAT in terms which are frequently quoted:

Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the AAT is an administrative decision maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it . . . The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.⁹⁶

When a tribunal is operating inquisitorially it is obliged not to limit its determination to the case presented by the applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant.⁹⁷ These functions are more likely to be carried out by conference registrars or case officers⁹⁸ than by the tribunal itself. In practice, even when a tribunal is designed to be investigative, resource limitations, time pressures, and the need to avoid breaching fair process rules often inhibit a tribunal's investigative activity.⁹⁹ So despite their investigative role, it is more common for tribunal members to request the parties to provide information than for the tribunal to seek such information itself. Other inhibiting factors are the influence of the legal culture in which a tribunal operates, the unwillingness to move from the known and well-established rules of evidence, and the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion.¹⁰⁰

Courts too have been slow to impose an obligation on a tribunal to undertake independent inquiries, even given tribunals' ostensibly inquisitorial role.¹⁰¹ More recently, however, the High Court has given the 'green light' to the duty of inquiry, at least in some cases. In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs*¹⁰² the High Court accepted that it is a breach of procedural fairness for a tribunal not to make an inquiry in certain circumstances. As the Court noted:

The [Refugee Review] Tribunal was not an independent arbiter charged with deciding an issue joined between adversaries. The Tribunal was required to review a decision of the Executive made under the Act and for that purpose the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made. And the Tribunal had to decide whether the appellant was entitled to the visa he claimed.¹⁰³

Whether this concession will encourage greater resort to information-gathering by tribunals is yet to be tested but, subject to any specific statutory provisions, the *VEAL* decision has opened the way for this to occur.

There is one area in which tribunals are under such an obligation and that relates to their own jurisdiction. A tribunal always has a duty to ensure it is legally competent to decide a matter. If this entails making inquiries about jurisdictional facts or other jurisdictional issues to determine that question, the tribunal must undertake that inquiry. For example, as the AAT must be granted jurisdiction

under an enactment, the Tribunal has taken a careful approach to the interpretation of provisions vesting it with jurisdiction.¹⁰⁴ Where the enactment lists decisions that can be reviewed, the failure to include a decision is construed strictly.¹⁰⁵ Similarly a requirement that a decision be reviewed by a lower tier tribunal before seeking review by the AAT has been regularly enforced.¹⁰⁶ The same applies to a requirement that a decision be internally reviewed before review by the Tribunal.¹⁰⁷

Must be ‘fair, just, economical, informal and quick’

A major factor which impinges on the inquisitorial operation of tribunals is the requirement that they operate in a manner which is fair, just, economical, informal and quick. Complying with this litany of adjectives has created difficulties for tribunals, not least because they are internally inconsistent. They are among the benchmarks of several major tribunals.¹⁰⁸ The difficulty of how to give appropriate weight to these adjectives was described as follows:

First, the objectives referred to in [s] 420(1) will often be inconsistent as between themselves. In particular, a mechanism of review that is ‘economical, informal and quick’ may well not be ‘fair’ or ‘just’.¹⁰⁹

In failing to indicate which should take precedence, parliaments have created a conundrum for tribunals. Nor have the courts been helpful in assisting tribunal members to weigh up which of these competing objectives should receive preference in a particular case. While courts have held that it is for the decision maker to allocate weight to particular statutory objectives,¹¹⁰ and that this requirement is imperative in cases where the objectives are in competition, guidance ceases at this point.

Burden and standards of proof

It has long been accepted that strict notions of burdens of proof, statute aside, are inappropriate in the administrative process, including in tribunals. A burden of proof is the obligation to prove or disprove a fact. Nonetheless, in a practical sense, a tribunal cannot make a decision unless it has evidence before it and in turn that requires someone to produce evidentiary material. In some circumstances, the obligation to do so is placed on the applicant or the agency. In the absence of any statutory injunction, there is generally a practical onus on an applicant satisfactorily to establish their case and that requires production of evidence.¹¹¹ This conclusion flows from curial statements at the highest level that the tribunal is entitled to rely on the case the applicant presents.¹¹² Indeed, as Gleeson CJ said in *Dranichnikov v Minister for Immigration and Multicultural Affairs*,¹¹³ the inquisitorial role of the tribunal does not ‘mean that a party before [a tribunal] can simply present the facts and leave it to the Tribunal to search out, and find, any available basis which theoretically the Act provides for relief’. As a consequence,

a claimant cannot assume from the fact that the proceedings are inquisitorial that the burden of providing the evidence in support of a claim is borne by the tribunal.

Although there may only be a practical, not a legal, onus of proof in tribunal proceedings the same is not true in relation to the standard or burden of proof. Evidence must at least meet a probative standard, however fluid that notion may be. For facts which are required to be established by statute, it is more likely that the civil standard, again interpreted with flexibility, is applicable. That is consistent with the principle established by the High Court in *Sodeman v R*¹¹⁴ that the common law knows only two standards of proof – the civil and the criminal standards. That does not preclude the seriousness of the matter imposing a higher than normal civil standard.¹¹⁵ In some contexts, such as when the tribunal is seeking to determine what might happen in the future or even what has already happened, the use of the term burden of proof might be misleading. But when the tribunal is required, as a step in the process of arriving at its decision, to determine whether a fact does or does not exist, generally the civil standard should apply to its decision-making with due regard being paid to serious issues.¹¹⁶

Appealing tribunal decisions

Appeals lie from tribunals to the courts. What form that appeal will take and what the appeal embraces will depend on the statutory formula. In the Commonwealth, appeals lie to the Federal Court, the original jurisdiction of which includes ‘decisions from persons, authorities or tribunals other than courts’.¹¹⁷ Usually, this jurisdiction is exercised by a single judge, but where the appeal is from a tribunal or authority while constituted by, or by members who include, a judge, the appeal lies to a Full Court of the Federal Court.¹¹⁸ In the states and the territories, the appeal is usually to the Supreme Court or the Court of Appeal.

The most common provision is for appeal on a question of law or for error of law. For example, the rights of appeal from the AAT is for a ‘question of law’.¹¹⁹ An appeal on a question of law or for error of law does not permit the reviewing court to reconsider the weight to be attached to facts raised in an application. As the Federal Court commented in *Collins v Minister for Immigration and Ethnic Affairs*:¹²⁰

It is not sufficient in an appeal under the *Administrative Appeals Tribunal Act 1975* s44 for the appellant to invite the Court to make its own assessment of the weight of the evidence, or to substitute its own findings. The appellant must show that there was no material before the Tribunal to support the conclusion reached. It is not a basis for appeal under s44 to contend that the decision was against the weight of the evidence . . . The task of the Court is ‘to leave to the tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law’.

An appeal 'on a question of law' is narrower than an appeal that involves a question of law.¹²¹ That finding has been affected by the constitutional restrictions on a federal court deciding matters of fact. Hence, the Federal Court has been enjoined not to permit mixed questions of fact and law to be regarded as an appeal 'on a question of law'.¹²² Although amendments to the AAT Act have given the Federal Court limited powers to make findings of fact, this power may only be exercised once the question of law which constitutes the subject matter of the appeal has been established, and then only within the narrow terms of the legislation and to avoid the need for the matter to be remitted.¹²³

As appeal is a creature of statute, there are other formulae for describing the right of appeal. Some of these provisions for appeal rights are not explicit. A statute which simply provides for a right of review, or an appeal by way of rehearing, does not spell out what the appeal right entails. In this situation, the courts have attempted to fill the statutory gaps. A commonly cited passage, which describes the four most frequently cited rights of appeal, is found in the following extract from the judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*.¹²⁴ Although the extract refers to appeal from a 'trial court' the same principles apply when the appeal right is from the decision of a tribunal:

Appeal is not, as such, a common law procedure. It is a creature of statute. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*, Mason J distinguished between (i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing *de novo*. There are different meanings to be attached to the word 'rehearing'. The distinction between an appeal by way of rehearing and a hearing *de novo* was further considered in *Allesch v Maunz*. Which of the meanings is that borne by the term 'appeal', or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case.¹²⁵

A clear example of a hearing *de novo* is the merit review undertaken by the AAT. The appeal by way of rehearing most commonly applies to an appeal from a specialist tribunal to a court. An appeal by way of rehearing generally means that the court will undertake a hearing *de novo*, although there is no absolute rule to that effect.¹²⁶ It is clear that there is a spectrum of possibilities for appeal rights and the key to the type of appeal from that spectrum is the statute granting the right of appeal.

Tribunals and policy

This is the quintessential area in which the uneasy situation of tribunals in Curtis's 'no-man's land' is most evident. The Kerr Committee concluded that a tribunal

should not substitute a new decision ‘when it is shown that the administrative decision is properly based on government policy’, but should be able to inform the minister that ‘government policy as applied in the particular case is operating in an oppressive, discriminatory or otherwise unjust manner’.¹²⁷ The Bland Committee took a harder line, that a tribunal should neither express opinions on government policy nor question the policy grounds on which a decision is based. A tribunal ‘should do no more than identify the government policy on which the decision is based’.¹²⁸ Neither view prevailed. As McMillan explained:

It is now part of Australian administrative law history that the strict ‘hands off’ approach supported by both committees was not adopted by either the Federal Court or the Administrative Appeals Tribunal. Each, in the *Drake* litigation, emphasised the independent duty of a tribunal to reach a correct or preferable decision on the merits of the case under review. Both held that it would be an abdication of that function for the Tribunal to reach a decision by the unreflective application of a policy that was not enshrined in legislation. As they saw it, the public interest in a policy being applied at an administrative level can always be outweighed by the demands of good government or the justice of the individual case. The Federal Court would have gone so far as to regard government policy as simply ‘a relevant factor’, with the tribunal obliged to make ‘an independent assessment’ of ‘the propriety of the particular policy’. A more restrained view was subsequently expressed by the Tribunal, with Brennan J as President giving emphasis to competing factors that should be considered by the Tribunal, principally the need for consistency and predictability in decision-making, and deference to ministerial judgment on policy matters. The upshot, on either view, was the clear articulation of a principle that administrative policies are not binding on review tribunals and have a significance that is subordinate to a tribunal’s obligation to reach what it sees to be the correct or preferable decision.¹²⁹

The decision of Brennan J in *Re Drake (No 2)*¹³⁰ is a classic judgment in administrative law. The ruling treads a careful line between acceptance by a tribunal of government policy while retention of a freedom to depart from policy in an appropriate case. At the same time, as tribunals are now generally considered to be part of the executive arm of government, their decisions are more likely to be accepted if they command respect. That means that a decision must not only be legally sound and well reasoned, but attuned to the administrative, including policy, context in which it occurs. Not surprisingly, given the sensitive nature of this issue, there are differences of opinion as to how well tribunals have achieved that balance. As McMillan noted:

Mr Justice Kirby observed that the statement of the AAT’s functions and duties . . . ‘has taken [the AAT] beyond the frontier marked “Policy – Lawyers Keep Out” [and] Mr Derek Volker [an experienced official] warned of the impending confusion for administrators who would be faced with conflicting views on the status of particular policy directives, between the administration and the Tribunal, and also among different members of the Tribunal.’¹³¹

Views of this kind probably lie behind the restrictions imposed on review by the multi-purpose tribunals. The New South Wales ADT, the Victorian VCAT and Western Australia's SAT are each bound to take account of government policy in certain circumstances, provided the policy is lawful and to apply it would not be inappropriate in the circumstances.¹³² Those circumstances include that the policy was in force at the time, that some form of certification or publication of the policy is available, and in the case of Victoria and WA, that the decision maker took account of the policy when making the decision. There was a similar proposal for Commonwealth tribunals if the Administrative Review Tribunal Bills had been passed. The proposal lapsed with the Bills and no attempt was made to introduce such a provision when there were subsequent amendments to the AAT Act.

These attempts in the states to make policy binding on tribunals appear to have had little impact. This probably reflects the practical difficulties. These include that many policies do not have endorsement at ministerial or Cabinet level; the requirement misunderstands the role of tribunals which is to consider the individual case, rather than wider fiscal, administrative or other public interest matters; and policies can become out-of-date, or be inappropriate in the particular case. Nonetheless, the clash between government policy and individual or administrative justice is a constant theme in administrative law.

Impact of tribunal decisions

In strict theory, since a tribunal is not a court the doctrine of precedent does not apply to a tribunal and a decision of a tribunal does not become a binding precedent. Nevertheless, since consistency and predictability are at the heart of good administrative decision-making, earlier rulings by a tribunal should not be ignored. Within a tribunal, encouraging consistency is undertaken by ensuring that decisions of the tribunal are available on a database accessible to members, and that members are reminded of the value of consistent decision-making. In at least one federal tribunal, the SSAT, there is legislative recognition of this function with the requirement that the Executive Director of the SSAT take steps to ensure consistency of its decisions.¹³³

The impact of tribunal decisions within public administration is more problematic. One of the reasons is that there is no formal institutional arrangement for monitoring the application of tribunal decisions by agencies. This is a gap in the administrative law framework.¹³⁴ In its 1995 *Better Decisions Report*, the Administrative Review Council observed:

Unless an agency has in place organisational structures and procedures that enable it to take account of tribunal decisions in the development of agency policy and legislation, and apply them in other individual cases, it will be unable to take full advantage of the significant potential benefits of merits review.¹³⁵

Despite this concern, an empirical study has indicated that even without an institutional framework for disseminating information about tribunal decisions, although there is room for improvement, in fact decisions are understood and their principles disseminated within agencies.¹³⁶ Officials have generally embraced administrative law standards and the principle of legality is strongly adhered to within agencies.

Australian Ombudsman: A continual work in progress

Rick Snell

The transition in the roles, functions and activities of Australian Ombudsman from those contemplated at the start of the 1970s to current practice in 2006 has been remarkable.¹ Early research on the Ombudsman in Australia argued that the office was an alien concept to Australia that had been remarkably successful in terms of receiving and resolving complaints and establishing a good reputation with the public, but that the office had received marginal attention in legal scholarship and had a problematic relationship with other parts of the administrative landscape.² Australian Ombudsmen have transformed from an alien (and barely understood) import on the edge of public administration, assigned a secondary and assistant role, to being regarded as a central component of administrative justice.³ There has been a significant redistribution of focus and activity from an original complainant-focused, incident-based approach to an institution-focused and performance-based approach to investigation.⁴

The administrative law and public administration landscapes in Australia have radically changed since the 1970s. More importantly the rate, extent and impact of those changes continue to compound in the early decades of the twenty-first century. This raises some interesting questions about the capacity of an institution, initially configured as a third-hand antipodean import of a nineteenth century instrument of Swedish law reform, to function in a rapidly changing Australian environment two centuries removed from its Swedish beginnings.⁵

Australian Ombudsmen, more than any other part of the New Administrative Law package introduced in the 1970s, have had the capacity to move beyond their originally conceived mandate, to attract new jurisdictions from governments and to constantly redevelop and refine their mission and purpose. Furthermore, of all the administrative law processes and institutions it is the Ombudsman that is best placed to respond to what have become central concerns of public law

such as ‘compensation for wrongful government action, the regulation of rule-making, and the contribution of administrative law to better decision-making for the better of the community as a whole’.⁶ Indeed, the Australian Ombudsmen may be an exception to George Soros’s argument that there are limits to the life spans and vitality of institutions.⁷ Approaching its third decade, there appears to be little evidence of a loss of vitality or any limit to the Ombudsman’s expected lifespan.

This chapter explores some of the key themes that have shaped and guided the operations of the Australian Commonwealth Ombudsman since the 1971 Report of the Commonwealth Administrative Review Committee (the Kerr Committee) to the present day. Attention is then turned to how the dynamics of change within Australian administrative law and public administration presented further significant opportunities for the institution to have its activities, purpose and mission reshaped. The Harlow and Rawlings typology of fire-fighting and fire-watching is refined and used to understand some of the shifts in emphasis and activity that have occurred with the Commonwealth Ombudsman at various stages of its evolution.⁸ This chapter builds upon the array of previous studies that have extensively dealt with issues surrounding the jurisdiction, powers, accountability and positioning of Australian Ombudsmen including those by D Pearce,⁹ M Groves¹⁰ and A Stuhmcke.¹¹

Revisiting the dawn of the Australian Ombudsman

Stuhmcke has depicted 1968–1976 as a period that led to the ‘conceptualisation, refinement and eventual introduction of the Commonwealth Ombudsman’.¹² Both Stuhmcke and Pearce have presented a detailed exploration of the evolution from the innovative and revolutionary proposal for a General Counsel for Grievances to the more traditional Ombudsman model that appeared in the *Ombudsman Act 1976* (Cth).¹³ Stuhmcke argues that:

... the parameters set for the Commonwealth Ombudsman reflect an attempt to meld the classic European formulation of an Ombudsman with the English Westminster style of government and, in addition, reflect the creation of the Commonwealth Ombudsman as part of a wider package of administrative reforms. This period establishes a transformation in dispute resolution between government and citizens – the new administrative law package providing citizens with an alternative to the court system or ministerial accountability for resolving disputes with administrators where hitherto there had existed little or no alternative review mechanisms.¹⁴

Yet the lead up to the development of those parameters, indeed the very nature of those parameters, was both a continual work in progress and a process that has left an on-going legacy. That legacy has granted the Ombudsman very flexible limits on its mission, practice and future development. An uncertain and evolving experiment has continued from the very conception of an Australian

'grievance man' by the Kerr Committee – as a leading member of the Bar with an extraordinary capacity to receive, investigate and pursue complaints¹⁵ – to the more classical Ombudsman model, heavily influenced by the New Zealand model.

The Kerr Committee, in its short chapter, deliberately rejected the New Zealand model of the Ombudsman as not 'the best way' of dealing with complaints that were not justiciable, minor or for reasons of costs not worthwhile litigating.¹⁶ The Committee never fully detailed why they assigned their grievance man to the administrative arena apart from a desire to avoid locating the institution in either the Parliament or the executive.¹⁷ The Committee's conception seemed to embrace the idea of a roaming and independent administrative officer whose interest in most matters, especially minor ones, would produce an immediate correction of the problem by a responsive Commonwealth Public Service that was of 'high quality'.¹⁸ The decision not to locate the Ombudsman in the parliamentary sphere has long been regretted by some writers¹⁹ and at the state level is progressively being addressed.²⁰ On a continuum ranging from a complainant-focused, incident-based approach to an institution-focused and performance-based approach the Kerr Committee placed their grievance man firmly and permanently in the first category.

Often the Bland Committee²¹ and its recommendations are lost in the shadows of, or compared unfavourably with, those in the Kerr Committee Report. Remarking on the proposals to replace the 'grievance man' with an Ombudsman model, Lindsay Curtis argued 'the message was unmistakable. In the view of the Bland Committee, the Kerr Committee had committed the cardinal sin of not asking the bureaucracy what it wanted, and had, therefore, come up with the wrong answer'.²² A careful reading of the Interim Report,²³ which contained the proposal for the Ombudsman model, and an examination of the internal workings of the Bland Committee reveals a more positive motivation.

Whilst there is a general deficiency in the historical coverage of Australian administrative law, we are blessed by Peter Bailey's detailed insider's account of the Bland Committee.²⁴ The Committee set the initial benchmark for the type of extensive, detailed and consultative approach to administrative law reform which is the hallmark of both the Administrative Review Council and the Australian Law Reform Commission approaches in subsequent years. An example of this painstaking research was the extensive interviews with senior public servants and the detailed scrutiny of legislation and regulations.²⁵

There is little doubt that an informal visit to New Zealand by Sir Henry Bland and a meeting with Sir Guy Powles, the New Zealand Ombudsman, was a critical and formative episode in the thinking and approach of the Committee.²⁶ The 'lesson drawing'²⁷ from the New Zealand experience encouraged the Committee to move away from a legalistic and activist 'grievance man' to a more neutral, reactive and administrative orientated Ombudsman model. By mid-December 1972, the Committee had advanced their thinking about the Ombudsman concept to a stage at which Sir Henry Bland was able to win the enthusiastic backing of the

new Attorney-General, Senator Lionel Murphy, who commissioned an immediate interim report on the proposal.²⁸

However, the New Zealand decision to locate the Ombudsman in the parliamentary arena has not been adopted in Australia. R Creyke and J McMillan have argued that 'internationally, the prevalent model for creating the Ombudsman is to make it an officer of the parliament'.²⁹ A number of the state Ombudsmen report to parliamentary committees, and in Western Australia the Ombudsman is titled the 'Parliamentary Commissioner for Administrative Investigations'. Yet 'from a practical perspective, all Australian public sector Ombudsman offices are located in an administrative law setting within the executive branch. That is, they are established and operate much in the same fashion as other executive agencies, although they enjoy statutory independence'.³⁰ Pearce has been a long term advocate for relocating Australian Ombudsman from the executive to the parliamentary arena but no steps have been taken at the Commonwealth level to achieve this position.³¹

In the final lead-up to the passage of the *Ombudsman Act 1976* (Cth), a number of the Bland Committee recommendations were modified or replaced with measures that prepared the legislative and creative groundwork for future Ombudsman to expand upon. Professor Pearce succinctly outlines both the significant changes and their consequence when he states:

The Ombudsman Act 1976 reflects a bolder approach than that taken by the Bland Committee. The policy/administration dichotomy is avoided – the action that may be investigated is 'action that relates to a matter of administration' (s5(1)). Ministers' actions are excluded (s5(2)(a)) but not recommendations; and there is no power for a minister to prevent an investigation. The Ombudsman may proceed on his or her own motion (s5(1)(b)). A decision may be found to be wrong. A report may be made public. Relative to Ombudsman offices in other jurisdictions both in Australia and overseas, the Commonwealth Ombudsman is one of the stronger offices in terms of breadth of jurisdiction and power.³²

By the time Professor Jack Richardson took up his position as the first Commonwealth Ombudsman, the institution had already undergone two distinct phases of modification from the original and revolutionary concept of a government paid lawman ready to act on behalf of citizens with valid complaints. In the mind of many in the general public, this powerful agitator for citizens role is still mistakenly seen as the core activity of the Ombudsman. Ombudsmen constantly draw attention to the fact that their legislation places them as an independent and neutral party in the citizen-state relationship.

On 1 July 1977, Professor Richardson was at the helm of a new institution, with fresh and untested jurisdictions, a capacity to be both reactive (receiving and acting on complaints) and proactive (own motion investigations), the necessity to devise procedures, the limitations of a budget based on guesswork about load, function and activity, and the capability to declare decisions as wrong, unfair or unreasonable and to publish such findings. In retrospect, many within the

Australian public service, and even Cabinet members, might have opted for the original and more limited 'grievance man' concept if ever offered the choice again.

Harlow and Rawlings deployed the analogy of 'fire-fighting' and 'fire-watching' to explain a gradual change in the operations of the Parliamentary Commissioner for Administration (UK).³³ Fire-fighting, for Harlow and Rawlings, is the type of reactive response by Ombudsman to complaints generated by individuals. On the other hand, fire-watching is the type of activity which the Ombudsmen engage in when they mount 'a systemic investigation where on the basis of previous complaints he believed a department was working inefficiently, with a view to making recommendations for putting things right'.³⁴ Harlow and Rawlings viewed this typology as showing 'a built-in tension between its fire-fighting and fire-watching functions'.³⁵ In this analogy, the Australian Ombudsman had gone from one entirely focused as a fire-fighter under the Kerr Committee proposals, to a primarily fire-fighting function, with an unknown potential (using own motion powers) to drift into fire-watching activity under the *Ombudsman Act 1976* (Cth).

There are two limitations to the Harlow and Rawlings fire-fighting and fire-watching analogy. First, as the rest of this chapter will try to demonstrate, the fire-fighting and fire-watching typology should be expanded to include a third type of activity of 'fire-prevention'. Fire-prevention can be described as that area of activity where the Ombudsman uses own motion powers, systemic approaches, reporting and continuing monitoring of departmental activities in a way that is not based solely or primarily on intelligence gained from previous complainants. Other activities in this area would include production of improved decision-making guides, provision of training courses and performance evaluations. Second, the notion either that there is a linear progression over time from the fire-fighting and fire-watching functions (and fire-prevention) or that there is an unnecessary tension between the roles does not seem forceful. Observations of Ombudsman activity in the UK, Canada, New Zealand and Australia over the last three to four decades suggests that there is a constant change in the distribution of activity between all three functions. A more productive deployment of the analogy would be to use it to chart this constant change in the distribution, emphasis and level of importance attached to each of these roles at any one time by any particular Ombudsman or over various periods of the institution's existence.

1976–1989: Setting the pattern and finding some creative responses

During this period, the first three Ombudsmen took a relatively unknown institution, that had been allocated uncertain powers and a limited role in the executive

branch of government, and made several important steps towards being seen as 'occupying an essential place in modern society'.³⁶ The first three Ombudsmen experienced many problems with the workload and staffing of their office. There were also concerns that the recommendations of Ombudsmen were not addressed by the Prime Minister and Parliament.³⁷ Nevertheless, as Stuhmcke observed, 'despite many of these issues having the capacity [to] impede the operational effectiveness of the Ombudsman, such as staffing and resources, by the end of this period the Commonwealth Ombudsman is established as a primary means of dispute resolution in terms of the New Administrative Law'.³⁸

The powers and procedures of the Ombudsman distinguished the institution from many of the other administrative law mechanisms. Ombudsman investigations are usually conducted informally and by way of preliminary inquiries and in private. Whilst the Ombudsman has the same powers as a royal commission (to require the attendance and examination of witnesses, to enter premises, to administer oaths and to require the production of documents) these powers have rarely been exercised and generally are used as a last resort.

The Ombudsman does not have determinative powers to alter an administrative decision and can only make a report to an agency recommending that further action of some kind be taken.³⁹ The Ombudsman can determine (s15) that an administrative action:

- appears contrary to law;
- was unreasonable, unjust, oppressive or improperly discriminatory;
- was in accordance with a law or administrative practice that itself was unreasonable, unjust, oppressive or improperly discriminatory;
- was taken for an improper purpose or was based on an irrelevant consideration;
- was based on a mistake of law or fact;
- was one for which reasons should have been but were not given; or
- was otherwise wrong in all the circumstances.

The Ombudsman can, if of the opinion the agency has not taken appropriate action in relation to any recommendation, report to the Prime Minister and thereafter to the President of the Senate and the Speaker of the House of Representatives, for presentation to the Senate and the House of Representatives and for presentation to both Houses of Parliament.

In the period 1976–1989, the workload of the Ombudsman rose from about 7500 complaints (written and oral) to a peak of almost 21 000 in 1986 before falling to about 10 000 complaints in 1989.⁴⁰ The key innovation was the decision by Professor Richardson not only to receive oral complaints by phone but to use that device to try and resolve complaints. Whilst the innovation was driven by necessity, it nevertheless won the support of many agencies, complainants and observers. External observers, like Professor Rowat from Canada, expressed surprise at and admiration for how the Ombudsman could handle such a heavy workload with comparatively so few staff compared with those available in other jurisdictions.⁴¹

An increase or extension in functions started to occur in the 1980s with the Ombudsman gaining some responsibility for dealing with complaints against the Australian Federal Police, responsibilities under the *Freedom of Information Act*, *Telecommunications (Interception) Act 1987* and gaining jurisdiction as the Australian Capital Territory Ombudsman. Professor Pearce in particular saw this jurisdictional growth as undesirable because the jurisdictions which lay 'outside the traditional Ombudsman function, have not aided the office in that they have not assisted the relationship of the Ombudsman with either the public or the government and they have diverted the attentions and resources of the office away from mainstream functions'.⁴²

Another feature of this period was a deliberate decision to allocate a significant level of resources, time and effort to ensure that 'general systemic change flows from the Commonwealth Ombudsman's investigation of complaints by individuals'.⁴³ This was achieved in three ways. First, by making recommendations for systemic changes when reporting back to agencies on individual complaints. Secondly, by noting the need for such changes in each annual report. Thirdly, by an active contribution of advice to government and Parliament, especially its committees and law reform bodies.

In terms of the fire-fighting, fire-watching and fire-prevention typology this first period of the Commonwealth Ombudsman had seen the majority of activity conducted in the fire-fighting area but a significant amount of activity being devoted to the 'fire-watching' function. The Ombudsman, especially Professor Pearce, did not view this as either a tension-filled dichotomy or an inevitable evolutionary progression away from a complainant-focused, incident-based approach to a purely institution-focused and performance-based approach to investigations. The approach seemed to be both a resource saving strategy and one that also allowed the Ombudsman to be a positive contributor to good administrative practice.

In December 1990, the Senate Standing Committee on Finance and Public Administration undertook an external review of the institution, after a request from the Prime Minister, using terms of reference suggested by Professor Dennis Pearce, the retiring Ombudsman. The Committee's report, presented in December 1991, was largely favourable and made several important recommendations.⁴⁴ In particular the Committee reaffirmed that they considered that the:

Ombudsman principally functions as an informal complaints-resolution agency. It seems to the Committee that much of the value of the Office in that role stems from the very factors for which it has been criticised in some quarters: the fact that it is not an advocate for complainants, is not bound by legal formalities and lacks power to enforce its recommendations. These features make the Ombudsman at the same time accessible to complainants and acceptable to the public service.⁴⁵

The Committee, when it tried to define the Ombudsman's role, suggested that it was better suited and more capable of adopting a fly-swatting function rather

than a more active lion hunter role.⁴⁶ This was a clear rejection of the trend that had been developing with the Ombudsman over the previous fifteen years of allocating more resources and effort to encouraging and pursuing systemic change within the public service. This was not a view shared by the new Ombudsman, Alan Cameron, who stated in reaction to this part of the Committee's report that 'there is little point in applying a band-aid or quick fix solution if a festering sore lies undiscovered beneath'.⁴⁷ The Committee had stated:

The traditional Ombudsman role assigned to the Commonwealth Ombudsman is more concerned with the resolution of particular grievances than with systematic reform of the administration or with coordination of the whole system of administrative review. The main focus of the Ombudsman's operations in the core jurisdictions of the office can be summarised as:

- Processing individual complaints, through contact, frequently informal, with the agencies that are the subject of complaints;
- Transmission of information in both directions between complainants and the agencies about which they have complained;
- Attempting to bring complaints to a resolution in which both sides agree on the facts of the complaint and on the fairness of whatever final decision is made by the agency following the Ombudsman's intercession.⁴⁸

In the view of the Committee, it was only once these functions were settled upon that issues of resources, determinative powers and alignment (or placement) within the legal and administrative system would be able to be resolved, whilst 'significant systemic benefits will continue to arise from such a role but these will occur as a spin-off from the Ombudsman's primary task of resolving complaints'.⁴⁹ This approach had been strongly advocated by Peter Bailey, a member of the Bland Committee, in his testimony to the Senate Committee.⁵⁰ A return to, and concentration on, a fire-fighting role by the Commonwealth Ombudsman was the central message.

However, the Committee felt comfortable with Professor Tomasic's argument that the Australian Ombudsman was a developing or evolving concept. In particular, the Committee accepted Professor Tomasic's view that the developing concept should move the Ombudsman away from a legalistic and citizen's rights orientation towards a more administrative focus that sought to improve 'the link between the public service and those it serves'.⁵¹ To this end, the Committee made the suggestion that future Ombudsman, from a non-legal background, should be recruited in preference to those with legal training.⁵² Yet it rejected Professor Tomasic's view that the Ombudsman's principal role ought to be 'to facilitate the improvement and rationalisation of decision-making processes within the bureaucracy itself'.⁵³

The Senate Committee recommended a return of attention and activity back towards the fire-fighting function with any fire-watching activity an incidental and occasional by-product of that primary focus. Yet as we will see in the next section the Senate Committee had adopted a Canute-like attitude in trying to turn back an inevitable sea change.

1990–2002: The Commonwealth Ombudsman reacting and responding to an administrative landscape in flux⁵⁴

The next twelve years saw all the Commonwealth Ombudsmen recognising and responding to an environment where administrative law and public administration in Australia were in a constant state of flux.⁵⁵ H Arthurs has argued that several key features of a ‘New Economy’ and restructured state have demanded a ‘reconsideration of the ways in which we have previously thought about bureaucracy, government, and the role of the interventionist state’.⁵⁶ Many authors have also dealt with the nature, extent and implications of these changes to both government and public administration in Australia.⁵⁷ As G Airo-Farulla maintains these changes in ‘government are as significant as the nineteenth century revolution in government’.⁵⁸ Creyke and McMillan usefully summarise the effect of these changes as:

- A changed conception of the role and structure of government
 - Leaner government
 - Melding the public and private sectors
- Switched emphasis from external to internal regulation
- Concern with excessive formality and legalism in dispute resolution
- Shift in emphasis from judicial to the administrative correction of administrative errors.⁵⁹

Since the late 1980s, Commonwealth Ombudsmen were in the vanguard of those recognising the direction, extent and impact of changes occurring in public administration.⁶⁰ A direct, and day-to-day, engagement with administrative decision-making and an ability to access experiences from across the entire public service acted as an early warning system for Ombudsmen. The need for ‘adaptation and theorisation’ became a familiar refrain from Ombudsmen in their annual reports and speeches during this period. In 1992, Alan Cameron predicted that ‘future scholars may opine that the Senate Committee missed an opportunity to redefine the role and take it forward, in an era when much more regard is being had to public service management issues than when the office was created’.⁶¹ Philippa Smith, in her annual reports and submissions to the Administrative Review Council and Australian Law Reform Commission, strongly advocated that the Commonwealth Ombudsman maintain or extend jurisdiction to deal with concerns generated by contracting out or privatisation of public services and the development of Government Business Enterprises.⁶² In 2002, Ron McLeod noted that the creation and proliferation of industry Ombudsmen, specialist complaint bodies and other review schemes had required the Commonwealth Ombudsmen to ‘change our methods of operation and structures’.⁶³

Despite the fact that the Senate Committee Report in 1991 had strongly urged the Commonwealth Ombudsman to concentrate on individual grievance handling and to treat any systemic reviews as unplanned ‘spin-offs’, this period saw an increasing amount of attention being paid to systemic issues and major

investigations. In 1995, Smith indicated that whilst her core role was to ‘impartially investigate complaints, resolve disputes and discover and address defective administration’ a preventive role was also a ‘key part of the modern Ombudsman’.⁶⁴ Indeed, her Annual Report for that year revealed that the office had received funding that was ‘directed at improving our ability to analyse, investigate and report on the systemic nature and causes of complaints to the Ombudsman’s Office’.⁶⁵ About 150 important systemic issues were identified and twenty-five of these were adopted as major projects.⁶⁶ P McAloon has argued that in an increasingly privatised environment one of the key functions of the Commonwealth Ombudsman was to act as an early systemic warning system.⁶⁷

A significant contribution was also made by state Ombudsmen to refashion the functions, work practices and approach of Ombudsmen in a rapidly changing environment. In the early 1990s, after listening to an academic presentation on future challenges, the New South Wales Ombudsman, David Landa, undertook a ‘major re-think and review’ of the direction of his office.⁶⁸ In a climate of budget cuts, public sector restructuring, addition of extra jurisdictions and the spread of private Ombudsman he sought to strategically reposition the organisation and, in particular, adopted Professor Pearce’s suggestion that ‘the Ombudsman must establish an acceptance within the public service as an office that is of value as a management tool’.⁶⁹ The first step in New South Wales was to ‘give priority to complaints that indicated systemic deficiencies in administration and individual cases of serious abuses of power’.⁷⁰ In addition, numerous other proactive steps including surveys of users, training workshops and complaint resolution projects were taken.⁷¹ A transformation had occurred in the way Ombudsmen could go about their tasks. Over the next decade, to varying degrees and with varying commitment, all Australian Ombudsmen (state and Commonwealth) adopted some of these new practices and shifted some of their resources towards greater systemic activity.

By the end of Ron McLeod’s term of office in 2002, the resources, personnel and attention paid to systemic issues had become very significant. In 2001–2002, the Commonwealth Ombudsman had commenced twelve major investigations, including ten own motion inquiries, and had looked at a number of systemic issues across sixteen agencies.⁷² McLeod stated that: ‘One of my primary roles is to promote improved public administration and the major means I adopt to meet my objectives is investigating systemic issues in government agencies.’⁷³ A specialist Social Support unit had been created not only to provide greater expertise to the handling of social security and child support complaints, but in particular provided ‘an added capacity to analyse and address some systemic issues in these areas’.⁷⁴ A series of proactive reports were released including *Issues Relating to Oral Advice: Clients Beware* (1997), *A Good Practice Guide for Effective Complaint Handling* (1999), *Balancing the Risks* (1999) and *To Compensate or not to Compensate* (1999).

At the end of this twelve-year period, the Commonwealth Ombudsman had coped with an almost doubled increase in complaint handling, a constant level of staff,⁷⁵ a small but significant increase in jurisdiction (especially in 2002) and

significantly redirected resources and effort into systemic activity. The Ombudsman had quickly sensed the changes in public administration and exercise of public power and had adapted the practices and procedures of the office without the necessity of legislative change. Bruce Barbour, New South Wales Ombudsman, argued that the complaints-handling role was not fundamental to the office but only one of the tools required to ensure 'high quality decision-making by those exercising power'.⁷⁶ His preference was for a 'mix of proactive and reactive work' although he clearly favoured a greater proportion of proactive non-complaint-based work.

By the start of the new century, there had been a significant redistribution of activity and emphasis between the various roles of fire-fighting, fire-watching and fire-prevention. In particular, for the first time there was a noticeable level of activity and emphasis placed on fire-prevention activities. The New South Wales Ombudsman, and to a slightly lesser extent the Commonwealth Ombudsman, had embraced an institution-focused and performance-based approach to investigation. In terms of caseload, rhetoric and symbolic importance, individual-focused activities were still essential hallmarks of the Ombudsman but there was an emphasis on the systemic work. Monitoring, based on both previous complaint history and internally generated concern, had also become a more prominent activity.

Ombudsmen in Australia have been subjected to limited judicial review. Whilst there have been a number of challenges to Ombudsmen, these have usually involved questions about the Ombudsmen's jurisdiction to conduct investigations rather than attempts to seek judicial review of the results of their investigations. The challenges, which are decreasing in frequency, have generally been launched by government agencies⁷⁷ and the courts have been restrained in the exercise of their supervisory jurisdiction over Ombudsmen. In *Bounty Council v The Ombudsman*⁷⁸ Kirby P, with whom Sheller and Powell JJA agreed, explained:

Those powers, as the Ombudsman Act reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability . . . Sadly, the experience of the past (and not only the past) has been of the occasional misuse and even oppressive use of administrative power. One modern remedy against such wrongs has been the creation by parliaments in all jurisdictions of Australia of the office of Ombudsman. Whilst it may be expected that the Ombudsman will conform to the statute establishing his office, a large power is intended. The words of the Ombudsman Act should be . . . given ample meaning.⁷⁹

In *Anti-Discrimination Commissioner v Acting Ombudman*,⁸⁰ the Supreme Court of Tasmania endorsed Kirby P's comments in *Botany Council* and held that it could review the Ombudsman's jurisdiction to investigate but not the results of such investigations. In *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*, the court held the Commonwealth Ombudsman could not make 'findings' but was restricted to forming and expressing 'opinions'.⁸¹

2003 and beyond: More changes, new theories and a bigger footprint

The recruitment of Professor John McMillan was a return to an ANU academic lawyer occupying the post of Ombudsman (in the footsteps of Professors Richardson and Pearce).⁸² His first years as Ombudsman have been accompanied by a massive increase in staff, a greater diversification in functions and a deliberate attempt to shape a new theoretical structure for the institution. There are now over 140 staff, seven different Ombudsman titles (Commonwealth Ombudsman, Tax, ACT, Defence, Immigration, Postal Industry and Law Enforcement) and increases in jurisdiction over Commonwealth service providers and a significant and expanding jurisdiction in the area of law enforcement.

This increase in oversight functions has confronted the Ombudsman with the challenge of positioning the institution as 'a generalist agency, hosting a cluster of specialities'.⁸³ The Ombudsman had been granted other specialist functions since the 1980s (such as for tax, ACT Defence and FOI matters) but the specialist functions granted to the Ombudsman expanded rapidly since 2002 to cover a more diverse range of responsibilities (Immigration, Postal, Law Enforcement among others). These changes have necessitated different approaches to investigation and new monitoring techniques. Pitham and McMillan have described how in 2003–2004, the 'Commonwealth Ombudsman's focus on law enforcement matters underwent a remarkable transformation',⁸⁴ a transformation that required an additional element of accountability activity, labelled 'continuous' (undertaking an on-going auditing/inspection function), to be added to the general typology of reactive (complaint handling) and proactive (own motion or systemic) activity.⁸⁵ From this point, the fire-preventing activity was now associated with both a legislatively mandated activity and an institutional preference in certain areas. In part, McMillan suggests that the legislative requirement to undertake the monitoring role, required within both law enforcement and immigration, has transformed the way the Commonwealth Ombudsman performs this type of role.⁸⁶ Previously, the handling of systemic activity (both fire-watching and fire-preventing) was ad hoc, built upon complaint intelligence and generally once-off. Now the role is more likely to be scheduled, derived from a multitude of sources and repeated on a frequent basis.

By 2004, Professor McMillan was able to write that:

... it is conventional for the office to define its role as one concerned as much with systemic problems in public administration as with transitory malfunctions in administrative decision-making. It is normal for the office to follow through and examine whether recommendations have been implemented and assurances have been honoured. Particularly through own motion investigations and publications on decision-making the office has both a functional and an educative role in improving public administration, including legal compliance.⁸⁷

The dedicated legal-centric tactical fire-fighter of the Kerr Committee had in three decades become primarily an administrative and strategically focused

fire-watcher and fire-preventer. The Commonwealth Ombudsman's fire-fighting role and capacity is still regarded as essential core business for the institution but not the sole or prime justification for its existence.⁸⁸

S Boyron suggested that a rapidly changing administrative environment might herald the 'emergence of new paradigms that are requiring urgent adaptation and theorisation'.⁸⁹ Adaptation has been a constant motif of the Commonwealth Ombudsman. In recent writings, Professor McMillan has been floating the idea that the changed roles played by institutions like the Ombudsman may necessitate a new theoretical framework. Professor McMillan argues:

In my view the role of Ombudsman, tribunals, inspectors-general and like bodies is not well-understood in legal and academic thinking. The significance of their role is often overlooked and understated. A contributing cause of this misunderstanding is a timeworn and unrealistic view of the separation of powers, which positions these agencies in the executive branch of government, and treats the judiciary alone as the justice and oversight branch of government. An alternative constitutional theory, focussed on how our system has actually evolved, would describe four branches of government – parliament, courts, the executive, and (what I would loosely call) an oversight, review and integrity branch of government.⁹⁰

Within this integrity branch of government Professor McMillan sees a series of bodies entrusted with the task of ensuring 'legal compliance, good decision-making, and improved public administration within the executive branch of government'⁹¹ of which the Ombudsman is a key body. Reports and inquiries become essential tools within this new branch of government. Professor McMillan argues that 'inquiry mechanisms are now built into the fabric of government in a more penetrating and systemic manner'⁹² and furthermore in the aftermath of the cases of Cornelia Rau and Vivian Alvarez 'a single well-written report can be more effective in triggering political and departmental change than a decade of oversight by courts, tribunals and investigation agencies'.⁹³ This new theoretical framework for the Ombudsman is heavily orientated towards the fire-watching and fire-prevention end of the spectrum. However, Professor McMillan also creates a rejuvenated role for the fire-fighting function. Essentially he links complaint handling directly with the rule of law. Professor McMillan argues that:

... through the mechanism of the Ombudsman, the notion is now embedded in Australia that people have a right to complain against the government, to an independent agency, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence.⁹⁴

In this theory, the Ombudsman is both an institution that enables individuals to gain access to the rule of law, supplementing the central role played by the judiciary, and an exemplar of the rule of law in practice. By the way it conducts investigations, resolves problems and communicates to agencies and citizens the Ombudsman demonstrates the application of the theory or principle of the rule of law to everyday life. Professor McMillan observes 'the rule of law is as much concerned with explaining to a person why an adverse decision was made

and is unimpeachable as it is with examining whether a decision was legally proper'.⁹⁵ This linkage to the rule of law function adds an interesting dynamic to the complainant-focused, incident-based approach that is too often depicted in a negative light in Harlow and Rawlings fire-fighter model.

At the same time as the role and performance of the Ombudsman has been changing and evolving, there has been a similar change in the activities of Auditor-Generals. The *Auditor-General Act 1997* (Cth) allows the Auditor-General to conduct, at any time, a performance audit of an agency, a Commonwealth authority or company, other than a Government Business Enterprise (GBE) or any of its subsidiaries. Most other Australian jurisdictions have similar provisions. The Australian National Audit Office conducted forty-eight performance audit reports in the year 2004–2005. Typically, performance audits examine the use of resources, information systems, performance measures, monitoring systems and legal compliance. Therefore this function extends Auditor-General activity well beyond the financial management of government in ways that resemble own motion and performance monitoring activities of the Ombudsman.

The National Integrity Systems Assessment Project (NISA) has argued that the Commonwealth Auditor-General and Ombudsman effectively operate as two separate integrity systems 'overlapping only indirectly and not necessarily coordinated in their operation'.⁹⁶ The critique by NISA is that at national level this fragmented and uncoordinated approach poses a serious problem in dealing with governance issues and assisting in integrity and prevention of corruption activities.⁹⁷ The Commonwealth Ombudsman has reacted favourably to the Report's recommendation that each jurisdiction establish a governance review council which would include representatives of agencies such as the Ombudsman, Auditor-General, Public Service Commissioner among others.⁹⁸

State Ombudsmen – cut from a different cloth?

Some interesting questions arise about the Commonwealth Ombudsman's relationship to state Ombudsmen. The literature on Australian Ombudsmen has tended to concentrate on the Commonwealth Ombudsman, with a few exceptions notably Groves⁹⁹ and Pearce,¹⁰⁰ and has seemed to assume that for most intent and purposes the similarities between the institutions was more important than any differences. Descriptions and explanations of different Ombudsmen have usually used the same language to cover both the state and the Commonwealth Ombudsmen. This approach is derived in part from a lack of close study of state Ombudsmen and in part from an idea that a similar institution was introduced into near-identical Westminster systems. In my view, the origins, reception, administrative-legal cultures and the impact of changes produced a number of different evolutionary paths for the various Ombudsmen. Furthermore, although not examined in this chapter, each institution has been significantly shaped by the individuals who have occupied the position of Ombudsman.

McMillan claims that significant differences now exist between the state and Commonwealth Ombudsmen.¹⁰¹ Those differences may have already been there but after twenty to thirty years of different development paths, they have been compounded and widened in recent years. In his survey of Ombudsman jurisdictions, Pearce concluded that there were 'surprising variations between them'.¹⁰² Compounding the jurisdictional variation has been the type of caseload and focus of the various Ombudsmen. McMillan states:

The majority of complaints to the State Ombudsman arise in areas such as policing, local government, corrections, juvenile justice, and public transport. The investigation of those complaints often focuses on allegations of abuse of power by government, questionable behaviour, conflict of interest, and insensitivity. Many of the complaints to the Commonwealth Ombudsman are about Centrelink, the Australian Taxation Office, the Child Support Agency and Australia Post. Features that are common to the complaints against those agencies are that they stem from highly complex laws, that are administered by large agencies that employ tens of thousands of employees around Australia; the laws and administrative procedures are not well understood by government clients, or sometimes even the administrators; the complaints are often about money, including debt recovery; and the complainants have an ongoing relationship with the agency that is at risk of becoming toxic.¹⁰³

McMillan further suggests that there may be significant differences in the reporting and treatment of Ombudsmen activity, by the media between state and Commonwealth Ombudsmen.¹⁰⁴ This analysis could be extended to examining differences in the relationship with agencies, parliaments and complainants. Whilst it is beyond the remit of this chapter, it would be interesting to see if the use of the fire-fighting, fire-watching and fire-prevention typology would reveal similar shifts and changes with state Ombudsmen over time as it has done for the Commonwealth Ombudsmen. There is now need for greater focus on understanding aspects of differences between Australian Ombudsman in addition to heeding Professor Pearce's call that 'it is perhaps time for the office holders to look at the position of their colleagues and try to draw the best from each'.¹⁰⁵

The dramatic increase in jurisdictions, staffing and activities that occurred between 2002 and 2006 promise to propel the Commonwealth Ombudsman into further creative developments, especially in the areas of continuous activity and compliance monitoring of administrative standards. Staffing levels have increased by over fifty per cent in this period. Minimal changes to the complaint workload present the Ombudsman with the opportunity to strategically deploy staff to undertake greater institution-focused and performance-based approaches to investigation, monitoring and proactive compliance activity. Over most of the period since the Kerr Committee Report was presented the question of resources has pre-occupied Ombudsmen and severely limited their potential choices. Nevertheless, in each period examined in this chapter, every opportunity was taken not only to improve and refine the fire-fighting role of Ombudsmen but to slowly make advances in more systemic and preventive type of activity. Despite needing to carry out extra activities in areas like Immigration, Law Enforcement

and the like, the Commonwealth Ombudsman will now have greater staffing flexibility, expertise and capacity to pursue ideas like contributing to and developing an integrity branch of government.

The rise of new managerialism, performance and risk management and a transformation in the composition, skills and roles of the Commonwealth public service presented the Commonwealth Ombudsman with a necessity to further adjust his approach, whilst various, if not all, Commonwealth Ombudsmen have worked hard at selling their better management contribution to the rest of the public service that has now become a central plank in the institution's objectives. On its website the following declaration is made: 'the Ombudsman is independent and impartial, and works to improve public administration generally'.¹⁰⁶ Professor McMillan has flagged the possibility of greater use of inquiries, auditing and reports designed to have a wider impact, rather than simply a dispassionate and objective recounting of a resolved complaint. The Ombudsman is no longer a neglected aid to better management nor is the institution simply a modified grievance man. In 2006, the Commonwealth Ombudsman has an impressive track record over three decades and has been accepted into the heart of the executive branch of government. The uncertainty during its conception as to the role, form and necessity of an Ombudsman has well and truly been resolved. However the literature and our understanding of this institution constantly lags behind each major reconfiguration or modification of the office of the Ombudsman.

Professor McMillan has rightly labelled the two reports on the Rau and Alvarez cases prepared by Mick Palmer and Neil Comrie, as part of the investigation of the wrongful placement of many Australian citizens and residents into immigration detention, as 'a watershed in public administration and external oversight'.¹⁰⁷ More importantly these findings can be seen as representing a systemic breakdown in the operation of Australian administrative law, or at the very least exposing some very disturbing limitations or deficiencies in the much touted New Administrative Law package. The history of the Commonwealth Ombudsman, Professor McMillan's public musings, the new responsibilities of the Immigration Ombudsman and a dramatic increase in staff suggest that further changes to the institution are already well underway.

Freedom of information

Moira Paterson

Judicial review and responsible government both have an important role to play in ensuring legality and accountability in executive decision-making. Freedom of Information (FOI) laws enhance the operation of those mechanisms while supplementing them with a more direct form of accountability to the people.¹ They also make a substantial contribution to information privacy by providing an avenue for access to, and amendment of, personal records held by governmental agencies.

This chapter is concerned exclusively with FOI laws. Other laws which provide alternative sources of access to public sector information include information privacy and health records statutes,² public records statutes,³ requirements for administrative decision makers to provide reasons for their decisions (see Chapter 11), other common law duties of disclosure and laws which require the proactive disclosure of information, including information about government contracts.⁴

The concept of a statutory right of access to information originated in Sweden in the seventeenth century,⁵ but first attracted attention in Australia following the enactment of the FOI legislation in the United States⁶ in 1967.⁷

The *Freedom of Information Act 1982* (Cth) (the Commonwealth FOI Act), which will form the main subject of this chapter, formed the final element of the Commonwealth's so called 'New Administrative Law' package and is confined in its operation to the Commonwealth public sector. It was the first national legislation to be adopted by a country with a Westminster-style system of government and had its origins in a commitment by the Whitlam Labor government in 1972 to enact legislation along the lines of the United States legislation, although its enactment was delayed until 1982 while it was considered by a number of government bodies.⁸ The version of the Act enacted in 1982 failed to give effect to many

important recommendations in the 1979 report of the Senate Standing Committee on Constitutional and Legal Affairs. Subsequently, it was amended in 1986⁹ to give effect to some of those recommendations and again in 1996¹⁰ to give effect to further recommendations in a second report by the Senate Committee.¹¹ However, a series of important recommendations in the Australian Law Reform Commission's Open Government report¹² are yet to be implemented.¹³

The Commonwealth Act

The Commonwealth FOI Act is based on the rationales that: (1) transparency is an essential precondition for political accountability and for discouraging corruption and other forms of wrongdoing; (2) increased transparency contributes to greater public participation in government policy formulation and in the process of the government itself; and (3) the ability of individuals to request the amendment of personal information which is incorrect or misleading will contribute to information privacy by enhancing the ability of individuals to exercise control of their own information.

The Act consists of three separate elements: requirements for agencies to publish specified materials, a qualified universal right of access to government documents and procedures for the amendment of personal records.

Objectives and interpretation

The objects and interpretation statement in s3 refers inter alia to a general right of access to documents subject to 'exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities'. Although an equivalent clause in the Victorian Act has been interpreted as requiring the so-called 'leaning' position favoured by the US courts,¹⁴ the Full Court of the Federal Court has rejected that approach. It held in *Austin v Deputy Secretary, Attorney-General's Department*¹⁵ that the exemption provisions are as much a part of the Act as the rights of access provided and that each is to be given the meaning its own terms fairly convey.¹⁶ That interpretation has the consequence that decision makers and review bodies are not required to adopt a pro-disclosure stance in interpreting the exemption provisions in the Act.

Scope

The Act creates rights of access to documents rather than to information more generally.¹⁷ Those rights apply to 'documents of an agency' and 'official

documents of a Minister'. The former are defined as documents in the possession of an agency and the latter as documents relating to the affairs of an agency which are in the possession of a minister, in his or her capacity as a minister.

The concept of possession differs from mere custody and requires some aspect of control.¹⁸ The fact that a document is located on an agency's premises will not necessarily be sufficient to establish possession if it belongs to some other person (for example, if it belongs to an employee and does not relate to his or her employment).¹⁹ Likewise, a document located elsewhere, including overseas, may be regarded as being in an agency's possession if the agency is entitled to request its return.²⁰ As the Act does specifically extend to documents in the possession of government contractors, the ability to obtain access to them is dependent on whether the contracting agency has a contractual right to require their return.

The definition of 'agency' in s4(1) includes public service departments and 'prescribed offices'. The latter include bodies and offices established for a 'public purpose'²¹ by a Commonwealth law and a number of bodies over which the Commonwealth is in a position to exercise control which are declared by regulation to be prescribed offices. It specifically excludes incorporated companies and associations and royal commissions.

The Act also contains a total exclusion for the office of the Auditor-General and for the national security and other bodies listed in Pt I of Sch 2; a partial exclusion for specified documents of the bodies listed in Pt II of Sch 2; a partial exclusion in respect of documents relating to the commercial activities of government business enterprises listed in Pt III of Sch 2; and a total exclusion for documents originating or received from specified national security bodies. The combined effect of these exemptions is to provide substantial protection for the commercial activities of government business enterprises and the documents and activities of intelligence bodies.

'Document' is broadly defined in s4(1) to cover any record of information, including video and audio tapes, maps and photographs. Although it does not refer specifically to computer discs, it includes any article on which information has been stored or recorded, either mechanically or electronically.

The scope of the Act is also affected by the exemptions in Part V and some additional exceptions in s12. The latter apply to documents which are available via other specified access mechanisms and documents created or received more than five years before the commencement of the Act. There is no obligation to provide access to a document which was created or received by a minister or agency prior to 1 December 1977, unless it relates to an applicant's personal information or access to it is reasonably necessary to enable a proper understanding of a document which has lawfully been provided to the applicant. Older documents are potentially accessible via the *Archives Act 1983* (Cth).²²

Publication requirements

Section 8 requires the minister responsible for an agency to publish and annually update various statements containing information about the agency's functions, documents, FOI procedures and procedures for public participation.

In addition, s9 requires agencies to make available for inspection and purchase the policies and rules which govern the exercise of powers which affect members of the public.²³ These documents provide a potentially important source of information for the exercise of review and appeal rights. Failure to comply with s9 activates a limited reversal of the rule against estoppel in relation to administrative matters.²⁴ Section 10 provides that a person who could lawfully have taken some action (or avoided taking some action) and has not done so due to the failure to publish some rule, policy, guideline or practice should not be prejudiced by reason only of its application in relation to what has been done or omitted to be done. Its effect is to render the relevant rule inapplicable to a person who is unaware of its existence due to an agency's failure to publish it as required.

Applications for access to documents

The procedures for access are set out in Part III of the Act.

Informal access

Section 14 makes it clear that the Act is not intended to provide an exclusive avenue for access to public sector documents. Ministers and agencies are able to provide access to documents (including exempt documents) on an informal basis provided that they are not precluded from doing so by other laws.

Applying for access

The right of access in s11 is conferred on 'every person' (that is, any natural or legal person, irrespective of their status or nationality).²⁵ Section 11(2) states that an applicant's right of access is not affected by his or her stated reasons for seeking access or by a decision maker's belief as to what those reasons might be. This suggests that it is inappropriate to take into account the identity of an applicant in deciding whether a document is exempt. It can be argued that its primary purpose is to ensure that the concept of universal access is not undercut by judgments concerning the lack of worthiness of an applicant's motives in seeking access. Consequently, there have been cases in which review bodies have

considered an applicant's identity and motivation where these have added to, rather than detracted from, the public interest in disclosure.²⁶

Requirements for making applications

The requirements for making an application for access are set out in s15.²⁷ An application must be made in writing, supply an Australian address to which notices can be sent and include any fee payable for access. It must also contain such information as is reasonably necessary to enable a decision maker to identify the documents to which access is sought.

Obligations concerning processing of applications

Decisions concerning access must be made by persons who qualify as authorised decision makers under s23. They must also comply with specified time limits.²⁸ A decision maker who receives an application for access must generally notify the applicant of its receipt within fourteen days and of a decision within thirty days of its receipt. Failure to comply with the latter requirement results in a deemed refusal which triggers the review procedures outlined below (see page 130-2).

Section 16 allows for the transfer of a request to another agency where appropriate (but without extending the time limits for response) and requires decision makers to take reasonable steps to assist applicants in formulating their applications.

Fees and charges

Details of the fees and charges for access are set out in the Freedom of Information (Fees and Charges) Regulations (Cth). Unless it contains information relating to a decision concerning a 'prescribed benefit' such as a pension, a request for access must be accompanied by the prescribed application fee. That fee may be remitted under s30A if an agency or minister is satisfied that its payment could cause financial hardship to the applicant or that the provision of access would be in the interest of the general public or of a substantial section of the public. For example, it may be remitted if the application relates to an applicant's own personal information, is not unreasonable in magnitude or is required for research or other public interest purposes.

An applicant is also liable under s29 of the Act to pay access charges for the costs involved in processing a request and providing access to the documents sought (including the time spent in deciding whether information is exempt). The applicant must be provided with a written preliminary assessment of the amount payable, details of the basis on which it has been calculated and notification of any deposit payable. An applicant may either accept the charges notified and pay any deposit required or may apply for the charges to be reduced or remitted. If

her or she fails to reply within thirty days, the application is deemed to have been withdrawn and no charges are payable.

In deciding whether to remit a charge, a decision maker must consider whether payment of the charge would cause the applicant financial hardship and whether access to the document sought would be in the interest of the general public or of a substantial section of the public. That decision must be notified within twenty-eight days. Failure to do so results in a deemed adverse decision and triggers the right to exercise the review procedures outlined below.

Obligations to consult with third parties

Agencies are required to follow consultation procedures, otherwise known as 'reverse-FOI' procedures, where documents may potentially qualify for exemption under some of the exemption provisions which protect the interests of third parties.²⁹ Ministers and agencies are required to consult with: other Australian governments in relation to information provided by them or which may affect relations with them;³⁰ persons and organisations in relation to documents containing information about their professional or business affairs; and individuals in relation to documents which contain their 'personal information'. In each case the requirement to consult is confined to the question of exemption under the provision which is designed to protect the interests of the person or body consulted.

Persons and bodies consulted have the right to seek review of any decision to grant access to a document contrary to their wishes and must be informed of any such decision and of their right to apply for review. In addition, access must be deferred until the time available for seeking review has expired or the decision has been upheld by the Administrative Appeals Tribunal (AAT). Conversely, if a minister or agency decides to refuse access to a document in accordance with the wishes of a person or body consulted and the applicant seeks review of that decision, the person or body has a right to be joined as a party to those proceedings.

Possible responses to requests

An applicant who makes a valid request for access to a document must be granted full and immediate access to it unless one or more grounds for refusal are applicable. Alternatives to a complete denial of access include providing access to a copy of the document from which any exempt matter has been deleted and deferring access to some specified future time. In some circumstances, a decision maker may respond in terms which neither confirm nor deny the existence of a document.³¹ A decision maker who decides not to provide full and immediate access to a document must provide a written statement of reasons which includes findings on any material questions of fact and refers to the material on which they are based.

Protection against liability arising from disclosure of documents

Section 91 protects authorised officers who authorise or grant access to documents against liability for any defamation, breach of confidence or breach of copyright arising from the provision of access to an applicant. That protection is limited to cases where access is required under the Act, or is granted in the bona fide belief that it is required. It is therefore unavailable if access is granted informally. Persons who have provided documents or information to ministers or agencies are also protected from liability for any defamation or breach of confidence arising from the provision of access to an applicant (but not necessarily from any liability arising from the initial provision of information to a minister or agency).³² The protection under s91 does not extend to subsequent uses of documents by applicants and the provision of access to a document, including an exempt document, cannot be taken as approval of acts which constitute breaches of laws relating to defamation, breach of confidence or copyright.

Section 92 provides protection against liability for criminal offences arising by reason only of the authorising or giving of access. Again that protection is limited to authorised officers and is available only where access is required under the Act or provided in the bona fide belief that it is required.

Grounds for denying access to a document

An applicant has no statutory right of access if his or her application falls outside the parameters of the Act, does not comply with requirements for making a valid request or qualifies under one or more exceptions or exemptions in the Act. Access to a document may also be denied on the basis that it cannot be found or does not exist³³ or the request falls within s24(1) or (5).

Section 24(1) permits denial of access before an application is processed if the work involved in processing it would substantially and unreasonably divert an agency's resources from its other operations or substantially and unreasonably interfere with the performance of a minister's functions. The decision maker must consider the resources which would have to be used in identifying, locating or collating the documents sought; to justify non-disclosure the diversion of resources must be both substantial and unreasonable. The requirement of unreasonableness has been interpreted as permitting consideration of public interest grounds favouring disclosure to the applicant.³⁴

Section 24(5) permits access to be denied without identification of the documents to which an application relates and without specifying the specific grounds for exemption if it is apparent that all of the documents sought are exempt documents.³⁵ However, the decision maker must provide a general outline of the reasoning process which underlies the decision to refuse access.

The exemption provisions

Part IV of the Act contains a number of exemptions designed to protect public, business or personal interests which may be harmed by disclosure. The fact that a document is exempt does not preclude a decision maker granting access to it.

General matters of interpretation

It is possible for a document to qualify for more than one exemption. Section 32 specifically precludes a decision maker from having regard to any interrelationship between individual exemption provisions in resolving ambiguities in their wording. The exemptions fall into two main groups: class based provisions which provide for exemption simply because a document falls within a specified category or class; and harm-based provisions which require likelihood that disclosure will result in some specified adverse effect.

The harm-based provisions require an assessment of the effect of disclosure from the standpoint of 'disclosure under the Act'. As the Act is predicated on the notion of universal disclosure, that phrase logically requires an assessment of the effect of disclosure to the world in general, rather than to the specific applicant. However, the Act also serves an important avenue for individuals to obtain access to their own personal records so there is an argument for allowing consideration of an applicant's identify where documents shed light on his or her own personal affairs.

A number of the harm-based provisions require that some specified consequence is reasonably likely. That formulation has been interpreted as requiring a judgment as to what is reasonable, 'as distinct from something that is irrational, absurd, or ridiculous'.³⁶ Some of the harm-based provisions require a 'substantial adverse effect'. The word 'substantial' has been interpreted as requiring an effect that is sufficiently serious or significant to cause concern to a 'properly informed reasonable person'.³⁷ Alternative formulations refer to an effect that is severe or of some gravity³⁸ or 'real and of substance and not insubstantial or nominal'.³⁹

Some of the exemptions require a balancing of the factors for and against disclosure. These may take the form of public interest tests or requirements to assess the reasonableness of disclosure. Balancing tests serve a useful function in limiting the operation of exemptions to those cases where the harm likely to result from the disclosure of a specific document is sufficiently serious to outweigh the countervailing interests in transparency. They require a decision maker first to identify any public interest considerations which mitigate against disclosure of the specific document having regard to the nature of the harm which the particular exemption provision seeks to avoid. These must then be balanced against the public interest considerations favouring transparency, including the general democratic interests inherent in the objectives of the Act. Other considerations which may favour disclosure of specific documents include the interest

in shedding light on whether an agency has acted legally⁴⁰ or been soundly administered⁴¹ and the interest in finding out about current decision-making while it is still possible to contribute to that process.⁴²

The Act also contains provision for ministers to issue conclusive certificates to support claims for exemption under ss33A, 34, 35 and 36.⁴³ These establish conclusively that a document qualifies for exemption or, in the case of s36, that it satisfies the second part of the test for exemption. They also limit the review powers of the Commonwealth Administrative Appeals Tribunal.⁴⁴

The exemption provisions

Cabinet and Executive documents

The exemptions in ss34 and 35 are designed to protect the processes of Cabinet and Executive Council decision-making by ensuring the secrecy of their deliberations, thereby protecting the operation of collective ministerial responsibility and avoiding the other types of harm which may arise where individuals are able to obtain advance knowledge of proposed policy changes.⁴⁵ They both contain provision for the issuing of conclusive certificates.

Subject to exceptions in respect of 'purely factual material',⁴⁶ they encompass: (1) documents created for the purpose of submission to the Cabinet/Executive Council; (2) official records of the deliberations of the Cabinet/Executive Council; (3) copies, parts and extracts of those documents; and (4) documents, other than those officially published, which would disclose the deliberations or orders of the Cabinet/Executive Council. It has been held by the AAT in relation to the last category that it is sufficient if disclosure 'would reveal the substance of the deliberation or decision'.⁴⁷ The exemption of Cabinet documents has been extended via the exclusion of Cabinet notebooks from the definition of 'document' in s4(1).

National security and international relations

The national security exemption in s33 is additional to the extensive exclusions for intelligence agencies outlined above. A document is exempt if its disclosure under the Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth or would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation. A claim for exemption under s33 may be supported by a conclusive certificate.

'Security of the Commonwealth' is broadly defined in s4(5) as extending to matters relating to the detection, prevention or suppression of activities, wherever occurring, which are subversive of, or hostile to, the interests of Australia or its allies and to the security of any communications system or cryptographic system of any country used for the purposes of defence or the conduct of international relations.

The expression ‘communicated in confidence’ has been interpreted as having ordinary meaning. It does not necessarily require proof of each of the elements necessary for an actionable breach of confidence.⁴⁸

In some instances review bodies have accepted claims for exemption based on the so-called ‘mosaic theory’. That theory suggests that seemingly innocuous pieces of information can be used to build a composite picture such as the identity of a confidential informant and may need to be withheld from access to prevent this occurring.⁴⁹

Relations with states and territories

Section 33A protects relations with other Australian governments. A document is exempt if its disclosure under the Act could reasonably be expected to cause damage to relations between the Commonwealth and a state or territory government or if it would divulge information or matter communicated in confidence by or on behalf of a state or territory government or one of its authorities. That test is subject to an overriding public interest proviso in s33A(5). A claim for exemption under s33A may be supported by a conclusive certificate.

Internal working documents

Section 36 provides for exemption of documents relating to the deliberative processes of an agency. The primary test for exemption in s36(1) consists of a class-based definition of the documents which potentially qualify for exemption and an overriding public interest test. A document will fall within the first part of the test if its disclosure under the Act would disclose matter in the nature of, or relating to, opinion prepared or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of an agency or a minister. The expression ‘deliberative processes’ has been interpreted by the Commonwealth AAT as ‘thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action’.⁵⁰

The public interest test requires a balancing of competing interests as outlined above. However, because this exemption focuses on the processes by which documents are generated rather than on any specific harm arising from disclosure there is some degree of uncertainty and controversy as to the factors which can legitimately be taken into account as weighing against disclosure.

A common, but not uncontroversial,⁵¹ starting point in many cases is a list of five factors identified by the Commonwealth AAT in *Re Howard and the Treasurer*.⁵² Those factors are that: (1) the parties to the communication are of high rank; (2) the communication was made in the course of the development and consequent promulgation of policy; (3) disclosure will inhibit frankness and candour in future pre-decisional communications; (4) disclosure will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered; and (5) disclosure will not fairly disclose the reasons for a decision

subsequently taken. An alternative line of cases adopt a more flexible approach that focuses more specifically on the factors relevant to each individual case.⁵³

The exceptions to 36(i) fall into four categories: matters relating to the 'internal laws' of an agency as it affects members of the public, purely factual material, records of decisions or exercise of powers or adjudicative functions, and reports of scientific or technical experts. A claim for exemption under s36 may be supported by a conclusive ministerial certificate which establishes conclusively that disclosure of any document specified is contrary to the public interest.⁵⁴

Law enforcement and protection of public safety

The exemption in s37 protects documents relating to the administration and enforcement of Australian laws. A document is exempt if its disclosure under the Act could reasonably be expected to have one of six specified consequences. These are: (1) prejudice to a current law enforcement investigation or to the proper administration of the law; (2) disclosure of the existence (or non-existence) of a confidential source in relation to the enforcement of administration of the law; (3) danger to the life or physical safety of any person; (4) prejudice to a fair trial or impartial adjudication; (5) prejudice to methods used for preventing breaches of the law; and (6) prejudice to lawful methods for protecting public safety. A source of information will qualify as confidential if 'the information was provided under an express or implied pledge of confidentiality'.⁵⁵

Documents subject to secrecy provisions in other laws

Section 38 regulates the interrelationship between the access provisions in the Commonwealth FOI Act and secrecy provisions in other legislation. It provides that a document is exempt: (1) if its disclosure or the disclosure of information contained in it is prohibited under a provision of a law specified in Schedule 3; or (2) there is a legislative provision which expressly applies s38 to the document (or information) in issue. Section 38(1A) makes it clear that a document is exempt only to the extent that disclosure to the applicant is prohibited by the relevant enactment.

Documents affecting the Commonwealth's financial or property interests

A document is exempt under s39(1) if its disclosure under the Act could reasonably be expected to have a substantial adverse effect on the financial or property interests of the relevant government or of an agency. That primary test for exemption is subject to a public interest proviso in s39(2).

Documents concerning certain agency operations

Section 40(1) is designed to protect the operations of agencies and is subject to a public interest proviso in s40(2). A document is exempt if its disclosure under the Act could reasonably be expected to: (1) prejudice the effectiveness or procedures or methods for the conduct of tests, examination or audits by an agency; or (2) prejudice the attainment of the objects of particular tests, examinations or

audits by an agency; (3) have a substantial adverse effect on the management or assessment of personnel; (4) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency; or (5) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The types of prejudice which may be relevant to claims for exemption on the first two grounds include the ability of examinees to gain an unfair advantage over others, the potential for plagiarism and that regular challenges to their judgment might inhibit examiners in the performance of their functions.⁵⁶

The fourth ground for exemption is potentially very broad-ranging and involves a substantial degree of overlap with the deliberative processes provision in s36. Review bodies have upheld claims for exemption under s40(1)(d) where there has been evidence that disclosure of specific documents would affect the future ability of an agency to obtain information or cooperation from others (including consultants),⁵⁷ inhibit candour and frankness⁵⁸ or have a substantial adverse effect on the future provision of information.⁵⁹

Documents affecting personal privacy

Section 41 provides that a document is exempt if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). 'Personal information' is broadly defined in s4(1). It means 'information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. That definition is consistent with the definition of 'personal information' in the *Privacy Act 1988* (Cth).

The requirement that disclosure must be unreasonable has been interpreted in *Colakovski v Australian Telecommunications Commission*⁶⁰ as requiring a balancing of the public interest consideration for and against disclosure. Factors relevant to that balancing process include any personal interest of the applicant in the information in question, the nature and sensitivity of that information, how the information was obtained by the agency, the likelihood that the person to whom it relates would not wish to have it disclosed without consent and whether it has any current relevance.⁶¹ It may also be affected by any relationship between the applicant and the person to whom the record relates.

Section 41(3) confers discretion to provide access to an applicant's own personal information indirectly via an agreed intermediary in cases where it is of a disturbing or distressing nature. That discretion arises if it appears likely that the information will be detrimental to an applicant's 'physical or mental health or well-being' and it has been supplied by a qualified person such as a medical practitioner, psychologist, marriage guidance counsellor or social worker.

Documents subject to legal professional privilege

A document is exempt under s42 if it is 'of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional

privilege'. However, material which is required to be published under s9 is not exempt by reason only of the inclusion in it of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in that section.

It has been held that the test to be applied is the new common law 'dominant purpose' test articulated in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia*.⁶² This requires that a document has been created for the main purpose of giving or receiving legal advice or use in actual or anticipated litigation. The High Court has confirmed that the privilege extends to professional communications with salaried legal advisors provided there is a professional relationship which secures to the advice an independent character.⁶³ Legal privilege cannot be relied on if a document was created for some illegal purpose (for example, to avoid some statutory duty). Furthermore, because it attaches to information rather than documents, privilege may attach only to some part or parts of documents.

Documents relating to business affairs

Section 43 protects the trade secrets and business affairs of third parties. A document is exempt if its disclosure under the Act would disclose: (1) trade secrets; (2) any other information having a commercial value that could reasonably be expected to be destroyed or diminished if disclosed; (3) other information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, the disclosure of which could reasonably be expected to unreasonably affect that person or body adversely in respect of those affairs; or (4) other information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking which, if disclosed, could reasonably be expected to prejudice the future supply of information to the government or an agency for the purpose of the administration of a local law or the administration of matters administered by an agency.

The first category provides for a class-based exemption in respect of any information which qualifies as a trade secret. That expression has been interpreted in *Searle Australia Pty Ltd v Public Interest Advocacy Centre*⁶⁴ as having its ordinary meaning, not some technical legal one. What is essential, therefore, is that information is secret in character, that it would be advantageous to trade rivals to obtain it and that it has an actual or potential trade use to the business owner. The second category is harm-based and requires an assessment of the impact of disclosure on the information's 'commercial value'. The Federal Court has held that this requires an assessment of value from the perspective of those activities of an organisation which are of a commercial (as opposed to, say, an administrative) character.⁶⁵ In the case of the third category, the expression 'unreasonably affect' has been interpreted consistently with the requirement of reasonableness in s41 as requiring a balancing of the competing factors for and against disclosure.⁶⁶

Documents containing material obtained in confidence

The exemption for confidential information in s45 is worded with reference to the common law test for breach of confidence. A document is exempt if its disclosure under the Act would 'found an action, by a person other than the Commonwealth, for breach of confidence'. The primary test for exemption in s45(1) is subject to a proviso in s45(2) that it does not apply to internal working documents prepared by a minister, by an officer or employee of an agency in the course of his or her duties, or by a prescribed authority in the performance of its function unless its disclosure would constitute a breach of confidence owed to a third party.

The test generally applied in the absence of a contractual obligation is that set out in the dissenting judgment by Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)*.⁶⁷ This requires demonstration that the specific information in issue: (1) has the necessary quality of confidentiality (and is not, for example, commonly known); (2) was received in circumstances which gave rise to an obligation of confidence; and (3) that disclosure will amount to a misuse of it.

The requirement to treat information as confidential may be implied from the context in which the information was obtained and it is unnecessary that there should have been any express undertaking to that effect.⁶⁸ Conversely, the fact that a document is marked as confidential will not be definitive.

A problem with s45 is that it provides scope for agencies to structure their contractual arrangements with third parties in ways which allow them to claim exemption on this ground, thereby shielding their commercial activities from public scrutiny.⁶⁹

Other exemptions

The Act also contains additional exemptions which protect ongoing research by agency officers,⁷⁰ documents affecting the national economy,⁷¹ documents the disclosure of which would be in contempt of Parliament or contempt of court,⁷² certain documents arising out of companies and securities legislation⁷³ and electoral rolls and related documents.⁷⁴

Applications for amendment of personal documents

The procedures for amendment of records are contained in Part V of the Act.

Making an application

An applicant who has lawfully obtained access to a document which contains his or her personal information and is used for an 'administrative' purpose may apply in writing for the document to be amended or for an annotation to be added to it. An application must specify the respects in which the information is claimed to be

incomplete, incorrect, out of date or misleading and the reasons for that claim. An application for an annotation must, in addition, specify such other information as would make the information complete, correct, up-to-date or not misleading.

Information will not necessarily qualify as out of date simply because it is old; what is required is that it must be in some sense obsolete. Likewise, it will not be regarded as incorrect if it is simply a transcript of a conversation which itself contained factual inaccuracies. Another limitation is that the amendment procedure cannot be used to 'rewrite history' or to provide an avenue for disputing an agency's decision.

Responding to an application

An agency or minister must respond to an application for amendment or annotation within a specified time period and provide reasons for any adverse decision. There is also provision for transfers to other agencies. An important difference, however, is that there is no automatic right to amendment. A decision maker who is satisfied that information in a document is incomplete, incorrect, out of date or misleading has discretion to amend the document so as to correct the deficiency. If he or she declines to do so, the applicant is entitled to require the addition of a note specifying the respects in which the information is incomplete, incorrect or misleading. In that case the agency may, if it so chooses, add comments of its own by way of an additional note.

In most cases, amendment will be achieved via some method which does not obliterate the original information. However, review bodies have agreed to fully obliterate data in exceptional circumstances (for example, where it is highly defamatory and lacking in any factual foundation).⁷⁵

Review of adverse decisions

Part VI of the Act provides for a two tiered system of internal review within an agency and external review by the Commonwealth AAT. It also makes specific provision for complaints to the Commonwealth Ombudsman and for appeal on questions of law from the AAT to the Federal Court.

Internal review

Internal review is restricted to decisions made by a person other than a minister or the principal officer of an agency. The procedures and grounds for applying for it are set out in s54. An application for review may be made by any person who has received an adverse decision in relation to an application for access or amendment (including a deemed decision, a decision concerning charges and a decision to grant access with deletions or to defer access to a later date or a third party who has been consulted in accordance with the procedures for consultation). It must be accompanied by the required application fee and made within thirty days of

notification of the original decision (or deemed decision), or within such further period as the agency allows.

The person conducting the review must inform the applicant of its result within thirty days. Failure to comply with this requirement results in a deemed decision which triggers a right to apply for external review by the AAT.

Ombudsman review

A person who is dissatisfied with any action taken by an agency under the Act is entitled to make a complaint to the Commonwealth Ombudsman (see Chapter 6).

Section 57 contains two restrictions on the Ombudsman's powers. First, his or her report cannot contain information about the existence or non-existence of information which would, if included in a document of an agency, cause that document to be exempt from the national security, intergovernmental relations and law enforcement exemption provisions. Second, the Ombudsman is precluded from recommending amendment where a document records a decision under an enactment by a court, tribunal, authority or person; or the decision whether to amend the document involves determination of a question that the person seeking to amend the document is, or has been, entitled to have determined by a court or tribunal.

Tribunal review

General

The provisions governing review by the AAT are set out in ss55 to 66. An application for review must be accompanied by the required application fee and made within the time limits prescribed (that is, as appropriate, within sixty days of notification of the original decision, a decision on internal review, a deemed decision or notification of the result of a complaint to the Ombudsman).

Except in the case of documents which are subject to conclusive certificates, it is the AAT's function to provide review on the merits. However, in contrast to the initial decision maker, the tribunal is precluded from granting access to an exempt document. It is also precluded from requiring the amendment of a record of opinion unless it finds that the opinion is based on a mistake of fact or that the author of the opinion was biased, unqualified or acted improperly in adducing the fact which formed the basis of the opinion.⁷⁶

The tribunal is required to have regard to the necessity to avoid the disclosure of exempt matter (including information concerning the existence or non-existence of documents) and to ensure that no exempt matter is included in its reasons for decision.⁷⁷ It cannot require the production of any document claimed to be exempt unless it is not satisfied by evidence that the claim for exemption is a justified one or requires access in order to decide whether it is practicable to

grant access to an edited copy of a document. It is also restricted in its ability to allow applicants' legal representatives to view any material which is claimed to be exempt.⁷⁸

In proceedings before the AAT, the onus is on the respondent to establish that its decision was justified. Each party is usually required to pay its own costs, irrespective of the outcome but the tribunal has discretion to recommend to the Attorney-General that the Commonwealth should pay the costs of an applicant who has been successful or substantially successful in his or her application.⁷⁹

Documents subject to conclusive certificates

The tribunal must be specially constituted to consider an application for review of a decision concerning access to a document which is subject to a conclusive certificate.⁸⁰ Its task is limited to assessing the reasonableness of the claims made in the certificate. In *McKinnon v Treasury*,⁸¹ the Full Court of the High Court rejected an argument that the exercise of that power in the context of a certificate issued under s36(3) required the Tribunal to specifically engage in a balancing of the factors for and against disclosure. However, the majority differed in their formulation of the Tribunal's task in reviewing such a certificate. Callinan and Heydon JJ took the view that: 'if one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review'.⁸² In contrast, Hayne J accepted that there would often be competing considerations which were relevant to the statutory test in s58(3) and described the Tribunal's task as being 'to decide whether the conclusion expressed in the certificate (that disclosure of particular documents would be contrary to the public interest) can be supported by logical arguments which, *taken together*, are reasonably open to be adopted and which, if adopted, would support the conclusion expressed in the certificate'.⁸³ He also stressed that the test of reasonableness required a finding of something more than a mere absence of grounds which are 'irrational, absurd or ridiculous'.⁸⁴ The two minority judges, Gleeson CJ and Kirby J, took the view that the Tribunal's assessment of reasonableness required it to consider all relevant considerations from the perspective that 'there is a general right of access to information . . . limited only by exceptions and exemptions necessary for the protection of essential public interests'.⁸⁵

If the Tribunal concludes that the claims made are unreasonable it may recommend that the certificate should be revoked.⁸⁶ In that case, the minister must either revoke the certificate or provide and table in Parliament a notice detailing his or her reasons for refusing to do so, including findings on any material questions of fact and the findings on which they were based.

Judicial review

Decisions made under the Commonwealth FOI Act are potentially subject to judicial review.⁸⁷

Overview

While it has made an important contribution to open government, the Act has fallen short of achieving its broader democratic objectives.⁸⁸ That failure is in part attributable to the way in which it has been drafted and interpreted and in part to shortcomings in its administration and funding and to a lack of governmental support.⁸⁹ Two major disincentives to its use for public interest purposes are delays in the processing of requests and the imposition of significant charges for access.⁹⁰

If the Act is to work more effectively there needs to be a greater emphasis on proactive dissemination of information and reconfiguring of its scope in a way which takes into account the erosion of the public/private dichotomy as discussed in Chapter 3.⁹¹ It is also important that there should be some office with responsibility for publicising the Act's existence, monitoring compliance and initiating actions to remedy factors which are found to inhibit its effective operation.⁹²

State and territory legislation

State and territory FOI laws⁹³ follow a generally similar pattern to the Commonwealth Act. They provide for rights of access to documents in the possession of agencies and official documents of ministers, requirements for the publication of internal laws and other specified documents (except in the case of the Tasmanian Act) and procedures for the amendment of an applicant's personal information. The access rights contained in them are again subject to a number of exceptions and exemptions, although there is some variation in the grounds of exemption and in the wording of specific exemption provisions.

The procedures for access and amendment are generally similar although there are variations in the time limits for responses and the circumstances in which third parties must be consulted about disclosures.

Like the Commonwealth FOI Act, the state and territory FOI Acts contain provision for both internal review within an agency and external review by some independent body. An important difference, however, is that some of the state Acts provide for review by an Information Commissioner or Ombudsman rather than an administrative appeals tribunal.

Delegated legislation

Stephen Argument

‘Delegated legislation’ is legislation made by a body or person to whom the Parliament has delegated its power to legislate. This is an important point of distinction with ‘primary’ legislation, which is passed by both Houses of the Commonwealth Parliament and assented to by the Governor-General. Delegated legislation (for example, regulations) is often made by the Governor-General, acting on the advice of the Federal Executive Council.

Delegated legislation tends to provide detail to a legislative scheme, setting out matters that are regarded as not necessary for Parliament itself to approve by passage of primary legislation. For a more precise exposition of what delegated legislation covers, however, it is more a case of referring to what should *not* be provided for by delegated legislation. The Department of the Prime Minister and Cabinet’s *Legislation Handbook*¹ provides that the following matters should only be implemented through primary legislation:

- a appropriations of money;
- b significant questions of policy including significant new policy or fundamental changes to existing policy;
- c rules which have a significant impact on individual rights and liberties;
- d provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
- e provisions conferring enforceable rights on citizens or organisations;
- f provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

- g provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);
- h provisions imposing taxes or levies;
- i provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);
- j provisions authorising the borrowing of funds;
- k procedural matters that go to the essence of the legislative scheme;
- l provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and
- m amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).

Since legislation should preferably be made by the Parliament and not delegated to non-parliamentary entities, delegated legislation is regarded, at best, a necessary evil that is only tolerated because the growth in the functions and requirements of modern government demand it. A more problematic issue is that delegated legislation might be regarded as challenging the concept of the separation of powers, in that it is 'legislative in form and executive in source'.

This chapter sets out to do four things. First, it looks at the justification for having delegated legislation. Second, it considers the arguments levelled against the uses of delegated legislation. Third, it discusses the single most important development in delegated legislation for at least half a century – the passage of the *Legislative Instruments Act 2003* (Cth) (LIA). Fourth, the effect of various developments (including the LIA but especially the role of parliamentary scrutiny committees) on the operation of delegated legislation and on the way that the courts have dealt with delegated legislation is analysed.

The justification for having delegated legislation

The conventional wisdom is that there are three justifications for the Parliament delegating the power to make legislation:

- to ease pressure on parliamentary time;
- to cope with legislation that is too technical or detailed for parliamentary consideration; and
- to provide the flexibility to deal with rapidly changing or uncertain situations.

The question that is posed is whether these justifications are still tenable. It is uncontroversial that the demands on parliamentary time are increasing rather than decreasing. However, does that justify the explosion of delegated legislation? Is it possible that the proliferation of delegated legislation reflects the fact

that the Parliament has let the genie out of the bottle? Is there an element of the self-fulfilling prophecy?

As to concerns about technical issues and complexity, again, it is indubitable that some delegated legislation deals with complex and technical issues, requiring voluminous detail. On the other hand, Parliament does not necessarily shy away from complex, technical or voluminous legislation, as exemplified by amendments to the *Corporations Act 2001* (Cth), the *Income Tax Assessment Act 1936* (Cth) or the recent amendments to the *Workplace Relations Act 1996* (Cth). The regulations made in relation to those recent amendments are, of course, another matter altogether. It is difficult to explain why Parliament is prepared to deal with some instances of complexity, technicality and volume but not others.

The flexibility argument is also, on its face, hard to dispute. Anyone who has been involved with the legislative process knows that on the whole it takes a longer lead-up time for the implementation of amendments to primary legislation than for putting in place amendments by way of delegated legislation. But legislation can be amended quickly, if there is the necessary will. The process for making regulations may also take time and has its own challenges.

Arguments against the use of delegated legislation

It is primarily argued that if the executive has power to make laws, the supremacy or sovereignty of the Parliament will be seriously impaired and the balance of the Constitution altered. Furthermore, it is asserted that if laws are made affecting the subject, they should first be submitted to the elected representatives of the people for consideration and approval.

Lord Hewart, an early critic of delegated legislation, said:

A mass of evidence establishes the fact that there is in existence a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts.²

Lord Hewart's prospective despot was seen as being able to achieve his or her purpose if he or she could:

- (a) get legislation passed in skeletal form;
- (b) fill up the gaps with his [or her] own rules, orders, and regulations;
- (c) make it difficult or impossible for the Parliament to check the said rules, orders, and regulations;
- (d) secure for them the force of statute;
- (e) make his [or her] own decision final;
- (f) arrange that the fact of his [or her] decision shall be conclusive proof of its legality;
- (g) take power to modify provisions of statutes; and
- (h) prevent and avoid any sort of appeal to a Court of Law.³

Is this true today?

The recent amendments to the Workplace Relations legislation would seem to be a good example of (a) and (b). While the amendments to the Workplace Relations Act could hardly be described as skeletal, it could also be said that there is a lot of devil in the detail that was left to the regulations.⁴ As to (c), parliaments in Australia rely on legislative scrutiny committees to check delegated legislation. These committees have been established explicitly to deal with this issue.

Undoubtedly, delegated legislation has the force of statute. An important role of legislative scrutiny committees is to ensure that what should be in primary legislation is *in* primary legislation, and not shunted off to delegated legislation. Thus, there is vigilance by the committees to ensure that the use of penalty provisions in delegated legislation is monitored and limited.

Legislative scrutiny committees are also required to ensure that decisions made under delegated legislation are subject to review on their merits by a judicial or other independent tribunal. We therefore rely on the legislative scrutiny committees to protect us from (e), (f) and (h) in Lord Hewart's list.

In relation to (g) the use of dreaded 'Henry VIII' clauses (these are clauses that allow the amendment of primary legislation by subordinate legislation)⁵ has increased, as instanced by the recent Workplace Relations legislation amendments. The legislative scrutiny committees are there to monitor the use of Henry VIII clauses. The committees draw attention to the use of Henry VIII clauses, forcing the Parliament to authorise their use expressly, rather than passing them into law as part of the blur of voluminous legislation. Parliament retains the capacity to disallow amendments made under Henry VIII clauses because the regulations that are made under Henry VIII clauses are themselves disallowable. How realistic this mechanism is can be queried, especially in parliaments where the Government has a majority.

Delegated legislation and the *Legislative Instruments Act 2003* (Cth)

The most significant element of the LIA is its application to all instruments made in exercise of a power delegated by the Parliament that are 'of a legislative character'. Section 5 of the LIA provides that an instrument is 'of a legislative character' if:

- (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The significance of this definition is that, unlike other jurisdictions, the regime provided for by the LIA operates by reference to what an instrument does, rather than by what it is called. While the operative definitions in some other jurisdictions refer to instruments having a legislative character, the fact is that, in all other Australian jurisdictions, whether or not an instrument is subject to the

relevant regime for publication, tabling and disallowance is governed by whether or not the instrument in question is a 'disallowable instrument',⁶ a 'regulation',⁷ a 'statutory instrument',⁸ a 'statutory rule',⁹ a 'subordinate law',¹⁰ 'subordinate legislation'¹¹ or 'subsidiary legislation',¹² depending on the jurisdiction.

The effect of this approach to instruments is that all that is required for an instrument not to be subject to the relevant publication, tabling and disallowance regime is for it to be designated as something other than the term that triggers the operation of that regime. From a theoretical perspective at least, it is difficult to justify a process that operates on the basis of what legislative instruments are called, rather than what they do.

Nomenclature should be irrelevant, not the least because it is a reflection of variations in bureaucratic practices and preferences, drafting approach or in what the Parliament might be prepared to allow at a particular time. This sleight-of-hand with nomenclature has, in the Commonwealth at least, been the single biggest cause of the explosion of 'quasi-legislation' that occurred in the twenty-five or so years prior to the enactment of the LIA.¹³ The coming into force of the LIA has put a stop to this exponential growth in legislative instruments that fall outside of the publication, tabling and disallowance regime.

The LIA addresses four basic problems prevailing before the enactment of the LIA. The first problem relates to the proliferation of instruments not covered by the existing regimes. Proliferation becomes irrelevant, because instruments are now covered by the LIA, irrespective of what they are called. All that matters is whether or not they are 'of a legislative character'.

In relation to the problem of poor drafting, s16 of the LIA gives the Secretary of the Attorney-General's Department an obligation to 'cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users, of legislative instruments'. These steps may include (but are not limited to) undertaking or supervising the drafting of legislative instruments; scrutinising preliminary drafts of legislative instruments; providing advice concerning the drafting of legislative instruments; providing training in drafting and matters related to drafting to officers and employees of other departments or agencies; arranging the temporary secondment to other departments or agencies of Australian Public Service employees performing duties in the department; and providing drafting precedents to officers and employees of other departments or agencies (s16(2)). Subsection 16(3) of the LIA also requires the Secretary to cause steps to be taken to prevent the inappropriate use of gender-specific language.

Secondly, the LIA by providing that instruments are recognised as having a legislative effect and have to be registered, leads to agencies taking more care to ensure that they say and do what they are supposed to do. The third problem of accessibility is arguably the most important. The LIA ensures that people can work out what the law is by making sure that all 'legislation' is now publicly available. Apart from requiring that instruments be tabled in the Parliament the LIA establishes a Federal Register of Legislative Instruments (FRLI),¹⁴ in which all legislative instruments must be registered. Finally, the LIA ensures

that instruments of a legislative character receive appropriate scrutiny by the legislature.

The importance of disallowance

Both Houses of the Commonwealth Parliament have the power to disallow a 'legislative instrument'. The situation is substantially the same in all the other Australian states. At the federal level, the power to disallow is set out in s42 of the LIA, which provides that a notice of a motion to disallow can be given in either House within fifteen sitting days of a legislative instrument being tabled in that House. There are then a further fifteen sitting days within which the notice of motion must be dealt with. If the motion is not either negated or otherwise disposed of within that further fifteen sitting days, then the legislative instrument is disallowed by *the effluxion of time* (see subsection 42(2) of the LIA).

While either House of the Federal Parliament can disallow a legislative instrument, historically, disallowance motions have tended to be moved in the Senate, where the legislative scrutiny process has, since 1932, been assisted by the Senate Standing Committee on Regulations and Ordinances Committee (R and O Committee). An important improvement that has been made by the LIA is to ensure that legislative instruments are subject to the scrutiny of the Parliament and of the R and O Committee.

The significance of s5 of the *Legislative Instruments Act*

Despite s5 of the LIA, a problem facing Commonwealth agencies is deciding what are and what are not legislative instruments. As the late Selway J stated in *McWilliam v Civil Aviation Safety Authority*¹⁵ there is no clear or 'bright line' distinction between legislative and administrative powers. After referring to two of the leading authorities on this issue,¹⁶ Selway J stated:

These decisions should not be understood as suggesting that administrative and legislative decisions fall into two mutually exclusive categories and that such categories can be identified by particular characteristics.¹⁷

He added:

That difficulty is exacerbated in relation to administrative functions simply because, under the Westminster system of government, the executive branch may exercise legislative powers delegated by the Parliament. This has the practical effect that it is impossible under Australian constitutional arrangements to draw a clear or 'bright line' distinction between legislative and administrative powers.¹⁸

Selway J concluded that ‘there is no reason in principle why the same decision could not be described as being both an administrative and a legislative decision’.¹⁹

In *RG Capital Radio Ltd v Australian Broadcasting Authority*,²⁰ referred to by Selway J, the Full Court of the Federal Court set out nine factors to be taken into account in characterising whether an instrument made under subsection 26(1) of the *Broadcasting Services Act 1992* (Cth) was administrative or legislative. While that case was decided in the context of whether the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applied to the making of the instrument, the discussion in the case is helpful in determining the issue at hand. The Full Court concluded that, in determining whether a power is legislative or administrative, a court would have regard to a series of relevant factors, none of which is determinative. The Full Court stated that ‘there is no simple rule’²¹ and that ‘no single feature is decisive’.²² Despite these cautions, the Full Court identified the following factors as relevant:

- i. Legislative decisions determine the content of rules of general, usually prospective, application whereas administrative decisions apply rules of that kind to particular cases.²³ On this issue, the court quoted the reasoning of Gummow J, while his Honour was a member of the Federal Court in *Queensland Medical Laboratory v Blewett*.²⁴ In that case Gummow explained that: ‘Individual norms’ which apply only to the action of a single person or occasion may still be classed as laws, and this is so although the operation of such laws must necessarily be upon particular cases.
- ii. If a decision is subject to parliamentary control, this tends to indicate that it is legislative.²⁵ In *RG Capital Radio*,²⁶ the Full Court summed up its review of authorities on this issue in the following terms:

The absence of any provision for disallowance by parliament points against characterisation of a decision under [the legislative provision under consideration] as legislative. However, although persuasive, the absence is not fatal to such a characterisation. No case declares provision for disallowance to be a litmus test of legislative character. Its absence is to be taken into account as a factor pointing against that characterisation, but that is all.²⁷
- iii. A requirement for publication ‘suggests’ that a decision is legislative but this requirement is not a ‘compelling indication’.²⁸
- iv. A requirement for wide consultation might indicate that the decision involves broad policy considerations, which suggests that it is legislative.²⁹
- v. The fact that a decision involves taking into account wide policy considerations suggests that it is legislative.³⁰
- vi. The fact that a decision maker has the power to vary a decision can indicate either legislative or administrative character. The capacity to vary a decision could be seen as analogous to the legislature’s power to amend legislation. That said, s33 of the *Acts Interpretation Act 1901* (Cth) construes the power to make an instrument (including an administrative instrument) as including the power to amend, etc an instrument.³¹
- vii. An absence of control of the decision maker by the executive suggests that the decision is legislative.³²
- viii. An absence of merits review of the decision suggests that the decision is legislative.³³

- ix. If a decision has a binding effect, in the sense that other statutory provisions are 'enlivened' by the decision, that may tend to confirm that the decision is making a rule of general content rather than applying rules in a particular case.³⁴

Delegated legislation and the courts

Although most of this chapter has been concerned with the procedures that govern the making of delegated legislation, it is important to note that all delegated legislation may be challenged by way of judicial review. In theory the principles of ultra vires that govern administrative decisions apply to delegated legislation but in practice judicial review rarely intersects with delegated legislation. Douglas and Jones explain:

. . . successful attacks on the validity of subordinate legislation are rare. There are various reasons for this. They include the relative discretion enjoyed by rule-makers as compared with administrative decision makers; the fact that rule-makers normally have much more time to devote to decision-making than makers of purely administrative decisions; the careful vetting process which typically characterises the rule-making process; and review by parliamentary committees charged, inter alia, with examining the legality of the legislation before them.

Pearce and Argument adopt a similar position. Those authors note that the courts' approach to delegated legislation generally involves a presumption as to validity and a reluctance to substitute judicial opinion for that of the legislation-maker.³⁵ One of the many cases to which they refer is the High Court's decision in *Gibson v Mitchell*.³⁶ The issue in that case was what might be 'necessary or convenient' for carrying out the purposes of the Commonwealth *Post and Telegraph Act 1901* (Cth). Isaacs J explained the effect of the words 'necessary and convenient' in the following terms:

Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily, they signify what the Governor-General may consider necessary or convenient, and no court can overrule that unless utterly beyond the bounds of reason and so outside power.³⁷

A case in which vigorous judicial control was underlined by the court occurred in *Paradise Projects Pty Ltd v Gold Coast City Council*.³⁸ In that case, Thomas J said:

The by-laws which I have concluded to be ultra vires are typical examples of lazy drafting. It is much easier to frame general prohibitions than to define exactly what is intended. Those who draft ordinances should identify their true target rather than attack the community with grapeshot. Unless this trend is identified and curbed by the courts, we may find practically every form of human activity contrary to some by-law or regulation, or that a permit is required for virtually every form of everyday activity. If the courts do not control these excesses, nobody will.³⁹

The role of parliamentary committees

Parliamentary committees, specifically legislative scrutiny committees, play a very important role in the oversight of delegated legislation. The most significant of the 'evils' identified by Lord Hewart relates to the likelihood that delegated law-making, because of its volume and complexity, makes it difficult or impossible for the Parliament to check the detail of the various regulations, rules, orders, and so on. Lord Hewart might not have appreciated just how voluminous and just how complex delegated legislation would become. Experts are appointed to assist legislative scrutiny committees in scrutinising the minutiae of delegated legislation.

There is a certain irony that one of the answers to the evils of delegated legislation is for Parliament to entrust the task of scrutinising delegated legislation to a committee and for the committee then (in effect) to entrust an expert with the responsibility of providing it with technical advice as to the content of the legislation and whether or not it might offend against a series of established (but nevertheless highly subjective) principles. The committee also has to be able to trust the legal adviser not to go off on a campaign or frolic of his or her own.

There is another element of trust in the process. The committees, to a certain extent, have to be able to trust the rule-makers (as the LIA calls them) to do the right thing. In particular, the committees need to be able to trust rule-makers to be open and fulsome in their Explanatory Statements. Whether this trust is warranted may on occasions be questioned.

Delegated legislation involves the Parliament entrusting the Executive with the power to make legislation, without requiring that it be passed by the Parliament. The key mechanism for ensuring that the Executive does the right thing is the legislative scrutiny process and the role of parliamentary committees such as the Senate's R and O Committee. Australia has, for seventy years, led the world in legislative scrutiny. With the enactment of the LIA, the Commonwealth jurisdiction has gone to the cutting-edge of legislative scrutiny, by implementing a scrutiny trigger that operates by reference to what legislative instruments do, rather than by what they are called. In so doing, the Commonwealth Parliament has set an example that other jurisdictions would do well to follow.

The concept of 'justiciability' in administrative law

Chris Finn

The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the Executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside the bounds of its appropriate constitutional role.

There is a good deal of confusion surrounding justiciability. At least in part, this is due to the fact that the term is used in a number of discrete, albeit sometimes overlapping, senses.¹ It is important to keep these various strains of meaning analytically separate. Some are best analysed quite separately from justiciability in its strict sense. The following senses of the term may be encountered from time to time:

- 1) The matter is beyond the jurisdiction of the court;
- 2) The matter is within the jurisdiction of the court, but beyond the reach of the prerogative writs or their equivalent administrative law remedies, as it does not involve an exercise of 'public' power;
- 3) The court possesses jurisdiction but is institutionally incompetent to resolve the matter;
- 4) The court possesses jurisdiction and is competent, but regards the matters as constitutionally inappropriate for its intervention;
- 5) The court views the matter as premature, and thus not yet appropriate for judicial intervention;
- 6) The court can find no ground of review, or at least no argument that would not involve an impermissible intrusion into the administrative merits;

- 7) The Court lacks admissible evidence upon which to determine the matter, particularly due to Crown immunity from disclosing that evidence.

It is submitted that the third and fourth of these senses lie at the core of the concept of 'non-justiciability'.

There is a complex relationship between questions of jurisdiction, justiciability and the limits of public law. At common law, these concepts are particularly difficult to separate. However, they remain analytically distinct. First, the outer limits of public law and its attendant remedies have traditionally been set by the public/private divide. Judicial review has been held to be available to remedy abuse of statutory and prerogative powers, but not abuse of contractual or other common law powers by the Crown. The latter powers are not unique to the Crown and any remedy for their abuse is said to lie in private rather than public law.² In this sense, exercises of contractual power and other private law powers are sometimes said to be 'non-justiciable' at public law. But this is misleading for two reasons. First, misuse of such powers remains justiciable at private law. Private law remedies are potentially available. Second, 'non-justiciability' is a narrower concept than 'public power'. The mere fact that a power is classified as 'public' rather than 'private' does not entail its justiciability. Many prerogative, and arguably even some statutory, powers are still viewed by the courts as non-justiciable.

The jurisdiction of the courts is also a separate concept. This is most evident when that jurisdiction is conferred by statute, such as the Federal Court's jurisdiction conferred by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). That jurisdiction, intended to largely mirror the common law position at the time of enactment, has been left looking somewhat anachronistic as the common law has developed. It remains limited to review of statutory powers, and does not extend to review of any decision-making powers formally conferred upon the Governor-General. By contrast, the jurisdiction of the court conferred by s39B of the *Judiciary Act 1903* (Cth) has evolved with the common law, allowing the Court to review decisions beyond the scope of its ADJR Act jurisdiction.

Where jurisdiction is conferred by common law, it is likely to be coterminous with the limits of public power described above.

The final area where lack of jurisdiction and non-justiciability are liable to be confused lies in relation to alleged breaches of international law. Such breaches are not infrequently alleged in domestic courts but dismissed as non-justiciable in that court.³ But this is not true non-justiciability. It is simply a case of domestic courts lacking the jurisdiction to determine such claims or award any appropriate remedy. The matter may be justiciable, but only in an appropriate international institution.

The fifth, sixth and seventh senses of non-justiciability listed above are more trivial, and can quickly be disposed of. The fifth sense, where the matter is 'premature', may simply mean that the plaintiff has acted in haste, fearing injustice,

but before any actual ground of review has been made out on the facts. Thus it merges with the sixth sense, where the plaintiff simply fails to make out their chosen ground or grounds of review. Neither is truly an example of non-justiciability as these claims do not refer to the nature of the particular decision or class of decisions, but simply to the failure of the particular case before the court. This is certainly a valid reason for a court to decline to provide a remedy, but it is distinct from true 'non-justiciability', which involves a court declining to adjudicate regardless of the presence or absence of an arguable ground for review.

On occasion, however, the argument that a matter is 'premature' may have a much deeper meaning. It is fundamental that Australian courts will only adjudicate upon a 'matter'; they will not answer purely 'hypothetical' questions, even in an action for a declaration. This may be an example of true 'non-justiciability' as this refusal is linked to understandings of the limits of judicial power.⁴ This constitutional aspect of non-justiciability will be considered further below.

Where evidence is lacking a court will, inevitably, be unable to adjudicate upon a matter. This is particularly likely in matters relating to national security where the executive may resist disclosure of documents or other evidence on the basis of crown immunity. Equally, courts may be willing to accept as conclusive executive statements that national security required a particular course of action to be taken, and will be reluctant to look behind such claims. The lack of evidence will usually be fatal to a plaintiff's claim, but should not be confused with true non-justiciability had such evidence been available. However, the willingness to accept executive pronouncements as conclusive should probably be seen as a genuine acceptance by the courts that the particular issue is non-justiciable.

The core meaning of 'non-justiciability'

It is the third and fourth senses listed above, then, which capture the essence of non-justiciability. This arises when a court, correctly imbued with jurisdiction to hear a particular matter, brought by a plaintiff with *locus standi*, and raising at least an arguable case that one or more ground of review has been made out, nonetheless decides for reasons of institutional incompetence or constitutional legitimacy that it should decline to hear and determine the matter.

Underlying issues

As the foregoing indicates, there are two key sets of concerns which underpin the view that some classes of administrative decisions are not appropriately subject to judicial review. First, it is argued that a combination of the adversarial trial method and the rules of evidence mean that courts are institutionally incompetent to resolve particular types of disputes. Second, it is suggested that some decisions are sensitive, in a constitutional or political sense, and should be avoided

for that reason. Allied with the latter concerns are those sourced from the limits of judicial power.

The argument that curial decision-making techniques are unsuited to the resolution of some issues focuses on decisions described as 'polycentric'. These are decisions whose resolution one way or another is likely to affect a wide range of interest groups, such that the full effect of a decision may not easily be predicted. Moreover, it is argued that many of those whose interests are affected may not be represented in the judicial proceedings, whose resolution may turn upon a single narrow point, without evidence bearing upon the wider ramifications. Lon Fuller uses the metaphor of a spider's web, where 'a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole'.⁵ J Jowell describes polycentric decisions as ones which:

... involve a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, shaping the conditions, so that a new basis must be found for the next decision.⁶

A polycentric administrative decision involves the weighing and balancing of disparate interests, an exercise which seems quintessentially of 'the merits'. Thus it appears quite inappropriate for judicial resolution, both for separation of powers reasons, and because the adversarial method of the courts, the party selected nature of the evidence and the tendency to focus proceedings on a small number of key issues, make it unlikely that the court will be well placed to make a good decision on the merits. On this line of argument, it is far more appropriate that such matters be resolved administratively, by experts in the particular field who have access to much wider sources of information from all interested parties and who have not been confined to a particular set of issues by the rules of evidence and curial procedures.

It is suggested, however, that this line of argument is misconceived. Quite simply, a court undertaking judicial review is not being asked to resolve the administrative matter under review, in the absence of those questions of law which admit of only one resolution. Typically, the court supervises the decision-making process, and the outcome of a finding that this process was flawed is the remittal of the decision to the relevant administrative body to resolve the polycentric matter in question, this time in accordance with law.

To put the matter another way, it can be accepted that courts are ill-suited to the resolution of polycentric matters. They are seldom, however, called upon to do so. It is the administrative decision which is polycentric, not the question which the court is asked to resolve. The latter will typically be an altogether simpler question, or at least a series of such questions, that is, was the applicant accorded procedural fairness? Were all legally relevant matters considered by the decision maker? Was a policy inflexibly applied in the decision-making process? These may on occasion be difficult questions to answer, but they are not polycentric ones. They are in fact matters well suited to resolution by the adversarial process, with the points of disagreement narrowed by pre-trial procedures and with skilled advocates then

presenting argument and relevant evidence to assist in the resolution of those narrowly defined issues. The result, of course, of a successful judicial review is not a substitution of the court's decision on the merits, but a quashing of the decision under review, with the matter remitted for re-decision by the administrative decision maker.

It should perhaps be noted in passing that polycentric administrative decisions are no rarity. They are commonplace. Many, if not all, licensing and other regulatory decisions, are likely to affect the interests of a wide range of parties directly or indirectly. Even the most individualised of decisions, such as dismissals from public office or visa decisions, are likely to have knock-on effects which may well be beyond the purview of the courts. Thus, if polycentricity were to be seen as a serious bar to judicial review, then there would be little work for the courts to do.

The second concern is the constitutional suitability of the courts reviewing certain classes of decision. Whilst this matter will be discussed in more detail later in this chapter, it can be said at the outset that this provides a much more powerful argument in favour of the non-justiciability of at least some limited classes of administrative decisions. It is perhaps no surprise that there is a tradition of judicial reluctance to intervene in matters which are constitutionally sensitive, which raise political questions, and which seem peculiarly within the province of the executive branch. These same areas are typically those which were traditionally governed, and in some cases still are governed, by the exercise of prerogative powers. Since the manner of exercise of prerogative powers became reviewable only as recently as the 1980s, it is understandable that considerable judicial reluctance to aggressively review such powers remains. And indeed, the law has moved only a little, now holding that the exercise of prerogative power is not automatically immune from review, a position which falls considerably short of suggesting that such review is commonplace.

Non-justiciability: A short history

Case law dealing with the nature and extent of the royal prerogative can be found at least as far back in the early seventeenth century constitutional turmoil in England. In a series of cases, the ability of the Stuart Kings (James I and Charles I) to govern by means of the prerogative, and thus without the need for parliamentary support, was examined in the Courts. In *Bates Case (The Case of Impositions)*,⁷ it was held that the King had prerogative power to regulate trade, as an aspect of foreign affairs. However, in the celebrated *Case of Prohibitions*,⁸ Lord Chief Justice Coke risked the Royal displeasure by holding that the King could not create new offences. In 1611, Coke went further, holding in the *Case of Proclamations*⁹ that no new prerogative could be created. The Chief Justice famously quoted Bracton as authority for the proposition that 'The King himself ought not to be subject to man, but subject to God and the law, because the law

makes him King'. He went on to say that 'The King has no prerogative, but that which the law of the land allows him'.¹⁰

Whilst it was not until after the 'Glorious Revolution' of 1688 that the Crown finally accepted this proposition, these cases mark the emergence of the principle, lying at the heart of the rule of law that it is the province of the common law courts, rather than the executive itself, to determine the limits of the existing prerogative. Thus the extent of the existing prerogative power was confined, and it was further established that Parliament could abrogate individual prerogatives.¹¹

Not all decisions during this period went against the King, however. In the *Case of Ship Moneys*,¹² it was held, by a court under considerable Royal pressure, that the King's historical power to levy maritime ports to provide for naval vessels in times of war could be extended to levy all of England and to do this outside of times of war. The decision was overturned by the Parliament within a few years, helping to establish the principle that no new taxes could be imposed without parliamentary consent.

An important observation should be made of these cases. Each was concerned with determining the existence and extent of the challenged aspect of the Royal prerogative. In short, the question was simply whether or not the King possessed the particular prerogative power in question, and thus could act unilaterally, or whether the consent and action of Parliament was required. Where the existence of the relevant power was established, however, there was no further question raised as to the manner of its exercise. The Courts would not inquire into such matters but limited themselves to determining what we would today term the basic question of vires: did the King possess the claimed power or not? The justiciability of this question was clearly established by these cases; however the justiciability of questions relating to the manner of exercise of prerogative powers was not to be addressed for another 350 years. It is in that sense that prerogative powers have been described as 'traditionally immune from review'.

It was from these seventeenth century upheavals that the modern system of Westminster government would ultimately emerge. The decline of the personal power of the monarch, however, did not signify a triumph of Parliament over the Executive. Rather, executive power was simply transferred to the government of the day, and subjected to only limited oversight by Parliament. Thus questions of the extent of prerogative power, which once related to the extent of the monarch's personal power, are now questions of the ability of Executive government to act without Parliamentary authority or sanction. The monarch, or in Australia the Governor-General as the monarch's representative, remains the formal head of the executive branch of government, but their decisions are made and their powers exercised on the advice of the government of the day. Some former prerogative powers have in fact been expressly transferred to particular ministers and others have been abrogated by statute. In practical terms, prerogative power is now exercised entirely by the Executive government of the day and not by the monarch.

Whilst the locus of prerogative power thus shifted, the level of review of that power remained unchanged until the 1970s and 1980s. During that period, a series of cases indicated a new willingness by the courts to go beyond the simple question of the existence or otherwise of a claimed prerogative power and now to treat as justiciable the question of the manner in which a particular power had been exercised. In particular, courts first expressed themselves as willing to extend the doctrine of natural justice (or procedural fairness) to at least some exercises of prerogative power. In this, the courts began to reject a formalistic distinction between exercises of statutory power, seen as potentially reviewable, and exercises of prerogative power, traditionally seen as immune from the scrutiny of the courts.

An important early precursor was *Ex parte Lain*¹³ in 1967, where the Queens Bench Division held that the Criminal Injuries Compensation Board was amenable to the writ of certiorari, despite the fact that its authority derived from the prerogative rather than from a statutory source. Then, in the *Laker Airways* case¹⁴ in 1977, Lord Denning expressed himself as unable to see why a decision ought to be immune from review, merely because it was sourced to the prerogative rather than a statutory power. These decisions set the stage for the leading House of Lords decision in *CCSU* in 1985.

Council of Civil Service Unions v Minister for Civil Service (CCSU)

The House of Lords 1985 decision in *CCSU* marked a major turning point in the reviewability of decisions sourced from a prerogative power. Here, the Lords held that the manner in which a prerogative power was exercised could, at least in some cases, be open to judicial review. The English Prime Minister, Margaret Thatcher, had issued an Order-in-Council, sourced from the prerogative. That order prohibited union membership amongst employees at GCHQ, an electronic intelligence gathering facility, on the grounds that union activism had disrupted the facility, thus posing a threat to national security. The union argued that a legitimate expectation of consultation with respect to changes in employment conditions had been frustrated, thus constituting a denial of procedural fairness. The government asserted that the decision, sourced from the prerogative, was in any case immune from review.

A majority of the House of Lords disagreed with the proposition that prerogative powers were automatically immune from review. Lord Diplock famously stated that:

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision maker . . . either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage . . .¹⁵

Lord Diplock held that for a decision to be amenable to judicial review, 'the decision maker must be empowered by public law',¹⁶ and reached the conclusion that he could:

see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should *for that reason only* be immune from judicial review.¹⁷

Lords Scarman and Roskill agreed. However, all members of the court agreed that whilst the fact that the decision was sourced to prerogative power did not confer immunity from review, evidence, provided by government affidavit, that the decision was one likely to affect 'national security' had precisely that consequence. In short, an immunity based upon the source of the power was rejected, but a new immunity based upon the subject matter of the decision replaced it. Lord Roskill listed a range of subject matters which would not attract judicial review:

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or parliament dissolved on one date rather than another.¹⁸

Thereafter the focus would be on the subject matter of a particular decision, rather than its source in the prerogative or in statute. It has subsequently been accepted that at least one of the powers listed by Lord Roskill, the prerogative of mercy, has indeed been held susceptible to judicial review, at least on some occasions. In *Ex parte Bentley*,¹⁹ Lord Roskill's list of non-reviewable powers was dismissed by the Queens Bench division as obiter, and review of this particular exercise of prerogative power was allowed. However, a 1996 decision of the Privy Council, *Reckley v Minister of Public Safety (No 2)*,²⁰ distinguished Bentley and opted for the traditional view that this prerogative power was indeed unreviewable. To similar effect is the decision of the South Australian Supreme Court in *Von Einem v Griffin*.²¹

One of the more striking justiciability sagas of recent times is the Bancoult litigation. In *R (Bancoult) v Foreign Secretary*,²² an ordinance requiring the forcible removal of all the civilian inhabitants of the Chagos Archipelago was held to be invalid by the Queen's Bench as it could not reasonably be described as being made for the 'peace, order and good government' of those inhabitants. This was despite the fact that the forced removal flowed from an agreement between the British and United States governments, whose principal aim was the establishment of a US airforce base on the largest of the islands, Diego Garcia. Whilst this placed the decision squarely within the 'national security' and 'foreign relations' subject matters, review was nevertheless granted. The British Foreign Secretary of the day, Robin Cook, announced that the government would not be appealing that decision. That was not the end of the matter, however. The British government continued to stall on the granting of access and in 2004, by means of an Order-in-Council, again purported to exclude all right of access by the former inhabitants to the islands comprising the archipelago. In 2006, in *Bancoult*

(*No 2*),²³ the Queens Bench held that the 2004 Order-in-Council was also invalid on the ground that it was irrational and unreasonable. This was despite argument that the Order was made on national security grounds in the wake of September 11. The Order-in-Council, although signed by the Queen, was treated in substance as being an order of the Secretary of State and reviewed accordingly. Thus, in the fields of national security and international relations also, the UK courts at least do not always accept automatic immunity from review.

The current Australian law

Australian case law has largely followed the United Kingdom lead in rejecting automatic immunities based upon the source of power or indeed the status of the decision-maker. Thus, as long ago as 1980 in the *Toohey* case,²⁴ the High Court had rejected a claim that a decision of the Administrator of the Northern Territory was immune from review for improper purpose. Similarly in *FAI v Winneke*²⁵ and *South Australia v O'Shea*,²⁶ the fact that the decisions in question were attributed to state Governors did not entail the conclusion that they were immune from review.

The leading Australian decision, however, is that of the Federal Court in *Peko Wallsend*,²⁷ two years subsequent to that of the House of Lords in *CCSU*. In *Peko Wallsend*, the Full Federal Court was asked to rule on the justiciability of a decision of the Federal cabinet to proceed with heritage listing, under the World Heritage Convention, of an area within the Kakadu National Park, a decision which was a step along the way to ultimately making it more difficult for Peko to conduct mining operations in the area.

There were a number of obstacles to review. First, this was clearly an exercise of prerogative power. No statutory power was involved. Second, it was a decision of the Federal cabinet which was challenged and, despite its central political importance, cabinet is not a legally or constitutionally recognised body. Third, the complex polycentric nature of the decision and its subject matter, involving the implementation of Australia's international obligations, arguably rendered it unsuitable for review. Finally, as this decision was in itself only one part of a process, it was unclear whether any direct and immediate effect on the rights of the plaintiff could be said to flow from the challenged decision of the cabinet.

All three members of the Court agreed that the decision was not immune from review merely because it involved an exercise of prerogative power rather than flowing from a statutory source. *CCSU* was applied in aid of this conclusion. As to whether cabinet decisions were in principle capable of being reviewed the judges seemed divided. Wilcox J would clearly not have denied review on this ground alone; however the position of the other two members of the court was less clear.

All members of the court agreed, however, that the decision was in this instance non-justiciable. They reached this conclusion on the basis of the complex policy nature of the decision, and its subject matter, which involved the implementation

of Australia's international obligations. In addition, it was held that the main ground of review argued, a denial of procedural fairness, had not been made out.

The current position in Australian law may thus be shortly stated. First, there are no longer any automatic *a priori* immunities from judicial review based upon either the nature of the power exercised or the nature and status of the decision maker. Australian courts have followed *CCSU* in rejecting any *a priori* immunity from review of decisions merely because those decisions were made in exercise of prerogative power. Similarly, Australian courts clearly accept that decisions attributed to ministers may be reviewable, and have extended that possibility to decisions made by a Governor or Governor-General or even by a Cabinet.

Nonetheless, judicial reluctance to review decisions in particular subject areas remains. It is perhaps not surprising that this reluctance is found primarily in subject matters formerly within the province of the Crown prerogative. Thus, the courts remain reluctant to intrude upon the exercise of executive powers in relation to defence, national and internal security, the conduct of foreign affairs and related matters. Equally, matters related to the administration of justice including judicial appointments, the exercise of the prerogative of mercy, the decision to enter a *nolle prosequi* or alternatively to enter an *ex officio* indictment, and the grant or non-grant of consent to a relator action are treated with great caution. Finally, to these two traditional categories of restraint, a third perhaps may be added, that is, decisions on matters of broad economic policy. These would include, for example, major budgetary decisions made by Cabinet.

It can be argued that even in these areas, the better view, older authorities notwithstanding, is that there are no complete immunities from review. Even accepting that view, however, it should be stressed that judicial review of decisions made in these subject areas remains extremely rare. The landmark decision in *CCSU* and the subsequent Australian decision in *Peko Wallsend* have not opened the gates to a flood of new litigation or sparked a new wave of judicial activity. Rather, development since that time has been sporadic at best.

Subject matter immunities

As noted above, *CCSU* itself clearly accepted that, whilst some exercises of prerogative power might be capable of review, there would remain some subject matters that were effectively immune from review. In 1992, Fiona Wheeler suggested that a steady erosion of these remaining immunities would occur, on a case by case basis.²⁸ This has proven to be a slow process, with relatively few matters of significance reaching a level in the court system where such issues might be argued. Of Lord Roskill's list, it is only in the case of the prerogative of mercy and national security that the position has arguably changed, and development appears confined, at least to date, to the United Kingdom cases.²⁹

In Australia, courts have not departed greatly from this suggested list of immune subject matters. Indeed, even where the relevant prerogative power

has been abrogated by statute, many Australian courts have been reluctant to take the view that statutory conferrals of power are necessarily limited, by the subject matter, scope and purpose of the statute if by nothing else. Rather, they have tended to suggest that a former 'prerogative' power remains of that nature, notwithstanding its new statutory basis and framework.

In *Coutts v Commonwealth*,³⁰ a majority of the High Court held that an airforce officer held office at the pleasure of the Crown and therefore could be dismissed at any time, without any requirement that the niceties of procedural fairness be observed. This was despite the fact that the dismissal occurred in peacetime and no issue of national security was raised. Significantly, it was also despite the fact that the power to dismiss was now contained in statute which appeared to provide for the right to be heard.

In *Macrae v Attorney-General (NSW)*,³¹ Kirby P, whilst ultimately holding that the appellants had been denied procedural fairness, stated that the fact that appointments of magistrates was now regulated by statute did not take those appointments out of the category of prerogative powers. However, he held, applying *CCSU*, that this did not make the exercise of the power non-reviewable.

In *Waters*,³² the same foundation led to the opposite conclusion. Here the applicant had sought to be appointed as Queen's Counsel in the Northern Territory. His application was ultimately rejected and he sought judicial review claiming a denial of procedural fairness. Again, the relevant power, historically flowing from the prerogative, was now based in statute. However, in the view of Olney J this made no difference and the claim for judicial review was dismissed on the basis of the old authorities.

It is interesting that each of these decisions was one in which denial of procedural fairness was argued. It may well be that this is the ground most likely to succeed where the exercise of a true prerogative power is challenged, as the absence of a statutory framework makes it harder to establish ultra vires grounds. However, in none of these cases did the provision of a statutory framework appear to render the decision in question more clearly justiciable.

A more nuanced approach is evident in some decisions, however. A good example is the decision of Gummow J in *Re Diftort*,³³ which examined the legality of an extradition order. Whilst ultimately finding against the plaintiff, Gummow J explicitly rejected the Commonwealth's argument that the subject matter of the decision, foreign relations, rendered the decision non-justiciable. To the contrary, he stated:

Insofar as the applicant asserts that the Commonwealth acted in excess of the executive power with respect to foreign relations . . . there is a justiciable matter . . . the matter touches foreign relations, but that does not place the matter, as to any part of it, beyond the cognisance of the court.³⁴

Thus, at least the ground of simple excess of power was potentially available to the plaintiff, though it may have been much harder to make out other grounds relating to the manner of its exercise.

The cases suggest therefore that the *CCSU*-led move towards a subject matter approach to justiciability, in place of a flat refusal to review exercises of prerogative power, is by no means an unequivocal move towards a more liberal approach to judicial review. In some cases, the result may paradoxically be that review is less easy to obtain where, for example, a statutory power has been exercised, but the subject matter of that power clearly relates to national security.

There are a number of criticisms that might be levelled at the existing subject matter immunities. In many cases, the immunities appear too broadly drawn, and it is difficult to see a common thread running through the decisions nominally involving the same immune subject matter. Whilst the case against judicial oversight of decisions to declare war or to deploy military force in a particular fashion might seem a strong one, it is more difficult to justify immunity of decisions such as the dismissal of a service person in peacetime, the situation in *Coutts*. The latter class of decision appears only tangentially related to national security.

In the case of decisions such as the grant or non-grant of consent to a relator action, the grant of honours, or the exercise or non-exercise of the prerogative of mercy, the immunity from judicial review seems little more than an uncritically accepted historical relic, for which there is scant remaining justification in the vastly changed constitutional landscape of the twenty-first century. The lines of authority dealing with judicial appointments are also open to criticism on this count. Cases such as *Waters* seem particularly questionable, as they simply rely upon existing authority and make little or no attempt to examine the relevance of that authority or its underlying principle to an evolving system of government. Equally, whilst 'non-justiciability' may be a convenient device to explain non-intervention into the budgetary processes of government, it will be argued below that there are other equally effective, and more finely calibrated, techniques to achieve this end.

Before reaching a final conclusion on these criticisms, however, it is important to return to the underlying rationales for the justiciability doctrine. The first of these, polycentricity, has already been dismissed. The deeper set of concerns, however, relate to the constitutional separation of powers and the limits of the judicial power. These must now be considered.

Non-justiciability, political questions and the separation of powers

The core of concerns as to justiciability lie in a sense that there are some decisions or classes of decisions which it is simply not appropriate for the courts to review. In some cases, this is because of the sensitivity to the courts of the decisions in question. Decisions relating to judicial appointments provide the best example as it may be seen to be particularly awkward, and potentially self-serving, for a court to have to rule on the process of appointment of one of its own members.

Similar concerns, albeit rather more remote, may underlie the refusal to examine the exercise of various prerogatives reposed in the Attorney-General, such as the power to grant consent to a relator action, to proceed by way of *ex officio* indictment, or to enter a *nolle prosequi*. These may involve the court ruling in relation to a matter which will later come before them for decision on the substantive issue, and the court may wish to avoid both the appearance and the actuality of prejudgment of that issue.

In other cases, such as national security matters, the concern may be that allowing any form of judicial intervention is simply not in the public interest, as it may fetter executive action at a time when rapid and decisive action is required in response to an external threat. Moreover, it is argued that, in such cases, it is peculiarly within the realm of the executive to judge what is in the public interest and to act accordingly. This rationale for non-intervention is also extended to cases involving foreign relations generally. In the United States, many of these concerns are addressed in the political questions doctrine. Brennan J of the American Supreme Court described 'political questions' as involving:

... a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁵

Finally, there are concerns sourced from understandings of the limits of judicial power. As mentioned earlier, exercise of the Commonwealth judicial power requires, at least, a constitutional matter for the court to address. Beyond this requirement, the separation of powers doctrine dictates that it is not for the courts to exercise executive power, that being solely the province of the executive government. To do so is for the court to enter a region where there are no 'judicially discoverable and manageable standards' to guide it, and where it travels beyond the legitimate judicial review role of supervising administrative process to the wholly illegitimate point of participating in that process.

It is the combination of these concerns which appears to underpin the remaining subject matter immunities. However, it should be recognised that these concerns are buttressed by the judicial tendency to call in aid old authorities, frequently predating *CCSU*, which are arguably of diminishing relevance in the altered constitutional landscape.

It may be that these concerns are overstated. It is undoubtedly the case that the separation of powers doctrine requires that courts refrain from exercising executive power and confine themselves to supervising its exercise in accord with the rule of law. But it is doubtful that such restraint must result in the total non justiciability of decisions made in these sensitive subject areas. As was

argued earlier in relation to polycentric decisions, the way forward may lie in recognising that judicial review contains its own internal self constraints built into the nature of the various grounds of review. With minor exceptions, such as some aspects of the unreasonableness ground, judicial review grounds are clearly concerned with the process of administrative decision-making and not with the substantive outcomes. This is evident both in the nature of those grounds, for example, was the process fair; were relevant matters considered, and so on, and also in the nature of the remedies granted, which seldom if ever determine the substantive outcome of the administrative process. Thus it is possible for courts to undertake judicial review of decisions made in these sensitive areas without thereby transgressing into constitutionally inappropriate areas.

Criticisms of the justiciability doctrine

A number of criticisms may be made of the doctrine that there are remaining classes of decisions which are non-justiciable. First, it is evident that the doctrine constitutes a limit, if not an affront, to the rule of law. Simply put, it is a doctrine that there are at least some areas of executive decision-making which are immune from judicial supervision in even the most attenuated of forms. This is a conclusion which ought to be assessed in terms of modern constitutional appropriateness, rather than simply accepted on the basis of authority which reflects a very different understanding of the relationships between executive, judiciary and citizens. Sadly, far too many of the cases simply reflect the dead weight of past authority and lack any examination of underlying principle.

Second, judicial acceptance that there are immune subject matters opens the possibility of unchecked abuses of power. In this, a new formalism, wherein immunity is based upon subject matters, fares little better than the formalism based upon the sources of power which was rejected so emphatically in *CCSU*. It is not to the point to respond that abuse will be rare; experience suggests that the possibility of judicial review is at least one way of ensuring that this is so. Equally, it is not to the point to suggest that political accountability provides a satisfactory alternative to judicial review in such cases. Rather, it may well be that it is precisely in the case of the unpopular plaintiff for whom the political process is least likely to prove a remedy that the risk of misuse of power is greatest. The cases of elected governments losing office due to disrespect of the rights of a few unpopular applicants for the prerogative of mercy are few indeed.

Third, it is questionable whether the separation of powers requires that some classes of decision, such as those involved in defence or national security, be immune from review. This is because, as noted in the earlier discussion of polycentricity, judicial review does not call upon the courts to exercise these powers for themselves, to declare war or send the armed forces to particular destinations. The separation of powers itself ensures, by means of the legality/merits distinction, that the courts can play no such role. Moreover, the very nature of

the grounds of review which constitute judicial review ensure that judicial intervention, even in the absence of justiciability constraints, would be rare indeed.

This last observation leads to a final and central critique. It is arguable that the justiciability doctrine is simply redundant. The judicial review process already contains within itself sufficient restraints, such as the requirement for *locus standi*, to ensure that inappropriate judicial intervention in the administrative process is restrained. Most crucially, the various grounds of review are themselves shaped and constrained by the distinction between legality and merits. Thus, it can be argued that there is simply no need for an additional freestanding doctrine of justiciability.³⁶ On this approach, non-justiciability might be seen as a convenient judicial short hand, but at the cost of a lack of transparency in explaining a decision not to grant review.

Whatever the merits of this argument, it is evident that non-justiciability is very much a part of current Australian administrative law.

Standing

Roger Douglas

Standing has been described as a ‘metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies’.¹ A finding that a person lacks the requisite interest means that they are not entitled to an order in their favour even if they have otherwise shown that they would otherwise be entitled to orders in their favour.

The law which governs standing in public law cases is ‘far from coherent’.² ‘The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is sufficient in one case may be less than sufficient in another’.³ The law is complex, and reflects the semi-independent development of the different strands of law which make up Australian public law. The ‘rules’ governing standing vary, depending on whether the person seeking standing is an Attorney-General (Part 1); a person seeking an injunction, a declaration and, it seems, statutory orders of review (Part 2); an applicant for any of the public law writs of certiorari, prohibition, quo warranto and habeas corpus (Part 3); or an applicant for relief pursuant to a statutory scheme for judicial review or review on the merits (Part 4).

The standing of the Attorneys-General

Attorneys-General (whether state or federal) have a statutory right to intervene in matters arising under the Constitution or involving its interpretation.⁴ Under the general law, Attorneys-General normally have standing, *ex officio*, to seek review of administrative decisions made by bodies within their jurisdiction.⁵ They usually do so because they are seeking to uphold the law of their jurisdiction.⁶

Attorneys-General may also allow someone else to sue in their name.⁷ In these cases, the case is still brought in their name, but is described as being ‘ex relatione A’, where A (who is called the relator) is the person who is suing. In such cases, the Attorney-General has ultimate control of the action.⁸ The Attorney-General can terminate the case at any time and may settle on any terms. However, subject to such decisions, the person on whose behalf the case is brought is the de facto litigant, and the Attorney-General’s agreement to act will normally have been conditioned upon the relator’s having undertaken to pay costs in the event of the application failing. In deciding whether to bring an action at another’s request, the Attorney-General’s discretion appears to be absolute. Neither the decision to grant a fiat, nor a decision to refuse, is justiciable.⁹

When Attorneys-General participate in litigation they do so in their own right and not on behalf of the governments of which they are members. This is the case whether they act on their own initiative, or whether they are acting on the relation of another party. In *McBain*, Gaudron, Gummow and Hayne JJ considered that this precluded the Attorney-General from participating in litigation both as an intervener and as lender of his fiat. Kirby J, however, was prepared to accept that the Attorney-General could act in two different capacities.¹⁰

If Attorneys-General were inspired solely by a desire that the law be upheld, the Attorney-General’s powers would represent an important mechanism for the enforcement of public rights. But Australian Attorneys-General are typically active members of the government. Their decisions tend to be influenced by politics as well as law. They rarely initiate public law litigation, and while they occasionally lend their fiat to collective interest litigation, this may be only after a lengthy delay, and in some cases, agreements may be revoked under political pressure.¹¹ The High Court has treated this as grounds for favouring a liberalisation of the standing rules.¹²

Injunctions, declarations and (probably) mandamus and orders under the Judicial Review Acts

There are restrictions on who is entitled to seek declaratory or injunctive relief in cases where administrators have allegedly erred. A convenient starting point is *Boyce v Paddington Borough Council*,¹³ where Buckley J held that there were only two circumstances in which a private individual could sue in relation to the performance of public duties:

first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

However, Australian standing law is complicated by the coexistence of cases in the Boyce tradition and cases which come close to suggesting that there are no longer any such restrictions.

High Court authority

In *Australian Conservation Foundation v Commonwealth*,¹⁴ the High Court considered whether it should continue to follow *Boyce*, and if so, what the *Boyce* test implied. The Australian Conservation Council (ACF) sought to challenge the validity of decisions under foreign currency regulations giving approval to a developer to import the capital needed to construct a resort. It contended that a condition precedent to the granting of permission was that a proper environmental impact study be completed, and that this had not been done. It no doubt hoped that the decisions would be declared invalid, in which case the development would at least be delayed, and possibly permanently derailed. The defendants raised the standing issue as a preliminary point before Aickin J who found that the ACF lacked standing.

On appeal, the Full High Court dismissed the appeal (Murphy J dissenting). The majority (Gibbs J, Mason and Stephen JJ) agreed with Aickin J that there was no reason why the question of standing should not be dealt with as a preliminary issue, although it also recognised that a court might choose to exercise its discretion by dealing with the matter on the merits without first resolving the standing issue.¹⁵ It pointed out that, while courts possessed a discretion in relation to when they might determine the standing issue, they did not possess any discretion in relation to whether to find that plaintiffs possessed the requisite standing. It agreed that it was not appropriate to alter the law and adopt something akin to an open standing rule.

Broadly, it followed *Boyce*, but it rejected the requirement that the plaintiff suffer damage ‘peculiar to himself’, insofar as this implied that the damage must be suffered by the plaintiff and no-one else. Instead Gibbs J considered that the requirement should be that the plaintiff should have ‘a special interest in the subject matter of the action’, this being the way in which *Boyce* had been understood in both English and Australian decisions.¹⁶

This left open the question of how ‘interests’ were to be conceptualised. In a much quoted passage, Gibbs J stated that:

... an interest for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance, or a debt for costs, if the action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.¹⁷

Stephen J used slightly different language, but his reasoning was similar.¹⁸ Mason J acknowledged the difficulty of specifying which interests would suffice to ground standing. He considered that ‘social or political interests’ could ground standing,¹⁹ but he agreed that ‘a mere belief or concern, however genuine, does

not in itself constitute a sufficient locus standi in a case of the kind now under consideration . . .²⁰

Implicit in the Gibbs' language was the assumption that the ACF's interest was a 'mere intellectual or emotional' one. The fact that it was an incorporated association with particular objectives was irrelevant. If a private individual lacked standing, 'a body corporate formed to advance the same beliefs is in no stronger position'.²¹ Stephen J broadly agreed.²² Gibbs J considered that even if its members had a special interest, that might not be enough to ensure that the ACF had standing.²³ The making of submissions in relation to the decision could not confer standing unless the relevant law revealed an intention that the making of submissions should give rise to further rights. The relevant legislation and procedures conferred no such right.²⁴ Gibbs J concluded that the ACF did not have a special interest in relation to the proposed development, and that it certainly did not have a special interest to challenge the foreign currency decision. Stephen and Mason JJ agreed.

The decision meant that a person or group could have standing if it had a special interest in the subject matter of the litigation. The interest did not have to be a legal interest, but not all interests would suffice to ground standing. The sufficiency of an interest was to be determined objectively. Whether an interest would ground standing would depend on a number of variables: on the distinctiveness of the plaintiff's interest; on the directness of the relationship between the relief sought and the interest, and, implicitly, on whether the interest belonged to a class which qualified for legal protection. *ACF* decided that the ACF's interest was not great enough, partly because the relief being sought did not affect members of the ACF in a manner sufficiently different to the way in which it affected other members of the public, and partly because the members' interest was, in any case, a 'mere intellectual or emotional' one.

In *Onus v Alcoa*,²⁵ the Court applied and developed its reasoning in *ACF*. The plaintiffs, members of the Gournditch Jmarra people, sought injunctive relief to restrain Alcoa from carrying out works in an area rich in Aboriginal relics. They argued that the proposed works were prohibited by the *Archeological and Aboriginal Relics Preservation Act 1972* (Vic) (the Relics Act). They contended that they had standing to sue. First, they contended that they had rights under the Relics Act. Secondly, they contended that even if they did not, they had a special interest in the proper enforcement of the Act. The first argument failed: The legislation was such that it could not be construed as intended to confer rights on Aborigines in particular. The second argument succeeded.²⁶ The plaintiffs represented a small group. They used the land on which the relics were to be found, and had used the relics in the process of passing on group knowledge. The interests they were seeking to protect were of particular significance to members of that group.²⁷ The case could be distinguished

both in terms of weight and, in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection.²⁸

The directness with which the plaintiffs' interests were affected was such that the case could be distinguished from *ACF*. But why did they carry greater weight than environmentalists' interests, and why were they not merely intellectual or emotional?

Gibbs CJ and Stephen J pointed out that the mere fact that an interest was emotional or intellectual did not mean that it was insufficient, provided that it would otherwise be sufficient. Here the plaintiffs' claim was they were 'custodians of [the relics] according to the laws and customs of their people and that they actually use them'.²⁹ But Gibbs CJ, Stephen and Brennan JJ all seemed to treat the 'cultural and spiritual significance' of the relics as *one* of the reasons why the plaintiffs had standing.³⁰ Yet if intellectual and emotional interests cannot suffice to ground standing, it is not clear why they be capable of helping to ground standing, unless 'cultural and spiritual' interests are distinct from 'intellectual and emotional' interests, and it is certainly not clear how spiritual interests differ from emotional ones. Wilson J's attempt to distinguish the interests from 'mere intellectual and emotional interests' is only partly convincing. He described the plaintiffs' interest as 'deeper and more significant than a mere emotional attachment',³¹ but the basis for this conclusion is unclear. Is the criterion the depth of the attachment of those seeking standing (in which case, subjectivity rears its impermissible head), or is it to be determined objectively, and if so, how?

A partial answer was suggested by Stephen J who favoured an objective test based on community values:

Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a greater proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalised, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be [sic] found standing to sue.³²

The assumption that courts *necessarily* reflect community values is questionable. But his Honour's observation can fairly be treated as a worthy aspiration, and as a tacit acknowledgment that the process of assigning weights to interest involves making value judgments. Arguably, he was articulating what was implicit in the other judgments. If so, it is not of fundamental importance that the interest in question is 'intellectual or emotional'. Rather, what matters is whether weight should be given to the interest. Weight will reflect judicial assessments of community values, guided by law, evidence, guesswork and possibly wishful thinking. If so, decisions on standing will sometimes appear a little arbitrary, but at least their basis will be clear.

In the years following *Onus* a series of Federal Court and state Supreme Court decisions appeared to depart in several important respects from *ACF* and even, perhaps, from *Onus*. None of these went on appeal to the High Court, but in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,³³ the majority joint judgment contained a somewhat elliptical suggestion that the time had come to abandon the standing requirement. The plaintiff

contended that a competitor whose market overlapped closely with the plaintiff's had been improperly subsidised from public funds so that it was able to offer the relevant services at below cost price, with the result that the plaintiff would be unable to compete. The High Court held that the plaintiff's economic interest in the relief sought was sufficiently direct and substantial to ground standing. It was to be distinguished from 'competitor' cases where the nexus between the decision at issue and the plaintiff's interest was far more tenuous. In this respect the decision involved no more than a relatively straightforward application of established principles to the facts. McHugh and Hayne JJ emphasised that their decisions were based on the traditional law of standing.³⁴

But dicta in the joint judgment of Gaudron, Gummow and Kirby JJ suggest that had the issue arisen for resolution, they would have concluded that under the general law there was no superadded standing requirement in relation to who might seek injunctions to restrain people from acting in breach of a public duty:

In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. . . .

The result would not be a unique situation. It will be recalled that, in this Court, there is a body of authority that, even in the absence of a legal interest, 'a stranger' to an industrial dispute has standing as a prosecutor to seek prohibition . . .³⁵

They noted that this approach had been rejected in *Gouriet v Union of Post Office Workers*³⁶ and that it had not been the basis for the plaintiffs' case. They did not address the fact that it had also been rejected in *ACF*. But they did recognise that there might be cases where legislation would impose a standing requirement:

Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of competitors or other third parties. An example is the special but limited legislation considered in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* for judicial review of successful applications for registration.³⁷

The implications of this dictum are unclear.³⁸ Insofar as it suggests that legislatures can limit the right to seek judicial review, it sits oddly with the High Court's constitutionally entrenched administrative law jurisdiction. If (as seems to be the case) parliament lacks the power to prescribe inflexible time limits within which applications for constitutional writs and injunctions must be made,³⁹ it is difficult to see how it could have the power to legislate to restrict the range of people who may apply to the High Court for prohibition, mandamus or injunctions in the event of jurisdictional error by an officer of the Commonwealth.⁴⁰

It could, of course, limit standing to seek judicial review in the Federal Court or the Federal Magistrates Court. Given the inconsistent and opaque nature of the three major High Court decisions, one might have expected that litigants would have provided the Court with a test case in which it could have resolved these issues. The marginal importance of the standing rules is evidenced by the fact that, almost a decade after the decision, the High Court has not yet had occasion to do so.

Applying the rules

There is a general judicial consensus that the law relating to standing has become increasingly relaxed.⁴¹ While the High Court is partly responsible for these developments, Federal Court and state Supreme Court decisions have independently contributed to the development of standing law, and in the area of environmental decision-making, there are at least some decisions which are, in some respects, difficult to reconcile with *ACF*. It is irrelevant that most of these are decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or the *Judicial Review Act 1991* (Qld). The standing requirement under the Judicial Review Acts are almost identical to those governing applications for equitable remedies (see below, pp. 169–70). The cases therefore evidence a judicial tendency to liberalise the standing rules governing both traditional and modern remedies.

Orthodox decisions

Many superior court decisions have involved relatively straightforward applications of the law as developed in *ACF* and *Onus*. Some decisions have denied standing on the basis of the *ACF* principles. Examples include decisions that the nexus between the relief sought and the applicant's interests was too tenuous to ground standing,⁴² and decisions that ideologically motivated plaintiffs were not affected by a decision any more than were those of ordinary members of the public.⁴³ Conversely, the *Boyce* principle that those whose *rights* are affected by a decision have standing to seek review of that decision has been the basis for decisions that plaintiffs who have acquired a right to participate in a formal decision-making process have standing to seek review of decisions which have deprived them of that right, or which have deprived them of the correlative right to participation in a properly conducted process.⁴⁴ Non-proprietary interests shared by relatively small numbers of people have sufficed to ground standing to seek particular relief.⁴⁵ Following Gibbs J's dictum that people might have an interest in *particular* environments, standing has been granted to people concerned about allegedly unlawful threats to particular environments, and to groups representing them.⁴⁶ In land rights cases, where the standing rule is slightly less generous than it is for judicial review cases, standing has nonetheless been afforded to people who have used the relevant land for recreational purposes.⁴⁷

But, to the satisfaction of many commentators,⁴⁸ some superior courts have taken a more liberal approach to that taken in *ACF*.

Organisations' interests

In *ACF*, the High Court treated the standing of the ACF as dependent on the standing of those interests it represented. If its members lacked standing they could not overcome their problem by incorporating. Even in the 1990s, there were cases where courts carefully differentiated between members' interests and organisational interests.⁴⁹

In other cases, courts seem to have been less concerned with whether members' interests could ground standing. In *Ogle v Strickland*⁵⁰ the question was whether two clerics had standing to seek judicial review of a decision allowing the importation of an allegedly blasphemous film. The Full Court considered that the plaintiffs' vocation and status as priests within organised religious groups sufficed to give them a special interest in decisions permitting the circulation of blasphemous material. Yet, as Sackville J pointed out in *North Coast Environment Council Inc v Minister for Resources*:

If an organised group regards the preservation of the environment in general, or of an area in particular, to be of profound cultural and spiritual significance, how does their standing to challenge decisions threatening the values to which they adhere, differ from the position of the applicants in *Ogle v Strickland*? And if the distinction between a vocational interest in a set of values and an interest based on a deeply held but non-vocational commitment to those same values is unsound, why should organisations genuinely committed to the preservation of the environment be denied standing to complain of (or to claim reasons for) decisions that offend their values? In the end, I do not think it necessary to answer these questions in this case, but in my opinion *Ogle v Strickland* poses them.⁵¹

In *Australian Conservation Foundation v Minister for Resources*,⁵² Davies J held that the ACF had standing to seek review of a decision to licence the export of woodchips which were to be obtained by logging forests which were part of the National Estate. He also found that a member of the ACF (who had been joined as an applicant) and who owned property adjacent to, and likely to be affected by, the relevant developments, lacked standing to challenge the licensing decision. The latter decision raises questions about the former one. If the latter applicant lacked standing, it is difficult to see how any member of the ACF could have had standing, and if that were the case, under *ACF* (1980), the ACF could not have standing.

Davies J distinguished *ACF*: it applied to a local matter and not the National Estate; support for environmental causes (and indeed the ACF) had increased, and there was now a community expectation that organisations like the ACF should have standing to litigate to protect the environment. To deny standing would be 'to deny an important category of modern public statutory duties an effective procedure for curial enforcement'.⁵³ The ACF was well-equipped to

represent environmental concerns. It was Australia's major national conservation organisation. Its activities had received considerable government support. It had relevantly lobbied and researched. Substantively, his argument is persuasive, but legally, his reasoning is difficult to reconcile with *ACF*.⁵⁴ But in practice *ACF* (1989) prevailed.

In *North Coast and Tasmanian Conservation Trust Inc v Minister for Resources*,⁵⁵ Sackville J followed *ACF* (1989) and did not advert to whether and why organisations could have standing even if their members did not, and in *Right to Life Association (NSW) Inc v Secretary, Commonwealth Department of Human Resources*,⁵⁶ the trial judge and Full Court both seem to have assumed that the Association could have had standing regardless of its members' standing, if it had demonstrated that the cause for which it stood had borne a sufficient relationship to the decision it wished to attack. In *North Queensland Conservation Council Inc v Executive Director, Parks and Wildlife Service*,⁵⁷ the issue was irrelevant, given Chesterman J's reconceptualisation of the standing requirements. But the *Right to Life* case indicates limits to the degree to which organisations have standing to pursue their goals by litigation. Even if they can establish standing without the need to rely on their members' standing, they must be able to demonstrate a nexus between their objectives and activities and the relief which they are seeking.

Sufficient interests

Since *ACF*, courts have continued to struggle with the question of what constitutes a sufficient interest to ground standing. In effect they have abandoned the 'intellectual or emotional' test, notwithstanding continued citation of Gibbs J's dictum. Instead, they have used a variety of other tests.

Standing based on the importance of the interest

Stephen J's recognition that standing issues ultimately require judicial assessments of whether interests warrant protection has been the basis for a number of decisions which, on their face, are not readily reconciled with *ACF* or even *Onus*. In *Ogle v Strickland*,⁵⁸ the question was whether two clerics had standing to seek judicial review of a decision allowing the importation of an allegedly blasphemous film. Fisher J considered that the issue involved a value judgment, the question being whether the priests' vocational and professional concerns should be sufficient to give them standing.⁵⁹ He decided that it was.

An alternative approach is that of Davies in *ACF* (1989), who cited (thinly evidenced) public perceptions and community expectations as grounds for his conclusion that the *ACF* had standing to seek judicial review of threats to Australia's natural environment. Implicit in his reasoning is that the *ACF*'s interest deserved to be treated as more than a mere emotional or intellectual one.⁶⁰ Later cases, however, appear to contain references neither to judicial assessments of what is important, nor to 'community values'.

Is the interest consistent with relevant legislative purposes?

A second approach has been to examine the directness of the relationship between the applicant's purposes and relevant legislative policies. Purposes consistent with those policies may be the basis of a finding that the applicant has a sufficient interest; purposes inconsistent with the policy will not. This approach overlaps with the requirement that there be a reasonably direct relationship between the relief sought and the interest asserted, but it involves different issues. A close nexus between the relief sought and the plaintiffs' interests does not necessarily mean that the relevant legislation seeks to protect those interests.

The legislative purpose approach bears a close relationship to the 'community values' approach, legislation constituting a guide to community values, but unlike the 'community values' approach, it seems to assume that an interest which may be sufficient to ground standing in one legislative context may not be sufficient to ground it in another. It is consistent with aspects of the High Court's analyses in *ACF* and *Onus*, save insofar as it seems to replace questions as to whether the interest is intellectual or emotional with the question of whether it is sufficient, given the relevant legislative scheme. It is also consistent with the majority's observations in *Bateman's Bay* in relation to the relevance of legislation to standing questions (but sits uneasily with the majority's reservations about standing rules).

The legislative purpose requirement seems to have underpinned both standing decisions in cases involving environmental issues, as well as standing decisions in cases where people with a direct economic interest in doing so, have sought to challenge decisions made under legislation whose purpose is clearly not the protection of these economic interests.⁶¹ The principle seems to have become even more firmly embraced following the Full Federal Court's decision in *Alphapharm*.⁶² While *Alphapharm* was a decision about standing to seek administrative review, it has subsequently come to be applied to cases involving standing to seek judicial review under the Judicial Review Acts. In *Right to Life*,⁶³ Lindgren J based his decision that the Right to Life Association lacked standing in part on the fact that 'the moral and ethical concern of the applicant is not a public interest with which the Act evinces a concern'. This consideration also influenced the Full Court, which dismissed the Association's appeal. Gummow J observed that 'Section 5(1) of the ADJR Act operates in an ambulatory fashion over a wide area of federal law. Questions as to whether a particular applicant is "aggrieved" within the meaning of that provision arise in the context provided by the "enactment" under which the administrative "decision" in issue was made'.⁶⁴ Lockhart J based his decision in part on the fact that the basis for the plaintiff's claim did not relate to matters relating to the 'quality, safety, efficacy and timely availability' of the drug in question or of any other drug, and that the objects of the Association did not relate to the objects of the *Therapeutic Goods Act*.⁶⁵

But the 'extended' *Alphapharm* principle itself has proved controversial. Its implicit assumption that pieces of legislation can be treated as free-standing and independent of each other seems problematic, and a number of Federal

Court judges have rejected arguments that it has bearing on whether people have standing to seek judicial as opposed to administrative review.⁶⁶ While the authority of several of these observations has been qualified by the High Court's decision in *Allan*,⁶⁷ the High Court's decision does not resolve the question of whether and how *Alphapharm* applies to applications for judicial review.

Is the interest consistent with fundamental legal policy?

Several judges have suggested a third consideration to be taken into account in determining whether an interest is sufficient to ground standing, namely whether the interest is consistent with fundamental legal values. This consideration obviously overlaps with the 'legislative purpose' consideration discussed above, but sometimes sits uneasily with it. *Sackville and Gummow JJ* have both expressed doubts about the decision in *Ogle v Strickland* – the former on the grounds that it involved the privileging of Christianity and ran in the face of a legal policy contrary to such treatment, and the latter on the grounds that it ran counter to the common law's policy of protecting civil liberties.⁶⁸ But if *Alphapharm* applies to judicial review, one might argue the regulations disclosed a legislative intention that parties committed to keeping blasphemous literature out of the country should have standing. Moreover the assumption that law is a coherent system of rules, grounded in principle is questionable, and the law of standing stands as vivid testimony to this. In any case, no decision has turned on the inconsistency between the interest asserted and general legal policies, and Gummow J's privileging the common law over the criminal law was rejected in *Purcell v Venardos*,⁶⁹ where Derrington J considered that a *victim* of a crime had standing to seek review of a magistrate's decision not to commit a defendant to trial.

Precedent

The case law illustrates the way in which successive cases can quickly transform conceptions of what constitutes a sufficient interest. Analogies and distinctions drawn between consecutive cases can quickly have a cumulative effect such that the proposition for which a later case is authority may be almost impossible to reconcile with the law which was the basis for an earlier decision. *Onus* was (rightly) distinguished from *ACF* on the basis of the directness with which the plaintiffs' interests were affected, but the Full Court decision in *Ogle v Strickland* was based partly on the resemblance between the priests' interests in *Ogle* and those of the plaintiffs in *Onus*. In two short steps, courts had reached a conclusion which was difficult to reconcile with *ACF*.

The same can be said of environment cases. In *ACF* (1989) Davies J distinguished its facts from those in *ACF* (1980), and set out a number of circumstances which might justify the conclusion that an organisation had standing to sue, even if most of its members might have had no more than an emotional or intellectual interest in the decision at issue. In *North Coast*, Sackville J considered that standing could be grounded on the existence of similar circumstances, which,

he recognised, could also bear on whether the organisation could adequately represent those interests. In *North Queensland*,⁷⁰ Chesterman J built on these decisions (and even on *ACF* (1980)) and concluded that:

The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient.⁷¹

His decision was followed in a subsequent Queensland decision.⁷² So *ACF* (1980) has been reinterpreted to the point where it is regarded as no longer mandating requirement that plaintiffs have standing, so long as their claim is not an abuse of process (in which case it could be struck out regardless of whether the plaintiff had standing). Yet there had not been even a hint in *ACF* (1980) that this had been a problem with the *ACF*'s claim.⁷³

Standing to seek public law writs

There is considerable authority for the proposition that a 'stranger' may apply for a public law writ of certiorari (for jurisdictional error), prohibition or habeas corpus. There is less agreement as to the meaning of these dicta, and as to their current status. Aronson et al have argued that 'stranger' does not mean 'anyone'. Rather 'stranger' means someone who was not a party to the relevant dispute, but who nonetheless had a material interest in the outcome. They point out that in all the relevant cases, the interest of the relevant 'stranger' was also an interest which would have sufficed to ground standing under the rules governing standing to seek 'equitable' relief. Their scepticism seems to have been echoed by Aickin J in *ACF*.⁷⁴

Stephen J, however, accepted that strangers (broadly construed) could have standing to seek public order writs,⁷⁵ and in subsequent High Court cases there has been almost unqualified support for the proposition that strangers (in the broad sense) have standing to seek prohibition, certiorari (for jurisdictional error and possibly error of law on the face of the record), habeas corpus and (insofar as it is still available) *quo warranto*.⁷⁶

Despite the generous standing rules governing applications for certiorari and prohibition, it is rare to find cases where these remedies have been sought by parties which lacked standing to seek equitable remedies. In *Canberra Tradesman's Union Club Inc v Commissioner for Land and Planning*,⁷⁷ Crisp J held that a plaintiff which lacked standing under the ACT ADJR Act nonetheless had standing to seek certiorari to quash a decision allegedly flawed by jurisdictional error. But this appears to be the only recent case in which a court has found that a plaintiff had standing to seek some remedies, but not others. In the absence of standing requirements, there are evidently other filters which serve as the functional equivalents of these requirements.

Standing is, however, a requirement for applicants for mandamus, who must be able to demonstrate an interest in the performance of the relevant duty.⁷⁸

Legislation

Legislation governs both standing to seek judicial review and standing to participate in administrative decision-making processes. The most important legislative standing rules bearing on judicial review are those contained in the Judicial Review Acts. These provide that a 'person aggrieved' by the relevant decision, conduct or failure to act may apply for an order of review. Despite the different terminology, the requirement has been interpreted as almost identical to the 'special interest' requirement.⁷⁹ While one encounters occasional suggestions that the Review Act test might differ from the general law test, these suggestions have never been developed, and no case has ever turned on the existence of the differently worded tests.⁸⁰

There are, however, some contexts in which legislation has liberalised standing requirements considerably, especially in the area of planning law.⁸¹ Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) means that environmental activists and environmental groups will usually have standing to seek orders of review of decisions under the Act, and similarly broad rules govern standing to seek orders of review of decisions under the *Hazardous Waste (Regulation of Exports and Imports Act 1989)* (Cth): s58A. The *Trade Practices Act 1974* (Cth) allows 'anyone' to take action in face of a breach of the provisions of the Act, and 'anyone' has been interpreted to mean anyone, regardless of whether they have a special interest.⁸²

Standing to participate in *administrative* decision-making is governed by the legislation which creates the right to participate. Typically, standing is given to parties whose 'interests are affected', and this test has been treated as similar to the tests governing applications for declarations, injunctions and statutory orders of review.⁸³ In some important respects, the administrative appeal standing rules are more generous. For instance, the AAT legislation provides that both incorporated and unincorporated associations have standing if their purposes are such as to indicate a concern with the relevant decision, provided that the group and the relevant purposes were formed and ratified prior to the decision.⁸⁴

But in some respects, standing to seek administrative review is restricted. First, standing rules may be expressed narrowly so that the only people with standing are those who sought a particular benefit,⁸⁵ or members of a narrowly defined class.⁸⁶ Secondly, decisions to refuse benefits may be reviewable, but not decisions to grant them. The practical effect of this is almost identical to a rule that limits the right to seek review to those who are denied the benefit, although an interest group might conceivably want to intervene in a case where it considers a benefit ought to have been granted.⁸⁷ Thirdly, even when the test is whether a person's interests are affected, courts may interpret this phrase in the light of its legislative context. This is particularly likely to be the case if

standing to participate in an administrative process would delay or complicate decision-making in circumstances where it is desirable that decisions be made expeditiously and economically, and in cases where the would-be appellant's interest is unrelated or contrary to the achievement of the evident purposes of the Act.⁸⁸

There is something rather surreal about the standing rules. *ACF* continues to be cited, while being distinguished to the point where its demands are treated as largely irrelevant. The High Court has dropped hints to would-be public interest litigants that the relevant law might be up for grabs once more, but courts and litigants have proved remarkably reluctant to make any reference to this invitation. Various criteria are used to justify conclusions that interests are capable or not capable of grounding standing in particular contexts, but it is not clear which of the different criteria are to apply. Different standing rules govern applications for public law orders as distinct from equitable ones, but little turns on this. Legislation sometimes creates generous standing regimes, and sometimes seeks to limit standing, especially in relation to administrative review.

Some of the *doctrinal* confusion disappears once one distinguishes between the 'private interest' and the 'collective interest' cases. In the former cases, the standing rules tend to operate in a relatively straightforward manner. It may not always be clear whether an interest is sufficiently directly affected, and whether it is too remote from the purposes of the relevant legislation, but the concepts which underline the decisions are typically straightforward. The 'collective interest' cases are straightforward in a different sense. Once one forgets *ACF*, the authorities are reasonably consistent. The *North Queensland* test comes close to constituting the *de facto* test for standing, although cautious judges may prefer to use the multi-factorial approach developed in *ACF* (1989) and *North Coast*.

Not all interest groups have standing. The requirement that the body have an interest consistent with the relevant legislation (insofar as there is such a requirement) sets some limits to 'collective interest' litigation, but this is a requirement which can be applied reasonably easily.

But while the law may be relatively clear, its rationale is not. In a sense this does not matter. Cases almost never turn solely on standing issues, and the functions served by the standing requirements can also be served by a mixture of economic deterrence, broadly defined administrative discretions, and discretionary remedies (especially where third party expectations are threatened). Just occasionally, standing rules may perform functions which other rules cannot: they may enable the early termination of proceedings which would otherwise give rise to delay and expense. But their logic is that they may also involve the termination of litigation which would reveal violation by public officials of their legal duties. They therefore matter, not because they make a detectable difference, but because they reflect which of two conflicting elements of administrative law is prevailing at any given time, and this is something in which jurists have a deep intellectual and emotional interest.

Reasons for administrative decisions: Legal framework and reform

Marilyn Pittard

To what extent are decision makers obliged to provide reasons for their administrative decisions? Should they be obliged to give reasons in all circumstances and for all decisions? Two decades ago, the then-Chief Justice of the High Court of Australia, Gibbs CJ, stated in the leading case of *Public Service Board of New South Wales v Osmond*:¹

The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done *after* the decision has been made.

In 2006, by way of contrast, the Court of Appeal in the United Kingdom in *Phipps v The General Medical Council*² approved as applicable to administrative decision-making a statement in *English v Emery Reimbold and Strick Ltd*:³

[J]ustice will not be done if it is not apparent to the parties why one has won and the other has lost.

These statements reflect different approaches to the question of whether administrative decision makers and tribunals should provide reasons to the person affected by the decision. In the first statement by Gibbs CJ, the view is that providing reasons *after* a decision is made cannot ensure fairness in the decision which has already been made. The focus of the second statement by the UK Court of Appeal is the individual affected by the decision and his or her need to see that justice has been done.

To a certain extent, these different approaches explain the differing decisions of the courts in relation to requiring, or not, administrative decision makers to provide the person affected by the decision with reasons for it. Fairness may be achieved through ensuring fair procedures during the decision-making process;

but once the decision is made, that fairness of process does not dictate that reasons be given. Sometimes an opportunity for disclosure during the process may be more important than knowing the reasons for decision. In *Fayed's* case,⁴ the court noted that it is more important to know what the decision maker might be thinking and have an opportunity to meet any points before a decision is made, rather than only having the opportunity later to know why an adverse decision was made. In addition, *justice* may be done by making it clear why the decision has been made, after the outcome has been communicated to the person affected. But does justice demand that reasons be given for all decisions?

These differing policy approaches are also reflected in the preparedness of parliaments in Australia to legislate to compel the decision maker to provide reasons in some instances, but to make no such requirement in others, with the legislative silence about reasons necessitating the application of the common law with all its vagaries.

This chapter explores and analyses the circumstances in which the legislature has decreed that reasons should be given by administrative decision makers and the attitude of the common law courts to imposing on decision makers a duty to give reasons where the statute does not require reasons to be given. Divergences between the approaches in Australia and the United Kingdom are explored. A modern approach is outlined in the chapter as a possible framework for when a duty should arise. First, some of the specific policy arguments in favour of, and in opposition to, the requirement to give reasons are discussed.

The role of reasons

Giving reasons for decisions performs several roles and the benefits may be both private, that is benefiting the particular individuals or parties concerned, or public, where the benefits go beyond those immediately affected by the decision.

The private benefits

A private benefit is that the persons affected are informed clearly why the decision, especially an adverse one, is made. The individual's ability to make an informed decision about whether to challenge the decision will often depend on understanding the reasons; this may come from the decision maker's explanation of the reasoning. The possible legal basis for any challenge to the validity of the decision may only be revealed in the actual reasons. Was an error of law revealed in the reasons? Did the decision maker take relevant considerations only into account? Was the decision made for a proper purpose? Was there evidence, or sufficient evidence, for the decision? Was the governing legislation correctly interpreted? Or applied? If expert opinions were required, were there plausible reasons for preferring one expert's opinion to that of another expert?

Where the statute confers a right of appeal, the person affected may be hard put to actually exercise that right where the reasons for decision are not apparent: thus appeal rights might be rendered theoretical if reasons are not given. Similarly, where the decision maker is amenable to judicial supervisory review, that review may not be possible without the reasons being apparent and disclosed.⁵ Depending on the circumstances where reasons are not disclosed, the only ground for review may be the ground of unreasonableness: was the decision so unreasonable that no reasonable decision maker would have reached that conclusion? Such a ground is usually not readily available.⁶ Sometimes courts draw inferences that there was no 'good reason' for the decision where no reasons are given.⁷

The converse of the argument that reasons are relevant to appeal rights or judicial review is that, where no errors of law are disclosed in the reasons, the parties may be satisfied that the decision maker has properly made the decision. Fulfilment of standards of justice and fairness may be enhanced by provision of reasons. These aspects go largely to the impact on the parties, including their confidence in the decision maker and arguably the more ready acceptance, if not understanding, of the decision.⁸ The feeling of grievance may be reduced where persons know why the decision is made.⁹

The public benefits

The wider public may benefit in terms of better administrative decision-making. Decision makers may act more responsibly – yielding a 'salutary discipline for those who have to decide anything that adversely affects others'.¹⁰ They may consider more carefully what is relevant, how legislation is to be interpreted and applied in the particular instance, thus affecting the very cogency of the decision and guarding against arbitrary decision-making or decision infected by errors. Consistency of decision-making may be promoted and enhanced, ensuring that like cases are treated similarly. Some certainty in outcome in the decision-making process therefore may be ensured. It may promote openness and increased confidence in the system of decision-making.¹¹ Transparency in decision-making has been regarded as beneficial to the individual and, where decisions are made available to the public, will also confer a public benefit in terms of consistency and the precedent value of decisions.

There is another sense in which the public, or at least a wider group of individuals than just the immediate parties, may benefit. Groves and Campbell have argued that decisions which are not 'bi-polar' (involving two parties) but which are polycentric (having an impact on a wider group, such as the granting of a finite number of licences) may involve different considerations of natural justice and reviewability.¹² Bringing their argument to this context, the provision of reasons in respect of polycentric decisions may be even more significant to the wider community affected.

Disadvantages of furnishing reasons for decisions

Furnishing reasons may yield some undesirable results. It is sometimes argued that candour in decision-making might be diminished. Flick identified the possibility that this may lead to ‘canned reasons’¹³ – with decision makers virtually ticking boxes or attaching prepared standardised reasons as to which best fit the particular case – and masking the true reasons for decision. The High Court has pointed out, however, that where a ‘formula to cloak the decision with the appearance of conformity with the law when the decision is infected by one of the grounds of invalidity prescribed’ is used, ‘the incantation of the formula will not save the decision from invalidity’.¹⁴ However, the routine use of ‘verbal formula’ by decision makers has not been frowned upon by the courts and will not invalidate a decision where there is no error of law.¹⁵ The need to provide reasons may take time, thereby delaying the outcome. The burdens of decision makers might be expanded and consequently costs of administration may increase. An indication of the increasing burdens imposed can be gleaned from the Annual Reports of the Administrative Review Council in which staff hours dealing with requests for reasons under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) are calculated.¹⁶

Further, the effect of the provision of reasons may be to render some decisions, which should be beyond the supervision of the courts, reviewable.¹⁷ In other contexts it has been argued that some government decisions are not suitable for review by the courts, where they contain wide discretions and no guidance as to how they are to be made. In such instances, the giving of reasons may serve no real purpose, as they will never be able to be shown to be ‘wrong’ or infected with error.¹⁸ The courts have highlighted these policy reasons from time to time and we will return to them.

Right to reasons and duty to give reasons under statute

Parliaments at state and federal levels have intervened in two ways to ensure that persons affected by certain decisions have a right to know the reasons and conversely that decision makers are under a duty to furnish those reasons: via the administrative law statutes and express subject-specific legislation.

The administrative law statutes

A powerful impetus in favour of conferring rights and obligations in relation to reasons was the so-called ‘New Administrative Law’. The conferral of appeal rights to administrative appeals tribunals (for example, *Administrative Appeals Tribunal*

Act 1975 (Cth) [AAT Act]) and the provision of more streamlined access to judicial review (for example, the ADJR Act) have brought with them the conferral of the duty.¹⁹ The hallmark of these statutes is that the duty arises in respect of decisions which either can be appealed to the appeals tribunal²⁰ or are judicially reviewable under the streamlined schema.²¹ The clear underlining policy was that access to appellate tribunals or courts exercising judicial review may be impeded if reasons for decision could not be accessed.²²

The administrative law statutes generally do not seek to impose an obligation on those decision makers to give reasons for each decision at the time it is made. Rather, the legislation entitles persons affected by relevant decisions to request reasons; and the duty to give reasons is activated only upon request, usually within a specified period of the decision.²³ Hence the duty is very much linked with the path to appeal or judicial review; and perhaps satisfying the person making the request that there is no error or miscarriage of justice.

Some other common threads can be discerned in this legislative approach to the giving of reasons. Generally, the statutes impose an obligation on decision makers to supply reasons within a specified time after the request is made.²⁴ Usually the legislation identifies what is required by the tribunal or administrative decision maker to fulfil the duty: providing findings of facts, materials on which those findings are based and statement of reasons.²⁵ Some of the applications to seek reasons shift to whether the statute applies to the decision in question.²⁶

Subject-specific legislation

An additional approach by parliaments is to prescribe the duty on decision makers under subject-specific legislation – in the field covered by the statute, the statute specifically addresses whether the reasons for decision should be given, and whether they should be given when made or upon request. Over the years, there has been a burgeoning of this type of legislation which expressly confers rights to reasons for certain decisions. The power to require reasons rests clearly with parliaments, federal or state, and the decision about whether to require reasons is deliberately and consciously made within the context of the subject area. Numerous examples abound²⁷ including decisions about benefits such as cancellation and suspension of pensions,²⁸ decisions about licensing of racing²⁹ or regulating gambling,³⁰ decisions about cancelling registration (for example, a home educator's registration),³¹ and decisions relating to environmental matters³² or regulation of suppliers.³³

Decisions outside the statutes

The ADJR Act³⁴ and some state Acts provide for schedules of exemptions *excluding* certain administrative decision makers from the obligation to provide reasons.³⁵ As schedules can be easily altered (as can classes of decisions exempt by regulations under the ADJR Act)³⁶ decisions amenable to the express duty to

give reasons can expand or contract depending on parliament's policy, thereby arguably altering effective supervisory review of the courts over such decisions.³⁷

However where statutes remain silent on the question of giving reasons or where the types of decisions are not covered by the administrative law statutes (for example, a particular decision is not 'under an enactment' in the ADJR Act), the existence of a duty, or not, to give reasons must be determined by the common law.

The common law attitude to giving reasons

What does the common law say about the obligation to give reasons? The common law courts are themselves very familiar with the concept of giving reasons as they are usually required, to not only make a decision in the matter before them requiring adjudication, but also give reasons for the decision.³⁸ Provision of reasons is part and parcel of judicial decision-making, whether the cases are in private law (such as contractual dispute between parties); public law (such as judicial review by superior court of tribunal's decision); or criminal law (such as the outcome of criminal prosecution).

Decisions by administrative tribunals and decision makers may have significant consequences for individuals – for example, granting a licence to sell liquor may affect livelihood. Some tribunals are court-like in their adjudicative process and procedure – they hold oral hearings; receive written and oral testimony; permit legal representation; sit in open proceedings; rule on admissibility of evidence, and so on. Some tribunals are less formal, determining their own procedure, not bound by the rules of evidence; and preclude lawyers from advocacy before them. Other tribunals may consider matters on the papers only, not undertaking oral hearings. At the other end of the spectrum is the individual administrator, minister, commissioner or other person empowered to make the decision – who considers either the written record only (such as applications with supporting material), or an oral request. What is the attitude of the common law courts to the obligation on these different decision makers to furnish reasons for their decisions when there is no statutory duty?

In Australia, the High Court decision in *Public Service Board of New South Wales v Osmond*³⁹ in 1986 remains authority for the proposition that at common law there is no general duty on administrative tribunals and decision makers to give reasons for their decisions. The case arose out of proceedings taken by a disappointed applicant for promotion within the New South Wales public service. Mr Osmond had sought appointment (by promotion) to the position of chair of the Local Lands Board. The convenor, on recommendation of the departmental head, recommended another appointee; and Osmond's appeal under s116 of the *Public Service Act 1979* (NSW) was dismissed by the Public Service Board (PSB). The PSB gave no written reasons as to why Osmond was not the preferred candidate. Osmond, in seeking a declaration from the New South Wales Supreme

Court, argued that the PSB was under an obligation to provide reasons: the court did not make the declaration sought. The New South Wales Court of Appeal, on appeal, held that the PSB was under such a duty.⁴⁰ The majority of the court was largely informed or influenced by the following in coming to its decision:

- The law on the point in Australia was not settled;
- The law in other jurisdictions, notably the United Kingdom, United States of America, Canada and India, had made inroads by obliging decision makers to provide reasons for decision;

Principles of good administration and policy reasons relating to fairness in decision-making supported the positive duty to provide reasons.

The judgment of Kirby P, then-President of the Court of Appeal, 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'. On further appeal to the High Court, the reforming approach on the issue adopted by the Court of Appeal was abruptly curtailed.

The High Court examined the reasoning of Kirby P in relation to the United Kingdom authorities, and on reviewing those authorities came to the opposite conclusions. The court indicated that there was no general duty to give reasons for the decision, and that the law was clear. Policy reasons in favour of the general duty played little part in the reasoning of the High Court, even though Gibbs CJ acknowledged that 'most people would agree that it is desirable that bodies exercising discretionary powers of the kind now under consideration should as a general rule give reasons for their decisions'.⁴¹

However, policy reasons opposing the duty held sway with the court: the burden on decision makers; increased cost; delay; possible 'lack of candour'⁴² in the reasons declared by decision maker. Moreover, given that the law was clear that there was no general duty to give reasons, the court was reluctant to step in and make new law, preferring to leave that role to the Parliament. It also observed that legislatures had enacted obligations to give reasons in administrative statutes and had done so after extensive policy review and debate; Parliament, rather than the courts, was the more appropriate body to undertake that task of reforming the law.

Gibbs CJ cited with approval Glass JA in the Court of Appeal who said:

The proposal [ie submission by Mr Osmond's counsel] would subject New South Wales administrative tribunals to control by the courts in a blunt indiscriminating way as compared with the finely tuned system operating federally. I believe that judicial innovation under these circumstances is not justified.⁴³

The court had fallen back on the not unfamiliar argument that judges should not be creative in making new law. The High Court, although rejecting the general duty to provide reasons, explored the question whether special circumstances might justify the obligation in this instance; and answered this question in the negative. The PSB considered issues which were 'simple and well defined',⁴⁴ that

is 'which of the two officers had the greater efficiency, and if neither of them had greater efficiency than the other, which was the senior?'.⁴⁵ Osmond not only had the means to know the issues canvassed on appeal but could easily infer upon which paragraph of the governing statute the PSB had relied.

The *Osmond* decision was subject to widespread commentary, with some opinion expressed that an opportunity had been lost by the High Court.⁴⁶

Post-Osmond's case

Osmond was decided over two decades ago yet it remains the prevailing and unchallenged view, at least at High Court level in Australia, on the common law duty. Whilst some subsequent cases have adhered to the general rule in *Osmond*,⁴⁷ others have decided that the circumstances warrant a duty to give reasons. For example in *McIlraith v Institute of Chartered Accountants*,⁴⁸ the Supreme Court of New South Wales held that a disciplinary committee, which had suspended the applicant from membership and ordered payment of costs, and an appeal committee had breached procedural fairness by failing to furnish reasons, the basis of this view being that reasons were required 'in a complex factual dispute with a very wide ambit of evidence'.⁴⁹ In *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd*,⁵⁰ the New South Wales Court of Appeal was prepared to imply a duty on assessors for costs to give reasons for their decisions, and earlier, in a strong judgment in *Cypressvale Pty Ltd v Retail Shop Leases Tribunal*,⁵¹ Fitzgerald P, although in dissent on the issue of the duty to give reasons which the majority of the Queensland Court of Appeal had not been required to decide, was clearly of the view that there was such a duty:

It is not really surprising that, in a complex society in which there is a proliferation of tribunals with power to affect citizens' rights and liabilities, the courts have come to insist that it is an incident of a duty to act fairly that decisions be adequately explained.⁵²

Further, his Honour acknowledged that the 'nature and extent of the obligation to give reasons varies according to the circumstances'⁵³ and concluded that 'the obligation is, after all, an aspect of the duty to act fairly in the particular circumstances'.⁵⁴

Other ways to access reasons for decisions include through a judge's order made at directions' hearing in proceedings challenging administrative decisions. The New South Wales Supreme Court's Practice Note⁵⁵ provides that, in such proceedings, a judge may direct the decision maker to supply written reasons for the decision which has been challenged, plus findings of fact, reference to evidence on which findings are based, the decision maker's understanding of the relevant law and the process of reasoning. In addition, where appropriate, the court could make such orders 'by way of particulars, discovery or interrogatories'.⁵⁶ New South Wales remains the only state to provide this vehicle for access to reasons.

Perhaps surprisingly, the debate in Australia has not really extensively canvassed whether it is an integral part of the duty of fairness to provide reasons for decision. Certainly the High Court in *Osmond* thought not – but concepts of natural justice have become more finely-tuned, arguably sophisticated and certainly well aired since then, but not in the context of the duty to give reasons. This may in large part be due to the significant statutory intervention conferring the obligation to provide reasons. However, as discussed, there are gaps in this coverage; and parliaments, Commonwealth and state, retain the power to remove that duty. The obligation is entrenched only so far as the parliaments permit.

Effect of not giving reasons

What is the effect of failing to give reasons when required? In many instances, the court will make an order to furnish those reasons.⁵⁷ There are often disputes as to whether the content of reasons given is adequate and has fulfilled the duty, and an order may be made to compel the giving of full reasons.⁵⁸ Where there is a total failure of giving reasons in breach of the duty, there is the vexed question of what the result is of that failure on the decision itself.⁵⁹ Statutes expressly conferring the duty may specify the consequence of the breach as not invalidating the decision.⁶⁰ In the absence of such specification, the failure may be an error of law,⁶¹ and may justify setting aside the decision.⁶² To hold that the decision itself is null and void solely on the basis of the decision maker not supplying reasons may be at odds with one outcome desired by the person affected – to simply obtain the reasons.⁶³ Could a null decision be engineered by requesting from a tribunal known to be reluctant, or slow, to give reasons – even where those reasons would not otherwise disclose any errors? Logic has it that where the error has arisen by non-compliance with a post-decision request, the validity of the decision itself should not be questioned for that reason alone.

Developments in the United Kingdom

Although the United Kingdom does not have the same developed administrative law statutory framework as exists in Australia,⁶⁴ the recent common law approach in the United Kingdom should be considered. Courts in that jurisdiction started from the original premise that at common law there was no general duty to give reasons for decisions.⁶⁵ However, developments indicate that the UK courts seem more prepared today to consider exceptions to the general rule that there is no duty to give reasons; indeed Lord Justice Wall in *Phipps v General Medical Council* stated that ‘the common law does not stand still, particularly in the developing area of the need for judges and tribunals to give reasons for their decisions. Thus, it seems to me that what was exceptional in 2001 may well have become commonplace in 2006’.⁶⁶

Courts seem to have been more willing to impose a duty to supply reasons, at least of a summary or brief explanatory form. Consistent with a trend to increased openness in matters of government and administration, the courts have indicated the duty on a case-by-case basis, including for example in:

- *R v Civil Service Appeal Boards; Ex parte Cunningham*⁶⁷ where the Court of Appeal held that natural justice required the Civil Service Board to give reasons for its decision to award minimal compensation only, for a dismissed (tenured) prison officer, given he was unable to appeal to an industrial tribunal which would have supplied reasons;⁶⁸
- *Stefan v General Medical Council*⁶⁹ where the Privy Council held that although there was no express or implied statutory obligation on the General Medical Council to give reasons for its decision to suspend indefinitely the registration of a doctor, ‘there was a common law obligation to give at least a short statement of reasons’ so as to inform the parties in broad terms why the decision was reached; and
- *Denman v Association of University Teachers*,⁷⁰ where the Court of Appeal held that the Employment Tribunal was under a duty to give reasons and had not fulfilled its duty by providing sufficient reasons in respect of the discrimination claim.

The courts have also identified cases where ‘the subject-matter is an interest so highly regarded by the law (for example, personal liberty) that fairness requires that the reasons . . . be given as of right’.⁷¹ Such a duty was required in respect of a decision to impose psychiatric treatment on a non-consenting adult.⁷²

The approach of the common law has been described as one of ‘incremental development’.⁷³ Given this, it is not surprising that some decisions in the common law’s developmental journey have been held not to attract the duty.⁷⁴

More significantly, the United Kingdom appears to be moving towards a general obligation of explanation for the decision. Perhaps in acknowledgement that requiring precise standards of statements of reasons may set the bar too high for many decision makers or be too burdensome, the courts have been more willing to impose a duty to *explain* the reasons so that the parties understand why they have won, or lost. The Court of Appeal in *English v Emery Reimbold and Strick Ltd*⁷⁵ justified the approach in this way: ‘[W]e would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.’

In *Phipps*’ case,⁷⁶ Lord Justice Wall was of the view that the decision in *English* could apply also to ‘any tribunal charged with the duty to reach a judicial or quasi-judicial conclusion’.⁷⁷ Have we reached the point where it is now a matter of semantics? The common law’s failure to require a general duty to give reasons is being eroded by the new notion of the duty to *explain*. This duty to explain acknowledges that tribunals and decision makers are not courts; that sophisticated lawyer-like analysis and explanation are not warranted – so long

as the parties are given information to understand why the conclusion has been reached.

The content of reasons, too, will be influenced by various considerations. In *Denman's* case, the Court of Appeal considered that the tribunal, having found evidence which might lead to inferences of racial discrimination (either conscious or unconscious) being drawn, 'was under a clear obligation to explain fully why it had decided not to draw them. In other words, it had to give reasons for its decision'.⁷⁸ Standards for reasons sometimes include the necessity to state conclusions on facts which are essential to the legal conclusion.⁷⁹ Similarly reasons may be inadequate where a tribunal adopts one line of evidence which is at odds with the weight of evidence. In *The Queen on Application of 'H' v Ashworth Hospital Authority*,⁸⁰ the tribunal, in deciding whether 'H' could be discharged from a mental hospital, was faced with conflicting expert evidence and the Court of Appeal stated that '[i]n such cases, it is important that the tribunal should state which expert evidence (if any) it accepts and which it rejects, giving reasons'.⁸¹ The need for reasons becomes more significant when the tribunal adopts the minority view, rejecting the majority of experts.

Modern approach: A framework for giving reasons

The strong private and public benefits from furnishing reasons, as discussed earlier, remain. Appeal rights would be facilitated and judicial review's role, as the protector of individuals from abuse of power by government and decision makers, would be enhanced by requiring reasons. It can also be strongly argued that where procedural fairness is applicable, an aspect of such fairness includes the provision of adequate explanation. Moreover, in the decades since *Osmond*, some of the opposing policy reasons have diminished in importance. Record-keeping is more sophisticated, aided by computer systems; decision makers are more highly trained; there is a more accepted use of 'pro-formas' or templates for decisions – and all these diminish administrative burdens and aid decision makers. The tribunals' workload argument seems to be treated less sympathetically today as a policy reason. In the *Ashworth Hospital* case, for example, Lord Justice Dyson rejected this as justification for providing inadequate reasons where there was a duty to furnish them:

If tribunals do not have the time and back-up resources that they need to discharge their statutory obligation to provide adequate reasons, then the time and resources must be found. Either the reasons are adequate or they are not, and the sufficiency of resources is irrelevant to that question.⁸²

There is in any event a greater promotion of openness by way of freedom of information legislation enabling records to be accessed; and providing reasons is consistent with such openness.⁸³ The contemporary focus on individual rights generally, including human rights, increases an individual's awareness of their

rights to administrative justice, and perhaps creates expectations of individuals in knowing, precisely, ‘why?’.

Guiding principles

Can a model, then, for when administrative decision makers should give reasons at common law be identified and advanced? In *Phipps*, Lord Justice Wall, in clear *obiter dicta*, put forward some guidance for tribunals in the giving of reasons. His Lordship, whilst acknowledging that the case was ‘not a proper forum for the promulgation of guidelines’⁸⁴ nevertheless posited a general guiding principle as follows:

In every case, as it seems to me, every Tribunal . . . needs to ask itself the elementary questions: Is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?⁸⁵

An appropriate explanation may require reasons for a particular finding or findings of fact.

This guidance of Wall LJ was given in the context of, first, a decision of a *tribunal*; and second, a decision where ‘[v]ery grave outcomes are at stake’⁸⁶ entitling persons affected to know the reasons for the findings.

Proposed framework

Building on the approach outlined by Wall LJ, we can identify a spectrum of types of cases where a full explanation of reasons should be given. Cases involving loss of liberty, for example, may require higher standards in relation to reasons compared to cases where a lesser right or expectation is affected. Loss of right to livelihood, denial of welfare benefits where there is no alternative means of support, withdrawal of rights to permanently reside in a country similarly also carry severe consequences for the individual – and justice may be done when the individual is told, fully, why. Thus, the nature of the issue and the importance of the decision may tilt the scales in favour of imposing the duty to explain, and to explain fully.

A lower level duty then, it is suggested, may be imposed on decisions with less severe consequences. Fairness may be satisfied by an explanation without such high standards of reasons being furnished. This may apply to decisions even where a tribunal is involved (such as in *Osmond* concerning promotion) or in which the decision maker is not a tribunal, for example, Departmental decisions made by government officers (such as about entitlement to allowances). The fulfilment of the duty to explain may be easily satisfied by pro-forma statements of reasons, evidenced by indicating which reasons apply in a particular case (the ‘box ticking’ approach). This requirement, albeit at a lower level, would also encourage the decision maker to address the cogent and relevant reasons, and

to consider the relevant legislative schema. Errors may be readily rectified by individuals supplying information, informally seeking reappraisal by the officer or supervisor and/or using any internal mechanisms for review. Even where decisions are essentially left to less senior administrators to be made in the name of the person empowered to decide (under the *Carltona* principle),⁸⁷ the nature or significance of the decision itself will assist in determining the need for, and content of, reasons.

Costs of administration, coupled with administrative burdens, are unlikely to escalate where the 'pro-forma approach' is used in 'lower' level cases. The High Court in *Minister of Immigration and Ethnic Affairs v Wu*⁸⁸ acknowledged that the standard of reasons was to inform 'and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed'.⁸⁹ As Kirby J indicated in the same case, the departmental officers were not 'untrained laymen'.⁹⁰ They were experienced, had access to legal advice, were familiar with relevant legal authority and '[s]tandard paragraphs for their decisions were prepared evidencing what were suggested to be considered positions on common matters of approach which, it was accepted, they had to take into account'.⁹¹

Thus the High Court has accepted that the reasoning need not always conform to the extent and content of reasoning required of judicial bodies; the decision maker is not a court of law; and that prepared reasons may be used. The 'green light' from the High Court in this regard seems to be a significant acknowledgement that the standards may be lower than those expected of judicial bodies. This comes very close to fulfilling the 'duty to explain' proposed in the UK.

We have seen that the High Court's view in *Osmond*, that there is not a common law duty to give reasons for decision, still generally prevails in Australia. Statutory intervention under the new administrative law Acts and the subject-specific legislation provides a duty in particular instances only and does not have universal coverage, lacking uniformity in approach and operation. The approaches of the UK courts to impose a common law duty incrementally and develop a 'duty to explain' have been analysed. The need for a review of the application of *Osmond* 20 years later in accordance with contemporary standards of openness and accountability is apparent.

A framework has been proposed for ensuring that more significant decisions attract the duty to give reasons, and that the lower level decisions attract at least a duty to explain in a variety of modes.

Relevant and irrelevant considerations

Naomi Sidebotham

If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.¹

Failure to comply with Lord Greene's well-worn directive may render a decision *ultra vires* for failure to take into account a relevant consideration. Conversely, if there are matters to which a decision maker clearly should not have regard, a decision may be *ultra vires* for taking into account an irrelevant consideration, if such factors are indeed taken into account.

This ground, or perhaps more accurately grounds, of judicial review are enshrined in both common law and statute. The Commonwealth *Administrative Decisions (Judicial Review) Act 1977* states in s5(2) that an improper exercise of discretion includes (a) taking an irrelevant consideration into account in the exercise of power and (b) failing to take a relevant consideration into account in the exercise of power. Their history, however, has not been spectacular. From the *Wednesbury* case² through to foundational Australian cases such as *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*³ and *Sean Investments Pty Ltd v MacKellar*,⁴ courts have presented the task of judicial review of an administrative decision on the considerations ground as a simple and straightforward exercise in statutory interpretation. Parliament confers discretionary power on a decision maker, the limits of which can be simply ascertained from a reading of the relevant legislation. Importantly, these early cases emphasised a narrow role for the courts, one which was mindful of the legality/merits distinction and dictated that the courts' task was no greater than that of ensuring compliance with the legal limits of a discretionary power. The decision maker's right to decide the merits of the case was upheld.⁵ In recent years, however, largely as a result of increasing migration

litigation, this ground of review has become both more conceptually complex and less certain as the standards against which it is judged, and the appropriate level of judicial intervention, particularly for failure to consider a relevant matter, have become a subject of much debate. It has also become one of the most-often argued grounds of review.⁶

This increasing popularity, along with the ground's somewhat vaguely defined boundaries and growing complexity, make it one of the more important and interesting grounds of review to study because it arguably represents a microcosm of administrative law as a whole. Certainly it clearly exemplifies many of the problems inherent in our system of judicial review, such as the potential for judicial incursion into the merits of a decision and the difficulties of defining the ambit of and the relationship between the various grounds of review. Mason J clearly warned of the dangers of the former in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*⁷ both generally and in relation to the considerations ground of review in particular. The difficulties of defining the ambit of this ground of review can be seen in, for example, the overlap between this ground and that of unreasonableness in relation to the duty to make inquiries or the duty to obtain relevant information. Likewise recent cases, such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*,⁸ while predominantly concerned with the ambit of the unreasonableness ground and the emergent ground of irrationality, may have considerable impact on the future development of the considerations ground as the extent of an irrationality ground is clarified. Many of these developments are consequent on recent migration litigation, as constantly changing migration legislation has necessitated the evolution of this and many other grounds of review. The emergence of jurisdictional error, for example, as a central ground of review in the migration area has in turn rendered failure to consider a relevant matter one of the more important grounds of review following the conclusion in *Minister for Immigration and Multicultural Affairs v Yusuf*⁹ that failure to so consider constitutes a clear basis for asserting jurisdictional error.

Developments such as these have led to recent arguments that courts have gone too far in their interpretation and application of this ground of review and so breached the separation of powers doctrine and the legality/merits divide.¹⁰ Certainly, courts exercising federal judicial power must not breach these constitutional limitations on their power of review. This ground of review, however, does provide a necessary safeguard against the misuse of administrative power. Although at times vague and sometimes difficult to apply it does, despite these difficulties, nevertheless provide a useful standard against which to measure administrative decision-making. This is particularly so in the current climate of government attempts to curtail the courts' power of review.

The following discussion examines the development of the requirements for establishing both failure to consider a relevant matter and consideration of an irrelevant matter. 'Failure to take into account relevant considerations' focuses on the former, in particular the requirements that a decision maker actually

consider the matter in question, and also the level of personal knowledge and involvement of a decision maker in the consideration of factors relevant to his or her decision. 'Taking into account irrelevant considerations' examines the less complex ground of taking into account an irrelevant consideration. Finally, this chapter offers some concluding observations about this ground of review which deserve greater attention.

Failure to take into account relevant considerations

It is perhaps the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*¹¹ that provides the seminal starting point for any discussion of failure to take into account a relevant consideration. The case is well known. It concerned a ministerial decision to grant a parcel of land to its traditional owners, following a report and recommendation submitted to him by the Aboriginal Land Commissioner.¹² Peko-Wallsend argued that the minister had failed to take into account a relevant consideration in issuing the declaration, namely the detriment the company would suffer as a result of his decision, the details of which were contained in a subsequent submission made to the minister following the report and recommendation of the Commissioner. The specific question addressed by the High Court in this case was whether this subsequent submission was, in fact, a relevant matter which the minister should have considered when making his decision. The Court held that the answer to this question was 'yes'. The minister had failed to look at a relevant consideration. Of some importance in reaching this conclusion was the issue of detriment. That is, Peko-Wallsend's submission clearly detailed the detriment it would suffer if the land grant was declared. Detriment was a relevant matter to be considered. Section 50(3)(b) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) specified that the Commissioner's report was to comment on any detriment that might be suffered by interested parties if the land claim was granted. Clearly, if this was something on which the Commissioner was obliged to comment, it should be something which the minister had to consider. Mason J reasoned:

[i]t would be a strange result indeed to hold that the Minister is entitled to ignore material . . . which may have a direct bearing on the justice of making the land grant . . .¹³

In his judgment, Mason J specified a number of principles that have become fundamental to the operation of this ground of review. Importantly, he emphasised that courts must be vigilant in complying with the appropriate limits of judicial review, and that the role of the courts is not to review the merits of a decision. Rather, courts must be mindful of their task of examining a decision on the basis of legality only.¹⁴ While it is now well-worn that courts must review only the legality and not intrude into the merits of a decision, it is nevertheless important to pay heed to Mason J's warning. As McMillan reminds us:

A cardinal principle in public law is the legality/merits distinction, to the effect that the role of a court is to define the boundaries of a statutory discretion, but not to examine whether an executive decision made within those boundaries was the preferable decision to make.¹⁵

Courts should not review administrative fact findings, nor should they substitute their judgment for that under scrutiny.¹⁶ Failure to observe such limitations can lead to questionable decisions by judicial bodies, with courts sometimes intervening simply because something that *may* be relevant is omitted from a decision maker's reasoning¹⁷ Having regard to these limitations, Mason J warned that it is up to the decision maker, not the courts, to determine the weight that should be accorded to a particular consideration. To interfere at this level would again breach the legality/merits divide.¹⁸

In relation to the considerations ground of review in particular, Mason J stated that it can only be argued where a decision maker is obliged to consider a relevant factor and that determining this issue is a simple process of statutory interpretation. At its simplest level, a statute may expressly impose such an obligation on a decision maker, but in most instances it is something that needs to be implied from the subject matter, scope and purpose of the act. As such a decision can only be *ultra vires* if there has been a failure to consider a matter which the statute either expressly or by implication states is both relevant and mandatory. Mason J also emphasised that even in these circumstances this ground of review will not always be successful. It will only succeed if the matter which was not considered was significant; that is, material to the final decision. If the final outcome would have remained unchanged this ground of review will not succeed.¹⁹

A further issue which arose in the *Peko-Wallsend* case was that of knowledge. That is, it was found by the High Court that in order for the considerations ground of review to succeed, the applicant must show that the matter was something of which the decision maker had knowledge. This criterion has been the subject of much debate in later cases. It was satisfied in *Peko-Wallsend* because the minister was deemed to have constructive knowledge of the material in question. A final issue of contention, although not one that arose in *Peko-Wallsend* itself, is the level of consideration that a decision maker must give to a relevant matter. That is, whether it is sufficient for a decision maker merely to assert that he or she has considered a matter, or whether, as argued in a line of immigration cases, it is necessary to establish a more in-depth level of consideration and analysis.

What is perhaps left after *Peko-Wallsend* is a series of questions. How to determine if something is prescribed in the empowering statute as relevant? How is it decided if there is an obligation to consider such a matter? What might constitute sufficient consideration? What level of knowledge is a decision maker deemed to possess? How accurate must be the information on which he or she relies? And when, if ever, is there an obligation on a decision maker to find relevant information? These issues are discussed fully below.

The initial stages of arguing failure to take into account a relevant consideration are fairly uncontentious. The two questions of whether something is in

fact relevant and whether the decision maker is obliged to consider the relevant material are, as Mason J identified in *Peko-Wallsend*, largely exercises in statutory interpretation. The court will simply examine the grant of discretion conferred in the empowering statute to ascertain its limits. Sometimes the statute may well expressly (and exhaustively) state the considerations to which a decision maker must have regard in the making of a decision. More frequently, however, a statute will provide little express guidance as to those factors which are relevant, and it becomes necessary for the courts to imply relevance by looking at the purpose, object and subject matter of the Act as a whole. In these instances, the statute often confers discretion in such wide terms that a determination of relevance is not always easy. The wider and more open textured the grant of discretion the less guidance there is as to what is and is not relevant. Of course, it is a fundamental principle of judicial review that an apparently unconfined statutory discretion is not an unfettered discretion. It will above all be limited by the purpose of the Act and so allow the court an avenue to imply relevance. However, it is also a fundamental principle that the wider the grant of discretion, the narrower the role of the courts and the greater the decision maker's scope for determining relevance, as it is clear that the legislature has intended that the decision maker decide what is relevant and which factors will be considered.²⁰ There can clearly be considerable room for disagreement on what may or may not be relevant to a particular decision and also on the appropriate role of the courts in determining relevancy. Compare, for example, the infamous case of *Roberts v Hopwood*,²¹ in which the House of Lords felt compelled to castigate the Poplar Borough Council's decision to set equal pay for male and female employees, despite the grant of an unconfined discretion to pay such salaries as it saw fit, with the statement of Deane J in *Sean Investments Pty Ltd v MacKellar* that:

In a case . . . where relevant considerations are not specified, it is largely for the decision maker, in light of matters placed before him by the parties, to determine which matters he regards as relevant . . .²²

The task of implying relevant considerations into a statute is a vague process that can often simply depend on the nature of the statute in question and the facts of the particular case, yet the manner in which courts choose to interpret a statute may have a considerable impact not only on the individual case, but also the future interpretation of that statute. Creyke and McMillan cite the example of the now defunct 'strong compassionate or humanitarian grounds' for granting residency under the *Migration Act 1958* (Cth)²³ as an illustration of the impact judicial interpretation of a statute can have. They highlight that this phrase was, according to departmental guidelines, intended to be applied narrowly to applicants seeking residency in Australia due to situations of war or natural disasters in their country of origin, or because of a denial of their fundamental rights and freedoms. The Federal Court, however, applied a broader interpretation to the phrase, extending it to include cases that could generally result in feelings of pity or compassion if an applicant were to be deported.²⁴ The consequence of this was that the range of matters that could be implied as relevant also widened so that by the late 1980s,

the number of applications under this section was 8000, not the expected 100 per year.²⁵ This example shows that it is the interpretation given to statutory phrase, whether by the decision maker or the courts, that will dictate relevance, and this process is both uncertain and malleable.

A further issue that must be commented on in relation to relevance is that not all material presented by an applicant is a relevant consideration. Material presented as evidence must clearly relate to one of the criteria identified in the statute (whether expressly or by implication) as relevant. It is primarily the statute, and not the facts of a particular case, that determines what factors are relevant. In *Abebe v Commonwealth Gummow and Hayne JJ* explained:

This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration . . . What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision maker acts.²⁶

Clearly, there must be a link between a party's submissions and the obligation to consider them. This is not a ground of review that is available because there is an error in the fact finding process or the interpretation or weighing of the evidence presented to the decision maker. It is a ground of review for ensuring that the decision maker properly applies the law. It is not an avenue for re-submitting and re-arguing findings of fact. Justice Kirby recently confirmed that this ground of review should not be used by applicants:

to re-canvas factual findings in an impermissible way and to argue their claim for judicial review in a manner significantly different from the argument advanced before the tribunal.²⁷

Even if the applicant can establish that a matter was relevant this will not be sufficient. It must also be shown that the contentious consideration is one that the decision maker was *bound* to consider. As stated by Mason J in *Peko-Wallsend*:

The ground of failure to take into account a relevant consideration can only be made out if a decision maker fails to take into account a consideration which he is bound to take into account.²⁸

Some considerations may be mandatory, some forbidden and others merely permissible. It is certainly not intended that this ground that judicial review be open for failure to consider everything that could be relevant. There is not an obligation on a decision maker to consider every single piece of evidence that comes before him or her, but only those which the statute renders mandatory.²⁹ This, once again, is a question of statutory interpretation. At its simplest, the legislation will expressly list those matters which are obligatory. If not, it must be implied. This, again, is something which may turn on the nature of the discretion conferred. The wider the grant of the discretion, the greater the level of deference

that should be accorded to the decision maker to determine if he or she should consider the matter. It is not for the courts to interfere with this decision. To do so would be to impinge on the merits of the case. As stated by Deane J in *Sean Investments v MacKellar*:

The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.³⁰

A decision maker cannot be held to have erred for failure to consider everything placed before him or her by the applicant.³¹ The range of mandatory considerations can, however, be influenced by the applicants. In the migration context, for example, in determining if an applicant should be deported all that needs to be considered is the eligibility for deportation and whether there are good reasons for not deporting.

However, if the deportee and others make lengthy submissions, and if some of the departmental material calls for a response from the deportee, the agenda's size will increase significantly, and the decision maker must consider it all . . . In other words, the parties can often lengthen the agenda by placing material and submissions before the decision maker for consideration . . .³²

The nature of the discretion may also influence the implication of an obligation to consider a matter.³³ Thus, in cases such as *Peko-Wallsend*³⁴ and *Hindi v Minister for Immigration and Ethnic Affairs*³⁵ where the decision could impact adversely on an individual, the courts may more readily imply an obligation to consider relevant material.

An issue at the core of the dispute in *Peko-Wallsend*³⁶ was the extent of the minister's knowledge, in particular, the level of his knowledge of the additional submissions and objections put forth by Peko-Wallsend to address the question of the impact that the minister's decision could have on its mining interests and that the report by the Commissioner to the minister recommending the land grant did not adequately deal with the potential impact on its commercial interests. The minister, in making his decision, had relied on a departmental brief that summarised the major issues in the dispute. This brief, however, did not refer to these subsequent submissions put forward by Peko-Wallsend. The minister argued in response to a challenge to his decision to allow the land grant that he was unaware of this subsequent information. The Court concluded that the minister had knowledge of the submission regardless of whether he had read, seen or was even aware of it.

It is uncontentious that a decision will be invalid for failure to consider a relevant factor of which the decision maker had actual knowledge. The High Court here extended this principle so that knowledge includes constructive or deemed knowledge. Its reasoning was that information which is in the possession of the department is deemed to be in the possession of the minister.³⁷ The submission in

Peko-Wallsend was one of which the minister should have had knowledge. It was in the possession of the department. The failure of the departmental brief to refer to it did not absolve the minister of responsibility. While it is acceptable for the minister to rely on a briefing paper provided by his or her staff, such reliance does mean that the minister is able to argue lack of knowledge of certain information that deals with a relevant consideration as a means of defending a decision that failed to take that information into account.³⁸

From this beginning, the issue of the knowledge of which a decision maker is possessed has become one of the more contentious elements of the considerations ground of review. While there is arguably some merit in Mason J's reasoning that, in making a decision, the decision maker should have regard to submission put forward by affected parties that address relevant criteria, this arm of the considerations ground has burgeoned such that it now raises issues concerning the quality of the briefing paper, the accuracy of the information upon which a decision maker relies and the extent to which a decision maker is obliged to conduct inquiries to ascertain relevant and accurate information. McMillan has been particularly critical of the importance that courts have placed on the briefing paper, arguing that linking it to the considerations ground of review has created a number of difficulties, as it brings the briefing paper itself to the fore, so that the 'length and quality of the briefing paper thereafter became a crucial determinant of the validity of an administrative decision'.³⁹

The judges in *Peko-Wallsend* allowed the paper to be brief. But its exact content was not conclusively discussed. Brennan J asserted that it must include salient facts and Gibbs CJ asserted that it must include material facts. If something is insignificant, it can however be omitted.⁴⁰

In relation to the accuracy of the information on which a decision maker relies, the court in *Peko-Wallsend* stated that information which is the basis of a decision must be 'the most recent and accurate information that [is] at hand . . . the most current material available to the decision maker'.⁴¹

This would seem to impose some obligation on the decision maker to base his or her decision on information that is accurate and current. Certainly, it has become clear that any mistake that is contained in the briefing paper will result in a decision made on the basis of such a paper being ultra vires. For example, in *Re Patterson; Ex Parte Taylor*⁴² there were two errors in the briefing paper which led to a declaration of invalidity of the minister's decision. The first of these was the paper's failure to fully elucidate the meaning of 'national interest', which was at the core of the visa determination in dispute. The second mistake related to Mr Taylor's option to seek further review of the decision to cancel his visa. McMillan suggests that neither of these errors were significant to the minister's decision, as 'national interest' was an issue about which the minister would be informed and that Mr Taylor was able to seek review of the decision regardless of the error in the briefing paper.⁴³ This leads McMillan to conclude that this approach to this ground of review is clearly posing an 'open ended risk' that courts will intervene too far.⁴⁴

A final issue that arises in relation to this question of knowledge is that of whether there is an obligation on a decision maker to conduct an inquiry to obtain relevant information. There have been a few cases suggesting that if readily available and relevant information is ignored by the decision maker this may expose the decision to review and there may, therefore, be a duty on the decision maker to initiate inquiries to ascertain this information.⁴⁵ For example, in *Prasad v Minister for Immigration and Ethnic Affairs*,⁴⁶ Wilcox J held that the decision maker should have inquired as to why the parties provided inconsistent evidence in relation to their marriage and that failure to do so rendered the decision ultra vires. Other examples include *Luu v Renevier*⁴⁷ and *Tickner v Bropho*.⁴⁸ Some of these cases have been dealt with under unreasonableness and some under the considerations ground. Aronson, Dyer and Groves note that in light of *Applicant S20*, this duty must now be questionable, at least insofar as it is part of the unreasonableness ground.⁴⁹ In relation to the considerations ground, the High Court has recently moved away from imposing such an obligation when it held that a decision maker was not under an obligation to inquire into the sentencing practices of a country seeking extradition of someone from Australia.⁵⁰ What does appear to be clear is that if such a duty were to be imposed it would be a very limited one.⁵¹

One of the more contentious areas of the considerations ground of review is that of consideration itself. That is, what constitutes sufficient consideration of any particular matter? Is simply looking at such an issue enough or must there be a demonstration that the decision maker actively turned his or her mind to the issue in question? This is not a question that was addressed comprehensively in *Peko-Wallsend*, although Mason J suggested that simply some consideration will be sufficient given that the task of the court is to police the legal limits of the decision maker's power and not to substitute its decision for that under review. On this view, the considerations ground of review is inappropriate if the complaint is that something has not been adequately considered. This issue is rather something that should be dealt with under *Wednesbury* unreasonableness.⁵²

Since *Peko-Wallsend*, however, competing lines of authority on this issue have emerged. On the one hand, there are cases clearly indicating that courts should show deference to the decision maker. That is, if there is an assertion by the decision maker that he or she has considered the matter, or if it can be implied from the circumstances, this will be sufficient. To inquire any further into this question would be an inappropriate incursion into the merits of the decision. This is more than adequately demonstrated by *Sean Investments*⁵³ where the court accepted that reference to the matter in a briefing paper was sufficient to constitute consideration. Deane J in this case also emphasised that courts should show deference to a decision maker.

The competing line of authority, drawn largely from migration litigation, does not accept a simple assertion of consideration as sufficient. This line of cases rather demands a rigorous analysis of whether the issue in question was in fact considered. That is, the decision maker must show that he or she actually turned

their mind to the issue and fully considered it. Nowhere is this requirement more clearly articulated than in *Khan v Minister for Immigration, Local Government and Ethnic Affairs*, where Gummow J famously stated that a decision maker must give 'proper, genuine and realistic consideration to the merits of the case'.⁵⁴

This less than adequately explained standard has been supported and applied in a number of cases including *Hindi v Minister for Immigration and Ethnic Affairs*,⁵⁵ *Minister for Immigration and Ethnic Affairs v Tagle*⁵⁶ and *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh*.⁵⁷ *Hindi*, in what McMillan labels 'a foremost illustration of the elasticity of that standard',⁵⁸ clearly demonstrates the willingness of a court to intervene and conclude that a matter has not been properly considered despite the decision maker's assertion that it had been. The kinds of factors that a court may look at in determining if sufficient consideration has been accorded in these circumstances include the reasons given for the decision, the failure of these reasons to mention the material in question and the decision itself. In *Tagle*, it was an inflexible application of policy that led the court to conclude that proper consideration had not been given to the case.

Aronson, Dyer and Groves are critical of this approach, preferring the 'tick-a-box' approach to consideration that is displayed in most cases. That is, that deference be accorded to a decision maker's assertion that he or she has considered an issue. They assert that cases such as *Khan* are 'puzzling' and use:

the considerations ground quite openly to assess whether the decision maker placed the appropriate weight on relevant considerations. That was probably in plain disregard of the limits of the 'considerations' grounds.⁵⁹

They rather support a line of cases that has been critical of this approach to the considerations ground, including *Bruce v Cole*⁶⁰ and *Minister for Immigration and Multicultural Affairs v Anthonypillai*.⁶¹ In the former of these cases, Spigelman J warned against judicial incursion into merits review. In *Anthonypillai*, the Federal Court said that the use of this standard 'creates a kind of general warrant, invoking language of indefinite and subjective application in which the procedural and substantive merits of any . . . decision can be scrutinised'.⁶²

Arguably, the *Khan* standard does bring the courts very close to a review of the merits of a decision. However, in many instances it is not sufficient for the court to accept an assertion of consideration by the decision maker. It is no coincidence that it is in migration cases that this debate is being played out. When dealing with areas that have such potential adverse impact upon the individual, it is necessary for the decision maker to do more than pay lip service to fundamental principles. Aronson, Dyer and Groves suggest that whatever the preferred option there is potentially no longer any scope for review for inadequate consideration in light of *Applicant S20*. That is, if an attack is going to be launched for failure to give genuine consideration to a matter the applicant is questioning, the reasoning underlying the decision is now something that is challenged on the basis of irrationality, not unreasonableness and certainly not failure to give consideration to a relevant matter.⁶³ In relation to the standard laid down in

Khan, they submit that *S20* has now subsumed Gummow J's requirement that the consideration that decision makers give to mandatory considerations be proper, genuine and realistic.⁶⁴

Whether or not this will be the case remains to be seen.

Finally, when it comes to consideration, it is clear that ministers are able to rely on departmental briefing papers, and in some cases, notably *Sean Investments*, it has been accepted that a ministerial delegate is able to consider relevant matters and give a summary to the ultimate decision maker. But there is another line of authority that suggests that this is not sufficient and demands that it be the ultimate decision maker who actually considers the matter in question.

This emphasis on the role of the decision maker is demonstrated in *Tickner v Chapman*.⁶⁵ In this case, the Minister for Aboriginal Affairs issued a declaration to prevent the Hindmarsh Island development. This decision was ultra vires for failure to consider a relevant matter as the minister had not personally considered some 400 submissions on the proposal or secret material detailing the adverse impact that would be suffered by Aboriginal women in the area if the development went ahead.⁶⁶ The legislation in this case made it clear that it was to be the minister who should consider the issue and it was clear that he had not. This approach was again applied in *Tobacco Institute of Australia Ltd v National Health and Medical Research Council*.⁶⁷ The legislation in this case placed the authority under a duty to have regard to submissions received in relation to an inquiry into passive smoking. The Council decided to consider only those submissions that had been peer reviewed in scientific journals, and submissions were summarised before being considered. As with *Tickner*, the decision in this case was held to be ultra vires because the Council did not consider the material itself, but rather relied on summaries prepared for it by researchers.⁶⁸ In both *Tickner* and the *Tobacco* case, the Federal Court focused on the statutory language which made it clear that the decision makers had a personal duty to consider the matters in question.

Ultimately, as noted by Aronson, Dyer and Groves, the practical problem with the considerations ground of review is not in establishing that a matter is relevant or that there is an obligation on the decision maker to consider the matter. It is in proving its breach, that is, establishing that the decision maker failed to consider a matter which he or she had an obligation to consider.⁶⁹

Taking into account irrelevant considerations

The converse to the above ground of review is that a decision may be ultra vires if a decision maker takes into consideration an irrelevant matter. Lord Greene explained in the *Wednesbury* case:

... if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.⁷⁰

This principle is also enshrined in s5(2)(a) of the ADJR Act. This arm of the considerations ground is, however, much less complex than that of failure to look at a relevant consideration. All that is required is that the matter addressed by the decision maker be irrelevant, that it is something which the decision maker is prohibited from examining and that having regard to the matter materially impacts on the final outcome.

As with failure to look at a relevant consideration, these issues are ones which are determined by a process of statutory interpretation. Sometimes the statute will state expressly those matters to which a decision maker must not address themselves. But more often they must be implied from the language, purpose and subject matter of the statute in question. As with failure to consider a relevant matter, courts must, when engaging in this process of statutory interpretation and exercising review for taking into account an irrelevant consideration, be aware of the limits of judicial review. They must, in appropriate circumstances, show deference to the decision maker and allow him or her to determine if a particular matter is irrelevant.

One of the more notorious examples of this ground of review, and of the court arguably exceeding its mandate, is that of *Roberts v Hopwood*.⁷¹ While the case is now of questionable precedent, it does clearly demonstrate the difficulties associated with this arm of the considerations ground. The case concerned a decision by the Poplar Borough Council to fix salaries for its employees at an equal rate for men and women and maintained them as such for five years despite a fall in the cost of living over this period. In setting aside this decision as ultra vires the House of Lords determined that the Council, although vested with a wide discretion to pay its employees 'such salaries and wages as [it] may think fit', had taken into account an irrelevant consideration in reaching its decision, namely, that it thought that a public authority should be a model employer. Or, as stated by Lord Atkinson 'some eccentric principles of socialist philanthropy, or . . . a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour'.⁷²

The irrelevant consideration was not one expressly stated but was implied in the legislation. One of the comments that can clearly most easily be made about this case is that the House of Lords arguably breached the legality/merits divide and rather than judging on the lawfulness of the decision it made a policy decision about the appropriateness of the Council's determination.

There are, however, many other cases where the courts have shown greater deference to the decision maker. Where a broad discretion is conferred Australian courts generally show deference to the decision maker to determine relevance and are reluctant to intervene on the basis that an irrelevant factor has been taken into account.⁷³ Thus, in *Murphyores Inc Pty Ltd v Commonwealth*,⁷⁴ for example, the High Court read the list of permissible considerations expansively to reject an argument that an environmental impact assessment was irrelevant to a decision on whether to grant permission to export mineral concentrates.

What these cases demonstrate is that the difficulties of succeeding in an argument of taking into account an irrelevant consideration are greater than its counterpart of failure to look at a relevant matter. Generally (with the exception of *Roberts*), for a matter to be deemed irrelevant there must be a clear positive indication in the statute that the matter in question was one which the decision maker was prohibited from considering. As such, matters such as the public interest have repeatedly been held not to be irrelevant or extraneous to an exercise of discretion unless the statute clearly gives a positive indication that they are prohibited.⁷⁵ Political considerations however have been held to be irrelevant, such as in *Padfield v Minister of Agriculture, Fisheries and Food*⁷⁶ where the minister famously based his decision not to establish a committee of investigation into a milk marketing scheme on the potential embarrassment he would suffer if the committee upheld the complaint.

There are a number of issues that can be mentioned by way of conclusion. The first is that with this, as with many of the grounds of review, there is considerable uncertainty of principle. There is no definite approach to answering questions of statutory interpretation, the extent to which a decision maker is entitled to rely on briefing papers and the like is not completely resolved and the level of consideration that must be accorded to a relevant matter remains contentious. Consequently, this ground of review and its lack of certainty does bring with it the potential for occasional inappropriate judicial incursion into the merits of a decision, thus raising the perennial question of the appropriate ambit of judicial review. Decisions such as *Roberts*, *Hindi* or *Prasad* do clearly raise such issues. Courts must, of course, respect the constitutional limitations on their power of review and not intervene in the merits of a case.⁷⁷

This does not mean that courts should be too restrained in their approach to judicial review, particularly on the considerations ground. Indeed, recent developments in migration law have demonstrated the need for judicial intervention at a number of levels.⁷⁸ One consequence of such developments is that jurisdictional error has become an important tool in monitoring migration decisions. One important way in which an applicant can establish jurisdictional error is by arguing the considerations grounds of review.⁷⁹ In turn, this has resulted in greater numbers of applications for review on this ground.⁸⁰ This is but one example of the potential overlap between the grounds of review. The considerations ground also overlaps with unreasonableness, the emerging irrationality standard and natural justice.⁸¹

Finally, it should be noted that despite the dangers and uncertainty associated with this ground of judicial review and judicial review generally, judicial review is, to quote Mary Crock, 'No bad thing',⁸² and the considerations ground of review serves a useful purpose. The task for the courts, as always, is simply to find the right balance between intervention and restraint.

Improper purpose

HP Lee

‘Improper purpose’ is a recognised ground, both at common law and under statute, which, if established, can enable the courts to invalidate the exercise of a discretionary power. At common law, this ‘elementary proposition’ was first established in England ‘in cases concerning the exercise of powers of compulsory acquisition’.¹ At the federal level in Australia, under the *Administrative Decisions (Judicial Review Act) Act 1977*, s5(1)(e) and s6(1)(e) provide respectively for judicial review of a decision or conduct engaged in for the purpose of making a decision on the ground ‘that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made’. ‘An improper exercise of a power’ referred in relation to a decision or conduct engaged in the making of a decision is defined in both instances as meaning ‘an exercise of power for a purpose other than a purpose for which the power is conferred’.² This fundamental principle was articulated in the following broad fashion by Gibbs CJ in *The Queen v Toohey; Ex parte Northern Land Council*³ (hereafter ‘*Toohey*’):

The principle, which is clearly settled . . . is that a statutory power may be exercised only for the purposes for which it is conferred.⁴

Gibbs CJ invoked the principle stated by Latham CJ in *Brownells Ltd v Ironmongers’ Wages Board*:⁵

No inquiry may be made into the motives of the legislature in enacting a law, but where a statute confers powers upon an officer or a statutory body and either by express provision or by reason of the general character of the statute it appears that the powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be invalid.⁶

In *Municipal Council of Sydney v Campbell*,⁷ the Municipal Council of Sydney was conferred the power to resume any land with a view to 'carrying out improvements in or re-modelling any portion of the city'.⁸ It was held by the Privy Council that the resumption of the lands in issue was effected 'with the object of enabling the Council to get the benefit of any increment in the value of them arising from the extension [of Martin Place]'⁹ and thus was unauthorised and an improper purpose. Likewise, in *Schlieske v Minister for Immigration and Ethnic Affairs and Others*¹⁰ the deportation power under the *Migration Act* was held to enable the country 'to determine who shall be permitted to enter it and who should be excluded therefrom'.¹¹ Consequently, it was an improper purpose to effect a deportation under the *Migration Act* for the purpose of extradition. As Wilcox and French JJ explained: 'It is not one of the purposes of the *Migration Act* to aid foreign powers to bring fugitives to justice.'¹² The exercise of the deportation power has yielded a few other cases in which the improper purpose ground was successfully invoked. In *Park Oh Ho v Minister for Immigration and Ethnic Affairs*,¹³ Foster J remarked that 'a deportation order can never be legally made or maintained for the purpose of keeping persons in custody to ensure their availability as witnesses in a prosecution'.¹⁴ In *Ang v Minister for Immigration and Ethnic Affairs*,¹⁵ Wilcox J found that the departmental deputy secretary had 'used his power to make a deportation order, not for the purpose intended by the Act, that is to implement a present decision to remove the applicant from Australia as soon as possible, but to enable the department to make such a decision at a later date'.¹⁶

The Toohey case

Regarded as a landmark case, *Toohey* dealt with the improper purpose argument in the context of a subordinate law claimed to have been made for a purpose not contemplated by the primary Act. In *Toohey*, a claim by the Northern Land Council on behalf of a group of Aborigines was made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to a substantial area of the Cox Peninsula in the Northern Territory. The area of the Cox Peninsula is about 800 square kilometres. If the area of land fell within the expression 'unalienated Crown Land', the Aboriginal Land Commissioner, Toohey J, would have the jurisdiction to deal with the application. The expression 'unalienated Crown land' was defined to exclude land in a town. In between the making of the land claim and the actual hearing by Toohey J, the Administrator of the Northern Territory, exercising a regulation-making power under the *Planning Act 1979* (NT), made a regulation which declared a large area comprising 4350 square kilometres centred upon the town of Darwin (which has an area of about 143 square kilometres) as town land. The declared area included the Cox Peninsula.

The Northern Land Council challenged the validity of the regulation by seeking to establish that it was made not for town planning purposes consistent with the Act, but for the alien purpose of defending the land claim by removing the Cox Peninsula from the operation of the Land Rights Act. An application by the Council for the production of a wide range of documents in the possession of the Administration relating to the considerations which brought the impugned regulation into existence was rejected by Toohey J. The Council sought from the High Court writs of certiorari and mandamus to quash the Commissioner's decision and to compel him to exercise his jurisdiction under the Land Rights Act. The High Court made an order of mandamus to compel Toohey J 'to inquire into the question whether the Administrator had exercised the power for planning purposes or for the improper purpose of defeating land claims'.¹⁷

A significant feature of the case was that the statutory discretion which was claimed to have been exercised for an improper purpose was reposed in the Administrator of the Northern Territory. Two justices¹⁸ held that the Administrator was the Crown's representative in the Northern Territory, while two other justices¹⁹ proceeded on the assumption that he was. The Court held that it could inquire whether a power granted to the Crown by statute had been exercised by the Crown for a purpose which the statute did not authorise. In reaching this conclusion, the Court jettisoned the then prevailing Crown immunity doctrine.

Gibbs CJ said:

In my opinion no convincing reason can be suggested for limiting the ordinary power of the courts to inquire whether there has been a proper exercise of a statutory power by giving to the Crown a special immunity from review. If a statutory power is granted to the Crown for one purpose, it is clear that it is not lawfully exercised if it is used for another. The courts have the power and the duty to ensure that statutory powers are exercised only in accordance with law. They can in my opinion inquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise.²⁰

The High Court also pointed out that they were concerned with the judicial impugment of the exercise of statutory discretions and not the exercise of a prerogative power by a Crown representative. To what extent can the courts review an exercise of a prerogative power on the improper purpose ground? No definitive stand was taken by the High Court on this question, although some members of the Court did comment on the issue. Aickin J said:

The position with respect to prerogative powers is not the same as that with respect to statutory powers, it being clear that at least in the case of some prerogative powers, reasons, motives and intentions of the Crown's representative are not reviewable in any court.²¹

Considering the state of the authorities at the time of the *Toohey* decision, Mason J remarked:

There was no doubt that an exercise of prerogative power was considered to be immune from attack for *mala fides*. Likewise . . . there is no doubt that an attack on the exercise of a prerogative power for improper purpose and inadequacy of grounds was regarded as inconsistent with accepted doctrine.²²

However, Mason J appeared to favour the more enlightened view that reviewability of a prerogative power depended on the subject-matter of the power. He said:

An examination of the cases in which the courts have refused to examine the exercise of prerogative powers reveals that most, if not all, of the decisions can be justified on the ground that the prerogative power in question was not, owing to its nature and subject-matter, open to challenge . . .²³

Mason J approved the view expressed by Lord Denning MR in *Laker Airways Ltd v Department of Trade*²⁴ that the exercise of a discretionary prerogative power ‘can be examined by the courts just as any other discretionary power which is vested in the executive’.²⁵

Wilson J, after acknowledging that a statutory discretion was more susceptible of judicial review than a prerogative power, said:

In the case of prerogative powers, the subject matter of the power will be of primary importance in determining whether the manner of exercise of the power is justiciable.²⁶

Today, the prevailing view is that judicial review of a prerogative power is dependent on the ‘nature and subject matter’²⁷ of the prerogative power. The exercise of the prerogative power to make a treaty, the prerogative of mercy or the disposition of the armed forces are often cited as illustrations of prerogative powers touching on subject matters not susceptible to judicial review.

Determining the purpose of the power

Aickin J in *Toohey* said:

Generally speaking executive or administrative powers are conferred for a purpose ascertainable, with greater or lesser difficulty, from the terms of the instrument conferring the powers.²⁸

Spigelman CJ of the New South Wales Court of Appeal said in *Attorney-General (NSW) v World Best Holdings Ltd*²⁹ that the contemporary approach to the determination of parliamentary intention is the same approach taken by the High Court in determining whether there was a legislative purpose to invalidate conduct that was undertaken without compliance with a legislative stipulation.³⁰ In *Project Blue Sky v Australian Broadcasting Authority*,³¹ McHugh, Gummow, Kirby and Hayne JJ said:

The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void

every act done in breach of the conditions. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied, there is not even a ranking of relevant factors or categories to give guidance on the issue.³²

The task of challenging an exercise of a statutory discretion on the ground of improper purpose is facilitated in many instances by an express indication in the statute of the purpose for which the power may be exercised. An ‘objects’ clause is often a feature of modern-day statutes. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) contains an example of a very detailed objects clause. Section 3(1) states:

- (1) The objects of this Act are:
 - (a) to provide for the protection of the environment, especially those aspects of the environment, that are matters of national environmental significance; and
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
 - (c) to promote the conservation of biodiversity; and
 - (d) to provide for the protection and conservation of heritage; and
 - (e) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
 - (f) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and
 - (g) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
 - (h) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

Professor Robin Creyke and Professor John McMillan have, however, observed: ‘Commonly, too, there can be conflicting purposes in the one statute’. They exemplified this observation by pointing to the freedom of information statutes which specify the aim of promoting ‘public disclosure of government documents’ and the competing aim of securing official secrecy in the public interest.³³

Toohy was concerned with an attack on the validity of a piece of delegated legislation. It is clearly accepted that the improper purpose argument can be levelled at both legislative and administrative acts. Whether subordinate legislation was made for a purpose not contemplated by the enabling Act would depend on the construction of the scope of the enabling Act. Where the subordinate legislation would impact adversely on common law rights a clear manifestation in the enabling Act of an intention by the legislature to confer such a power would be essential. In *Bailey v Conole*,³⁴ the Supreme Court of Western Australia (comprising Northmore, Draper and Dwyer JJ) acceded to the submission in the case that the impugned traffic regulation under which the appellant bus driver had been convicted was invalid. Two of the judges (Draper and Dwyer JJ) found that the

regulation's object was 'admittedly to prevent privately owned omnibuses competing with government trams',³⁵ contrary to the spirit of the enabling statute. Dwyer J said that 'clear and unambiguous language'³⁶ was required if it was the parliament's intention to confer a power to achieve such an object.

Evidentiary burden

The authors of *Judicial Review of Administrative Action* asserted:

Any inquiry into purposes presents real evidentiary difficulties, where the court must choose between the appearance of a purpose and determining the objective reality.³⁷

In the Australian context, Gibbs CJ in *Toohey* has made it very clear that '[t]he onus of proving that the Crown did act for an unauthorised purpose lies on those who make that assertion'.³⁸

Similarly, in *Municipal Council of Sydney v Campbell*, the Privy Council also said:

Where the proceedings of the Council are attacked upon this ground, the party impeaching these proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purposes, is in fact employing them in furtherance of some ulterior object.³⁹

It is very difficult to establish an improper purpose especially if a right to reason is not conferred by law.⁴⁰

The level of evidentiary difficulties will depend on the subject matter. The courts tend to adopt a very cautious and deferential approach if a decision is made at the highest level of government and especially if the decision complained of has a 'political' backdrop.

Extreme reluctance on the part of the courts to query the invocation of a power to declare a state of emergency was displayed by the Malaysian courts and the Privy Council in *Ningkan v Government of Malaysia*.⁴¹ In *Ningkan*, a constitutional impasse had arisen in the Malaysian state of Sarawak. To resolve this constitutional deadlock with the ultimate aim of removing the Chief Minister of the State, the Malaysian King proclaimed a state of emergency in Sarawak and in consequence of that proclamation, an Emergency Act was passed by the Malaysian Federal Parliament. On perusing the provisions of the Emergency Act the indubitable conclusion was that the Emergency Act was crafted with the aim of empowering the state Governor to effect the removal of the state Chief Minister who had fallen out of favour with the Federal Government.⁴² It was submitted in *Ningkan* that 'the said proclamation was in *fraudem legis* in that it was not to deal with grave emergency whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak'.⁴³ It was pointed out to the court that earlier emergency provisions had been made in 1964 in relation to the whole

Malaysian Federation and that they were sufficient to deal with any threat to the security of the Federation or any part of it. It was further pointed out that none of the usual signs of a grave emergency existed in Sarawak at or before the making of the proclamation: there were no disturbances, riots or strikes.

Ningkan lost his case because the Privy Council, in dealing with the 'in *fraudem legis*' arguments on the assumption that the proclamation of emergency was a justiciable issue, held that Ningkan had failed to discharge the heavy onus of proof placed on him of showing that the 'government was acting erroneously or in anyway *mala fide*'.⁴⁴

Ningkan illustrates the difficulty of challenging the exercise of a statutory discretionary power on the improper purpose ground, especially when the exercise of the power allegedly relates to the protection of the security of the state. The courts are extremely reluctant to second-guess the executive on the issue, and where possible seek to avoid having to make a decision on it. Lord MacDermott, in delivering the reasons for the Privy Council's decision, said: 'Whether a Proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debateable.'⁴⁵

In *NAALAS v Bradley*,⁴⁶ the Chief Minister of the Northern Territory (Mr Shane Stone) offered the position of Chief Magistrate of the Northern Territory to Mr Bradley, following the resignation of Mr Ian Gray as Chief Magistrate. The circumstances which led to Mr Gray's resignation 'had to do with his views regarding the regime of mandatory sentencing which came into force in the Northern Territory on 8 May 1997'.⁴⁷ Also, at the time of the resignation, there was consideration by the Northern Territory government of the introduction of contract appointments for magistrates. Mr Bradley was appointed Chief Magistrate on 27 February 1998 by the Administrator-in-Council. As there was an initial understanding that Mr Bradley was prepared to serve only two years, a 'special determination' providing for a special remuneration package was made by the Administrator. Subsequent to the negotiations relating to the special remuneration package, Mr Bradley requested that his appointment be an 'ordinary' appointment, but that 'he would only stay for two years'.⁴⁸ By the time of the actual appointment, the government had jettisoned the idea of enacting legislation for fixed-term appointments for magistrates, which in consequence would have made 'the remuneration package in the special determination inappropriate'.⁴⁹

The appellant's case at first instance was summarised in the joint judgment of Black CJ and Hely J in the Full Court of the Federal Court:

The appellant alleged that the appointment of Mr Bradley on 27 February 1998 by the Administrator in Council was made for improper purposes. Several improper purposes were alleged as set out in [12] of the statement of claim:

- (i) defeating the measure of judicial independence implicitly required by the Act;
- (ii) giving effect to an agreement or arrangement entered into on or prior to 27 February 1998 between the Northern Territory and Mr Bradley, pursuant to which

- Mr Bradley agreed to accept the office of Chief Magistrate for a limited period of 2 years upon certain terms and conditions;
- (iii) securing a short-term special appointment to the office of Chief Magistrate;
 - (iv) creating what was, in effect, a 2 year appointment subject to review at the expiration of that time;
 - (v) securing an appointee who would, at the expiration of 2 years, be dependent upon the executive government for remuneration and allowances;
 - (vi) subverting the purpose of s 7 of the Act requiring magistrates' appointments to be to age 65; and
 - (vii) defeating a fundamental objective of the Act, namely that magistrates should enjoy secure tenure to the age 65 free from the influence of, and appearance of influence by, the executive government.⁵⁰

The appellant's case as to impropriety of purpose 'was largely based on inferences'.⁵¹ Having established that other contending inferences were also open on the facts, Weinberg J concluded that he was 'not persuaded' that the decision to appoint Mr Bradley was actuated by an improper or extraneous purpose.⁵²

In the appeal to the Full Court of the Federal Court of Australia, the improper purpose argument was more constricted. Black CJ and Hely J explained:

On appeal, the factual basis for the alleged improper purpose was confined to a contention that the inevitable consequence of the special determination was that Mr Bradley would be forced to re-negotiate the terms and conditions of his continued appointment if he chose not to resign after 2 years, and that this was a consequence known to and intended by those advising the Administrator, including Mr Stone.⁵³

In *South Australia v Slipper*,⁵⁴ the finding of an improper purpose was aided by the open acknowledgment of the minister whose exercise of a power under the *Lands Acquisition Act 1989* (Cth) was impugned. The Commonwealth, in order to compulsorily acquire land, is required under the *Lands Acquisition Act 1989* (Cth) to serve on an affected person a pre-acquisition declaration containing certain minimum information. Such a requirement is waived if the minister, under s24(1)(a), issues a certificate stating that the minister is satisfied that 'there is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed'. Following the giving of such a certificate, the minister 'may, subject to section 42, declare, in writing, that the interest is acquired by the acquiring authority by compulsory process': s41. Section 42 provides that the making of a declaration under s41(1) is precluded in relation to land in a 'public park' unless there is consent to the acquisition by the state or territory government.

Following an announcement by the Commonwealth of its aim to establish a nuclear waste storage facility at two specified sites in South Australia, the state government introduced legislation into the South Australian Parliament proposing to make the two specified sites 'public parks'.

In *South Australia v Slipper*, it was submitted, inter alia, that the s24 certificates had been issued by the Commonwealth minister for an unauthorised purpose.

Branson J, with Finn and Finkelstein JJ agreeing, found that the power under s24(1) of the *Lands Acquisition Act 1989* (Cth) had been exercised for an improper purpose.⁵⁵ Invoking the explanation of ‘improper purpose’ by Aicken J in *R v Toohey: Ex parte Northern Land Council*,⁵⁶ Branson J held that the power conferred by s24(1)(a) ‘was not conferred for the purpose of authorising the Minister to limit or control the operation of s42 of the Act’.⁵⁷ In this case, the improper purpose was evidenced by the acknowledgment by the minister that he had acted under s24(1) to prevent s42 of the Act ‘from operating in accordance with its terms’.⁵⁸ The judge added that the minister had ‘conceded that he acted to frustrate the will of Parliament as reflected in s42’.⁵⁹

A mixture of purposes

A difficult aspect of the improper purpose ground lies in a situation involving a mixture of purposes, some proper and some improper. Such situations are not uncommon. Kirby P in *Warringah Shire Council and Others v Pittwater Provisional Council*⁶⁰ succinctly explained the ‘truism’ in the following terms:

‘In the nature of human affairs, it is rare that individuals, still less corporations such as local government authorities, act as they do exclusively for a particular purpose. It is of the nature of human motivations (and still more, if it can be ascertained, the motivation of corporations governed and directed by numerous individuals) that their purposes are complex and multifarious.’⁶¹ From this truism a controversy has arisen as to the extent to which an illicit, irrelevant or impermissible purpose for the exercise of statutory powers will render that exercise beyond power, with the serious consequences that follow.

Professor Paul Craig thus observed: ‘Complex problems can arise where one of the purposes is lawful and one is regarded as unlawful.’⁶² Professor Craig has identified the following various tests which have been used in the English courts to resolve the problem:

First, what was the true purpose for which the power was exercised? Provided that the legitimate statutory purpose was achieved it is irrelevant that a subsidiary object was also attained. Secondly, what was the dominant purpose for which the power was exercised? Thirdly, were any of the purposes authorised? This has less support in the case law than the previous two tests. Fourthly, if any of the purposes was unauthorised and this had an effect upon the decision taken, that decision will be overturned as being one based upon irrelevant considerations.⁶³

The approach favoured in Australia was adverted to by the High Court in *Thompson v Council of the Municipality of Randwick*,⁶⁴ wherein the appellants had sought injunctions to restrain a council from resuming certain council-owned lands with a view to implementing a scheme for the purpose of constructing a new road. The council sought to resume more land than was required for that purpose so that the profit arising from the re-sale of the balance of the land would help to

reduce the cost of the road construction. The High Court found that the evidence established that one purpose underlying the attempt by the council to acquire the land not required to construct the new road was 'to appropriate the betterments arising from its construction'.⁶⁵

In a joint judgment, Williams, Webb and Kitto JJ said:

[I]t is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale.⁶⁶

In allowing the appeal, they reiterated the 'substantial purpose' test as the operative test in Australia. Williams, Webb and Kitto JJ concluded:

Upon consideration of the scheme as a whole, the conclusion seems irresistible that, with respect to so much of the land included in the scheme as is not required for the new road, profit-making by sale is a substantial purpose actuating the Council in deciding upon the proposed resumptions.⁶⁷

The 'substantial purpose' test was adopted with approval by Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ in *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board*.⁶⁸ The High Court observed:

If the Board is seeking to acquire the land for an ulterior purpose, that will be an ostensible but not a real exercise of the power granted by the Act. The attempted exercise of power will be vitiated even if the ulterior purpose was the sole purpose of the acquisition; it will be an abuse of the Board's powers if the ulterior purpose is a substantial purpose in the sense that no attempt would have been made to acquire the land if it had not been desired to achieve the unauthorised purpose . . .⁶⁹

The High Court emphasised that the questions whether the land was acquired for another and unauthorised purpose and, if so, whether that purpose was a substantial purpose were questions of fact.

Professor Margaret Allars' criticism of the 'substantial purpose' test as 'internally contradictory' is apt.⁷⁰ Referring to the test as a 'strict' one, she observed:

The 'but-for' element indicates that the purpose must be necessary to the decisions being reached, whilst the 'substantial' element indicates that the purpose must be a weighty one, a requirement which swings back to the English test.⁷¹

The ambivalence detected by Professor Allars in the High Court's judgment in *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* was reflected in the High Court's agreement with the finding of the primary judge that the legitimate purpose was 'the true, and the dominant purpose'.⁷²

Decisions made by a multi-member body

Another difficulty with the operation of the improper purpose test relates to decisions which are made by a multi-member body. Kirby P in the NSW Court

of Appeal in *Warringah Shire Council and Others v Pittwater Provisional Council* noted that ‘where a decision maker is a collective body, discerning its intentions, purposes and motives will necessarily be more problematical’.⁷³

The appropriate test to be applied in attributing a ground of decision to a multi-member body was considered by the Full Court of the Supreme Court of Western Australia in *Perth City v DL*⁷⁴ and commented upon by Toohey, Gummow and Kirby JJ in the appeal before the High Court in *IW v City of Perth*.⁷⁵ In issue was the question whether the City of Perth had infringed anti-discrimination laws by refusing planning approval for the use of premises as a day time drop-in centre for HIV-infected persons. The Full Court of the Supreme Court of Western Australia concluded that the Equal Opportunity Tribunal had erred in law in upholding the complaint of discrimination.

The application was rejected by the Perth City Council on a close vote of thirteen to twelve. It was found by the Equal Opportunity Tribunal that five of the majority on the Council had cast their votes ‘not upon planning or like grounds but because of views which they then held about HIV/AIDS impairment or the characteristics which they ascribed to persons so impaired’.⁷⁶ Toohey J identified those possible tests which emerged from the proceedings in the Tribunal and the Supreme Courts as follows:

- (1) That ‘the ground of decision of any Councillor whose decision was causative, in the sense that “but for” that decision approval would not have been refused, can be imputed to the Council’;⁷⁷
- (2) That ‘relevantly the ground of decision is the ground on which a majority of the voting Councillors made their decision’;⁷⁸ and
- (3) That one should look at the ground ‘on which a majority of the majority Councillors made their decision’.⁷⁹

Given that the appeal to the High Court was dismissed on grounds which did not require the Court to deal with determining how to attribute a decision to a multi-member body, the issue remains unresolved. However, Toohey, Gummow and Kirby JJ expressed their views on the issue. Toohey J appeared to favour a but-for test. He said that in the case before the Court the vote cast by each Councillor determined the outcome of the matter, adding:

If one or more of these Councillors voted on an impermissible ground, whether or not that was ‘the dominant or substantial reason’ . . . that vote determined the outcome because the result would have been different ‘but for’ the vote of that Councillor. The City of Perth could only act through its Council; the Council could only act through the vote of its members; the vote of every member of the majority was causative in the sense that the application would not have been refused but for each of those votes; and in fact five Councillors reached a decision on a ground that was unlawful. The decision of the Council was likewise infected.⁸⁰

Gummow J preferred a strict stance based on the position pertaining to disqualification for bias. He noted that, as a matter of general law, ‘a decision made by such a body as the Council, one or more members of which are disqualified for

bias, is liable to be set aside on administrative review'.⁸¹ In the case of decisions entrusted by law to a collegiate group acting by a majority, he said that the decision-making process would be tainted 'in similar manner as a decision of that body would be tainted by the presence of bias, in accordance with the principles of administrative law'.⁸² According to those principles, it was no answer 'that only a minority of those decision makers comprising the majority of the whole body was biased'.⁸³

Kirby J held that it was not necessary to show that the majority of the Councilors or, alternatively, a majority of the majority acted on the unlawful ground. The focus should be on achieving the purposes of the legislation and these purposes 'could only be achieved, in the case of the City, acting through the vote of the members of its Council, by ensuring that no unlawful "ground" caused the doing by the City of the act complained of'.⁸⁴

He added:

Where, as in this case, the discrimination alleged was not only one of the reasons for the act of the Council (and hence the City) but also critical to the determination which decided whether the act would be done or not, the discriminatory conduct on the part of the members of the Council may be attributed to the Council itself. This is not because of a doctrine of company law or administrative law. It is because no other interpretation would achieve the objectives of the Act that the relevant conduct (in this case of the local government body) should be free from unlawful discrimination and that proof that the unlawful ground for the conduct was 'the dominant or substantial reason' is not required.⁸⁵

Improper purpose and bad faith

It has been observed that 'the courts sometimes uses terms like "improper purpose" (or "motive") and "bad faith" interchangeably and unscientifically',⁸⁶ Lord Somerville, in *Smith v East Elloe RDC*,⁸⁷ said that the '*mala fide*' term has 'never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases'.⁸⁸ He added that it covered 'fraud or corruption'.⁸⁹

The term '*mala fides*' should only be used in the context of actual dishonesty and 'not the mistaken pursuit of a by-purpose'.⁹⁰ The latter category refers to a situation where the authority may exercise a discretionary power for an unauthorised purpose without realising that it is acting illegally. Stephen J in *Toohey*⁹¹ referred to the distinction between 'honest error and dishonest design', as described by Isaacs J in *Werribee Council v Kerr*.⁹² This distinction was elaborated by Isaacs J on another occasion:

[*Mala fides*] is wholly distinct from the notion of mistakenly pursuing a by-purpose. Such a pursuit may in this connection be honest or dishonest. The body pursuing it may genuinely avow it, thinking it permissible. There the action adopted may be *ultra vires* but not *mala fide*. On the other hand there may be a pretended pursuit of a legitimate purpose that is *mala fide*.⁹³

Constraints imposed by the Commonwealth Constitution

In the Australian constitutional context, there are judicial comments which suggest that the external affairs power in s51(xxix) of the federal Constitution might not be attracted to support the validity of federal legislation if the entry into the treaty was ‘merely a device to procure for the Commonwealth an additional domestic jurisdiction’.⁹⁴ This was elaborated by Brennan J in *Koowarta v Bjelke-Petersen*⁹⁵ in the following way:

I would agree, however, that a law with respect to a particular subject would not necessarily attract the support of para. (xxix) if a treat obligation had been accepted with respect to that subject *merely* as a means of conferring legislative power upon the Commonwealth Parliament.⁹⁶

Engaging in a ‘colourable attempt’ of using the power in s51(xxix) for the improper purpose of converting a matter of internal concern into an external affair indicates bad faith on the part of the executive. However, Gibbs CJ recognised the difficulty involved in proving bad faith and said:

The doctrine of bona fides would at best be a frail shield, and available in rare cases.⁹⁷

The invocation of a power of executive detention vested by statute may be constrained by the operation of Ch III of the Commonwealth Constitution even though the purpose is manifest on the face of the statute. The separation of judicial power doctrine as established by the *Boilermakers’* case⁹⁸ precludes the vesting of a judicial power in a non-Chapter III court. Kirby J in *Al-Kateb v Godwin*⁹⁹ explained:

The existence and pre-dominance of the judicial power necessarily implies constitutional limitations on the use of the heads of legislative power in Ch 1 (or the powers of the Executive under Ch II) of the Constitution in providing for unlimited detention without the authority of the judiciary. This is because such a power of detention can turn into punishment in a comparatively short time. And punishment, under the Constitution, is the responsibility of the judiciary; not of the other branches of government . . .¹⁰⁰

The purpose underlying the exercise of an executive detention power is therefore crucial in determining the validity of the detention. The High Court has subscribed to a punitive/non-punitive dichotomy in making that determination. McHugh J in *Re Woolley: Ex parte Applicants M276/2003*¹⁰¹ said:

The issue of whether the law is punitive or non-punitive in nature must ultimately be determined by the law’s purpose, not an *a priori* proposition that detention by the Executive rather than by judicial order is, subject to recognised or clear exceptions, always punitive or penal in nature.¹⁰²

McHugh J stated that the ‘most obvious’ example of a non-punitive law that authorises detention is ‘one enacted solely for a protection purpose’.¹⁰³ Where the executive seeks to effect detention for a purpose which is penal or punitive in

nature, the detention is rendered unlawful even though it is ‘proper’ (that is, an intention manifested by the terms of the legislation); it is simply unlawful because the punitive nature of the detention contradicts Chapter III of the Commonwealth Constitution.

An overlap with irrelevant considerations

The acknowledged heavy onus involved in proving the existence of an improper purpose largely explains the small number of cases decided on this ground. This explanation is augmented by the ‘comparative ease of establishing the alternative ground, that an irrelevant consideration was taken into account’.¹⁰⁴ In asserting that a decision maker was actuated by an ulterior purpose is akin to saying that the decision maker had taken into account, as an irrelevant consideration, the matter constituting the ulterior purpose in arriving at the impugned decision. In *Ex parte SF Bowser and Co; Re Municipal Council of Randwick*,¹⁰⁵ Ferguson and Davidson JJ concurred with Street CJ in holding that a council had gone outside the legitimate scope of its function when it granted permission for the erection of a petrol pump on a footpath subject to a condition that the pump be of Australian manufacture. Street CJ found that the Local Government Act was passed ‘to make better provision for the government of the areas’ but that adopting a policy of giving preference to goods of Australian origin exceeded the council’s powers. ‘I think that that is an extraneous consideration which ought not to influence the minds of councillors in dealing with applications.’¹⁰⁶

The above exegesis on the improper purpose ground indicates that this ground is not one which will be invoked readily by a person who is aggrieved by an exercise of a discretionary power by a public authority. The onus of proof is extremely heavy. This is particularly so if the challenge pertains to a matter which involves a national security interest or which has serious political overtones. In such a context, the courts are likely to steer away from it, as it may require the courts to exercise scrutiny over the motive or the bona fide of the maker of a decision which is sought to be impugned. This will be the case if other grounds can be relied upon. In the case of improper purpose, the overlap with the ground of irrelevant considerations provides the courts with the escape route.

Reasonableness, rationality and proportionality

Geoff Airo-Farulla

Reasonableness is a central, defining concept in Australian administrative law. All justiciable aspects of administration – determinations of fact, questions of law, discretion, and delegated legislation – are subject to judicial review for unreasonableness.¹ Other grounds of judicial review similarly apply across the board. However, the courts most explicitly have to navigate the boundaries between the ‘legality’ and the ‘merits’ of administrative action when applying the reasonableness grounds. Theoretically, the legality/merits dichotomy lies at the heart of Australian administrative law doctrine, defining the respective roles of administrative agencies, courts, merits review tribunals, and Ombudsmen. The courts’ use of unreasonableness as a ground of judicial review tells us where the boundary between the two actually lies in practice.²

This chapter provides an overview of the role of reasonableness, and the related concepts of rationality and proportionality, in judicial review of administrative action. It begins by discussing why the law requires administrators to act reasonably, then the relationship between the concepts of reasonableness, rationality and proportionality. It then considers how the courts use these concepts when reviewing findings of fact, exercises of discretion and delegated legislation. It concludes with a defence of the role of reasonableness as a ground of judicial review, against the charge that it is too indeterminate to provide a useful standard of good administrative decision-making.

Why is reasonableness legally required?

Much has been written on why the courts can hold unreasonable administrative action invalid.³ As they clearly can do so, the law must somewhere oblige

administrators to act reasonably. The question is whether this obligation comes from statute or the common law. No overarching statutory provision imposes such a requirement, and specific statutory grants of power rarely do so in explicit terms either. However, one view is that it 'goes without saying' that Parliament intends that statutory powers be exercised reasonably.⁴ This is a reasonable assumption because, in a representative democracy, one would not ordinarily expect the people's representatives to give the executive power to act arbitrarily and capriciously. In practice, then, the courts often apply a presumption of statutory interpretation to this effect. However, there is not room for this presumption to operate if a statute clearly and unambiguously gives a decision maker power to decide unreasonably. It also cannot apply to non-statutory powers.

The alternative view is that the common law requires decision makers to act reasonably when exercising their powers, just as the common law requires us to take reasonable care to avoid harming our 'neighbour'. Such a common law principle can apply to statutory grants of power because Parliament does not legislate in a vacuum. Parliament will not be taken to have altered or excluded the common law, unless the statute contains clear and unambiguous words to that effect.⁵ If this common law approach is taken, the further question arises: Where in the common law does the reasonableness requirement come from? It is often associated with common law procedural fairness or natural justice requirements.⁶ Historically, the courts enforced compliance with natural justice requirements on decision makers having a 'duty to act judicially'. The notion of 'acting judicially' was used to define the nature of natural justice requirements, by analogising from how courts make decisions to define how other decision makers ought to decide. As the courts do not consider that they can or do decide unreasonably, some judges have suggested that natural justice imposes an analogous duty on administrative decision makers.

The modern formulation of when procedural fairness is required – affecting rights, interests or legitimate expectations – is much broader than the historical 'duty to act judicially' requirement. Even so, many statutory grants of power fall outside even the broad, modern test. If a requirement to act reasonably comes from procedural fairness, then any decision-making power not subject to procedural fairness would similarly not have to be exercised reasonably. The better view is that the requirement to act reasonably is a free-standing common law principle of good administration that applies to all administrative actions, not just those subject to procedural fairness. Either common law approach avoids the problem, inherent in the implied statutory intent approach, of non-statutory grants of power being free of any requirement to act reasonably. Only the free-standing common law approach also avoids the procedural fairness approach's limits.

In practice, either common law approach leads to the same outcome as the 'legislative intent' approach in most cases: Administrative decision makers are required to act reasonably, unless the statute clearly demonstrates that Parliament intended to give them power to act unreasonably. The weakness in all these

approaches is therefore evident: Parliament can, if it wants, give administrative agencies power to act unreasonably, provided it does so clearly. Is there, then, a constitutional basis for legally requiring administrative agencies to act reasonably? In *Plaintiff S157/2002 v Commonwealth*,⁷ the High Court endorsed Dixon J's statement in *Australian Communist Party v Commonwealth* that the Constitution is framed on the assumption of the rule of law.⁸ As Montesquieu long ago said, the point of the rule of law and the separation of powers is that 'power should be a check to power' so that 'the life and liberty of the subject [is not] exposed to arbitrary control'.⁹ Arguably, then, the Constitution requires the courts to be more than mere rubber-stamps to the existence of arbitrary and capricious power. If the Constitution's assumption of the rule of law is meaningful, then the Constitution must place some limits on Parliament's power to confer arbitrary power on the executive. Ultimately, any attempt to use reason to explain why administrative agencies have to use reason is inevitably circular: What is the reason for reason? In a fundamental sense, expectations of reasonableness are not merely constitutional, but constitutive of our legal system.

Reasonable, rational, proportionate

In ordinary language, 'reasonable' can be used to describe or qualify many things, such as 'a reasonable price'. In the administrative law context, the two most important uses of reasonableness are in relation to *actions* and *beliefs*. In both cases, the first requirement of reasonableness is that the reasons, for the action or belief, must be intelligible: if we cannot understand the reasons for something, we cannot judge it reasonable. Intelligibility is not enough, however: intelligible reasons can still be either good or bad. In this context, reasonableness means more 'within reason', which the *Macquarie Dictionary* defines as 'justifiable or proper'. To 'justify', reasons have to be at least persuasive, if not compelling; to be 'proper', reasons have to be relevant to the particular situation.

'Rationality' is a closely related concept. Thus, the *Macquarie Dictionary* relevantly defines 'rational' as 'proceeding or derived from reason, based on reasoning'. In practice, however, we use the concept of rationality to *refine* our understanding of reasonableness in the following two key ways:

- **Rational *action*:** A person is considered to act rationally if they try to find, and then adopt, the best means to achieve their desired end. People cannot necessarily find all the available options, or accurately predict which will be most effective. However, it is irrational to act unthinkingly, or contrary to one's beliefs as to what is best.
- **Rational *belief*:** A belief is considered rational if it is based on some probative evidence, and the person has not simply ignored countervailing evidence.¹⁰ Rationality is based on practical reasoning, which means that there is scope for people to rely on judgment and experience, as well as formal logic, when evaluating and weighing evidence. However, it is irrational to be logically self-contradictory, to fall back on prejudice or habit, or to take a 'stab in the dark'.

Rationality is necessary for an action to be reasonable, but is not always sufficient. Sometimes, what might seem to be the best means to an end is still ‘unreasonable’, in the sense of being excessive or not ‘proportionate’. The concept of ‘reasonable force’ is a good example: shooting a person dead may be the most effective way of stopping them running off with a stolen packet of chewing gum, but such excessive use of force is not proportionate to the offence. The concept of proportionality is often summed up in the saying ‘You don’t use a sledgehammer to crack a nut’. As discussed below, in law, proportionality also has a more specific meaning, derived from its use in European administrative law, in situations where fundamental human rights are at stake.

Is the test objective or subjective?

When a court considers whether administrative action was reasonable, it may simply ask whether the action is objectively capable of being justified, regardless of the decision maker’s actual reasons. Or it may go further, and ask whether the decision maker’s subjective reasons were reasonable. To give an extreme example, a lazy decision maker may flip a coin and reach the same decision that another, diligent decision maker could have reached by rationally considering the evidence. The decision is objectively capable of being justified. If the legal requirement is simply for administrators to *act* reasonably, then the decision itself will be valid, notwithstanding the flawed process of reasoning used to make it. If the legal requirement is for administrators to *be* reasonable, then the decision will be invalid.

The classic administrative law test of *Wednesbury* unreasonableness strongly suggests an objective test. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (Wednesbury)*,¹¹ Lord Greene MR said that a court could set aside a decision where the decision maker had come ‘to a conclusion so unreasonable that no reasonable [decision maker] could ever have come to it’. In the past, the courts have certainly tended to apply this test in a purely objective fashion. However, the trend is clearly towards a subjective reasonableness test. A number of factors push the courts in this direction. First, a number of related grounds of judicial review, such as improper purpose and relevant and irrelevant considerations, require the courts to examine the decision maker’s actual reasons. Having gone so far, it is difficult for the courts to pull back in the face of other reasoning errors. The modern expansion in legal obligations to give reasons for decisions has clearly reinforced this. That development itself reflects increased political and community expectations that public servants have good reasons for their decisions.

The separation of powers doctrine also suggests that the reasonableness requirement should be a subjective one. The courts have emphasised that the separation of powers doctrine gives the legality/merits distinction a constitutional basis. When the legislature grants power to an administrative agency, it

makes that agency primarily responsible for deciding how that power ought to be exercised. Thus, the decision's merits – what the correct and preferable thing to do was in the circumstances – is for the agency to decide. The court's role is limited to deciding whether the decision maker stayed within the bounds of their power. As Mason J said in *Minister of Aboriginal Affairs v Peko-Wallsend Ltd*:¹²

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

Thus, if the decision maker has properly decided to exercise their power in a particular way, the court should not come up with other reasons for why the power should not have been exercised in that way. Equally, though, where a decision maker did *not* decide reasonably, the court should not come up with better reasons to justify the decision maker's action. The court should not do the decision maker's job for them.

Reasonable fact-finding

Laws are necessarily expressed in general, abstract terms. But legislatures grant abstract powers to administrators so they can make practical decisions, about specific people in particular circumstances. Thus, statutory grants of power are typically expressed in one of two forms:

- If X is satisfied Y exists (or will exist), X may do Z; or
- If Y exists, X may do Z.

In each form of expression, X is the decision maker, Y is a requisite state of affairs, and Z is the action that the decision maker is empowered to take. The focus here is on Y, that is, the requisite state of affairs to which the statutory power relates.

This requisite state of affairs may be purely factual, such as 'the applicant is over eighteen'. It may involve discretionary value judgments and questions of policy, such as 'the applicant is a fit and proper person'. It may involve predicting the future, such as 'the applicant has a well-founded fear of persecution if they return to their home country'. It may involve questions of law as well as fact, such as what constitutes 'persecution' in the previous example. It may involve uncertain cause-effect relationships, such as 'the applicant's injury or disease is attributable to their employment', when the causes of the disease are not well understood.

In every case though, the decision maker's starting point must be empirical reality: Did the applicant actually do something that calls their fitness into question? What happened to the applicant when they were previously in their home country? What disease does the applicant have? As the High Court said in

Minister for Immigration and Ethnic Affairs v Guo,¹³ in relation to determinations about well-founded fears of persecution:

It is . . . ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events . . . Without making findings about the [past], . . . the Tribunal would have had no rational basis from which it could assess whether there was a real chance that [Mr Guo] might be persecuted . . . if he were returned to the PRC [People's Republic of China].

Even where statutory grants of power are not directly based on a requisite state of affairs, they will usually identify certain matters that the decision maker should 'have regard to' or 'consider' in deciding whether or not to act. Again, these considerations may be purely factual, or may involve discretionary value judgments or questions of policy, or the risk that something may happen in the future. To the extent that the relevant considerations do involve factual elements, the decision maker must find the facts in order to consider them. Statutes also frequently require decision makers to have regard to certain types of information. Again, Parliament's intention is clearly that the decision maker will not simply engage in idle contemplation, but will use the information to make empirical conclusions.¹⁴

Thus, inherent in all statutory grants of power is a legislative intent that decision makers inform themselves about the empirical reality that they are deciding about – to find the facts of the case. It is no coincidence that statutory requirements to give reasons for decisions invariably require decision makers to explicitly state the findings of fact on which their decision is based. Of course, administrators may get their findings of fact wrong. The general principle is that '[t]here is no error of law simply in making a wrong finding of fact'.¹⁵

In the first form in which grants of power are typically expressed identified above, where the legislature has explicitly referred to X being 'satisfied'¹⁶ as to Y, then it is clear that X's 'jurisdiction', or power to decide, includes the power to determine whether the requisite state of affairs empirically exists: to find the facts of the case. If the decision maker finds the facts of the case in a valid way, they have power to act, even if they are empirically mistaken about the facts. The wrong finding of fact 'goes to the merits' of the decision, not its legality. On judicial review, the court's role – the 'legality' question – is to determine whether the decision maker validly found the facts. The requirements for validly finding facts are discussed further below.

In the second form of expression, power is granted in terms that seem to require the requisite state of affairs to actually, empirically exist before the decision maker has the power to act. If the power is interpreted in this way, then the requisite state of affairs is a 'jurisdictional fact', on which the power's existence depends. A decision maker who acts on the basis of an incorrect finding that the fact exists has made a legal error about the power's existence. Similarly, a decision maker who refuses to act, on the basis of an incorrect finding that the fact *does not* exist,

has also made a legal error about the power's existence. In either case, on judicial review the court's role – the legality question – is to determine whether or not the requisite facts, and hence the power itself, actually existed. In substance, then, in jurisdictional fact cases courts review the correctness of the decision maker's factual finding, not just its reasonableness.

In practice, the courts almost always interpret grants of power in the form 'if Y exists' as actually meaning 'if X is satisfied Y exists'. This interpretation usually seems more consistent with the legislative intent and purpose underlying the Act. It also better maintains the distinction between the legality and the merits of a decision, as it avoids the court having to consider the correctness of the administrator's factual findings. As Aronson, Dyer and Groves point out, '[j]urisdictional facts are . . . mercifully rare, because of the extreme improbability of Parliament intending to give courts the last word on most factual issues'.¹⁷ In the vast majority of cases, therefore 'if Y exists' means, in effect, 'if X is satisfied Y exists'.

When the statute is interpreted in this way, the court's role is exactly the same as when the statute is expressly in those terms. The question is still whether the factual findings were validly made, not whether they were correct. As Gleeson CJ, Gummow, Kirby and Hayne JJ said in *Enfield Corporation v Development Assessment Commission (Enfield)*:¹⁸

[If the relevant provision] had been expressed so as to turn upon the satisfaction or opinion of the relevant authority as to a state of affairs, or *were it to be so understood*, . . . the existence of the opinion or satisfaction would be treated as requiring an opinion or satisfaction formed reasonably upon the material before the decision maker.

As this passage makes clear, the requirement for beliefs to be reasonably formed does not only apply when the grant of power expressly requires the decision maker to form the relevant satisfaction. Rather, it applies whenever the grant of power is 'understood' as requiring the decision maker to form a conclusion about the requisite state of affairs.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (S20)*,¹⁹ and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (SGLB)*,²⁰ the High Court held that a decision maker's satisfaction was not reasonably formed if it was 'illogical, irrational, or was not based on findings or inferences of fact supported by logical grounds'. In practice, three interrelated requirements must be met for a factual finding to be 'supported by logical grounds':

1. The finding must be empirically grounded in rationally probative evidence.
2. The finding must have been reasonably open on that evidence.
3. The decision maker must have rationally considered that evidence.

In order to avoid intruding excessively into the ultimate decision's merits, the courts apply a 'rule of restraint'²¹ when applying these requirements. Allowance is made for the decision maker's judgment and experience, and not every factual

statement in a statement of reasons needs separate justification. Further, even if a particular finding is found to be problematic, the decision itself will only be invalid where it was 'based on' that finding. Each of these requirements is discussed below, as is the legal consequences of rational uncertainty, i.e. situations where the evidence is simply inadequate to allow decision makers to reach the required state of satisfaction.

The finding must be empirically grounded in rationally probative evidence

The first requirement for a factual finding to be supported by logical grounds is that it must have some grounding in empirical reality. Decisions based on chance, blind guesses, convenience, habit or prejudice are all properly characterised as arbitrary and capricious. Thus, at common law it is clearly established that a finding of fact based on 'no evidence' is a jurisdictional error of law.²² In this context, evidence is not limited to material that would be admissible as evidence in judicial proceedings. Rather, it means any 'material which tends logically to show the existence or non-existence of facts . . . or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant'.²³

To satisfy the 'no evidence' rule, it is not enough that there is material relevant to the *question* of fact to be determined: the material must provide empirical grounding for the *actual finding* made. As Hayne J said, on judicial review, the question for the court is 'whether the material upon which the decision maker has acted was material that, as a matter of logic or reason, supported the finding made'.²⁴ For example, in *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs*,²⁵ the Refugee Review Tribunal accepted that the applicant had a well-founded fear of persecution from the Taliban when he left Afghanistan, but it found that his fear was no longer well-founded, because the Taliban 'is no longer a force in Afghanistan', and not active in the applicant's home region. Material before the tribunal described the general situation in Afghanistan, and the level of the Taliban's activity in the applicant's home region. There was, therefore, some evidence on the overall question to be determined. However, the only information about the applicant's home region suggested that the Taliban in fact remained active there. The Full Federal Court set aside the Tribunal's decision, because there was no evidence supporting its critical finding that the Taliban was not active there.

The 'no evidence' ground requires that there be literally 'no' rationally probative evidence to support the finding made. As Aronson, Dyer and Groves put it, '[t]he "no evidence" ground cuts out when even a skerrick of evidence appears'.²⁶ Some cases have taken a *de minimis* approach,²⁷ holding that there must be more than a 'scintilla' of evidence supporting the relevant finding, because a mere scintilla rationally cannot prove anything.²⁸ The dividing line between a 'skerrick' and a 'scintilla' is far from clear, but either way the 'no' evidence rule is

a strict one. It is not a covert means to attack the sufficiency of the evidence or the weight attributed to it. Questions of the sufficiency and weight of evidence go to the decision's merits, except in extreme cases where it can be said that the factual finding was not reasonably open on the evidence before the decision maker.

The finding must have been reasonably open on the evidence

In practice, decision makers rarely make important finding of facts based on absolutely 'no evidence'. Usually, questions of fact need to be resolved precisely because the evidence is unclear. The decision maker's job is to mentally weigh up the various pieces of evidence, determining how persuasive each one is, and then balance it out to reach a conclusion. This weight and balance metaphor may suggest some kind of scientific or mathematical process, but in practice the process usually involves a large degree of discretionary judgment. By conferring decision-making power on the administrative agency, the legislature has indicated that it relies on the decision maker's judgment and discretion to achieve the legislation's underlying objective. The courts therefore strongly adhere to the principle that the decision maker's evaluation of the evidence lies at the heart of the decision's merits. Factual findings cannot be judicially reviewed simply because the court would have reached, weighed and balanced the evidence differently.

However, if there really is no more than a mere 'skerrick' of evidence going one way, and overwhelming evidence going the other, then objectively there may only be one finding reasonably open. A decision maker who makes the contrary finding invites judicial criticism. Several possible doctrinal bases have been identified for why the court can invalidate such decisions: The decision maker must have misunderstood the law to be applied, or asked the wrong question, or must not actually have been satisfied of the requisite state of affairs;²⁹ or the decision maker has created a reasonable apprehension of bias,³⁰ or the finding was '*Wednesbury* unreasonable'.³¹

Conceptually, *Wednesbury* unreasonableness provides the most satisfying explanation for such a holding. It provides a direct, and quite apt, description of the actual problem: 'No reasonable decision maker, looking at the evidence, could have made that finding of fact'. The other suggested doctrinal bases all require the court to *infer*, from the finding's objective unreasonableness, that some other problem exists: if the decision maker decided that, then by implication they must have asked themselves the wrong question, or not really considered the question at all, or have already prejudged the question. However, *S20* appears to have closed off using *Wednesbury* unreasonableness to describe the problem. It held that *Wednesbury* unreasonableness only applies to exercises of discretions, so that it cannot be used as a ground of attack for factual findings that were not objectively open on the evidence.³²

This does not mean that such findings are immune from review. If a factual finding flies in the face of overwhelming evidence, a court may still infer that

the decision maker must have applied the wrong legal test, or asked the wrong question. Alternatively, *S20*'s requirement that the decision be based on findings of fact 'supported by logical grounds' may be broad enough to encompass objectively unreasonable factual findings.³³ In any case, *S20* clearly does allow review of a decision maker's failure to rationally consider the evidence, and that will often be easier to demonstrate than that the finding itself was not reasonably open on the evidence. A critical finding may well have been reasonably open, but if the decision maker's reasons were seriously flawed, their decision can still be set aside. For example, in *S20* itself, Kirby J accepted that the decision was reasonably open on the evidence,³⁴ but considered it invalid because the decision maker had not rationally considered the evidence.

The decision maker must have rationally considered the evidence

S20 is significant because it clearly establishes that courts can review the subjective rationality of factual findings. The question whether this is an available ground of review has long been a vexed one.³⁵ In *Epeabaka v Minister for Immigration and Multicultural Affairs*,³⁶ the Full Federal Court held that a decision could not be invalidated on the basis that the decision maker had failed to rationally consider the evidence. In *S20*, the High Court did not give explicit guidance on the authoritative status of the earlier case-law, and the Full Federal Court has been divided on whether this ground is now open.³⁷ It surely must be, given that in *S20* the High Court clearly did examine whether the decision maker had failed to rationally consider the evidence.

In *S20*, the Refugee Review Tribunal had rejected the applicant's claims of persecution in the past because inconsistencies in his evidence led the tribunal to reject his credibility. Having rejected the applicant's credibility, the Tribunal declared that it gave no weight to corroborating evidence from several independent sources that clearly supported the applicant's story.

The applicant argued that this was illogical. The question was whether the corroborative evidence strengthened the applicant's credibility, not whether the person's lack of credibility undermined the corroborative evidence – after all, the evidence did not come from him. The tribunal ought to have suspended its conclusion on the applicant's credibility until *after* it had determined what weight the corroborative evidence should have, judged on its own merits. The trial judge and all members of the Full Federal Court agreed that the tribunal's reasoning was flawed in this way, but the trial judge and a majority of the Full Federal Court (Hill and Stone JJ, Finkelstein J dissenting) held that failure to rationally consider the evidence was not an available ground of review.

The High Court in effect upheld Finkelstein J's view of the applicable law. The Tribunal's decision could be set aside if it was shown to be 'irrational, illogical and not based upon findings or inferences of fact supported by logical grounds'. However, a majority (Gleeson CJ, McHugh, Gummow and Callinan JJ, Kirby

J dissenting) held that the decision maker's reasons were not logically flawed. The majority's main reason for this was that it accepted, as a general proposition, that a person's own credibility may be so 'shot' that no amount of independent corroboration can restore it. McHugh and Gummow JJ said: 'It cannot be irrational for a decision maker . . . to proceed on the footing that no corroboration can undo the consequences . . . of a conclusion that³⁸ a party is lying. With respect, however, this statement must be subject to some qualification. At the very least, it clearly is irrational for a decision maker to ignore corroborative evidence, if their conviction that a person is lying has a totally illogical basis, such as the person's shoe-size.

Ultimately, the balance between corroboration and credibility depends on just how 'shot' the person's credibility is, and how strong the corroboration is. Indeed, all members of the High Court considered that the tribunal should actually have considered the corroborative evidence in this case. Gleeson CJ ultimately only let the tribunal member off the hook by suggesting that she did not mean what she said about giving the corroborative evidence 'no weight'.³⁹ McHugh and Gummow JJ (Callinan J agreeing) took the tribunal member at her word, and thought that it would have been 'preferable' had she weighed up the corroborative evidence before reaching a conclusion on credibility. However, her failure to do so went to the merits of her decision, not its validity.⁴⁰ Kirby J also took the tribunal member at her word, but, in his view, her failure to consider the corroborative evidence went to the legality of her decision, because she had failed to take a fundamental step in the legally-required reasoning process.⁴¹

Two further observations about *S20* are worth making. First, McHugh, Gummow and Callinan JJ's approach reflects the courts' traditional reluctance to probe too deeply into credibility findings where evidence is given orally.⁴² Credibility assessments can happen subconsciously and in the blink of a witness's eye, and decision makers are not required to give detailed reasons for why they reject a witness's credibility. On the other hand, there are clear dangers in making credibility assessments 'intuitively', especially where cross-cultural communication issues arise, and when dealing with people who may be vulnerable, traumatised and rightfully fearful of authority.⁴³ There is an increasing expectation for credibility assessments to be put on a more objective basis than 'I found the person inherently unbelievable'. Failing to do so is not an error of law, although it may yet become one. However, if the decision maker does offer more objective reasons for disbelieving a person, the courts are increasingly likely to examine them to ensure that they are reasonably plausible, notwithstanding the majority's lack of inclination to go down this path in *S20*.

Secondly, it is unclear how *S20* applies where the decision maker has made a simple mistake about the evidence, for example, misreading a six (6) for a nine (9). Such errors, on their own, do not equate with irrationality.⁴⁴ On the other hand, the decision maker may turn their simple error into the fundamental, but clearly erroneous, premise for a whole chain of reasoning. In such a case, are the ultimate factual findings and inferences 'supported by logical grounds'?⁴⁵

The rule of restraint

Not every factual conclusion in a statement of reasons needs to be independently based on rationally probative evidence, objectively open on that evidence, and reached through a rational process of reasoning. First, decision makers can usually take uncontested facts for granted, and concentrate their attention on the issues in contention. Otherwise, the process of obtaining the evidence and finding the facts would be incredibly burdensome and impractical. Secondly, decision makers are entitled to rely on their own knowledge, experience and expertise when they assess the evidence. For example, the courts readily accept that decision makers can rely on their own judgment and experience to reject a supposed version of events as inherently implausible. They do not require specific evidence that similar events have never ever occurred, which would of course be impossible to obtain. Thus, up to a point, there is nothing wrong with decision makers generalising from what they already know.⁴⁶

Thirdly, not every factual aside, comment or observation need be based on rational consideration of rationally probative evidence. As the High Court emphasised in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,⁴⁷ the reasons must be read fairly and as a whole. The court's role is not to go over them with a fine toothcomb looking for minor errors, or as Kirby J put it in *S20*, 'minor infelicities or trivial lapses in logic'.⁴⁸ Flaws in the reasoning process must be serious before a court will entertain an argument that they vitiate the factual finding.

Finally, and most importantly, the ultimate decision must be based on the impugned finding: it must appear that the same ultimate decision would not have been made without the impugned finding having been made.⁴⁹ A similar requirement applies under the specific 'no evidence' ground of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁵⁰ The High Court has interpreted this requirement strictly, requiring that the impugned finding be 'critical' to the ultimate decision.⁵¹ This is often discussed in terms of the finding being a 'critical link' in the decision maker's 'chain of reasoning', and a search for whether there is sufficient rational support for the ultimate decision in the reasons, even without the particular factual finding.⁵²

Managing uncertainty

In practice, decision makers frequently cannot determine the facts with any certainty. The available evidence is often limited, and the underlying cause of known facts may not be well-understood. Further, decision makers are only human, so their capacity to process large amounts of information is naturally limited. Getting more and more information may not actually lead to any greater clarity if it simply overwhelms the decision maker's ability to 'hold it all together'. In practice, then, the courts recognise that decision makers need to be able to act on imperfect information, and cannot display logically perfect reasoning, in coming to their conclusions.

But what if the decision maker, acting reasonably, just cannot be sure? In *S20* itself, while there was some corroboration of the applicant's story, there were still some problems with it, so any decision maker would have found it difficult to be sure whether to believe the applicant. Faced with uncertainty, one option is to simply decide that some elements of the evidence are more important than the others, and then reach the conclusion that those elements support, as did the tribunal member in that case. In practice, though, that often amounts to little more than a stab in the dark. The alternative is to openly acknowledge the uncertainty, and then determine the legal consequences that flow from it.

Legally, administrative decision makers usually do not have to be satisfied beyond reasonable doubt. Certainty is not required. Rather, administrative decision makers usually ought to decide on the balance of probabilities, which means asking 'Is it more likely than not?'⁵³ This is consistent with basic expectations of rationality – it is irrational to believe in one version of events if you actually consider another version to be more likely. Under the balance of probabilities test, the mere fact that the decision maker has some doubt about asserted facts does not mean that they should not accept them.⁵⁴ That is the beyond reasonable doubt standard. Asserted facts may be somewhat doubtful, but, on the evidence, still more likely than not. In practice, however, once doubts are raised it may be difficult to rationally decide even what is more likely than not. The only rational and truthful answer may simply be 'I just don't know'.

If insufficient evidence exists to decide rationally where the balance of probabilities lies, then the default rule is that the 'status quo prevails'.⁵⁵ For example, when a person applies for some kind of governmental grant or benefit, the general rule is that the applicant needs to provide sufficient evidence to demonstrate that they meet the relevant criteria. If they fail to do so, then the application can be refused, without the decision maker having a duty to enquire, i.e. obtain further information to fill the gaps in the applicant's case.⁵⁶ On the other hand, decision makers may be empowered to initiate the decision-making process themselves, for example by considering whether an existing grant should be cancelled. In these cases, the decision maker needs to gather sufficient evidence to be reasonably satisfied of facts that justify the action being taken. If sufficient evidence is not available to rationally induce the required satisfaction, then the decision maker cannot act. Of course, in such cases the affected person may still have a 'practical' or 'tactical' onus, in the sense that their failure to provide certain kinds of information may well allow the decision maker to draw adverse inferences about them.

The balance of probability test is the usual test, but a statutory grant of power may expressly adopt a different one. For example, it may require the decision maker to reach a higher level of satisfaction about the requisite state of affairs, such as beyond reasonable doubt, before they can act. Alternatively, it may set a lower standard, such as requiring no more than a reasonable suspicion. In the first case, if the evidence is not sufficient for the decision maker to rationally reach the

required certainty, then the conditions necessary for them to take action do not exist. In the alternative case, the decision maker can act on the basis of reasonable possibilities, rather than probabilities.

Even where the statute does not expressly depart from the balance of probability test, properly understood it may allow or require the decision maker to apply a different test in order to achieve the statute's underlying purpose. For example, many statutes are intended to protect people or the environment from some form of risk. The concept of 'risk' spans two spectra: the likelihood of occurrence (that is, from the barely possible, to the very probable); and the magnitude of the consequences (that is, from minimal to catastrophic). Just how great the risk should be before the regulatory agency intervenes is pre-eminently a policy question that the legislature has committed to the administrative agency, not a court, to decide. A decision maker can therefore be quite risk averse, and decide to act on the basis of quite limited evidence that the risky event has or will occur, particularly where they consider the stakes to be high in terms of consequences.

When it comes to determining whether or not a person is a refugee, the question is whether they have a well-founded fear of persecution. A fear will be well-founded if there is a real chance or real possibility of it occurring; thus decision makers do not need to be satisfied that it is more likely than not. Furthermore, the real chance test applies not only to predicting what is likely to happen in the future, but also to what happened in the past.⁵⁷ In other words, decision makers should ask themselves whether there is a real chance that the applicant is telling the truth, not whether it is more likely than not that they are. In *S20*, the majority did not explain why the decision maker could ignore whether the corroborative evidence showed there was at least a real chance that the applicant would face persecution in Sri Lanka.

Reasonable exercises of discretion

As discussed above, *Wednesbury* unreasonableness applies primarily, if not only, to exercises of administrative discretion – the 'Z' part of 'If Y exists, X may do Z'. The decision maker has discretion if they have a choice about what to do in the particular circumstances. This may involve choosing from a limited menu of options in the statute itself, or a more open-ended search for the best response, for example, determining what action would be necessary and convenient or in the public interest. In either case, identifying the appropriate action inherently raises public policy questions that the legislature has committed to the administrative agency to resolve. Separation of powers considerations apply strongly here, because judges cannot impose their subjective views about good public policy on the government.⁵⁸

However, even the broadest, most open-textured discretions are subject to some limits. A key limit is that they must be exercised in order to achieve the public

policy purpose underlying the statute conferring the discretion.⁵⁹ Decision makers are thus usually restricted to choosing the means they will employ to achieve that statutory purpose, rather than determining the ultimate end to be achieved itself. If a decision maker's choice of means does not appear to be rationally related to a valid statutory purpose, then a court may invalidate their decision, either by inferring that the decision maker had another, improper purpose, or for unreasonableness.⁶⁰ The selected means may appear not to be rationally related to the statutory purpose in either of two ways:

1. The means cannot reasonably be expected to be effective in achieving the relevant end at all;
2. The means, whilst effective, appear to be a wholly inappropriate way to achieve the relevant end.

The first ground is very difficult to establish. Administrators cannot be expected to perfectly predict the future, or achieve perfect outcomes. Predicting outcomes is often necessarily speculative, and there must be scope for policy experimentation. One possible example of this ground, though, is *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy*,⁶¹ in which a fishery management plan was held to be unreasonable. The plan implemented a new 'Total allowable catch' for the fishery by introducing a new quota system. The aim was that each industry participant would be allocated a quota in proportion to their share of the total catch under the old system. However, a statistical fallacy in the formula used to calculate the quotas meant that some participants were allocated far less than their pre-quota share, while other boats were allocated far more. The plan therefore could not reasonably be considered likely to achieve the intended outcome.

The second ground is the more usual basis on which *Wednesbury* unreasonableness is argued. As Aronson, Dyer and Groves say, this form of *Wednesbury* unreasonableness 'is inescapably qualitative, because it requires qualitative assessment of the impugned decision'.⁶² Thus, such arguments are often simply invitations – rarely accepted – for the courts to express their own views about the decision's merits. For this ground of review to rise above merits review, and have a principled basis, there must be a relevant normative standard that limits the choices allowed to the decision maker in the circumstances,⁶³ which the decision has exceeded. To be relevant, the normative standard must be more than just the individual judge's subjective views about what should have been done. It must reflect some wider community standard that the decision maker was bound to respect, either by virtue of the common law, or because the legislature must be taken to have so intended.

Thus, in a frequently quoted passage in *Council for Civil Service Unions v Minister for Civil Service (CCSU)*,⁶⁴ Lord Diplock suggested that *Wednesbury* unreasonableness 'applies to a decision which is so outrageous in its defiance of . . . accepted moral standards that no sensible person who applied his mind to the question could have arrived at it'. In *Kruger v Commonwealth*,⁶⁵ Brennan CJ said:

When a discretionary power is statutorily conferred . . . the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intent.

The difficulty is to identify community standards that clearly operate to limit administrative discretion. In practice, most unreasonable cases have involved either issues of inconsistency and unequal treatment, or some kind of excessive and disproportionate impact on affected individuals.

Inconsistency and unequal treatment

Consistency, in the sense of treating like cases alike, is a basic goal of bureaucratic organisations and a basic requirement of good administration.⁶⁶ As the Western Australian Full Court said recently:

Inconsistency has the potential of bringing the decision-making process into disrepute because it suggests that the decision is arbitrary, rather than one made in accordance with a disciplined approach reflecting the application of sound [policy] principles and consistent with commonly accepted notions of justice.⁶⁷

In *Kruse v Johnson*,⁶⁸ Lord Russell of Killowen CJ made an early suggestion that inconsistent treatment may be unreasonable, saying that a council by-law might be invalid if it was 'partial and unequal' in its operation. In *Parramatta City Council v Pestell*,⁶⁹ the High Court did indeed strike down a decision to impose a rate on industrial properties, but not residential properties in the same area, when both types of property would benefit equally from the work to be paid for by the rate. In *Sunshine Coast Broadcasters Ltd v Duncan*,⁷⁰ Pincus J held that a decision rejecting one application, for reasons equally applicable to competing applications that were allowed, was an abuse of power because no rational basis for the differential treatment could be shown.⁷¹

On the other hand, in *De Silva v Minister for Immigration and Multicultural Affairs*,⁷² the Full Federal Court accepted that there was a rational basis for treating differently people from Sri Lanka, depending on when they had arrived in Australia. From 1990, in light of conflict in Sri Lanka, all Sri Lankans lawfully in Australia were able to automatically obtain a series of twelve-month visas allowing them to remain here on humanitarian grounds. In 1997, the government decided that those who had arrived before 1 November 1993 would be allowed to stay permanently, without having to show that they had a well-founded fear of persecution and therefore were refugees. The others would either have to show that they were refugees, or go home.

The legality of this policy was challenged by 164 Sri Lankans who had arrived after the cut-off date. They argued that there was no rational basis for treating them differently from those who had arrived earlier. The government explained that its policy was to resolve the status of people from a number of countries

besides Sri Lanka, who had also been on temporary humanitarian visas for a long time because of conflicts in their home countries. In other words, the basis for the distinction was not the conditions in the person's home country, but how long they had been in Australia on a temporary humanitarian visa.

The Court accepted that the length of time in Australia was a rational basis for distinguishing between different groups of people. Implementing this policy necessarily involved identifying a cut-off date. While the date selected was in one sense arbitrary, by excluding those who arrived even one day later, any cut-off date would inevitably have this effect. Thus, the cut-off date was rationally related to the end to be achieved, and its differential impact was both rationally explicable and necessary in order to achieve the policy objective.

Disproportionate impact

Administrative agencies are established to take action, in the public interest, that often impacts adversely on particular individuals. This is particularly true of regulatory agencies, which regulate what individuals and businesses may do to their workers, customers, shareholders, the environment and so on. The mere fact that an administrative agency's action impacts on a person cannot, without more, mean that its action was *Wednesbury* unreasonable.⁷³ On the other hand, the principle that the punishment should fit the crime is well-established, and not just in criminal law. When considering how to respond to a particular problem, such as a breach of a licence condition, the decision maker may have a menu of options to choose from that range in their severity. If the infraction is very minor, selecting the most severe response available may be out of all proportion to the situation and therefore unreasonable. As Sir Anthony Mason has argued:

A decision which involves the application of policy to an individual to his detriment in circumstances where there is no reasonable basis for thinking that the integrity of the policy will be significantly compromised if the decision went the other way, is disproportionate to the interest which the decision maker seeks to protect. Gross disproportionality in this sense often lies behind a conclusion that a decision is unreasonable.⁷⁴

One example is *Hall and Co Ltd v Shoreham-by-Sea Urban District Council*.⁷⁵ Hall applied for planning permission to develop land alongside a busy road. The local authority granted permission on the condition Hall construct and maintain a public road along the front of the land, parallel to the existing road, to relieve congestion on that road. The local authority had the power to resume land needed for public roads, but was required to pay compensation if it did so. The council's attempt to achieve the same end without paying compensation was unreasonable.

The leading Australian example is *Edelsten v Wilcox*.⁷⁶ Edelsten was a doctor who owed the Australian Tax Office (ATO) a large amount of money. To recover it, the ATO ordered the Health Commission pay to it 100% of all the Medicare payments that the Commission owed to Edelsten. The Medicare payments were

Edelsten's only source of income, and were also necessary to meet his business outlays, so this decision threatened to put him out of business. He was also appealing the amount that he owed to the ATO, and he was likely to have to abandon his appeal because of the decision's practical impact. The Full Federal Court held that the ATO's decision was a disproportionate solution that made absolutely no attempt to balance the competing interests, and it was therefore unreasonable.

Proportionality, human rights and degrees of scrutiny

In both of *Hall* and *Edelsten*, the public policy objective could be achieved equally effectively, without such a harsh impact. However, it is for the decision maker to decide how important the policy objective is, and therefore what level of effectiveness is needed. Traditionally, *Wednesbury* unreasonableness does not apply where a less severe approach would compromise effectiveness. On this view, the courts cannot require decision makers to trade off some degree of effectiveness, in order for their decisions to have a less severe impact. Doing so is an impermissible intrusion into the decision's merits.

This is very much a one size fits all approach to unreasonableness. It does not distinguish between more and less important policy objectives, nor between more and less important individual interests. In practice, of course, the common law has long considered some individual rights and interests more important than others.⁷⁷ By the same token, some policy objectives are generally considered more important than others – counter-terrorism versus anti-littering, for example. A measure impacting on individual rights may appear a proportionate response to the problem of terrorism, but disproportionate to the problem of litter.

In Europe, in recognition of this, a more specific proportionality test has developed as a test of validity of administrative actions impacting on human rights protected by the European Convention on Human Rights (ECHR). In essence, under the European proportionality principle the court examines whether a decision's impact on a fundamental human right was no greater than was strictly necessary in the circumstances. In assessing what was necessary, the policy objective's importance is weighed in the balance. Some trade-off in effectiveness may be required, if fully achieving the policy objective is not considered important enough to justify the impact on human rights.

Lord Diplock seems to have had this approach in mind when he identified proportionality as a potential ground of review in *CCSU*.⁷⁸ This suggestion was soon taken up, and since *Bugdaycay v Secretary of State for the Home Department*,⁷⁹ the English courts have made *Wednesbury* unreasonableness more context-dependent. Thus, 'the intensity of review in a public law case will depend on the subject-matter at hand; so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification'.⁸⁰ In other words, the nature of the impact on individuals has to be weighed against the objective importance of the policy objective. The requirement

for more intense scrutiny when fundamental common law rights are at stake emerged before the Human Rights Act 1998 (UK) introduced the European proportionality principle directly into English administrative law.⁸¹ Thus, today the English courts apply three levels of intensity of scrutiny:

- The ‘traditional’ *Wednesbury* approach, where there is no particular impact on fundamental rights.⁸²
- Heightened levels of more ‘anxious scrutiny’ where fundamental or common law rights are at stake.⁸³
- A European proportionality analysis where specific Convention rights are at stake.⁸⁴

It remains to be seen whether Australian courts will similarly move beyond a one-size-fits-all approach to *Wednesbury* unreasonableness, and increase the intensity of scrutiny when fundamental rights are at stake. In *S20*, Kirby J was alone in endorsing the second level of ‘heightened scrutiny’ approach in relation to decisions that ‘imperil life or liberty’.

Reasonable Delegated Legislation

Delegated legislation can be attacked as unreasonable in two situations. The first is where the power to legislate is delegated in terms of ‘If X is satisfied Y exists, X may . . .’ make a regulation or by-law, or other rule having legislative force. The High Court’s approach in *Enfield* and *S20* applies equally here. Power to legislate does not exist unless the required satisfaction or opinion was reasonably formed.⁸⁵ Thus, the requirements for reasonable fact-finding discussed earlier apply here, with the qualification that power to legislate is rarely delegated in terms that require the subordinate legislator to decide pure questions of fact. Attention is normally focussed on wider public policy questions, so decisions are usually less vulnerable to attack on the basis of ‘no evidence’, or failure to rationally consider the evidence.

The second situation in which the validity of delegated legislation can be attacked as being unreasonable is where the power to legislate is granted in order to provide an administrative means for achieving an identifiable legislative purpose. This picks up the earlier discussion about the proportionality of means and ends. As Dixon J said in *Williams v Melbourne Corporation*,⁸⁶ delegated legislation is invalid if ‘it could not reasonably have been adopted as a means of attaining the ends of the power’. In modern terms, a court can review whether the delegated legislation is ‘reasonably appropriate and adapted’ to achieving the statutory purpose.⁸⁷ Again, what was said earlier about disproportionate impact on individuals applies here as well.

The complicating factor is that it remains unclear exactly when the reasonably appropriate and adapted test applies. In theory, it is well established that it applies at least where the power is expressly purposive, but courts still do not always apply the reasonably appropriate and adapted test.⁸⁸ Even where power to legislate is delegated in purely subject matter terms, the reasonably appropriate

and adapted test should in principle still apply. The distinction between subject matter and purpose, as a basis for determining whether the test applies, comes from constitutional law. The High Court uses subject matter and purpose as alternative ways of testing whether there is a sufficient connection between a Commonwealth law and a constitutional head of power. If the law and a head of power have the same subject matter, then a sufficient connection exists, and the law's purpose is irrelevant. However, a law that does not directly operate on a head of power's subject matter will still be sufficiently connected to it, if the law is reasonably appropriate and adapted to achieving a purpose that is within power.

If the same approach is taken with respect to delegated legislation, then the reasonably appropriate and adapted test would be inapplicable to exercises of purely subject matter powers. However, the constitutional grants of power to the national Parliament to legislate on specific subjects for Australia's 'peace, order and good government' are very different from statutory grants of power to administrative agencies to legislate. The constitutional grants of power with respect to particular subject matters are not limited to the achievement of any particular purpose, so the High Court has no reason to ask whether the law on the relevant subject matter is reasonably appropriate and adapted to achieving a purpose. In contrast, administrative agencies are only ever given power, including legislative power, for particular purposes. The proper purposes doctrine already requires an agency's purpose in making delegated legislation to be consistent with the head legislation's purposes, even where the power to legislate is delegated in purely subject-matter terms.⁸⁹ Thus, even when the power to legislate is expressed in purely subject matter terms, delegated legislation's validity depends on its purpose, and the reasonably appropriate and adapted test is therefore applicable.

There are good reasons for requiring delegated legislators to articulate the purposes for which the delegated legislation has been made, and then demonstrate that it is reasonably appropriate and adapted to achieving that purpose. *R v Toohey; Ex Parte Northern Land Council*,⁹⁰ in which delegated legislation was made extending Darwin's town boundaries for the improper purpose of defeating an Aboriginal land claim, shows that such power can be the subject of very real abuse. The law will not be effective in curbing such abuses if delegated legislators do not have to disclose their purposes. And there is little point in requiring purposes to be proper, unless a rational connection between the stated purpose and the law is also required. Otherwise, delegated legislators will be able to say one thing – that they are acting for a proper purpose – but do another – act in a way that achieves a completely different purpose.

The main criticism advanced against the development of unreasonableness as a ground of judicial review is that it is too indeterminate a standard. Administrators, affected individuals and courts have insufficient guidance as to what will count as unreasonableness in a particular case. This criticism has some force. For example, exactly what makes a decision illogical, irrational, or based on findings

of fact not supported by logical grounds, and when this test applies, is far from clear. On the other hand, unreasonableness and related grounds are no more indeterminate than the distinction between jurisdictional and non-jurisdictional errors of law, which was so central for so long, and is now undergoing a revival in the High Court's jurisprudence on the constitutional writs under s75(v) of the Constitution. Similarly indeterminate standards abound in other areas of the law too – the reasonable foreseeability test in negligence law, for example. Whatever one thinks about the acceptable level of legal indeterminacy generally, unreasonableness in administrative law is not an extreme example of it.

An alternative view is that unreasonableness's indeterminacy is a strength, not a weakness. It is indeterminacy that has allowed the Australian courts to slowly but surely turn up the intensity of review of factual findings. The effect of this, in my view, has clearly been to enhance the integrity of administrative decision-making in this country. It is also indeterminacy that has allowed the English courts to modify the traditional one-size fits-all approach to *Wednesbury* unreasonableness, in recognition that not all policies, and not all affected interests, are created equal. While the Australian courts have not yet gone down this path, the logic is strong, and it is probably only a matter of time until they do.

The logic is not all one way, however. Governments are not powerless here. They can choose how they respond. The negative reaction is to try to ward off the courts with privative clauses. A more positive approach is to build greater integrity into the system in the first place. The courts are well aware that review for unreasonableness, after a decision has been made, is a poor substitute for well-designed institutions in the first place. Decision-making bodies can be designed to minimise the possibility for arbitrary and capricious decision-making in a number of ways. Multi-member panels are particularly effective, particularly where the members are genuinely independent and bring a range of perspectives, expertise and experience to the task. In such a setting, flaws in reasoning are usually quickly exposed through robust debate. Open, participatory and transparent procedures help too. Indeterminacy means that the courts can turn down the intensity of review if the decision-making institution is well designed,⁹¹ as well as turn it up if it is not. More open acknowledgment of this by the courts would create clear incentives for governments to respond positively rather than negatively, and build more integrity into their institutions.

The 'no evidence' rule

Bill Lane

'No evidence', law versus facts and the 'legality-merits' distinction

Generally, courts have been reluctant to interfere by way of judicial review in the manner in which decision makers assemble facts and evidence¹ so that the extent to which an absence or insufficiency of evidence constitutes a basis for judicial review has been difficult to determine precisely. This judicial reluctance to evaluate the evidence on which a decision is based reflects the 'critical line between factual and legal matters'² and the historical importance which the law attaches to the conventional distinction between errors of law and errors of fact. As Aronson, Dyer and Groves have explained, the fact/law distinction is a fundamental tenet of legal doctrine, observable in most areas of law, albeit one of notorious difficulty in application.³ In a criminal trial, for instance, the role of the judge is to declare the law whilst the function of the jury is to determine the facts and in the process of litigation generally, the function of higher or appellate courts is mostly confined to resolving questions of law.

In administrative law, the fact/law distinction is readily observable in the relationship between administrative appeals and judicial review.⁴ In most systems of administrative decision-making, an appeal from a primary decision maker to a higher administrative official or tribunal usually means a re-hearing of the facts and evidence. On the other hand, intervention by way of judicial review means that the role of the court is confined to the correction of legal errors. As Kirby J explained in *Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002*, judicial review is not a basis for a complete re-evaluation of the findings of fact made by an administrative tribunal.⁵

In Australia, the fact/law distinction in administrative law is accentuated as a result of the marked separation of judicial power under the Australian Constitution. In *Australian Broadcasting Tribunal v Bond*,⁶ Mason CJ spoke of the relationship between the executive and judicial branches of government as meaning that the function of courts exercising judicial review does not ordinarily extend to an examination of findings of facts.⁷

The distinction between legality and merits is another way of describing the manner in which this constitutional separation of judicial power dictates avoidance of judicial interference in the fact finding and evidentiary processes of administrative decision makers. Brennan J warned in *Attorney-General (NSW) v Quin*⁸ that if courts were to examine the merits of an administrative decision, they would assume a power to do the very thing entrusted to the repository of an administrative power within the executive branch, thus transgressing the autonomy of the three branches of government.⁹

In other words, the legality merits distinction is deeply rooted in conventional doctrine about the role of the judiciary in a system of government based on a formal separation of powers. It has played a central, legitimising role in relation to judicial review of administrative action in Australia with the result that recognition of no evidence as a ground of judicial review has been relatively circumscribed. This is in contrast to the more relaxed approach which has evolved under English law.¹⁰

‘No evidence’ as a basis for judicial review

In considering the manner in which ‘no evidence’ has emerged as a basis for judicial review, it is useful to bear in mind at the outset that the use of the word ‘evidence’ in a legal context is normally taken to mean material which would be legally admissible in judicial proceedings, that is, in accordance with the rules of evidence.¹¹ However, most administrative decision makers, including tribunals, are not bound by the rules of evidence; their statutory charters often directing them to proceed with as little formality and technicality as possible in order to arrive expeditiously at a just result.¹² In this context therefore, the term ‘evidence’ does not carry the same meaning as it does in judicial proceedings and often other terms such as ‘matter’ or ‘material’ are used which are an appropriate shorthand method of signifying the distinction. For instance, the system of statutory judicial review in Australia, based on the *Administrative Decisions (Judicial Review) Act 1977* (Cth)¹³ (ADJR Act), does not apply against an exercise of judicial power and in that respect, its ‘no evidence’ ground (dealt with later) refers to ‘evidence or other material’ where the term ‘other material’ encompasses matter which would not be admissible in accordance with the rules of evidence.¹⁴

Fact finding generally and errors of law

As indicated earlier, the confined nature of judicial review reflects the underlying importance of the fact/law distinction so that judicial interference in the fact

finding and evidentiary processes of decision makers is formally restricted to errors of law. Of course, the often fine distinctions which courts draw in classifying an error as legal, rather than factual, are the subject of much critical analysis.¹⁵ However, it is at least recognised that as a general principle, the existence or otherwise of evidence of a particular fact is a question of law¹⁶ so that an absence of evidence or material to sustain a finding or inference of fact is an error of law.¹⁷

As Diplock LJ colourfully explained in *R v Deputy Industrial Injuries Commissioner ex parte Moore*,¹⁸ the decision maker 'must not spin a coin or consult an astrologer' although it can be safely presumed that the threshold level of acceptable decision-making sits well above a benchmark of that nature. Generally, administrative decision makers are expected to base their findings on probative material which is capable, as a matter of normal logic, of demonstrating the existence or non-existence of the relevant facts.¹⁹

The procedure by which both administrative decision makers assemble relevant evidence and reach decisions is largely the same as it is for courts. The process was described by the New South Wales Court of Appeal in *Azzopardi v Tasman UEB Industries Limited*²⁰ as involving three stages – the first being the determination of primary facts and inferences, the second involving identifying and making directions as to relevant law and the third constituting the application of the relevant law to the facts.²¹ Not surprisingly, there was no disagreement between the members of the court that any error committed at the second stage of identifying the relevant law would constitute an error of law.

However, the first and to some extent the third stages, involving as they do the resolution of facts and evidence, produced a difference of views. Although it is widely accepted that an error of law will occur if there is no evidence to support the existence of a fact, the majority in *Azzopardi* considered that as a general rule, the process of determining primary facts at the first stage of the process was not vulnerable to attack on the basis of error of law.²² On the other hand, Kirby P took the view that errors of law were, indeed, possible at this stage – where 'manifest error or illogicality in the reasoning process' was apparent.²³

In relation to the third stage, the majority considered that 'marginal cases' might exhibit an error of law, for instance, where a statutory test is not satisfied²⁴ although no real analysis followed. Nonetheless, *Azzopardi's* reference to 'marginal cases' where the application of statutes is involved draws attention to the fact that in cases of this nature, the process of identifying legal, as opposed to factual errors is often fraught with uncertainty. In general, misinterpreting a statute may mean that an incorrect legal test is applied and that may result in a decision based on an absence of material to support conclusions of fact.²⁵ In that respect, as Starke J pointed out in *Federal Commissioner of Taxation v Broken Hill South Limited*,²⁶ a question of law arises if there was no material to justify the meaning given to the relevant words of a statute.²⁷ *Broken Hill South Limited* involved legislation allowing for tax concessions for 'mining operations'. The issue was whether the decision-making body was correct in determining that this phrase encompassed activities constituting the upkeep, maintenance and safety of an inactive or shut-down mine. In the result, the High Court took

the view that it was permissible for the decision maker to adopt a construction of the phrase which would encompass the activities in question, implying in other words that there was sufficient material to support the meaning adopted so that there was no error of law.

Beyond this, however, most authorities indicate that errors of law in relation to the construction of statutory words and phrases are generally confined to technical or specialist words, as opposed to words capable of definition by reference to their ordinary dictionary meaning.²⁸

‘No evidence’, jurisdictional error and error of law on the face of the record

The emergence of ‘no evidence’ as a basis of judicial review under common law is inherently linked with prerogative writ procedure and in particular, the writs of certiorari and prohibition in relation to the correction of jurisdictional error. Originally of course, these writs applied against inferior courts and indeed, most of the early cases involving attempts to challenge decisions for want of evidence involve decisions by justices and magistrates.²⁹ Generally speaking, however, superior courts were initially loath to engage in any kind of re-examination of the facts and evidence, a position stemming from the basic approach that in accordance with its primary and original meaning, jurisdictional error was confined to the correction of an unlawful assumption of authority.

The 1922 decision of the Privy Council in *R v Nat Bell Liquors Ltd*³⁰ is generally regarded as the classic representation of this judicial reluctance to interfere. The case involved a magistrate’s decision to convict a company for the unlawful sale of alcohol. The conviction was ultimately shown to be based on the uncorroborated evidence of a single witness, who had acted as an *agent provocateur* and whose credibility was in issue for falsely denying a conviction of his own for the theft of alcohol. There being no statutory right of appeal, certiorari was invoked in an attempt to argue that there was no jurisdiction to convict a person on unsupported evidence. According to Lord Sumner, however, as long as the magistrate had jurisdiction to entertain the matter, it was erroneous to suggest that to convict without evidence is to act without jurisdiction:

... if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.³¹

Although there were some indications that the strictness of this approach might have been confined to inferior courts, rather than administrative bodies,³² it was ultimately apparent that it applied to both.³³

As the prerogative writs extended to administrative bodies established by parliament, it was possible for jurisdictional error to result from an incorrect interpretation of statutory provisions conferring power. Although in one sense, this might have allowed for review of the facts and evidence, the remedy was

confined, in jurisdictional terms, to what are generally referred to as 'jurisdictional facts'; that is, facts or circumstances clearly specified by the legislature as conditioning the exercise of the power conferred, so that a wrong finding as to their existence constitutes jurisdictional error.³⁴ So, if a statute provides that if 'A' exists the decision maker may grant a licence, the existence or otherwise of the fact or matter which constitutes 'A' is directly examinable by way of judicial review.

Whilst conventional notions of jurisdictional error did not permit a re-examination of the facts and evidence before the decision maker, the jurisdictional fact doctrine is based on the rationale that the existence of 'A' is a question of law because it determines whether the decision maker has jurisdiction to exercise the power entrusted to it. In that way, the theory could accommodate the apparent review of facts whilst remaining true to the basic position that, once it was shown that the decision maker was correctly seized of jurisdiction, judicial interference in its subsequent treatment of the evidence was unlikely.

Craig has described this as the natural result of the commencement theory of jurisdictional error³⁵ and it was a position which endured, at least in formal terms, until the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*³⁶ gave judicial recognition to a broader notion of jurisdictional error in recognising that a body correctly seized of jurisdiction may nonetheless subsequently exceed jurisdiction in the process of reaching a decision.

Jurisdictional error aside, however, prerogative writ procedure had always contained the potential for an alternative means of examining the adequacy of evidence before the decision maker. The possibility lay within the writ of certiorari which, apart from correcting jurisdictional error, also corrects errors of law on the face of the record. Whilst this particular use of the writ had fallen into disuse in the late nineteenth century, it was revived by the Court of Appeal in *Re Northumberland Compensation Appeal Tribunal; ex parte Shaw*.³⁷

Of course, the error must be a legal, rather than a factual, error, although it need not be one of such magnitude as to amount to jurisdictional error.³⁸ So, despite the narrow formalism of *Nat Bell Liquors Ltd*, certiorari for error of law on the face of the record offered a means of traversing restrictions inherent in the traditional concept of jurisdictional error. It thereby provided an alternative avenue for possible judicial examination of the adequacy of facts and evidence upon which a decision was based. The manner in which this was possible was explained by the House of Lords in *Armah v Government of Ghana*.³⁹ In that case, the question was whether a magistrate had correctly committed a person for trial where the statute required the evidence to raise 'a strong or probable presumption' that an offence had been committed. Ultimately, the majority found that the magistrate had applied the wrong test, mistakenly taken from an earlier, differently worded provision of the statute. In other words, the wrong question had been posed at the outset, thus resulting in jurisdictional error. Accordingly, it was not strictly necessary to consider whether, if the correct test had been applied, there was, nonetheless, evidence which would support a decision to commit for

trial. Nonetheless, Lords Reid and Upjohn issued a reminder that interference by way of certiorari was not confined to jurisdictional matters but extended to errors of law on the face of the record. Lord Upjohn pointed out that the existence or otherwise of evidence to justify a finding was a question of law.⁴⁰ Lord Reid noted that, if the depositions in a committal hearing were part of the record, there would be an error of law on the face of the record if they were insufficient to support the committal.⁴¹

Ultimately, the effectiveness of certiorari for error of law on the face of the record as a means of examining evidentiary findings depends largely on how widely review courts are prepared to define 'the record'.⁴² Obviously, a broad approach increases the available material from which potential errors of law can be identified although, in Australia at least, the High Court has rejected an expansionist approach in defining 'the record'. So, for instance, in the absence of legislation to the contrary, the record of an inferior court will not ordinarily include the transcript, exhibits or the reasons for decision⁴³ unless they have been incorporated by reference.⁴⁴ In the case of tribunals, the reasons for decision and the complete transcript of proceedings will not ordinarily be taken as constituting the record.⁴⁵

Developments under English law

English courts have managed to develop a more relaxed approach to judicial review and 'no evidence' than their counterparts in Australia. As Mason CJ explained in *Australian Broadcasting Tribunal v Bond*, the difference is that English law regards 'insufficiency of evidence' as a basis for judicial intervention, whereas Australian courts have formally adhered to the stricter, 'complete absence of evidence' approach.⁴⁶ The House of Lords decision in *Anisminic Limited v Foreign Compensation Commission*⁴⁷ is responsible in some measure for the broader approach. As indicated earlier, by expanding the concept of jurisdictional error, the position was ultimately reached under English law where no distinction remains between jurisdictional and non-jurisdictional errors of law⁴⁸ except, possibly, where a privative clause expressly ousts the writ of certiorari for error of law on the face of the record.⁴⁹ Under Australian law by contrast, the distinction between jurisdictional and non-jurisdictional errors of law remains, at least in the case of inferior courts.⁵⁰

In other respects, the 'insufficiency of evidence' position under English law is often linked with a series of cases involving local authority regulation of housing and compulsory acquisition of which the Court of Appeal decision in *Ashbridge Investments Limited v Minister of Housing and Local Government*⁵¹ is usually regarded as representative. There, the court sanctioned a trial judge's interference with a ministerial determination made under legislation which required the minister to decide that a particular dwelling constituted a 'house' satisfying the description of 'unfit for human habitation'. Lord Denning said that the trial judge was justified in setting aside a decision of this nature, not only where the

minister had acted on 'no evidence' but also where he had reached a conclusion which could not be 'reasonably sustained on the evidence'.⁵² Although the case involved a statutory appeal, rather than judicial review, the court's reasoning made it obvious that this was regarded as an issue going to the jurisdiction of the minister,⁵³ an approach which was confirmed in subsequent decisions of a similar nature.⁵⁴

In more recent times, English law has moved further in accepting the idea that a factual mistake in the evidence may, in itself, be a basis for judicial review.⁵⁵ For example, in *R v Criminal Injuries Compensation Board; ex parte A*⁵⁶ the House of Lords indicated that mistake or ignorance of a relevant fact could constitute a basis for judicial review in relation to unfairness or natural justice⁵⁷ and subsequently, in *E v Secretary of State for the Home Department*,⁵⁸ the Court of Appeal took a broader, systematic approach to judicial review for factual error. Whilst generally agreeing with the decision in *ex parte A* that factual error may be reviewable in relation to unfairness, Carnwath LJ suggested four requirements for establishing mistake of fact as a basis of judicial review: (i) that the mistake was a mistake as to an existing fact, including the availability of evidence, (ii) that the fact or evidence was objectively verifiable and uncontentious, (iii) that the applicant for review was not responsible for the mistake and (iv) that the mistake played a material, although not necessarily decisive, part in the decision.⁵⁹

In *E*, decisions by an immigration appeal tribunal rejecting refugee status were shown to be based, in part, on factual assumptions which were later shown to be wrong⁶⁰ and the issue on appeal was whether or not the tribunal had erred in law by not admitting relevant evidence (reports which showed the incorrectness of the tribunal's assumptions). The case proceeded by way of appeal, rather than judicial review, although it was clear that the court considered that there would be no material difference as to the manner in which the point of law was treated.⁶¹

Craig considers that the systematic approach taken in *E* provides useful guidance for future development.⁶² Whilst the case raises distinct and difficult issues about the role of judicial review in relation to evidence which was not available to the decision maker,⁶³ he nonetheless considers that it generally paves the way for a uniform approach to judicial intervention on the basis of mistake of fact which, at the same time, avoids limitations implicit in the narrow approach which confines review to 'jurisdictional facts' or to the situation where the disputed fact is the only evidence on which the decision was based.⁶⁴

The Australian common law position

As indicated earlier, unlike the direction taken by their English counterparts,⁶⁵ Australian courts have been more circumspect in recognising the 'no evidence' rule as an independent ground of judicial review and in that respect appear to be far more reluctant to move beyond the traditional approach of confining 'no evidence' within the realm of the jurisdictional fact doctrine. The High Court decision in *Parisiennes Basket Shoes Pty Ltd v Whyte*⁶⁶ is a landmark illustration of

a theme which has changed little in subsequent years. The issue in that case was whether or not documents necessary for activating a prosecution were properly laid before justices within the time specified by the legislation. This depended on ascertaining when the offence was actually deemed to have occurred.⁶⁷ According to the High Court, this was an issue of fact reserved for the justices, rather than a condition precedent to the valid exercise of their jurisdiction.⁶⁸ That meant that the lack or otherwise of evidence on which their decision was based was not reviewable. Dixon J stated that the existence of facts upon which a decision is based will always be a matter for the decision maker, except where the legislature had specified that they constitute the condition upon which the existence of jurisdiction depends.⁶⁹

The same kind of reasoning is evident in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*⁷⁰ except that, in this instance, judicial intervention was possible because the relevant facts were seen as jurisdictional facts, conditioning the board's power to act. The legislation in that case allowed the board to make an inquiry and to cancel or suspend the registration of an employer of waterside workers where it was satisfied that the employer was unfit to continue. After the board had commenced its inquiry, the High Court granted prohibition. At that point, the evidence before the Board amounted to little more than minor record-keeping infractions by the employer concerning stevedore attendance records. Although the decision can be explained in a number of different ways,⁷¹ at the centre of the High Court's reasoning was the fundamental distinction between

a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the Tribunal and on the other hand, . . . the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends.⁷²

According to this reasoning, the legislature contemplated 'unfitness' to mean deficiencies of a certain magnitude in relation to stevedoring operations rather than the relatively minor or trivial type of infractions which the board had relied on to initiate its inquiry. In other words, the board had proceeded on the basis of facts which did not fall within what the legislation contemplated as sufficient to invoke its inquiry power.

The High Court decision in *Sinclair v Mining Warden at Maryborough*⁷³ is probably the first indication of a greater willingness on the part of the High Court to embrace the idea that an absence of evidence could constitute an independent basis of judicial review outside the jurisdictional fact doctrine.⁷⁴ The legislation in that case allowed a mining warden to recommend to the minister that an application for a mining lease be granted or refused; however, the statute provided that the warden was to recommend refusal if he was of the opinion that the public interest would be prejudicially affected by the grant of a lease.

In the course of reaching a decision to recommend the grant of a lease, the warden refused to take account of an objection put forward by the applicant on

behalf of an environmental group. The refusal was based on the view that the objection simply represented the group's own view and could not therefore be considered as representing the interests of the public, which the statute required. In the result, the High Court ruled that the warden had misunderstood the legal test to be applied – the fact that the appellant represented only a section of the public did not automatically mean that the interests of the public as a whole would not be prejudicially affected.

More to the point however, three of the four judges made it clear that the exercise of the warden's power required depended on more than simply finding that the formal requirements of a lease application were met. Barwick CJ (with whom Murphy J agreed) pointed out that in two of the areas of land relating to the lease application, there was no evidence at all of the presence of minerals and no evidence to suggest that a mining lease was nonetheless necessary for the proper discharge of mining operations in other areas. In other words, there was no evidence upon which the warden's power to make a recommendation could have properly been exercised.⁷⁵ *Sinclair* thus indicates that an absence of evidence, in itself, will allow for judicial review, but as subsequent decisions have indicated this does not extend to a mere insufficiency of evidence.⁷⁶

'No evidence' and other grounds of review

Wilcox J observed in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*⁷⁷ that it is possible for 'no evidence' to be treated as an aspect of some other ground of judicial review where the challenge centres on the absence of facts or evidence before the decision maker.⁷⁸

In one sense, of course, it can be said that the most obvious and direct example is found in the jurisdictional fact doctrine⁷⁹ which, as indicated earlier, operates where the legislature has indicated that the exercise of a power is made conditional on the existence of a specified fact or matter. In other words, the existence or otherwise of that fact or matter is directly examinable for possible jurisdictional error. However, the jurisdictional fact doctrine does not permit review of the general facts and evidence before a decision maker who is otherwise properly seized of jurisdiction.

In other respects, an absence of evidence to support a decision may result in a breach of the rules of natural justice, which, at the same time, may also constitute jurisdictional error.⁸⁰ A breach of natural justice or procedural fairness may arise, for instance, where a decision maker refuses to admit or listen to relevant material⁸¹ or bases a decision on material falling short of what can be described as logically probative evidence.⁸² For example, in *Mahon v Air New Zealand*,⁸³ a Royal Commission had investigated the causes of an airline crash. At the end of the inquiry, the Commissioner made a finding that senior airline officials had deliberately destroyed or concealed relevant documents as part of a pre-determined plan of deception, referring to one official as the 'orchestrator of a litany of lies'.⁸⁴ As the Privy Council explained, the rules of natural justice

required a finding of this nature to be based on evidence of probative value which logically demonstrated the existence of the facts relied on. In that respect, whilst the evidence indicated that some witnesses provided false testimony to the inquiry,⁸⁵ the Commissioner's finding of an organised plan of deception by officials was found to be based upon a misunderstanding of the manner in which they had collected and recorded evidence. Once the Commissioner had formed a preliminary view that such a finding was warranted, he was bound to advise persons likely to be adversely affected and provide them with an opportunity to address relevant matters so as to ensure that he was thus able to proceed on all available and relevant material.⁸⁶

As explained earlier developments under English law have linked mistake of fact with unfairness. In *R v Criminal Injuries Compensation Board; ex parte A*⁸⁷ the House of Lords indicated that judicial review based on unfairness or a breach of natural justice was possible where mistake or ignorance of a relevant fact was involved,⁸⁸ a stance which Craig has explained fits generally within the general nature of English law's judicial review for 'illegality'.⁸⁹

Beyond this, the exclusion of factually relevant material may mean that a relevant consideration has been ignored, resulting in a failure to comply with statutory requirements in reaching a decision.⁹⁰ More controversially, if a process of fact finding can be described as having proceeded in an 'obviously perverse manner', *Wednesbury* unreasonableness may apply.⁹¹ Indeed, recent suggestions from the High Court indicate that, under Australian law, 'manifest illogicality or irrationality' may, in itself, become a recognised basis for judicial interference in the fact finding process.⁹²

Statutory regimes of judicial review and 'no evidence' rule – the 'ADJR Act system'

Some jurisdictions have established statutory regimes of judicial review which expressly incorporate a 'no evidence' rule.⁹³ In Australia, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) establishes a system of judicial review for administrative decisions taken under federal law. The 'ADJR Act system' has been replicated in a number of other Australian jurisdictions.⁹⁴ It does not supplant the pre-existing common law-based procedures but provides a simplified method of judicial review for administrative decisions made pursuant to statutory authority.⁹⁵ Review is available on any one or more of a number of specified grounds, which generally reflect the recognised common law grounds of judicial review.⁹⁶ One of these grounds provides for review where 'there was no evidence or other material to justify the making of the decision'.⁹⁷

At the very least, the inclusion of a 'no evidence' ground was an acknowledgement that Australian common law recognised that an absence of evidence to support a decision constitutes an error of law, although the statutory 'no evidence'

ground is qualified by reference to specific matters which must be established before the rule can operate.⁹⁸

A notable feature of the ADJR Act is that as well as the inclusion of a specific 'no evidence' ground, a general 'error of law' ground was also included.⁹⁹ The architects of the ADJR Act were no doubt well aware that an 'error of law' ground was capable of encompassing 'no evidence' situations, having regard to the common law position. The reason for including both seems to have been driven by a concern that an unrestricted 'no evidence' ground could be unnecessarily disruptive given that, for the most part, administrative decision-making was based on the exercise of discretionary powers where legally admissible evidence was not necessary.¹⁰⁰ There was also a related apprehension about the extent to which an unrestricted 'no evidence' ground might invite courts to stray into the merits of administrative decision-making under the guise of judicial review.¹⁰¹

In the result, the recommendation was for the specific 'no evidence' ground to operate in two situations: firstly, where the decision maker relied on the existence of a particular matter for which no evidence in support could be reasonably demonstrated; and secondly, where a fact which conditioned the valid exercise of a decision was shown not to exist.¹⁰²

The specific 'no evidence' ground in s5(1)(h)

In its final form, the specific 'no evidence' ground in section 5(1)(h) of the ADJR Act provides a ground of review on the basis that 'there was no evidence or other material to justify the making of the decision'.

The two situations which qualify the 'no evidence' ground are spelt out in s5(3) which provides:

The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

The Explanatory Memorandum attached to the Bill for the ADJR Act¹⁰³ stated that the 'no evidence' ground was intended to embody the basis of the decision of the House of Lords in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*.¹⁰⁴ That case dealt with the exercise of a statutory power by the Secretary of State to give a local authority a direction if satisfied that the authority was acting unreasonably. The Secretary of State had directed the local authority to reverse its policy of establishing a comprehensive school system. The direction was based on the view that it would not be possible for the local authority to implement it in time for the start of the new school year, thus

causing insurmountable difficulties for the parents of students. According to the House of Lords, whilst the Secretary of State's power was discretionary, it had to be based on the existence of at least some evidence warranting its exercise and in this case, there was no evidence that the local authority was acting unreasonably, thus there was nothing to justify the direction.

It is not clear which of the two limbs of the 'no evidence' ground was meant to be predicated on *Tameside* although it would seem that there are elements of the decision in both. Wilcox J observed in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*¹⁰⁵ that *Tameside* clearly involved a positive finding as to the non-existence of the relevant fact, thus suggesting its relevance for the second limb. On the other hand, Kirby J in *Minister for Immigration v Rajamanikkam*¹⁰⁶ commented that a reading of *Tameside* made the provenance of the first limb at once obvious.¹⁰⁷

The general 'error of law' ground in s5(1)(f)

As indicated earlier, apart from a specific 'no evidence' ground, the ADJR Act also includes a general 'error of law' ground. This is found in s5(1)(f) of the ADJR Act, which provides for review on the basis that 'that the decision involved an error of law, whether or not the error appears on the record of the decision'.

The relationship between 'error of law' in s5(1)(f) and 'no evidence' in s5(1)(h)

Given the underlying common law position that 'no evidence' constitutes an error of law, the inclusion of both an 'error of law' ground and a 'no evidence' ground raises an immediate question about their intended relationship. Did the architects of the ADJR Act contemplate the 'no evidence' ground in s5(1)(h) would operate in a self-contained manner, supplanting all pre-existing common law notions of no evidence? Or was it assumed that there would be a measure of overlap between the 'no evidence' and 'error of law' grounds?

There is no indication that the potential interplay of the two separate grounds was actively considered beforehand. The first judicial comment on the issue was made in one of the initial Federal Court decisions dealing with the provisions in *Western Television Ltd v Australian Broadcasting Tribunal*.¹⁰⁸ In that case, Pincus J expressly rejected the idea that the ADJR Act 'error law' ground in s5(1)(h) could encompass circumstances considered as falling within the particular 'no evidence' ground. In his opinion, that would result in the 'no evidence' ground having no practical effect.¹⁰⁹

However, that view did not endure and a basis for 'harmonising' the two grounds was subsequently explained by the High Court in *Australian Broadcasting Tribunal v Bond*.¹¹⁰ According to Mason CJ, the preferable view was to regard the 'error of law' ground in s5(1)(f) as encompassing what was generally understood to be within the common law 'no evidence' rule before the enactment of the ADJR Act. On this view, the specific 'no evidence' ground in s5(1)(h) was

meant to be an expanded form of its common law counterpart, albeit within the confines established by s5(3).¹¹¹

The 'harmonisation' approach suggested by Mason CJ in *Bond* seems to have been generally accepted, at least in the sense of not being the subject of any detailed judicial analysis in subsequent cases. It was briefly referred to by the High Court in *Minister for Immigration v Rajamanikkam*,¹¹² and whilst it did not receive unequivocal endorsement, nor was it expressly rejected.¹¹³ The lack of specific analysis in *Rajamanikkam* was not, however, surprising given that the case did not directly concern the two ADJR Act grounds but dealt with analogous judicial review provisions of the *Migration Act*. In this respect, whilst the *Migration Act* 'no evidence' ground was identical to its ADJR Act counterpart,¹¹⁴ the 'error of law' ground¹¹⁵ was significantly different, thus ruling out the need to address the assumed relationship between the two ADJR Act grounds put forward in *Bond*.

Some difficulties remain with the *Bond* 'harmonisation' approach. First, the demarcation it makes between the 'error of law' and 'no evidence' grounds assumes that the common law position in Australia concerning 'no evidence' is readily identifiable as at the date of enactment of the ADJR Act.¹¹⁶ Secondly, it also seems to assume that the substantive content of the ADJR Act grounds of review remains immutably fixed, reflecting the law as it stood at the date of enactment of the ADJR Act. Yet, there are persuasive arguments for interpreting the provisions containing the ADJR Act grounds of review¹¹⁷ in an ambulatory manner, so that their scope and content are capable of varying over time, in tune with common law judicial development.¹¹⁸

Finally, whilst *Rajamanikkam* did not expressly disapprove of the *Bond* 'harmonisation' approach, comments made by Gaudron and McHugh JJ seem to imply an important qualification. In their view, a single finding may involve a reviewable error under both the 'error of law' and the 'no evidence' grounds of the ADJR Act.¹¹⁹ If that is so, then the rationale for maintaining a separate field of operation for each ground becomes less convincing. As well as this, if common law development in Australia follows the direction of English law on 'no evidence', then the specific statutory 'no evidence' ground may become less relevant.

Section 5(3)(a) – the first 'no evidence' limb

The first limb of the s5(1)(h) 'no evidence' ground applies where the relevant decision-making power is structured in such a way as to mean that the decision maker was 'required by law' to reach a decision only if 'a particular matter was established'. Given that the ADJR Act only operates in relation to the exercise of statutory decision-making powers, 'required by law' will generally mean that the statute creating the decision-making power must specify the 'particular matter' which must be established.

In that respect, it is not surprising that the first limb of the rule has drawn analogies with the common law 'jurisdictional fact doctrine'. For instance, in

Western Television Ltd v Australian Broadcasting Tribunal,¹²⁰ Pincus J said that s5(3)(a) applied to legislation which, either expressly or by implication, provides that the making of decision 'A' depends upon the establishment of matter 'B'.¹²¹ Similarly, in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*,¹²² Wilcox J stated that that s5(3)(a) applies 'where the establishment of a particular fact is a pre-condition in law to the decision'.¹²³

The analogy is well illustrated by the reasoning and result in each of these cases. In *Western Television Ltd*, the legislation required a tribunal to grant a television broadcasting licence to the 'most suitable applicant'.¹²⁴ As there was no statutory definition of this term, the tribunal, itself, identified certain characteristics it considered relevant to suitability, one of which was the 'shareholding stability' of the companies competing for the licence. According to the reasoning of the tribunal, shareholding stability was necessary to ensure that the successful contender would not fall under different control subsequent to having been granted a licence. The tribunal then proceeded on the assumption that corporate shareholders were more likely to 'sell out' than individual shareholders. On that basis, the licence was awarded to the applicant's rival, whose shares were held by a higher proportion of individual, as opposed to corporate, shareholders.

In an application for judicial review under the ADJR Act, the applicant asserted that in terms of s5(3)(a), there was 'no evidence' to support the tribunal's assumption about corporate shareholders. However, Pincus J pointed out that whilst shareholding stability was a relevant aspect of the statutory requirement of suitability, it was not, in itself, a criterion which the legislation expressly required the tribunal to establish in order to reach a valid decision.¹²⁵

In a similar fashion, the relevant statute in *Television Capricornia Pty Ltd* specified that the 'financial, technical and management capabilities' of an applicant had to be considered by the tribunal in reaching a decision to grant a television broadcasting licence. However, the legislation did not specify that these criteria were exclusive, thus allowing the tribunal to consider other relevant matters. On that basis, the court ruled out any reliance on s5(3)(a) of the ADJR Act that there was no evidence to support the tribunal's conclusion that the successful applicant had adequate 'financial etc. capabilities'. As Wilcox J explained, satisfaction of the 'financial etc. capabilities' requirements was not, as a matter of law, specified by the legislation as a necessary precondition to a decision to grant a licence.¹²⁶

Rulings in cases of this nature indicate a rather confined role for the first limb of the statutory 'no evidence' rule. Many statutory decision-making powers are cast in terms which require the decision maker to consider or have regard to specified matters in reaching a decision. Yet the rule seems to require that the 'particular matter' relied on by an applicant for judicial review is expressly and specifically identifiable in the statute as a requirement and secondly, that the statute describes it in terms which show that its existence is clearly a condition precedent to the valid exercise of the decision-making power. In other words, it will not be sufficient to simply show that, in light of the statute, the matter is, by law, a relevant consideration in reaching a decision.¹²⁷

The first limb of the statutory 'no evidence' ground also refers to the need to show that there was no 'evidence or other material' from which the decision maker could reasonably be satisfied that the 'particular matter' was established. As indicated earlier, given that most administrative decision makers, including tribunals, are not bound by the rules of evidence, the term 'other material' allows the rule to operate in relation to matter which would not be admissible in accordance with the rules of evidence.¹²⁸ Nonetheless, there must be limits on the kind of material to which the provision can relate. Mason CJ in *Bond* said that the ground allows for review of a finding of fact where 'there is no probative evidence to support it',¹²⁹ a threshold which is consistent with the general rule as to the kind of material the law expects administrative decision makers to rely on in reaching decisions.¹³⁰

Finally, the wording of the first limb has been described as lessening the burden under common law of having to demonstrate a complete absence of evidence to support the decision.¹³¹ This stems from the fact that it simply requires an absence of evidence or material from which the decision maker 'could reasonably be satisfied that the particular matter was established'. At the same time, however, as Aronson, Dyer and Groves point out, an odd feature of the rule is that it is confined to the decision maker's reasoning process, irrespective of whether or not the decision would have been different if other material was before the decision maker.¹³²

Section 5(3)(b) – the second 'no evidence' limb

The second limb of the 'no evidence' rule in s5(3)(b) of the ADJR Act operates where a decision is based on the existence of 'a particular fact' in circumstances where an applicant can establish that it 'did not exist'. As the wording indicates, there are at least three issues involved in its application, the first two of which are inter-related.

The first concerns the manner in which the 'particular fact' is identified, raising a question as to the level of specificity or abstraction involved in the process of identification. In a broad sense, it is generally understood that the law distinguishes between 'primary' or 'evidential' facts – which are those observable by witnesses or proved by testimony – and 'secondary' or 'ultimate' facts – which are those inferred by a process reasoning from the existence of 'primary' or 'evidential' facts.¹³³ Given that 'primary' or 'evidential' facts do not ordinarily attract immediate legal consequences,¹³⁴ there seems to be an assumption that, for the most part, the second limb of the 'no evidence' rule requires identification of a 'secondary' or 'ultimate fact' as the 'particular fact'.¹³⁵ This view is also consistent with the approach taken by the majority on *Azzopardi v Tasman UEB Industries Limited*¹³⁶ that errors of law are unlikely to arise in the process of determining primary facts.¹³⁷

Secondary or ultimate facts may be constituted by a wrong assumption by a decision maker about the implications of a primary fact. This is illustrated

by *Curragh Queensland Mining Ltd v Daniel*.¹³⁸ In that case, the applicant had entered into a contract to supply a quantity of coal by a specified date and had imported mining equipment in order to meet its obligations under the contract. An import tariff concession was available where, according to the statute, no suitably equivalent locally manufactured product was reasonably available. In applying for a tariff concession, the applicant argued that the locally manufactured product could not move the quantities of coal in the time frame necessary to enable it to meet its contractual obligations. However its application was rejected on the basis that it could have arranged the terms of its contract for the supply of coal in such a way as to allow for the use of a locally manufactured product.

According to the Full Federal Court, the decision to refuse a tariff concession was based on a fact which was shown to be incorrect, namely, that the applicant could have negotiated a later delivery date for the coal than that stipulated in its contract. In other words, the ‘particular fact’ was the (incorrect) assumption by the decision maker about the legal liability of the applicant under the contract.

The second and inter-related issue is that the decision must be shown to be ‘based on’ the particular fact. In *Bond*, Mason CJ¹³⁹ had said that a decision is ‘based on’ a particular fact where that fact is ‘critical to the making of the decision’,¹⁴⁰ a description which the court subsequently approved of in *Minister for Immigration and Multicultural Affairs v Rajamanikkam*.¹⁴¹ This means that the ‘particular fact’ must attain a high level of significance in the process of reasoning leading to the decision so that, at the very least, findings on matters of peripheral importance are clearly excluded.¹⁴²

Gleeson CJ also warned that the higher the level of particularity employed in identifying the ‘particular fact’, the harder will it be to demonstrate the decision was ‘based on’ the existence of that fact.¹⁴³ This again emphasises the apparent assumption mentioned earlier, that the first ‘no evidence’ limb is primarily concerned with secondary or ultimate facts, rather than primary facts.

It is the actual process of reasoning employed by the decision maker which is critical in determining whether a decision is ‘based on’ a particular fact. This was initially highlighted by the Full Federal Court in *Curragh Queensland Mining Ltd v Daniel*.¹⁴⁴ According to Black CJ (with whom Spender and Gummow JJ agreed):

A decision may be based upon the existence of many facts; it will be based upon the existence of each particular fact that is critical to the making of the decision. A small factual link in a chain of reasoning; if it is truly a link in the chain and there are no parallel links, may be just as critical to the decision, and just as much a fact upon which the decision is based, as a fact that is of more obvious immediate importance. A decision may also be based on a finding of fact that, critically, leads the decision maker to take one path in the process of reasoning rather than another and so to come to a different conclusion.¹⁴⁵

This idea that a decision may be ‘based on’ a fact which is otherwise only a ‘small factual link’ in the process of reasoning received general endorsement from the High Court in *Rajamanikkam*,¹⁴⁶ although Gaudron and McHugh JJ

cautioned that the finding of fact must be one 'without which the decision in question either could not or would not have been reached'.¹⁴⁷ According to their methodology, whether a decision 'could' have been reached without the existence of a particular factual finding depends on a process of logic or the law to be applied¹⁴⁸ and whether or not it 'would' have been made requires analysis of the decision, the decision-making process itself and the reasons given for reaching the decision.¹⁴⁹ In general, the task centres on the decision maker's reasons and whether or not any supposed 'factual link' in the chain of reasoning was pivotal in the sense that it could only have led in the direction of the decision.¹⁵⁰

*Rajamanikkam*¹⁵¹ dealt with a decision by a refugee review tribunal, affirming a decision of a delegate of the Minister to reject the respondents' applications for protection visas under migration law. According to the tribunal, they did not satisfy the criteria for refugee status inasmuch as there was no well founded fear of them being persecuted if returned to Sri Lanka.¹⁵² The tribunal's written reasons listed eight factors in support of its decision, two of which were based on assumptions by the tribunal that on two occasions during interviews and questioning, the first respondent had deliberately conveyed a false impression that it was unsafe for him to return to an area where he had formerly lived. These assumptions stemmed from the tribunal's belief that in relation to each occasion, the first respondent had previously given inconsistent accounts. The tribunal therefore concluded that he was not a credible witness in relation to the answers he gave on each of the two occasions.

The tribunal's belief as to the existence of prior inconsistent statements by the first respondent was subsequently shown to be wrong. First, it had overlooked other written material he had provided which removed any cause for doubting his credibility and secondly, it had simply made a mistake as to what he had actually said in verbal evidence at the hearing. On that basis, the Full Federal Court described the tribunal's assumptions as 'facts' of central importance, without which it would not have reached its decision.¹⁵³

When the matter reached the High Court, three of the four members of the majority¹⁵⁴ accepted the proposition that, first, the tribunal's assumptions were non-existent 'facts' and that secondly, the tribunal took account of them in reaching its decision.¹⁵⁵ However, the majority were not prepared to find that this, in itself, meant that the tribunal's decision was *based on* these non-existent facts. In simple terms, that was because the tribunal had listed eight reasons in support of its final decision, only two of which were based on the non-existent 'facts'.¹⁵⁶ Interestingly, Callinan J thought that the second limb of the 'no evidence' rule should only apply where a decision is shown to be based upon the existence of a positive fact, rather than a negative finding as to the existence of a fact, as was the case here. This issue has been the subject of previous judicial consideration,¹⁵⁷ although the rationale offered by Callinan J stems from a perceived need to ensure that the second 'no evidence' limb is not available where the basis of review involves nothing more than an erroneous finding of fact.¹⁵⁸

Most administrative decision-making bodies are now obliged to provide reasons for their decisions and for the most part, good practice dictates the provision

of more than one isolated reason. In that respect, it would seem absurd to say that a decision cannot be 'based upon' a non-existent fact where more than one reason is given. Does *Rajamanikkam* say that the non-existent facts in that case were rendered less than 'critical to the making of the decision'¹⁵⁹ simply because additional reasons in support of the decision were formally recorded? Or was it because, in a more abstract sense, the additional, unrelated reasons reduced the non-existent facts to the status of simply being 'parallel links'¹⁶⁰ in the chain of reasoning?

In another sense, the majority approach in *Rajamanikkam* separates the process of reaching a decision from the ultimate decision itself. On that basis, the tribunal's conclusion as to the first respondent's credibility could be viewed as simply an interim step which was 'based upon' the non-existent facts whilst its ultimate decision to refuse a protection visa was 'based on' a greater number of facts, derived from all of the relevant evidence before it.¹⁶¹ As Callinan J emphasised, the decision under review was not whether the first respondent had told the truth about two matters arising during the course of the tribunal's proceedings but whether or not the tribunal was satisfied that the respondents were eligible for protection visas.¹⁶²

The third requirement of the second 'no evidence' limb is the need to show that the particular fact relied upon 'did not exist'. If the intention pursued by the framers of the ADJR Act was to ensure that the statutory 'no evidence' ground would be a more restricted version of the common law 'no evidence' rule, then it is certainly achieved in this requirement. This is clear from the fact that an applicant is required to do more than demonstrate an absence of evidence justifying the decision. It is necessary to go further and negate the actual existence of the fact relied on by the decision maker.¹⁶³

Although onerous enough in itself, this task would be all the more difficult if applicants were confined to the evidence before the decision maker at the time of the decision. However, the accepted approach seems to allow recourse to evidence assembled subsequent to the decision for the purpose of demonstrating that the fact did not exist at the time the decision was made.¹⁶⁴

The relationship between s5(1)(h) and s5(3)

The final aspect of the statutory 'no evidence' ground concerns the relationship between the primary expression of the ground in s5(1)(h) and the manner of operation of the two limbs in s5(3) of the ADJR Act. The opening words of s5(3) specify that the ground of review set forth in s5(1)(h) is 'not to be taken to have been made out unless' the provisions of sub-paragraph (a) or (b) of s5(3) apply and in *Television Capricornia Pty Ltd*, Wilcox J emphasised that this was consistent with the overall intention of the legislature to create a restricted version of the common law 'no evidence' rule.¹⁶⁵

Assuming for the moment then that s5(3) has a qualifying or limiting function, does it comprehensively define the content of the primary 'no evidence' ground

in s5(1)(h)? In *Bond*, Mason CJ (with whom Brennan and Deane JJ agreed) said that the effect of s5(3) is to 'limit severely the area of operation of the ground in s5(1)(h)',¹⁶⁶ a view consistent with the idea that s5(3) exhaustively defines the content of s5(1)(h) in the sense that the primary ground in s5(1)(h) is established as soon as either of the two limbs in s5(3) is made out. However, that does not appear to have been the approach adopted by the Federal Court. In *Curragh Queensland Mining Ltd v Daniel*¹⁶⁷ Black CJ made it clear that it was necessary to separately establish both the primary ground in s5(1)(h) as well as either limb in s5(3) and other decisions indicate the same approach.¹⁶⁸

The issue was briefly referred to by the High Court in *Rajamanikkam* where Gleeson CJ appears to have endorsed the approach taken in *Curragh Queensland Mining Ltd* by Black CJ.¹⁶⁹ Two of the other majority judges, Gaudron and McHugh JJ, subjected the approach taken by Mason CJ in *Bond* to a certain level of criticism.¹⁷⁰ In their view, to say that s5(3) limited the operation of s5(1)(h) was to suggest that, somehow, s5(1)(h) bore a more extensive meaning than its actual terms suggested. In any event, according to their Honours, that view could only be possible if the *Bond* 'harmonisation' approach to the 'error of law' and 'no evidence' grounds in ss5(1)(g) and 5(1)(h) was correct, yet, as explained earlier, no firm opinion was offered on that issue because it was not active in the case.¹⁷¹ Ultimately, Gaudron and McHugh JJ took the view that s5(1)(h) is simply a discrete and independent ground of review, the content of which is identified in s5(3).¹⁷² In a similar vein, Kirby J felt that s5(3) did not qualify the primary 'no evidence' ground but was rather a statement of the content of its application.¹⁷³

The ADJR Act: Where to now for the relationship between s5(1)(h) and s5(3)?

At the very least, the inclusion of a 'no evidence' ground in the 'ADJR Act system' of judicial review acknowledges at the very least that under common law, a complete absence of evidence on which to support a decision constitutes an error of law. At the same time, the inclusion of a general 'error of law' ground has left room for some uncertainty as to the precise boundaries of each of these grounds. As the preceding examination also shows, the specific 'no evidence' ground comprises a number of somewhat technical requirements and the rather confined and restrictive judicial approach taken in interpreting its terms means that it is difficult to predict how it will evolve, in comparison with judicial review for 'no evidence' under the general law.

In an overall sense, any movement towards a broader approach in the general law in Australia concerning judicial review for 'no evidence' appears small, compared with developments under English law. Whilst there are certainly some suggestions that broader means of judicial supervision of fact finding and

evidence may evolve,¹⁷⁴ the basic approach seems to remain for the moment firmly within the conventional boundaries of judicial review, defined by the enduring influence of the 'legality merits' distinction.

The same is largely true of the reformed statutory 'ADJR Act system' of judicial review, which now exists in a number of Australian jurisdictions. Although in some respects it appears to liberalise pre-existing restrictions on review for 'no evidence', it appears to remain, by and large, reflective of the basic common law position in Australia. Indeed, as the previous examination of recent case law show, it appears to have unduly complicated the basic position by creating an overlay of technical and restrictive requirements. Perhaps in that respect, greater possibility for future development of this area of law in Australia may lie within the general law of judicial review.

Failure to exercise discretion or perform duties

Maria O’Sullivan

Administrative decision makers may be given a discretionary power under a statute or required to perform a duty. Of these two, the law relating to the exercise of a discretionary power has been the greater subject of substantial jurisprudence and academic commentary. The central debate in this context is the extent to which administrative law should constrain the exercise of discretion – that is, how to achieve a balance between ensuring that decision makers consider the merits of individual cases, whilst also recognising the bureaucratic imperatives of consistency and efficiency. In this respect, this topic presents a challenge for administrative law which must (to some extent at least) reflect the political reality of administrative decision-making, whilst also ensuring that decisions are made lawfully.

The common thread in the jurisprudence in this area is that a decision maker granted power by Parliament under a statute must be the person to make the decision. Thus he or she cannot fetter that discretion, improperly delegate to another or, if a duty is applicable, fail to perform that duty. Before discussing the grounds for judicial review which arise in this respect, it is necessary to discuss the meaning of the term ‘discretion’ in administrative law and to set the grounds in their political context.

The meaning of discretion

The term ‘discretion’ indicates the existence of a level of choice in making a decision and is usually expressed by use of the word ‘may’ in a statutory provision.¹ This can be contrasted with those statutory provisions which require a decision maker to make a decision if certain criteria are satisfied.² The important aspect of a discretion in terms of administrative law is that it is designed to allow a decision maker to examine the *merits* of a particular case, rather than applying criteria in an automatic fashion.

The political context

Although many statutory provisions place discretionary powers in the hands of ministers, in practice it is normally administrators in government departments who make, or at least play a central role in making, those decisions. This is largely due to the fact that ministers are not able to attend personally to every decision in their portfolio. Thus, in the vast majority of cases, a minister will delegate such powers to public servants in his or her department. Alternatively, he or she may ask departmental officers to write a report on the issue, with recommendations as to the best course of action to take. The question this raises for administrative law is how to accommodate these practices, whilst also ensuring that powers are exercised within the bounds of the statute.

Additionally, the principle of responsible government provides that a minister is accountable to Parliament for the operations of his or her portfolio (also known as 'ministerial responsibility'). The extent to which administrative law principles should take account of this political accountability structure underpins some of the debates about the control of discretion. One controversial question is the extent to which the political relationships and practices which arise from responsible government ought to influence the application by the courts of principles of judicial review. This issue is complicated by the uncertain nature of responsible government in Australian law. The High Court has accepted that the principle of responsible government underpins Australia's Constitution and governmental structures.³ It has also accepted that responsible government is a dynamic concept.⁴ However, it has hesitated to explain clearly what the doctrine entails or requires. The extent to which principles of responsible government interact with judicial review principles therefore remains unclear.

Applicable grounds of judicial review

There are essentially three ways in which an administrative decision maker may fail to exercise a discretion and therefore act *ultra vires*. First, a decision maker cannot make a decision under the 'dictation' of another. Secondly, the decision maker must not fetter the exercise of the discretion by inflexibly applying a rule or policy or by adhering to an undertaking. Thirdly, the decision maker cannot delegate the power to another decision maker unless this is permitted by the statute. Additionally, there are also specific remedies available for a failure to perform a duty.

Acting under dictation

This ground arises where a decision maker acts under the instructions or influence of another person, or of a policy, in such a way that he or she fails

to consider the merits of a particular case. There is some overlap between the ground of acting under dictation and that of inflexible application of policy.⁵

The applicable ground of review for acting under dictation is s5(1)(e) with 5(2)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), which provides that an applicant can apply for an order of review in relation to ‘an exercise of a personal discretionary power at the direction or behest of another person’.⁶

In *H Lavender and Son Ltd v Minister of Housing and Local Government*,⁷ the issue was whether the Minister for Housing had acted under the dictation of the Minister for Agriculture in refusing planning permission to Lavender. The Court held that, although the minister could consider the views of others, the minister must be ‘open to persuasion’ in relation to the decision and the application of the policy.⁸ Importantly, the Court stated that whilst the decision of the Minister for Agriculture might be a *decisive* factor for the Minister of Housing when taking into account all relevant considerations, a policy could not be applied in such a way that it was the *only* material consideration.⁹

Lavender involved the dictation of a minister by another minister. However, what principles should apply where Parliament specifically grants a discretion to a senior public servant, rather than a minister? Should that official act pursuant to ministerial directions? The Australian line of authority on this point is obscure due to divergent judicial opinion in the two leading High Court cases on this issue: *Ipec Air* and *Ansett*.

In *R v Anderson; Ex parte Ipec Air Pty Ltd*,¹⁰ *Ipec Air* applied to the Director-General of Civil Aviation (the head of the Department of Civil Aviation) for permission to import aircraft under the *Customs (Prohibited Imports) Regulations*. The Director-General ultimately refused to grant permission for the importation after the Minister for Civil Aviation informed him that such permission would be against the government’s ‘two airlines’ policy.¹¹ The High Court, by a three to two majority, held that the ground of acting under dictation was not made out on the facts.¹² The judgments of their Honours reflect essentially three different positions on the issue of acting under dictation. Kitto and Menzies JJ took a stricter view of the ability of ministers to direct public servants.¹³ They conceded that a public servant could take account of some matter of general government policy, as long as he or she arrived at a decision of his or her own.¹⁴ However, they noted that the Regulations committed the decision-making power to the Director-General which indicated that the decision was intended to be made at a *departmental* rather than *ministerial* (that is, the political) level.¹⁵ In this case, the minister had effectively made the decision, thereby contradicting the Regulations.¹⁶ Importantly, Menzies J made a distinction between the function of ministers and heads of departments, noting that: ‘the sound theory behind conferring a discretion upon a department head rather than his minister is that government policy should not outweigh every other consideration’.¹⁷

Taylor and Owen JJ adopted an ‘intermediate’ position, finding that government policy was a proper matter for consideration by the Director-General and,

on the evidence, that the decision had in fact been made by him.¹⁸ At the other end of the spectrum, Windeyer J found that the Director-General must have regard to government policy and 'exercise his functions accordingly'.¹⁹ He added that 'the *only* consideration by which the Director-General could properly have been guided was the policy of the Government',²⁰ and that the Director was under a duty to 'obey all lawful directions of the Minister'.²¹ In coming to this conclusion, his Honour referred to public service legislation and the doctrine of ministerial responsibility.²²

The later High Court case of *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*²³ concerned the Secretary of the Department of Transport who was given power under the *Customs (Prohibited Imports) Regulations* to permit the importation of aircraft (thus, an area raising economic policy issues similar to those in *Ipec*). The High Court expressed differing views of the validity of ministerial directions. The majority stated that a decision taken by a public servant at the direction of his or her minister does not constitute acting under dictation. Regarding the proper influence of government policy, Barwick CJ and Murphy J, the only members of the court who had been ministers prior to their judicial appointment, said that in an area such as aviation policy (raising important political and economic issues of national concern) the head of a department would be bound to carry out government policy and the lawful directions of his or her minister.²⁴ In taking this view Murphy J seemed to be influenced greatly by the notion of ministerial responsibility.²⁵ Likewise, Aickin J stated that there is 'nothing improper' in a minister directing the secretary of a department to act in a particular manner and, in fact, in some cases the secretary might be under a duty to act in accordance with the policy of the government of the day.²⁶ Gibbs J stated that it would not be wrong for the secretary in exercising his discretion 'to give weight, and indeed conclusive weight, to the policy of the government'.²⁷ The majority Justices adopted an approach similar to that of Windeyer in *Ipec*.

Mason J, on the other hand, was more cautious. He took a similar approach to that of Kitto and Menzies JJ in *Ipec* by pointing out that the Regulations placed the discretion in the hands of the Director, rather than the minister. Thus, if the secretary was obliged to act according to ministerial direction, then the decision is no longer the secretary's.²⁸ Mason J did recognise the importance of government policy in the area of aircraft importation and thus noted that the decision maker may 'have regard to any relevant government policy', but emphasised that he or she nevertheless has to decide for themselves 'whether the existence of the policy is decisive of the application'.²⁹ In this regard, the secretary is not 'entitled to abdicate his responsibility for making a decision by merely acting on a direction given to him by the minister'.³⁰ Mason J explicitly disagreed with the approach taken by Windeyer J in *Ipec*.³¹

All the judges in *Ipec* and *Ansett* accepted that government policy may constitute a relevant consideration to be taken into account by a decision maker. The point where they diverge is the extent to which a decision maker can give such policy 'decisive' or 'conclusive' weight. However, the line of authority (such as

it is) appears to be that in *certain circumstances*, a departmental officer may be obliged to follow government policy or comply with ministerial directions, even though there is no explicit statutory provision imposing such an obligation.

Ipec and *Ansett* concerned the heads of government departments. Should such an approach also be applicable to statutory authorities and tribunals established as *independent* bodies? This question arose in the 1981 case of *Bread Manufacturers*,³² where the High Court held that the Prices Commission (an independent body) was not precluded from ascertaining the minister's view before making a particular order.³³ This conclusion seemed to depend a great deal on the statute in question which gave the minister the power to veto a decision by the Commission in relation to the setting of prices.³⁴ The Court refrained from formulating a clear legal rule which could be applied to acting under dictation cases (in light of the diverging approaches of the Court in *Ipec* and *Ansett*). Mason and Wilson JJ merely stated that it was not possible to formulate a general rule as the position depended on a variety of considerations, including the 'nature of the question to be decided, the character of the tribunal, and the general drift of the statutory provisions . . . as well as the views expressed on behalf of the Government'.³⁵ These comments illustrate the difficulties posed in adopting set principles in administrative law given that much will depend on the individual statute in question. Since the decisions in the three cases mentioned above, the law relating to the acting under dictation ground remains unclear in a number of respects. One aspect pertains to the extent to which the courts should give effect to statutory provisions permitting ministers to give directions to decision makers as to the exercise of their statutory powers.³⁶ Such provisions, which are increasingly enacted, tend to allow only for *general* directions (rather than directions as to the outcome of a particular decision).³⁷ Can a minister direct an administrator as to the decision to be reached, or are the directions to be limited to only general guidance as to the exercise of the discretion? The position very much depends on the statute in question and the law is still unclear on this issue.³⁸ Where there is an explicit statutory provision allowing for *general* ministerial directions, case law suggests that the minister will generally not be able to direct a decision maker as to the *outcome* of a decision.³⁹ However, it should be noted that there is some conflicting jurisprudence in this regard.⁴⁰ Sir Anthony Mason, writing extra-judicially in 1989, observed:

One of the unresolved problems of administrative justice is that we have failed to evolve principles spelling out the circumstances in which a decision maker must act independently of political direction or influence, as compared to those in which he is subject to such direction or influence. The questions which were not finally answered in *R v Anderson: Ex parte Ipec-Air Pty Ltd* and *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* still remain unanswered.⁴¹

Another somewhat controversial line of cases have been those dealing with cabinet influence on ministerial decisions. Australian courts have held that, at least in some circumstances, a minister may consult cabinet prior to making an administrative decision without infringing the rule against acting under

dictation.⁴² On a more positive note, the courts have made progress in defining what is meant by ‘behest’ as that term is used in the ADJR Act. For instance, in *Telstra Corp Ltd v Kendall*, the Full Federal Court held that ‘the word “behest” cannot simply be a substitution for request’.⁴³ This indicates that it may be unnecessary to establish that a decision maker acted under duress in order to argue this ground of judicial review.

Examining the approaches taken in the above cases more broadly, a number of questions are raised. Do the approaches taken in the cases remain relevant in today’s political environment? For instance, a number of the judges in *Ipec* and *Ansett* placed an emphasis on ministerial responsibility. However, does that emphasis remain well-founded in practice? Furthermore, can it be said that the courts have given sufficient effect to parliamentary intention in the way they have stated the principles in this area? Some of these issues will be canvassed in the concluding section of this chapter.

Inflexible application of policy

A decision maker may take into account government policy in certain circumstances. The term ‘policy’ in this context can encompass high-level ministerial policy, departmental policy or guidelines, or a personal rule or policy of a decision maker. It is thought that policy provides many benefits to administrative decision-making, such as encouraging consistency, certainty, and efficiency – particularly where numerous decision makers are making the same kind of decision across a department.⁴⁴ But policy also has significant disadvantages. For instance, an administrative decision maker may become overly reliant on a policy, thereby failing to consider the individual merits of a case. Thus, administrative law limits the use of policy in a number of ways.

First, a policy must be consistent with the relevant statute. If it is not, an applicant may argue that the policy is outside the scope of the Act pursuant to s5(1)(d) of the ADJR Act,⁴⁵ or that it is an irrelevant consideration.⁴⁶ Secondly, a lawful policy cannot be inflexibly applied by a decision maker. This ground is codified in ss5(1)(e) with 5(2)(f) of the ADJR Act which provides that an applicant may lodge an order of review in relation to ‘an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case’.⁴⁷

In *British Oxygen Co Ltd v Minister of Technology*,⁴⁸ the House of Lords held that the general rule is that a decision maker exercising a statutory discretion must not ‘shut his ears to an application’.⁴⁹ Delivering judgment for the court, Lord Reid noted that there could be no objection to a ministry or large authority which has had to deal with a multitude of similar applications adopting a rule or policy to deal with those applications, provided the authority keeps an open mind to any applicant who wants to argue that their case is exceptional – that is, a decision maker must always be willing to ‘listen to anyone with something new to say’.⁵⁰

The notion of an ‘open mind’ in relation to the application of policy was considered by the High Court in *Green v Daniels*.⁵¹ The applicant, who had recently left school, was denied unemployment benefits on the basis that department policy provided that school leavers could not receive such benefits until the beginning of the next school year. Section 107 of the *Social Security Act 1947* (Cth) set out specific criteria for the grant of unemployment benefits, among which was a requirement that the Director-General (the head of the department) had to be satisfied that the applicant was unemployed. There was nothing in the legislation which stated that school leavers were ineligible for these benefits.

The High Court found that the Director-General had not exercised his discretion lawfully as required under the statute. The Court emphasised that the Act did not confer ‘general discretion’ on the Director-General but set out ‘specific criteria’ for the exercise of his discretion.⁵² On this view, the Director-General could provide guidelines to decision makers in relation to the statute but they could not be inconsistent with ‘a proper observance of the statutory criteria’.⁵³ The existence of specific criteria in s107 was a central aspect of the decision in *Green v Daniels*. In this respect, some later cases have distinguished *Green* on this basis.⁵⁴ This indicates that it may be difficult to establish that a policy is inconsistent with a statute where the particular provision provides only a *general* discretion.

In later cases, the Australian Federal Court has emphasised the need for decision makers to give ‘genuine and realistic consideration’ to the merits of a case and be ready, where necessary, to depart from any applicable policy.⁵⁵ Thus, a decision maker will be required to reflect this in his or her statement of reasons.

The decision maker in *Green v Daniels* was the head of a government department. But to what extent are independent statutory authorities and tribunals expected to take account of government policy? As with the principles enunciated for the acting under dictation ground above, the general principle is that much depends on context, that is:

... the extent to which an independent body may reflect established government policy depends upon the character of the body, the nature of its functions and the relevance to that charter and functions of the policy in question. There is no absolute rule that the body must ignore known government policy. On the other hand, it must not be so influenced by the policy that it fails to perform its own functions, as the statute contemplated.⁵⁶

Finally, it should be noted that particular principles relating to government policy apply to the Commonwealth Administrative Appeals Tribunal (AAT) and the equivalent tribunal of general jurisdiction that exists in many states.⁵⁷

Fettering of discretion by undertakings

The current position in Australian administrative law is that administrators are not able to fetter the exercise of their discretion under a statute by treating

themselves bound by either a representation or a contractual undertaking. In this regard, Australian courts have generally not supported the use of estoppel in administrative law. For instance, in *Minister for Immigration v Kurtovic*,⁵⁸ the Full Court of the Federal Court held that an estoppel cannot be raised so as to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion, as this would amount to an impermissible fetter upon the future exercise of discretion conferred by the relevant statutory provision. A similar approach was taken by the High Court in *Quin* in relation to change of policy.⁵⁹ Putting this aside, applicants may have some procedural rights in such a situation, that is, they may be able to argue that they are entitled to natural justice (the right to be heard) arising from a representation or the existence of a policy.⁶⁰

Improper delegation

If a parliament vests a discretion in a particular decision maker, it is normally that decision maker who must exercise the power. In many cases a statutory discretion granted to a nominated person (usually a minister or department head) may be exercised by an administrator in a government department in two ways: via delegation or by the agency principle.

The common law prescribes a presumption against the delegation (or sub-delegation) of power.⁶¹ This presumption springs from the principle that the power should be exercised by the decision maker named in the statute. Delegation is therefore only permitted if this common law presumption can be rebutted by either an express or an implied authority to delegate in the relevant legislation. Use of the agency principle is slightly different to this in that it avoids the common law presumption against delegation by utilising a principal-agency relationship. The primary difference in practice is that a delegate makes a decision in his or her *own name* whereas an agent makes the decision in the name of *the designated decision maker*.

There is no ground in the ADJR Act which specifically provides for 'improper delegation'. Instead, an applicant may utilise s5(1)(c), relating to lack of jurisdiction, or s5(1)(d), relating to unauthorised decisions.⁶² This ground may arise not simply when it appears from the face of a decision that an unauthorised person has made the decision (for example, because it is signed by a public servant, without proper delegation from the minister) but also where a decision maker simply 'rubber-stamps' a recommendation of his or her staff.

Delegation

A statute will often set out an *express* power for the nominated decision maker to delegate all of his or her powers under the statute. Regard must then be had to any restrictions or conditions governing the power (such as a requirement to publish the instrument of delegation).

In some circumstances, a power to delegate may be implied from the words, structure and subject matter of a statute. In *Ex parte Forster; re University of Sydney*,⁶³ the Full Court of the Supreme Court of New South Wales considered the validity of a decision by the University of Sydney to exclude a student for unsatisfactory performance. The central issue was whether the University Senate, in delegating power to faculties and faculty committees to decide on student admission and exclusion, breached the prohibition against sub-delegation. The Court held that, on the facts, the common law presumption against sub-delegation had not been infringed, as it had been rebutted by construction of the statute and the context in which it operated. The Court noted that the implication of delegation from a statute must be considered 'with due regard to the purpose and objects of the statute, the character of the power which is conferred, the exigencies of the occasions which may arise with respect to its exercise and other relevant considerations'.⁶⁴

In applying this test to the facts, the Court noted that the objects of the relevant legislation was the entire management of the affairs of a university and thus, the University could not function without an 'ample facility for delegation'.⁶⁵ The Court also noted that the importance of the subject matter may have a bearing upon the permissibility of delegation or the appropriateness of the body to whom the delegation is made.⁶⁶

Agency/alter ego principle

The common law also recognises that in certain cases, the agency principle may apply to some administrative decisions (also known as the 'alter ego' principle). There is a slight difference in the way in which a power to delegate is implied from a statute compared with implication of a power to act via agents. The implication of delegation is made by direct and close reference to the terms of the statute, with particular focus on evincing parliamentary intention. In contrast, use of the agency principle looks not just to the statute, but also more broadly at the entire decision-making process to establish whether a power to act via agents can be implied due to administrative necessity.

In *O'Reilly v Commissioners of the State Bank of Victoria*,⁶⁷ the Commissioner of Taxation had validly delegated to the Deputy Commissioner of Taxation his power to issue a notice under section 264 of the *Income Tax Assessment Act 1936* (Cth) to call witnesses to the taxation office to give evidence. This was done pursuant to an express power of delegation in the *Taxation Administration Act 1953* (Cth). That power did not permit the Deputy Commissioner to sub-delegate. Subsequently, the Deputy Commissioner gave written authorisations to Chief Investigative Officers in the department to issue notices in the Deputy Commissioner's name to require persons to attend the taxation office. In this instance, a notice calling two witnesses to appear was sent by a departmental official who stamped the notices with the signature of the Deputy Commissioner, pursuant to a general

authorisation by the Deputy Commissioner. In argument before the High Court, the two persons affected argued that the notices were invalid on the basis that they breached the common law rule against sub-delegation. In response, the Deputy Commissioner argued that the agency principle applied.

The High Court held that the notices were valid as the departmental official had acted as an authorised agent of the Deputy Commissioner.⁶⁸ The court relied on the principle of the leading English case of *Carltona v Commissioners of Works*⁶⁹ where the English Court of Appeal held that a minister given 'multifarious functions' was entitled to exercise his or her power via agents.⁷⁰ That approach was heavily influenced by the principle of ministerial responsibility, with the Court noting that ministers would have to answer to Parliament for any mistake or incompetency by a departmental official exercising such powers.⁷¹

The *Carltona* principle was not directly on point with the facts in *O'Reilly* given that the latter involved the powers of a senior public servant, rather than those of a minister. It was therefore questionable whether the English Court of Appeal's reliance on ministerial responsibility could be applied to the *O'Reilly* scenario (given that heads of departments are not directly responsible to parliament in the same way as ministers). The High Court answered this by recognising that the decision in *Carltona* 'depended in part' on the special constitutional position of ministers,⁷² but found that *Carltona*, and the line of decisions following it, also rest on the recognition that ministers have multifarious functions and that '[m]inisters are not alone in that position'.⁷³ Thus, the Court held that the *Carltona* principle was 'equally persuasive to the head of any large government department'.⁷⁴ The Court added:

No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible Minister.⁷⁵

Consequently, the Court found that 'there exists, as the Parliament must have known, a practical necessity that the powers conferred on the Commissioner by the Act should be exercised by the officers of the Department who were acting as his authorised agents'.⁷⁶

In dealing with the existence of the express power of delegation in the statute, the Court held that practical administrative necessity may require a decision maker to act via an agent *despite* the existence of an express power to delegate.⁷⁷

The reasoning in *O'Reilly* can be questioned on a number of bases. One question is whether the court accurately and properly gave effect to the intention of Parliament in applying the agency principle in a case where Parliament had specifically stated that the powers in question were not to be sub-delegated. If the rule in *Carltona* is designed to be one of statutory interpretation, one can argue that it did not function well in *O'Reilly* because the approach of the High Court seemed at odds with the apparent intention of parliament. A related criticism of the reasoning used in *O'Reilly* is that it tends to transform the interpretive approach favoured in *Carltona* into one based on administrative convenience.

Failure to perform a duty

In circumstances where a decision maker has a 'duty' to make a decision (as that term is defined in the ADJR Act), an applicant may also lodge an application under s7 of the ADJR Act on the ground that the decision maker has failed to make that decision.⁷⁸ If there is no section in the relevant statute setting out a time period for the making of the decision, the ADJR Act allows an applicant to apply for an order on the grounds that there has been 'unreasonable delay' in making the decision.⁷⁹

Alternatively, an applicant may apply under the common law for the writ of mandamus to compel an administrator to perform a statutory duty according to law. Further, if there is a serious, extended delay in the handing down of a decision, an applicant may also be able to argue that the delay has prevented them from receiving a fair hearing pursuant to the principles of natural justice.⁸⁰

An appraisal

Some justices in *Ipec* and *Ansett* justified their conclusions by invoking the doctrine of ministerial responsibility.⁸¹ Considering the contemporary political environment, many commentators have stated that ministerial responsibility is no longer a strong mechanism of accountability.⁸² To the extent that the reasoning in those judgments relies on the effectiveness of ministerial responsibility as a means of political accountability, it may be flawed.

A debatable issue is whether the courts have given effect to parliamentary intention in the application of the abovementioned grounds of review. In *O'Reilly*, the High Court justified the application of the agency principle on the basis that Parliament could not have intended for the Commissioner to function without a facility to operate via agency. This was despite the fact that Parliament had enacted a clear statutory provision limiting delegation. The High Court reached this conclusion by an interpretation of parliamentary intention that rested upon the doubtful reasoning that 'there exists, as the Parliament must have known' a practical necessity for application of the agency principle.⁸³ This, however, is highly questionable given that Parliament specifically limited the Deputy Commissioner's ability to sub-delegate in the statute. If the role of the courts is to ensure that decision makers act in accordance with the will of parliament (expressed via legislation), is such an avoidance of an express prohibition on sub-delegation justifiable?

Likewise, the approach of the majority of the High Court in *Ipec* and *Ansett* is questionable as they appeared to take the view that, despite parliament specifically nominating a senior public servant (rather than the minister) as the repository of a discretionary power, that power should be exercised in accordance with ministerial policy. Arguably, the dissent of Menzies J in *Ipec* gave better effect to Parliament's intention in this regard. As has been stated in case law on this issue:

The principle underlying the rule against replacement of statutory discretion by a statutory prohibition is simply respect for parliamentary sovereignty. Where parliament says that in certain circumstances there is a discretion to grant permission, then no official may replace that law by one to the opposite effect . . .⁸⁴

If the role of courts is to ensure that the boundaries of statutory powers which are set down by parliament are respected, one may question whether this function is being undertaken in some of the grounds discussed in this chapter. Moreover, these concerns highlight some of the pertinent issues facing the future development of administrative law as a whole. Namely, how should the law accommodate the reality of bureaucratic decision-making processes, whilst also protecting the rights of individuals and furthering the values of justice?

Procedural fairness: The hearing rule

Linda Pearson

The essential requirements of procedural fairness are fairness and detachment.¹ Those requirements find expression in the two rules of procedural fairness. The first is the hearing rule (*audi alteram partem*), which is the requirement to give notice to the person affected by a decision that a decision is to be made, to disclose information or material on which the decision maker proposes to rely, and to allow an opportunity to put a case. The second is the rule against bias (*nemo debet esse judex in propria sua causa*), which is the requirement that the decision maker be free of actual bias or prejudice, or the perception of prejudice.²

The hearing rule is a broad topic that could potentially cover a vast range of procedural requirements that arise from the principles of procedural fairness. This chapter addresses four aspects of those requirements: (a) the application of the hearing rule; (b) the exclusion or limitation of the hearing rule; (c) the content of the hearing rule; and (d) the consequences of breach of the hearing rule.

It is important to note at the outset that the term ‘hearing’ does not refer just to that part of a decision-making process that may take the form of an oral presentation of evidence and argument. Unlike judicial decision-making in an adversarial system, which has its primary focus on the formal oral hearing of evidence and submissions, administrative decision-making adopts many forms, and need not necessarily involve an oral component. Analysis of the fairness of the ‘hearing’ in this context necessarily requires consideration of the entirety of the decision-making process. In some contexts, for example review by the tribunals established to review migration decisions (the Migration Review Tribunal [MRT] and the Refugee Review Tribunal [RRT]), the legislature will set out detailed procedural requirements, which may include an entitlement to an oral hearing. Where this applies, separate (and often difficult) issues may arise,

in particular, the question whether those requirements are exhaustive, or what is the consequence of any breach.

Application of the hearing rule

The current Australian test for determining whether procedural fairness is required was formulated by Mason J in *Kioa v West*.³ Mason J explained:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject to the clear manifestation of a contrary statutory intention.

In formulating the threshold test in this way, Mason J reflected, and summarised, the twentieth century expansion of the ambit of procedural fairness, from decisions affecting rights such as property rights,⁴ to interests, including livelihood and reputation,⁵ and finally to expectations arising from undertakings, conduct or, in some circumstances, the nature of the application.⁶ The historical development of the application of natural justice, or procedural fairness, to administrative decision-making is traced by Holloway in his study of the High Court,⁷ and by other text writers,⁸ and will not be repeated here. The first significant step in that development was the move away from the requirement that the decision maker be under a 'duty to act judicially' in addition to having the legal authority to make decisions affecting rights, which effectively limited procedural fairness to those bodies engaged in adjudication.⁹ The decisions of the House of Lords in *Ridge v Baldwin*,¹⁰ the Privy Council in *Durayappah v Fernando*,¹¹ and the Australian High Court in *Banks v Transport Regulation Board (Vic)*¹² opened the way for recognition, and protection, of interests falling short of rights in the strict sense. The second significant step was the acceptance of the concept of 'legitimate expectation', which Mason J in *Kioa* described as arising from some statement or undertaking by the decision maker, from the nature of the application, or from the existence of a regular practice.¹³ As noted below, the concept of legitimate expectation (at least as an indicator of the application of procedural fairness) is in retreat. The current focus for the application of procedural fairness is more generally on the nature of the 'interest' affected by an administrative decision. The range of interests to which procedural fairness will apply is extremely broad, and includes interests such as status, business and personal reputation, liberty, confidentiality, and livelihood and other financial interests.¹⁴

In the course of the twentieth century expansion of the range of circumstances in which procedural fairness is required, there was a shift from describing the duty as a duty 'to act judicially', to a duty to accord natural justice, and ultimately to a duty to comply with the requirements of 'procedural fairness'. For a period there was an attempt at characterisation of a 'duty to act fairly' as being distinct from a duty to apply natural justice, and as requiring some (more limited)

form of procedural safeguards where natural justice did not apply.¹⁵ In *Kioa*, Mason J suggested that the distinction was one of label rather than substance, and expressed a preference for the term ‘procedural fairness’ for administrative decision-making, commenting that the term natural justice ‘has been associated, perhaps too closely associated, with procedures followed by courts of law’.¹⁶ However, the label does have implications for content, as Mason J stated that ‘the expression “procedural fairness” more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case’.¹⁷

It is difficult to entirely separate the ‘implication question’,¹⁸ or the ‘threshold test’,¹⁹ from the question of the content of procedural fairness. In part, this is because the broadening of the range of circumstances to which procedural fairness applies is potentially unlimited. Deane J acknowledged this point in *Haoucher v Minister for Immigration and Ethnic Affairs*²⁰ when he explained:

Indeed, the law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making . . . and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of those requirements in the circumstances of a particular case and of the standing of a particular individual to attack the validity of the particular decision in those circumstances.

More recently, in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*,²¹ McHugh and Gummow JJ approved the following explanation of the requirements of procedural fairness that McHugh had provided in *Teoh*’s case:

The rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to all administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision maker ‘to bring to a person’s attention the critical issue or factor on which the decision is likely to turn so that he may have an opportunity of dealing with it’ (*Kioa* at 587). If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?²²

These recent statements by the High Court reflect a more widely growing dissatisfaction with the use of legitimate expectation as an indicator of the application of the requirements of procedural fairness, which stems from Brennan J’s longstanding objection to the concept of legitimate expectation.²³ But expectations continue to be relevant to the content of the hearing rule. In *Lam*²⁴ Gleeson CJ commented that the content of procedural fairness may be affected by what is said or done during the decision-making process – the relevant factor being unfairness, and not the disappointment of an expectation.

Leaving aside the debate as to the utility of the concept of legitimate expectation, it may be that these comments foreshadow a shift away from the *Kioa* test, and its focus on the nature and extent of the interests affected, and towards a presumptive application of the requirements of procedural fairness for all administrative decision-making. Such a presumption has echoes in the remarks of Lord Loreburn LC in *Board of Education v Rice*,²⁵ noting that the duty ‘to act in good faith and fairly listen to both sides’ was ‘a duty lying upon everyone who decides anything’. As Creyke and McMillan note, however, while such an approach has the advantage of ‘apparent simplicity and popularity’, there are difficulties, in particular, the need to acknowledge some exceptions, for example decision-making by Cabinet, exercises of prerogative power, decisions of a subordinate legislative character, and some ‘policy’ decisions.²⁶ Such exceptions could, perhaps, be excluded from the ambit of judicial review on the broader basis of justiciability.²⁷ Even if not so excluded, the consequence of such an approach might be, as foreshadowed by Brennan J in *Kioa*,²⁸ that if it is assumed that procedural fairness applies generally in administrative decision-making, in some circumstances the content of the principles may be diminished, ‘even to nothingness’, to avoid frustrating the purpose for which the statutory power in issue was conferred.

Exclusion or limitation of a duty to accord procedural fairness

The High Court decision in *Kioa* crystallised debate concerning the source of the obligation to comply with the requirements of procedural fairness. For Mason J, the obligation to accord procedural fairness where rights, interests or legitimate expectations were affected was a common law obligation. Brennan J differed from Mason J in his analysis of the source of the obligation.²⁹ For Brennan J the qualification of a statutory power by the requirement to observe procedural fairness derived from an implied legislative intent, applying ‘to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public’.³⁰

The difference in approach to the implication of procedural fairness is more significant in appearance than in reality. While Brennan J maintained his view that there was no freestanding common law right to be accorded procedural fairness, independent of statute, in some of the key High Court procedural fairness decisions following *Kioa*, Brennan J and Mason J were in agreement as to the outcome.³¹ The High Court decision in *Re Refugee Review Tribunal; ex parte Aala*³² added a further dimension to the debate, in treating procedural fairness as an implied condition or limitation on the exercise of statutory power that must be complied with for a valid exercise of that power.

Regardless of the source of the obligation, the approaches of both Mason J and Brennan J anticipate the possibility that procedural fairness can be excluded or limited. In *Kioa*,³³ Mason J accepted that ‘the clear manifestation of a contrary

statutory intention' could override the common law implication of the requirement to accord procedural fairness. Starting from his position that the implication of procedural fairness was a matter of discerning an implied legislative intent, Brennan J noted that the presumption of procedural fairness 'may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised'.³⁴

The suggestion that for most purposes there is a presumptive application of the requirements of procedural fairness in administrative decision-making raises squarely the issue of the possible exclusion or limitation of the requirements of procedural fairness. Exclusion of a duty to accord procedural fairness can be express, or arise by implication. Interpretation of the relevant statute is required, and this interpretation exercise requires consideration of whether the legislature intends to exclude all the requirements of procedural fairness (in which case any legislated procedure would operate as code), or only some (and if so, which ones).

The difficulty in finding a clear expression of legislative intent is illustrated by the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte Miah*.³⁵ Miah challenged the decision of a delegate of the minister to refuse his application for a protection visa. The delegate decided that Miah's fear of persecution in his country of nationality was not well-founded because of a change of government which had occurred after the application was lodged. The delegate did not inform Miah of the intention to rely on this information, or give him an opportunity to comment on it. Subdivision AB of Division 3 of Part 2 of the *Migration Act 1958* was headed 'Code of procedure for dealing fairly, efficiently and quickly with visa applications'. Subdivision AB set out some procedural requirements, including s54, which provided that a decision could be made without giving the applicant an opportunity to make oral or written submissions, and s57, which required the decision maker to invite the visa applicant to comment on information relevant to the decision 'that is specifically about the applicant'. There was a right of appeal to the RRT, however the applicant had not applied for review within the prescribed time limit, and sought constitutional writs in the High Court under s75(v) of the Constitution.³⁶ Gaudron J noted the different approaches of Mason J and Brennan J to the implication question, and continued:

... if natural justice is a common law duty, the question is whether the provisions of that subdivision manifest a clear intention that that duty be excluded. On the other hand, if the rules of natural justice are seen as implied by the common law, the question is whether the provisions of subdivision AB manifest an intention that that implication not be made. Whatever approach is adopted, in the end the question is whether the legislation, 'on its proper construction, relevantly (and validly) limit[s] or extinguish[es] [the] obligation to accord procedural fairness'.³⁷

Gleeson CJ and Hayne J noted that there is a difference between a code of procedure for dealing with visa applications and a comprehensive statement of the requirements of natural justice. For example, those requirements include the

requirement of absence from bias. However, on their reading of the procedural requirements of subdivision AB, together with the requirement on the decision maker to give reasons, and the entitlement to full review on the merits, there was an intention on the part of the legislature to prescribe the circumstances in which the applicant was entitled to make submissions or provide additional information.³⁸ The majority (Gaudron, McHugh and Kirby JJ) held that the Act did not exclude the application of the common law principles of procedural fairness. McHugh J commented that ‘the use of the term “code” is too weak a reason to conclude that Parliament intended to limit the requirements of natural justice to what is provided in subdivision AB’.³⁹ The majority concluded that the delegate was required to provide an opportunity to the applicant to put a case by reference to the change of government.

The response of the government was to move Parliament to amend the Migration Act, by inserting s51A in subdivision AB:

- (1) 51A (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Similar provisions were inserted in Part 5 Division 5, applying to merits review by the MRT (s357A), and in Part 7 Division 4, applying to merits review by the RRT (s422B).

A divergence of views concerning the scope of the phrase ‘in relation to the matters it deals with’ in s51A and its equivalents soon emerged. Some decisions of the Federal Court adopted a confined view, treating this phrase as applying only to the exact text of the procedural requirements set out in the relevant Division or Subdivision.⁴⁰ In *Moradian*,⁴¹ for example, Gray J held that the ‘indirect references, uncertain inferences or equivocal considerations’ in s51A did not disclose an intention on the part of the legislature to exclude the principles of procedural fairness with sufficient certainty. Other judicial decisions adopted a wider view, identifying a legislative intention that the relevant provisions cover all procedural aspects of the consideration of the application or the conduct of the review.

A Full Court of the Federal Court has attempted to resolve this divergence in favour of the wider view, holding in *Minister for Immigration and Multicultural Affairs v Lay Lat*⁴² that what was intended was that subdivision AB ‘provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule’.⁴³ The same Full Court has applied this reasoning to s422B (and thus, by implication to s357A).⁴⁴ This conclusion does not necessarily affect the availability of judicial review, as procedural irregularities may still be reviewable on the basis that there has been a failure to properly ‘review’ the decision.⁴⁵ However, the response of the courts to these provisions is illustrative of the profound tension between the courts and executive as to the proper scope and operation of judicial review,

particularly of migration decisions, and the difficulty in discerning ‘the express terms or necessary implication’⁴⁶ required to exclude the common law principles.

Exclusion by implication

In some instances, the characterisation of a decision as being ‘preliminary’ or merely a step (for example, a recommendation) on the path of the decision-making process will be seen as an indication of an implied intention to exclude a duty to accord procedural fairness. More commonly, the issue will arise where there is a right of appeal against the decision. The existence of a right of appeal will not of itself exclude procedural fairness. In *Miah*⁴⁷ McHugh J discussed the factors to which the courts will have regard. Those factors relate both to the nature of the original decision – whether it is preliminary or final, private or public, urgent, and whether there are any specified formal procedures – and to the nature of the appeal – whether it is to an internal or external (particularly judicial) body, and whether it is limited or a full *de novo* rehearing⁴⁸ – and, ultimately, the nature of the interest of and consequences for the person affected, and the subject matter of the legislation. Applying those factors, McHugh J concluded that even the *de novo* right of review by an independent tribunal was not sufficient to indicate an intention to exclude the application of procedural fairness to the delegate’s decision.

An alternative approach is to view the provision of a right to appeal not as an indication of legislative intent to exclude the requirements of procedural fairness, but rather as an indication that to the extent that procedural fairness is still required, judicial review is not the appropriate recourse, and the right of appeal must be exercised. This explains the difference in reasoning between Barwick CJ and Jacobs J in *Twist v Randwick Municipal Council*.⁴⁹ It made no difference to the outcome in *Twist*; however it would be open to the person affected to seek the intervention of the court (such as by mandamus to direct that a hearing be given) before the initial decision is made.

Requirements of the hearing rule

The essence of the hearing rule can be simply stated, and is that the person whose rights, interests or legitimate expectations are likely to be affected by an administrative decision is given the chance to be heard before the decision is made. The difficulty comes in identifying what is actually required in the circumstances of a particular case. Writing extra-judicially, in 1986 Sir Gerard Brennan commented that ‘[T]he imprecision in the content of “natural justice” and the *ex post facto* declaration of that content is one of the unsolved problems of administrative law and practice’.⁵⁰ The imprecision to which Sir Gerard Brennan refers is a reflection of the diversity of administrative contexts in which the hearing rule must be applied. There is no universal standard, and the requirements of procedural

fairness ‘depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth . . .’⁵¹

Writing in 1974, when the English and Australian courts were reinvigorating the principles and application of natural justice,⁵² Ganz commented that: ‘The greatest disservice that administrative lawyers can render administrative law is to mould the administrative process in their own image.’⁵³ Ganz went on to characterise the rules of natural justice as being ‘modelled on the gladiatorial combat between two parties before an impartial judge’.⁵⁴ While the notion of ‘gladiatorial combat’ was possibly once an accurate reflection of the judicial process, it is increasingly less so now. It has never been an appropriate characterisation of the administrative decision-making process. Ganz’s point is, however, an important one. While an uncritical adoption of the adversarial paradigm to administrative decision-making processes is inappropriate, it is not surprising that it is a natural reference point for the judges whose decisions have framed the content of the hearing rule. And unless administrative decision-making is regarded as entirely distinct from judicial decision-making, it is difficult to see why judicial procedures should be completely disregarded in framing the requirements of a fair hearing.

An early acknowledgement that the rules formulated for an adversarial judicial process are not appropriate for an administrative process came in *Board of Education v Rice*,⁵⁵ where Lord Loreburn LC characterised the Board of Education as ‘in the nature of an arbitral tribunal’, and noted that the Board could ‘obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view’.

Holloway has criticised this part of Lord Loreburn’s reasoning as ‘injecting a note of “thinness” into the doctrine [of natural justice]’, and more significantly as providing ‘the lever with which the procedural impositions of natural justice could be pared back’.⁵⁶ Holloway includes the other key decision of the early twentieth century, *Local Government Board v Arlidge*,⁵⁷ in this charge, noting an ‘explicit doctrinal relaxation’ of the obligations associated with procedural fairness.⁵⁸

Whatever their impact on judicial reasoning during the early twentieth century,⁵⁹ viewed some ninety years on, these decisions make sense. It is unlikely that these Boards have any direct modern equivalent, in terms of either their functions or their constitution.⁶⁰ However, the acknowledgement that there is both an irreducible minimum requirement for procedural fairness, and flexibility in its application, depending on the context, is crucial.

The irreducible minimum requirement of the hearing rule has been expressed in a number of ways. Lord Loreburn referred to a duty to ‘act in good faith and fairly listen to both sides’.⁶¹ While this formulation captures both the bias and the hearing requirements of procedural fairness, it reflects more of an adversarial context than is generally relevant in administrative decision-making. Tucker LJ referred to one essential, ‘that the person concerned should have a reasonable

opportunity of presenting his case'.⁶² Creyke and McMillan identify the minimum requirements as:⁶³

- prior notice that a decision will be made;
- disclosure of an outline or the substance of the information on which the decision is proposed to be based (that is, a summary of the case that has to be met); and
- an opportunity to comment on that information, and to present the individual's own case.

The central issues are how to apply these minimum requirements for the broad range of administrative decisions which are subject to procedural fairness and how to mould them according to the different circumstances of each case.

Much of the recent debate concerning the content of procedural fairness has occurred in the context of review of migration decisions, in particular those of the merits review tribunals, the RRT and MRT.⁶⁴ It is significant that despite the efforts of the Commonwealth Government to restrict judicial review in this area, it continues to constitute a major part of the federal courts' administrative law workload.⁶⁵ In particular, legislative attempts to preclude judicial review on the ground of breach of the hearing rules of procedural fairness,⁶⁶ and more recently to define the content of the hearing rule,⁶⁷ have neither limited the number of applications for judicial review, nor assisted in illuminating the requirements of the hearing rule.

Judicial review of the decisions of the migration tribunals highlights the tension between the judicial model of natural justice and broader administrative considerations. The migration tribunals adopt a non-adversarial model of decision-making, with certain legislated procedural obligations. Possibly the high point of criticism of the non-adversarial model adopted by the RRT came in *Selliah v Minister for Immigration and Multicultural Affairs*,⁶⁸ when the court stated that:

. . . hearings before the Tribunal are virtually unique in Australian legal procedures and in the common law system generally. They are not interrogatory or adversarial proceedings: *Abebe v The Commonwealth of Australia* [1999] HCA 14, lawyers are generally absent, and the appropriateness of providing an interpreter is apparently within the sole discretion of the Tribunal. The Tribunal will normally not be proficient in the first language of the asylum seeker and will generally know nothing of the culture or practices of the person's country of origin or the idiom of its language. The Tribunal is both judge and interrogator, is at liberty to conduct the interview any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the opportunity of reading and understanding the material before being questioned about it. Moreover, the Tribunal has been known to rely on supposed inconsistencies in the factual account being given without stating the alleged contradictions to the interviewee and giving the person an opportunity to explain them.

These methods contravene every basic safeguard established by our inherited system of law for 400 years . . .

While the court was disturbed about these features of the legislation, the power of the legislature to enact such restrictions was not disputed. More recently, in

*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*⁶⁹ Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ described the functions of the RRT in the following terms:

The Tribunal was not an independent arbiter charged with deciding an issue joined between adversaries. The Tribunal was required to review a decision of the Executive made under the Act and for that purpose the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made. And the Tribunal had to decide whether the appellant was entitled to the visa he claimed.

Not only is the tone less strident, but there appears to be an acceptance that the process is not necessarily defective because it fails to mirror an idealised judicial model: it is simply different. In part this may reflect the concern of the High Court as to the constitutional dimensions relevant to the federal tribunals. In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*,⁷⁰ Gummow J noted that the adoption of the paradigm of judicial processes of decision-making by the federal tribunals was ‘rarely helpful because it is apt to blur the constitutionally entrenched distinctions between judicial and executive power’. It is important not to make too much of this distinction, which is, in any event, relevant primarily to Commonwealth tribunals. Even though the migration tribunals are ‘carrying out an administrative function on behalf of the Executive’, there is an irreducible requirement that they adopt procedures that are fair, ‘so that “the practical requirements of fairness” appropriate for the application of the rule of law are observed’.⁷¹

Of course, the non-adversarial tribunals are only one form of administrative decision maker. The High Court has made it clear, however, that tribunals sit in the non-judicial camp for the purposes of jurisdictional defects and excesses.⁷² It is interesting to note that while the courts have acknowledged that the bias rule may apply less stringently to ministers than to courts or tribunals,⁷³ there has not been a similar consideration given to the application of the hearing rule, other than in acknowledging that application and content may vary according to the nature of the decision.⁷⁴

Aronson, Dyer and Groves argue that, while the courts have acknowledged that it is inappropriate to expect administrative decision makers to follow curial procedures, the procedures imposed by the common law are shaped by the values and assumptions of the adversarial tradition.⁷⁵ A recent study of inquisitorial processes in tribunals has identified as an issue the location of the tribunal system within a system where statutory appeal or judicial review are conducted by courts which operate in an adversarial manner.⁷⁶ That study flagged two key concerns for tribunals which are equipped with investigative powers and which adopt an inquisitorial role, which do not arise for those tribunals which operate in an adversarial model: avoiding a perception of lack of impartiality in the course of eliciting information and testing evidence, and identifying the extent to which the tribunal is required to inquire further than the material or information provided by an applicant.⁷⁷

The central requirements of the hearing rule were outlined by the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*.⁷⁸ The court explained:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision maker. It also extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

The distinction between identifying critical issues and exposing the decision maker's 'mental processes or provisional views' is often difficult to draw. The courts do not require decision makers to give the person affected 'a running commentary' on the prospects of success,⁷⁹ or to put to the person concerns which may be inclining the decision maker towards an adverse finding.⁸⁰ There may, however, be circumstances in which a decision maker is required to alert the person affected of the possibility of an adverse conclusion,⁸¹ and the decision maker must be careful not to mislead the person affected, for example, by allowing an implication to arise that a document has been accepted as genuine.⁸² While the decision maker is not required to make an applicant's case, the decision maker may in some instances be obliged to identify for the affected person the issues that need to be addressed. As McHugh J put it in *Minister for Immigration and Ethnic Affairs v Teoh*⁸³ the obligation is to bring to a person's attention 'the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it'.

This can be problematic for those non-adversarial tribunals, such as the tribunals created to determine migration issues, and the Social Security Appeals Tribunal, where the respondent decision maker plays no active role in relation to the presentation of evidence. In addition to the danger of creating a perception of possible prejudice, there are significant resource and efficiency issues in imposing obligations to assist an applicant to understand what the critical issues are. In this context, it is worth noting that the Administrative Decisions Tribunal of New South Wales has a statutory obligation to take such measures as are reasonably practicable to ensure that the parties to the proceedings before it 'understand the nature of the assertions made in the proceedings and the legal implications of those assertions'.⁸⁴ The extent of this obligation has not yet been tested.

While many adjudicative tribunals have the power to undertake their own investigations and to require the provision of information, the courts have been

reluctant to impose on such tribunals a duty to inquire further than the material provided by the applicant. As Edmonds J commented in *SZEGT v Minister for Immigration and Multicultural and Indigenous Affairs*,⁸⁵ procedural fairness did not require the RRT 'to tell the appellant that the material he had put forward was not sufficient and invite him to improve upon it', nor did it require the Tribunal 'to take upon itself the role of acquiring further information to bolster the appellant's case'.⁸⁶

The comment in *VEAL* noted above, that 'the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made', is the strongest statement that there may be, at least in some circumstances, an obligation to obtain additional material. The extent of such an obligation was at issue in *Applicant M164/202 v Minister for Immigration and Multicultural Affairs*.⁸⁷ The RRT had stated that the applicants' claims lacked credibility, and that a number of documents on which they relied could be disregarded, describing them as contrived and self-serving. Those documents included purported extracts from newspapers, from police station records, and letters. The majority (Lee and Tamberlin JJ) considered that the authenticity of the documents could have been ascertained without difficulty, by requesting the Department to investigate. Lee J noted that where the need for further inquiry is 'obvious', and there is no impediment to the conduct of such an inquiry, the failure to exercise a power to inquire may point to a denial of procedural fairness.⁸⁸ Dowsett J dissented, finding that the documents were not of such significance as to lead the tribunal to conduct its own inquiries.⁸⁹ For Dowsett J, the issue was whether there was any error in the unwillingness of the tribunal to act upon the evidence of the applicants. There is clearly further room to explore the extent to which *VEAL* imposes a positive obligation on administrative decision makers who have the power to obtain further information in addition to any provided by the person affected by their decision, to exercise that power.

As noted above, it was stated in *Alphaone*⁹⁰ that 'adverse material' from other sources which is before the decision maker must be put to the person affected for comment or rebuttal. Not all such material must be put, however, and Brennan J in *Kioa* limited the requirement to material that is 'credible, relevant and significant to the decision to be made'.⁹¹ The judgment as to whether particular information is 'credible, relevant and significant' must initially be made by the decision maker, but this is subject to review by the courts. In *Kioa* Brennan J addressed the issue of whether a decision maker could reach a decision without reference to such material, and commented that such information creates a real risk of prejudice, even if subconscious. This risk was at the heart of the High Court decision in *VEAL*. In that case, the RRT had decided not to put the contents of an unsolicited (but not anonymous) letter to an applicant, and noted in its decision that it had placed no weight on the allegations made in the letter. The High Court noted that the principles of procedural fairness in administrative decision-making focus upon procedures rather than outcomes, and thus govern what a decision maker must do *in the course of* deciding how the particular power given to the decision maker

is to be exercised. The decision maker could not dismiss information from further consideration unless the information is 'evidently not credible, not relevant, or of little or no significance to the decision that is to be made'.⁹²

The hearing rule requires that a person affected has an opportunity to put information and submissions to the decision maker in support of an outcome that supports his or her interests. The procedural focus of the principles of procedural fairness would suggest that they should have little to say about how the decision maker considers the material put by the person affected. However, in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*⁹³ the High Court addressed this issue, in the context of an inordinate delay between the oral hearing and the delivery of the decision. Callinan and Heydon JJ noted that unfairness can spring not only from a denial of an opportunity to present a case, but also from denial of an opportunity to consider it.⁹⁴ Here, the RRT had disabled itself from giving consideration to the presentation of the applicant's case, by permitting so much time to pass that it could no longer assess the evidence offered.

Procedural fairness may also require a decision maker to respond to 'a substantial, clearly articulated argument relying upon established facts'. An illustration of this proposition is provided by the decision of the High Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs; Re Minister for Immigration and Multicultural Affairs*.⁹⁵ The RRT had considered, and rejected, Dranichnikov's claimed fear of persecution in Russia based on his membership of a 'particular social group', namely, businessmen in Russia. The majority of the High Court held that Dranichnikov had in fact put his claim on the basis of membership of a smaller group, namely business people who had protested publicly about state sanctioned corruption, and that in failing to respond to that claim, the RRT had denied him procedural fairness. As Kirby J noted, however, the tribunal's generally inquisitorial procedure did not mean that a party before it could simply present the facts and leave it to the Tribunal 'to search out, and find, any available basis' for the applicant's claim.⁹⁶

Effect of breach

It has been clear at least since the High Court decision in *Re Refugee Review Tribunal; ex parte Aala*⁹⁷ that a breach of the requirements of procedural fairness is a jurisdictional error. The courts take a dim view of legislative attempts to protect decisions which can be so characterised from review.⁹⁸ It is arguable, however, that the courts are themselves limiting the consequences of having taken the step of identifying a breach of the requirements of procedural fairness. Procedural fairness is ultimately about opportunity: the opportunity to deal with adverse material, and the opportunity to put forward the best possible case. Much of the discussion of the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*⁹⁹ focussed on whether the alleged

breach of procedural fairness had deprived the applicant of possibility of different outcome,¹⁰⁰ or, as Gleeson CJ put it, whether ‘practical injustice’ had been shown.

The suggestion of Gleeson CJ does not sit easily with many earlier judicial comments that suggest that the effect of a breach of the hearing rule is irrelevant. In *Kioa*, for example, the majority judges noted that it was unlikely that the decision to deport would have been different had Mr Kioa had the opportunity to comment on the adverse allegations, and Wilson J commented that the setting aside of the decision represented ‘a very slender technical victory’.¹⁰¹ But this case is one of many which reinforce the primacy of adherence to the requirements of procedural fairness. Deane J commented:¹⁰²

... the mere circumstance that there is no apparent likelihood that the person directly affected could successfully oppose the making of a deportation order neither excludes nor renders otiose the obligation of the administrative decision maker to observe the requirements of procedural fairness. Indeed, the requirements of procedural fairness may be of added importance in such a case in that they ensure an opportunity of raising for consideration matters which are not already obvious.

Of course, there is a difference between insisting on adherence to the requirements of procedural fairness, and considering the consequences of an acknowledged, or found, breach of those requirements.

Aala has been read as authority for the proposition that if a breach (other than a trivial breach) of the hearing rule is established, the person affected is ordinarily entitled to the grant of relief by the court unless the court is satisfied that the breach could have had no bearing on the outcome.¹⁰³ There is no general obligation on an applicant to show how an alleged breach of procedural fairness affected the decision,¹⁰⁴ and the courts are extremely reluctant to conclude that the breach did not affect the outcome. In *NAIS*, for example, Callinan and Heydon JJ held that it could be inferred from the tribunal’s delay that, in the absence of contrary evidence, the tribunal had deprived itself of the capacity to properly consider the applicants’ case – and there was no contrary evidence. There may be limits, however, as indicated in *Lam* where the applicant was unable to show that he had done, or omitted to do, anything in reliance on the representation made by the delegate.

It is not entirely clear whether the consideration of ‘practical injustice’ is properly a factor in determining whether there has been a breach of the requirements of procedural fairness, or whether it is a matter for consideration in the exercise of the discretion to grant or withhold a remedy. It probably makes little difference, other than in limiting appellate scrutiny of judicial review. The danger in either approach is that consideration of the possibility of a different outcome may allow the court to get too close to the merits of the decision under review. The comments of Gaudron and Gummow JJ in *Aala*¹⁰⁵ in this regard are significant. Their Honours explained that: ‘The concern is with the observance of fair

decision-making procedures rather than with the character of the decision which emerges from those procedures.’

The hearing rule has been historically focussed on the procedure adopted by an administrative decision maker, rather than the substantive outcome. There are indications, however, that at times the courts may stray towards some consideration of the outcome of a case. The recent discussions of the consequences of a breach of the hearing rule, in particular Gleeson CJ's focus in *Lam* on the avoidance of ‘practical injustice’, and secondly, the insistence in *NAIS* on an entitlement to an opportunity to properly consider material put by a person affected, reflect this risk.

The adversarial assumptions behind the discussion of the requirements of the hearing appear to have been weakening, possibly because of the dominance of migration cases in the courts, in particular applications for review of adverse outcomes in the migration tribunals. How far this can be taken in other contexts is an open question.

Articulation of the principles of procedural fairness through the judicial review pathway is of necessity an *ex post facto* process, where, with the benefit of hindsight a court may point to an error made by the decision maker. The consequence of this is, however, that there is little in the way of guidance to decision makers, who should be assumed to be willing to comply with the demands of procedural fairness. Procedural fairness is, as Gleeson CJ put it in *Lam*, focussed on ‘fairness’ as a practical rather than abstract concept.¹⁰⁶ It is, however, sometimes difficult to identify what the practical requirements are. In this respect, little has changed since Brennan J's observation about the imprecision, and *ex post facto* declaration, of the requirements of procedural fairness.

The doctrine of substantive unfairness and the review of substantive legitimate expectations

Cameron Stewart

Introduction

There are many roads to justice and administrative law is one of them. Modern administrative law strives to protect the core values of the rule of law: certainty, generality and equality.¹ But it is a mistake to believe that administrative law can provide the route to a just outcome in every case of unfair administration. There are some journeys to justice that must be travelled by other paths than through the legal system. The legitimacy of judicial review rests firmly on the notion that judges must be occupied with legality, and that they should be wary of becoming involved in the politics of policy making, which is the role of the executive. It is a fatal mistake for lawyers to believe that they alone can achieve justice, and that judicial review can and should be applied to all decisions in order to achieve justice. Lawyers who believe this risk undermining the traditional role of judges, damaging the legitimacy of the judicial branch of government and threatening the very fabric of the rule of law.

Against this background, this chapter examines the doctrine of substantive unfairness, which is also referred to as the doctrine of substantive legitimate expectations. It is the most recently recognised head of judicial review. After a long and difficult labour it was finally born of the Court of Appeal of England and Wales in *R v North and East Devon Health Authority; Ex parte Coughlan* ('Coughlan').² This case recognised that the courts could not only review administrative decisions that were *procedurally* unfair, but that the courts could also review a decision on the grounds that the decision was *substantively unfair in its outcome*. As a result of this finding the courts in the United Kingdom are now free to examine not only

the legality of a decision but also its merits, when the decision is considered to be so unfair as to amount to an abuse of power.

This chapter maps out the limits of this form of review. It will begin by examining the history of attempts to have review of decisions which disappoint substantive legitimate expectations. It will then describe how these attempts were consolidated in *Coughlan* and in later cases. The chapter will then assess whether these types of review would be acceptable in Australian jurisdictions. The chapter will argue against the adoption of the doctrine of substantive unfairness because of the potential danger for this ground of review to improperly ask judges to perform the administrative functions of the executive.

Separation of powers, procedural unfairness and substantive unfairness

In modern administrative law there are two fundamental touchstones of judicial review. The first of these is abuse of power (*ultra vires*), in both narrow and broad (procedural) forms. Irrationality and unreasonableness are considered in this schema to be abuses of power. Under the *Wednesbury* unreasonableness principle³ a decision can be reviewed if it is so irrational or unreasonable that no reasonable body could have come to that decision.

The second is the concept of procedural fairness, which protects legitimate expectations through rules of natural justice.⁴ Procedural fairness must be accorded when a person has a legitimate expectation that a decision will be made after an appropriate hearing of the person's views. Alternatively, procedural fairness is due where a person enjoys a substantive benefit and expects that it will continue. In such circumstances, if a decision is made to take away the benefit, the decision maker is bound to hear the side of the person enjoying the benefit before they make the decision. In *Kioa v West*,⁵ Gibbs CJ stated that procedural fairness requires that:

when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.⁶

This traditional account of the role of administrative law shows that the law is primarily concerned with the *process* of decision-making but not the *outcome*. One of the primary reasons for this is to maintain a division between the policy-making function of the executive and the legality-checking role of the judiciary. While it is difficult to draw a completely bright line between these two functions, the traditional approach has attempted to abide by the legality/merits distinction so as to maintain the separation of powers. As stated by Spigelman CJ extra-judicially:

The distinction between judicial review and merits review is a fundamental principle of Australian administrative law. Although, as has sometimes been said, the legality/merits distinction is not as clear as is often assumed, nevertheless the distinction is valid.

...

Judicial review is a manifestation of the integrity branch of government. Merits review is a manifestation of the executive branch. The former seeks to ensure that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised. Merits review, in the common Australian formulation, is concerned to ensure that the 'correct and preferable' decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained. Such a function is part of the executive branch.⁷

The doctrine of substantive unfairness straddles both abuse of power and procedural fairness and challenges the traditional organisation of judicial review principles and the legality/merits distinction. It is invoked in situations where a person has an expectation that a benefit will be conferred or continued by government because the government has made a representation that the benefit will be conferred or continued. Professor Craig has identified four types of situation where this might arise:

1. A general norm of policy choice, which an individual has relied on, has been replaced by a different policy choice;
2. A general norm of policy choice has been departed from in the circumstances in a particular case;
3. There has been an individual representation relied on by a person, which the administration seeks to resile from in the light of a shift in general policy;
4. There has been an individualised representation that has been relied on. The administrative body then changes its mind and makes an individualised decision that is inconsistent with the original representation.⁸

In these situations, the doctrine of substantive unfairness is employed to check whether the impact of the decision is so substantively unfair that it amounts to an abuse of power. It shifts the focus from the concern with legitimate *procedural* expectations, and says that the law will also enforce legitimate *substantial* expectations.

The ultimate justification for recognising unfairness as a ground of review appears to be based on the principle of legal certainty, one of the three main constituent elements of the rule of law concept: certainty, generality and equality.⁹ The principle of legal certainty requires that all law should be prospective, open, clear and stable so as to help the subject be guided in ways to obey the law.¹⁰

But in inviting the judges to weigh up policy considerations, the doctrine of substantive legitimate expectations necessarily involves the judge in engaging in a form of policy formulation, which invariably results in unpredictable behaviour and results. As such, substantive unfairness has a real potential to undermine the judicial role and, through the undermining of legitimacy, damage the rule of law. This will be examined further below.

Substantive unfairness in the United Kingdom before *Coughlan*

It is possible to view *Coughlan* as the result of a long line of decisions that attempted to make a shift from procedural to substantive legitimate expectations. The shift began with *Kruse v Johnson*¹¹ where Lord Russell of Killowen stated that courts would review those decisions of a local council which were manifestly unjust, partial, made in bad faith or so gratuitous and oppressive that no reasonable person could think them justified.¹²

Later in *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association*¹³ a council gave an undertaking not to increase the amount of taxi licences without first allowing for consultation with the local taxi association. An increase in licences occurred in breach of the undertaking. The Court of Appeal described the duty of the council as one to act fairly, in accordance with statutory duties and the public interest. Lord Denning MR pronounced that the council:

... ought not to depart from [the undertaking] except after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case.¹⁴

Liverpool Taxis was applied in *Attorney General of Hong Kong v Ng Yuen Shiu*¹⁵ where the Privy Council quashed a decision to deport an illegal immigrant. The government of Hong Kong had published a general undertaking that it would not deport such immigrants without first affording them an interview. In reliance upon the undertaking the immigrant had come forward and was then deported without any consideration of the merits of his case. The decision was quashed on the basis that the government was bound by its undertakings as to the procedure it would follow. Once again this was said to be on the basis that the undertaking did not conflict with statutory duties. While some consider the decision to merely reflect the requirements of procedural fairness, the decision meant that there was a substantive right granted by the government from which it could not resile.

While both these cases concerned legitimate expectations of continuing substantive rights, in *Laker Airways Ltd v Department of Trade*¹⁶ a connection was established between the frustration of a legitimate expectation and an abuse of power. In this case an airline attempted to estop the government from withdrawing its licence after the government had represented that the licence would continue. The government sought to cancel the licence by use of prerogative power rather than by going through the statutory mechanism. This effectively denied the airline the right to a hearing. While the decision recognised that an estoppel could not hinder the formulation of policy it found that the government had used its power by 'the back door'¹⁷ to frustrate a reasonable reliance by the airline that it would continue to enjoy its licence. Hence the decision to use the

prerogative was an abuse of power, given the legitimate expectations generated by the statute.

These findings were repeated in *HTV v Price Commission*¹⁸ where there was an inconsistent calculation of profit margins that affected a company's entitlement to price increases. As well as adopting the notion that disappointed legitimate expectations could amount to abuse of power, Lord Denning MR added a proviso that there must be no overriding public interest in acting unjustly:

It is not permissible for the [the Price Commission] to depart from their previous interpretation and application where it would not be fair to do so . . . It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it.¹⁹

Similar reasons appeared in *Ex parte Khan*²⁰ where the Secretary of State had refused an entry clearance for a child to be allowed into the United Kingdom for the purpose of adoption. The Secretary had made the decision based on grounds which were not mentioned in the published policy regarding such adoptions. Parker LJ said:

I have no doubt that the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out, which were just as certain in their terms as the question and answer in Mr Ng's case, would be followed . . . The Secretary of State is, of course, at liberty to change the policy but in my view, *vis-à-vis* the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter.²¹

One of the major decisions to establish a connection between legitimate expectations, unfairness and abuse of power is *R v IRC; Ex parte Preston*.²² In this case it was alleged that the Inland Revenue Commissioners had gone back on their side of a bargain not to re-investigate a taxpayer. The House of Lords recognised that, if such claims were made out, the unfairness of the exercise of a power would amount to an abuse of power.²³ In any event the allegation was not made out on the facts as the taxpayer had not complied with his side of the agreement and was not able to prove that the Commissioners had given an undertaking of the sort alleged. However, as was seen above, the case is the primary authority for the decision in *Coughlan* to merge unfairness and abuse of power. Lord Templeman stated:

In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of a representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy . . . I consider that the taxpayer is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representation on their part.²⁴

Preston was built upon *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd*,²⁵ where Bingham LJ, while finding for the tax authorities, stated that clear and unequivocal representations could be relied upon. This was further discussed in *R v Inland Revenue Commissioners, ex parte Unilever plc*,²⁶ where the Revenue Commissioners refused to exercise a discretion in favour of the taxpayer to allow the submission of claims beyond the time limit (a discretion that had been exercised for the previous 25 years). Sir Thomas Bingham MR stated that the rejection of Unilever's claims 'in reliance on the time limit, without clear and general advance notice, is so unfair as to amount to an abuse of power'. Simon Brown LJ stated:

Unfairness amounting to an abuse of power as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in *R v ITC, ex parte TSW*: 'The test in public law is fairness, not an adaptation of the law of contract or estoppel'.²⁷

Finally, in *R v Ministry of Agriculture, Fisheries and Food; ex parte Hamble (Offshore Fisheries Ltd)*,²⁸ a case concerning a change in policy affecting the purchase of fishing licences, Sedley J (as he was then) proposed that the role of the court is to balance the unfairness of the decision against the public interest in upholding the administrator's decision, to determine whether the administrator's decision should stand.

After *Hamble Fisheries* it appeared the emerging doctrine of substantive unfairness would not survive. In *R v Secretary for the Home Department; Ex parte Hargreaves*²⁹ the Court of Appeal criticised the decision of Sedley J in *Hamble Fisheries* even going so far as to label it a 'heresy'.³⁰ The notion of review on substantive fairness grounds was rejected outright. The case concerned a claim by prisoners that their expectations of home leave and early release were not fulfilled after a change of policy. It was decided that the only legitimate expectation that the prisoners had was that their application would be considered in the light of existing policy. All three judges dispelled any notion of there being review on substantive fairness grounds and found that the court could only be involved in reviewing a policy change when it was *Wednesbury* unreasonable.

Coughlan and the formulation of substantive unfairness³¹

It was not long before *Hargreaves* itself became under fire. *Coughlan* (a decision of the Court of Appeal which had a much different coram from that in *Hargreaves*) not only accepted the doctrine of substantive unfairness but cemented it into British public law.

The facts of *Coughlan* were perfect for those who advocated the doctrine of substantive unfairness: a person whose case evoked sympathy and a clearly broken promise with devastating effects. Pamela Coughlan brought proceedings for review of the decision of the North and East Devon Health authority ('the authority') to close the facility in which she resided ('Mardon House'). Miss Coughlan was tetraplegic, doubly incontinent and required nursing aid in respect of regular catheterisation and with breathing difficulties. She had been moved to Mardon House, from an earlier home, on the promise that Mardon House would be her home for life (or until she wished for alternative accommodation).

The decision to close Mardon House was based on a new care policy that preferred to move patients away from institutional settings and into community settings. Importantly, the effect of the policy change was to move patients away from National Health Service (NHS) services (which are free) and towards local authorities (who charge for care services, subject to means testing).

In making its decision the authority did consider the promise made to Ms Coughlan (and others) that Mardon House would be their home for life. A consultation paper stated that these promises needed to be weighed in the decision-making process against the authorities' other clinical and financial responsibilities. After considering the recommendations of the consultation paper, the authority unanimously decided to close and sell the facility and move the patients into community care settings.

Coughlan challenged the decision on a number of grounds. The most important one for present purposes was that the authority had not properly accounted for the effect of its broken promise upon her when they made the decision to close Mardon House. It was argued that the authority had mistakenly treated its obligations to her as being to provide care generally rather than as an obligation to provide care at Mardon House. As such the decision ignored the legitimate expectation of Miss Coughlan.

The Court of Appeal accepted this argument. The Court decided that, while the decision itself was rational and logical, to remove Miss Coughlan was *substantively* unfair and hence illegal. Following *Preston*, the Court found that abuse of power included not only the usual *Wednesbury* claim, claims of bad faith, improper purpose and irrelevant considerations, but also situations where an authority, by an otherwise lawful decision, reneges on a promise to a limited number of individuals.³² For example the Court stated:

Abuses of power take many forms. One, not considered in the *Wednesbury* case, was the use of a power for a collateral purpose. Another, as the cases like *Preston* now make clear, is reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. There is no suggestion in *Preston* or elsewhere that the final arbiter of justification, rationality apart, is the decision maker rather than the court.³³

On this basis the Court of Appeal was ready to accept judicial review of the fairness of an outcome.³⁴ The Court then proceeded to analyse the fairness of

the outcome of the decision to close Mardon House. The test was formulated as whether the need of the health authority to move Ms Coughlan to a local facility was of greater weight than its promise that Mardon House would be her home for life.³⁵ In that sense the review of the fairness of the outcome was determined by weighing the public interest in closing Mardon House against the private interest of Ms Coughlan in staying.

Coughlan's dismissal of the findings in *Hargreaves* and the acceptance of the *Laker* and *Preston* lines of authority have now established substantive unfairness as a form of abuse of power, generated by a disappointed legitimate expectation. After *Coughlan* it was possible to break down the doctrine of substantive unfairness into the following elements:

1. A representation has been made by a decision maker concerning the conferral, or continuance, of a substantive right.³⁶ Alternatively, the representation may be about the manner of exercise of a power which would affect substantive rights.³⁷ The representation may also have been generated by prior conduct (such as continued practice or published policy) rather than a representation;³⁸ the representation was made to an individual or a small group of people.³⁹ If the statement was published, the benefit can be claimed by the class of people specifically affected by the statement.⁴⁰
2. The representation was made by the decision maker for its own purposes;⁴¹
3. The representation was made lawfully by a person with actual or apparent authority to make it;⁴²
4. It was relied upon by the claimant to his or her detriment;⁴³
5. By honouring the promise the decision maker would not be acting outside of its power or be acting inconsistently with its statutory duties;⁴⁴
6. A decision to dishonour the promise was equivalent to a breach of contract or estoppel in private law;⁴⁵
7. There was no compelling public interest in the promise being dishonoured.⁴⁶ Among the factors to be considered is whether the impact of honouring the promise would merely be financial.⁴⁷

The use of the doctrine post-*Coughlan*

Coughlan had an immediate effect on the limits of judicial review. Its relevance quickly spread beyond those situations involving the closure of health services and a large body of case law now exists where the doctrine of substantive unfairness has been brought to bear.

(i) Decisions to close, or not provide, hospital and support services

Coughlan was of obvious relevance to decisions to close hospital and support services. In *R v Merton, Sutton and Wandsworth Health Authority; ex parte Perry*⁴⁸ a decision to close a care home was overturned on the basis that the authority had failed to have regard to the promise which it had made not to close it. In contrast, in *R (Collins) v Lincolnshire Health Authority*⁴⁹ a decision to deny a home for life

to a disabled person was not overturned because the decision was motivated by a desire to serve the best interests of the disabled patient by having her live in a community setting. There were no medical or social reasons for her living in the home and it was the assessment of her carers that she would benefit substantially from the move.

Claimants have also struggled with the threshold issue of whether there was a promise actually made to provide a home for life. In *R (Core) v Brent, Kensington and Chelsea and Westminster Mental Health NHS Trust*⁵⁰ there was no promise to provide permanent accommodation and the residence was only ever intended to be used on an interim basis. In *R (on the application of C, M, P and HM) v Brent, Kensington and Chelsea and Westminster Mental Health NHS Trust*⁵¹ the evidence of a promise was found to be unconvincing and unsatisfactory so that no promise could be established.

Issues of detriment were discussed in the case of *Bibi v Newham LBC*.⁵² In this case the housing authority had promised to provide permanent housing to two families within 18 months, under the authority's mistaken belief that it was legally bound to do so. The authority later resiled from its promise and considered that the promise was not a relevant consideration in its assessment of whether to provide permanent accommodation. The families sought to enforce the promise using the doctrine of substantive unfairness. One of the arguments raised against the families was that they had not detrimentally relied on the promise of the authority and had not changed their position in response to it.

Schiemann LJ (giving the court's judgment) stated that detrimental reliance, while relevant, was not a necessary component of the doctrine:⁵³

In our judgment the significance of reliance and of consequent detriment is factual, not legal . . . In a strong case, no doubt, there will be both reliance and detriment; but it does not follow that reliance (that is, credence) without measurable detriment cannot render it unfair to thwart a legitimate expectation . . .

...

In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power. To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal foothold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them.

He then found that the authority's failure to consider the promise was an abuse of power and he ordered that the decision of the authority be remade in consideration of the promise.

(ii) Decisions to cease funding of assisted education places

Similar issues to those raised in the 'home for life' cases arise in cases where promised education funding is withdrawn. In *R v Secretary of State for Education and Employment; ex parte Begbie*⁵⁴ the Blair-led opposition in the British

parliament had made an election promise that children already holding places under a state-funded assisted places scheme would continue to receive support in their education although there was some confusion as to whether this would apply through primary and secondary school. Some weeks later, after the Blair government was elected, it became clear that funding was to be only in relation to primary school places. It was argued by Begbie's parents that this was a broken promise which was substantially unfair.

In finding against the parents Laws LJ recognised that 'abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law'.⁵⁵ In summarising the types of decisions that are affected by *Coughlan* he stated:

In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of the policy-maker which they cannot wear.

In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in *Coughlan* that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, failing to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.⁵⁶

After analysing the situation at hand, Laws LJ found that no abuse of power had occurred. The primary reason was there was no real change of policy, just a misrepresentation though incompetence, which was later corrected.

Both Peter Gibson LJ and Sedley LJ (in concurring with Laws LJ) agreed that detrimental reliance was not a necessary condition but that it would be common in most successful cases of disappointment of a substantive legitimate expectation.

(iii) Prisoners' conditions and parole

Given the findings in *Hargreaves* and the way that decision was adversely affected in *Coughlan*, it is not surprising that prisoners soon looked to *Coughlan* for

assistance in their claims. Myra Hindley, one of the infamous moors murderers who was gaoled for life, sought to use *Coughlan* to argue that she had an expectation of some date of release.⁵⁷ The House of Lords found that she had never been given any assurance about her tariff or told when she would be released, so no legitimate expectation could arise.

Similar disappointment followed in *R (Vary) v Secretary of State for the Home Department*⁵⁸ where prisoners, whose security classification had been upgraded by a change of policy (with the consequence that they were moved to a closed prison under tighter security), sought to overturn the decision on the grounds of a substantive legitimate expectation. The court found against the prisoners on the grounds that there was no clear representation or promise made to them. Secondly, the policy change was justified by the public interest of maintaining public confidence in the prison system. The finding in *Hargreaves* that prisoners only have limited legitimate expectations in relation to the effect of changes of policy concerning early release was repeated.

(iv) The making of *ex gratia* payments

Decisions concerning the making of *ex gratia* payments by government has also been attacked using *Coughlan*, albeit with little success. In *R v Ministry of Defence, Ex Parte Walker*⁵⁹ a sergeant in the British army argued that he should have been paid an *ex gratia* payment for being in combat during his service for the UN in Bosnia. He was among a group attacked in Bosnia and as a result he suffered an amputation of his leg. He applied for compensation under a scheme for service persons injured by crimes of violence when serving overseas. He was denied compensation under the scheme on the basis that he was injured in a wartime operation, and hence his injuries did not come under the scheme. The House of Lords upheld the decision. No direct representation had been made to Sgt Walker and the House found that he was entitled to have the policy in force at the time of the incident applied to him and to be given the opportunity to make representations that he was in the scheme and outside the exclusion. Both of these requirements had been satisfied.

Similar problems arose in *R (on the application of Mullen) v Secretary of State For the Home Department*.⁶⁰ Mullen had been wrongfully imprisoned on a charge of bomb-making. After his release he sought *ex gratia* compensation for his imprisonment, but after considering his application the Secretary of State refused to pay him. The House of Lords refused to find any abuse of power, given that Mullen had been given an opportunity to voice his claim with the Secretary.

In *Association of British Civilian Internees Far East Region v Secretary of State for Defence*⁶¹ World War II internees of the Japanese also failed in their application for review of a decision of the Secretary of State concerning *ex gratia* payment. The Secretary had announced a scheme whereby internees would be paid £10 000 but when the scheme was finalised the categories of claimant were much reduced by a requirement the claimant be a British citizen. An association of internees sought

to review the decision on the grounds that the policy was substantively unfair. The claim failed. There was no clear and unambiguous statement regarding who would be eligible. The court also considered that the lack of detrimental reliance was highly relevant to the issue of whether the policy was unfair. Another issue considered was the large expenditure of the scheme. The court stated that: 'It is for the democratically elected government and not the courts to decide how public funds should be spent and how scarce resources should be allocated between competing claims.'⁶² This is an interesting counterpoint to *Coughlan* where the fact that the implications were purely financial was a reason in *favour of review*.

(v) Environmental law and planning decisions

Decisions by local councils and environmental authorities have also been reviewed using the *Coughlan* test. In *R v East Sussex County Council; Ex Parte Reprotech (Pebsham) Ltd*⁶³ the House of Lords accepted that the doctrine may apply to planning law. This case concerned a representation by a council planning officer that further planning approval was not needed for a waste processing plant, a plant to be used to generate electricity. However, Lord Hoffmann (giving the judgment of the House) felt that the representation did not satisfy the requirements for determination under the relevant Act, and hence could not found a claim based on substantive unfairness. He explained:

There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213. 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.⁶⁴

The claimant's arguments were stronger in the case of *Rowland v the Environmental Agency*, although also doomed to fail.⁶⁵ Here the claimant, Mrs Rowland, was a land owner who enjoyed the private use of a stretch of the Thames River, referred to as Hedsor Waters. The water course had been treated by the authorities as private for over 150 years, but a ruling of the environmental agency placed that private ownership in doubt. The claimant argued that she had a substantive legitimate expectation that her rights to private use over the water course would be continued. The Court of Appeal reiterated the requirement that the representation made by the authority under the *Coughlan* ruling must be within the authority's power to make (*intra vires*). The evidence was accepted that the power to grant private use and extinguish public navigation rights did not exist in the authority or its forebears. As such the claim for substantive legitimate expectation had to fail.

While concurring with this finding, May LJ gave an impassioned plea for opening up the doctrine of substantive unfairness to include *ultra vires* representations. He believed that the outcome for Mrs Rowland was unfair and that

the limitation of substantive unfairness to *intra vires* representations worked hardship. May LJ reviewed the arguments of Professor Craig that in such cases compensation might be payable to the claimant as a way of offsetting the hardship. Nevertheless, May LJ felt such orders could not be made as they would amount to judicial legislation.⁶⁶

(vi) Immigration decisions

The doctrine of substantive legitimate expectation has also had a large impact on the practice of immigration law. It was first mentioned by the House of Lords in *Secretary of State for the Home Department v Zeqiri*.⁶⁷ In this case an ethnically Albanian Kosovar, Zeqiri, sought review of the decision of the Secretary to remove him to Germany for consideration of his appeal for asylum. Zeqiri argued that he had a legitimate expectation that he would not be sent to Germany for processing, at least until the test case immigration appeal had been heard of another Kosovar. The House rejected this argument, primarily on the basis that no representation had been made that the Secretary would act in this way. Nevertheless, Lord Hoffmann stated that representations may create obligations. The issues of whether such obligations arise must be determined 'in the context in which it is made. The question is not whether it would have founded an estoppel in private law but the broader question of whether . . . a public authority acting contrary to the representation would be acting "with conspicuous unfairness" and in that sense abusing its power'.⁶⁸

Later in *Secretary of State for the Home Department v R (on the application of Rashid)*⁶⁹ the Court of Appeal employed this definition of 'conspicuous unfairness' to overturn a decision not to grant asylum to an Iraqi Kurd, Rashid. Rashid's initial application for refugee status was not dealt with under the correct policy. Had it been so dealt with he should have been granted asylum. When this error was sought to be corrected, the policy had then changed, given that events had progressed in Iraq. Again his application was refused.

Rashid argued that the decision was an abuse of power. The Court of Appeal agreed. While there was no specific representation that he would be given asylum, the court found that there was a legitimate expectation that the Secretary of State would apply his asylum policy to Rashid's claim. Pill LJ stated that it did not matter whether the claimant knew of the exact policy or not. Dyson LJ agreed, finding that there had been conspicuous unfairness due to the flagrant and prolonged incompetence of the decision makers. Given no reason for why the Secretary departed from the policy, there was no argument that there could be a public interest which overrode the unfairness to Rashid.

A similar finding occurred in *R (Mugisha) v Secretary of State for the Home Department*⁷⁰ where an informal policy had been adopted to give Rwandan nationals four years exceptional leave to remain even after they had failed to successfully claim asylum. The claimant had not been given the benefit of this policy, although the Secretary for a long time disputed the claimant's nationality, and the claimant was himself rather non-compliant with the investigations.

Following *Rashid*, Smith J found that there was conspicuous unfairness in the decision of the Secretary not to grant four years exceptional leave.

However not all changes of policy in the immigration context seem to have generated findings of substantive unfairness. In *Thomson and Ors, R (on the application of) v The Minister of State for Children*,⁷¹ a case similar in some respects to *Ex parte Khan*, a change to the overseas adoption policy was challenged as being substantively unfair. The claim failed on the basis that none of the statements relied on by the claimants amounted to a promise or commitment by the Secretary of State that pending cases would continue to be processed under the published procedures.

The final case for review is *Abdi and Nadarajah v Secretary of State for the Home Department*.⁷² This case was a combined appeal of two decisions involving claims for asylum. The relevant basis of appeal for this chapter's purpose was that the claimants believed that the Secretary had not applied a policy which allowed claimants to stay if they had family residing in the United Kingdom. In the case of *Abdi* this argument failed as the Secretary was able to show that the policy did not apply to her as a claimant. However, in *Nadarajah* the Court of Appeal took a different tack and in doing so restated some fundamental principles of substantive legitimate expectation.

Nadarajah's argument was that his claim for asylum was made at a time when his wife also had made a claim. Under the family policy at that time he made his request he should have been entitled to remain in the United Kingdom until his wife's claim was finalised. Later the policy was changed so that it did not apply to family members of those whose asylum claims were not finalised. Nadarajah argued the failure to apply the earlier policy originally, coupled with the decision to now apply the revised policy, was a breach of his legitimate expectations. The difficulty for this argument was that Nadarajah was not aware of the policy at the time he made his request to stay.

Laws LJ reviewed the authorities on substantive unfairness, particularly the decision in *Bibi*, which discussed a change of policy and a lack of concrete detriment. His Lordship felt the pull of both sides' arguments. On the one hand the policy did not seem to have been applied consistently; but on the other the Secretary's decision was based on a good faith interpretation of the policy, which was not questioned by the applicant until after the decision was made.

On the balance Laws LJ found in favour of the Secretary, and held that there was no abuse of power. But in doing so Laws LJ felt uncomfortable with the subjective balancing of interests. In his conclusions he stated:

Principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. It may be, as I ventured to put it in *Begbie*, 'the root concept which governs and conditions our general principles of public law'. But it goes no distance to tell you, case by case, what is lawful and what is not.⁷³

Laws LJ, instead of relying on abuse of power, sought to justify review on the basis of a principle of *good public administration*:

The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. . . . Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.⁷⁴

By basing judicial review on a principle of good administration, Laws LJ stated that there was no need to differentiate between procedural and substantive expectations. Rather the issue was one of proportionality:

This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may justifiably be overridden. The difference between the two is not a difference of principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. . . . On the other hand where the government decision maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact.⁷⁵

(vii) Summary on the UK position

It remains to be seen whether Laws LJ's attempt to found a principle of good administration as the basis for the doctrine of substantive unfairness will be

successful. In any event it is clear that, given the use of public policy valuation in the doctrine of substantive unfairness, the legality/merits distinction does not figure in the English law of substantive unfairness. What is also clear is that the cases following *Coughlan* have shown a general relaxation of the requirement for a statement to be made to a small group, and for the claimant to have suffered detrimental reliance.

The doctrine of substantive legitimate expectations in Australia

The doctrine of substantive unfairness has received a far less favourable welcome in the Australian context, most probably because of the concern with the separation of powers, as enshrined in Australia's federal Constitution.

There has been some cautious discussion of the *Preston* line of cases but all these decisions were based primarily on procedural rather than substantive expectations.⁷⁶ The High Court's initial consideration of substantive unfairness also highlighted the importance of limiting judicial review to the procedural aspects of the decision. In *Attorney General (NSW) v Quin*⁷⁷ Mason CJ rejected substantive protection of expectations on the grounds that it would 'entail curial interference with administrative decisions on the merits by precluding the decision maker from ultimately making the decision which he or she considers most appropriate in the circumstances'.⁷⁸ However Mason CJ did leave open the possibility of substantive protection being afforded if it could be done 'without detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power'.⁷⁹

Brennan J's views were far less hopeful for any such review. He reasoned:

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 . . . If courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of merits of its exercise, the functions of the courts would be exceeded.⁸⁰

Gummow J also rejected unfairness as a ground of review in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*.⁸¹ Gummow J had two main objections to the concept:

First, the question of where the balance lies between competing public and private interests in the exercise of a statutory discretion goes to the merits of the case, and is thus one for the decision maker, not the courts, to resolve. Secondly, a conclusion that a representation or decision is *ultra vires* ordinarily will preclude its effectiveness. An *ultra vires* representation is not a mere factor in favour of which the scales of judicial balancing might be allowed to swing, but peremptorily forecloses such deliberations. If the view of Lord Denning MR [in *Laker*] were adopted, one would be entitled to wonder why judicial balancing might not replace the doctrine of *ultra vires* altogether . . . Accordingly, in my view, 'unfairness' . . . is not a ground of judicial review.⁸²

After *Quin* there was still the possibility of a change in doctrine, but concerns about upgrading legitimate expectations into expectations which might be enforced, substantively by courts, were still present. In *Minister for Immigration and Ethnic Affairs v Teoh*⁸³ Mason CJ and Deane J were concerned that expectations attracting a duty to accord procedural fairness might be made into 'rules of law' by automatically compelling the decision maker to act in accordance with the expectations.

The Full Federal Court confirmed that this fear was still present and rejected a claim of substantive unfairness in *Minister for Immigration and Ethnic Affairs v Petrovski*⁸⁴ which involved a representation as to citizenship. Petrovski had been born in Australia but had not become an Australian citizen as his father was a Consul-General of Yugoslavia. He had been given an Australian passport and that passport had been renewed. However, when he sought permanent residency status for his wife and her daughter, he was informed that he was not a citizen. His application for citizenship failed because he lacked necessary qualifications. The Full Federal Court found that the Department of Immigration and Ethnic Affairs had clearly made grossly negligent misrepresentations about Petrovski's citizenship. The Full Court declined to find for Petrovski even though there were no overriding public policy considerations and the decision appeared to be operational in effect. Moreover, in his discussion of authorities Tamberlin J found that Mason CJ's comments in *Quin* related solely to procedural fairness rather than substantive entitlements.⁸⁵

Later, in *Barratt v Howard*,⁸⁶ a case concerning the dismissal of a senior public servant, the Full Federal Court stated that: 'The weight of authority lies against the use of legitimate expectation to support enforcement of substantive rights. Rather, it generates an entitlement to procedural fairness.'⁸⁷

After *Coughlan* was decided, there were arguments raised again that the doctrine might find a foothold in Australia. In *Daihatsu Australia Pty Ltd v Deputy Commissioner of Taxation*⁸⁸ Lehane J proceeded on the basis that the doctrine may be available in Australia, but found no evidence to support the claim. In *Shergold v Tanner* the Full Federal Court noted that *Coughlan* style of review was not yet available in Australia.⁸⁹

However, any lingering doubts about the availability of substantive unfairness as a ground of judicial review were finally removed by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*.⁹⁰ In this decision a deportee unsuccessfully argued that the immigration authorities had failed to investigate the effects of his deportation on his children, even after they had promised to so investigate. All judges appeared to accept that expectations by a person about future administrative action, however legitimate, could only generate rights to procedural fairness if they are to be disappointed; not to have those expectations fulfilled. Gleeson CJ's judgment recognised that the boundary between a procedural and a substantive expectation were not always clear but he cautioned against a course which would lead to 'converting a matter of

procedure into a matter of substance, and a matter of expectation into a matter of right'.⁹¹

The joint judgment of McHugh and Gummow JJ also confirmed the position in *Quin* and *Teoh* that the doctrine of legitimate expectations was procedural only, and that English authority would not be followed. The standards in *Coughlan* were said to 'fix upon the quality of the decision-making and thus the merits of the outcome'.⁹²

Following *Lam*, there have still been some attempts in Australia to rely on *Coughlan*, all of which have failed.⁹³ Notably, the Bali nine convicted drug traffickers argued unsuccessfully for a substantive legitimate expectation that the Australian Federal Police would not have acted in such a way as to expose them to the death penalty in Indonesia.⁹⁴

Conclusion: should the UK or Australian position on substantive unfairness be preferred?

The above review of both the UK and the Australian positions has highlighted a deep divergence between the approaches adopted in each jurisdiction. I argue that the Australian approach is superior. This is for two reasons.

The first reason is that the UK doctrine of substantive unfairness asks the courts to be involved in assessing the merits of the decision. On its own this is not so fatal a criticism, especially given that a kind of merits review already arguably exists under the *Wednesbury* unreasonableness principle. However, in *Wednesbury* unreasonableness judges are limited to a strict rationality assessment,⁹⁵ whereas under *Coughlan* judges are asked to examine the merits of administrative decisions and how individual interests are to be balanced with public interests.

The question should be asked whether judges are really equipped to make such decisions. Because of the finite and individualised nature of judicial review claims, judges can never be given a total policy picture of why a decision has been made as it has. In *Coughlan*, for example, the implications of upholding the promise for life was considered to be 'merely' financial. With respect, judges are not in a position to assess the financial implications of policy choices, particularly in areas like health, where there are scarce enough resources to meet basic health care needs. In the past, courts have rightly been extremely reluctant to question decisions with financial implications.⁹⁶ Such decisions are almost always held to be non-justiciable and for good reason: judges are not financial administrators. They have not been chosen for that role. Nor do they have the skills to perform it.

The second argument against substantive unfairness as a ground of judicial review is that there is no concrete way for the public interests to be weighed under the *Coughlan* principles before it can objectively be said that there has been an abuse of power. The test under *Coughlan* remains highly subjective. This

much was expressly recognised by Laws LJ in *Abdi and Nadarajah*. Merely stating that a decision is an abuse of power says nothing about why a judge believes it has become so. While the test is said to be a balancing one, it is impossible to provide guidance on what will tip the balance. If substantive unfairness is justified by reference to the principle of legal certainty, one can surely question the legitimacy of this doctrine.

Law LJ's reformulation of *Coughlan* as a case on the principle of good administration, with respect, does not address the arbitrary nature of this form of judicial review. To paraphrase Laws LJ: Good administration, like abuse of power, goes no distance to tell you, case by case, what is lawful and what is not. There is, therefore, an undeniable irony that, in attempting to provide legal certainty, the English courts have adopted an arbitrary and unpredictable rule, that cannot on its own terms satisfy the rule of law's preference for legal certainty.

Returning, then, to the issue of separation of powers that was raised earlier in this chapter, it can be argued that the doctrine of substantive legitimate expectation offends the basic notion of separation of powers. As stated by Brennan J in *Quin*, the doctrine of substantive unfairness

would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or strike down any exercise which did not. A legitimate expectation not amounting to a legal right would be treated as though it were, and changes in government policy, even those sanctioned by the ballot box, could be sterilized by expectations which the superseded policy had enlivened.⁹⁷

In his extrajudicial writings, Gleeson CJ has argued that judicial legitimacy is based on the judiciary limiting the exercise of their powers to the purposes for which they were conferred. The legality/merits distinction, while battered and bruised, still serves a useful purpose:

The difference is not always clear cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.⁹⁸

The maintenance of the legality/merits distinction is therefore of key importance. To maintain it, Australian courts must continue to reject the doctrine of substantive unfairness.

The impact and significance of *Teoh* and *Lam*

Alison Duxbury*

There are many similarities in the factual and legal foundations of the High Court cases of *Minister for Immigration and Ethnic Affairs v Teoh*¹ (*Teoh*) and *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*² (*Lam*). Both *Teoh* and *Lam* concern individuals who were facing the revocation of their Australian entry visas, and consequently deportation, due to drug offences. In challenging these decisions, both Mr Teoh and Mr Lam claimed that they had been denied procedural fairness on the basis that they had a legitimate expectation that a course of conduct would be pursued by officers of the Department of Immigration and Multicultural/Ethnic Affairs. Both men were fathers of Australian citizens and provided testimonials to the effect that it was in the best interests of their children that they remain in Australia rather than be returned to their country of origin. At this point the similarities end.

The High Court's decision in *Teoh* was 'taken to the streets'³ due to the importance attached by the Court to Australia's ratification of an international treaty, the Convention on the Rights of the Child,⁴ in domestic law. *Lam* did not excite any public controversy (except perhaps amongst administrative lawyers). *Teoh* was regarded as a significant development in the doctrine of legitimate expectations in Australian administrative law, whereas *Lam* appeared to spell a retreat from the concept. In *Lam*, the High Court dealt extensively with the decision in *Teoh*, despite the fact that counsel for the applicant did not seek to rely upon the earlier decision and neither party attempted to reopen the case. This factor, as well as the similarities between the cases, indicates that they need to be understood together. This chapter will outline the facts and context of the High Court's judgments in *Teoh* and *Lam* before exploring the impact and significance of the decisions in two areas – first, the relationship between international law and Australian administrative law; and secondly the duty to accord procedural fairness.

The facts and context of *Teoh* and *Lam*

The cases of *Teoh* and *Lam* are part of what has been termed 'a titanic struggle' between the Australian government and the judiciary over the power to review executive decisions that fall within the ambit of the *Migration Act 1958* (Cth).⁵ The Commonwealth Parliament has passed legislation squarely aimed at limiting the potential for judicial review of certain types of migration cases.⁶ The High Court has proved adept at restricting the scope and application of such legislation.⁷ For the most part, this struggle between the government and the courts has been focussed on the review of decisions to deny, or in some cases grant, refugee status to an individual. Neither *Teoh* nor *Lam* involved the review of refugee applications but concerned another aspect of executive power over migration that has excited controversy in recent years – the deportation of residents as a result of criminal convictions.

Teoh was a Malaysian citizen who had resided in Australia since 1988 on a temporary entry permit. In July of that year, he married an Australian citizen, Jean Helen Lim, who was the mother of four children. Following their marriage, the couple had three more children. Teoh applied for permanent resident status prior to the expiration of his temporary entry permit; however, while his application was pending he was convicted of the importation and possession of heroin and sentenced to six years' imprisonment. In January 1991, Teoh was informed by an officer of the Department of Immigration and Ethnic Affairs that his application for permanent residence had been denied on the basis that he could not meet the 'good character' requirement pursuant to the Department's policy guidelines. According to this policy an applicant for resident status must be of 'good character' – a relevant issue being 'whether the applicant has a criminal record'.⁸ Facing deportation, Teoh applied for review of the decision and attached a number of testimonials to the effect that he was a concerned father and was the only person who could keep the family together.⁹ The Immigration Review Panel rejected his application, finding that in view of Teoh's criminal record the compassionate grounds did not compel a waiver of policy.¹⁰

Teoh challenged the decision of the Panel in the Federal Court. The basis of his challenge was three-fold: (1) that the delegate had failed to accord procedural fairness, (2) that the delegate had failed to take into account a relevant consideration, and (3) that the delegate had taken into account a policy without considering the merits of the case.¹¹ On appeal to the Full Court of the Federal Court, and subsequently the High Court, Teoh successfully argued that Australia's ratification of the Convention on the Rights of the Child (CRC) created a legitimate expectation that decision makers would abide by the provisions of the CRC in decisions which affect children.¹² Article 3(1) of the CRC provides that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The majority of the High Court held that if officers of the Department did not intend to give effect to this legitimate expectation then Teoh should have been given a notice and an opportunity to be

heard on why that course of action should not be taken.¹³ Although the decision was hailed in some circles as a positive step, the government was quick to condemn the result and took steps¹⁴ to nullify any further consequences of the case.

The High Court was again called upon to consider the requirements of procedural fairness in the context of an application to review a visa decision on the basis of an applicant's criminal record in *Lam*. Mr Lam was a Vietnamese citizen who arrived in Australia as a refugee at the age of thirteen, and was granted a transitional (permanent) visa. While in Australia he committed many criminal offences, including trafficking in heroin, and was sentenced to eight years imprisonment. As a result of his criminal activity, an officer of the Department of Immigration and Multicultural Affairs wrote to Lam stating that his visa may be cancelled pursuant to s501(2) of the *Migration Act 1958* (Cth).¹⁵ According to this provision, the minister may cancel a visa if the minister reasonably suspects that an individual does not pass a character test. Lam was the estranged father of two children who were born in Australia and were Australian citizens. In response to the Department's letter, Lam submitted that the children's best interests dictated that his visa should not be cancelled and he should not be deported to Vietnam. A letter from the children's carer, Ms Tran, was included as part of the supporting documentation and her telephone number was listed. One week later, on 7 November 2000, an officer of the Character Assessment Unit of the Department wrote to Lam asking for the contact details of the children's mother. Lam replied that he had no contact with the mother, but instead sent the contact details of the children's carer. Further correspondence ensued between the applicant and the Department, with the minister ultimately deciding to cancel Lam's visa.¹⁶ Lam challenged the decision, arguing that the letter of 7 November had created a legitimate expectation that Ms Tran would be contacted, and the failure to tell Lam that further contact would not be made by the Department resulted in a lack of procedural fairness.¹⁷

The High Court dismissed the application. Counsel for Lam did not seek to rely upon *Teoh* since there was no doubt that the requirements of Article 3 of the CRC had been taken into account by the Department. Although counsel for Lam clearly disclaimed any reliance on *Teoh*, the High Court commented extensively on the earlier case. While such comments may be considered strictly obiter, they are a strong indication of the direction that the High Court will take in the future when confronted with the relationship between Australian administrative law and international law, and cases involving an alleged denial of procedural fairness that is founded on an international instrument.

The interaction between international law and Australian administrative law

The decision in *Teoh*

Until the High Court's decision in *Teoh*, and the subsequent response to the decision by the Federal Government, the status of international treaties in Australian

domestic law could be stated in a few brief propositions. First, the executive power to enter into treaties is derived from s61 of the Commonwealth Constitution. The executive has used this power to ratify over 900 treaties, including all major human rights conventions. Second, ratification by the executive alone does not result in a treaty being incorporated into domestic law, nor does it create rights in the hands of private individuals unless the treaty is separately implemented by legislation.¹⁸ Although a number of human rights treaties have been annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), this process does not result in the incorporation of these conventions into domestic law.¹⁹ Third, the requirement for parliamentary implementation does not reduce the interaction between Australian law and unincorporated international instruments 'to a state of sterility'.²⁰ In relation to this third proposition, it is accepted that where a piece of legislation is ambiguous, then it should be interpreted in accordance with Australia's international obligations.²¹ This principle applies only where the treaty ratification predates the enactment of a piece of legislation, unless the legislation was enacted in contemplation of executive ratification.²² Another way in which international law may influence domestic law is through the development of the common law.²³ For example, in rejecting the common law doctrine of *terra nullius* in *Mabo v Queensland [No 2]*,²⁴ Brennan J stated that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.²⁵ Mason CJ and Deane J repeated these propositions in their joint judgment in *Teoh*, with no dissent from other members of the Court.²⁶

Where the majority in *Teoh* departed from previous case law was their willingness to give international treaties a role to play in influencing the exercise of a statutory discretion residing in an administrative decision maker. In their joint judgment, Mason CJ and Deane J (with Toohey J agreeing) reasoned that:

Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration' . . .

If a decision maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.²⁷

There are three parts to this statement. The first element is that the ratification of an international treaty constitutes a statement to the national community. In expounding upon this point, Toohey J quoted with approval from *Tavita v Minister of Immigration*,²⁸ decided in the New Zealand Court of Appeal, where it was stated that an argument that would result in treaty ratification being reduced to 'window-dressing' was 'unattractive' to the Court.²⁹ The second element of

Mason CJ and Deane J's statement is that ratification is an adequate foundation for a legitimate expectation. The third aspect relates to the consequences – if the expectation is to be disappointed then certain procedural requirements will follow. Gaudron J agreed with Mason CJ and Deane J as to the status of the CRC in Australian law, but believed that a more important rationale for preserving the best interests of the children was their status as Australian citizens.³⁰ McHugh J dissented on a number of grounds, emphasising that in his view the act of treaty ratification by the executive government was a statement to the international community, and, in particular, an undertaking to other state parties, rather than to the national community.³¹ McHugh J firmly believed that Article 3 of the CRC could not give rise to a legitimate expectation that an application for resident status will be decided in accordance with its terms. In particular, McHugh J was concerned that the approach advocated by the majority would result in the amendment of the law by the executive government and 'enormous' consequences for administrative decision makers.³²

Allars has suggested that *Teoh* constituted a dramatic beginning to 'the internationalisation of Australian administrative law' given the High Court's earlier rejection of the relevance of international treaties to the exercise of an administrative discretion.³³ In arriving at this conclusion, Allars examines two previous High Court cases: *Lim v Minister for Immigration, Local Government and Ethnic Affairs*³⁴ (*Lim*) and *Kioa v West*³⁵ (*Kioa*). In *Lim*, counsel argued that Division 4B of the *Migration Act 1958* (Cth) should be 'read down to the extent necessary' to avoid inconsistency with the *Human Rights and Equal Opportunity Act 1986* (Cth), the International Covenant on Civil and Political Rights (ICCPR) annexed to the Act, and the Convention and Protocol relating to the Status of Refugees.³⁶

Although Brennan, Deane and Dawson JJ agreed with the general proposition that where legislation is ambiguous the courts should favour a construction which accords with Australia's international obligations, they found that Division 4B, which required that 'boat people' be held in custody, was quite unambiguous.³⁷ In the seminal High Court decision on procedural fairness, *Kioa v West*, counsel went one step further and argued that the Declaration on the Rights of the Child and the ICCPR were relevant considerations in making a decision concerning the deportation of the parents of a child who was an Australian citizen.³⁸ Although the Preamble to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) stated that 'it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with' the conventions scheduled to the Act, Brennan J held that this only indicated that decision makers were entitled to take the conventions into account, not that they were bound to do so.³⁹ Gibbs CJ also rejected the argument based on the two international instruments stating that 'there was no legal obligation on the Minister's delegate to ensure that his decision conformed with the Covenant or the Declaration'.⁴⁰ In *Teoh*, Mason CJ and Deane J accepted that there was no failure to taken into account a relevant consideration.⁴¹ In this respect, *Teoh* was a 'small step'⁴² as it only elevated the role of international conventions in relation to the doctrine

of procedural fairness, rather than their status with respect to other grounds for the review of administrative action.

The response to *Teoh*

Not all were convinced that *Teoh* represented a modest step in developing the relationship between administrative law and international law, or that it was a positive development. Following the High Court's decision, the Minister for Foreign Affairs and Trade and the Attorney-General were quick to take up the concern articulated by McHugh J as to the potential impact of the case on administrative decision makers by issuing a joint ministerial statement. Seizing upon the words in Mason CJ and Deane J's judgment 'absent statutory or executive indications to the contrary' (emphasis added) the 1995 joint statement emphatically stated that merely entering into a treaty, without further parliamentary action, would not raise a legitimate expectation that administrative decision makers will act in accordance with its provisions.⁴³ The 1995 joint statement illustrates that Australia exhibits a certain amount of ambivalence towards its international human rights obligations.⁴⁴ The ministers assert that it is not legitimate to expect that a non-incorporated treaty will be applied by decision makers, while at the same time emphasising 'that the Government remains fully committed to observing its treaty obligations'.⁴⁵ However, international conventions enumerating human rights principles require states' parties to guarantee the rights of individual citizens and must have effect within a nation if they are to have any impact.⁴⁶ Thus, the 1995 joint statement sent divergent messages to the international and national communities concerning the way in which Australia would implement its treaty obligations.⁴⁷

In 1997, the new Attorney-General and Minister for Foreign Affairs for the Coalition Government issued a second joint statement in similar terms to the first.⁴⁸ But rather than underline Australia's full commitment to its treaty obligations at the international level, the 1997 joint statement is more concerned with the proper roles of the Executive and Parliament in ratifying and implementing treaties in Australia. Consequently, the 1997 joint statement emphasises that 'under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations'.⁴⁹ It will be seen that these expressions of concern regarding the proper role of the executive and parliaments with respect to treaties were taken up by some judges in *Lam*.⁵⁰

The response to *Teoh* did not end with the executive government as both joint statements were followed by the introduction of legislation into the Federal Parliament. The 1995 and 1997 versions of the Administrative Decisions (Effect of International Instruments) Bill contained a clause to the effect that Australia's ratification of a treaty does not give rise to a legitimate expectation that administrative decision makers will act in compliance with the treaty, and if not, that the person will be entitled to a hearing.⁵¹ Despite the flurry of activity at the time, neither piece of legislation has been enacted, leaving the 1997 joint statement as the

only existing executive or legislative indication at the Commonwealth level that the High Court's decision has no legal effect. The South Australian Parliament in 1995 passed its own *Administrative Decisions (Effect of International Instruments) Act 1995* (SA), attempting to negate the impact of *Teoh* in that state.⁵² Following the enactment of this legislation, a plaintiff in South Australia argued that a person in a correctional facility had a legitimate expectation that the minister and officers of the Department of Correctional Services would act in conformity with Standard Minimum Rules for the Treatment of Prisoners and other rules to which Australia is a signatory.⁵³ The argument failed on the basis that the Minimum Rules are not a treaty and are not part of domestic law.⁵⁴ Additionally, the plaintiff argued that the practice of 'doubling up' (whereby untried prisoners share the same cells as convicted criminals in South Australian prisons) breached Article 10 of the ICCPR.⁵⁵ Millhouse J found that the Covenant was not binding on the state of South Australia and stated (with regret) that the effect of the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA) in South Australia 'is to make Australia's involvement in international conventions "merely platitudinous and ineffectual"'.⁵⁶ The decision demonstrates that a heavy-handed legislative response may produce an impact beyond the fairly limited principle in *Teoh* and affect other areas where international law has been found to have a role to play in domestic law.

Doubts remain about the legal effect of the joint statements at the Commonwealth level.⁵⁷ In 1995, the Administrative Appeals Tribunal (AAT) in *Re PW Adams Pty Ltd and Australian Fisheries Management Authority (No. 2)*⁵⁸ held that the 1995 joint statement counteracted a party's submissions based on legitimate expectations in the context of the Universal Declaration of Human Rights. But a number of Federal Court and AAT decisions appear to have applied *Teoh* with no regard to the intentions indicated in the joint statements by members of the executive government.⁵⁹ In *Department of Immigration and Ethnic Affairs v Ram*,⁶⁰ Hill J expressed his reservations on the efficacy of the 1995 joint statement achieving its intended effect. Hill J doubted that Mason CJ and Deane J had:

... contemplated a case where at the time of ratification, Australia had expressed to the world and to its people its intention to be bound by a treaty protecting the rights of children, but subsequently one or more Ministers made statements suggesting that they at least had decided otherwise.

Although the High Court has not had the opportunity to consider the legal effect of either joint statement, the fact that no judge in *Lam* suggested that the decision in *Teoh* had been rendered nugatory by the executive government's actions indicates that the High Court continues to regard *Teoh* as arguable, even if members of the Court have doubts about the correctness of the majority's approach.

The future impact of international treaties in Australian administrative law

While most of the High Court's decision in *Lam* examines the concept of legitimate expectations (discussed in *Implications for procedural fairness and the role of*

legitimate expectations – see page 307–8), members of the High Court could not resist the opportunity to deal with the status of international treaties in Australian administrative law, despite the fact that no treaty obligation was in dispute. In their joint judgment, McHugh and Gummow JJ reinforced the accepted view that ratification of an international treaty does not ‘confer rights or impose liabilities’ upon citizens.⁶¹ They acknowledged that Australia’s international obligations may impact on statutory interpretation, but otherwise their Honours had a restricted view of the relationship between international law and domestic law. For example, they signalled a retreat from the majority judgment in *Teoh* stating that it was a ‘curiosity’ that although treaties were not to be accorded the status of relevant considerations, *Teoh* would result in international obligations being ‘mandatory relevant considerations for that species of judicial review concerned with procedural fairness’.⁶²

Hayne J confined himself to suggesting that the consequences of the *Teoh* principle with respect to the ratification of international treaties may need to be reconsidered in the future.⁶³ Callinan J prefaced his discussion of the role of treaties in administrative law by stating that the applicant’s assertion there was no need to rely upon *Teoh* was ‘not entirely’ convincing.⁶⁴ His Honour indicated his distaste for the majority’s treatment of international conventions in administrative law in *Teoh* by referring to the ‘elevation of an Executive ratification of an un-enacted Convention to almost the level of a concrete legal right or at least a springboard therefor’.⁶⁵ Callinan J’s comments in *Lam* are of little surprise given his suggestion in the earlier case of *Sanders v Snell* that the impact of *Teoh* may be limited to matters where ‘any civilised person would hold expectations, whether referable to a United Nations Convention or otherwise’.⁶⁶ This comment is in accordance with Gaudron J’s suggestion in *Teoh* that the status of the children as Australian citizens was more significant than ratification of the CRC.

Such observations indicate that the prospect for future developments in the relationship between international treaties and Australian administrative law may be limited. While the comments were obiter, as is suggested by Ruddle and Nicholes, the ‘decision in *Teoh* remains good law at present, albeit with an uncertain future’.⁶⁷ More broadly, the discussion of *Teoh* in *Lam* highlights that (with a few exceptions) the Australian judiciary displays a number of ‘anxieties about international law’.⁶⁸ Charlesworth, Chiam, Hovell and Williams have listed these anxieties as ‘the preservation of the separation of powers . . . the fear of opening the floodgates to litigation; the sense that the use of international norms will cause instability in the Australian legal system; and the idea that international law is essentially un-Australian’.⁶⁹ To some extent these anxieties are understandable – if international treaties are given too prominent a place in domestic case law then the judiciary will be accused of ‘backdoor’ incorporation.⁷⁰

In *Lam*, the first anxiety listed by the four commentators was manifested in the judgments of McHugh and Gummow JJ and Callinan J through their discussion of the proper roles of the Executive, the Parliament and the courts. McHugh and Gummow JJ pointed out that *Teoh* involved a treaty that had been ratified

by the executive, but had not been separately implemented by the parliament pursuant to the external affairs power in s51(29) of the Constitution.⁷¹ Their Honours stated that it was the task of the judiciary ‘to declare and enforce the limits of the power conferred by statute upon administrative decision makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power’.⁷² Callinan J indicated that the High Court in *Teoh* had elevated ‘the Executive above the parliament’ in giving effect to the CRC.⁷³ By invoking the separation of powers, these judges have suggested that the majority in *Teoh* interfered with the constitutional arrangements with respect to international obligations.

Prior to the High Court’s decision in *Lam*, concern had been expressed in other circles about the respective roles of Parliament and the Executive in relation to Australia’s involvement in international treaties. In 1995, the Senate Legal and Constitutional References Committee tabled its report on the treaty-making process in Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*. A number of witnesses to the inquiry made it clear that the decision in *Teoh* was an important consideration in their belief that parliamentary participation in the treaty process should be increased.⁷⁴ The Committee concluded that the High Court’s decision confirmed the influence of treaties in Australian domestic law which, in turn, indicated the need for increased parliamentary involvement prior to ratification.⁷⁵ This Report resulted in a number of reforms, including the establishment of the Joint Standing Committee on Treaties. This Committee was established to examine proposed treaty actions that have been tabled in the Commonwealth Parliament and to report on whether Australia should undertake steps with respect to treaties that would bind Australia in international law, including whether it should ratify new treaties. Viewed in the light of this inquiry, the decision in *Teoh* has played a part outside the administrative law context and has been utilised in debates concerning the roles of the three branches of government in entering into and implementing Australia’s international obligations.

Implications for procedural fairness and the role of legitimate expectations

The above discussion demonstrates that *Lam* has foreshadowed a retreat by the High Court from further developments in the utilisation of Australia’s ratification of international treaties as a means of illuminating the statutory discretions of administrative decision makers. Moving away from the impact of international treaties on administrative law to deal with the principles of procedural fairness, there are also indications in the judgments that the concept of legitimate expectations, and the notion of ‘unfairness’ for the purposes of procedural fairness as a ground of review, may have been altered as a result of the decision. In *Kioa*, Mason J held that:⁷⁶

. . . it is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.

Mason J's formulation of the principle of procedural fairness in *Kioa* has been preferred over Brennan J's reliance on the construction of the statutory power under review.⁷⁷ The High Court decisions in *Teoh* and *Lam* give different emphases to the role of legitimate expectations in procedural fairness, with the judges in *Lam* ultimately preferring a broader use of the concept of unfairness. This section will examine the discussion of legitimate expectations and unfairness in *Teoh* and *Lam* and the way in which the *Lam* decision has been applied in subsequent High Court and Federal Court cases.

The concept of legitimate expectations

In administrative law, the concept of a legitimate expectation has been employed for a number of different purposes.⁷⁸ First, it has been used to impose a duty to observe procedural fairness. Secondly, it may clarify the content of the duty, that is, whether notice is required or a hearing will be imposed in the circumstances of a particular case.⁷⁹ This is illustrated by Gaudron J's comment in *Haoucher v Minister for Immigration and Ethnic Affairs*,⁸⁰ where her Honour stated that:

The notion of legitimate expectations is one to which resort may be had at two distinct stages of an inquiry as to whether there has been a breach of the rules of natural justice. It may serve to reveal whether the subject matter of the decision is such that the decision-making process is attended with a requirement that the person affected be given an opportunity to put his or her case On the other hand, it may serve to reveal what, by way of natural justice or procedural fairness, was required in the circumstances of the particular case.

In *Teoh*, there was no dispute that the applicant was entitled to procedural fairness.⁸¹ The majority of the High Court held that Australia's ratification of the CRC gave the applicant a legitimate expectation that administrative decision makers would make the 'best interests of the child' a 'primary consideration', as required by Article 3(1). Thus, it was a decision which resulted in the content of procedural fairness being increased for the particular applicant. Mason CJ and Deane J were careful to point out that the legitimate expectation did not require the decision maker to act in a particular way as that would be 'tantamount to treating it as a rule of law'.⁸² Procedural fairness only required that if a decision maker 'proposes to make a decision inconsistent with a legitimate expectation . . . the person affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course'.⁸³

While the majority of the Court in *Teoh* drew upon the language of legitimate expectations to find that the applicant had been denied procedural fairness,

McHugh J cast doubt on the continuing applicability of the concept, questioning 'whether the doctrine of legitimate expectations still has a useful role to play'.⁸⁴ In his view, since the rules of procedural fairness are 'presumptively applicable to administrative and similar decisions made by public tribunals and officials', there is no need for legitimate expectations.⁸⁵ This is not the first time that a High Court judge has expressed dissatisfaction with the concept of legitimate expectations. In *Kioa*,⁸⁶ Brennan J questioned the utility of legitimate expectations in determining the threshold question as to whether procedural fairness should be implied into a decision-making process. His Honour described legitimate expectations as a 'seed' which had been planted by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*⁸⁷ and had 'grown luxuriantly in the literature of administrative law'.⁸⁸ Brennan J preferred the term 'interests' as being a more accurate descriptor than legitimate expectations.⁸⁹ A number of writers agree with this position, arguing that the notion of an interest in the threshold test is broad enough to encompass matters that fall within the ambit of procedural fairness.⁹⁰ In *Lam*, McHugh J found greater support for his desire to limit or abandon the concept of legitimate expectations altogether amongst other members of the Court. For example, Callinan J described the phrase 'legitimate expectation' as 'unfortunate' and the concept as a 'fiction'.⁹¹ Hayne J suggested that the use of legitimate expectations in *Teoh* 'raised more questions than it answers'.⁹² In their joint judgment, McHugh and Gummow JJ explicitly confined legitimate expectations to the content of procedural fairness.⁹³ The judgments evidence two concerns about the development of legitimate expectations. The first relates to the question whether an expectation has to be held by a particular individual in order for it to be regarded as 'legitimate'. The second concern draws upon the merits/legality distinction in administrative law and deals with the issue as to whether a legitimate expectation can give rise to substantive as well as procedural benefits. Each of these issues will be considered in turn.

Subjective versus objective expectations

In Australian administrative law, it is accepted that in applying the concept of legitimate expectations it is not necessary to demonstrate that an individual actually held an expectation, rather it is enough to show that it was reasonable in the circumstances. In *Teoh*, Mason CJ and Deane J stated that an applicant need not personally entertain the expectation, 'it is enough that the expectation is reasonable in the sense that there are adequate materials to support it'.⁹⁴ In *Haoucher*, McHugh J stated that a legitimate expectation could be founded on a detailed policy statement made by the responsible minister in the House of Representatives as to the considerations that would govern the exercise of a statutory power (in that case, the power to deport).⁹⁵ Such a legitimate expectation was not based on a subjective belief, but rather on the reasonableness of the expectation. In *Lam*, McHugh and Gummow JJ contrasted a legitimate expectation arising from ratification of a convention to the policy statement in *Haoucher*. In their view, *Teoh* could not stand beside *Haoucher*.⁹⁶ While their Honours did

not require that a person must actually hold an expectation, they suggested that ratification of a convention was beyond the range of expectations that could be regarded as legitimate. In their view, in determining the circumstances in which a legitimate expectation may arise it was wrong 'to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point'.⁹⁷ On the facts, Gleeson CJ agreed that Lam did not possess a subjective expectation as a result of the letter dated 7 November 2000 and he was unable to accept that 'it would have been reasonable to expect the Department to write to the applicant if for any reason there was a change of plan about contacting Ms Tran'.⁹⁸

Callinan J was scathing of the idea that a legitimate expectation could arise (as was the case in *Teoh*) where an individual has no knowledge of the existence of an international treaty, and therefore had no actual expectation 'legitimate or otherwise'.⁹⁹ In Callinan J's view, if legitimate expectations were to remain part of Australian law then they should be confined to situations where 'there is an actual expectation' or where 'a reasonable inference is available that the party turned his or her mind consciously to the matter in circumstances only in which that person was likely to have done so, he or she would reasonably have believed and expected that certain procedures would be followed'.¹⁰⁰ Although Callinan J was critical of the idea that a legitimate expectation may arise where it is not held by an individual, he did not, nor did any other member of the High Court, rule that an expectation must be subjectively held. However, it does appear that if legitimate expectations are to survive post-*Lam* then the range of circumstances in which it may be said that they are reasonably held will be limited. The extent to which this has occurred in practice will be examined in the context of the post-*Lam* jurisprudence. As is suggested by Dyer, 'if it happens that we use the term [legitimate expectations] less, it might well be because the courts give more attention to the different kinds of expectations and their significance for fair procedure'.¹⁰¹

Substantive versus procedural outcomes

Australian courts have continually reinforced the principle that a legitimate expectation will only result in procedural rather than substantive outcomes for an applicant. In *Attorney-General (NSW) v Quin*,¹⁰² Mason CJ expressed the position as follows:

In the cases in this Court in which a legitimate expectation has been held entitled to protection, protection has taken the form of procedural protection, by insisting that the decision maker apply the rules of natural justice. In none of the cases was the individual held to be entitled to substantive protection in the form of an order requiring the decision maker to exercise his or her discretion in a particular way.

In accordance with this reasoning, in *Teoh* the Court refused to hold that the administrator must comply with the provisions of the CRC. The Australian focus on procedure rather than on substance can be contrasted to the position in

England where the courts have extended the concept of legitimate expectations to deliver substantive outcomes and not just procedural benefits. In *R v North and East Devon Health Authority; Ex parte Coughlan*,¹⁰³ the English Court of Appeal held that an assurance given by a Health Authority that a nursing home would remain the home for life of a severely disabled patient, Mrs Coughlan, was binding in the absence of an overriding public interest. Although counsel for the applicant in *Lam* did not argue for substantive protection on the basis of *Coughlan*, the English Court of Appeal's decision was given prominence in the judgments of Gleeson CJ and McHugh and Gummow JJ. Gleeson CJ suggested that the applicant's arguments in *Lam* came 'very near' to suggesting a substantive outcome rather than a procedural benefit.¹⁰⁴ In considering *Coughlan*, McHugh and Gummow JJ explicitly rejected the operation of substantive protection in Australia on the basis that it would impinge on the merits of the case and thus be beyond the proper constitutional role of the judiciary in determining proceedings for judicial review of administrative action.¹⁰⁵ These statements echo comments made by Brennan J in *Kioa* where he emphasised that procedural fairness is not concerned with the merits of the case, but with the procedure that is to be observed in the exercise of a power.¹⁰⁶ While the comments do not add anything new to an understanding of the principles of procedural fairness in Australia, they indicate that many judges in the High Court are dissatisfied with the existing concept of legitimate expectations and are looking for ways to diminish its significance. In this context, Burmester believes that the Court in *Lam* 'was sending a strong message that in Australia there were not to be any substantive rights associated with the doctrine'.¹⁰⁷

The meaning of unfairness

It would appear that that one way in which the High Court in *Lam* sought to downplay the place of legitimate expectations was to give greater weight to the meaning of 'unfairness'. Gleeson CJ stated that 'what must be demonstrated is unfairness, not merely a departure from a representation . . . The ultimate question remains whether there has been unfairness, not whether an expectation has been disappointed'.¹⁰⁸ For Gleeson CJ, the essential question was one of 'practical injustice'.¹⁰⁹ Hayne J also suggested that if the procedures were fair, then 'reference to expectations, legitimate or not, is unhelpful, even distracting'.¹¹⁰ Questions of fairness generally go towards determining the content of procedural fairness – that is, the procedural steps that are required of the decision maker in a particular case.¹¹¹ Flexibility appears to be a key factor, with Brennan J in *Kioa* describing the principles of procedural fairness as having 'a flexible quality which, chameleon-like, evokes a different response from the repository of statutory power according to the circumstances in which the repository is to exercise the power'.¹¹² In the same case, Gibbs CJ stated that the 'rules of natural justice are flexible, requiring fairness in all the circumstances'.¹¹³ Mason J also equated flexibility with fairness when he held that 'the statutory power must be exercised

fairly'. In Mason J's view, this question was to be determined 'in accordance with procedures that are fair to the individual considered in the light of the statutory requirements'.¹¹⁴ The crucial factor for the High Court in *Lam* was the inability of the applicant to demonstrate that he had been deprived of an opportunity to put material to the Department, or that there was additional material that would have influenced the Department to decide the case differently.¹¹⁵ In determining whether there had been unfairness, some members of the High Court employed a concept that bordered on the private law notion of detrimental reliance.¹¹⁶ For example, Gleeson CJ found that the applicant had not suffered any detriment as the Department had not made a statement of intention that had resulted in Lam failing to put material before the Department.¹¹⁷ McHugh and Gummow JJ also accepted that there was no evidence to support a conclusion that the applicant had relied upon the letter of 7 November 2000 and consequently failed to submit information to the Department on the best interests of the children.¹¹⁸

Lacey has criticised the use of detrimental reliance in *Lam* as an improper transposition of private law concepts to the public law arena. In her view, it draws the courts into a consideration of the fairness of the outcome to a particular applicant.¹¹⁹ This brings the Court to a consideration of the merits, a matter which is outside the purview of judicial review. Lacey argues that an approach which concentrates on the outcome may also encourage poor administrative decision-making as it suggests that a determination of whether a procedure is unfair will depend on whether there was any detriment to a particular individual.¹²⁰ Dyer acknowledges that some members of the High Court used the language of detrimental reliance, but believes that the Court concentrated on the question whether the breach affected the applicant's right to be heard, rather than whether the breach affected the outcome of the applicant's case.¹²¹

Unfairness and 'practical injustice' post-*Lam*

Lacey's concern that the courts will be drawn into considering the merits of a case does not appear to have been borne out by subsequent cases in the High Court and the Full Court of the Federal Court. Since *Lam*, the High Court has considered the concept of unfairness in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,¹²² a case in which the Court unanimously declared that there had been a breach of procedural fairness. The applicant in *Applicant NAFF of 2002* was denied a protection visa and applied for review in the Refugee Review Tribunal (RRT). At the close of the hearing the RRT stated that it would write to the applicant to clarify inconsistencies in his evidence and to enable him to place further information before the RRT. Contrary to this statement, the RRT did not write to the applicant and instead published its decision in which it rejected the applicant's claim. In its reasons, the RRT stated that it did not find the applicant a credible witness. As is noted in the joint judgment of McHugh, Gummow, Callinan and Heydon JJ, the RRT member's concluding remarks indicate that she believed that the applicant's case would be

assisted by further explanation.¹²³ The High Court held that the deprivation of the opportunity to answer further questions was a breach of procedural fairness.¹²⁴ The joint judgment paid careful attention to the words of the RRT member and the inference that could be drawn from these words that fairness required further steps to be taken.¹²⁵

In his separate judgment, Kirby J referred to Gleeson CJ's remarks in *Lam* where he indicated that unfairness would easily be demonstrated where 'a decision maker informs a person affected that he or she will hear further argument upon a certain point, and then delivers a decision without doing so'.¹²⁶ *Applicant NAFF of 2002* was just such a case. Kirby J accepted that the applicant not only had to prove that the representation was made, but that unfairness resulted.¹²⁷ However, he denied that an applicant 'must always prove . . . what the party would have done had the procedural defect not occurred'.¹²⁸ For Kirby J 'it was sufficient for the applicant . . . to establish that a procedural default had occurred which was not immaterial but might have affected the outcome of the proceedings'.¹²⁹ Such a conclusion obviated the need for the Court to consider the merits of the case.¹³⁰

The Federal Court has also had occasion to consider Gleeson CJ's notion of 'practical injustice'. The Full Court of the Federal Court in *WACO v Minister for Immigration and Multicultural Affairs*¹³¹ stated that Gleeson CJ's comments in *Lam* should not be read as requiring an applicant to demonstrate to the court that there would have been a different outcome. For example, it would be 'unfair' for a decision maker to make a finding about an issue without giving an individual notice that the issue is the subject of dispute and without giving the persona adversely affected an opportunity to be heard.¹³² If the 'possibility exists' that an applicant might be able to call evidence that 'could affect the outcome', it is not necessary for the applicant to prove that the evidence 'would affect the outcome'.¹³³ In *WACO* the applicant contended (amongst other claims) that the RRT had denied him procedural fairness when it failed to indicate that it did not believe that two supporting letters he produced were authentic and therefore did not give him an opportunity to call evidence to buttress his claim that the letters were genuine.¹³⁴ The Full Court accepted that this was 'unfair'.¹³⁵

In *Minister for Immigration and Multicultural and Indigenous Affairs v SZFDJ*,¹³⁶ a refugee applicant argued that he had been denied the opportunity to comment on information relied upon by the RRT in deciding against his refugee application. The Full Court of the Federal Court purported to distinguish *Lam* in stating that 'in the present case, unlike that in [*Lam*], the demonstration of a positive unfairness flowing from the accepted denial of natural justice does not require affirmative evidence that, but for the denial, the visa applicant would have taken, or refrained from taking, a particular course'.¹³⁷ What is interesting about this statement is that the Full Court appeared to assume that *Lam* was authority for the proposition that 'positive unfairness' needed to be demonstrated. The impact of this interpretation is somewhat mitigated by the Full Court's conclusion in *SZFDJ* that it was 'not necessary to conclude affirmatively' that the RRT would have arrived at a different result but for the denial of procedural fairness.¹³⁸ Together with *Applicant NAFF*

of 2002, these two decisions demonstrate that in applying *Lam* the courts have not required an applicant to show that the result would have been different, only, in the words of the Full Court of the Federal Court, that it 'could' have been different.

A single judge of the Federal Court has also considered the concept of practical injustice in a case involving a dumping notice issued pursuant to the *Customs Act 1901* (Cth). In *Expo-Trade Pty Ltd v Minister for Justice and Customs* the applicant contended that the method of calculation adopted for the non-injurious price in a report by the Customs Department alleging that the applicant was liable for dumping duty on goods imported into Australia did not match the methods indicated in a Customs Manual.¹³⁹ *Expo-Trade Pty Ltd* argued that the failure to tell it that there would be a departure from the policy in the Manual constituted a denial of procedural fairness as it was unable to make submissions on the method of calculation.¹⁴⁰ Citing Gleeson CJ's decision in *Lam*, Moore J found that no 'practical injustice' could be demonstrated by the corporation as:¹⁴¹

There was no evidence to suggest that *Expo-Trade* acted on the basis that what was said in the Manual would be given effect to and refrained from advancing material (which it can now point to) or making submissions because of an erroneous assumption about how Customs would go about considering relevant matters.

This statement appears to give great weight to the place of detrimental reliance in determining whether procedural fairness has been breached. Dyer has highlighted that *Lam* does not go as far as Moore J indicates, particularly as McHugh and Gummow JJ's comments demonstrate that they agree with the way in which *Haoucher* dealt with an announced policy.¹⁴² However, it does reinforce the conclusion that where applicants cannot indicate to a court that there is any additional material that could result in a different decision, or that a procedure has been fundamentally 'unfair', the concept of legitimate expectations will not add to their case. This view is supported by the majority's decision in *Le v Minister for Immigration and Multicultural and Indigenous Affairs*, where it was held that 'a mere failure to follow the stated procedure does not, of itself, amount to a denial of procedural unfairness . . . [t]he applicant has not established that there was any practical unfairness'.¹⁴³

In the 2006 case of *Royal Women's Hospital v Medical Practitioners Board of Victoria*, Maxwell P of the Court of Appeal of the Victorian Supreme Court stated that:¹⁴⁴

Teoh might well be decided differently by the present High Court. But the occasion for that re-examination of *Teoh* has not yet arrived, and the legitimate expectation test continues to be applied in the courts.

In any case, the question of legitimate expectation represents only one part of what was said in *Teoh*. The other propositions to which I have referred about the relevance of international human rights law are still good law, and continue to be applied.

In that case, Maxwell P relied upon *Teoh* as support for a number of propositions concerning the relationship between international law and Australian law.¹⁴⁵ Thus, despite the doubt cast on the majority's decision in *Teoh* by the High Court in *Lam*, the case is still being cited with approval in a number of contexts. In particular, the fact that the Departmental officer in *Lam* referred to Article 3 of the CRC in a letter to the applicant, and no judge doubted the relevance of the children's best interests, indicates the extent to which the case has permeated the decision-making process. Maxwell P's statement also suggests that the doctrine of legitimate expectations is pertinent post-*Lam*. Commenting on the decision in *Lam*, French has written that 'notwithstanding the doubts expressed by some members of the High Court, the doctrine of legitimate expectations remains practical and relevant'.¹⁴⁶ But the continuing relevance of legitimate expectations must be tempered by the High Court's reluctance to contemplate further developments in the doctrine and its preference for taking an approach which pays closer examination to the concept of unfairness. It is yet to be seen whether a legitimate expectation based on Australia's ratification of an international convention (apart from the CRC) will be successfully argued in the future, or whether some other type of executive action will be taken to found a legitimate expectation. Dyer best sums up the current position by stating that 'it appears that a majority of the High Court is now unlikely to accept loose usage of the concept of 'legitimate expectation'. Rather, the court is likely to expect explanation as to the nature, basis, doctrinal justification and affect of alleged expectations'.¹⁴⁷ These comments are supported by the courts' subsequent reliance on the concepts of 'unfairness' and 'practical injustice' in applying *Lam*.

Standing back from the details of the status of international law in Australian administrative law and the doctrine of legitimate expectations, one of the most interesting aspects of the decision in *Lam* is the underlying concern displayed by the judges for the separation of powers and the proper functions of the three branches of government. This is evidenced in their treatment of two issues. First, the judges' obiter discussion of the role of international treaties in generating a legitimate expectation is explicitly based on the need to ensure that unincorporated treaties, ratified by the executive but not separately implemented by parliament, are not given an 'elevated' status in domestic law. The judges' fundamental concern appears to be that the *Teoh* decision could interfere with the proper roles of the parliament and the executive with respect to international obligations. Secondly, the invocation of the Constitution and the description of the proper role of judicial as distinct from merits review in the discussion of substantive expectations also evidences a desire to ensure that the appropriate sphere of the judiciary is preserved and the merits/legality distinction is upheld. The extent to which the Court dealt with both issues, despite the fact that neither point was in contention, is an indication of the depth of feeling regarding the need to maintain the proper constitutional functions of the executive, the parliament and the judiciary.

The rule against bias

Matthew Groves

Callinan and Heydon JJ recently observed that ‘unfairness can spring not only from a denial of an opportunity to present a case, but from denial of an opportunity to consider it’. They explained that the failure to fairly consider a case could arise ‘not only from obstruction . . . of its presentation but also from self-disablement by the [decision maker] from giving consideration to that presentation by permitting bias to affect its mind’.¹ Their Honours were right to suggest that the two pillars of natural justice – the hearing rule and the rule against bias – each emanate from notions of fairness, but each fosters fairness in different ways. The hearing rule governs the right to know and be heard. It is the source of principles governing the information that should be provided to a person who may be affected by a potential decision, when the information should be provided and how the person should be able to put his or her views to the decision maker. The bias rule provides an important complementary right, which is to ensure that the decision maker to whom the hearing rule applies is impartial and can approach a decision with an open mind.

This chapter examines the test governing allegations of bias and the apparently objective standard by which a court asks whether a well-informed observer would reasonably apprehend that a decision maker might not bring an impartial mind to a decision. It also considers the three exceptions to the bias rule – necessity, waiver and statutory modification. But first it is useful to explain the distinction between actual and apprehended bias and also the basis upon which the rule against bias rests.

Actual and apprehended bias

There are two forms of bias – actual and apprehended bias. A claim of actual bias requires proof that the decision maker approached the issues with a closed

mind or had prejudged the matter and could not be swayed by the evidence. An allegation of actual bias essentially invites a court to make an adverse finding against a decision maker in a personal sense because it involves a claim that the decision maker was biased or had prejudged the matter. The courts are naturally reluctant to make findings of this nature and subject a claim of actual bias to a high, arguably almost impossible, standard of proof.² It is not enough to establish that the decision maker held preliminary or tentative views of a strong nature. Short of an admission of guilt from the decision maker, or, more likely, an open and public expression of bias, this standard is difficult to satisfy.³ A claim of apprehended bias is much easier to establish because it requires a finding that a fair minded and reasonably well informed observer would conclude that the decision maker did not approach the issue with an open mind.⁴

Several consequences attach to the different requirements for actual and apprehended bias. Actual bias is assessed on a subjective basis, while apprehended bias is assessed objectively. A court that upholds a claim of apprehended bias is not required to make an adverse finding against the decision maker. It can make the more palatable finding that a reasonable observer, but not necessarily the court, might conclude that the decision maker was not impartial and go no further. There are many instances in which courts have stressed that a claim of apprehended bias is not upheld lightly,⁵ but there is no doubt that the standard applicable to apprehended bias is not nearly so strict as that which applies to actual bias. Although a successful claim of either form of bias is sufficient to set aside a decision, there is little reason for a party to attempt the more onerous and confronting requirements that are raised in a claim of actual bias.⁶ Kirby J acknowledged this when he conceded that a party who sought to raise a claim of actual rather than apprehended bias would be 'foolish . . . to assume a heavier obligation when proof of bias from the perceptions of reasonable observers would suffice to obtain relief.'⁷ This admission highlights the overlap between the two forms of bias. A case that might support a claim of actual bias may often be argued upon the ground of apprehended bias simply because the latter is easier to establish.⁸

What values underpin the rule against bias?

The core principles of the rule against bias are fairness and impartiality. The principle of fairness requires that the parties be treated in an even-handed manner. An important aspect of fairness in this sense is that each party be allowed to participate in the decision-making process in a manner that does not grant an unfair advantage to the other.⁹ The principle of impartiality requires a decision maker to approach a matter without predispositions of a character or strength that prevent the decision maker from reaching a decision contrary to those predispositions in an appropriate case. On this view, the principle of impartiality is not absolute. It requires a decision maker to be open to persuasion but not necessarily

to have a blank mind or be devoid of all preconceptions or other possible influences.¹⁰

There is a related issue that underpins the rule against bias, at least as it applies to judges, which emanates from the constitutional requirements that attend the position of judicial officers in our system of government. Some judges have suggested that the requirements of Chapter III of the federal Constitution might provide a constitutional basis for a requirement of impartiality on the part of judges.¹¹ Although this view has not yet gained strong currency in the High Court, it could be argued to represent a natural connection between the common law (from which the rule against bias developed) and the constitution (from which the requirements of the separation of powers have developed). If the rule against bias was accepted to be ultimately founded in Chapter III of the Constitution it could not be abrogated by legislation, at least in its application to federal judges.¹²

Any constitutional foundation for the rule against bias would be quite limited in its application. It would not extend to federal administrative officials, who exercise power under Chapter II of the Constitution and are, therefore, not subject to the requirements of impartiality that attend the exercise of powers by judges acting under Chapter III. If the rule against bias was accepted to be a requirement of Chapter III of the Constitution it might extend to state judges by virtue of the principle established in *Kable's case*.¹³ That principle prohibits state parliaments from investing in state courts non-judicial powers of a kind which are incompatible with the exercise by them of the judicial powers of the Commonwealth which may be invested in them pursuant to s77 of the Constitution. At present, however, the rule against bias is clearly not a requirement to which this principle might attach.¹⁴

It should be noted that the requirement of judicial impartiality may also be founded in the common law.¹⁵ It is clear that the rule against bias operates to preserve the administration of justice by removing the influence of factors that might distract a judge from performing his or her task in an objective manner.¹⁶ On this view, the rule helps to maintain actual impartiality of judges but it also bolsters their perceived impartiality by assuring observers that judges remain free of possible influence.¹⁷

The demise of the rule of automatic disqualification – the rise of a context sensitive rule against bias

The rule against bias was long dominated by the principle of automatic disqualification which can be traced to *Dimes v Grand Canal Junction*.¹⁸ That case involved a long running dispute that ended in favour of the Canal Company. It later emerged that the Lord Chancellor of England, who had presided over this decision, held a substantial holding in the Canal Company that would have been rendered almost

worthless if the Canal Company had lost. The decision of the House of Lords to overturn the ruling of the Lord Chancellor was long regarded to have established a rule of automatic disqualification for pecuniary interest.¹⁹

The decision of the House of Lords in *Pinochet (No 2)*²⁰ provides a useful starting point to trace the demise of the automatic disqualification rule even though that case confirmed and extended the reach of the principle in England. The Pinochet cases involved extradition proceedings against the former military ruler of Chile. In *Pinochet (No 1)*,²¹ a narrow majority of the House of Lords held Pinochet was eligible for surrender, but this finding was challenged in *Pinochet (No 2)*²² on the basis that a member of the majority of the first case (Lord Hoffmann) should be disqualified because of his association with Amnesty International. Amnesty had long lobbied for the extradition and trial of Pinochet and was granted leave to intervene in the first case. Lord Hoffmann was an unpaid director of the charitable arm of Amnesty which was established to raise funds for Amnesty. He had no pecuniary interest in the proceeding and no direct legal relationship to Amnesty, but the House of Lords held that his connections to Amnesty required his disqualification.

The House of Lords could have rested its decision on a narrower basis and confined its reasoning to the unusual coalescence of factors in the case at hand, but it adopted the more general view that the principle of automatic disqualification should not be limited to pecuniary interests. The Lords held that the rationale of automatic disqualification, which required that no person should be the judge or his or her own cause, applied equally to the *promotion* of a cause.²³ Although the House of Lords did not clearly explain which interests might attract this extended application of the rule of automatic disqualification, the general tenor in which this principle was applied to the interest of Lord Hoffmann suggests that the strength of the interest and its relevance to the case at hand will be important. Accordingly, any social cause or similar interest might trigger automatic disqualification if the view is strongly held by the decision maker and clearly relevant to the case at hand. The key, on this view, is the *effect* that an interest may have.

The High Court took quite a different path in *Ebner v Official Trustee*.²⁴ *Ebner* involved two co-joined applications, in each of which it was argued that the holding by a trial judge of shares in a bank that was a party to proceedings before the judge required the judge's automatic disqualification by reason of pecuniary interest. A majority of the High Court rejected the rule of automatic disqualification for pecuniary interest, partly because it was said to have evolved from a mistaken interpretation of earlier authority.²⁵ More importantly, it also rejected the conceptually broader notion that pecuniary interests should be the subject of a separate rule governing their effect for the purposes of bias.²⁶ Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ adopted a similar view to the House of Lords in *Pinochet (No 2)* by accepting the pecuniary and other interests should be treated in the same manner. According to their Honours:

As a matter of principle, in considering whether circumstances are incompatible with the appearance of impartiality, there is no reason to limit the concept of interest to financial interest, and there may be cases where an indirect interest is at least as destructive of the appearance of impartiality.²⁷

Their Honours also held that the question of whether a pecuniary or other interest might give rise to a reasonable apprehension of bias should be determined according to a two-fold test. They explained that as follows:

First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.²⁸

The reasoning in these passages invites several comments. First, the High Court has clearly adopted a single standard for bias. While the test itself is uniform, its outcome is not. Disqualification is no longer automatic and instead depends on the circumstances of each case. Secondly, the requirement to articulate the connection between the alleged source of bias and the potential departure from impartiality highlights the need to explain the effect of the interest in question upon the decision maker. A party must now essentially 'join the dots' for a court before it may be satisfied of an apprehension of bias.²⁹ Thirdly, the requirement to explain the effect of a source of alleged bias raises the standard of the test, at least in practical terms. An applicant cannot simply point to an interest, but must now take the further step of explaining the effect of that interest.³⁰ This protean test does not distinguish between either decision makers or interests. If the basic elements of the test remain constant, the main variable is the context in which an allegation of bias is raised. In the area of bias, therefore, context is everything.³¹ The majority in *Ebner* hinted at this issue when it explained that the application of the rule against bias to 'decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision-making'.³²

The extent of those differences was subsequently highlighted in the case of *Jia*.³³ That case concerned the effect of statements by a minister in a talkback radio program. The minister explained what might lead him to conclude a person was not of good character for the purposes of migration legislation. Mr Jia had been convicted of several offences involving the type of behaviour the minister had discussed. Mr Jia's case came before the minister, who made an adverse determination. The immediate question for the High Court was whether the minister's statements gave rise to a reasonable apprehension of bias. The deeper question was the extent to which the minister's political activities, which required him to provide media interviews and discuss issues within his ministerial portfolio,

could be taken into account in fashioning the requirements of the rule against bias.

Gleeson CJ and Gummow J, with whom Hayne J agreed, accepted that the principles applicable to judges should be modified when applied to the minister.³⁴ They reasoned that the decision by Parliament to vest a discretionary power in the hands of a minister suggested that the power was intended to be exercised in light of the minister's many responsibilities, which included accountability to both the Parliament and the electorate. It was possible that a minister who discharged these responsibilities would make statements that could offend the rule against bias, at least if it was applied with the same requirements that extend to judicial officers. Gleeson CJ and Gummow J were clearly mindful of this possibility. They explained:

As the circumstances of the radio interview demonstrate, the Minister himself can be drawn into public debate about his powers. He might equally well have been asked questions about the cases in Parliament. The position of the Minister is substantially different from that of a judge, or quasi-judicial officers, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officer or jurors. There is no reason to conclude that the legislature intended to impose such standards upon the Minister, and every reason to conclude otherwise.³⁵

Callinan J was perhaps even more sensitive to the position of a minister. He accepted that the minister was essentially required to 'wear two hats'; one as a member of the federal executive who was required to engage heavily in the political process, the other as a decision maker to whom a discretionary power was entrusted. Callinan J held that the views advocated by the minister in one capacity could not necessarily be imputed to his thinking in another capacity.³⁶ It is unclear whether his Honour would accept that other decision makers should have such leeway in their different role. Perhaps the better view is that ministers represent one extreme of the variable content of the rule against bias. That view seems to accord with what Callinan J saw as the obvious 'difference between a Minister and a judge, and indeed, a Tribunal or member'. According to his Honour, the consequence of that distinction was that:

The role of none of these is identical with the role of others. And different considerations requiring the application of different rules in relation to each of them are involved in a judgment whether one of them is affected by disqualifying bias. The Minister is, it should be noted, in a different position from a Tribunal . . .³⁷

The reasoning of the High Court in *Jia* confirms the context sensitive nature of the rule against bias. There also appears to be general support within the High Court to group decision makers into broadly similar categories, such as tribunal members and ministers and also, one assumes, administrative officials. But subsequent decisions of the High Court have provided little elaboration on precisely what the rule against bias might mean for those different categories. It is notable that the court has not used the several later cases concerning alleged

bias in tribunal decision-making to explain more clearly how those requirements might apply to tribunal members. In these cases, which are discussed below, the court has either pointedly declined to explain the standards it might expect from a tribunal member,³⁸ or confined itself to more general remarks about the character of inquisitorial tribunal proceedings.³⁹

The Court did, however, provide some further guidance in *Hot Holdings v Creasy*.⁴⁰ McHugh J suggested that while the actual test for bias remained constant:

. . . its content may often be different. What is to be expected of a judge in judicial proceedings or a decision maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision.⁴¹

Gaudron, Gummow and Hayne JJ stressed the particular position occupied by ministers,⁴² which impliedly accepts the more general contextual approach that McHugh J accepted more explicitly. But no member of the majority explained in detail the standards expected of either the departmental officers who advised the minister or the minister himself.

The demise of the principle of automatic disqualification has left the law governing bias in a state of flux. The effect of financial and all other interests is now determined according to one test. The crucial element of that test is the requirement to articulate the effect of an interest in a very precise way, namely, to explain how the alleged interest might cause a decision maker to lose his or her impartiality. While all interests may be treated in the same manner, decision makers are not. The High Court has signalled that the rules devised for judicial bias will be modified in their application to other decision makers but is yet to clearly articulate the nature or extent of those modifications. That issue clearly awaits further guidance from the court, but in the meantime it seems that principles governing judicial officers will continue to provide the main point of reference.

Real likelihood, real danger or reasonable likelihood of bias?

The qualities of the fair minded observer, by whose judgment the rule against bias is determined, can only be fully understood by reference to the earlier tests that were rejected or refined. For some time the test for apprehended bias veered between one of 'reasonable suspicion' or 'real likelihood'. The House of Lords discarded the test of 'real likelihood' in favour of one of 'real danger' in *R v Gough*.⁴³ The Lords reasoned that the test of 'real danger' rather than 'likelihood' would orient the test of bias to 'possibility rather than probability'.⁴⁴ It also held that that test could be applied by the court after consideration of any relevant evidence, even if not available to the decision maker at the time. The High Court of Australia retained the 'real likelihood' test in *Webb v R*,⁴⁵ largely because it enabled the court to focus on the perception of the public, rather than the court, on the effect of the alleged source of bias.

The difference between the two approaches was not so much about words as the position from which bias was assessed. The ‘real danger’ test as applied in *Gough* clearly made the question of bias one for the court to decide, according to the court’s view of the case. The ‘real likelihood’ test devised in *Webb* – subsequently refined to one of a ‘reasonable apprehension’ as held by a fair minded lay-observer – also left the question of bias ultimately to the court, but required that the circumstances of the case be assessed in an objective manner.⁴⁶ The difference between the two is smaller than might first appear. It is not a difference between the view of the court and that of a bystander, but rather one between the view of the court in a purely subjective sense and view of the court on what is the view of the bystander (which introduces some level of objective judgment).

The semantic differences between each test should not obscure the point that the perceptions of an individual judge presiding over a claim of bias will always be of great importance no matter what test applies.⁴⁷ Kirby J attempted to strike a balance in *Johnson v Johnson*⁴⁸ when he suggested that a ‘reasonable member of the public is neither complacent nor unduly sensitive or suspicious’. The attraction of this approach is its emphasis placed on the ‘reasonable’ nature of any assessment made of the facts by the fictional well informed observer. But subsequent cases make clear that most judges will endow the reasonable observer with all the information placed before a review court, no matter how detailed. In such circumstances, it is almost impossible to adopt the arms’ length assessment favoured by Kirby J.

*Hot Holdings v Creasy*⁴⁹ is an example. The crucial question in that case was whether a minister’s decision to grant a mining licence to Hot Holdings was influenced by the interest that two administrative officers held in that company. One officer held shares in the Creasy company, while another had a close relative with a large holding in the company. The minister was unaware of these interests but it was argued that his decision was essentially infected by the interests of the two officers. A majority of the High Court rejected the claim because the role of the officers in the decision-making process was too ‘peripheral’ to have affected the minister’s decision. Kirby J dissented strongly, principally because he disagreed with the majority on whether the conduct complained of could provide the basis of a reasonable apprehension of bias. Kirby J thought that the majority drew fine distinctions on the facts before the court which were antithetical to the objective nature of the test for bias.⁵⁰ He complained that the reasonable observer upon which the bias test was based would have:

... neither the time nor the inclination to evaluate detailed evidence and protestations as have been made in this case. He or she, as a lay-person, simply sees a ministerial minute in which two senior departmental officials participated without declaring personal or familial interests known to each other.⁵¹

This criticism highlights a paradox that arises in any judicial assessment of what a fair minded and reasonably well informed observer might conclude in any given case. In an application for judicial review the parties normally provide considerable information about the particular circumstances of the case,

which appears consistent with the touchstone of the ‘reasonably well informed observer’. But the objective position of the reasonably well informed observer diminishes as the information attributed to this observer (or the appellate judges who step into the shoes of the observer) increases.⁵² The more that the observer is deemed to know about the circumstances of the decision and the knowledge held by the decision maker at the time of deciding, the more likely it is that the observer’s reasoning will mirror that of the decision maker rather than a person placed at an appreciable (and more objective) distance from the case. The preparedness of courts to receive detailed evidence of the actual knowledge of decision makers means that the ‘reasonably well informed observer’ may in fact become a ‘reasonably well informed decision maker acting with the benefit of hindsight and much more information’. More particularly, the continued willingness of courts to accept very detailed evidence of the circumstances about a decision claimed to be affected by bias undermines the objective basis upon which the test to determine this issue is supposed to rest.

What behaviour might give rise to a complaint of bias?

The facts that might give rise to a claim of bias are clearly open but existing cases provide a useful list of what might normally support a claim of bias. In *Webb v R*,⁵³ Deane J explained that the areas encompassed by the rule against bias fell into four main categories, which were separate but overlapping:

The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements . . . The third category is disqualification by association. It will often overlap the first and consist of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third . . .⁵⁴

Much attention has focussed on the second and third categories of conduct and association, particularly after the decision in *Pinochet (No 2)*⁵⁵ when parties became much more inquisitive about the associations and activities of judges. There was even some suggestion that cynical parties were seeking to ‘judge shop’, by gathering information about judges who might be unfavourable to a case and using that information to exclude the judge on the ground of bias. The English Court of Appeal moved to stamp out this practice in *Locobail (UK) Ltd v Bayfield Properties Ltd*,⁵⁶ by issuing a rigid set of principles governing the factors commonly invoked in a claim of bias. The Court of Appeal held that the age, gender, national or ethnic origin, religion, sexual orientation, social class or wealth

of a judge could not normally support a claim of bias. It even doubted whether these factors might *ever* support a claim of bias. A further category of factors that would 'hardly ever' support a claim of bias included judges' educational, employment or social background, or members of social, charitable bodies, or previous statements made in lectures, articles, textbooks or prior judicial decisions, or the fact that the judge had previously acted as counsel on behalf of a party. The factors the court accepted would 'ordinarily' support a claim of bias included a close familial relationship or personal friendship with, or animosity to, someone closely associated with the case.

Several comments can be made about this apparently clear cut list. One is that the Court of Appeal was clearly anxious to prevent parties from using the rule against bias as a means of 'judge shopping'.⁵⁷ When viewed from this perspective, it seems clear that the approach in *Locobail* is essentially a pragmatic one that lacks a coherent or guiding principle.⁵⁸ Despite that caution, the problems that could flow from any attempt by parties to 'judge shop' could also arise in other forms of decision-making, so the *Locobail* list might be of wider use even though the Court of Appeal stressed that its reasoning was confined to judges. Administrative decision-making by either tribunals or bureaucrats would be undermined in the same manner as judicial decision-making if the rule against bias could be deployed too easily.

Although decision of the Court of Appeal in *Locobail* carried a dogmatic tone, there must always be exceptions.⁵⁹ For example, some judges have been disqualified for bias because of their extra-judicial writings,⁶⁰ and others by their earlier judicial decisions.⁶¹ The decisive factor is usually the strength with which these earlier statements were made, which suggests that the bias test will not be breached by a judge who has expressed negative opinions or made adverse findings but it will be when the judge has done so in an unduly strong fashion. This focus on the earlier decisions and articles written by decision makers can be applied readily to judges, whose decisions and articles are freely available to the public, but one can question how it might be applied to other decision makers. Most decision makers do not issue detailed reasons for decisions or publish in the scholarly journals, so it is much more difficult to gain access to the previous opinions of non-judicial decision makers.

There are other reasons to doubt whether the decisions on judicial bias can and should be applied to administrative decision-making without some modification. The judicial mode of decision-making focuses on adversarial decision-making which is usually conducted in oral proceedings, with evidence gathered and issues defined almost entirely by the parties and presented in a competitive manner by the parties in a public hearing. The role of the judge within this contest is essentially that of an umpire.⁶² Decisions on the requirements of the rule against bias in this context can only be understood as reinforcing that impartial and often passive judicial role.

Administrative proceedings may contain several key differences. One is that most administrative decision-making does not involve a hearing. The decision

maker will instead simply work in an office, read over material relevant to the decision, make a decision and communicate that decision by letter to the person or people directly affected by the decision. Is it important that justice is 'seen' to be done when no-one may be looking? The short answer is 'yes'. The reasons are both instrumental and non-instrumental.⁶³ The instrumental reason is that a strict adherence to the rule against bias will ensure that decision makers act according to the facts before them rather than the extraneous and often irrelevant factors that the rule against bias can operate to cast aside. A non-instrumental reason is that the exercise of power according to a rule that promotes fairness and impartiality fosters values such as respect and fair treatment, and is likely to enhance respect for and acceptance of administrative action. Another key difference is that administrative decision-making often involves only one party. The decision-making process in such instances cannot be reduced to a competition of the type associated with adversarial litigation. Even if there is a second party, such as a respondent agency in external review proceedings, the parties are not necessarily adversaries. Sometimes a respondent decision maker may adopt a neutral view, while in other times it may adopt a more adversarial one because it believes the applicant is not entitled to gain a favourable decision.

An important consequence of these various differences is that the nature of judicial proceedings is such that intervention by, and involvement of, a judge is not normally required and, when it does occur, is likely to provoke query or challenge from the parties. It is for this reason that most of the decisions on judicial bias are instances where judges have moved outside the carefully structured scheme within which judicial decision-making occurs.⁶⁴ Procedures for administrative decision-making are almost always less structured, so the active involvement of decision makers in procedural issues is more likely. It is also more desirable because it can provide guidance, clarity and assistance to the parties when necessary. On this view, the relatively passive decision-making role that occupies a central role in the doctrine of judicial bias has no place in administrative decision-making.

Exceptions to the rule against bias

The rule against bias is subject to three exceptions. The exceptions of waiver and statutory modification, which also apply to the hearing rule, have a similar conceptual basis in their application to the rule against bias, namely that the rule may be modified or abrogated in whole or in part by either the consent of a party or by clear legislation to that effect. The rule against bias is also subject to the further exception of necessity, which enables some decisions that might offend the rule to be preserved essentially on pragmatic grounds.

Waiver

A party who becomes aware of facts that could support an objection on the ground of bias but fails to raise the issue in a timely manner may be found to have

waived the rule against bias.⁶⁵ This apparently simple principle can give rise to many practical problems. First, the requirement to make a timely objection presupposes that a suitable and convenient time for objection will arise. In some instances it will be difficult to identify the point at which there is sufficient basis for an objection. A claim of bias might be based on the cumulative effect of many small issues, such as continued interruptions and comments from a judge, the effect of which cannot be understood until viewed in hindsight and after a decision is delivered.⁶⁶ In addition, a party who objects during the hearing risks offending the court or having the objection considered before all possible supporting evidence arises.⁶⁷

Secondly, an objection is often difficult to make. Many judges have conceded that even the most skilled advocate can hesitate to pursue a claim of bias.⁶⁸ A party must explain to the judge why he or she might not be seen as fair and impartial. The party must, however, remain mindful that the judge may reject the application and continue to preside. The question is how a party may press a claim of bias with sufficient strength to explain the claim, while preserving a necessary level of courtesy with the judge. The inherent tension in these issues presents a great challenge to experienced advocates and one that most unrepresented parties would find impossible to manage.

Finally, it should be noted that waiver may be express or implied. Express waiver normally presents little difficulty. A party who clearly disavows any right to pursue a question of bias that is raised during a hearing has virtually no prospect of pursuing the issue on appeal or review. Implied waiver may be more difficult if there is uncertainty as to whether and when a party had sufficient knowledge of the facts that might support a claim of bias. It is clear that the consent of a party to some procedures that might otherwise offend the rule against bias do not necessarily amount to a wholesale waiver of the rule.⁶⁹ Different considerations arise if an objection is not pursued for tactical reasons. Such decisions will constitute an implied waiver of the rule against bias and, according to the rules governing adversarial litigation, the tactical decision of a lawyer will almost always bind the client.⁷⁰

Statutory abrogation or modification

The rule against bias may also be excluded or modified by statute. Legislative attempts to wholly exclude the rule against bias are rare. The decision of the High Court in the *Epeabaka* case⁷¹ suggests that such legislation must be expressed in very clear terms to be effective. That case concerned legislation that sought to preclude judicial review for a breach of 'the rules of natural justice' that occurred in connection with decision-making, but expressly allowed for review on the ground that the decision was affected by actual bias. The High Court rejected the suggestion that the detailed procedures provided evidence of an intention to exclude the operation of the rule against bias. More particularly, the court did not accept that an implied intention to exclude or limit review for apprehended bias could be found when that issue was not clearly addressed. This conclusion

suggests that legislation which purports to exclude judicial review for either actual or apprehended bias will almost certainly not be taken to have intended to exclude the other form of bias.

The most common means by which the rule is modified is by legislation that invests a decision maker with functions which would otherwise offend the rule against bias if performed by a single decision maker.⁷² The rule against bias will yield to the extent required by any such arrangements but may still be invoked against the use of procedures or statements made by the decision maker which would offend the rule against bias and are not clearly sanctioned by the Act. On this view, for example, a court might give effect to legislation that expressly enabled a decision maker to exercise both prosecutorial and adjudicative functions but it would not allow that officer to make biased statements that were neither permitted nor required for the proper administration of the statute under which the officer acted.⁷³

Necessity

Although necessity has long been recognised as an exception to the rule against bias the cases do not provide a coherent body of doctrine on this exception. In *Metropolitan Fire Brigade and Emergency Services Board v Churchill*,⁷⁴ Gillard J explained that a question of necessity was usually decided by reference to a range of factors, including the nature and degree of the bias, the qualifications and experience of the decision maker, the conduct of both the parties and the decision maker, the existence of appeal rights and the public interest. While each of these factors may be influential, the question for the court is usually a more general one of whether the circumstances of a case provide some reason for the court to uphold a decision that would otherwise be invalid by reason of the rule against bias.

Some cases suggest that necessity will operate to enable a decision maker to perform its essential functions.⁷⁵ On this view, the rule against bias cannot operate so as to frustrate the proper operation of the statute from which the decision maker draws power.⁷⁶ The application of this principle is sometimes very clear. If, for example, there is only one decision maker who may decide a matter or discharge a function, the necessity exception may be invoked to enable that decision maker to act even though the circumstances of the case might support a claim of bias.⁷⁷ But the exception is much harder to invoke if the decision maker could have avoided the circumstances that gave rise to a claim of bias⁷⁸ or another decision maker may act.⁷⁹

So can the principles governing the rule against bias be stated with any precision? Probably not, but that may not be a great drawback. The hearing rule provides some indication why. Flexibility is the great strength of the hearing rule. It allows the requirements of fairness to be moulded to the circumstances of each case and this has fostered the modern growth of the hearing rule. But this flexibility

comes at a price. The hearing rule has long been criticised as uncertain, imprecise, difficult to predict and a principle that can only be sure when pronounced upon by court at some later date. Now that the rule of automatic disqualification has been discarded, the bias rule can be criticised for the same lack of certainty, but should it be? The rejection of the hard and fast approach of automatic disqualification in favour of a more flexible approach is only the latest stage of the bias rule. If the evolution of the hearing rule is any guide, the adoption of a more flexible and context based approach will inevitably lead the courts away from their focus on the traits of judicial hearings (which are almost always oral and adversarial) to administrative decision-making (which is almost never oral and rarely adversarial). The courts will inevitably provide greater guidance on exactly what they expect of administrative officials, while still preserving a good dose of flexibility, and that will be no bad thing.

Jurisdictional error without the tears

Mark Aronson

‘Jurisdictional error’ is a term which has puzzled many people.¹ Kirby J thinks it is useless at best, and retrograde at worst:²

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.

. . . Once it is appreciated that the [constitutional] writs . . . are distinct, are not confined to their historical provenance, have high constitutional purposes in Australia and may adapt over time within the limits of their essential characteristics, the old insistence upon preserving the chimerical distinction between jurisdictional and non-jurisdictional error of law might be interred, without tears, in Australia as has happened elsewhere.

The term once had a strict meaning, back in the mid-sixteenth century. However, its vast expansion of scope and meaning over the course of the twentieth century means that it now conveys no meaning whatsoever as to how it was reached, but only as to what will be likely to follow, if it has indeed been reached. Specifically, there are numerous different pathways towards ‘jurisdictional error’, but usually only one route away from it. In other words, it is both a conclusory term³ and a point of departure.

There was more to Kirby J’s protest than semantics. His Honour was suggesting that continued use of the term cannot hide the need to develop higher-level principles of good administration, and this chapter will look also at that argument.

Different contexts, different meanings?

'Jurisdictional error' is a term used in several contexts. It might be helpful first to identify these, because one of the reasons why some people despair at ever giving it real meaning is their view that the term might carry a different meaning for each context.

First, there are the remedial contexts. It is trite law that a jurisdictional error of one sort or another is a prerequisite to obtaining the common law's prerogative writs of prohibition and mandamus, or orders in the nature of those writs. The same remedies are part of the High Court's entrenched original (as opposed to appellate) jurisdiction under s75(v) of the Constitution, although in that context they are called 'constitutional writs'. As with their common law models, the constitutional writs also require a showing of jurisdictional error. However, some members of the court may have been hinting that fewer things might count as jurisdictional error for the constitutional writs.⁴ Although jurisdictional error is usually a prerequisite for the common law's certiorari, the common law has long extended that particular remedy beyond jurisdictional error if the challenged decision displays a non-jurisdictional error of law upon the face of the decision maker's record.⁵

Decisions interpreting privative clauses provide another context. For example, s474 of the *Migration Act 1958* (Cth) tried to oust judicial review of any 'decision . . . made . . . under this Act'. However, the High Court interpreted that as not applying to decisions flawed by a jurisdictional error. This was because jurisdictionally flawed decisions are not 'decisions made under this Act'. In strict legal theory, they are not 'decisions' but *purported* decisions.⁶ 'Jurisdictional error' is therefore a handy way around most privative clauses, whose drafting usually confines their protection to 'decisions', not 'decisions or purported decisions'.

Some state privative clauses have been stronger than their federal counterparts, on the theory that they need observe no constitutional restraints. One state minister proudly described one such clause⁷ as 'one of the most complete privative clauses on record',⁸ because it protects decisions or purported decisions.⁹ The High Court recently decided three cases involving that clause, all on appeal from the New South Wales Court of Appeal.¹⁰ The majority thought that the extension of the privative clause's coverage to *purported* decisions added nothing to its meaning, because Australia's typically strong clauses were all drafted on the assumption that the decision had not been made according to law.¹¹ Perhaps so, said the Court of Appeal in a subsequent case, adding that the legislative removal of that particular extension was nevertheless significant in signalling Parliament's intention to soften the clause.¹² Kirby J thought that a clause protecting purported decisions would not work if there were 'fundamental affronts to jurisdiction', whilst Heydon J seemed to accept the effectiveness of the privative clause without qualification. Strictly speaking, the majority view was obiter, but it does signal that whether future privative clauses be federal or state, their

drafters should shift focus. Instead of taking away remedies or talking of purported decisions, they should spell out which errors (breach of natural justice, breaches of specified sections of the Act and so forth) will no longer nullify the protected decision.

Collateral attack provides yet another context for using the terminology of jurisdictional error. The reasoning is analogous to the privative clause cases. For example, because a jurisdictionally flawed surveillance warrant for a listening device is no warrant in law, there is an inherent weakness in a prosecution case which is reliant on audiotapes obtained 'under' the warrant. The taped evidence will have been obtained unlawfully, and an accused can raise that issue with the judge at the criminal trial, without having first to get a judicial review decision from another judge to quash the warrant.¹³

'Jurisdictional error' is also used in cases discussing when administrators or tribunals can re-make their decisions. Some powers can be exercised from time to time, but others can be exercised only once in relation to any specific circumstance or individual. For example, an appellant before a Migration Review Tribunal gets a hearing followed by a decision one way or the other. Whether the appellant has won or lost, the matter is out of the Tribunal's hands once the decision is completed. There is no room for second thoughts. Second thoughts on the merits, that is. But second thoughts will be first thoughts in law if the decision was invalid. For example, a clerical error by the Tribunal's registry staff may have been the reason for the appellant's non-attendance at the first hearing. If so, then there was no 'decision', because there was a breach of both the common law requirement of natural justice and the statutory requirements to afford an opportunity for a hearing. As there was no decision, it was perfectly proper for the Tribunal to reconvene and conduct a fresh hearing on the footing that the first hearing could be ignored.¹⁴

The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and its state and territory equivalents provide yet another context for 'jurisdictional error'. Two of the grounds of review found in the Commonwealth's ADJR Act and its territory and state equivalents have been taken as either encompassing or even just re-stating the 'jurisdictional error' idea.¹⁵ These are first, 'that the person who purported to make the decision did not have jurisdiction to make the decision', and secondly, 'that the decision was not authorized by the enactment in pursuance of which it was purported to be made'.

Professors Creyke and McMillan appear to treat each of the above usages of 'jurisdictional error' as a conceptually distinct context, and suggest that 'jurisdictional error' carries different (but overlapping) meanings in each context.¹⁶ They also offer 'jurisdictional facts' as another context, although one might well argue that it is no more 'separate' (albeit a good deal more dysfunctional) than any of the other ways of committing an error that is jurisdictional.

Other contexts can be imagined, but they would be no more productive. For example, judges are immune from common law liability in tort for things done in office unless they acted in 'excess of jurisdiction'. In that context, however,

not even bias or bad faith will amount to such an excess.¹⁷ One could engage here in a semantical debate as to comparisons between 'excess of jurisdiction' and 'jurisdictional error'.¹⁸ However, the real reason why we should not fret as to whether this is yet another context with yet another meaning is that the words are only labels. The contexts are so different that the semantical similarities should not be taken seriously. Bias and bad faith are clearly jurisdictional errors in the context of inquiring whether a challenged decision is a nullity, but it does not necessarily follow that the same criteria should be used when stating a judge's liability to defend tort actions for damages, or to pay damages if those actions were to succeed.

Believing as they apparently do that jurisdictional error has so many meanings, it is no surprise that Creyke and McMillan suggest that it 'has become an overloaded distinction'.¹⁹ That would be mild criticism indeed if the term really bore so many different meanings, but subject to qualifications relating to the special position of the High Court, this essay begs to differ.

The fact that 'jurisdictional error' is conclusory is not necessarily an argument for abandoning it. Conclusory terms can be useful. They can help us to group concepts together when we think that they share something in common. In the case of the many and varied ways of committing 'jurisdictional errors', it is argued that what they share is not so much the quality of the errors, as their legal consequence. In essence, 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. 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.

If jurisdictional error is conclusory, it cannot now be an organising concept for judicial review, but if nullity is its usual consequence, then *that* might well be (or once have been) an organising concept. Nullity's primary indicia are the ability to treat decisions as if they had not been made, and to treat conduct as if it had no legal authority, which explains the basis of collateral attack, and how the courts outflank most privative clauses.

A word of warning is necessary, however, because it should not be imagined that nullity is an absolute affair. It is a bundle of legal consequences which are not meant to apply to some circumstances, and which the courts sometimes 'disapply' in other circumstances. Rights to appeal to the Administrative Appeals Tribunal, for example, apply even where the original decisions were nullities.²⁰ Similarly, the ADJR Act allows for judicial review of invalid decisions, even though its rights are all framed in terms of challenges to decisions of an administrative character made under enactments.²¹ There is nothing illogical in this. Parliament can grant appeal or judicial review rights as it sees fit, and it would be perverse to give a more narrow construction to its Acts in these two contexts. There are also situations where the court will not treat a decision as a nullity even though there has been a jurisdictional error. There is no point, for example, in declaring a decision to be null and void if the only challengers lacked standing. Similarly, a challenger

who had standing, but who applied too late, might well be denied relief, with the result that the 'decision' remains in effect.

The High Court's special position

The High Court's judicial review jurisdiction is peculiar in a number of respects. Relevant to this chapter, its constitutional writ jurisdiction is not bounded by 'jurisdictional error' in quite the same way as in the state Supreme Courts exercising their prerogative writ jurisdiction.

The High Court's constitutional writ jurisdiction is available to stop Commonwealth officers enforcing unconstitutional legislation, and to stop them breaching any constitutional limits to the Commonwealth's executive power as granted by s61 of the *Constitution*. The writs are available even though one would not normally talk of such officers acting in 'excess of jurisdiction' in those situations.²²

The constitutional writ jurisdiction lies against Commonwealth officers, a term which includes the judges of both the inferior federal courts (such as the Federal Magistrates Court) and the superior federal courts (such as the Federal Court and the Family Court).²³ In one sense, the presence of constitutional restraints upon all Australian courts means that this country has no equivalent of the English court of 'unlimited jurisdiction'. The state and territory Supreme Courts are nevertheless treated as being immune from judicial review, as if their jurisdictions were unlimited. The requirement for 'jurisdictional error' can therefore explain Supreme Court immunity.²⁴ However, the constitutional writs' coverage of federal judges beneath the High Court cannot be convincingly explained on the basis of an application of or extrapolation from the general law's concept of 'jurisdictional error'. The Federal Court, for example, always has jurisdiction to determine its jurisdiction, and its decisions in that regard are legally effective and remain so unless and until they are reversed by the High Court, which says that it can do this in either its appellate or original jurisdiction.²⁵ This aspect of the High Court's constitutional writ jurisdiction therefore goes further than 'excess of jurisdiction', *if* by that one means to involve the concept of nullity.²⁶ On that assumption, it is explicable only as an essential feature of the High Court's role in enforcing all limitations on the exercise of power by the Commonwealth Parliament's statutory creations. Because the High Court's judicial review jurisdiction is discretionary, the court has been able to state that it will usually decline to exercise its constitutional writ jurisdiction against federal judicial officers where the applicant could and should be using a statutory appeal mechanism.²⁷

Certiorari is not *directly* entrenched in the High Court's original jurisdiction, but it frequently issues as *ancillary* to the court's constitutional writ jurisdiction. Considerable doubts have been expressed as to whether ancillary certiorari is available in the High Court for non-jurisdictional errors of law.²⁸

It should also be noted that some members of the High Court may have been hinting that the term might have a narrower meaning in the constitutional writ

context.²⁹ At this stage, one can only guess at their concerns, but these probably include a wish to entrench as little as possible of the grounds of review, leaving it ultimately to the mercy of the parliamentary drafter as to whether the legislature meant³⁰ a decision maker's breach of a statutory requirement to result in nullity.³¹ Kirby J has protested that giving a narrower meaning to jurisdictional error in the context of the constitutional writs 'would add another layer of obscurity to what are already elusive distinctions'.³² There is an obvious attraction to his Honour's appeal to doctrinal simplicity, but guessing once more, one suspects that there is more to his protest than that. Kirby J believes in expanding the grounds of judicial review, whether that be via the constitutional writs, the common law's prohibition or mandamus, or certiorari or injunction. His Honour sees an anomaly in certiorari and injunction being available for non-jurisdictional error of law whilst mandamus and prohibition are not. His preferred way out of that anomaly would be to broaden the reach of mandamus and prohibition.³³ On the other hand, Hayne and Callinan JJ have suggested the exact opposite, namely a retraction of certiorari and injunction, at least in the exercise of the High Court's original jurisdiction.³⁴

The modern catalogue of jurisdictional errors

The grounds of judicial review frequently overlap and frequently chase the same or largely the same goals. More importantly for present purposes, they are frequently expressed in ways which are either entirely circular or open-ended. It is as if the judges want to avoid being pinned down. Consider the High Court's classic definition of 'jurisdictional error' in *Craig v South Australia*.³⁵ It is too long to quote, but it is suggested that this is because it was carefully crafted to say very little indeed. What follows is a fair summary of *Craig's* catalogue of a decision maker's jurisdictional errors. It uses only some of its original wording, but to help the reader who is familiar with that original, it adheres to *Craig's* expository sequence. *Craig* listed six errors as jurisdictional. In the same order as they appeared in *Craig*, these were:

- (1) A mistaken assertion or denial of the very existence of jurisdiction.
- (2) A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.
- (3) Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances (e.g. a civil court trying a criminal charge).
- (4) The catalogue continued, with a list of things which are unauthorised (albeit, 'less obviously')³⁶ even though the decision makers are acting within their 'general area of jurisdiction'. Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact (commonly called a jurisdictional fact) or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion.

- (5) Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions to the validity of the decision maker's act or decision. These mistakes constitute one form of error of law. For the same reasons as apply to item 6 below, an inferior court's 'relevancy' errors will ordinarily be non-judicial errors of law, whereas the same error by a tribunal is more likely to be jurisdictional.
- (6) Misconstruing the decision maker's Act (another form of error of law) in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers.

Craig acknowledged that this item can involve very fine line-drawing. It added that, generally speaking, errors of law committed by inferior courts will not amount to such misconceptions of the nature of their functions, because it is an ordinary part of an inferior court's functions to give authoritative interpretations of the law. In this respect, *Craig* proposed a presumptive difference between inferior courts and tribunals, because the latter's functions do not ordinarily include the authoritative determination of questions of law. Being merely an interpretive presumption, not all cases have adopted *Craig's* approach of characterising all tribunal errors of law as jurisdictional. In particular, industrial bodies and those dealing with 'small claims' seem still to be accorded some leeway for making non-judicial errors of law even though they are 'tribunals' rather than 'inferior courts'.³⁷ *Craig's* reasons for according the concept of a non-judicial error of law less space in tribunals than in inferior courts apply with even greater strength to bureaucrats, although they did not rate a mention in the case.

Craig was built on an earlier catalogue given by Lord Reid in *Anisminic Ltd v Foreign Compensation Commission*.³⁸ Lord Reid's list was longer by two items. However there is no reason to doubt that *Craig* would have included *Anisminic's* further items had it thought of them.³⁹ These were:

1. Bad faith.
2. Breach of natural justice.

Interestingly, Australia's inclusion of natural justice in the catalogue was not finally confirmed until *Re Refugee Review Tribunal; Ex parte Aala*,⁴⁰ decided some five years after *Craig*. The government had tried to persuade the *Aala* court that when the Constitution came into force, prohibition was issued only for 'want or excess of jurisdiction', not for breach of natural justice. The argument seemed to tolerate the contraction of 'want or excess of jurisdiction' to 'judicial error',⁴¹ but resisted its incorporation of the natural justice grounds of review which should, it maintained, be regarded as entirely distinct. The court gave a number of reasons for rejecting the government's argument. There were in fact some pre-1900 precedents for treating a breach of natural justice as taking its author beyond 'judicial', at least partially undermining the government's

argument from history. But even if one were to concede the history, the court said that the real concern of the constitutional writs was to check want or excess of federal power. It said further that it was consistent with this concern that breaches of natural justice be treated as 'jurisdictional errors' for the purposes of the constitutional writs, just as they are so treated nowadays at common law. Gaudron and McHugh JJ subjected the government's argument to their own historical examination, not (as Kirby J alleged) because they thought that any earlier word usage might be controlling, but because they thought that there was a consistency of theme to all of the cases, old and new. The theme was the restraint of breaches of statutory power. Kirby J was dismissive of the joint judgment's 'tedious and largely unilluminating' historical examination which was borrowed, he said, from the Minister's submission. The joint judgment returned fire, criticising Kirby J's preference for essentialist 'intuition or divination' over legal scholarship.⁴² Hayne J had no desire to enlist in that particular battle, and was content to acknowledge the difficulties in distinguishing between errors of law that were jurisdictional and those which were not.⁴³ His Honour's approach was to say that there was no harm in assimilating the natural justice grounds into 'jurisdictional error if that had not already occurred'.⁴⁴

Aala's overall message could not have been clearer. Regardless of whether one regards 'jurisdictional error' as a handy conclusion (joint judgment) or unnecessary historical distraction (Kirby J), the judgments are all agreed that it has assimilated all the grounds for attacking the exercise of a statutory power as a nullity.

There are only two differences of any note between *Craig's* catalogue and *Anisimic's*. First, *Craig* left more room for unreviewable legal errors if committed by inferior courts. The English judges had also lingered briefly with a 'presumption' that some legal issues were within the final 'jurisdiction' of inferior courts but not other decision-making bodies,⁴⁵ but they soon expanded jurisdictional error to encompass almost all errors of law.⁴⁶ Of course, the virtual abolition of non-jurisdictional errors of law would not necessarily entail a conclusion that all errors are henceforth jurisdictional, because there would still be room for non-jurisdictional errors of fact or discretion. However, at least one English commentary now contains considerable slippage between announcing the near-irrelevance of the distinction between the two sorts of errors of law, and the near-irrelevance of the more general distinction between jurisdictional and non-jurisdictional errors.⁴⁷

Other commentaries are more careful,⁴⁸ but it was perhaps inevitable that one would begin to see cases characterising all reviewable errors as 'errors of law'. The English Court of Appeal now sees errors of fact as errors of law if they were decisive and unfair.⁴⁹ The court acknowledged that its conversion of fact to law might appear 'paradoxical',⁵⁰ but it is surely worse than that. Its net effect would be to replace one conclusory term (jurisdictional error) with a term (error of law) which until then had not been conclusory. That is an effect which Professor Craig would regret.⁵¹ Australian law is far from clear about the distinction between

errors of law and fact,⁵² but it has shown no signs of treating it as a catch-all label to summarise all of the available grounds of review, whether they be for errors of fact or law.⁵³

The second difference between the *Anisminic* and *Craig* catalogues is evidenced by Lord Reid's preference of restricting 'jurisdiction' to its 'original sense' of a 'tribunal being entitled to *enter* on the inquiry in question'. Lord Reid was happy to acknowledge that the reviewable errors committed *after* that point would result in nullity, but thought that describing them in terms of jurisdiction would be to use that term 'in a very wide sense'.⁵⁴ There is an explicit reference in the Australian High Court to Lord Reid's distinction between what he called the original and wider usages of 'jurisdiction',⁵⁵ and there is no shortage of other cases giving what might be called a 'chronological tinge' to 'jurisdiction'.

Anisminic's catalogue had concluded with the observation that it was not exhaustive. Similarly, the High Court acknowledges that its *Craig* catalogue is not exhaustive.⁵⁶ Indeed, how could it have said anything else? The straight-forward examples of jurisdictional error are far out-numbered by the sorts of errors which Lord Reid thought had stretched the original understanding of the term, and which *Craig* admitted were less obvious⁵⁷ and sometimes required the drawing of lines which 'may be particularly difficult to discern'.⁵⁸ Such admissions go back a long way in Australia. Many High Court judgments have distinguished between 'actual' and 'constructive' failures to exercise jurisdiction.⁵⁹ That can be traced to a judgment of Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*,⁶⁰ in a passage to which the High Court has referred many times, and which Gaudron J once described as '[t]he classic statement as to what constitutes constructive failure to exercise jurisdiction'.⁶¹ It is worth quoting a portion of the old classic, because its indeterminacy is revealing:⁶²

I quite agree that the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction. *But there are mistakes and mistakes*; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test'; or to 'misconceive its duty', or 'not to apply itself to the question which the law prescribes'; or 'to misunderstand the nature of the opinion which it is to form', in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law.

These 'constructive' failures to exercise 'jurisdiction' have some common threads. They are not exhaustive. Further, they are all committed during a process which was properly commenced, but which went off the rails because of an error going to 'jurisdiction', if one uses that term in a way described by Lord Reid as wide and by the High Court as less obvious.

Death of the pure theory of jurisdiction

Lord Reid was right. 'Jurisdiction' used to have a narrower meaning, although one might well ask why that should still matter.

Mr D M Gordon wrote a series of articles advocating what he called a 'pure theory of jurisdiction'.⁶³ He had wanted this to apply to all cases of judicial review of administrative action of an adjudicative nature, no matter what the context, and no matter how egregious the decision maker's error might have been. Gordon's starting point was a definition, that 'jurisdiction' meant only the authority to decide. His next step was to deny that there could be any exceptions to or extensions of his definition.

Gordon's easiest examples came from decisions involving challenges to decisions of justices of the peace. He acknowledged that their jurisdiction could be limited in terms of subject matter (for example, they had no jurisdiction in equity), or by the monetary amount at stake, or by the relief claimed or claimable (for example, they could not determine title to land or grant injunctions). These were matters, he said, which could be determined at the outset. Once a matter properly got under way, however, the justices could not 'lose' or 'exceed' their jurisdiction by an error of reasoning or procedure. He could cite an impressive list of authorities in support of his argument, perhaps the most famous being Lord Sumner's judgment in *R v Nat Bell Liquors Ltd*:⁶⁴

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

The idea that decision makers cannot lose their jurisdiction once they have properly passed their starting points is completely at odds with the now-classic acceptance of constructive failures to exercise jurisdiction. *Anisminic*⁶⁵ discussed many cases, but the only case it felt compelled to overrule was *Davies v Price*,⁶⁶ which had depended on an acceptance of Lord Sumner's logic to reject an argument that applying the wrong legal test could sometimes amount to a jurisdictional error.

Mr Gordon's articles contained some valuable historical insights into the evolution of the prerogative writs, and they are still cited in that context.⁶⁷ They also acknowledged an impressive line of precedents which were contrary to the approach he advocated, making his argument more than just an appeal to a narrow, definitional logic. It was in effect an appeal not just to restrict, but to reverse the growth of the grounds of judicial review. That appeal is at least seventy years too late.

Even at the time Mr Gordon started advocating his position, however, his definition left too much either unexplained or explained unconvincingly. Most obviously, it failed either to explain or even to have a label for judicial review for fraud, improper purpose, or breach of natural justice. It also failed to allow for

jurisdictional fact review,⁶⁸ although others got around that problem by subdividing a matter that might otherwise be properly before a decision maker. Case after case talked of issues that were collateral, or preliminary, or even ‘essential preliminaries’, and some of those predated Lord Sumner by at least a generation.⁶⁹ Despite the terminology, however, there was no pre-ordained way of recognising what issues were core or preliminary. Even the idea of an essential preliminary lost its tether to any sense of chronology⁷⁰ when it found itself being deployed to ‘explain’ jurisdictional fact review (jurisdictional facts being essential preliminaries). It is still used in the High Court⁷¹ and elsewhere, but it seems to indicate nothing more than a severable or separate issue which is ‘jurisdictional in the sense that the decision maker must get it right on pain of being overturned on judicial review for jurisdictional error’.

To be fair, Mr Gordon’s arguments distinguished between the truly judicial decision makers (inferior courts) and tribunals and others. Indeed, he was critical of overarching accounts of the judicial review grounds which failed to draw such contextual distinctions, and he always opposed resort to the terminological devices of preliminary issues and jurisdictional facts.⁷² However that left him opposing too many decisions for want of proper fit with his logical definition, and too large a scope of judicial review not just opposed but wholly unexplained. For example, he failed to adjust for the merger of what counts as ‘jurisdictional error’ and what counts as ‘ultra vires’. The two doctrines started life in different fields, the first in relation to judicial officers and (eventually) those with a duty to act judicially, the latter in relation to statutory bodies (classically, corporations in the days when most companies owed their existence to individualised Acts). However, each was driven by similar rationales of containing bodies within the limits of their powers, and searching for those limits in the context of the particular Act.⁷³ Separating the two doctrines became impossible with the spread of the administrative state, which saw the administrative branch of government invested with powers properly characterised as legislative, executive and judicial. *Anisminic* ended any attempt at papering over their merger. The terms are now used interchangeably.⁷⁴

Context is indeed important to any judicial review case, and the prime contextual variant is surely the relevant statute. If the statute is better interpreted as stipulating certain preconditions to a valid decision, why should it matter that some of them fail to fit an *a priori* definition of jurisdiction, even if that definition was once an accurate description in times well-past?

History aside, however, there is one aspect of Gordon’s critique that still has resonance. Gordon repeatedly criticised the judges for failing to come up with a rational theory to explain why they would choose to characterise some issues as jurisdictional and others as non-jurisdictional. He declared that ‘in no branch of English law [than that dealing with jurisdiction] is there more confusion and conflict’.⁷⁵ Any serious examination of the cases, he said, ‘must convince the open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found’.⁷⁶ The cases presented ‘a

hodgepodge of contradictory and inconsistent rulings, and . . . an aggregation of sophistical and even absurd reasons to justify rulings'.⁷⁷

One cannot sustain an argument based ultimately on the proposition that there is (or was) only one meaning of a term as slippery as 'jurisdiction'.⁷⁸ Nor should one hope for a single, over-arching theory of statutory interpretation. That said, it is often as difficult now as it was when Gordon was writing to predict which statutory requirements will be treated as mandatory (using the old language), and which will be characterised as directory. The usual consequence of 'jurisdictional error' is court action treating the challenged decision as a nullity. The High Court tells us that nullity is ultimately a consequence directed by the particular Act in question, which is only another way of telling us that whether a requirement is mandatory (and therefore jurisdictional) is ultimately a matter of statutory construction in each particular case. Small wonder, then, that the same High Court decision which tells us these things also admits that the result of this particular constructional exercise often 'reflects a contestable judgment'.⁷⁹ It cannot be otherwise.

Pure theories have no place in statutory construction, but is statutory interpretation entirely unpredictable? Is it utterly variable between cases, depending on the predilections of each judge, who is free to insert whatever implied conditions they like into the particular statute and as free to characterise statutory conditions as mandatory or directory as they like? This chapter opened with one of Kirby J's more colourful criticisms of jurisdictional error. His Honour said in another case that the terminology is 'meaningless'⁸⁰ unless it is either informed⁸¹ (or preferably replaced)⁸² by higher-level general principles. That approach is surely correct. Forget hang-ups with labels, and try and work out what lies behind them.

Jurisdictional errors: Can values be rules?

It is not too much of an exaggeration to characterise Australia's law of judicial review of administrative action as predominantly a bottom-up affair.⁸³ We do have our grand principles, of course, but they are so grand as to belong more properly to the field of constitutional law. The rule of law, the principle of legality, the separation of powers, even the recently advanced 'integrity principle' – these offer very little guidance to anyone wanting to know what the courts might commonly regard as the minimum standards of good public administration.

Indeed, most Australian judges deny a *direct* role in articulating or setting minimum standards of administrative decision-making.⁸⁴ Kirby J is a dissenter. His Honour acknowledges that judicial review can usually make do with its specific grounds of review, perhaps informed by the judge's perception of 'serious administrative injustice'. However, in the 'exceptional' case where there is serious administrative injustice which does not fit within any of the established review grounds, his Honour believes that the court can and should act.⁸⁵

An interesting trend in recent reforms to public service legislation has been the statutory formulation of a list of 'values' such as political neutrality, honesty and fairness,⁸⁶ but there is a complete absence of judicial review cases treating the violation of a prescribed value as a ground of review.⁸⁷ There seems to be a tacit consensus that these issues are better left to the Ombudsmen, or to the public sector managers. There is a good deal of sense in this at what one might call the micro-management level, because one should not expect judges to know much about theories of good and effective public sector management, let alone to keep abreast of developments in management theory and practice. Even at the more general level, however, we find Australia's senior judiciary reacting strongly against recent English suggestions of working from the 'top down'.

English courts pushed the ground of *Wednesbury* unreasonableness to its limits, increasingly impatient with the idea that it applied only to decisions which were utterly bizarre. They finally kicked over the traces when the European Court of Human Rights told them that even if it was applied in a stretched fashion ('anxious scrutiny' was the English term), *Wednesbury* unreasonableness was too lenient with the administration when it came to the protection of human rights.⁸⁸ So the English courts went further, and embraced 'proportionality' review. At roughly the same time, they were also reinterpreting some of their older cases, particularly those which involved *Wednesbury* unreasonableness or 'legitimate expectations'. They decided that some of the more restrictive cases could no longer stand, and that a good many of the remainder would be better understood as cases evidencing judicial review for substantive unfairness *per se*. Having taken the leap into substantive unfairness, it was but a short step to their recognition of judicial review for bureaucratic unfairness, or abuse of power,⁸⁹ and then only a slightly bigger step further into judicial review for a tribunal decision that was 'unfair' because 'fresh evidence' had subsequently revealed error in its factual premise.⁹⁰

This is all very different from the typical Australian judgment, which concentrates on lower-order issues, the specific 'grounds' of judicial review. 'Abuse of power' might well be a correct summation of the *values* underlying the specific grounds, but it lacks 'an immediate normative operation'⁹¹ in this country. In other words, 'abuse of power' or substantive 'unfairness' or the protection of 'legitimate expectations' might justify the operation of more specific legal rules or principles, but they are not grounds of review in their own right.

It is submitted that the courts cannot sensibly operate solely on either a top-down or a bottom-up approach. They need to do both, and probably cannot avoid it even if this is not always acknowledged. Grand value statements are usually too indeterminate to do more than provide general guidance, but by the same token, one cannot operate the more precise grounds of review in a vacuum, divorced from any sense of their proper fit with each relevant administrative or regulatory context.

A recent High Court decision provides a good example of the tensions involved in determining the relevance or status of notions of 'good administration'. The

challenge in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*⁹² was to a Refugee Review Tribunal's decision which had been six-and-a-half years in the making, with the main oral hearing held roughly five years before the decision itself. The challengers quite reasonably suggested that the long delays would have seriously diminished the Tribunal's capacity to remember the witnesses' demeanour or body language when they had testified, and yet demeanour may well have played a real part in the Tribunal's assessment of their credibility. For the majority, that meant that the procedure had been so unfair as to amount to a breach of natural justice. There was a real risk that the delay had deprived the Tribunal of its capacity to make demeanour-based assessments of credibility. This was a breach of natural justice. Gummow J protested in dissent that this amounted to the imposition of judicial process standards upon an administrative process, and his Honour implied that this in turn amounted to review for maladministration *per se*. Kirby J's response was frank. His Honour acknowledged the parallels between this case and the principles relevant to appeals from tardy judges,⁹³ and said that the distinction in this context between review on the merits and judicial review failed to give him 'much assistance':⁹⁴

Where judicial review is sought on the grounds of breach of the requirements of procedural fairness, it is precisely the merits of the way the decision-making power was carried out that is at issue. If that power is exercised in a manner that is unfair, within the authorities on procedural fairness, the decision may be invalidated by jurisdictional error for that reason.

Going beyond jurisdictional error

It has been seen that in the cases of certiorari, injunctions and declaratory relief, the general law allows judicial review for illegality not necessarily constituting jurisdictional error. So, too, do some of the grounds of review in the ADJR Act. Most of its grounds are a direct steal from the common law, but at least some of these may not be tethered to a requirement of jurisdictional error or invalidity. There are explicit hints in that regard from the High Court as regards ADJR's 'procedural error' ground,⁹⁵ and it is an assumption underlying much of the reasoning in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*,⁹⁶ where the ADJR ground was taking irrelevant considerations into account. As for ADJR's 'error of law' and 'no evidence' grounds, these self-evidently push further than the common law's analogues, and in so doing, push beyond jurisdictional error.⁹⁷

The net result is that many contexts no longer require jurisdictional error, and in the case of certiorari, injunction and declaratory relief, some contexts never did have such a requirement. One consequence must be that nullity (jurisdictional error's usual consequence) is less of an organising concept than in former times. Another consequence will surely be that as more and more contexts begin to de-couple from 'nullity' and 'jurisdictional error', the courts will have to become

more context-sensitive. They will increasingly need to give more consideration to granting remedies which do not automatically treat the successfully challenged decision as having been a nullity from its inception.⁹⁸

Is jurisdictional error conclusory? Yes, but that in itself is not a bad thing, provided we focus on what *counts* as jurisdictional error, and *why*. Should jurisdictional error be abolished? No, if that means copying England's switch to an equally conclusory label of 'error of law', and no, if it means ditching the concept of nullity altogether. It is clear, however, that jurisdictional error is in retreat in several contexts. From this author's perspective, that is a cause for neither tears nor celebration, but simply a reminder of the need to get behind the labels, conclusions and grounds to try and ascertain their rationales and assess their functionality.

Privative clauses and the limits of the law

Mary Crock and Edward Santow

Judicial review and privative clauses

The idea that courts or other legal bodies should play a role in overseeing administrative action is central to modern notions of democratic governance. However, it seems to be in the common law countries – United Kingdom, United States, Canada and the nations of the British Commonwealth – that the most complex oversight regimes have been created. This may be because of the sometimes nebulous distinction drawn in those countries between administrative review (review of the *merits* of administrative action) and judicial review (review of the *legality* of such action). The distinction is manifest on the one hand in the creation of both specialist and multi-jurisdictional tribunals or agencies charged with the review and/or re-making of administrative decisions. On the other hand are courts of law vested with constitutional or statutory authority to check that administrative decisions (including decisions made by those tribunals or agencies) have been made in accordance with the law.

It is a system built on a sequencing of functions between administrators, tribunals and courts, which are arranged in a natural hierarchy. This can militate against ‘efficiency’ in both administration and governance, in that a system involving decision-making by representatives of two branches of government creates a necessarily complex matrix of avenues for review. Thus in a sense, the Anglo-Australian system of judicial review is less efficient than, say, the French *droit administratif*. However, as Sir Gerard Brennan has observed, judicial review is an ‘intended . . . fetter on the Executive’s pursuit of its policies’ and so a certain level of inefficiency is ‘inevitable, if not intended’.¹

Put simply, in Australia, as in other common law countries, judicial review has developed as a forceful weapon in the hands of dissenters. Recourse to the courts can lead to judicial pronouncements on matters of process or on the interpretation of legal principle that invoke antagonistic responses from government. At a practical level, the sheer volume of court challenges lodged can result in lengthy delays in the final disposition of matters. Sometimes where the outcome of an administrative process represents a potential detriment to the applicant, delay can represent an advantage to the applicant. In cases where the respondent wishes to avoid the imposition of a penalty or the making of an order, the delays inherent in judicial review proceedings can be an equally potent tactical weapon.

In this chapter, we examine various ways in which government has responded to these challenges by attempting to constrain review of administrative action by the courts. The most contentious vehicle of restriction is known in Australia as the 'privative clause'.² This presents most often as a statutory device by which Parliament purports expressly to restrict the manner or extent of judicial review in respect of an identified class or classes of administrative decision. The intended effect is to reduce (or even to remove altogether) the tiers of judicial review available to challenge certain administrative (and sometimes, judicial³) decisions.

Privative clauses in their various incarnations are at the cutting edge of administrative law inasmuch as they highlight significant points of conflict in the administrative process. They also represent a point of reference within the broader context of relations between politics and the legal process. Privative clauses are subject ultimately to the constraints imposed by the federal and state Constitutions, to the extent that these pronounce on the respective powers and duties of the three arms of government. Accordingly, while parliaments enacting privative clauses may indicate a strong intention that the judiciary refrain from reviewing certain classes of decision, the courts have on occasion resisted the call for restraint in deference to higher duties. It is the thrust and parry between parliament and the judiciary that makes the subject of privative clauses both confusing for students of administrative law and endlessly fascinating for practitioners and academics.⁴

One of the reasons why privative clauses engender great controversy is that they often stand at the boundary – and even seek to define the boundary – of matters that are within the province of the courts and matters that are not. Indeed, rulings by the courts on the effectiveness of attempts to oust judicial review are often tied closely to the doctrines that have developed around the central question of what is and is not *justiciable* by the courts. If privative clauses raise issues about when courts can be excluded from review, they also raise questions about what are the limits of the law, or what will constitute illegality in any given situation.⁵ In this context, it is not surprising that the discourse on privative clauses is full of what Julius Stone would call 'categories of illusory reference'.⁶ When presented with such clauses, the courts have often asserted

their right to review, but then declined to offer relief to applicants because no legal error is apparent.⁷ On other occasions they have acknowledged the presence of legal errors, but declined to intervene on the basis that the privative clause is an effective barrier to review. This is where we see judicial review at its most political; where cases cannot be understood outside of their context and a complex interplay of factors.

It is beyond the scope of this chapter to compare in detail Australia's experience in the use of privative clauses with that of other common law countries. The United Kingdom and the United States make two comparators of particular interest. The United Kingdom is a country without a written constitution but with a rich tradition of respect for the judiciary as the final arbiter of what passes for the rule of law. Its historical jurisprudence on privative clauses forms the starting point for judicial thinking on the subject in Australia as in most common law countries. The United States, on the other hand, does have a written constitution but this document does not entrench expressly the right to judicial review of administrative action. Such rights have had to be implied using elements of America's constitutionally entrenched Bill of Rights – in particular the right to due process and the 'habeas' clause, which entrenches the right to freedom from arbitrary imprisonment. If Australia's constitutional matrix is different again, its jurisprudence finds interesting parallels in both of these foreign jurisdictions. In the United Kingdom and the United States, Parliament and Congress respectively have chafed against the supervisory role of the courts, enacting various iterations of privative clauses. Although the debate is far from closed in either of these countries, it would seem fair to say that in each instance the courts have mounted spirited defences against the constraints placed on them.⁸ How the Australian courts have reacted to similar challenges is the focus of this chapter.

In this chapter, we examine the significance of judicial oversight and the different ways in which governments have tried to curtail curial review: privative clauses present in many different guises. This leads inevitably to a discussion of the weapons in the judicial armoury – most particularly to the concept of 'jurisdictional error'. As kryptonite is to Superman, so is the 'jurisdictional error' fatal to the effectiveness of most privative clauses. The frustration of this area of administrative law is that every attempt to enunciate firm principle must be heavily qualified. Attempting to unravel all the strands of doctrine is no easy task. Our central argument is that attempts to constrain judicial review cannot be understood fully at the level of high legal principle. While viewed first and foremost as aids to statutory interpretation – and an expression of the will of Parliament – privative clauses can only ever be understood when fully contextualised. They are introduced to deal with specific problems or issues and have been interpreted by the courts in ways that reflect the nuances of context. Two case studies are used in detail to explore this concept. We examine the courts' treatment of privative clauses in the fields of immigration and industrial relations. The chapter concludes with a broader reflection on the future of privative clauses (see pp. 363–7).

An overview of the issue

In the common law system, judicial review is a vital check on administrative action, designed to guard against the natural fallibility of administrative decision makers.⁹ This is so whether the role of the courts is viewed as one based on upholding principles laid down by Parliament (in statutory law)¹⁰ or by the courts themselves in the ever evolving common law process.¹¹ Privative clauses are controversial because they have the potential to reduce the means by which a person wishing to challenge an administrative decision may seek judicial review of that decision. Although devised most commonly to limit oversight of administrative review bodies, such clauses can operate also to prevent appeals from judicial bodies in the form of both inferior courts and superior courts of record.¹²

Administrative decision-making has expanded such that, by the twenty-first century, there has developed a vast range of activities subject to 'government scrutiny, permit or control'.¹³ In areas such as migration law and industrial relations (areas in which legislatures have traditionally sought to enact privative clauses), administrative decision makers are empowered to make determinations affecting a person's fundamental rights. If the decision-making process is flawed, a privative clause can operate to prevent an affected person from obtaining legal redress. This, in turn, can have a devastating impact on the individual affected. For instance, a person wrongly denied refugee status, who is then sent back to their country of origin, may conceivably face torture or death. As we explore later (see pp. 360–3), it is not surprising that the courts have resisted constraints on their ability to review these types of decisions.

Having said this, it is a mistake to assume that privative clauses will have no impact at all on the manner in which a court will approach the task of judicial review. In this context, it is well to return to the question of why legislatures enact privative clauses at all.¹⁴

A privative clause is, perhaps above all else, a mechanism by which the Executive attempts to retain control over a particular decision-making process. This might be deemed desirable where, for instance, an administrative body is given the power to make decisions over the allocation of a finite resource. Parliament may be concerned that judicial intervention in this process could ultimately lead to the administrative body being required to make allocations which go beyond the availability of the resource in question. By the same token, the decisions in question may be ones of 'high' policy, even presented in the form of subordinate legislation: judicial review in such instances being unwelcome as a judicial usurpation of executive power.

Secondly, where the ability to make a certain decision requires considerable expertise in a particular field of knowledge, the legislature may wish to ensure that the relevant decision makers are sufficiently qualified in that field. Parliament may believe that it would be too difficult to reach a rational, fair and just decision unless the decision maker possesses the relevant expert knowledge.

Almost by definition, courts of general jurisdiction are not expert in every field of knowledge. For this reason, Parliament may take the view that a court is only equipped to ensure that the minimum *procedural* standards are met by the expert decision makers, but that any question touching on the merits of the decision is beyond the court's competence. The Administrative Review Council (ARC) refers in this context to the inappropriate use of judicial review in decision-making that requires the balancing of 'polycentric factors'.¹⁵

Finally, legislatures enact privative clauses because they perceive limitations with judicial review itself. Certainly, judicial review is no panacea. It does not provide the means for rectifying every type of administrative error. Judicial review can only be used to remedy errors relating to the *process* of decision-making, rather than the merits of the decision itself. In most instances, success in judicial review proceedings will result in no more than the referral of a matter back to the original decision maker so that the decision-making process can start afresh. Moreover, when courts review the legality of an administrative process they tend to enforce *minimum* standards. Put bluntly, judicial review cannot transform a statutory decision-making process that is elementally inequitable or discriminatory into one founded on equality and respect for individual dignity. On the other hand, judicial review is susceptible to abuse in instances where the delays involved in seeking curial review can constitute an advantage for one or other party.¹⁶

All of these matters (and more) must be weighed by the courts when presented with legislation that appears on its face to be saying 'Judges: Keep out'.

Identifying privative clauses

There are many ways in which legislatures attempt to shield administrative processes from curial review. Perhaps the most obvious mechanism is through the codification of decision-making in a way that reduces or removes altogether the discretion in decision makers. For example, a prime motivation for the creation of detailed regulations in the areas of taxation, social security and immigration is that statutory rules reduce the scope for arguing about how decisions can be made (as a matter of law). The problem, of course, is that lawyers are born and bred to argue about the interpretation of legal rules that appear on their face to be straight forward. Regulations that provide 'shopping lists' of matters required to be taken into account have attracted applications for judicial review where the courts have attacked even minute departures from the text of the legislation.¹⁷

Accordingly, legislators on occasion have resorted to the interposition of 'subjective' powers in decision makers. The legislation in this instance is characterised by phrases such as 'in the decision maker's opinion' and 'where the decision maker is satisfied that'. This statutory language is designed to restrict curial review in that the essence of legal decision-making is no longer a shopping list of provisions, but whether there is *any* legal basis upon which the decision maker could have reached the decision in question.¹⁸

Another way in which the role of the courts can be minimised is by creating structures that redefine the domus of administrative decision-making – for example, by vesting powers in ‘private’ bodies. In these instances, the statutory scheme will permit aspects of a decision-making process to be performed by individuals or corporations engaged as private contractors to carry out specific activities. Controversially, such contractors have been found to be operating outside of the accountability restraints of public administrative law.¹⁹

The traditional privative clause, however, is a more direct statutory device that purports to limit the courts’ ability to review nominated classes of administrative decisions. The devices go by many names, including ‘ouster clauses’, ‘preclusive clauses’ and ‘finality clauses’.²⁰ There are also various sub-species of these general terms denoting the various linguistic formulae that legislatures have developed to indicate their intention to limit or preclude judicial review. These include clauses purporting to prevent the operation of the writs of ‘prohibition or certiorari’; those stating that a class of administrative decision ‘shall not be questioned’; those stating that certain administrative decisions provide ‘conclusive evidence’ on a particular question; and those stating that an administrative decision should apply ‘as if it were enacted’.²¹ We explore the different approaches that have been taken to different types of preclusory clauses in the following part. For present purposes, however, it suffices to note that in the case of the most ‘extreme’ prescriptive legislation, the courts have generally treated the various provisions interchangeably.²²

Statutes imposing time limits on appeals or restricting the jurisdiction of courts are not generally included within the scope of the term ‘privative clause’. Nevertheless, it is acknowledged that, where a provision permits judicial review only within a very short period of time following an administrative decision, the *practical effect* of the provision is very similar to that of a privative clause.²³ Interestingly, in some very contentious cases, the courts have treated time limit provisions as if they were privative clauses.²⁴

The privative clause and kryptonite: Jurisdictional error

Leaving to one side the devices used to exclude or limit judicial review, the other constants in the discourse on privative clauses are the factors that lead courts to rule such clauses to be ineffective. The touch-stone at this point is the notion of ‘jurisdictional error’. These are errors of such gravity that the decisions made or proposed to be made are regarded at law to be no decisions at all – nullities. That is, where a jurisdictional error occurs in the making of an administrative decision, a person with standing to challenge the ruling will be able to ‘pierce’ any privative clause purporting to prevent judicial review of that class of decision. This means that the person will have the legal right to seek judicial review of the decision in the relevant court.

The problem, of course, is in defining a jurisdictional error. The variables are many. Much will depend on who is making a decision and on the nature of the

error made. As a rule of thumb, administrative decision makers in the form of bureaucrats or tribunal members will be given less lee way than judicial officers. Within the court hierarchy, it will be easier to show a jurisdictional error in the hands of an inferior court than in a superior court of record. This is due to the fact that superior courts are empowered to make binding rulings about their own jurisdiction.

As to the type of error made, distinctions are often drawn between errors made at point of entry into a process and those made after an inquiry has been validly commenced. Few privative clauses will hold against a decision maker who, from the outset, has no legal authority to enter upon the inquiry in question.²⁵ In most instances, however, the issue is not so clear cut. The decision maker may have begun 'within jurisdiction'. The question rather is whether he or she does anything that takes the process into jurisdictional error. As explored in the following section, privative clauses can prevent judicial review of some kinds of legal errors. For example, a long line of jurisprudence suggests that where a decision maker has jurisdiction to enter upon an inquiry, a privative clause will prevent a reviewing court from intervening to correct subsequent errors unless the errors go to jurisdiction and are apparent 'on the face of the record'. Whether an error amounts to a 'jurisdictional error' will again involve an examination of who is making the alleged error and of their status relative to the reviewing court.

In the domain of federal administrative law, the critical point of reference is Chapter III of the Constitution, which vests the 'judicial power' of the Commonwealth exclusively in courts of law. This means that under the federal Constitution, administrative bodies cannot be vested with judicial power. Section 75(v) of the Constitution provides further that the High Court has original jurisdiction to hear cases relating to 'all matters in which . . . a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. As this jurisdiction is conferred upon the High Court by the Constitution, the legislative and executive branches of government cannot prevent the Court from hearing cases in which these remedies will lie. Section 75(v) specifies that judicial review must be sought in one of two ways. The first is by operation of the prerogative writs (sometimes referred to as 'constitutional writs'), while the second is via the equitable remedies of declaration and injunction.

In *Plaintiff S157/2002 v Commonwealth (Plaintiff S157)*,²⁶ the High Court ruled that if a decision made by an *officer of the Commonwealth*²⁷ is infected with jurisdictional error, the decision would not fall within the ambit of a privative clause drafted in apparently express terms. In other words, the privative clause notwithstanding, the decision will remain amenable to judicial review. Kerr and Williams note that the case recognises, in Australia, a 'minimum standard of judicial review of executive action that cannot be abrogated by legislation' which is supported by the text of the Constitution, its structure and 'the concepts and principles that can be derived from the rule of law'.²⁸

Both the prerogative writs and the remedy of declaration are discretionary. Where the High Court is the only avenue left open to litigants, however, this

discretion is limited. The Court will have no option but to grant the appropriate remedy where there has been a transgression, and where the applicants have complied with the necessary procedures. It is in this context that privative clauses and distinctions in types of legal error become relevant.

It remains an open question – dealt with in more detail later in this chapter – whether the Commonwealth Parliament, or one of the state or territory parliaments, could formulate a privative clause that would render even jurisdictional errors impervious to judicial review. As we explore below, a critical difference between the federal and state constitutions is that state constitutions contain no equivalent to Chapter III of the Federal Constitution, meaning that the distinction between law and policy or questions of ‘merit’ is not as bright in the province of state law. At state level, judicial powers can be vested in bodies other than courts. There is also no equivalent of s75(v). By the same token, the effectiveness of a privative clause will inevitably depend – at least to some extent – on the rationale for its inclusion and on whether a court is persuaded of its legitimacy in the circumstances of a particular case. While the desire to achieve certainty is without doubt a motivator for the legislator in virtually every instance, there are few privative clauses that are certain in their application.

Towards a general interpretative approach to privative clauses

The courts in Australia and elsewhere tend to interpret privative clauses narrowly. This means that privative clauses have *not* traditionally been invalidated, but their impact has been diluted and in some cases almost completely nullified. The result is that access to judicial review has been constrained, but not as much as might be expected given the wording of the clauses in question.

Perhaps the first point to make is that privative clauses are designed as aids to statutory interpretation. As privative clauses are themselves creatures of statute, the traditional approach has been to examine their literal or ordinary meaning.²⁹ Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that provisions also be construed *purposively*.³⁰ This approach mandates an analysis of legislative intent. Despite concerns about the difficulty of gauging such intent simply by examining the record of parliamentary debates in *Hansard*,³¹ this remains an orthodox mode of statutory interpretation.

The problem with privative clauses is that judges have often adopted constructions that appear *not* to accord with ordinary meaning. For example, one might well think that where an Act provides that a particular class of administrative decision is ‘final and conclusive’ and ‘must not be challenged or reviewed by a court’ and is not subject to the various constitutional writs, a court would need to strain to construe the Act so as to permit judicial review of the relevant class of decision.³² As Wade and Forsyth put it: ‘Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words.’³³

Perhaps the oldest of the approaches apparent in the jurisprudence on privative clauses is that which has seen the judiciary focussing on the language used by the legislature so as to draw distinctions between different types of legal errors. Privative clauses were said to bar judicial intervention to correct ‘non-jurisdictional errors apparent on the face of the record’. In the 1760 case of *R v Moreley*³⁴ the Court of King’s Bench ruled that in the absence of strict words of statutory intendment, the court will always be empowered to issue a writ of certiorari to quash a decision that displays an error of law. The statute in that case provided:

No other court whatsoever shall intermeddle with any cause or causes of appeal upon this act: but they shall be finally determined in the quarter sessions only . . . [and] No record, warrant or mittimus to be made by virtue of this act, or any proceedings thereupon, shall be reversed, avoided or any way impeached, by reason of any default in form.

The Court agreed with the petitioner’s submission that the clauses merely prevented the reviewing court from re-examining the facts of the matters in question.

The idea that the courts’ power to quash decisions (by certiorari) will only be taken away by the ‘most clear and explicit’ words in a statute went on to become accepted doctrine. For their part, successive judges pushed the boundaries of language. So, for example, in *R v Medical Appeals Tribunal; Ex parte Gilmore*³⁵ the English Court of Appeal, led by Lord Denning MR, ruled that statements to the effect that a tribunal’s decisions were ‘final’ meant no more than final on the facts of a case. That case involved a workman blinded in an industrial accident who was awarded compensation only for the loss of sight in one eye – the other having been sightless before the accident! The Court had no hesitation in finding that the tribunal’s ruling involved a fundamental error of law. Romer LJ noted that ‘it is not in the public interest that inferior tribunals of any kind should be the ultimate arbiters on questions of law. Parliament, of course, can make them so; but . . . a legislative intention to do so is not sufficiently expressed by the mere provision that the decision of such-and-such a tribunal shall be “final”’.³⁶

In many cases involving prescriptive legislation, the courts have distinguished between issues of fact and issues of law;³⁷ between errors going to jurisdiction and non-jurisdictional errors;³⁸ and between a right to appeal (on matters of fact and law) and a right to judicial review.³⁹ Lord Denning was sanguine in his assessment of the jurisprudence, commenting that judges have tended to adopt a doctrinal approach that will deliver the desired outcome in the case before them.⁴⁰

So, in *Hockey v Yelland*⁴¹ the High Court of Australia held that a privative clause stating that the determination of a medical tribunal should be ‘final and conclusive’ did not prevent judicial review of the legality of the decision made. In the result, however, the Court found that the tribunal in question had committed no legal error and that the applicant’s complaint went to matters of fact or perhaps to errors of law that were not apparent on the face of the record. The Court also made it difficult for the applicant to challenge the ruling on the basis of

non-jurisdictional error by adopting a very narrow interpretation of the phrase ‘on the face of the record’.⁴²

In essence, there is an apparent disjuncture between what might be described as the ‘literal’ meaning of a privative clause, and what we would term its ‘constitutional’ meaning. We use the word ‘apparent’ advisedly: the dichotomy is arguably a false one. As Professor Allan observes, in one ‘crucial sense’, statutes have no ‘literal’ meaning:

The application of a statutory provision is always a matter of legal and constitutional *argument*: it entails an interpretation of the statute’s general purpose or policy sensitive to those enduring legal values that are part of the language or communication between legislature and judiciary, or between legislator and citizen.⁴³

Having said this, the distinction between the literal and constitutional import of a privative clause is a useful shorthand to denote how a privative clause *might* be construed without regard to those ‘enduring legal values’ (the ‘literal’ meaning), and how a privative clause *should* be interpreted when due regard is paid to all relevant legal and constitutional considerations (the ‘constitutional’ meaning).⁴⁴

The one constant has been that privative clauses complicate any judicial review process. There has been argument over whether they decrease the scope of judicial review or whether they increase the discretion given to an administrative decision maker. Logically, if a statute operates to preclude an administrative decision from being reviewed, this must increase (potentially *ad infinitum*) the decision maker’s discretion or decision-making powers. However, the truth of this statement is often denied.⁴⁵ For example, under the *Hickman* doctrine,⁴⁶ it has been argued that privative clauses are permissible provided their operation could be ‘characterised not as restricting judicial review but rather as defining the true reach of the decision maker’s power’.⁴⁷ However, this approach carries with it more than the faint odour of sophistry,⁴⁸ as the High Court recognised in *Plaintiff S157*.⁴⁹

In the process of enacting the privative clause in s474 of the *Migration Act 1958* (Cth) (see pp. 362–3 for further details), the Australian Parliament made plain its intentions, even seeking to direct how the provision should be interpreted. In the Second Reading Speech, the then-Immigration Minister, Philip Ruddock, explained that the government intended the privative clause to apply to the High Court as well as the inferior courts.⁵⁰ Further, the Explanatory Memorandum purported to express the legislature’s intention that the privative clause should be interpreted consistently with a particular view of the ‘*Hickman* doctrine’ so as to permit judicial review, but on three grounds only:

Such a clause has been interpreted by the High Court, in a line of authority stemming from the judgment of Dixon J in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598, to mean that a court can still review matters but the available grounds are confined to *exceeding constitutional limits, narrow jurisdictional error or mala fides*.⁵¹

In oral argument in *Plaintiff S157*, the Solicitor-General asserted that the Court was bound to follow this interpretative guide.⁵² He argued further that even if the

government's interpretation of the *Hickman* doctrine were found to be incorrect *as a matter of law*, this would not matter 'because [the Minister] has said very clearly . . . exactly what is intended'.⁵³

The High Court rejected this argument, the majority observing that a 'Minister's understanding of the decision in *Hickman* cannot give s474 an effect that is inconsistent with the terms of the Act as a whole'.⁵⁴

Claiming that the narrow construction of a privative clause vindicates legislative intent causes a number of problems for legislators. First, it can lead to confusion. For example, during debates prior to the introduction of the privative clause in the *Migration Act*, Senator Andrew Bartlett expressed his concern that the Commonwealth Parliament was enacting a provision, the effect of which it could not know:

If we are going to pass a bad law, at least we have to know how bad the damn thing is before we pass it. The government do not even know what they did. They probably wanted bad law; they might not have wanted very bad law. We probably got extraordinarily appalling law – and we do not even know if we have got it yet. We will not even know for another year or two, until we finally get a High Court case about what the hell this privative clause means.⁵⁵

Secondly, it can cause frustration on the part of legislators. It can lead to a game of cat-and-mouse wherein the courts, in effect, goad Parliament to formulate new forms of privative clause which will be impervious to the courts' meddling. The result is an escalation in hostilities and parliament will be encouraged to enact increasingly draconian privative clauses until the courts find them constitutionally invalid.

This analysis leads to the conclusion that the vindication of legislative intent is an unsatisfactory explanation for narrowly construing privative clauses. It is also arguably unnecessary. Sir John Laws argues that, in reality, decisions that construe privative clauses narrowly

. . . owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need the fig-leaf any more.⁵⁶

Forsyth responds that '[t]he fig-leaf, like the swimming-costume on a crowded beach', is necessary to 'preserve the decencies'.⁵⁷ The question, therefore, is whether it is indecent for the courts to construe privative clauses narrowly without paying lip-service to the old justification based on legislative intent. It will be our argument that a more satisfactory approach is to acknowledge that statutory interpretation must always be conducted within the framework of constitutional law and the broader context in which administrative decisions are made. As explored earlier, there may well be circumstances in which it is reasonable and appropriate to limit access to curial review. By the same token, it is not possible to make legitimate distinctions between types of legal error (jurisdictional or non-jurisdictional) without acknowledging the nature and significance of the administrative decision sought to be reviewed. Another interesting question is

whether there are legitimate distinctions to be found between the powers of the federal courts to review decisions (given the terms of the Federal Constitution) and those of superior state courts of record.

Privative clauses and the importance of context

The *operation* of a privative clause, like any statutory provision, is dependent on how it is interpreted. The foregoing discussion reveals that different privative clauses imply differing degrees of restriction on judicial review. One feature that emerges from the case law is that such restrictions appear to depend only partly on the wording of particular clauses. Context is highly relevant in the courts' interpretation of privative clause. The starting point must be the constitutional requirements of the jurisdiction in which a privative clause is enacted. The case law makes clear that a privative clause enacted by a state is subject to fewer limitations on its operation than one enacted by the Commonwealth Parliament.⁵⁸ As noted earlier, this is largely due to the operation of s75 of the Federal Constitution, which constitutionally enshrines the High Court's role in conducting judicial review of administrative action.

It is also clear that distinctions are drawn between administrative and judicial bodies and between inferior and superior courts of record. Australia has never adopted the broadly interventionist approach favoured by the English courts (where the tendency has been to treat all errors of law as going to jurisdiction).⁵⁹ However, the High Court has generally made it plain that tribunals and administrative bodies cannot be protected from judicial oversight where they fall into legal error.⁶⁰

Other contextual factors are also relevant. It seems that Australian courts *have* been influenced – consciously or sub-consciously – by the type of decision to which the privative clause applies. So, for example, more deference appears to be shown in the case of tribunals and fact finding bodies vested with special expertise in a particular area or matter. In such contexts, as noted earlier, it is not uncommon for the courts to give with one hand while taking away with the other. In some cases they have reaffirmed their power to intervene, but then drawn back from finding any legal error.⁶¹

In this section we explore two areas of law in which legislatures have attempted repeatedly to restrict access to judicial review. The first is that of industrial relations. This is interesting for the depth of history in attempts to shut out the courts; and for the complex interplay between state and federal powers. The second case study is immigration, interesting because of the battle royal that has raged in that area between parliament and the courts.⁶²

Privative clauses in industrial relations

There is a long history of privative clauses being used in the industrial relations field in Australia. These go back to the early years of the twentieth century when

the Federal Government and several of the state governments established labour courts to settle industrial disputes by conciliation and, where conciliation failed, by final and binding compulsory interest arbitration.⁶³ The purpose of the privative clauses was to limit judicial review of the decisions of specialist labour courts. The view of Parliament was that it was appropriate for arbitrated settlements, which bestowed terms and conditions of employment on the relevant industry and occupation, to be undisturbed from judicial review unless a court had manifestly exceeded its jurisdiction.

One noteworthy feature of the early labour cases is that the decision-making authorities at first instance were courts – one fact that may explain the early deference shown to rulings in this area. In more recent times, industrial relations arbitration has become the preserve – in the main – of industrial relations tribunals. Although the courts' treatment of preclusive provisions in this area has varied over the years, the move does appear to have engendered a less deferential approach to commission rulings. The commissions – with the exception of the New South Wales Commission in court session⁶⁴ – tend now to be regarded as no more than specialist tribunals with narrow fields of expertise.

During the first half of the twentieth century, the state Supreme Courts and the High Court paid deference to the state labour courts. As recently as 1960, the High Court confirmed that a privative clause inserted in the *Industrial Arbitration Act 1912–1952 (WA)*⁶⁵ had the effect of limiting the ability of superior courts to review the rulings made by the state Court of Arbitration. The case involved a mining dispute in which a union obtained an *ex parte* order against a mining company prohibiting the company from dismissing its employees or engaging in a 'lock out' at the coal mine in question. The company had threatened its employees that unless a drop in productivity could be reversed, it would be forced to close the mine. Instead of fighting the matter in the Arbitration Court, the company took its grievance straight to the Supreme Court of Western Australia (and thence to the Full Court of the Supreme Court). The Court obliged the company by issuing writs of certiorari and prohibition on the basis that the Arbitration Court had misconstrued the terms of the relevant legislation.

Leading the High Court in overturning the Supreme Court's ruling, Dixon CJ was at pains to emphasise the difference between privative clauses operating in the domain of state law. He said:

It might be thought that the exclusion of certiorari expressed by this provision would afford an insuperable objection to the use of that remedy to quash an order of the Arbitration Court; but reliance is placed upon the restrictive construction placed upon similar provisions in decided cases which say that they do not operate to remove the remedy where the subject matter is outside the scope of the authority of the inferior court.

In this Court the fact that s75 (v) of the Constitution invests jurisdiction in matters in which a writ of prohibition is sought against an officer of the Commonwealth has necessarily affected the interpretation of similar clauses in Commonwealth legislation. Such a provision cannot deny the remedy where it properly lies. But in relation to statutory

as distinguished from constitutional limitations, restrictions or restraints on the authority of a federal tribunal, the provision may be taken into account in ascertaining what the apparent restriction or restraint actually signifies when it is necessary to determine whether the situation is one in which prohibition properly lies.⁶⁶

In the result, Dixon CJ and the rest of the Court noted that the result was ‘unfortunate’ insofar as the impact was to entrench an order made by the Arbitration Court that was only ever intended to be a stop-gap measure. However, the High Court gave effect to the privative clause by holding that the dispute was the province of the Arbitration Court and ‘in the Supreme Court no other question could be considered except invalidity on the ground of complete lack of jurisdiction falling for that reason or otherwise outside the protection of s108’.⁶⁷

At the federal level, where for most of the twentieth century the only reviewing court was the High Court, that court scrutinised more closely the federal Labour Court and Commission. As noted by Dixon CJ above, the High Court was consonant of its powers under s75(v) of the Constitution. It was in the federal jurisdiction that Dixon J (as he then was) enunciated the famous *bona fides* test in *R v Hickman; Ex parte Fox and Clinton*.⁶⁸ As noted earlier, his Honour stated that privative clauses that purport to exclude even certiorari can validly restrict the scope for judicial intervention provided that three criteria are met. The protected decision must constitute a bona fide attempt to exercise the power conferred on the decision maker; it must relate to the subject matter of the legislation; and it must be reasonably capable of reference to the power given to the body.⁶⁹ It is noteworthy, however, that in spite of this deferential dictum, the High Court did intervene in *Hickman’s* case, ruling that the Commission order in that instance was invalidated by jurisdictional error.

In more recent years, controversy has arisen again over the use of privative clauses in state (as distinct from federal) industrial relations legislation. The most important such privative clause is s179 of the *Industrial Relations Act 1996* (NSW). It provides:

- (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.
- (2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.
- (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.
- (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
 - a. the Full Bench of the Commission in Court Session, or
 - b. the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

- (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

Thus, s179 of the *Industrial Relations Act 1996* (NSW) not only protects decisions from actual or *purported* jurisdictional error on the part of the Industrial Relations Commission. It also covers the Industrial Relations Commission in court session. Again, this body is a superior court of record whose judges have the same status as judges of the Supreme Court of New South Wales. Interestingly, jurisdiction is bestowed upon the Industrial Relations Commission in Court session to try defendants for criminal breaches of the *Occupational Health and Safety Act 2000* (NSW). In most instances there is no right of appeal to the superior courts. However, the privative clause means that aggrieved litigants are unable to seek judicial review of these criminal proceedings. The statute confers only limited rights to appeal such cases to the New South Wales Court of Appeal, but the privative clause prevents the judicial review of decisions. This has caused some disquiet in the community.⁷⁰

This provision was considered by the High Court in *Fish v Solution 6 Holdings Limited*.⁷¹ This is an extraordinary case that is very difficult to understand unless considered within the very particular context of state-judicial politics in New South Wales. The case was one in which the plaintiffs attempted to bring an action in the New South Wales Industrial Relations Commission for orders relating to an allegedly unfair contract of employment *and* seeking a declaration that a related share purchase agreement was unfair, harsh and unconscionable. The defendants fought the action by seeking prohibition in the New South Wales Court of Appeal to stop the Commission from hearing the case at all on the basis that it did not have the jurisdiction to entertain an application in a matter that involved a commercial dispute. (The action had to be brought in the Court of Appeal because the Commission in court session has the status of the Supreme Court.) The New South Wales Court of Appeal found unanimously that the privative clause in s179 did not apply where, as in this case, no 'decision or purported decision' of the Commission had yet been made.⁷² Extraordinarily, the Court of Appeal proceeded to grant prohibition on the basis that the Commission had no jurisdiction to rule on matters of commercial disputation. It made the ruling whilst acknowledging that the privative clause in question would have prevented judicial review of the decision had the Commission entered upon the inquiry in question. The Court acknowledged that the Commission would have been within its jurisdiction in deciding to hear the case because the subject matter related in part to an unfair contract of employment.

The High Court, by majority, dismissed the appeal.⁷³ The majority held that the privative clause did not apply in this matter because they held that the Commission did not have jurisdiction to hear commercial disputes and the application to the New South Wales Court of Appeal was instituted before the Commission had had the opportunity to conduct a hearing or make a decision.⁷⁴ Kirby J, in

dissent, argued that the Court of Appeal's approach was inconsistent with a previous line of authority that prohibition would be refused unless the jurisdictional objection had first been advanced and determined before the Commission.⁷⁵ Heydon J also registered a spirited dissent. His Honour argues persuasively that the majority ruling sits uneasily with precedent suggesting that a superior court of record should always be called upon to make its own rulings on matters going to jurisdiction before the intervention of a judicial body of similar or superior rank.⁷⁶

Perhaps the most surprising aspect of the majority ruling is the underlying presumption that the privative clause in question would have protected the proceedings from judicial review had the Commission proceeded to hear the case. The High Court upholds the apparent force of the privative clause, but then permits the complete subversion of the legislative measure by allowing prohibition to issue in the form of a pre-emptive strike! It is an approach that finds more than a few resonances with that adopted in the context of another privative clause, this time enacted in the domain of federal administrative law (for further details see pp. 361–3).

More generally, the joint majority judgment in *Fish* noted that there were a number of presumptions that operate to urge a narrow interpretation of privative clauses enacted in state legislation, including that 'it must . . . be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of [the High] Court under s73 of the Constitution'.⁷⁷ On the broader question of the effect of Parliament including 'purported' decisions within the ambit of the privative clause, Kirby J said (in dissent):

The statutory inclusion of reference to a 'purported decision' could not protect from supervisory orders of the highest court of the State action by the Commission that did not reach the fundamental requirements contemplated by Parliament in protecting 'decisions' and also 'purported decisions'.⁷⁸

With respect, this approach seems to be one that is more consistent with traditional understandings of the role of superior courts in overseeing the operation or application of the rule of law.

Privative clauses in immigration and refugee law

Industrial relations aside, the most extensive debates about the respective roles of the courts and the executive arms of government have occurred in cases involving immigrants and asylum seekers. The conflict between the executive and the judiciary dates back at least to the mid 1980s, when the newly-established Federal Court began to explore the supervisory powers vested in it by the *Administrative Decisions (Judicial Review Act) 1977* (Cth).⁷⁹ Faced with unprecedented incursions into the previously closed world of immigration decision-making,⁸⁰

successive federal governments have attempted to reassert the control of the executive. Changes to law and policy in the immigration field include some of the most extreme examples of privative clauses ever created in Australia. Indeed, it is fair to say that every device for restricting the power of the courts (and for maximising the power of the executive) has been trialled in this field. If the migration cases provide the starkest examples of courts struggling to 'read down' privative clauses, this is undoubtedly a reflection of the fact that contentious migration cases almost invariably involve serious issues of human rights. By the same token, the uncertain status of many migrants and the recent exponential increase in the federal courts' migration case load have combined to generate reluctance in the courts to deny governments the policy outcomes they desire. Many of the victories won by migrants and refugee claimants have been pyrrhic.⁸¹

In the 1980s, the open-ended nature of the migration legislation, which vested sweeping powers in administrators, was found to make decision makers particularly susceptible to judicial review. The courts used the legal principles of procedural fairness or natural justice and notions of legal relevance and reasonableness to overturn decisions and question the way in which decision makers made their rulings. Perhaps the most dramatic response to the blossoming of the 'new administrative law' in the immigration field was the decision in 1989 to 'codify' migration decision-making by replacing the broad discretions with closely circumscribed regulations. While the Minister for Immigration has always retained the power to intervene, ordinary decision makers – and any bodies reviewing their rulings – have been subjected to tighter and tighter controls. In fact, all sorts of devices have been employed to bolster the power of the minister. These include the personalisation of decision-making with the insertion of various clauses that turn on subjective factors such as the 'satisfaction' or 'opinion' of the minister,⁸² and the creation of what are known as 'non-compellable, non-reviewable decisions'.⁸³

The first attempt to constrain expressly the supervisory power of the courts occurred in 1992 in response to judicial rulings that challenged governmental policies aimed at the mandatory detention of certain unlawful non-citizens. The original targets of the laws were 'boat people' from Cambodia. A section that purported to prohibit any court from ordering the release of such persons was struck down by the High Court. The Court held that the effect of the provision was to place the decision to detain solely in the hands of the administration – to the point that it operated to usurp the judicial power vested by the Constitution exclusively in Australia's federal courts.⁸⁴

The controversy surrounding the Cambodian (and other) boat people led in due course to the amendment of the *Migration Act 1958* (Cth) to create a special system for the judicial review of migration decisions in Part 8 of the Act. The first Part 8 of that Act came into force on 1 September 1994, denying migrants access in the Federal Court to either the *Administrative Decisions (Judicial Review) Act 1977* or the *Judiciary Act 1903* (Cth). The curious regime then created spelled out the grounds on which the Federal Court could review migration decisions,

carefully excluding the broader grounds of procedural fairness, relevancy and reasonableness that were thought to be giving the Federal Court too great a licence to intervene in migration cases.⁸⁵

The first Part 8 was designed specifically to limit what was perceived to be abuse of the judicial review process by unmeritorious applicants.⁸⁶ However, despite these legislative measures, the number of migration appeals continued to mount. Cases brought before the High Court in its original jurisdiction increased as plaintiffs sought alternative avenues of redress to compensate for the reduced grounds of review available at the Federal Court.⁸⁷ More surprisingly, the Federal Court also experienced an increase in applications for review, despite the restrictive legislative provisions.

In *Abebe v Commonwealth*,⁸⁸ the applicant argued that the provisions amounted to an unconstitutional attempt to constrain the powers of the Federal Court. Ms Abebe also sought prerogative relief under section 75(v) of the Constitution, on the ground that the tribunal's decision in her case was unlawful by reason of unreasonableness. By a narrow majority of four to three,⁸⁹ the High Court ruled that Parliament could legislate to prevent the Federal Court from reviewing part of a legal 'matter', confining its jurisdiction to deal with only parts of a legal problem.⁹⁰ The majority of the Court further held that it was within Parliament's ability to narrow the exercise of judicial power by the Federal Court through Part 8 of the *Migration Act*, and to restrict those decisions available for judicial review.

Despite the judicial deference evidenced in *Abebe*, there appeared still to be significant scope for judicial review of migration decisions. Accordingly, the government repealed its first Part 8 experiment, replacing it with a privative clause regime modelled on the legislation at the heart of the *Hickman* case. Section 474 of the *Migration Act 1958* (Cth) states:

A privative clause decision:

- a. is final and conclusive, and
- b. shall not be challenged, appealed against, reviewed, quashed or called into question in any court; and
- c. is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

A 'privative clause decision' is defined in s474(2) as a decision of an administrative character made under the Act or the Regulations. Most decisions relating to migration were intended to be privative clause decisions. The intent of the legislation was to exclude review not only by the Federal Court, but also by the High Court, notwithstanding its Constitutionally-protected review powers. Although the government cannot entirely oust the jurisdiction of the High Court,⁹¹ it can signal its preference that the Court not intervene in certain classes of dispute.

It is clear from the construction of the privative clause that the government had believed it would be interpreted in light of the *Hickman* principle, as it understood that principle to operate.⁹² The government probably had good reason to be

confident in its new privative clause scheme, having regard to the High Court's deferential approach to the former Part 8.

The High Court's interpretation of the new Part 8 in *Plaintiff S157* is a curious mix of deference and assertion. While holding that the privative clause regime was indeed constitutional, the Court nonetheless stated that *any* tribunal decision evidencing jurisdictional error would fall outside the privative clause scheme and therefore be open to review by either the Federal or High Courts.⁹³ The Court stated firmly a failure to exercise jurisdiction or an excess of the jurisdiction conferred by the Act is 'regarded, in law, as no decision at all . . . Thus, if . . . the question cannot properly be described in the terms used in s474(2) as "a decision made under this Act" . . . [it] is, thus, not a "privative clause decision" as defined in ss474(2) and (3) of the Act'.⁹⁴

The effect of this pronouncement is to expand the concept of jurisdictional error and to hold that such an error vitiates a decision.

The deferential strain in the judgment is illustrated by the fact that the privative clause scheme was held to be constitutional. Therefore, Part 8 and the privative clause remain in place in the *Migration Act*, though the High Court has severely reduced their applicability.⁹⁵ Subsequent decisions by that Court suggest that a particularly hard line is being taken against decisions in which there has either been a departure from the strict terms of the legislation and/or a failure to follow fair procedures.⁹⁶

The future of privative clauses?

The desire in governments to make administrative decisions genuinely impervious to the meddling of courts has not diminished. Although never enacted,⁹⁷ the United Kingdom Parliament was asked to consider a clause in 2003 that sought to extend the prohibition on judicial review to:

. . . prevent a court, in particular, from entertaining proceedings to determine whether a *purported determination, decision or action* of the Tribunal was a nullity by reason of—

- (i) lack of jurisdiction,
- (ii) irregularity,
- (iii) error of law,
- (iv) breach of natural justice, or
- (v) any other matter . . .⁹⁸

Critically, the proposed subsection provided that the privative clause would cover not just administrative decisions or conduct, but also decisions or conduct affected by fundamental legal error—hence the reference to 'purported decisions'. This was an entirely new development and caused great consternation because courts in the United Kingdom (and, it might be interpolated, in Australia) have traditionally held that a decision that is infected by jurisdictional error is, in reality, no decision at all. The result is that a privative clause designed to immunise

‘decisions’ from judicial review does not apply to a failed attempt to make a decision.⁹⁹ In light of this, Professor Jowell observed that ‘[t]hose who drafted [the privative clause] must have studied *Anisminic* and other cases very carefully, as there is no room to doubt that this ouster clause is judge-proof.’¹⁰⁰ In practical terms, therefore, this privative clause (if interpreted literally) would completely immunise the specified class of administrative action (except on the very narrow grounds provided, viz. bad faith).

Shortly after this proposal was made in the United Kingdom, a new Bill came before the Commonwealth Parliament, proposing a similar amendment to the privative clause in s474 of the *Migration Act 1958* (Cth).¹⁰¹ The Australian Bill proposed to expand the definition of ‘privative clause’ to include:

- (b) a *purported* decision that would be a privative clause decision within the meaning of subsection 474(2) if there had not been:
 - (i) a failure to exercise jurisdiction; or
 - (ii) an excess of jurisdiction;
 in the making of the purported decision.¹⁰²

The key term is, again, ‘purported decision’. The Explanatory Memorandum stated: ‘A “purported decision” is a decision that would be a privative clause decision, had it not been affected by jurisdictional error.’¹⁰³ If accepted, this would clearly expand the ambit of administrative action falling within the scope of the privative clause. The accompanying explanatory material also sought to make clear that this amendment was aimed at closing the perceived loop-hole identified in *Plaintiff S157*,¹⁰⁴ by bringing jurisdictional errors within the scope of the privative clause.¹⁰⁵ This Bill was never fully debated, nor was it put to a vote. However, some aspects were included in the *Migration Litigation Reform Act 2005* (Cth), which came into force on 1 December 2005. The references to *purported* decisions remain in the context of denying jurisdiction to the inferior federal courts.

Why is this new form of privative clause, which seeks to bring within its ambit ‘purported’ decisions, so significant? Such provisions are a manifestation of a new type of privative clause that parliaments are starting to consider in order to make particular classes of administrative decision ‘judge-proof’. It is more draconian than anything previously proposed, in the sense that it seems intended to hive off entire categories of administrative action from judicial supervision in respect of almost every conceivable administrative error.

Had the United Kingdom privative clause been enacted, it would, almost certainly, have caused a constitutional crisis. Lord Woolf (as he then was) described this provision as ‘so inconsistent with the spirit of mutual respect between the different arms of government’, and such an affront to the rule of law, that the courts may have found it ineffective in achieving its aims.¹⁰⁶ In making this statement, Lord Woolf seemed to be alluding to the United Kingdom courts asserting a *Marbury v Madison*¹⁰⁷ type of power to strike down legislation. Legal orthodoxy has always posited that no such power exists in the United Kingdom courts.¹⁰⁸

Of course, the situation in Australia has always been different: Section 75 of the Commonwealth Constitution clearly gives the High Court power to invalidate legislation that is found to be inconsistent with the Constitution itself. What Australian administrative lawyers can learn from the debate in the UK relates to how the High Court might be likely to approach this nascent breed of privative clause.

It appears that this new type of privative clause is *intended* to force the courts to confront the will of Parliament more directly. As we stated earlier in this chapter, one of the central justifications used by courts for their narrow interpretation of privative clauses has been that they are vindicating the will of Parliament. By explicitly stating that ‘purported decisions’ are also included within the ambit of the relevant privative clause, it would be very difficult for the courts to state – as they have on numerous occasions – that an administrative decision infected with jurisdictional error is no real decision at all and, therefore, such an administrative decision does not fall within the scope of the privative clause. To take that approach, courts would need to depart even further from the natural and ordinary meaning of the privative clause itself.

One method of dealing with such a privative clause is to avoid the privative clause in the manner encouraged by the New South Wales Court of Appeal (and endorsed by the majority of the High Court) in the *Solution 6 Holdings* case.¹⁰⁹ In that case, the Court of Appeal granted relief in the form of prohibition, finding that the privative clause (which included ‘purported’ decisions) did not operate prior to a decision being made. This ‘pre-emptive strike’ approach neatly circumvents the privative clause. However, such a course of action would presumably only be available before the relevant tribunal has had the opportunity to reach its decision. In the vast majority of cases for which judicial review is sought, this would be of little assistance.

We would argue, therefore, that the High Court must eventually confront such a privative clause head on. When this occurs, it will face a stark choice: either it must give the privative clause its full application, thereby enfeebling the Court’s own role and its constitutional position; or it must invoke some higher principle to refuse to give full force to the terms of the privative clause. Four fundamental points need to be made here.

First, if the privative clause applies to a court established under Chapter III of the Commonwealth Constitution, there would be inevitable constitutional friction. As previously stated, s75(v) of the Constitution enshrines the High Court’s power to grant, as against an officer of the Commonwealth, the writs of mandamus and prohibition, or an injunction. If the privative clause were allowed to operate in accordance with its ordinary meaning, this would require a highly restrictive interpretation of s75(v) of the Constitution. We submit that this would run counter to accepted precedent, and such a development would be undesirable.

Second, a privative clause of this nature, if interpreted literally, would be inconsistent with the principle of the separation of powers. In essence, the separation of

powers is a mechanism to avert the tyranny which could otherwise result from the confluence of power in any one arm of government. As Montesquieu observed:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive.¹¹⁰

The separation of powers, as a principle, has been found to be embedded in the text and structure of the Federal Constitution.¹¹¹

There was considerable concern that the United Kingdom's proposed privative clause breached the separation of powers principle.¹¹² Like the Australian proposal, it *explicitly* tried to exclude the courts' 'supervisory or other jurisdiction (whether statutory or inherent)' in respect of a specified class of administrative decisions. Such a provision constitutes a direct threat to the separation of powers because, if permitted to operate in this way, it prevents the courts from fulfilling their constitutional role. As such, we believe that the High Court in particular would be very reluctant to permit a privative clause to operate in this manner.

Third, it has been our argument throughout this chapter that if (as was proposed in the two examples considered in this section) a new form of privative clause is directed towards administrative decision-making that affected individuals' fundamental rights, courts are less likely to permit its full operation. Both of the exemplars of the new breed of privative clause would have operated in the migration field, and would even have included decisions to refuse a person refugee status.¹¹³ It is quite proper for a court to look to the subject matter to which a legislative provision is directed in the process of statutory interpretation. The High Court has affirmed the correctness of this approach in many situations. For instance, in finding that the requirements of natural justice should not be taken to be excluded in respect of decisions made under the *Migration Act 1958* (Cth), McHugh J referred to the following relevant factor:

Here, the nature of the interest is the prosecutor's personal security. The consequences for him include returning to face serious threats to his personal security, if not to his life. The subject matter of the legislation is undeniably important – it enacts Australia's international obligations towards some of the world's most vulnerable citizens.¹¹⁴

Finally, this new form of privative clause offends the rule of law. One of the fundamental elements of the rule of law, as traditionally conceived, has always been that government power should be exercised by clearly articulated legislation as distinct from executive decrees.¹¹⁵ By immunising jurisdictional error from curial correction by way of judicial review, the effective discretion of administrative decision makers is increased exponentially. As Lord Denning stated: 'If [administrative] tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.'¹¹⁶

In relation to the proposed United Kingdom's privative clause, Lord Steyn stated extra-judicially: 'The Bill attempts to immunise manifest illegality. It is an astonishing measure. It is contrary to the rule of law.'¹¹⁷ The same argument could, of course, be made in relation to the Australian example considered in this part. Dixon J has stated, in obiter, that the rule of law is 'an assumption' of the Australian Constitution.¹¹⁸ The High Court of Australia has not yet been obliged to decide whether this means that it could or should invalidate a statutory provision found to contravene the rule of law.¹¹⁹ It may be that, if faced with a privative clause such as those outlined in this part, the Court would be forced to address this question and Dixon J's argument might be used to invalidate such a provision, assuming it is found to contravene the rule of law. Kirby J makes this point with customary eloquence in *Fish v Solution 6 Holdings Limited*.¹²⁰ Referring to the inclusion of 'purported' decisions within the scope of the privative clause in s179 of the *Industrial Relations Act 1996* (NSW), Kirby J stated:

The rule of law, which is an acknowledged implication of the Australian Constitution, imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that basal standard.¹²¹

For all of these reasons, we believe that the courts will continue to resist strongly any attempt to preclude them from engaging in judicial review to remedy administrative decisions infected with jurisdictional error.

Administrative law judicial remedies

Stephen Gageler

A rational system of law would start with matters of substance – it would prescribe legal norms. It would separately prescribe legal remedies for breach of those legal norms. It would provide a single procedure for a person claiming to be affected by a breach of a legal norm to apply to a court for a legal remedy. It would ultimately allow the court to grant whatever legal remedy was appropriate to the breach found. Unfortunately, a rational system of that nature has not been the legacy of the common law which has instead fastened ‘not upon principles but upon remedies’.¹ Much of the development of administrative law in the last 150 years has involved attempts in various ways to create a system in which principle prevails and in which remedies are functional and subservient.

The historical legacy

It is sometimes forgotten that the whole of the common law was once administered through a system of ‘writs’. The writs were numerous but finite in number. Each had its own ‘uncouth name’.² Each contained a unique command of the sovereign. Each was founded on a ‘form of action’ expressed or ‘endorsed’ on the writ in rigid and formulaic terms. The substantive law was constrained to fit the formulaic terms of the form of action but often strained against them. When a form of action failed to meet the demands of justice, the form prevailed and a ‘fiction’ was invented. There would be said to be an ‘implied’ or ‘constructive’ fulfillment of an otherwise unfulfilled element of the form of action.

Supplementing the common law and to some extent ameliorating its rigidity was the separately administered body of law known as ‘equity’. Equity had its own bevy of writs expressing still more commands of the sovereign. And equity

administered those writs according to its own canon of 'equitable principle'. The broadest and most flexible of the writs in equity was the 'writ of injunction': 'a judicial process whereby a party was required to do a particular thing or refrain from doing a particular thing according to the exigency of the writ'.³ A writ of injunction was available not only to redress a legal wrong where the common law was perceived as failing to provide an adequate remedy but also to restrain the 'unconscionable' exercise of a legal right.

All of the writs were commands of the sovereign to her 'subjects'. None of them was a command of the sovereign to herself or to her 'servants' or 'ministers' acting as such as distinct from acting as holders of a separate office. It was in this sense that the sovereign and derivatively her central government 'could do no wrong'. A claim that the sovereign or her government had infringed a legal right of the subject recognised by the common law could be made against the sovereign but only with the sovereign's permission or 'fiat' on a 'petition of right'. The result would be a 'declaration of right' which the sovereign could choose to honour.

A series of statutory reforms in the United Kingdom in the middle part of the nineteenth century culminated in 1875 with the abolition in proceedings between 'subject' and 'subject' of the common law 'forms of action' and the simultaneous assimilation of law and equity.⁴ The multiple writs were replaced with a single writ of summons which brought the disputing 'subjects' before the court to present their cases and receive whatever legal remedy was appropriate. Statutory reform also provided for a general remedy of a declaration of right, something unknown to the common law and to equity alike. The result, as recognised by Maitland writing in the idiom of his day in the early part of the twentieth century, was 'an important improvement in the law': 'for the attention [was] freed from the complexity of conflicting and overlapping systems of precedents and [could] be directed to the real problem of what [were] the rights between man and man, what is the substantive law'.⁵ The procedural reform thus wrought by statute facilitated the significant judicial and academic development of the substantive law of contract and of tort that occurred in the late part of the nineteenth century and the early part of the twentieth century. More recently, it has facilitated the judicial and academic development of the substantive law of restitution. Once labelled 'quasi-contract' and constrained to fit the elements of the action of '*indebitatus assumpsit*', restitution has been cut loose from the fiction of an implied contract to develop as a discrete body of jurisprudence.⁶

Left untouched by the statutory reforms of the mid-nineteenth century and remaining 'isolated survivors from the old era'⁷ were the 'prerogative writs'. These were common law writs designed not to address legal rights in proceedings between 'subject' and 'subject' but to convey the commands of the sovereign to officers who exercised or purported to exercise authority on the sovereign's behalf. The proceedings in which the prerogative writs issued were not 'inter partes' but 'ex parte'; a 'subject' would invoke the jurisdiction of the common law court by seeking the issue in the name of the sovereign of an 'order nisi' calling upon the officer as 'respondent' to 'show cause' why a particular writ should not

issue on grounds stated in the order. The 'order nisi' would issue only if the court was sufficiently persuaded at the outset that a ground existed for the issue of the writ. The order nisi would subsequently be made 'absolute' if the ground for its issue remained unanswered after the officer had had an opportunity to show cause.

Chief among the prerogative writs were the writs of 'mandamus', 'prohibition' and 'certiorari'. Mandamus (from the Latin 'to charge or command') was able to be issued to any officer who was charged with the performance of a public duty. It issued upon proof of a refusal on the part of the officer to whom it was directed to comply with a demand that the officer perform the duty. The writ in form charged or commanded the officer to perform the duty. Prohibition and certiorari were slightly more limited in their reach. They were each able to be issued only to an officer who exercised some 'judicial' function. The notion of a 'judicial function', however, extended to an extensive range of what would now be regarded as administrative functions then reposed in justices of the peace. The justices 'did administrative work under judicial forms'.⁸ Prohibition was simply a restraining order. It prohibited the judicial officer from doing some threatened act which was beyond the judicial authority or 'jurisdiction' of the officer. Certiorari (from the Latin 'to be informed') required the judicial officer to produce the 'record' of proceedings before the officer so that its correctness could be reviewed and the legal effect of any resulting exercise or purported exercise of authority by the officer could be 'quashed' if it could be shown that the officer exceeded his jurisdiction or if it could be shown on the face of the 'record' that his decision was otherwise legally erroneous.

Likened by Lord Denning in the middle of the twentieth century to a 'pick and shovel',⁹ the prerogative writs were adapted in the tradition of the common law to meet the demands of the modern administrative state. Mandamus was extended to cover not only an actual refusal to perform a duty following an actual demand but also a 'constructive' refusal to perform a duty notwithstanding a purported attempt to do so. This would occur where the purported performance of the duty failed to comply with some requirement essential to its valid or effectual performance. In such a case the officer could 'be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him'.¹⁰ Certiorari and prohibition were extended so as to be able to issue not only to officers exercising 'judicial' authority but to officers exercising 'quasi-judicial' authority. Devoid of any real meaning, the term 'quasi-judicial' was itself extended to encompass any authority to determine questions affecting legal rights where the repository had a duty to 'act judicially'¹¹ and came ultimately to be treated as superfluous. The explanation for this extension was that a duty to 'act judicially' sufficient to attract certiorari and prohibition was automatically imposed upon any repository of power to affect legal rights.¹² What constituted the 'record' for the purposes of certiorari also underwent a brief but significant expansion¹³ only to be superseded by the revelation in *Anisminic Ltd v Foreign Compensation Commission*¹⁴ that any error of law would result in the

officer exceeding jurisdiction. The explanation was that if the officer mistook the law to be applied to the facts as found by the officer it followed that the officer 'must have asked the wrong question' and that the question the officer asked was one into which he or she 'was not empowered to inquire and so had no jurisdiction to determine'.¹⁵ It therefore ceased to matter whether or not the error of law was on the face of the record. Indeed, it became redundant to describe an error of law as resulting in the officer exceeding jurisdiction. Any error of law could result in prohibition or certiorari being issued to restrain or correct it.

Uneasily coexisting with the prerogative writs were now the statutory remedy of declaration and the equitable remedy of injunction both available through the separate procedure of a writ of summons. The availability of the former to declare the validity or invalidity of acts purporting to be performed on behalf of the sovereign was confirmed as early as 1911.¹⁶ By the 1950s it had come to be regarded as an accepted method of challenging administrative action and as having the potential to usurp the writ of certiorari.¹⁷ The availability of the latter to prohibit or compel administrative action had the potential to usurp the writs of mandamus and prohibition. However, in practice the utility of injunctions tended to be limited by two factors. One was more restrictive rules of standing than those which existed for the issue of either mandamus or prohibition: whereas mandamus and prohibition could each be sought by a 'stranger', the ability to seek an injunction was for the most part confined to a person who could demonstrate that the action sought to be restrained infringed a private right.¹⁸ The other was the lack of availability of injunctive relief against a Minister or other officer of the sovereign.

The result, as summarised by Professor de Smith in the 1970s, was that:¹⁹

Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action.

Statutory reform in the United Kingdom

Although the writs of mandamus, certiorari and prohibition were replaced in 1938 with 'orders' having the same name and scope,²⁰ significant statutory reform of the legal remedies available in administrative law in the United Kingdom did not occur until 1977, more than a century after the more general reforms of the mid-nineteenth century. What has since come to be regarded as a reform as momentous for the relationship between the citizen and the state as that which occurred a century earlier in relation to proceedings between 'subject' and 'subject' occurred in that year with the ostensibly modest implementation by rules

of court of the single procedure of an 'application for judicial review' able to be commenced by an applicant with a 'sufficient interest in the matter to which the application relates'.²¹ The nomenclature of the prerogative writs was for a time preserved. So too were the remedies of declaration and injunction. But each was made a discretionary form of relief available as a potential outcome of a single procedure. There was thenceforth to be a single application for 'an order of mandamus, prohibition or certiorari' which was combined as appropriate with an application for a declaration or injunction. The latter could now always be granted on an application for judicial review, but only where the court considered it 'just and convenient' to do so. The procedure for making the new application for judicial review differed from that applicable to an ordinary action in that it required the permission or leave of the court to proceed and the time limits within which the proceeding could be commenced were shorter.

The consequence of this procedural reform, as interpreted by the House of Lords in 1983 in *O'Reilly v Mackman*,²² was to facilitate the creation of a distinct field of 'public law' now regulated by the distinct procedure of 'judicial review' as a result of which the court could order 'whichever remedy is found to be most appropriate in the light of what has emerged upon the hearing of the application'.²³ The general rule was laid down that it was to be regarded as 'contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action' including by way of ordinary action simply for a declaration or injunction.²⁴ Within a relatively short time, and as the direct result of the procedural changes which had taken place, there occurred a substantial merger of the rules for standing for seeking the various remedies that were available on an application for an order of review²⁵ and injunctive relief was accepted as having become available in such an application against a minister or other officer of the sovereign.²⁶ Further reform of the rules of court in 2000²⁷ resulted in a modernisation of nomenclature and with it a falling away of old distinctions: certiorari has become simply a 'quashing order'; prohibition a 'prohibitory order' and mandamus a 'mandatory order'.²⁸

This distinction between 'public law' and 'private law' which emerged in *O'Reilly v Mackman* has been the subject of much debate and has been criticised as itself introducing procedural complexity. Procedurally, its strictness has been modified by later developments.²⁹

The distinction which emerged in *O'Reilly v Mackman* was described the year following as having 'recently been imported into the law of England from countries which . . . have separate systems concerning public and private law'.³⁰ The reference was to European systems into which the law of the United Kingdom has since become increasingly integrated. The distinction has now taken firm root in the discourse of substantive legal doctrine.³¹ It has become possible, for example, to speak of 'general principles of public law'³² just as it has become possible to speak of 'the common law of the European Union'.³³ The significant point for

present purposes is that the distinction was one the articulation of which was able to be initiated not through any reform of the substance of the law but through a reform of procedure.

Statutory reform in Australia

At the time of federation, and for much of the twentieth century, the Supreme Courts of each state retained the prerogative writ procedures of the common law. As in the United Kingdom, the statutory remedy of declaration and the equitable remedy of injunction were both available.

While it is unprofitable to examine the historical development in each state, because of its proximity to the changes which were shortly to occur both in the United Kingdom and at the Commonwealth level, the enactment of the *Supreme Court Act 1970* (NSW) is worthy of note. Where formerly the Supreme Court had jurisdiction to issue writs of mandamus, prohibition or certiorari, that jurisdiction was replaced by a jurisdiction to grant remedies of the same nature by order in ordinary proceedings commenced by writ of summons.³⁴ In addition, it was declared that the jurisdiction of the Supreme Court to make an order in the nature of certiorari extended to quashing an ultimate determination of a court or tribunal made on the basis of an error of law appearing on the face of the record and that the 'record' for this purpose included the reasons expressed by the court or tribunal for making the ultimate determination.³⁵ At the same time, the Supreme Court was separately empowered to 'order any person to fulfill any duty in the fulfillment of which the person seeking the order is personally interested'³⁶ and confirmed in its general power to make declarations.³⁷ The consequence, as judicially expounded almost immediately, was to deny continuing relevance to the 'adjectival aspects of the prerogative writs', to allow 'relief of at least equivalent significance [to be] more readily available to be sought under one or other of the new provisions' and thereby to allow the Supreme Court to direct its attention 'to the matter of substance involved in the dispute between the parties' and to avoid being distracted by the 'tedious and profitless task' of examining 'the authorities, old and new, upon adjectival considerations affecting the grant of the writ[s]'.³⁸

Removal of the procedural complications attendant on the grant of the prerogative writs also underlay the statutory development of a different nature which occurred at the Commonwealth level with the enactment in the same year as the statutory reform in the United Kingdom of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).³⁹ That Act conferred on the newly-created Federal Court of Australia jurisdiction to entertain an 'application for an order of review' by a 'person aggrieved' in respect of a 'decision' having an 'administrative character' made under a Commonwealth enactment.

The structure of the *Administrative Decisions (Judicial Review) Act* was to a very large extent a reflection of the prerogative writs it was designed to supersede.

It made provision for not one but three kinds of application for an order of review each of which was capable of being made only on specified 'grounds'. The grounds largely replicated those which had by then come to be recognised at common law. The kinds of application for which provision was made were: by s5 an application for an order of review in respect of a decision that had already been made (in substance statutory certiorari); by s6 an application for an order of review in respect of conduct in which a person had been or was engaged for the purpose of making a decision (in substance statutory prohibition); and an application for an order of review in respect of a failure to make a decision (in substance statutory mandamus). Each kind of application then gave rise to its own range of remedial orders to be available, in the exercise of judicial discretion, upon the establishment of any one or more specified grounds of review. The remedies so provided were designed to be simple, broad and flexible.

The key provision in this respect was s16. It provided:

- (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:
 - a. an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies;
 - b. an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
 - c. an order declaring the rights of the parties in respect of any matter to which the decision relates;
 - d. an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.
- (2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Court may, in its discretion, make either or both of the following orders:
 - a. an order declaring the rights of the parties in respect of any matter to which the conduct relates;
 - b. an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.
- (3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Court may, in its discretion, make all or any of the following orders:
 - a. an order directing the making of the decision;
 - b. an order declaring the rights of the parties in relation to the making of the decision;
 - c. an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.⁴⁰

Commenting on the scope of the declaratory and injunctive powers conferred by s16(1)(c) and (d) – in terms identical to each of s16(2)(a) and (b) and s16(3)(b) and (c) – the High Court said in *Park Oh Ho v Minister for Immigration and Ethnic Affairs*:⁴¹

The legislative purpose to be discerned in the conferral by s16(1)(c) and (d) of power to grant declaratory and injunctive relief in addition to the power to quash or set aside (with effect from a specified date) an impugned decision is clear. It is to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is 'necessary to do justice between the parties' (s16(1)(d)) and which will avoid unnecessary re-litigation between the parties of those issues. The scope of the powers to make orders which the sub-section confers should not, in the context of that legislative purpose, be constricted by undue technicality. In particular, the phrase 'any matter to which the decision relates' in s16(1)(c) should be construed as encompassing any matter which is so related to, in the sense of connected with, the impugned decision that it is appropriate that it be dealt with by the grant of declaratory relief in judicial proceedings for the review of the propriety of that decision. In a case such as the present where the impugned decision is a deportation order which has been found to have been null and void ab initio, the lawfulness of a period of forced imprisonment which was based solely on the void order could, depending on the circumstances, be such a matter. If the applicant in such a case is still held in custody by persons under the control of the respondent decision maker, an injunctive order that the respondent do whatever be necessary to procure the applicant's release could be properly considered as 'necessary to do justice between the parties'. In that regard, it is relevant to mention that both declaratory and injunctive orders, as distinct from an order for damages, can readily be seen as appropriate remedies of judicial 'review' of administrative decisions and actions.

Wide though they were proclaimed to be, the ancillary remedial powers so conferred on the Federal Court were not left entirely at large. The express qualification on the power of the Federal Court under s16(1)(d), s16(2)(b) and s16(3)(c) to make orders in the nature of injunctions or statutory prohibition, expressly limited to those which 'the Court considers necessary to do justice between the parties', was held to refer to 'justice according to law'.⁴² The power was therefore interpreted as authorising no relief to which a person would not be entitled at general law.

Although for a time hugely influential on the development of substantive administrative law throughout Australia, and recently replicated in two states, the significance of the *Administrative Decisions (Judicial Review) Act* has receded over the past two decades. This has been under three main influences. The first has been recognition of the limitations inherent in its jurisdictional requirement for a 'decision' of an 'administrative character'.⁴³ The second has been the concurrent conferral on the Federal Court by amendment to the *Judiciary Act 1903* (Cth) of other bases of jurisdiction which are not subject to those limitations: in 1983 the Federal Court was invested with jurisdiction in terms equivalent to that conferred on the High Court by s75(v) of the Constitution⁴⁴ and in 1997 its jurisdiction was further expanded to include any matter arising under a law of the Commonwealth

Parliament.⁴⁵ The third and more pervasive influence has been the legislative withdrawal of a range of decisions from the jurisdiction conferred on the Federal Court by the *Administrative Decisions (Judicial Review) Act* particularly in the field of migration.

Refocus on the Constitution

A result of first the conferral and then the contraction of the jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act* has been to stimulate a refocus on the original jurisdiction conferred on the High Court by s75 of the Constitution. Two aspects of that jurisdiction have particular significance to administrative law. By virtue of s75(iii) of the Constitution, the High Court has original jurisdiction in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party. By virtue of s75(v) of the Constitution the High Court also has original jurisdiction in all matters in which 'a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.

Where its original jurisdiction is invoked, the High Court has always had statutory power under the *Judiciary Act* to make and pronounce all orders as may be 'necessary for doing complete justice' in the matter before it⁴⁶ and, in addition, has always been specifically empowered to make orders which include 'commanding the performance of any duty by any person holding office under the Commonwealth'.⁴⁷ Before the enactment of the *Administrative Decisions (Judicial Review) Act*, the availability of statutory relief in the exercise of the original jurisdiction conferred on the High Court by s75(iii) of the Constitution had come to be recognised as providing a sufficient foundation for an action in the original jurisdiction of the High Court seeking declaratory or injunctive relief against a Commonwealth administrator.⁴⁸

However, it is in the irreducible minimum of the remedies which define the original jurisdiction of the High Court under s75(v) of the Constitution that the essential nature of the judicial review of administrative action has been found to exist. In the face of a privative clause expressed to render a decision 'final and conclusive', incapable of 'challenge' or 'review' and 'not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any count',⁴⁹ the High Court in *Plaintiff S157/2002 v Commonwealth*⁵⁰ recalled and acted upon the observation of Dixon J in *R v Hickman; Ex parte Fox and Clinton*:⁵¹

It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution . . . It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.

The result was to confirm what had been expressed earlier in more general terms by Griffith CJ in *The Tramways Case [No 1]*:⁵² that the consequence of the entrenched position of s75(v) is that 'any act done under the asserted authority of a Commonwealth law may be impeached in appropriate proceedings on the ground that it was done in excess of the authority' and that the Commonwealth Parliament 'cannot take away this right by any form of words or any device'.

The exegesis of the varying circumstances in which the limited remedies for which s75(v) of the Constitution provides are available has influenced the High Court during the last decade in shaping the content of the substantive law not only in matters within its original jurisdiction but more generally in matters in which it has exercised appellate jurisdiction. A number of particular features of s75(v) have been highly influential.

The first is that s75(v) is expressed not in terms of a substantive principle but in terms of a conferral of jurisdiction on the High Court of inviolable constitutional status to grant specified remedial orders. What were once 'prerogative writs' have become 'constitutional writs'. Under that guise what has occurred yet again is that the form of remedy for which the ancient writs of mandamus and prohibition provide has both driven and constrained the development of substantive legal principle.

The second is that the 'officer of the Commonwealth' against whom relief may be sought under s75(v) includes a Commonwealth judicial officer as well as a Commonwealth executive or administrative officer. The same jurisdiction that allows the High Court to grant mandamus or prohibition to a Commonwealth administrator allows it to grant mandamus or prohibition to the Federal Court or to the Family Court of Australia.⁵³ Any explanation of the nature of the conduct to which the relief available under s75(v) can be directed must therefore be capable of equal application to judicial acts as well as administrative acts. Whereas the terminology of 'ultra vires' is appropriate to describe administrative acts undertaken without authority, it has never been applied to unauthorised judicial acts. The terminology of 'jurisdictional error', on the other hand, is not only traditional but apposite to describe both unauthorised administrative acts and unauthorised judicial acts. In the context of Commonwealth judicial officers, the terminology of 'jurisdictional error' is particularly apposite to describe an unauthorised act of such an officer given the terms in which s77 of the Constitution confers on the Commonwealth Parliament power to make laws '[d]efining the jurisdiction of any federal court other than the High Court'.

It is therefore unsurprising that the refocus on s75(v) has brought with it a return to the traditional conception of the writs of mandamus and prohibition being concerned with 'jurisdictional error' sometimes referred to as either a 'want of jurisdiction' or an 'excess of jurisdiction'. What 'jurisdictional error' in every case amounts to is a breach of some express or implied legislative condition which defines the ambit and powers of the Commonwealth judicial officer or Commonwealth executive or administrative officer to whom the writ is directed.⁵⁴

The necessary retention of the concept of ‘jurisdictional error’ as applicable to Commonwealth judicial officers and Commonwealth executive or administrative officers alike has also inhibited acceptance in Australia of the broader implication of *Anisminic Ltd v Foreign Compensation Commission* that any error of law results in an officer exceeding jurisdiction. As explained in *Craig v South Australia*, with faint but nevertheless significant allusion to the constitutional underpinning, it is ‘important to bear in mind a critical distinction which exists between administrative tribunals and courts of law’.⁵⁵

The third of the features of s75(v) of the Constitution to have had a bearing on the development of administrative law is the absence from the collocation of remedies of a writ of certiorari. This had two influences. One has been to expand the scope of prohibition and mandamus to the point where one or other of them is available to challenge what is in fact a final decision – prohibition on the basis that the decision has ongoing legal consequences and mandamus on the basis that a decision affected by ‘jurisdictional error’ is in law no decision at all with the consequence that any duty pursuant to which the decision was purportedly made remains unperformed. The other influence has been substantially to negate the development of any separate role for that writ by treating its statutory availability by virtue of the *Judiciary Act* as simply ancillary to the grant of relief under s75(v)⁵⁶ and by reducing its scope to issue for error of law on the face of the record by minimising almost to the point of oblivion what is to constitute the ‘record’ for that purpose.⁵⁷

Finally, there is the enigmatic presence in s75(v) of the remedy of injunction. A more generous approach to standing to seek injunctive as well as declaratory relief has come to prevail in Australia, requiring not that a plaintiff seek to vindicate a private right but only that the plaintiff have ‘a special interest in the subject matter of the action’.⁵⁸ In addition, less inhibition has been shown to granting one or other of those additional forms of relief in proceedings principally for prerogative or constitutional writs in which the writ has been found wanting.⁵⁹ The result has been to allow a declaration or injunction to be granted by reference to equitable principle ‘on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies otherwise available) to vindicate the public interest in the maintenance of due administration’.⁶⁰ Indeed, it has been pointed out that there has never been in Australia any inhibition on the grant of an injunction to a minister who is for the purposes of s75(v) just another officer of the Commonwealth.⁶¹

The ideal of the triumph of substance over procedure remains elusive. The step taken for better or for worse in *O’Reilly v Mackman* has not been replicated in Australia. Here no sharp distinction between ‘public law’ and a proceeding by way of ‘ordinary action’ has been drawn. Rather, ‘[s]ignificant questions of public law . . . are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes’.⁶² This is in very large part because ‘in Australia, the existence

of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems . . .'.⁶³

The promise of procedural simplicity and flexible remedies held out by the *Administrative Decisions (Judicial Review) Act* has been unfulfilled to the extent of its jurisdictional limitations. Yet refocus on s75(v) of the Constitution has allowed a different paradigm of judicial review to emerge in Australia: one focused under the rubric of 'jurisdictional error' on the provision of remedies for breach of a legislative condition which defines the ambit and powers of the Commonwealth judicial officer or Commonwealth executive or administrative officer.

Notes

Foreword

- 1 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 per Brennan J (as he then was)

Chapter 1

- 1 See AW Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347, who argues that the collective rights offered by administrative law are developing into a new and distinct human right. The Chief Justice of Canada took a similar view when she suggested that people regard the ability to challenge and seek a justification for administrative decisions as a 'right': Hon B McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1998) 12, *Canadian Journal of Administrative Law and Practice* 171 at 174.
- 2 Much of this list is drawn from M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, LBC Information Services, 2004) 1.
- 3 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J).
- 4 [1891] AC 173.
- 5 *ibid*, 179 (footnotes omitted).
- 6 See, for example, *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 532; *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391 at 447; *Re Minister for Immigration and Multicultural Affairs*; *Ex parte S20/2002* (2003) 198 ALR 59 at [54].
- 7 DJ Galligan, *Discretionary Powers* (Clarendon Press, 1986) 4.
- 8 See, for example, Aronson, Dyer and Groves, n2 above, 85–93.
- 9 The analysis of privative clauses by Crock and Santow in chapter 22 shows just how hard it can be for parliaments to undermine these foundational assumptions in an effective manner.
- 10 A leading English work on judicial review has long maintained that the control of government power lies at the 'heart' of all administrative law: HWR Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, 2004) 4.
- 11 (1992) 177 CLR 106.
- 12 *ibid*, 138.
- 13 Commonwealth Constitution, s64.
- 14 This is subject to a minor qualification set out in s64 of the Commonwealth Constitution: 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.'
- 15 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69–70 (Deane and Toohey JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559; *Wetzell v District Court of NSW* (1998) 43 NSWLR 687 at 688 (Mason P).
- 16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

- 17 The report that led to the introduction of the federal administrative law reforms of the late 1970s was strongly influenced by the view that ministerial accountability was an inadequate means of control for administrative failings: Commonwealth Administrative Review Committee, *Report* (AGPS, 1971).
- 18 (1994) 75 A Crim R 205.
- 19 *ibid*, 210.
- 20 (1992) 177 CLR 106.
- 21 *ibid*, 136.
- 22 The possible impact of these changes is examined in Chapter 4.
- 23 The most notable instance is *Jackson v Attorney-General* [2006] 1 AC 262, discussed in J Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' [2006] *Public Law* 562.
- 24 Though similar considerations already apply in Australia, at least to the interpretation of privative clauses: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 (Gleeson CJ).
- 25 The ground is explained in Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174.
- 26 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73. The Privy Council reached a similar view in *Attorney-General (Cth) v R* (1957) 95 CLR 529, 540 (*The Boilermakers' Case*). The early evolution of the doctrine is traced in C Saunders, 'The Separation of Powers' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Federation Press, 2000).
- 27 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.
- 28 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- 29 *ibid*, 11.
- 30 *NSW v Commonwealth* (1915) 20 CLR 54.
- 31 *Waterside Workers' Federation v JW Alexander* (1918) 25 CLR 434.
- 32 (1909) 8 CLR 330.
- 33 *ibid*, 357.
- 34 Peter Cane argues that the search for a clear definition of 'judicial power' is pointless because it focuses on what judicial power is rather than the more important question of what judicial power is for: P Cane, 'Understanding Judicial Review and Its Impact' in M Hertogh and S Halliday, *Judicial and Bureaucratic Impact* (Cambridge UP, 2004) 26. The nub of this criticism is the notion that the High Court has adopted a formalistic and unhelpful approach to defining judicial power that will never reach a clear answer.
- 35 (1995) 183 CLR 245.
- 36 *ibid*, 267.
- 37 *Drake v Minister of State for Immigration and Ethnic Affairs* (1979) 24 ALR 577.
- 38 *ibid*, 584. Smithers J agreed on this point.
- 39 (1985) 157 CLR 57.
- 40 *ibid*, 68.
- 41 *ibid*, 81.
- 42 (1995) 184 CLR 348.
- 43 *ibid*, 363.
- 44 *ibid*, 364–5.
- 45 *ibid*, 365.
- 46 (1996) 189 CLR 1.
- 47 (1995) 183 CLR 245.
- 48 The wider issues are explained in E Campbell and M Groves, 'Enforcement of Administrative Determinations' (2006) 13 *Australian Journal of Administrative Law* 121.
- 49 (1996) 189 CLR 51.
- 50 Section 5(1).
- 51 (1996) 189 CLR 51 at 124 (McHugh J).
- 52 (2004) 210 ALR 50.

- 53 See generally, D Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182.
- 54 The classic exposition of this doctrine was made by the Supreme Court of the United States in *Marbury v Madison* (1803) 5 US 87 at 111.
- 55 (1990) 170 CLR 1.
- 56 *ibid*, 35–6.
- 57 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 11–12 (Gleeson CJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645 (Hayne J).
- 58 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [170].
- 59 Section 39B of the *Judiciary Act 1903* (Cth) invests the Federal Court with a roughly equivalent jurisdiction. Many claims that fall within s75(v) would normally be remitted by the High Court to the Federal Court if the case does not involve a point of special importance. Section 39B enables applicants to avoid that procedure by lodging their claim directly in the Federal Court.
- 60 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- 61 Though any use of the common law developments of other nations would require adjustment to ensure their conformity with Australia's constitutional arrangements: *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [168] (Kirby J).
- 62 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513–14 (Gaudron, Gummow, Kirby and Hayne JJ).
- 63 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [27].
- 64 The work of the Kerr Committee is examined in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty Five Year Mark* (ANU, 1998) and Hon A Mason, 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135.
- 65 An important allied reform was the creation of the Federal Court, which was granted jurisdiction to determine applications under the ADJR Act.
- 66 The Chief Justice of New South Wales has suggested that these reforms have introduced a notion of 'administrative responsibility' by which individual decision makers are directly accountable for their decisions to the people who are affected by them: 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1999) 58(1) *Australian Journal of Public Administration* 3. This idea suggests that increased rights in administrative law have created a direct connection between those who exercise power and those affected by its exercise.
- 67 A point explained by Sir Anthony Mason in 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135 at 138–41.
- 68 The first such criticisms were made long ago, but they were fairly isolated: D Pearce, 'The Fading of the Vision Splendid in Administrative Law? Retrospect and Prospect' (1989) 58 *Canberra Bulletin of Public Administration* 15.
- 69 The apparent tension in the objects clause of the FOI Act between the desire to provide access to information and the maintenance of privacy have led the courts to essentially declare the objects of the FOI Act are almost useless: *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 66.
- 70 P Cane, 'Merits and Judicial Review: The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 212.
- 71 A point raised by Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [157] and examined in detail in M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79. Aronson ultimately rejects the view that the ADJR is restraining the growth of judicial review, but accepts that the Act should be amended to extend judicial review to a wider range of decisions.

- 72 Hon M Gleeson, 'Outcomes, Process and the Rule of Law' (Speech delivered for the thirtieth anniversary of the AAT, Canberra, 2 August 2006).
- 73 The same point can be made at a wider scale. Robin Creyke, for example, has stressed that the various rights and institutions of administrative law provide a systemic or overall package of benefits to people: R Creyke, 'The Performance of Administrative Law in Protecting Rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without A Bill of Rights* (Ashgate, 2006) 127.
- 74 M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 1.

Chapter 2

- 1 $z_{n+1} = z_n^2 + c$. Each value of z derived on the left is fed back in the right to generate a sequence of numbers. The Mandelbrot set is the set of values of c which give sequences that are bounded, that is, which do not expand to infinity.
- 2 Specialist Divisions of the Federal Court or specialist courts have been proposed from time to time in intellectual property, competition and taxation and, for different reasons, in human rights and native title – see, 'Federal Courts created by the Parliament' in B Opeskin and F Wheeler (eds) RS French, *The Australian Federal Judicial System* (MUP, 2000) 156–7.
- 3 Australian Patent Office Manual of Practice and Procedure – Oppositions, Court, Extension and Disputes, November 1995 Part 1 and see *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1.
- 4 R Cooke, 'The Struggle for Simplicity in Administrative Law' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (OUP, 1986) 5.
- 5 *ibid.*, 17.
- 6 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Law* (3rd edn, Law Book Co, 2004) 1.
- 7 P Craig, *Administrative Law* (5th edn, Sweet and Maxwell, 2003).
- 8 *ibid.*, 1.
- 9 HWR Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, 2004) 4.
- 10 'A celebrated historic ideal, the precise meaning of which may be less clear today than ever before' – RH Fallon, 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.
- 11 AV Dicey, *Introduction to the Study and the Law of the Constitution* (10th edn, 1959) 184. Editor's note: None of the many editions of Dicey translated this passage of medieval French. It was kindly translated for us by David and Ann Garrioch as follows: 'The law is the greatest heritage that the king has; for by the law he and all his subjects are governed, and if the law did not exist, there would be no king and no heritage.'
- 12 *ibid.*, 188.
- 13 *ibid.*, 193.
- 14 *ibid.*, 195.
- 15 J Jowell, 'The Rule of Law Today' in J Jowell and D Oliver (eds), *The Changing Constitution* (5th edn, OUP, 2004) 24.
- 16 *ibid.*, 25.
- 17 A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 203–4.
- 18 *ibid.*, 204.
- 19 (1951) 83 CLR 1 at 193.
- 20 *ibid.*
- 21 See the reference by Gleeson CJ to s75(v) as providing in the Constitution 'a basic guarantee of the rule of law' in Gleeson, *The Rule of Law and the Constitution* (Boyer Lectures 2000 ABC Books) 67.
- 22 WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167 at 179.

- 23 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J), 496 (Latham CJ); *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49–50; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368 (Mason CJ); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J); *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 and *Oshlack v Richmond River Council* (1980) 193 CLR 72 at 84.
- 24 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [69]–[70]. See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 171.
- 25 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
- 26 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 190. And see generally the discussion in Wade and Forsyth, n9 above, 356–9.
- 27 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368–9.
- 28 *Ruddock v Vadarlis* (2001) 110 FCR 491.
- 29 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242.
- 30 Wade and Forsyth, n9 above, 20.
- 31 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 79 (McHugh J).
- 32 (1990) 170 CLR 1 at 35.
- 33 *ibid*, 35–6 approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
- 34 SA De Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, 1999) 19.
- 35 R Cranston, *Law, Government and Public Policy* (1987) 176.
- 36 R Creyke, 'Performance of Administrative Law in Protecting Rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) 127.
- 37 To a large extent reflected in the statutory grounds for judicial review set out in s5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its State counterparts – *Kioa v West* (1985) 159 CLR 550 at 567, 576, 594, 625 and 630; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356–8.
- 38 See, for example, *Migration Act 1958* (Cth) Part 7, Div 4.
- 39 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340 (Gaudron J).
- 40 *Mills v Meeking* (1990) 169 CLR 214 at 226 and 346.
- 41 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 196.
- 42 *R v Secretary of State for Home Department; Ex parte Pierson* [1998] AC 539 at 587.
- 43 (1908) 7 CLR 277 at 304.
- 44 (1905) 122.
- 45 *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437.
- 46 (2001) 206 CLR 57 at 93.
- 47 *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and the discussion by D Dyzenhaus, M Hunt and M Taggart in 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.
- 48 *Thoburn v Sunderland City Council* [2003] QB 151.
- 49 *ibid*, 187.
- 50 *ibid*.
- 51 Wade and Forsyth, n9 above, 36. See also CF Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review* (1996) 55 *Cambridge Law Journal* 122. For a perspective on administrative law principles as judicial creations see J Laws, 'Law and Democracy' [1995] *Public Law* 72. See also M Elliott, *The Constitutional Foundations of Judicial Review* (2001, Hart) 109–10. cf Craig P, *Competing Models of Judicial Review* [1999] *Public Law* 428 at 446 and TRS Allan, 'The

- Constitution Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' (2002) 61 *Cambridge Law Journal* 87.
- 52 Shorter Oxford English Dictionary 'faith'; Blacks Law Dictionary 7th Edition, West Group (1999) 701.
- 53 *Westminster Corporation v London and North Western Railway Company* [1905] AC 426 at 430.
- 54 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 400. See also *Little v The Commonwealth* (1947) 75 CLR 94 at 108 (Dixon J).
- 55 Wade and Forsyth, n9 above, 410.
- 56 *Connock Chase DC v Kelly* (1978) 1 WLR 1; *Western Fish Products Ltd v Penrith DC* [1981] 2 All ER 204 at 215.
- 57 For example *Income Tax Assessment Act 1936* (Cth) s177; *Migration Act 1958* (Cth) s474.
- 58 *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 805 at [41] (Hely J); *NADR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 465; *NAAQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 300.
- 59 *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361.
- 60 *Applicant WAFV of 2002 v Refugee Review Tribunal* (2003) 125 FCR 351 at 371. cf. *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 42 [24] where Gyles J rejected the notion that good faith could be constituted by recklessness in the sense of negligence.
- 61 *Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation* (2001) 184 ALR 576 at 587 (Finn J).
- 62 *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 412 at [24] (Gyles J).
- 63 Sometimes the toss of a coin, figuratively speaking, is a good faith way to proceed. Decision-making between applicants for a single benefit who cannot be otherwise distinguished may be conducted by ballot without complaint – see the process under the *Mining Act 1978* (WA) of holding a ballot between competing applicants for an exploration licence, upheld by the Full Court of the Supreme Court of Western Australia in *Ex parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy* (1996) 16 WAR 428.
- 64 G Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543.
- 65 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 and see *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 656 (Gummow J).
- 66 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–6 Mason CJ (Brennan, Toohey and Gaudron JJ agreeing). *Roads Corp v Dacakis* [1995] 2 VR 508 at 517–29, approved in *Minister for Immigration and Multicultural Affairs v Epeabeka* (1999) 84 FCR 411 and see *Minister for Immigration and Multicultural Affairs v Anthony-pillai* (2001) 106 FCR 426 at [42].
- 67 *Minister for Immigration and Multicultural Affairs v Miah* (2001) 65 ALD 141 at [34].
- 68 As in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 discussed in *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at 74–5 and 90–1.
- 69 See discussion of S20 by Aronson, Dyer and Groves, n6 above, 338–9.
- 70 The doctrine of rationality is explained in chapter 14.
- 71 *Annetts v McCann* (1990) 170 CLR 596 at 598.
- 72 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [41].
- 73 *Barratt v Howard* (2000) 96 FCR 428 at 444.
- 74 The flexible nature of procedural fairness and the principles that govern this flexibility are explained in chapter 17.
- 75 *Local Government Board v Arlidge* [1915] AC 120 at 138.

- 76 *Kioa v West* (1985) 159 CLR 550; *Salemi v Mackellar (No 2)* (1977) 137 CLR 396; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.
- 77 The possible application of the doctrine of substantive unfairness to Australia is considered in chapter 18.
- 78 (1995) 183 CLR 273.
- 79 (2003) 195 ALR 202.
- 80 This question is examined in chapter 19.
- 81 (2002) 210 CLR 438 at 448
- 82 *O'Sullivan v Repatriation Commission* (2003) 128 FCR 590.
- 83 *Clements v Independent Indigenous Advisory Authority* (2003) 131 FCR 28 at 38 [33].
- 84 *Freeman v Health Insurance Commission* (2004) 141 FCR 129; *B41 of 2003 v Refugee Review Tribunal* [2004] FCA 30 and in the United Kingdom see *R v Secretary of State for the Home Department; Ex parte Al Mehdawi* [1990] 1 AC 876.
- 85 *Lazarus Estates Ltd v Beasley* (1956) 1 QB 702.
- 86 For a recent discussion see *Minister of Immigration and Multicultural Affairs v SZFDE* [2006] FCAFC 142 at [104]–[124].

Chapter 3

- 1 See, for instance, M Aronson, B Dyer, and M Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) 85; M Allars, 'Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises', (1995) 6 *Public Law Review* 44 at 73.
- 2 [1987] QB 815.
- 3 A number of decisions have held, conversely, that power will not be public for the purposes of judicial review, notwithstanding its derivation from statute, if the nature of the power is private. See *R v London Borough of Camden, ex p Hughes* [1994] COD 253 at 254 (Latham J); *R v Bolsover District Council, ex p Pepper* [2001] LGR 43 at 51 (Keene J); *R (on the application of Ise Lodge Amenity Committee) v Kettering Borough Council* [2002] EWHC 1132 at [64] (Goldring J); *R (on the application of Hopley) v Liverpool Health Authority* [2002] EWHC 1723 at [53] (Pitchford J) and *R (on the application of Nurse Prescribers Limited) v The Secretary of State for Health* [2004] EWHC 403 at [69] (Mitting J).
- 4 Aronson, Dyer, and Groves, n1 above, at 15–19.
- 5 *ibid.*
- 6 *ibid* 115–32.
- 7 See *Typing Centre of New South Wales v Toose* (Unreported, New South Wales Supreme Court, 15 December 1998) at 19–20 (Matthews J); *Masu Financial Management v FICS and Julie Wong (No 2)* (2005) 23 ACLC 215 at 216–17 [4–7] (Shaw J). See also *D'Souza v Royal Australian and New Zealand College of Psychiatrists* (2005) 12 VR 42 at 59 (Ashley J). Australian cases which have accepted in theory that non-statutory power may be public, by virtue of its nature, for the purposes of judicial review, but do not appear actually to have held that particular instances of non-statutory power are public include *Norths Ltd v McCaughan Dyson Capel Cure Ltd and Ors* (1988) 12 ACLR 739 at 745 (Young J); *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 123 ALR 215 at 223 (Beaumont J); *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654 at 666 (Ryan J); *Minister for Local Government v South Sydney Council* (2002) 55 NSWLR 381 at 384 (Spigelman CJ); *Hall v the University of New South Wales* [2003] NSWSC 669 at [81]–[103] (McClellan J) and *McClelland v Burning Palms Life Saving Club* (2002) 191 ALR 759 at 779–91 [80–117] (Campbell J).
- 8 *Administrative Decisions Judicial Review Act 1977* (Cth) s3(1); *Administrative Decisions (Judicial Review) 1989* (ACT) s2, Dictionary; *Judicial Review Act 1991* (Qld) ss4(a), 4(b) (ii); *Judicial Review Act 2000* (Tas) s4(1).

- 9 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277.
- 10 *ibid.*, 314.
- 11 See M Aronson, 'Is the ADJR Act hampering the development of Australian administrative law?' (2004) 15 *Public Law Review* 202 at 212. It is unlikely that the Australian courts' preparedness to countenance that non-statutory and non-prerogative power might be public for the purposes of judicial review would impact upon the High Court's jurisdiction under s75(v) of the Commonwealth Constitution. The requirement in s75(v) that the power in question be exercised by an 'officer of the Commonwealth' significantly limits the extent to which power that is not statutory or prerogative might be subject to the Court's review jurisdiction under that section. But it has been observed that, ultimately, the High Court must determine who is an 'officer of the Commonwealth': C Mantziaris, 'A "Wrong Turn" on the Public/Private Distinction: *NEAT Domestic Trading Pty Ltd v AWB Ltd*' (2003) 14 *Public Law Review* 197 at 200.
- 12 It is recognised that where such relationships do exist, the wielders of power may be subject to constraints that are very similar to the principles of good administration. Accordingly, courts in common law jurisdiction are increasingly prepared to find implied terms in contracts that impose restrictions on the exercise of discretionary contractual power that correspond closely to the broad *ultra vires* grounds of review. See *Paragon Finance Plc v Staunton* [2002] 2 All ER 248 at 262 (Dyson LJ), (Astill LJ and Thorpe LJ agreeing); *Gan Insurance v Tai Ping Insurance Co* [2001] All ER (Comm) 299 at 324–6 (Mance LJ), concurred with at 328 (Latham LJ). In the context of equity, trustees are subject to similar restrictions: *Harris v Lord Shuttleworth* [1994] ICR 991 at 999 (Glidewell LJ), concurred with at 1007 (Evans and Waite LJ); *Edge v Pensions Ombudsman* [2000] Ch 602 at 627 (Chadwick LJ); *Scott v National Trust* [1998] 2 All ER 705 at 718 (Robert Walker J).
- 13 J Stuckey-Clarke and F R Burns, 'Declarations' in P Parkinson (ed), *The Principles of Equity* (2nd edn, Lawbook Co, 2003) 889.
- 14 See *Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd* (2002) 208 CLR 199 at 218 (Gleeson CJ), 248 (Gummow and Hayne JJ).
- 15 M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing', in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 40, 41–2. A Stuhmcke, 'Administrative law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry' (1997) 4 *Australian Journal of Administrative Law* 185 at 187–8.
- 16 G Brennan, 'The mechanics of responsibility in government' (1999) 58(3) *Australian Journal of Public Administration* 3 at 10.
- 17 See, for example, *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 at 930 (Farquharson LJ), 932 (Hoffman LJ). A recognition of this factor is also implicit in Donaldson MR's comments in *Datafin* that 'No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law . . . Its lack of a statutory base is a complete anomaly' (at 835).
- 18 JWF Allison, *A Continental Distinction in the Common Law* (revised edn, OUP, 2000) 37.
- 19 *ibid.*, 72.
- 20 *ibid.*
- 21 [1993] 2 All ER 833.
- 22 *ibid.*, 849.
- 23 *ibid.*
- 24 *ibid.*
- 25 [1991] 6 Admin LR 697.
- 26 *ibid.*, 719.
- 27 *ibid.*, 718.
- 28 See, for example, *R v Press Complaints Commission, ex p Stewart-Brady* (1997) 9 Admin LR 274; *R v Life Assurance Unit Trust Regulatory Organisation Ltd; ex p Ross* [1993] QB 17.

- 29 *R v Press Complaints Commission, ex p Stewart-Brady* (1997) 9A Admin LR 274 at 277 (Lord Woolf MR), 279 (Millett and Potter LJJ concurring); *R v Life Assurance Unit Trust Regulatory Organisation, ex p Ross* [1993] QB 17 at 45 (per Glidewell LJ), 53 (Stocker and McCowan LJJ concurring).
- 30 For a similar argument, see D Pannick, 'Who is Subject to Judicial Review in Respect of What?' [1992] *Public Law* 1.
- 31 Cf S Fredman, and G Morris, 'The Costs of Exclusivity: Public and Private Re-examined' [1994] *Public Law* 69 at 76–77.
- 32 D Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999) 60–70.
- 33 [1992] 1 WLR 1036.
- 34 *ibid*, 1041–2.
- 35 *ibid*, 1042.
- 36 See, for example, H Woolf, 'Droit Public – English Style' [1995] *Public Law* 57 at 64.
- 37 J Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24 at 35.
- 38 J Beatson, 'The Courts and the Regulators' (1987) 3 *Professional Negligence* 121 at 123.
- 39 SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) para 3-024.
- 40 JWF Allison, 'Theoretical and Institutional Underpinnings of a Separate Administrative Law' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 85.
- 41 de Smith, Woolf and Jowell, n39 above, para 3-024.
- 42 *Typing Centre of New South Wales v Toose* (Unreported, New South Wales Supreme Court, 15 December 1998) (Matthews J).
- 43 *ibid*, 4.
- 44 *ibid*, 19–20.
- 45 HWR Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, 2004) 355. There is some suggestion that, historically, such a conception of statutory power in fact played a significant role in the first decisions that subjected statutory power to the courts' supervisory jurisdiction: see J Barratt, *The Fiduciary Duty of a Local Governor* (unpublished PhD thesis, Cambridge University, October 2003).
- 46 *Typing Centre of New South Wales v Toose* (Unreported, New South Wales Supreme Court, 15 December 1998) at 3 (Matthews J).
- 47 *ibid*, 4.
- 48 *ibid*, 20.
- 49 *ibid*.
- 50 *ibid*.
- 51 [1995] 2 VR 121.
- 52 *ibid*, 133–6 (Tadgell J), 147–9 (Ormiston J); 153–60 (Eames J).
- 53 *ibid*, 138 (Tadgell J), 160, 161–4 (Eames J).
- 54 *ibid*, 138 (Tadgell J).
- 55 *ibid*, 164 (Eames J).
- 56 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277.
- 57 *Masu Financial Management v FICS and Julie Wong (No 2)* (2005) 23 ACLC 215.
- 58 See n9 above.
- 59 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277 at 314.
- 60 *ibid*.
- 61 *ibid*.
- 62 *Masu Financial Management v FICS and Julie Wong (No 2)* (2005) 23 ACLC 215 at 217 [7].
- 63 *ibid*.
- 64 *ibid*.
- 65 *ibid*.
- 66 *ibid*.
- 67 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277 at 313, referring to *Datafin*, [1987] QB 815 at 848.

- 68 *ibid*, referring to *Datafin* [1987] QB 815 at 849.
- 69 *ibid* at 314.
- 70 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 70.
- 71 *ibid*.
- 72 (1979) 143 CLR 242.
- 73 *ibid*, 264.
- 74 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277 at 312.
- 75 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 264.
- 76 See *Nagle v Feilden* [1966] 2 QB 633 at 644, 646 (Lord Denning), 650 (Dankwerts LJ); *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329 at 343 (Denning LJ), 347 (Romer LJ).
- 77 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2004) 216 CLR 277 at 313.
- 78 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 275.
- 79 *D'Souza v Royal Australian and New Zealand College of Psychiatrists* (2005) 12 VR 42.
- 80 *ibid*, 59.
- 81 *ibid*, 58–9.
- 82 *ibid*, 59.
- 83 *ibid*.
- 84 *ibid*.
- 85 See n18 above.
- 86 T Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd edn, Federation Press, 2002) 67.
- 87 Allison, n18 above, 75.
- 88 *ibid*.
- 89 L Zines, *The High Court and the Constitution* (4th edn, Butterworths 1997) 249.
- 90 For the examples that follow (in the text) I am indebted to Zines, *ibid*, 249.
- 91 *Commonwealth Constitution* s61.
- 92 *ibid*, s2.
- 93 *ibid*, s64.
- 94 *ibid*, s66.
- 95 Allison, n18 above, 77.
- 96 See, for example, *Constitution Act 1902* (NSW) Part 2A, Part 3, Division 3, Part 3, Division 4; *Constitution Act 1975* (Vic) Part 1, *Constitution Act 1934* (SA) Part 3.
- 97 P Hanks, *Constitutional Law in Australia* (2nd edn, Butterworths, 1996) 488.
- 98 Zines, n89 above, 154.
- 99 Hanks, n97 above, 488 referring to G Winterton, *Parliament, the Executive, and the Governor General* (Melbourne UP, 1983) 64.
- 100 See also *Davis v Commonwealth* (1988) 166 CLR 79 at 92 (Mason CJ, Deane and Gaudron JJ).
- 101 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 179, referred to by Gummow J in *Airservices Australia v Canadian Airlines* (2000) 202 CLR 133 at 276.
- 102 *ibid*.
- 103 *ibid*.
- 104 *ibid*.
- 105 *ibid*.
- 106 *Bropho v Western Australia* (1990) 171 CLR 1 at 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
- 107 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 584 (Mason J).
- 108 Aronson, Dyer, and Groves, n1 above, 64.
- 109 *ibid*.
- 110 See, for example, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 550 at 632 (Deane J).

- 111 See *R v North East Devon Health Authority, ex p Coughlan* [2001] QB 213 at 244 (Woolf J). See also *R v Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207 at 209 (Neil LJ), 220 (Roch LJ); *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225 at 243–4 (Stuart-Smith LJ). See also Woolf, n36 above, 64.
- 112 See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 290 (Gleeson CJ) and 319 (Kirby J); *Master Builders* [1995] 2 VR 121 at 137–8 (Tadgell J), 164 (Eames J).

Chapter 4

- 1 C Beaton-Wells, 'Australian Administrative Law: The Asylum Seeker Legacy' [2005] *Public Law* 267; J McMillan and N Williams, 'Administrative Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 63 at 82; J McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347 at 356–62. The High Court also criticised the Federal Court for 'over-zealous judicial review': *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
- 2 J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335 at 336.
- 3 McMillan and Williams, n1 above, raise these in their discussion of human rights and administrative law.
- 4 See, for example, N O'Neill, S Rice and R Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd edn, Federation Press, 2004) 177–86, 477–562.
- 5 (1995) 183 CLR 273 at 311.
- 6 *Teoh* is considered in chapter 19 in this volume.
- 7 M Taggart, 'Reinventing Administrative Law' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003) 311 at 326.
- 8 C Evans, 'Human Rights Act and Administrative Law Talk', Assessing the First Year of the ACT Human Rights Act, ANU, Canberra, 29 June 2005, at 12.
- 9 Good discussions of values in public law are found in P Cane, 'Theory and Values in Public Law' in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP, 2003) 3; D Oliver, 'The Underlying Values of Public and Private Law' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1999) 223; M Taggart, 'The Province of Administrative Law Determined' in M Taggart (ed), *The Province of Administrative Law* (Hart, 1999) 1 at 3.
- 10 See generally A Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (1994) 1 *Australian Journal of Human Rights* 1.
- 11 Oliver, n9 above.
- 12 As Oliver writes, 'public bodies must justify their actions against recognised criteria': *ibid*, 228. But, as the chapter in this volume by Marilyn Pittard explains, there is no common law duty to give reasons for administrative decisions.
- 13 This principle is commonly traced to *Entick and Carrington* (1765) 19 St Tr 1030 (no lawful authority to issue a search warrant which resulted in a trespass on private property).
- 14 McMillan and Williams, n1 above, 71; see also *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758 (Dixon J); *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375 (Deane J); *Buck v Bavone* (1976) 135 CLR 110 at 119 (Gibbs J).
- 15 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). The case and its consequences are explained in the chapter in this book by Geoff Airo-Farulla.
- 16 See, for example, *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476. See also Beaton-Wells, n1 above.

- 17 See, for example, K Ewing, 'The Futility of the Human Rights Act' [2004] PL 829; C Finn, 'Some Reflections on the Council's Discussion Paper on the Scope of Judicial Review' (2004) 56 *Admin Review*; J Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Craig and Rawlings (eds), n9 above, 67.
- 18 ICCPR, art 4; *Human Rights Act 1998* (UK), arts 14 and 16.
- 19 Finn, n17 above, at 7.
- 20 Taggart, 'The Province of Administrative Law Determined', n9 above, at 10–15.
- 21 *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121 at 132. For example, in *Parramatta City Council v Pestell* (1972) 128 CLR 305, a decision was found to be unreasonable where a benefit or a burden was distributed unequally and unjustifiably among members of similar class. In that case, a council levy to fund improvements such as footpaths, kerbs and gutters was imposed on commercial land owners but not on residential owners.
- 22 Taggart, 'The Province of Administrative Law Determined', n9 above, 16.
- 23 Cf McMillan and Williams, n1 above, 70: 'the structure of administrative law is premised more upon the protection of individual rights than it is upon the pursuit of good decision-making'.
- 24 J McMillan, 'Parliament and Administrative Law', Australian Parliamentary Library Research Paper 13 (2000–01).
- 25 M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202 at 214.
- 26 McMillan and Williams, n1 above, 72, giving the example of racial discrimination as a permissible criterion in exercising a discretion (prior to the *Racial Discrimination Act 1975* (Cth)): *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).
- 27 M Taggart, 'The Tub of Public Law' in D Dyzenhaus (ed), *The Unity of Public Law* (Hart, 2004) 455.
- 28 McMillan and Williams, n1 above, 67.
- 29 ICCPR, art 2(3).
- 30 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s39.
- 31 [1994] 3 NZLR 667
- 32 *ibid*, at 673 (Cooke P).
- 33 Evans, n8 above, 10.
- 34 [1999] 1 AC 69.
- 35 *ibid*, at 80 (Lord Clyde). See also *R v Shayler* [2002] UKHL 11 at [61] (Lord Hope); C Ovey and R White, *Jacobs and White: European Convention on Human Rights* (3rd edn, OUP, 2002) 201.
- 36 See, for example, *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54 at 64–5 (Gummow J); *Premelal v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 117 (Einfeld J); B Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212.
- 37 *South Australia v Tanner* (1989) 166 CLR 161 at 165; McMillan, n2 above, 354.
- 38 A Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 21 at 38.
- 39 B Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30 *Federal Law Review* 217 at 224.
- 40 McMillan, n2 above, 368.
- 41 Taggart, n7 above, at 22.
- 42 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). For an example, see *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 at 543 [138].
- 43 [2001] 3 All ER 433.
- 44 *ibid*, at 446. See also D Feldman, 'Proportionality and the Human Rights Act 1998' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999) 107 at 117.

- 45 *ibid*, at [27].
- 46 *ibid*, at [28].
- 47 J Laws, 'Law and Democracy' [1995] *Public Law* 72 at 79.
- 48 *ibid*, 80.
- 49 The issues are considered in the chapter in this volume by Colin Campbell.
- 50 *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242 at 274 (Murphy J).
- 51 UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13 at [8].
- 52 In the UK, there has been extensive debate about the scope of the term 'public authority' under the *Human Rights Act 1998* (UK), while in the US, there has been similar debate about the 'state action' requirement for constitutional rights.
- 53 UN Human Rights Committee, n51 above.
- 54 *Velasquez Rodriguez* case, IACHR, Ser C, No 4 (1988) 9 Human Rights LJ 212 at [172–3]; T Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L Henkin (ed), *The International Bill of Rights* (Columbia UP, 1981) 72 at 77–8; A Clapham, *Human Rights in the Private Sphere* (Clarendon, 1996) 105–6 at 119; D Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1990) 13 *Fordham Intl LJ* 1; G Sperduti, 'Responsibility of States for Activities of Private Law Persons', in R Bernhardt (ed), *Encyclopedia of PIL*, Instalment 10 (1987) 373 at 375.
- 55 ICCPR, art 2(3).
- 56 H Steiner, 'International Protection of Human Rights' in M Evans (ed), *International Law* (OUP, 2003) 757 at 776.
- 57 *Velasquez-Rodriguez* case, n54 above, at [172–3].
- 58 Preambles to UNGA resolution 48/22 (1993); UN Commission on Human Rights resolutions 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 2000/30; 2001/37.
- 59 Clapham, n54 above, at 97–8.
- 60 Constitution of South Africa 1996, Chapter 2 (Bill of Rights), art 8(2). In applying this provision, a court must apply or develop the common law to the extent that the legislation does not give effect to that right: art 8(3).
- 61 *Ombudsman Act 1976* (Cth), s5; *Freedom of Information Act 1982* (Cth), s4.
- 62 *Privacy Act 1998* (Cth), schedule 3.
- 63 S Free, 'Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry' (1999) 21 *AIAL Forum* 1 at 8.
- 64 *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] 1 QB 815.
- 65 (1979) 143 CLR 242.
- 66 *ibid*, at 275 (Murphy J): 'When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purposes for which it is conferred and with due regard to the persons affected by its exercise. This generally requires that where such power is exercised against an individual, due process or natural justice must be observed.'
- 67 *Judiciary Act 1903* (Cth) ss39B(1) and 39B(1A)(c) respectively.
- 68 See, for example, *Fencott* (1983) (accrued jurisdiction); *Federal Court of Australia Act 1976* (Cth), s32 (associated jurisdiction).
- 69 *Judiciary Act 1903* (Cth), ss31–32. Such jurisdiction may also be inherent or accrued.
- 70 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s3(1).
- 71 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at 192 (McHugh, Hayne and Callinan JJ).
- 72 *ibid*.
- 73 *Griffith University v Tang* (2005) 213 ALR 724.
- 74 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at 195.
- 75 *Griffith University v Tang* (2005) 213 ALR 724 at [99].
- 76 R Creyke and J McMillan, *Control of Government Action* (Butterworths, 2005) 99.

- 77 M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Taggart (ed), n7 above, 40 at 69.
- 78 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, (Report No 48, 1996).
- 79 McMillan and Williams, n1 above, 64–70.
- 80 McMillan and Williams, n1 above, 64, citing A Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347. See also F Bignami, 'Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe' (2005) 11 *Columbia Journal of European Law* 1 at 15 (identifying three generations of rights before the European Commission: the right to a hearing, the right to transparency, and the right to civil society participation).
- 81 McMillan and Williams, n1 above, 64–6.
- 82 See, for example, C Harlow, 'Global Administrative Law: The Quest for Principles and Value' (2006) 17 *European Journal of International Law* 187; N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247; N Krisch and B Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1; M Barr and G Miller, 'Global Administrative Law: The View from Basel' (2006) 17 *European Journal of International Law* 15.
- 83 Art 27(1): 'Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which as the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law'. Art 27(2): 'Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination'.
- 84 Electoral and Administrative Review Commission of Queensland Report, *Individual Rights and Freedoms: A Bill of Rights and Other Freedoms for Queensland – The Implications for Australia?* (Queensland University Press, 1993), 312–13.
- 85 *ibid*, 313.
- 86 McMillan and Williams, n1 above, 88. See, for example, *Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J) (a decision may consider international treaties but is not required to do so), 570–1 (Gibbs CJ).
- 87 (1994) 179 CLR 427.
- 88 *ibid*, at 437 (Mason CJ and Brennan, Gaudron and McHugh JJ); see also *Bropho v Western Australia* (1991) 171 CLR 1 at 17–18; *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at 492; *Potter v Minahan* (1908) 7 CLR 277 at 304; McMillan and Williams, n1 above, 78–80.
- 89 T Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435 at 451.
- 90 *Coco v R* (1994) 179 CLR 427 at 437–8.
- 91 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann): 'The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.'
- 92 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (BLF Case)* (1986) 7 NSWLR 372 at 404–6 (Kirby P).
- 93 Evans, n8 above, 4.
- 94 *Human Rights Act 2004* (ACT) s30; Victorian Charter of Rights and Responsibilities Act s32.
- 95 McMillan, n24 above.
- 96 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1 at 24–5.

- 97 Taggart, n27 above, 469.
- 98 [2004] HC 37.
- 99 *ibid*, at [33] (McHugh J); see also [298] (Callinan J), [241] (Hayne J).
- 100 *ibid*, at [22] (Gleeson CJ).
- 101 *ibid*, at [65] (McHugh J).
- 102 *ibid*, at [20] (Gleeson CJ). The rule of law has been invoked elsewhere in support of liberty: see, for example, McMillan, ‘Recent Themes in Judicial Review’, n1 above, at 355–6.
- 103 *ibid*, at [150] (Kirby J), citing *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 532; *McGarry v The Queen* (2001) 207 CLR 121 at 140–2.
- 104 J Spigelman, ‘Blackstone, Burke, Bentham and the *Human Rights Act 2004*’ (2005) 26 *Australian Bar Review* 1 at 6.
- 105 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524.
- 106 *K and S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309 at 315 (Mason J). See also D Meagher, ‘The “Tragic” High Court Decisions in *Al-Kateb* and *Al Khafaji*: The Triumph of the “Plain Fact” Interpretive Approach and Constitutional Form over Substance’ (2005) 7 *Constitutional Law and Policy Review* 69.
- 107 *Al-Kateb v Godwin* [2004] HC 37 at [73] (McHugh J).
- 108 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).
- 109 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).
- 110 *Al-Kateb v Godwin* [2004] HC 37 at [63] (McHugh J); see also *Polites v Commonwealth* (1945) 70 CLR 60 at 68–9, 77, 80–1.
- 111 *Al-Kateb v Godwin* [2004] HC 37 at [63] (McHugh J). In contrast, Kirby J was in favour of interpreting the Constitution consistently with international law where this is possible.
- 112 Evans, n8 above, 8: such as ‘the powers as a landowner to exclude certain types of protesters from government land . . . or the power to enter into contracts for the operation of detention facilities with corporations that have poor human rights records’.
- 113 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 153 ALR 490 at 517–18 (McHugh J, Gummow, Kirby and Hayne JJ).
- 114 Spigelman, n104 above, 1; G Lombard, ‘Human Rights and the “Breakfast Theory of Jurisprudence”: Treaty Monitoring Bodies and Public Administration’ (1999) 5 *Australian Journal of Human Rights* 150 at 152.
- 115 Lombard, *ibid*, 152.
- 116 J Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1 at 17, 19.
- 117 *ibid*, 18.
- 118 See, for example, ICCPR, arts 5, 12(3), 19(3), 21, 22(2); ICESCR, arts 4–5.
- 119 (1992) 175 CLR 1.
- 120 *ibid*, at 42 (Brennan J).
- 121 *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [75] (Maxwell J).
- 122 *Mabo (No 2)* (1992) 175 CLR 1.
- 123 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
- 124 *Simsek v McPhee* (1982) 148 CLR 636 at 641 (Stephen J); see also *Dietrich v The Queen* (1992) 177 CLR 292 at 304 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 297 (Mason CJ and Deane J).
- 125 McMillan, ‘Recent Themes in Judicial Review’, n1 above, 353.
- 126 (2003) 214 CLR 1.

- 127 *ibid*, at [105] (McHugh and Gummow JJ).
- 128 (2004) 79 ALJR 397.
- 129 *ibid*, at 409.
- 130 Aronson, n25 above, 214.
- 131 See, for example, P Sales and K Steyn, 'Legitimate Expectations in English Public Law: An Analysis' [2004] *Public Law* 564.
- 132 See *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [76] (McHugh and Gummow JJ).
- 133 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 476 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
- 134 See resolution of appointment: <www.aph.gov.au/house/committee/jsct/reports/resolution.pdf>.
- 135 See generally H Charlesworth, M Chiam, D Hovell and G Williams, *No Country Is An Island: Australia and International Law* (UNSW Press, 2006), 41–8.
- 136 *ibid*, 76.
- 137 *Nulyarimma v Thompson* [1999] FCA 1192.
- 138 *ibid* (Wilcox and Whitlam JJ).
- 139 See, for example, McMillan and Williams, n1 above, 75–8.
- 140 See, for example, *Chaudhary v Minister for Immigration and Ethnic Affairs* (1993) 44 FCR 510 (Beazley J), (1994) 49 FCR 84 (Wilcox, Burchett and Foster JJ); *Ates v Minister of State for Immigration and Ethnic Affairs* (1983) 67 FLR 449 at 455–6; *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 515 at 527; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304 (Gaudron J); *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719 at 730 (Wilcox and French JJ). But see *Minister for Immigration v Teo* (1995) 57 FCR 194 at 204–207 (Black CJ, Gummow and Beazley JJ).
- 141 *W375/01 A v Minister for Immigration and Multicultural Affairs* [2002] FCA 379 at [16] (Lee, Carr and Finkelstein JJ).
- 142 (1999) 197 CLR 510.
- 143 *ibid*, at 577–8.
- 144 McMillan, 'Judicial Restraint and Activism in Administrative Law', n1 above, 353.
- 145 (1989) 169 CLR 379.
- 146 *ibid*.
- 147 (1999) 93 FCR 220.
- 148 *ibid*, at 239–40 (Sackville J).
- 149 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 at [196], [203–204].
- 150 Australian Senate, Standing Order 24(1)(a).
- 151 *ibid*.
- 152 *Human Rights Act 2004* (ACT) s38(1).
- 153 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s30.
- 154 *ibid*. Note: pursuant to the *Subordinate Legislation Act 1994* (Vic) s21.
- 155 NSW Legislative Council Standing Committee on Law and Justice, *ANSW Bill of Rights*, Report 17, October 2001, 118.
- 156 See *Parliamentary Committee Act 1995* (Qld) s22 read with the *Legislative Standards Act 1992* (Qld) s4. The Committee considers similar matters to the Senate Standing Committee, but also whether, for example: property is compulsorily acquired with fair compensation; sufficient regard is paid to Aboriginal tradition and Island custom; protection is provided against self-incrimination; judicial warrants authorise entry to premises or seizure of documents or property; the onus of proof is not reversed in criminal case without adequate justification; there is consistency with natural justice; and immunity is not conferred without adequate justification.
- 157 *Parliamentary Committees Act 1968* (Vic) s4D(a)(iia)–(iib).

- 158 NSW Legislative Council Standing Committee, n155 above, 115–132. See *Legislation Review Amendment Act 2002* (NSW); S Argument, ‘Scrutiny of Bills’, *Law Society Journal*, October 2003, 53.
- 159 See *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.
- 160 NSW Legislative Council Standing Committee, n155 above, 123–6.
- 161 *Human Rights Act 2004* (ACT) s37.
- 162 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s28(1).
- 163 *ibid*, s28(2).
- 164 *ibid*, s28(3)(a).
- 165 *ibid*, s28(3)(b).
- 166 *Human Rights Act 2004* (ACT) s39; *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s29.
- 167 See L Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff, 2004); L Reif, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’ (2000) 13 *Harvard Human Rights Journal* 1.
- 168 Reif, ‘Building Democratic Institutions’, *ibid*, at 11.
- 169 J Hatchard, ‘Developing Appropriate Institutions to Meet the Challenges of the New Millennium’ (2000) 8 *Asia Pacific Law Review* 27 at 50.
- 170 Reif, *The Ombudsman*, n167 above, 395. Lack of parliamentary support for the Ombudsman has been a common complaint in Australia: see, for example, McMillan, n24 above.
- 171 Hatchard, n169 above, 34–5.
- 172 Reif, ‘Building Democratic Institutions’, n167 above, 13.
- 173 Anand Satyanand, ‘Human Rights in the Commonwealth: The Ombudsman Role’ (2002) 28 *Commonwealth Law Bulletin* 547 at 550.
- 174 *ibid*, 550–1.
- 175 J McMillan, ‘The Immigration Ombudsman Role: Lessons for Public Law’, Address to an AIAL Forum, Melbourne, May 2006, 1.
- 176 *ibid*, 2.
- 177 *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) s870; see L Stockdale, ‘NSW Ombudsman to Scrutinise New Public Safety Powers’, *Law Society Journal*, August 2006, 71.
- 178 Norwegian Parliamentary Ombudsman, Arne Fliflet, quoted in Satyanand, n173 above, 552. See also Hatchard, n169 above, 30–1, 49–50 (discussing the similarities and differences between ombudsmen and human rights bodies).
- 179 Ombudsman of Trinidad and Tobago, quoted in Hatchard, n169 above, 29.
- 180 *Ombudsman Act 1976* (Cth) s15(1)(a)(i)–(v).
- 181 *ibid*, s15(1)(b) and (c)(i)–(ii) respectively.
- 182 ICCPR, art 2; ICESCR, art 2.
- 183 Lawful detention may be *arbitrary* if it is *unreasonable* (including where it is inappropriate, unjust or unpredictable): *van Alphen v Netherlands*, UN Human Rights Committee, 1990. Detention is unreasonable if it is unnecessary or disproportionate to the legitimate end being sought: *Toonen v Australia*, UN Human Rights Committee, 1994.
- 184 Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005) 122–3.
- 185 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) schedule.
- 186 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s6(2)(c).
- 187 *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) s39.
- 188 *Human Rights and Equal Opportunity Act 1986* (Cth) s11(1)(f).
- 189 McMillan, n175 above, 1.
- 190 *ibid*.
- 191 *ibid*, 5.

- 192 *ibid.*
- 193 *ibid.*, 4.
- 194 *ibid.*
- 195 Human Rights Bill 1973 (Cth) (lapsed following a double dissolution); Australian Bill of Rights Bill 1985 (Cth) (passed by the lower house but withdrawn in the Senate; based on an earlier draft of 1984); 1988 Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth). See generally G Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2002) 250–7.
- 196 Parliamentary Charter of Rights and Freedoms Bill 2001 (Cth) (introduced into the Senate by the Australian Democrats leader, Senator Lees and drafted by Senator Murray as the Australian Bill of Rights Bill 2000 (Cth); reintroduced by Senator Stott-Despoja in 2005); Australian Bill of Rights Bill 2001 (Cth) (introduced by Labor MP Andrew Theophanous in the lower house); New Matilda conducted a national consultation on its Human Rights Bill 2006, which it hopes to introduce into Parliament as a private member's bill in 2006.
- 197 *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 at 653.
- 198 McMillan, 'Judicial Restraint and Activism in Administrative Law', n1 above, 369. See also McMillan and Williams, n1 above, 89.
- 199 *Evidence Act 1995* (Cth) s138(3)(f).

Chapter 5

- 1 See the attempt by L Curtis, 'Agenda for Reform: Lessons from the States and Territories' in R Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, ANU, 1992) 34.
- 2 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings* (Issues Paper No 24, 1998) para 12.2.
- 3 *ibid.*
- 4 L Curtis, 'Agenda for Reform: Lessons from the States and Territories' in R Creyke (ed), *Administrative Tribunals: Taking Stock* (CIPL, 1992) 35.
- 5 M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) paras 7.1–3; Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings* (Issues Paper 24, 1998) para 2.4.
- 6 LW Maher, 'The Australian Experiment in Merits Review Tribunals' in O Mendelsohn and LW Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe UP, 1994) 74–5.
- 7 Allars, n5 above, para 7.4.
- 8 ALRC, n5 above, para 2.2.
- 9 It is equally difficult to distinguish a 'court' from a tribunal whether for constitutional or other reasons: see G Hill, 'State Administrative Tribunals and the Constitutional Definition of "Court"' (2006) 13 *Australian Journal of Administrative Law* 103.
- 10 Advice provided by the Administrative Appeals Tribunal. Jurisdiction may be granted under *Administrative Appeals Tribunal Act 1975* (Cth) s25.
- 11 S Forgie, 'Commonwealth Tribunals: Past, Present and Future' (unpublished paper presented at the Queensland Law Symposium, 3 March 2000) 1.
- 12 *Administrative Decisions Tribunal Act 1997* (NSW) ss113–15. The Tribunal also offers an appeal for a question of law.
- 13 Based on figures taken from the 2004–2005 and 2003–2004 *Annual Reports* of the High Court of Australia, the Federal Court of Australia and the Federal Magistrates Court of Australia. This figure does not include family law applications made in the Federal Magistrates Court.
- 14 Lord Justice Carnwath, 'Tribunals under the Constitutional Reform Act' (2006) 13 *Journal of Social Security Law* 58 at 62.

- 15 Sir G Brennan AC, KBE 'Foreword' in R Creyke (ed), *Administrative Tribunals: Taking Stock* (ANU Centre for International and Public Law, 1992) i–ii.
- 16 L Curtis, 'Crossing the Frontiers Between Law and Administration' (1989) 58 *Canberra Bulletin of Public Administration* 56.
- 17 P Bayne, 'Tribunals in the System of Government' (1990) 10 *Papers on Parliament* 1 at 3.
- 18 B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 694; Chief Justice JJ Spigelman, 'Jurisdiction and Integrity' (2005) 2 *AIAL National Lecture Series*, Lectures 1, 2–3; J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 11–13; R Creyke, 'Administrative Justice – Towards Integrity in Government: the First to the Third Way' (forthcoming), paper presented at the First Seminar of the *ESRC Seminar Series on Administrative Justice*, Edinburgh, 27 March 2006, 16–28.
- 19 University of Griffiths Key Centre for Ethics, Law, Justice and Governance, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems: National Integrity Systems Assessment* (NISA) Final Report (December 2005).
- 20 *Re Adams and The Tax Agents' Board* (1976) 1 ALD 251.
- 21 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 94 (Toohey J) 109 (McHugh J) 67 (Brennan CJ, dissenting) 77 (Dawson J, dissenting) 103–4 (Gaudron J).
- 22 *Commonwealth Administrative Review Committee* (the 'Kerr Committee Report') (Parliamentary Paper 44/1971).
- 23 *ibid*, paras 11, 58.
- 24 *Final Report of the Committee on Administrative Discretions* (the 'Bland Committee Report') (Parliamentary Paper 316/1973).
- 25 R Creyke and J McMillan, 'Administrative Law Assumptions . . . Then and Now' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (CIPL, ANU, 1998) 4.
- 26 For details see R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 2005) ch 3.
- 27 *Re Staffieri and Commonwealth* (1986) 10 ALD N36.
- 28 *ibid*, N37.
- 29 Kerr Committee Report, n22 above, paras 58, 89, 90, 225, 289.
- 30 J McMillan, 'Merit Review and the AAT: A Concept Develops' in J McMillan (ed), *The AAT – Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review* (AIAL, 1998) 33.
- 31 For example, *Administrative Appeals Tribunal Act 1989* (ACT) s44; *Administrative Decisions Tribunal Act 1997* (NSW) s63; *District Court Act 1991* (SA) s42F; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s51; *State Administrative Tribunal Act 2004* (WA) s29.
- 32 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report 39, 1995) above, para 2.2.
- 33 (1979) 46 FLR 409.
- 34 Hon Mr Justice FG Brennan, 'Comment: The Anatomy of an Administrative Decision' (1980) 9 *Sydney Law Review* 1 at 4–5.
- 35 *Environment Protection Authority v Rashleigh* [2005] ACTCA 42 at [26], [28].
- 36 The 'stands in the shoes' expression appears in *Nation v Repatriation Commission (No 2)* (1994) 37 ALD 63 at 68.
- 37 (1979) 2 ALD 60 at 68.
- 38 (1990) 170 CLR 267.
- 39 *ibid* at 273–4. See also *Nation v Repatriation Commission (No 2)* (1994) 37 ALD 63 at 68.
- 40 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137 at 141; *Builders' Licensing Board (NSW) v Sperway Constructions (Syd) Pty Ltd* (1976) 51 ALJR 262 at 264.

- 41 For example, *Administrative Appeals Tribunal Act 1975* (Cth) s29.
- 42 (1979) 2 ALD 137.
- 43 *ibid*, 141.
- 44 *Administrative Appeals Tribunal Act 1975* (Cth) s33(1)(b).
- 45 *Re Greenham and Minister for Capital Territory* (1979) 2 ALD 137 at 141–2.
- 46 The matter is not free from doubt. In *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332, the fact that a decision of the Superannuation Complaints Tribunal was ‘unfair or unreasonable’ meant the Federal Court struck down this provision. On appeal to the High Court, however, in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, the decision was overturned, largely because the decision obtained its force by a private arbitration under the trust deed, rather than the Act and the Act did not purport to give a binding effect to the decision.
- 47 *Crompton v Repatriation Commission* (1993) 30 ALD 45 at [19].
- 48 (1995) 184 CLR 163 at 179.
- 49 For example, *Aged Care Act 1997* (Cth) s85.1; *Civil Aviation Act 1988* (Cth) s31(1); *Civil Aviation Regulations r297A(1)*.
- 50 *Administrative Appeals Tribunal Act 1975* (Cth) s3(3); *Administrative Appeals Tribunal Act 1989* (ACT) s46(1); *Administrative Decisions Tribunal Act 1997* (NSW) s6; *District Court Act 1991* (SA) ss42B(2), 42E; *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic) s4; *State Administrative Tribunal Act 2003* (WA) ss3, 17(3).
- 51 *Director-General of Social Services v Chaney* (1980) 31 ALR 571 at 591 per Deane J.
- 52 *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.
- 53 *ibid*, 342.
- 54 (1983) 78 FLR 373.
- 55 *ibid*, 396–7.
- 56 R Creyke and G Hill, ‘A Wavy Line in the Sand: Bond and Jurisdictional Issues in Judicial and Administrative Review’ (1998) 26 *Federal Law Review* 15.
- 57 *Director-General of Social Services v Chaney* (1980) 31 ALR 571.
- 58 *Crompton v Repatriation Commission* (1993) 30 ALD 48 at [19].
- 59 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.
- 60 *ibid*, 68.
- 61 *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342.
- 62 *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333.
- 63 *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225.
- 64 *Kavvadias v Commonwealth Ombudsman* (1984) 1 FCR 680.
- 65 *Esber v Commonwealth* (1992) 174 CLR 430.
- 66 See, for example, *Acts Interpretation Act 1901* (Cth) ss8, 50.
- 67 *Rodway v R* (1990) 169 CLR 515 at 518–19.
- 68 For a discussion of the meaning of these terms see Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (1999) [1.111]–[1.134].
- 69 *Administrative Appeals Tribunal Act 1975* (Cth) ss2A, 33; *Administrative Appeals Tribunal Act 1989* (ACT) s32; *Administrative Decisions Tribunal Act 1997* (NSW) s73(3); *District Court Act 1991* (SA) s42F; *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) s34; *Victorian Civil and Administrative Act 1998* (Vic) s98(1)(d); *State Administrative Tribunals Act 2004* (WA) s32(2). See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 248–9 (Starke J).
- 70 (1999) 197 CLR 611.
- 71 For example, *Migration Act 1958* (Cth) s420.
- 72 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628.
- 73 *Qantas Airways v Gubbins* (1992) 28 NSWLR 29 at 29 (Gleeson CJ and Handley JA) citing *R v War Pensions Appeal Entitlements Tribunal; Ex parte Bott* (1933) 50 CLR 228.
- 74 *Re Gee and Director-General of Social Services* (1981) 3 ALD 132.
- 75 *McDonald v Director-General of Social Security* (1984) 6 ALD 6 at 9.
- 76 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256.

- 77 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 (Gleeson CJ and McHugh J) 635 (Gaudron and Kirby JJ) 642 (Gummow J) 659 (Hayne J) 668 (Callinan J).
- 78 *Kioa v West* (1985) 159 CLR 550.
- 79 *ibid*, 585.
- 80 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.
- 81 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 75; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.
- 82 *Lay Lat v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 61.
- 83 *Yung v Adams* (1997) 159 CLR 436.
- 84 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397 at 400 (Finkelstein J).
- 85 JA Smillie, 'The Problem of Official Notice' [1975] *Public Law* 64. See also *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41–2; *Mahon v Air New Zealand* [1984] AC 808 at 821; *Riverside Nursing Care Pty Ltd v Hon Bronwyn Bishop* (2000) 100 FCR 519.
- 86 *Courtney v Peters* (1990) 27 FCR 404; *Ruangrong v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 773.
- 87 Certoma, 'The Non-Adversarial Administrative Process and the Immigration Review Tribunal' (1993) 4 *Public Law Review* 4.
- 88 *Administrative Decisions Tribunal Act 1997* (NSW) s73(5).
- 89 *Administrative Decisions Tribunal Act 1997* (NSW) s73(5)(b).
- 90 Curtis, n16 above.
- 91 CROSRMD Committee report, *Non-adversarial review of migration decisions: the way forward* (1992) para 7.1.2.
- 92 *ibid*, paras 7.1.3–4.
- 93 *Migration Act 1958* (Cth) Parts 5, 7.
- 94 *Migration Act 1958* (Cth) ss353, 359; *Social Security Act 1991* (Cth) s1270; *Veterans' Entitlements Act 1986* (Cth) s138; *Administrative Appeals Tribunal Act 1975* (Cth) s33; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s98.
- 95 (1992) 175 CLR 408.
- 96 *ibid*, 424–5.
- 97 *Grant v Repatriation Commission* (1999) 15 VerBosity 99; *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247 at [23]; *Satheeskumar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1285 at [15].
- 98 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System* (Report 89, 1999) para 9.53.
- 99 *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342.
- 100 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration Inc, 2006) 65–8.
- 101 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426.
- 102 (2005) 80 ALJR 228.
- 103 *ibid*, [26].
- 104 *Re McLindin and Acting Commissioner for Superannuation* (1979) 2 ALD 261; *Re Dennis and Secretary, Department of Transport* (1979) 2 ALD 255; *Re Surf Air and Civil Aviation Authority* (1991) 22 ALD 118 at 122.
- 105 *Re Bienstein and Commonwealth Ombudsman* (2003) 38 AAR 270.
- 106 *Re Advocacy for the Aged Association Inc and Secretary, Department of Social Security* (1991) 25 ALD 535; *Re Prodan and Secretary, Department of Family and Community Services* (2002) 71 ALD 700.
- 107 *Lees v Comcare* (1999) 56 ALD 401; *Re Reynolds and Defence Force Retirement and Death Benefits Authority* (2000) 58 ALD 539.
- 108 Cth: AAT (*Administrative Appeals Tribunal Act 1975* (Cth) s2A); SSAT (*Social Security Act 1991* (Cth) s1246); MRT, RRT (*Migration Act 1958* (Cth) s353(1), 421(1)).

- 109 *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324, reversed on other grounds: (1997) 81 FCR 71, in terms approved by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 643 (Gummow J). See also 628 (Gleeson CJ and McHugh), 668 (Callinan J).
- 110 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.
- 111 *McDonald v Director-General of Social Security* (1984) 6 ALD 6.
- 112 *Abebe v Commonwealth* (1999) 197 CLR 510 at 576; *Appellant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387.
- 113 (2003) 197 ALR 389 at [78].
- 114 (1936) 55 CLR 192 at 216 (Dixon J).
- 115 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- 116 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.
- 117 *Federal Court Act 1976* (Cth) s19(2).
- 118 *Federal Court Act 1976* (Cth) s20(2).
- 119 *Administrative Appeals Tribunal Act 1975* (Cth) s44(1).
- 120 *Repatriation Commission v Thompson* (1988) 82 ALR 352 at 357.
- 121 *Comcare v Etheridge* [2006] FCAFC 27 (Branson J, Spender and Nicholson JJ agreeing).
- 122 *Birdseye v Australian Securities and Investment Commission* (2003) 76 ALD 321; *Australian Telecommunications Corporation v Lamboglou* (1990) 12 AAR 515 at [18].
- 123 *Administrative Appeals Tribunal Act 1975* (Cth) s44(7)–(10).
- 124 *Fox v Percy* (2003) 214 CLR 118.
- 125 *ibid*, 124–5.
- 126 *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 at 621 (Mason J).
- 127 *Kerr Committee Report*, n22 above, paras 297, 299.
- 128 *Bland Committee Report*, n24 above, para 172g.
- 129 J McMillan, ‘Review of Government Policy by Administrative Tribunals’ (1998) 9 *Law and Policy Papers* (CPIL) 30–1.
- 130 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
- 131 McMillan, n129 above, 31.
- 132 *Administrative Decisions Tribunal Act 1997* (NSW) s64; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s25(3); *State Administrative Tribunal Act 2004* (WA) s28.
- 133 *Social Security (Administration) Act 1999* (Cth) Sch 3 item 2.
- 134 R Creyke, ‘The special place of tribunals in the system of justice: How can tribunals make a difference?’ (2004) 15 *Public Law Review* 230.
- 135 Administrative Review Council, n32, above, para 6.3.
- 136 R Creyke and J McMillan, ‘Executive Perceptions of Administrative Law – An Empirical Study’ (2002) 9 *Australian Journal of Administrative Law* 180 at 185–7.

Chapter 6

- 1 The primary focus of this chapter is the Commonwealth Ombudsman, but many of the points are applicable to state Ombudsmen. At the end of the chapter, some differences between the Commonwealth and state Ombudsmen are explored. The terms ‘Ombudsman’ and ‘Ombudsmen’ are used interchangeably throughout this chapter, whilst I prefer ‘Ombudsman’ many writers often use ‘Ombudsmen’.
- 2 *ibid*.
- 3 A Stuhmcke, ‘Privitisation and Corporatisation: What now for the Commonwealth Ombudsman?’ (2003) 11 *Australian Journal of Administrative Law* 102. For an extensive discussion on the relationship of Ombudsman to administrative justice in Australia see M Groves, ‘Ombudsmen’s Jurisdiction in Prisons’ (2002) 28 *Monash University Law Review* 183.

- 4 R Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in C Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (AIAL 2000) 189.
- 5 The Australian Ombudsman was not copied from Sweden, but instead drew from the New Zealand model which was in turn based on the Danish model. See W Gelhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (Harvard University Press, 1967) 102; and JE Lane, 'The Ombudsman in Denmark and Norway' in R Gregory and P Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press, 2000) 144.
- 6 R Creyke and J McMillan, 'Administrative Law Assumptions . . . Then and Now' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 34.
- 7 George Soros, *Open Society: Reforming Global Capitalism* (Little, Brown and Company, 2000) 30–1.
- 8 C Harlow and R Rawlings, *Law and Administration* (2nd edn, Butterworths, 1997) 399.
- 9 D Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in M Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 110.
- 10 Groves, n3 above.
- 11 Stuhmcke, n3 above, 101–14.
- 12 Stuhmcke, n3 above, 102.
- 13 D Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 54–9.
- 14 Stuhmcke, n3 above, 105.
- 15 Commonwealth Administrative Review Committee, *Report* (Parl Paper 144/1971) ('the Kerr Committee Report') 95.
- 16 *ibid*, 93.
- 17 *ibid*.
- 18 *ibid*, 94.
- 19 Pearce, n13 above, 54–72. See also Snell, n4 above.
- 20 In most states there is some form of parliamentary oversight of, or relationship with, the Ombudsman. A notable exception is Tasmania.
- 21 Committee on Administrative Discretions, *Final Report* (Parl Paper 361/1973) ('the Bland Committee Report').
- 22 L Curtis, 'The Vision Splendid: A Time for Re-Appraisal' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 43.
- 23 Interim Report of the Committee on Administrative Discretions, *Parl Paper No 53/197*.
- 24 P Bailey, 'Practical Solutions For Practical Problems: Some Reflections on the Bland Committee on Review of Administrative Discretions' in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 127–48.
- 25 *ibid*, 130–5.
- 26 Interim Report, n23 above, 3. Although the date and timing of the visit is uncertain.
- 27 C Bennett, 'Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability' (1977) *Governance: An International Journal of Policy and Administration* 225–226. Bennett points out how important individuals like Sir Guy Powles, first New Zealand Ombudsman, were in disseminating the general efficacy and applicability of the Ombudsman concept.
- 28 Interim Report, n23 above, 1.
- 29 R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 4.3.15.
- 30 *ibid*.

- 31 Pearce, n13 above.
- 32 *ibid*, 58–9.
- 33 Harlow, n8 above, 399.
- 34 *ibid*, 431.
- 35 *ibid*, 427.
- 36 K del Villar, ‘Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen’ (2003) 25 *AIAL Forum* 44.
- 37 Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Report* (AGPS, Canberra 1986–1987) 2.
- 38 Stuhmcke, n8 above, 109.
- 39 The decision to not grant the Commonwealth Ombudsman determinative powers helped avoid the problem, at the federal level, that the Ombudsman could not have been granted powers of a judicial nature.
- 40 See Stuhmcke, n8 above, 106–7, for an excellent survey of these statistics.
- 41 D Rowatt, ‘Why a Legislative Ombudsman is Desirable’ (1993) 11 *Ombudsman Journal* 131.
- 42 Pearce, n13 above, 64.
- 43 Stuhmcke, n8 above, 108.
- 44 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman* (Parl Paper 519/1992).
- 45 *ibid*, 16.
- 46 *ibid*, 19–20.
- 47 A Cameron, ‘Future Directions in Administrative Law: The Ombudsman’ in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL 1992) 205.
- 48 Senate Standing Committee, n44 above, 2.
- 49 *ibid*, 18.
- 50 *ibid*, 17.
- 51 *ibid*, 20.
- 52 *ibid*, 21–2.
- 53 *ibid*, 17.
- 54 The Ombudsmen in this period were Dennis Pearce 1988–1991; Alan Cameron 1991–1993; Philippa Smith 1993–1998; Ron McLeod 1998–2003.
- 55 R Snell and E Langston, ‘Who Needs FOI When Market Mechanisms will Deliver Accountability on Demand? A Critical Evaluation of the Relationship Between Freedom of Information and Government Business Enterprises’ (1999) 3 *Flinders Journal of Law Reform* 215 at 217–21.
- 56 H Arthurs, ‘Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy’ (1997) 42 *McGill Law Journal* 29.
- 57 M Aronson, ‘A Public Lawyer’s Response to Privatisation and Outsourcing’ in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 40; C Pitham and J McMillan, ‘Who’s Got the Map? The Changing Landscape of National Law Enforcement, Homeland Security and the Role of Administrative Accountability Bodies’ in C Finn (ed), *Shaping Administrative Law for the Next Generation: Fresh Perspectives* (AIAL, 2005) 165; C Downey, ‘Shifting Models of Accountability: The Consequences for Administrative Law in the Rise of Contractualism in Social Security’ (2001) 30 *AIAL Forum* 28; M Allars, ‘Public administration in private hands’ (2005) 12 *Australian Journal of Administrative Law* 126.
- 58 G Airo-Farulla, ‘Administrative Law and Governance’ in C Finn (ed), *Sunrise or Sunset? Administrative Law in the New Millennium* (AIAL 2000) 268.
- 59 R Creyke and J McMillan, ‘Administrative Law Assumptions . . . Then and Now’ in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 21.
- 60 Dennis Pearce had raised concerns about privatised and corporatised government agencies and resort to private sector industry Ombudsman in his Commonwealth Ombudsman and Defence Force Ombudsman *Annual Report 1989–1990* (AGPS Canberra) 102.

- 61 Cameron, n47 above, 211.
- 62 See Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Report 1993–1994* (AGPS Canberra) 2. In the *Annual Report 1995–96*, Chapter 2 was titled ‘The changing boundaries of government’.
- 63 R McLeod, ‘Twenty Five Years of the Commonwealth Ombudsman’ (2003) 36 *AIAL Forum* 15.
- 64 Commonwealth Ombudsman, *Annual Report 1994–95* (AGPS Canberra) 7.
- 65 *ibid.*, 45.
- 66 *ibid.*, 45. In the following year’s Annual Report Appendix A was devoted to detailing Major Projects.
- 67 P McAloon, ‘When the Business of Business is Government: The Role of the Commonwealth Ombudsman and Administrative Law in a Corporatised and Privatised Environment’ (1999) 23 *AIAL Forum* 44.
- 68 D Landa, ‘The Ombudsman Surviving and Thriving into the 2000s’ in Stephen Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (AIAL, 1994) 91–2.
- 69 *ibid.*, 94 citing DC Pearce, ‘The Ombudsman: Review and Preview: The Importance of Being Different’ reproduced in International Ombudsman Institute, *Fifth International Ombudsman Conference Report*, 29.
- 70 *ibid.*, 95.
- 71 *ibid.*, 96–103.
- 72 Commonwealth Ombudsman, *Annual Report 2001–2002* (AGPS Canberra) 138.
- 73 *ibid.*, 38.
- 74 *ibid.*, 1.
- 75 The 1989–90 Annual Report showed a total of 77 staff. In 1996–1997 and 2001–2002 there were 88 staff.
- 76 B Barbour, ‘What are the Essential Features of an Ombudsman?’ in R Creyke and J McMillan (eds), *Administrative Law the Essentials* (AIAL, 2002) 57.
- 77 Some exceptions include *Re Reference* (1979) 2 ALD 86, in which the Commonwealth Ombudsman sought an advisory opinion (s11) and *Kjavvadias v Commonwealth Ombudsman* (1984) 1 FCR 80 where a complainant sought access to documents.
- 78 (1995) 37 NSWLR 357.
- 79 *ibid.*, 367–8.
- 80 [2003] TASSC 34.
- 81 (1995) 134 ALR 238. For a further discussion of judicial review of Ombudsman, see: Pearce, n9 above, 121–32; Groves, n3 above; Creyke and McMillan, n29 above, 201–7.
- 82 McMillan had previously worked for the Commonwealth Ombudsman as a young investigator in 1979.
- 83 J McMillan, ‘Future Directions – The Ombudsman’ Address to the National AIAL Forum, Canberra July 2005, available at <www.comb.gov.au/commonwealth/publish.nsf/Content/research_speeches_2005> [accessed 20 September 2006].
- 84 Pitham, n57 above, 166.
- 85 *ibid.*, 170.
- 86 J McMillan, ‘The Ombudsman, Immigration and Beyond’, unpublished paper from an address to IPAA Seminar, Canberra, 25 October 2005, 4.
- 87 J McMillan, ‘The Ombudsman and the Rule of Law’, Address to the Public Law Weekend, Canberra 5–6 November 2004, available at: <www.comb.gov.au/commonwealth/publish.nsf/Content/research_speeches_2004> [accessed 20 September 2006].
- 88 J McMillan, ‘Key Features and Strengths of the Ombudsman Model – National Ombudsman Commission of Indonesia’ address to Indonesian Ombudsman Training Seminars 22–25 June 2004, available at: <www.comb.gov.au/commonwealth/publish.nsf/Content/research_speeches_2004> [accessed 20 September 2006].
- 89 S Boyron, ‘The Rise of Mediation in Administrative Law Disputes: Experiences from England, France and Germany’ [2006] *Public Law* 342.
- 90 McMillan, n86 above, 6.
- 91 *ibid.*, 7.

- 92 *ibid*, 5.
 93 *ibid*, 4.
 94 McMillan, n87 above, 4.
 95 *ibid*, 6.
 96 AJ Brown, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, National Integrity Systems Assessment Final Report (Griffith University, 2005) 32.
 97 *ibid*, 35.
 98 J McMillan, 'Chaos or Coherence? Strengths and Opportunities and Challenges for Australia's Integrity Systems' Speech Parliament House Sydney 9 December 2005.
 99 Groves, n3 above.
 100 Pearce, n9 above.
 101 McMillan, n86 above, 2.
 102 Pearce, n9 above, 138.
 103 McMillan, n86 above, 2–3.
 104 *ibid*, 3.
 105 Pearce, n9 above, 138.
 106 See <www.comb.gov.au> [accessed on 20 September 2006].
 107 McMillan, n86 above, 4.

Chapter 7

- 1 See *Egan v Willis* (1998) 195 CLR 424 at 452; C Mantziaris, 'Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege' Research Paper 12 1999–2000 <<http://www.aph.gov.au/LIBRARY/pubs/RP/1999–2000/2000rp12.htm#exploration>>. (Accessed 30 May 2006).
- 2 *Health Records (Privacy and Access) Act 1997* (ACT), *Privacy Act 1988* (Cth), *Health Records and Information Privacy Act 2002* (NSW), *Privacy and Personal Information Protection Act 1998* (NSW), *Information Privacy Act 2000* (Vic), *Health Records Act 2001* (Vic); *Information Act 2002* (NT).
- 3 *Territory Records Act 2002* (ACT), *Archives Act 1983* (Cth), *State Records Act 1998* (NSW), *Public Records Act 2002* (Qld), *State Records Act 1997* (SA), *Archives Act 1983* (Tas), *Public Records Act 1973* (Vic), *State Records Act 2000* (WA). See also the *Information Act 2002* (NT) Part 9.
- 4 See, for example, the *Public Access to Government Contracts Act 2000* (ACT).
- 5 S Lamble, 'Freedom of Information, a Finnish Clergyman's Gift to Democracy' (2002) 97 *FOI Review* 2.
- 6 *Freedom of Information Act* 5 USC s552.
- 7 An article by Enid Campbell (E Campbell, 'Public access to government documents' (1967) 41 *ALJ* 73) played an important role in bringing the US legislation to the attention of the Australian government: see Gough Whitlam's Foreword to M Groves (ed), *Law and Government in Australia*, 2005 at v–vi.
- 8 See Report of Interdepartmental Committee, *Proposed Freedom of Information Legislation*, Australian Government Publishing Service, Canberra 1974; Cth Hansard, Senate, 5 December 1974, 3175; and Commonwealth 'Policy Proposals for Freedom of Information Legislation', Australian Government Publishing Service, Canberra, 1976; Cth Hansard, House of Representatives, 9 December 1976, 3577; Commonwealth of Australia, Royal Commission on Australian Government Administration Report, *Parliamentary Paper* 185/1976; Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978, 1979*.
- 9 *Freedom of Information Amendment Act 1986* (Cth).
- 10 *Freedom of Information Amendment Act 1991* (Cth).
- 11 Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation*, 1987.

- 12 ARC/ALRC, *Open Government: A Review of the Federal Freedom of Information Act 1982*, 1995.
- 13 The Freedom of Information (Open Government) Bill 2003 (Cth) would, if enacted, implement a small number of them. See also the Legal and Constitutional Affairs Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*.
- 14 See, for example, *Accident Compensation Commission v Croom* [1991] 2 VR 322.
- 15 (1986) 67 ALR 58.
- 16 See also *Arnold v The State of Queensland and the Australian National Parks and Wildlife Service* (1987) 13 ALD 195; P Bayne, 'The Objects of the Freedom of Information (FOI) Acts and their Interpretation' (1995) 2 *Australian Journal of Administrative Law* 114.
- 17 See R Snell, 'The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *Federal Law Review* 575.
- 18 *Re Wertheim and Department of Health* (1984) 7 ALD 121.
- 19 *Re Mann and Capital Territory Health Commission (No 2)* (1983) 5 ALN N368.
- 20 *Re O'Grady and Australian Federal Police* (1983) 5 ALN N420.
- 21 See *Re Brennan and the Law Society of the ACT* (1984) 6 ALD 428.
- 22 The *Archives Act* provides an access regime for documents which are more than thirty years old.
- 23 Section 9 includes an exception for certain exempt matters.
- 24 See *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117.
- 25 This has been accepted as extending to children. However, see *Wallace v Health Commission of Victoria* [1985] VR 403 concerning the issue of lack of capacity to make a request.
- 26 For example, *Re Hanbury-Sparrow and Department of Foreign Affairs* (1997) 47 ALD 779. See further, M Paterson, 'Freedom of Information and Privacy: A Reasonable Balance?' (1992) 66 *Law Institute Journal* 1001; M Paterson, *Freedom of Information and Privacy in Australia* (2005, Lexis Nexis) [5.33]–[5.36].
- 27 See also s15A regarding access to personnel records.
- 28 See s15(5) and (6).
- 29 See ss26A, 27 and 27A.
- 30 Consultation is required only where there are in place procedures for consulting with that government.
- 31 Sections 26(2), 34(4) and 35(4). These address the situation where acknowledgement that a document exists may be sufficient to reveal information which would otherwise be exempt. See further M Paterson, *Freedom of Information and Privacy in Australia*, n26 above [3.59]–[3.61].
- 32 *Re McKinnon* (Cth AAT, 12 December 1995, unreported). A Cossins, *Annotated Freedom of Information Act New South Wales*, LBC Information Services, Sydney, 1997, at [66.1.1]. See also *Ainsworth v Burden* (2003) 56 NSWLR 620.
- 33 See s24A.
- 34 See, for example, *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 14 AAR 178 at 187.
- 35 It must, however, be apparent from the nature of the documents described that no obligation would arise to grant access to edited copies of them or that the applicant would not wish to have access to edited copies of them
- 36 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190. It should be noted that the latter words should not be understood as a paraphrase of the former but rather 'as drawing an emphatic comparison': see *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, at [61] per (Hayne J).
- 37 *Re Connelly and Department of Finance* (1994) 34 ALD 655.
- 38 *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551.
- 39 *Asic v Australian Federal Police* (1986) 11 ALN N184.

- 40 *Re Rae and Department of Prime Minister and Cabinet* (1986) 122 ALD 589 at 606; *Re Heaney and Public Service Board* (1984) 6 ALD 310 at 323; *Re Lawless and Secretary, Law Department* (1985) 1 VAR 42 at 49.
- 41 *Re Lianos and Secretary, Department of Social Security* (1985) 7 ALD 475 at 500–1; *Re Downie* (1985) 8 ALD 496 at [172]–[173]; *Re Birrell and Department of Premier and Cabinet (Nos 1 and 2)* (1986) 1 VAR 230 at 240–1.
- 42 *Re Lianos and Secretary, Department of Social Security (No 2)* (1985) 9 ALD 43 at 49; *Re Young and State Insurance Office* (1986) 1 VAR 267.
- 43 For a useful critique of their operation see R Snell, ‘Conclusive or Ministerial Certificates: An Almost Invisible Blight in FOI Practice’ (2004) 109 *FOI Review* 9.
- 44 For a useful critique of their operations see R Snell, ‘Conclusive or Ministerial Certificates: An Almost Invisible Blight in FOI Practice’ (2004) 109 *FOI Review* 9.
- 45 See further JW Shaw, ‘The Established Principles of Cabinet Government’ (2001) 73 *The Australian Quarterly* 21.
- 46 Material may be purely factual even though it is not confined to primary facts: see *Harris v Australian Broadcasting Corporation* (1984) 1 FCR 150 at 155.
- 47 *Re Anderson and Department of the Special Minister of State (No 2)* (1986) 4 AAR 414.
- 48 *Gersten v Minister for Immigration and Multicultural Affairs* 61 ALD 445 at 448.
- 49 See *Re Milliss and National Archives of Australia* [2000] AATA 565 at [21]–[22].
- 50 *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588 at 606–7.
- 51 See, for example, S Zifcak, ‘Freedom of Information: Torchlight but not Searchlight’, (1991) 66 *Canberra Bulletin of Public Administration* 162; P Bayne and K Rubenstein, ‘Freedom of Information: A return to basics?’ (1994) 1 *Australian Journal of Administrative Law* 107; Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (ALRC, Canberra, 1995) [9.16]. See also *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 in which the NSW Court of Appeal stressed that an equivalent provision in the *Freedom of Information Act 1989* (NSW) should not be constrained by the application of rigid rules or formulaic recourse to the Howard factors.
- 52 (1985) 7 ALD 645.
- 53 See *Re Fewster and Department of Prime Minister and Cabinet (No 2)* (1987) 13 ALD 139, *Re Bartlett and Department of Prime Minister and Cabinet* (1987) 12 ALD 659, *Re Kamminga and Australian National University* (1992) 26 ALD 585.
- 54 See the discussion of *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at pp 132 below.
- 55 *Department of Health v Jephcott* (1985) 62 ALR 421.
- 56 See *Re Redfern and University of Canberra* (1995) 38 ALD 457; *Re Ascic and Australian Federal Police* (1986) 11 ALN N184.
- 57 See *Re Public Interest Advocacy Centre and Department of Community Services (No 2)* 14 AAR 180.
- 58 See *Re Brennan and Law Society of the Australian Capital Territory (No 2)* (1985) 8 ALD 10.
- 59 See *Re Telstra Australia Ltd and Australian Competition and Consumer Commission* [2000] AATA 71; *Re Sherrington and Merit Protection and Review Agency* (1996) 62 *FOI Review* 23.
- 60 (1991) 29 FCR 429.
- 61 *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243, 245–6. See also *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257 at N259; *Re Pinder and Medical Practitioners Board* (1996) 10 VAR 75 at 81.
- 62 (1999) 201 CLR 49. See *Commonwealth of Australia v Dutton* (2000) 102 FCR 168 at 169.
- 63 *Waterford v Commonwealth* (1987) 163 CLR 54 at 63–4.
- 64 (1992) 36 FCR 111 at 119.

- 65 *Secretary, Department of Workplace Relations and Small Business v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301, 309.
- 66 See *Searle Australia v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 125.
- 67 (1987) 14 FCR 434 at 443.
- 68 *Department of Health v Jephcott* (1985) FCR 85 at 89.
- 69 See further M Paterson, 'Commercial in Confidence and public accountability: Achieving a new balance in the contract State' (2004) 32 *Australian Business Law Review* 315.
- 70 Section 34A.
- 71 Section 44.
- 72 Section 46.
- 73 Section 47.
- 74 Section 47A.
- 75 See, for example, *Re Sime and Minister for Immigration and Ethnic Affairs* (1995) 21 AAR 369.
- 76 Section 58(2) and (6).
- 77 Section 63.
- 78 Section 64.
- 79 See s66.
- 80 It must be constituted exclusively by presidential members: s58B(2).
- 81 [2006] HCA 45. The court's decision has attracted criticism on the basis that it failed to give adequate weight to the objectives of the Act and 'give governments fresh impetus to suppress information that is embarrassing or politically inconvenient': see Australian Press Council, *General Press Release No 72* accessed at <www.presscouncil.org.au/pcs/site/activities/guides/gpr272.html>.
- 82 [2006] HCA 45 at [131].
- 83 [2006] HCA 45 at [56].
- 84 [2006] HCA 45 at [60].
- 85 [2006] HCA 45 at [19].
- 86 See s58A.
- 87 See, for example, *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551. The existence of statutory rights to appeal FOI decisions does, however, provide a strong reason for a court exercising supervisory jurisdiction to decline relief on discretionary grounds.
- 88 J McMillan, 'Twenty years of open government – what have we learnt?' Inaugural Professorial Address, delivered on 4 March 2002 <<http://eprints.anu.edu.au/archive/00001463/>>, (accessed 30 May 2006); R Fraser, 'Where to Next with the FOI Act? The Need for FOI Renewal – Digging In, Not Giving Up' (2003) 38 *AIAL Forum* 57.
- 89 See further M Paterson, 'Transparency in the Modern State: Happy Birthday FOI or Commiserations?' (2004) 29 *Alternative Law Journal* 10–14; R Snell, 'Administrative Compliance: Evaluating the Effectiveness of Freedom of Information' (2001) 93 *FOI Review* 26.
- 90 See M Paterson, 'Transparency in the Modern State: Happy Birthday FOI or Commiserations?' (2004) 29 *Alternative Law Journal* 10; Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982* in Australian Government Agencies Report (2006).
- 91 See Paterson, n26 above [2.18] and [12.16]; R Snell, 'Who Needs FOI when Market Mechanisms will Deliver Accountability on Demand? A Critical Evaluation of the Relationship between Freedom of Information and Government Business Enterprises?' (1999) 3 *Flinders Journal of Law Reform* 215.
- 92 See R Snell, 'Administrative Compliance – evaluating the effectiveness of freedom of information' (2001) 93 *FOI Review* 26.

- 93 *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1989* (NSW); *Information Act 2002* (NT); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA). For a detailed overview of the relevant State and Territory laws see *Halsbury's Laws of Australia* (LexisNexis/Butterworths) Chapter 10(2), Freedom of Information.

Chapter 8

- 1 (May, 2000) at 3–4.
- 2 *The New Despotism* (1932).
- 3 *ibid*, 21.
- 4 See Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2006* (2006) 36–43.
- 5 Henry VIII clauses are discussed in DC Pearce and S Argument, *Delegated Legislation in Australia* (3rd edn) (2005, LexisNexis) [1.8], [1.20] and [19.8].
- 6 *Legislation Act 2001* (ACT) s9.
- 7 *Subordinate Legislation Act 1978* (SA) s4; *Interpretation Act* (NT) s61.
- 8 *Statutory Instruments Act 1992* (Qld) s7.
- 9 *Subordinate Legislation Act 1989* (NSW) s3; *Subordinate Legislation Act 1994* (Vic) s3; *Statutory Instruments Act 1992* (Qld) s8.
- 10 *Legislation Act 2001* (ACT) s8.
- 11 *Statutory Instruments Act 1992* (Qld) s9; *Subordinate Legislation Act 1992* (Tas) s3.
- 12 *Interpretation Act 1984* (WA) s5.
- 13 See, generally, Pearce and Argument, n5 above, at [1.11] to [1.18]. See also S Argument, 'Quasi-legislation: Greasy pig, Trojan Horse or unruly child?' (1994) 1 *Australian Journal of Administrative Law* 144.
- 14 The register can be viewed at <www.frli.gov.au>.
- 15 [2004] FCA 1701 at [41].
- 16 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 and *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573.
- 17 *McWilliam v Civil Aviation Safety Authority* [2004] FCA 1701 at [39].
- 18 *ibid*, [41].
- 19 *ibid*, [42].
- 20 (2001) 185 ALR 573.
- 21 *ibid*, 580.
- 22 *ibid*, 588.
- 23 *ibid*, 581–2.
- 24 (1988) 16 ALD 440 at 456–7.
- 25 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at 582–4.
- 26 *ibid*.
- 27 *ibid*, 584.
- 28 *ibid*, 584–5.
- 29 *ibid*, 585.
- 30 *ibid*, 585–6.
- 31 *ibid*, 586.
- 32 *ibid*, 587.
- 33 *ibid*, 587.
- 34 *ibid*, 589.
- 35 Pearce and Argument, n5 above, 392.
- 36 (1928) 41 CLR 275.
- 37 *ibid*, 279.
- 38 [1994] 1 Qd R 314.
- 39 *ibid*, 321.

Chapter 9

- 1 Lindell identifies three major senses of the non-justiciability of political questions. See G Lindell: 'The Justiciability of Political Questions: Recent Developments' in HP Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company, 1991) 180–250 at 183.
- 2 See *Xenophon v State of South Australia* (2000) 78 SASR 25, where the granting of an indemnity to ministers for their costs and potential liabilities in a defamation action brought by Mr Xenophon was held to be non-justiciable.
- 3 See, for example, *Horta v Commonwealth* (1994) 181 CLR 183; *Attorney General (UK) v Heinemann Publishers (Spycatcher)* (1988) 165 CLR 30.
- 4 A Mason, 'The High Court as Gatekeeper' (2000) 24 *University of Melbourne Law Review* 784.
- 5 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 395.
- 6 J Jowell, 'The Legal Control of Administrative Discretion' [1973] *Public Law* 178 at 213.
- 7 *Case of Impositions (Bates case)* (1610) 2 State Tr 371.
- 8 *Prohibitions del Roy* (1607) 12 Co. Rep. 63; K and L 108.
- 9 *Case of Proclamations* (1610) 77 ER 1352; 1611 12 Co. Rep. 74; K and L 110.
- 10 *ibid* 1354.
- 11 However, existing prerogatives can evolve over time. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 1 All ER 556, the power to declare war and make peace was held to have evolved to include the power to 'keep' the peace. This allowed Police use of CS gas despite concurrent statutory authority (the *Police Act 1964* (Eng)) for this.
- 12 *Case of Ship Money; R v Hampden* (1637) 3 State Tr 826.
- 13 *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864.
- 14 *Laker Airways v Dept of Trade* [1977] QB 643.
- 15 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 408.
- 16 *ibid*, 409.
- 17 *ibid*, 410.
- 18 *ibid*, 418.
- 19 *R v Secretary of State for the Home Department; Ex parte Bentley* [1993] 4 All ER 442.
- 20 [1996] 1 AC 527.
- 21 (1998) 72 SASR 110.
- 22 *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 2 WLR 1219.
- 23 *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Bancoult* [2006] EWHC 1038.
- 24 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.
- 25 (1982) 151 CLR 342.
- 26 (1987) 163 CLR 378.
- 27 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 219. An application for special leave to appeal to the High Court in this matter was refused.
- 28 F Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14 *Sydney Law Review* 432.
- 29 See the discussion of *Ex parte Bentley* and the *Bancoult* litigation above.
- 30 (1985) 157 CLR 91.
- 31 *Macrae and others v Attorney-General (NSW)* (1987) 9 NSWLR 286.
- 32 *Waters v Acting Administrator of the Northern Territory* (1994) 119 ALR 557.
- 33 *Re Ditfort; ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265.
- 34 *ibid*, 288–9.
- 35 *Baker v Carr* 369 US 186, 287 (1962).
- 36 For an extended development of this argument, see C Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.

Chapter 10

- 1 *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
- 2 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 279–80 (McHugh J).
- 3 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327–8 (Mason J).
- 4 *Judiciary Act 1903* (Cth) s78A.
- 5 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 258–9 (Gaudron, Gummow and Kirby JJ), 276 (McHugh J).
- 6 In *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 409, Gaudron and Gummow JJ considered if an Attorney-General were to seek a declaration that a Commonwealth law should be given a restrictive interpretation whose effect would be to save a state law from invalidity under Constitution s109, the Attorney-General would not be maintaining 'a particular right, power or immunity in which he was concerned', and that as a result, the application would not be a 'matter'.
- 7 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 259 (Gaudron, Gummow and Kirby JJ), 276 (McHugh J).
- 8 In *McBain*, for instance, the fiat was granted on condition that the relator not argue that the Commonwealth legislation was unconstitutional: see at 401 (Gaudron and Gummow JJ) for the wording of the fiat.
- 9 *Barton v R* (1980) 147 CLR 75 at 90–1; *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 258–9 (Gaudron, Gummow and Kirby JJ), 276 (McHugh J); *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 473 (Hayne J).
- 10 *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 400–3 (Gaudron and Gummow JJ; 473–5 (Hayne J), 451–2 (Kirby J).
- 11 Australian Law Reform Commission, *Standing in public interest litigation* (AGPS, 1985), 88–95.
- 12 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262–3 (Gaudron, Gummow and Kirby JJ). McHugh J noted views to this effect at 278–9, but argued that reform of standing law was a matter for the legislature.
- 13 [1903] 1 Ch 109.
- 14 (1980) 146 CLR 493.
- 15 *ibid*, 532–3 (Gibbs J), 546–7 (Stephen J), 552 (Mason J).
- 16 *ibid*, 527–8 (Gibbs J), 547 (Mason J). Stephen J did not expressly consider whether this more liberal interpretation should be applied.
- 17 *ibid*, 530.
- 18 *ibid*, 539.
- 19 *ibid*, 547.
- 20 *ibid*, 548.
- 21 *ibid*, 531.
- 22 *ibid*, 539. Mason J did not expressly address this issue, but acceptance of it is implicit in his judgment.
- 23 Stephen J and Mason J did not advert to this.
- 24 *ibid*, 531–2 (Gibbs J), 540–6 (Stephen J); 547 (Mason J).
- 25 (1981) 149 CLR 27.
- 26 Aickin J considered that the state of the evidence was such that the applicants for the striking out order had not shown that the plaintiffs lacked standing, but he considered that it was possible that at a full hearing, they might nonetheless succeed: *ibid*, 56–7.
- 27 *ibid*, 36–7 (Gibbs CJ), 42 (Stephen J), 62, 63 (Wilson J, with whom Aickin J agreed). The judgments of Murphy J and Brennan J do not advert expressly to this consideration, but it is implicit in Brennan J's analysis of the law: at 74–6.
- 28 *ibid*, 42 (Stephen J).

- 29 *ibid.*, 37. See too Stephen J (at 41–2).
- 30 *ibid.*, at 36, 42, 77 (respectively). Murphy J seems to have taken it for granted that any religious interests would suffice to ground standing, and saw no reason why Aboriginal beliefs should not be accorded the same respect as Judaeo-Christian beliefs: at 46.
- 31 *ibid.*, 62.
- 32 *ibid.*, 42.
- 33 (1998) 194 CLR 247.
- 34 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 275–83 (McHugh J, arguing that there are powerful arguments for restricted standing), 284–5 (Hayne J, agnostic).
- 35 (1998) 194 CLR 247, 263.
- 36 [1978] AC 435.
- 37 *ibid.*, 266 (citations omitted).
- 38 See Bruce Dyer, 'Costs, standing and access to judicial review' (1999) 23 *AIAL Forum* 1, 11–15.
- 39 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 40 It could limit standing in cases where the alleged error was non-jurisdictional, but courts have been disinclined to treat legally flawed administrative decisions as non-jurisdictional.
- 41 See Kirby J's observations in *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 393 (Kirby J), and *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 642; and see, for example, *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (SC WA, Parker J, 9 August 1995); *Criminal Justice Commission v Queensland Advocacy Incorporated* [1996] 2 Qd R 118 at 123 (Macrossan CJ), and see Davies JA, 128; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 at 502 (Sackville J); *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1996) 56 FCR 50 at 64–5 (Lockhart J); *North Queensland Conservation Council* [2000] QSC 172 at [8], [12]–[15], [17] (Chesterman J).
- 42 *Australian Foreman Stevedores Association v Crone* (1980) 98 ALR 276; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1; *Nolan v Development Allowance Authority* (unreported, Federal Court, Goldberg J, 4 February 1997); *Maritime Union of Australia v Minister for Transport and Regional Services* (2000) 100 FCR 58.
- 43 *Friends of Castle Hill Association Inc v Queensland Heritage Council* (1993) 81 LGERA 346 (which seems a borderline case which arguably should have gone the other way); *Defence Coalition Against RCD Inc v Minister for Primary Industry and Energy* (1997) 74 FCR 142; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (1996) 70 FCR 212.
- 44 This principle antedated ACF: see, for example, *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473. Post-ACF decisions include: *Australian Conservation Foundation v Environmental Protection Appeal Board* [1983] VR 385; *Australian Conservation Foundation v South Australia* (1990) 53 SASR 349; *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127; *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73; *Queensland Newsagents Federation Ltd v Trade Practices Commission; Ex parte Newsagency Council of Victoria Ltd* (1993) 118 ALR 527. And see *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79 (which recognised that such a right could also ground an application to be joined as a party in a case where the applicant's success would have defeated such a right).
- 45 *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124; *Bropho v Tickner* (1993) 40 FCR 165; *Pharmacy Guild of Australia v Community*

- Pharmacy Authority* (1996) 70 FCR 462 (a case in which those plaintiffs whose interests were less directly affected by the decision under challenge were held not to have standing).
- 46 *Ex parte Helena Valley/Boya Association (Inc); State Planning Commission and Beggs* (1990) 2 WAR 422. In *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 and *North Coast Environment Council* (1994) 55 FCR 492, the directness of the relationship between the members' interests and the area affected was only one of the matters regarded as relevant.
- 47 See for instance *Byron Environmental Centre Inc v Arakwal People* (1998) 78 FCR 1.
- 48 See for instance Margaret Allars, 'Standing: the role and evolution of the test' (1991) 20 *Federal Law Review* 83; Michael L Barker, 'Standing to sue in public interest environmental litigation – from ACF v Commonwealth to Tasmanian Trust v Minister for Resources' (1996) 13 *Environmental and Planning Law Journal* 186.
- 49 *Australian Conservation Foundation v South Australia* (1990) 53 SASR 353; *Bridgetown Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 at 114; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 192 ALR 625.
- 50 (1987) 13 FCR 306.
- 51 (1994) 55 FCR 492 at 510.
- 52 (1989) 19 ALD 70.
- 53 *ibid*, 74.
- 54 Jeffrey Barnes, 'Administrative law' (1990) 18 *Australian Business Law Review* 338.
- 55 (1994) 55 FCR 492.
- 56 (1994) 52 FCR 201 (Lindgren J), (1995) 56 FCR 50 (Full Court).
- 57 [2000] QSC 172
- 58 (1987) 13 FCR 306.
- 59 *ibid*, 308.
- 60 (1989) 19 ALD 71 at 74.
- 61 *Rayjon Properties Pty Ltd v Director-General, Department of Housing, Local Government and Planning* [1995] 2 Qd R 559; *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85; *BGL Corporate Solutions Pty Ltd v Australian Prudential Regulation Authority* [1999] FCA 420; *Chilcott v Medical Registration Board of Queensland* [2002] ASC 118.
- 62 *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250.
- 63 (1994) 52 FCR 201 at 226.
- 64 (1995) 56 FCR 50 at 83.
- 65 *ibid*, 68.
- 66 *Allan v Development Allowance Authority* (1998) 80 FCR 583 at 588 (Wilcox J with whom Finn J agreed). See too *Transurban Citylink Ltd v Allan* (1999) 95 FCR 553 at 566.
- 67 At issue in Allan was whether Allan had standing to seek *administrative* review, and this clearly does depend on the legislation which purportedly confers the right.
- 68 (1995) 55 FCR 492 at 509–10; (1995) 56 FCR 50 at 85–6.
- 69 [1996] 1 Qd R 310.
- 70 [2000] QSC 172
- 71 *ibid*, [12].
- 72 *Save Bell Park Group v Kennedy* [2002] QSC 174.
- 73 The North Queensland approach was rejected in *Save The Ridge Incorporated v Australian Capital Territory* (2004) 182 FLR 155 at [18] (Crispin J).
- 74 (1980) 146 CLR 493 at 509.
- 75 *ibid*, 547.
- 76 *Bateman's Bay Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 (Gaudron, Gummow and Kirby JJ, citing prohibition under

- s75(v)); cf *McHugh J (275); Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 599 (Gleeson CJ and McHugh J, citing s75(v) prohibition and habeas corpus), 627–8 (Gummow J, prohibition, habeas corpus, quo warranto), 652–3 (Kirby J, prohibition, certiorari, habeas corpus), 669–70 (Callinan J, certiorari, prohibition, habeas corpus, quo warranto); *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 394–5 (Gleeson CJ), 413–15 (McHugh J), 464–5 (Hayne J) (Gleeson CJ and Hayne J appeared to consider that strangers could only seek certiorari for jurisdictional error; McHugh J considered that they could also could seek certiorari for non-jurisdictional error on the face of the record).
- 77 Unreported, ACT Supreme Court, 23 June 1998.
- 78 M Aronson, B Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) 675–9.
- 79 *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; *Australian Institute of Marine and Power Engineers* (1986) 13 FCR 124 at 132–3 (Gummow J) (who considered that the ADJR requirement closely resembled the standing requirements for ‘equitable’ orders, and for certiorari *ex debito iustitiae*; *Ogle v Strickland* (1987) 13 FCR 306 (where the Full Court concluded that the ADJR test was no less liberal than the ‘special interest’ test); *Friends of Castle Hill Association Inc v Queensland Heritage Council* (1993) 81 LGERA 346 (*Judicial Review Act 1991* (Qld)); *Bropho v Tickner* (1993) 40 FCR 165 at 174; *Byron Environmental Centre Inc v The Arakwal People* (1998) 78 FCR 1 at 33 (Merkel J); *Right to Life Association (NSW) Inc v Secretary, Commonwealth Department of Human Services and Health* (1994) 125 ALR 337; *Maritime Union of Australia v Minister for Transport and Regional Services* (2000) 175 ALR 411.
- 80 In *North Coast*, Sackville J stated that ‘the law, at least for the purposes of the ADJR Act, appears to be in a state of transition’, but later, he stated that ‘it has never been held that the principles governing the award of declarations and injunctions under the general law have been superseded by different and broader conceptions under the ADJR Act’: (1994) 55 FCR 492 at 502, 511–2.
- 81 See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 640–2 (Kirby J) for a comprehensive survey of the formulae used to confer standing under Commonwealth legislation, including formulae which relax standing requirements. See too *Barker* n48, 202–4.
- 82 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.
- 83 The test for the AAT is that the person’s ‘interests are affected’: *Administrative Appeals Tribunal Act 1975* (Cth) s27(1). As to this being similar to other tests, see for example *Ogle v Strickland* (1987) 13 FCR 306 at 309–11 (Lockhart J); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79 at 88–9. Standing to make applications and appeals to the Victorian Civil and Administrative Appeals Tribunal is governed by the legislation which confers the relevant jurisdiction on VCAT: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss43, 45.
- 84 *AAT Act 1975* (Cth) s27(2). See too the broad definition of ‘interests are affected’ in the *VCAT Act 1998* (Vic) s5. (This applies whenever an enabling Act conditions the right to appeal on whether a person’s interest are affected.)
- 85 *Export Control (Unprocessed Wood) Regulations* (Cth) r16 (applicant for licence may appeal to AAT for review of a decision to refuse a licence or impose conditions).
- 86 *Fisheries Act 1959* (Tas) ss18, 23C (see *Re v Dixon; Ex parte Ridler* (1993) 31 ALD 531).
- 87 See for example *National Registration Authority v Deputy President Barnett* (unreported, Federal Court of Australia, Carr J, 8 May 1998).
- 88 See, for example, *Alphapharm* (where the test was whether an appellant’s ‘interests are affected’); *Criminal Justice Commission v Queensland Advocacy Incorporated* [1996] 2 Qd R 118; *Transurban City Link Ltd v Allan* (2001) 208 CLR 167; *Brisbane Airport Corporation Ltd v Deputy President Wright* [2002] FCA 359.

Chapter 11

- 1 (1986) 159 CLR 656 at 670 (emphasis added).
- 2 1[2006] EWCA Civ 397 at [77].
- 3 1[2002] 1 WLR 2409 at 2417.
- 4 *R v Secretary of State for Home Department; Ex parte Mohammed Fayed* [1996] EWCA Civ 946.
- 5 R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) [18.2.4].
- 6 See pp. 216–230.
- 7 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
- 8 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 242 (Kirby J); SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) 459; M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Law Book Co, 2004) 554; R Douglas, *Administrative Law* (2nd edn, Butterworths LexisNexis, 2004) 241–2; *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 463 (Kirby J).
- 9 See, for example, Administrative Review Council, *Third Annual Report 1979* (AGPS, 1979) Appendix II, 58; Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals (Report No 39 (1995))*.
- 10 De Smith, n8 above, 459.
- 11 Kirby J called this promoting ‘public confidence in the administrative process’: *Osmond* [1984] 3 NSWLR 447 at 463; Douglas labelled various aspects as ‘[a] safeguard of sound administration’: n8 above, 241.
- 12 E Campbell and M Groves, ‘Polycentricity in Administrative Decision-making’ in M Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 213.
- 13 G A Flick, *Natural Justice: Principles and Practical Applications* (2nd edn, Butterworths, 1984) 120.
- 14 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 266 (Brennan CJ, Toohey, McHugh and Gummow JJ).
- 15 *ibid.*
- 16 See also R Douglas, *Douglas and Jones’s Administrative Law – Commentary and Materials* (5th edn, Federation Press, 2006) 144–6; D O’Brien, ‘The Impact of Administrative Review on Commonwealth Public Administration’ in M Harris and V Waye, *Administrative Law* (Federation Press, 1991) 111.
- 17 See n8 above at 464 (Kirby J).
- 18 Campbell and Groves, n12 above.
- 19 See state counterparts at n23 below.
- 20 *AAT Act*, s28. AAT itself must provide reasons upon request.
- 21 Under the ADJR Act, the reviewable decision must be made ‘under an enactment’: *Australian National University v Burns* (1982) 64 FLR 166, and *Griffith University v Tang* (2005) 221 CLR 99.
- 22 See ‘Role of Reasons’ above.
- 23 See judicial review legislation: *ADJR Act*, s13; *Administrative Law Act 1978* (Vic) (ALA) s8; *Administrative Decisions (Judicial Review) Act 1989* (ACT) (ACTADJR Act) s13; *Judicial Review Act 1991* (Qld) (JRAQ) ss32, 33; *Judicial Review Act 2000* (Tas) (JRAT) ss29, 30; see appeals tribunals legislation: *AAT Act*, s28; *Administrative Appeals Tribunal Act 1989* (ACT) (ACTAATA Act) s28; *Administrative Decisions Tribunal Act 1997* (NSW) (ADTANSW) ss49, 50; the *Victorian Civil Administrative Tribunal Act 1998* (Vic) (VCATA) s45; *Magistrates Courts (Administrative Appeals Division) Act 2001* (Tas) (AADT) ss13, 14; *State Administrative Tribunal Act 2004* (WA) (SATWA) s21.
- 24 Usually as soon as practicable and within twenty-eight days: ADJR Act s13(2); ACTADJR Act, s13(2); JRAQ s33(1); JRAT s30(1) (note ALA, s8(3) ‘reasonable time’);

- AAT and ACTAAT Acts, s28(1); ADTANSW s49(2); VCATA s46(1); AADT s13(2); SATWA s21(4).
- 25 See ADJR and ACTADJR Acts s13(1); JRAQ ss3, 34; JRAT ss3, 31; (cf ALA specifies 'reasons' only: s8(1); note procedure to compel adequate reasons, s8(4)); AAT and ACTAAT Acts s28(1); ADTANSW s49(3); VCATA s46(2); AADT s13(3); SATWA s21(5). Note also s25D of *Acts Interpretation Act 1901* (Cth).
 - 26 *ANU v Burns* (1982) 64 FLR 166 at 176. In *Pullicino v Osborne* [1990] VR 881 Supreme Court (Vic) held that the decision suspending the plaintiff's trainer's licence was a 'decision' within s2 of the ALA as a 'decision operating in law to determine a question . . . to . . . suspend . . . the privilege of a licence'.
 - 27 My database search of state/federal statutes revealed extensive legislation imposing the duty.
 - 28 *Veterans Entitlement Act 1986* (Cth) s34 outlines the Repatriation Commission's requirements to provide detailed reasons for pension-related decisions.
 - 29 *Racing (Proprietary Business) Licensing Act 2000* (SA) s47 requires the Independent Gambling Authority to give reasons for decision on request if there is an appeal right or by leave of the Supreme Court.
 - 30 *Gambling Regulation Act 2003* (Vic) s10.1.24 provides for requesting reasons from the Victorian Commission for Gambling Regulation.
 - 31 *School Education Act 1999* (WA) s54 requires both written notice and reasons of the decision of the minister confirming, varying or reversing the chief executive officer's decision cancelling a home educator's registration.
 - 32 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), for example, obliges the relevant minister under s77 to give reasons for the decision that action is a 'controlled action'; and s54 of the *Biological Control Act 1987* (Qld) requires the Queensland Biological Control Authority to give reasons upon request and to furnish them within 28 days.
 - 33 *Electricity Supply Industry Act 1995* (Tas) s95 provides for written application, by an interested person within twenty-eight days of the decision's notification, for a 'statement of the reasons for the decision'. The Regulator or authorised officer must supply reasons 'as soon as practicable and, in any case, within sixty days of the application'.
 - 34 Section 13(11), Schedule 2.
 - 35 JRAQ s31(b), Schedule 2; JRAT s28(b) Schedule 3.
 - 36 Section 13(8).
 - 37 Other decisions may be exempt on public interest grounds; see, for example ADJR Act s14(1); or personal or business information disclosed in confidence, see, for example, ADJR Act s13A(1).
 - 38 See, for example, *Pettitt v Dunkley* [1971] 1 NSWLR 376, where the New South Wales Court of Appeal held that District Court judge's failure to give reasons was an error of law.
 - 39 (1986) 159 CLR 656.
 - 40 [1984] 3 NSWLR 447.
 - 41 (1986) 159 CLR 656 at 668.
 - 42 *ibid.*
 - 43 *ibid.*, 670 (citing [1984] 3 NSWLR 447 at 474).
 - 44 *ibid.*, 670.
 - 45 *ibid.*
 - 46 See, for example, M Taggart, 'Osmond in the High Court of Australia: Opportunity Lost' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press with Legal Research Foundation Inc Auckland, 1986) 53. Note: Justice M Kirby, 'Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121. Others were more cautious, considering that administrative costs and burdens were relevant to the question; see, for example, M Allars, *Introduction to Australian Administrative*

- Law (Butterworths, 1990) at 133. Kirby J remains convinced that his views in the NSW Court of Appeal ‘will ultimately be vindicated’: interview in *Lawyers Weekly* (www.hcourt.gov.au/speeches/kirbyj/kirbyj_aug05.html)/[accessed 22 June 2006].
- 47 In, for example, *Coope v Iuliano* (1996) 65 SASR 405, the Promotion Appeal Board was not required to give reasons for its promotion decision; in *Whalley v Commissioner of Police* [2003] NSWSC 273 the Supreme Court of New South Wales adhered to the general rule in *Osmond* in not ordering the Commissioner of Police to give reasons for the decision not to approve secondary employment at [8]; in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S190 of 2002* [2002] HCA 39, Kirby J acknowledged at [21]: ‘Under current doctrine it is not incumbent on an Australian official at common law, deciding even a matter so serious as a decision affecting an application for refugee status, to provide the reasons for that decision. [*Osmond’s* decision] reversed a contrary conclusion in which I had participated in the [New South Wales] Court of Appeal. Again, at this level of decision-making, I am obliged to conform to the approach of the Full Court of this Court until it is changed.’
- 48 [2003] NSWSC 208.
- 49 *ibid.*, [41] (Dowd J).
- 50 (1998) 43 NSWLR 729.
- 51 [1996] 2 Qd R 462.
- 52 *ibid.*, 476.
- 53 *ibid.*
- 54 *ibid.* See also *Yung v Adams* (1997) 80 FCR 453.
- 55 Practice Note No. SC CL 3 – Administrative Law List, New South Wales.
- 56 *ibid.*
- 57 See, for example, *Pullicino v Osborne* [1989] VR 881 (under ALA Victorian Supreme Court ordered the stewards – ‘a tribunal’ – to give reasons for suspending a trainer’s licence).
- 58 See, for example, *Palme’s* case (2003) 216 CLR 212; Justice A Goldberg, ‘When are Reasons for Decision Considered Inadequate?’ (2000) 24 *AIAL Forum* 1; H Katzen, ‘Inadequacy of Reasons as a Ground of Appeal’ (1993) 1 *Australian Journal of Administrative Law* 33; T Thawley, ‘An Adequate Statement of Reasons for an Administrative Decision’ (1996) 3 *Australian Journal of Administrative Law* 189.
- 59 P Bayne, ‘The Inadequacy of Reasons as an Error of Law’ (1992) 66 *Australian Law Journal* 302.
- 60 Whilst s180(1) of *Gene Technology Act 2001* (SA) requires reasons to be given ‘as soon as practicable’ after the decision, s180(2) states that failure to comply with the reasons requirements does not affect the decision’s validity.
- 61 See, for example, *Pettitt v Dunkley* [1971] 1 NSWLR 376 and *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 20.
- 62 See *Dornan v Riordan* (1990) 24 FLR 564 where inadequacy of reasons meant the court could not ascertain whether errors had occurred so the court set aside the tribunal’s decision *ab initio*; *Commissioner of State Revenue v Anderson* [2004] VSC 152 where Nettle J stated at [33]: ‘Section 117 of the [VCATA] requires the Tribunal to furnish reasons that are intelligible. The failure to do so is an error of law in itself.’
- 63 Brennan J in *The Repatriation Commission v O’Brien* (1985) 155 CLR 422, 445–6 stated: ‘In any event, a failure by a tribunal adequately to fulfil its statutory obligation to state the reasons for making an administrative decision does not, without more, invalidate the decision or warrant its being set aside by a court of competent jurisdiction.’
- 64 Note limited reasons requirement first introduced by *Tribunals and Inquiries Act 1958* (UK).
- 65 See, for example, HWR Wade, *Administrative Law* (5th edn, OUP, 1982) 486.
- 66 [2006] EWCA 397 at [73].
- 67 [1991] 4 All ER 310.

- 68 The compensation award was so low as to be prima facie irrational, warranting judicial review.
- 69 [1999] 1 WLR 1293 at 1300–1.
- 70 [2003] EWCA Civ 329.
- 71 *Wooder, R v Feggetter* [2002] EWCA Civ 554 at [24].
- 72 *ibid.* The decision was of a Second Opinion Appointed Doctor (SOAD) under the *Mental Health Act 1983* (UK).
- 73 See Lord Justice Potter in *Wooder, R v Feggetter* [2002] EWCA Civ 397 at [49].
- 74 In *Gupta v General Medical Council* [2002] 1 WLR 1691, the Court of Appeal held that there was no duty to provide reasons for the decision to remove the registration of a doctor. However the terms of the decision in the light of the evidence sufficiently revealed the reasons. In *R v Higher Education Funding Council; Ex parte Institute of Dental Surgery* [1994] 1 WLR 242, an earlier case, it was held that a decision to downgrade the Institute of Dental Surgery's rating (used for the purposes of allocating higher education funding) did not, in the circumstances, require reasons to be given: see at 256–7.
- 75 [2002] 1 WLR 2409.
- 76 [2006] EWCA 397.
- 77 *ibid.*, [78].
- 78 [2003] EWCA Civ 329 at [49].
- 79 In *Anya v Oxford University* [2001] ICR 847, Sedley J stated: 'What were lacking were the industrial tribunal's conclusions on the factual issues essential to its conclusion, and in consequence, a proper and rounded determination of the single legal matter of complaint, the selection of [one person] in preference to the appellant'.
- 80 [2002] EWCA Civ 923.
- 81 *ibid.*, [80]. Although the statutory scheme imposed a duty to give reasons, the duty was not fulfilled where the particular reasons for accepting one view over another were not included.
- 82 *ibid.*, [76].
- 83 All of the states, except Victoria, enacted their freedom of information legislation after *Osmond*.
- 84 [2006] EWCA 397 at [85].
- 85 *ibid.*
- 86 *ibid.*, [86].
- 87 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.
- 88 (1996) 185 CLR 259.
- 89 *ibid.*, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
- 90 *ibid.*, 292.
- 91 *ibid.*

Chapter 12

- 1 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] KB 223 at 228 (Lord Greene MR).
- 2 *ibid.*
- 3 (1986) 162 CLR 24.
- 4 (1981) 38 ALR 363.
- 5 J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335 at 357.
- 6 *ibid.*, 356. McMillan states that it is the second most argued ground of review. See also R Creyke and J McMillan, *Control of Government Action Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 482; and M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) 254.
- 7 See n3 above.
- 8 (2003) 198 ALR 59.

- 9 (2001) 206 CLR 323.
- 10 See for example McMillan, n5 above.
- 11 See n3 above.
- 12 As provided for in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
- 13 See n3 above, 45.
- 14 *ibid*, 40–1.
- 15 McMillan, n5 above, 356.
- 16 *ibid*, 357.
- 17 Aronson, Dyer and Groves, n6 above, 255.
- 18 See n3 above, 41. Mason J suggested that the appropriate ground of review in these circumstances would be unreasonableness. However, the ambit of this ground of review has itself recently become less clear due to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*, n8 above. See Aronson, Dyer and Groves, *ibid*, 258–9.
- 19 Mason J, n3 above, 40.
- 20 Aronson, Dyer and Groves, n6 above, 255; and Creyke and McMillan, n6 above, 466.
- 21 [1925] AC 578.
- 22 See n4 above, 375.
- 23 *Migration Act 1958* (Cth) s6A(1)(e).
- 24 Creyke and McMillan, n6 above, 510.
- 25 *ibid* 511, citing E Arthur, ‘The Impact of Administrative Law on Humanitarian Decision-making’ (1991) 66 *Canberra Bulletin of Public Administration* 90. Other factors that have been considered in determinations of relevance include human rights principles and conventions. Creyke and McMillan, n6 above, 504–9; and Aronson, Dyer and Groves, n6 above, 258, 262–3.
- 26 (1999) 197 CLR 510 at 579.
- 27 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 at 520 (Kirby J).
- 28 See n3 above, 39.
- 29 Creyke and McMillan, n6 above, 482.
- 30 (1981) 38 ALR 363 at 375.
- 31 *ibid*.
- 32 Aronson, Dyer and Groves, n6 above, 261.
- 33 Creyke and McMillan, n6 above, 483.
- 34 See n3 above.
- 35 (1988) 91 ALR 586.
- 36 See n3 above.
- 37 *ibid*, 31 (Gibbs CJ), 45 (Mason J).
- 38 All of the judges in *Peko-Wallsend* agreed that the minister was entitled to rely on a briefing paper.
- 39 McMillan, n5 above, 358.
- 40 *ibid*.
- 41 *ibid*, 359.
- 42 (2001) 182 ALR 657.
- 43 McMillan, n5 above, 359–60.
- 44 *ibid*, 359.
- 45 G Airo-Farulla, ‘Rationality and Judicial Review of Administrative Action’ (2000) 24 *Melbourne University Law Review* 543 at 563.
- 46 (1985) 65 ALR 549.
- 47 (1989) 91 ALR 39.
- 48 (1993) 114 ALR 409.
- 49 Aronson, Dyer and Groves, n6 above, 268.
- 50 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442. See Creyke and McMillan, n6 above, 503.
- 51 See Aronson, Dyer and Groves, n6 above, 268–75.

- 52 See n3 above, 41. Note however the comments by Aronson, Dyer and Groves, n6 above, 259 concerning the potential limitation on *Wednesbury* unreasonableness posed by *Applicant S20*, n8 above.
- 53 (1981) 38 ALR 363.
- 54 (1987) 14 ALD 291.
- 55 See n35 above.
- 56 (1983) 48 ALR 566.
- 57 (1989) 18 ALD 77.
- 58 McMillan, n5 above, 362.
- 59 See n6 above, 259.
- 60 (1998) 45 NSWLR 163.
- 61 (2001) 106 FCR 426.
- 62 *ibid*, 442.
- 63 See n6 above, 259.
- 64 *ibid*, 260.
- 65 (1995) 57 FCR 451. See McMillan, n5 above, 358–9.
- 66 McMillan, *ibid*.
- 67 (1996) 71 FCR 265.
- 68 McMillan, n5 above, 359.
- 69 Aronson, Dyer and Groves, n6 above, 262.
- 70 See n1 above, 228 (Lord Greene MR).
- 71 [1925] AC 578.
- 72 *ibid*, 594.
- 73 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).
- 74 (1976) 136 CLR 1.
- 75 Creyke and McMillan, n6 above, 469. See for example *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45; *O'Sullivan v Farrer* (1989) 168 CLR 210.
- 76 [1968] AC 997.
- 77 See n 45 above, 550–60.
- 78 See, for example, the need for the High Court to intervene in the face of government attempts to oust judicial review in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 79 *Minister for Immigration and Multicultural Affairs v Yusuf*, n9 above. See also C Beaton Wells, 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 *Federal Law Review* 141 at 153–4.
- 80 See McMillan, n5 above, for criticism of the expanding role of judicial review in this area.
- 81 *ibid*, 356.
- 82 M Crock, 'Abebe v Commonwealth, Minister for Immigration and Multicultural Affairs v Eshetu, Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decision' (2000) 24 *Melbourne University Law Review* 190 at 216.

Chapter 13

- 1 De Smith, Woolfe and Jowell, *Judicial Review of Administrative Action* (5th edn Sweet and Maxwell, 1995) 330.
- 2 *ADJR Act 1977* (Cth) ss5(2)(c) and 6(2)(c) respectively. At state level, see *ADJR Act 1989* (ACT) s5(2)(c); *Judicial Review Act 1991* (Qld) s23(c); *Judicial Review Act 2000* (Tas) s20(c).
- 3 (1981) 151 CLR 170.
- 4 *ibid*, 186.

- 5 (1950) 81 CLR 108.
- 6 *ibid*, 120.
- 7 [1925] AC 338.
- 8 *ibid*, 340.
- 9 *ibid*, 342.
- 10 (1988) 84 ALR 719.
- 11 *ibid*, 729 per Wilcox and French JJ.
- 12 *ibid*.
- 13 (1988) 81 ALR 288.
- 14 *ibid*, 315.
- 15 (1994) 121 ALR 95.
- 16 *ibid*, 104.
- 17 M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 176–7. For a conspectus of the protracted legal proceedings flowing from the High Court’s decision in *Toohey*, see R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 456–8.
- 18 Aickin and Wilson JJ. Gibbs CJ held to the contrary.
- 19 Stephen and Mason JJ. Murphy J regarded the issue of whether the Administrator was ‘the Crown’ as immaterial.
- 20 (1981) 151 CLR 170, 193.
- 21 *ibid*, 261.
- 22 *ibid*, 218.
- 23 *ibid*.
- 24 [1997] 1 QB 643.
- 25 *ibid*, 705.
- 26 *ibid*, 283.
- 27 *ibid*, 220 per Mason J.
- 28 *ibid*, 233.
- 29 (2005) 223 ALR 346.
- 30 *ibid*, 357.
- 31 (1998) 194 CLR 355.
- 32 *ibid*, 389.
- 33 R. Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005), p 463.
- 34 (1931) 34 WALR 18.
- 35 *ibid*, 23.
- 36 *ibid*, 24.
- 37 M Aronson, B Dwyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) 299.
- 38 *ibid*.
- 39 [1925] AC 338, 343.
- 40 *Warringah Shire Council v Pittwater Provisional Council* (1992) 26 NSWLR 491, 509 per Kirby J.
- 41 [1970] AC 379.
- 42 See Gordon Means, *Malaysian Politics* (2nd edn, Hodder and Stoughton, 1976) who said that, because of the strained relations between the Sarawak State government and the Federal government, the latter was ‘determined to engineer the overthrow of the Ningkan government’ (at 383).
- 43 [1970] AC 379, 389.
- 44 *ibid*, 391.
- 45 *ibid*, 392. In *Dean v Attorney-General of Queensland* [1971] Qd R 391 an attempt to seek a declaration that a proclamation of emergency and an order in council were void was dismissed by Stable J of the Supreme Court of Queensland wholly on the ground that the plaintiff had no locus standi. It was obvious at that time that the state

of emergency was proclaimed for the purpose of ensuring that matches involving the visiting South African Rugby Union football team could proceed. Stable J at 404–5 concluded that it was not for the court ‘to question the validity of any opinion formed by His Excellency in Council’ under s22 of *The State Transport Acts 1938–1981* (Qld). Section 22 provided as follows: ‘Where at anytime it appears to the Governor in Council that any circumstances exist or are likely to come into existence within the State . . . whether by fire, flood, storm, tempest, Act of God, or by reason of any other cause or circumstance whatsoever whereby the peace, welfare, order, good government, or the public safety of the State . . . is or is likely to be imperilled, the Governor in Council may, by Proclamation . . . declare that a state of emergency exists . . .’

46 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 192 ALR 701.

47 *ibid*, 704.

48 *ibid*, 705.

49 *ibid*, 707.

50 *ibid*, 707–8.

51 *ibid*, 708.

52 *ibid*, 709.

53 *ibid*, 710. An appeal to the High Court failed: (2004) 218 CLR 146.

54 (2004) 136 FCR 259.

55 *ibid*, 275.

56 (1981) 151 CLR 170, 233.

57 (2004) 136 FCR 259, 275.

58 *ibid*.

59 *ibid*. The irony did not escape Branson J’s notice when she said: ‘[E]ven today a question might arise as to the propriety of an exercise of the legislative power of South Australia for the purpose of restricting the exercise of power given to “the Minister” by s24 of the *Lands Acquisition Act* . . .’ (at 273). However, this question was not posed to the court because of the basis upon which the appeals were determined.

60 (1992) 26 NSWLR 491.

61 *ibid*, 509.

62 P Craig, *Administrative Law* (5th edn, Sweet and Maxwell, 2003) 559.

63 *ibid*.

64 (1950) 81 CLR 87.

65 *ibid*, 106.

66 *ibid*.

67 *ibid*.

68 (1982) 41 ALR 467.

69 *ibid*, 468–9.

70 M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 178.

71 *ibid*.

72 (1982) 41 ALR 467, 469.

73 (1992) 26 NSWLR 491, 509.

74 (1996) 90 LGERA 178.

75 (1997) 191 CLR 1.

76 *ibid*, 51 per Kirby J.

77 *ibid*, 31.

78 *ibid*, 32.

79 *ibid*.

80 *ibid*, 32–3.

81 *ibid*, 50.

82 *ibid*, 51.

83 *ibid*.

84 *ibid*, 66.

85 *ibid*.

- 86 EJ Sykes, DJ Lanham and RRS Tracey, *General Principles of Administrative Law* (Butterworths, 1979) 63.
- 87 [1956] AC 736.
- 88 *ibid.*, 770.
- 89 *ibid.*
- 90 (1981) 151 CLR 170, 205 per Stephen J.
- 91 *ibid.*
- 92 (1928) 42 CLR 1, 8–9.
- 93 *Jones v Metropolitan Meat Industry Board* (1925) 37 CLR 252, 263–4.
- 94 *R v Burgess, Ex parte Henry* (1936) 55 CLR 608 at 687 per Evatt and McTiernan JJ.
- 95 (1982) 153 CLR 168.
- 96 *ibid.*, 260. See also Mason J at 224.
- 97 *ibid.*, 200.
- 98 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 54 (HC); *Attorney-General for Australia v R* [1957] AC 288 (PC).
- 99 (2004) 219 CLR 562.
- 100 *ibid.*, 617 [153].
- 101 (2004) 210 ALR 369.
- 102 *ibid.*, 385 [60].
- 103 *ibid.*, 385 [61].
- 104 R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 446.
- 105 (1927) 27 SR (NSW) 209.
- 106 *ibid.*, 215.

Chapter 14

- 1 The courts usually review the correctness of administrative determinations of legal questions, particularly an agency's interpretation of its empowering statute. However, if the statute uses a word according to its 'ordinary English meaning', then the word's meaning is a question of fact, not law, and the court's role is to determine whether the administrative interpretation was reasonable, rather than correct: see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) 196–9 and the cases cited there. Space precludes detailed treatment of this issue here.
- 2 See further G Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543.
- 3 See the excellent discussion in Aronson, Dyer and Groves, n1 above, at 96–115.
- 4 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36.
- 5 See, for example, Chief Justice JJ Spigelman, 'Foundations of Administrative Law: Towards General Principles of Institutional Law' (1999) 58 *Australian Journal of Public Administration* 3 at 4, 9.
- 6 For example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 (Deane J).
- 7 (2003) 211 CLR 476 at 492 (Gleeson CJ), 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- 8 (1951) 83 CLR 1 at 193.
- 9 C Montesquieu, *On the Spirit of the Laws* (1748) (T Neuman trans, Hafner Publishing Company, New York, 1949), Book XI § 4; Book XI § 6.
- 10 For more detail, see Airo-Farulla, n2 above, at 545–50.
- 11 [1948] 1 KB 223, 223–4.
- 12 (1986) 162 CLR 24, 40–1.
- 13 (1997) 191 CLR 559 at 574–5 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

- 14 Sometimes power may appear to be granted in the bare form 'X may do Z'. However, such grants of power must be read in the context of the Act as a whole, and usually the 'Y' in which X may do Z will be defined in an earlier or later provision. Even where power to do Z appears unlimited by any 'Y' requirement, it is subject to the fundamental administrative law principle that all statutory grants of power have some limits: Aronson, Dyer and Groves, n1 above, at 85–6. At the very least, the power must be exercised only for the purposes for which it was granted, and by reference only to the considerations that the Act makes relevant: *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997; *Gerlach v Clifton Bricks Pty Ltd* (2002) 188 ALR 353 at [69]–[70] (Kirby J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
- 15 *Waterford v Commonwealth* (1987) 163 CLR 54 at 77 (Brennan J); *Attorney-General v Quin* (1990) 170 CLR 1 at 35–6 (Brennan J); *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303 (Dawson, Gaudron, McHugh, Gummow and Kirby JJ).
- 16 Such as 'if X decides . . .', 'if X determines . . .', 'if X believes . . .', 'if X reasonably believes . . .', 'if X is of the opinion that . . .', 'if X considers . . .', or 'if it appears to X that . . .'
- 17 Aronson, Dyer and Groves, n1 above, at 231.
- 18 (2000) 199 CLR 135 at 150 (emphasis added).
- 19 (2003) 198 ALR 59.
- 20 (2004) 207 ALR 12.
- 21 S20 (2003) 198 ALR 59 at 91, [147] (Kirby J).
- 22 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–6, 359–60 (Mason CJ), 367 (Deane J); Aronson, Dyer and Groves, n1 above, at 193–4, 239. I am not dealing here with the 'no evidence' ground of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
- 23 *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* (1965) 1 QB 456 at 488 (Diplock J); *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 68 (Deane J).
- 24 *Shulver v Sherry* (1992) 28 ALD 570 at 574.
- 25 (2004) 77 ALD 402.
- 26 Aronson, Dyer and Groves, n1 above, at 239.
- 27 '*De minimis non curat lex*': 'the court does not concern itself with trifles'.
- 28 See, for example, *Seguin Moreau, Australia v Chief Executive Officer of Customs* (1997) 77 FCR 410.
- 29 For example, *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.
- 30 *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328.
- 31 *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77 at 80; *Luu v Renevier* (1989) 91 ALR 39; *Othman v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 24 ALD 707; *Hill v Green* (1999) 48 NSWLR 161.
- 32 *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402 at 407, [18]–[19]; *Carcione Nominees Pty Ltd v Western Australian Planning Commission* (2005) 140 LGERA 429.
- 33 *Greyhound Racing Authority (NSW) v Bragg*, *ibid*, at [65] (Santow JA, Ipp JA and Brownie AJA agreeing).
- 34 (2003) 198 ALR 59 at 88, [130]–[131]; 91, [146].
- 35 Airo-Farulla, n2 above, at 564–7.
- 36 (1999) 84 FCR 411.
- 37 The 'yes' cases include: *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 77 ALD 402; *WAIJ v Minister for Immigration and Multicultural and*

- Indigenous Affairs* (2004) 80 ALD 568; *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328; *WAKK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 225. The 'no' cases include: *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 235; *NATC v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 52; *VWST v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 286.
- 38 (2003) 198 ALR 59 at 70, [49]; see also 63, [12] (Gleeson CJ).
- 39 *ibid*, 63, [14].
- 40 *ibid*, 70, [49].
- 41 *ibid*, 89, [135]; 80, [93].
- 42 *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 at 581–3, [60]–[69] (RD Nicholson J); *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328 at [135]–[136] (Allsop J, Moore and Tamberline JJ agreeing).
- 43 J Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2002) 13 *International Journal of Refugee Law* 293; G Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15 *International Journal of Refugee Law* 377.
- 44 *Independent FM Radio Pty Ltd v Australian Broadcasting Tribunal* (1989) 17 ALD 529; *WAKK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 225; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 263.
- 45 In *S20* (2003) 198 ALR 59 at 96–8, [162]–[168], Kirby J was alone in endorsing the English cases holding that some purely factual mistakes are reviewable, but see also *NABE v Minister for Immigration and Multicultural and Indigenous Affairs*, *ibid* at [63], holding that such an error of fact may be 'tantamount to a failure to consider the [applicant's] claim and on that basis can constitute jurisdictional error'.
- 46 Subject to procedural fairness requirements.
- 47 (1996) 185 CLR 259.
- 48 (2003) 198 ALR 59 at 92, [148].
- 49 *WAKK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 225.
- 50 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss5(1)(h), 5(3).
- 51 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222.
- 52 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 221 (Black CJ); *Rajamanikkam*, *ibid* at 257–9 (Kirby J).
- 53 Often referred to as the 'Briginshaw standard', in reference to *Briginshaw v Briginshaw* (1938) 60 CLR 336, although as pointed out in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [74] (Santow JA, Ipp JA and Brownie AJA agreeing), the *Briginshaw* standard does not apply as rigorously to administrative tribunals who are not bound by the rules of evidence.
- 54 *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 at 575–7, [27], [34], [40] (Lee and Moore JJ).
- 55 *McDonald v Director-General of Social Security* (1984) 1 FCR 356 at 358, 368–9.
- 56 *Kioa v West* (1985) 159 CLR 550 at 587 (Mason J); unless there are specific statutory duties to enquire, see for example *C v T* (1995) 58 FCR 1 at 12 (Burchett J).
- 57 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559; *Abebe v Commonwealth* (1999) 197 CLR 510 at 544–5 (Gleeson CJ and McHugh J).
- 58 *Buck v Bavone* (1976) 135 CLR 110 at 118–9 (Gibbs J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 (Brennan J).
- 59 See n14 above.
- 60 For example *Ziade v Randwick City Council* (2001) 51 NSWLR 342.
- 61 (1993) 112 ALR 211.

- 62 Aronson, Dyer and Groves, n1 above, at 339.
- 63 *ibid.*
- 64 [1985] 1 AC 375 at 410.
- 65 (1997) 190 CLR 1 at 36.
- 66 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640 (Brennan J).
- 67 *Dilatte v MacTiernan* [2002] WASCA 100 at [61] (Malcolm CJ, Wallwork J and White AJ).
- 68 [1898] 2 QB 91 at 99–100.
- 69 (1972) 128 CLR 305.
- 70 (1988) 83 ALR 121.
- 71 See also *Aboriginal Land Council (NSW) v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559.
- 72 (1989) 89 FCR 502.
- 73 *Minister for Arts, Heritage and the Environment v Peko-Wallsend* (1987) 75 ALR 218 at 256 (Wilcox J).
- 74 Sir Anthony Mason, ‘The Scope of Judicial Review’ (2001) 31 *Australian Institute of Administrative Law Forum* 21 at 38.
- 75 [1964] 1 WLR 240.
- 76 (1988) 83 ALR 99. See also *Payne v Deer* [2000] 1 Qd R 535.
- 77 *Coco v R* (1994) 179 CLR 427.
- 78 *Council for Civil Service Unions v Minister for Civil Service* [1985] 1 AC 375 at 410.
- 79 [1987] AC 514.
- 80 *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at [18] (Laws LJ).
- 81 *ibid.*
- 82 *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at 440 (Lord Bingham of Cornhill).
- 83 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at 531 (Lord Bridge of Harwich); *R v Ministry of Defence; Ex parte Smith* [1996] QB 517 at 554 (Sir Thomas Bingham MR); *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.
- 84 *R (Daly)* [2001] 2 AC 532 at 546–8 (Lord Steyn).
- 85 *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Foley v Padley* (1984) 154 CLR 349.
- 86 (1933) 49 CLR 142 at 155. See further Airo-Farulla, n2 above, at 570–1.
- 87 *Stenhouse v Coleman* (1944) 69 CLR 457, 467 (Starke J); *South Australia v Tanner* (1989) 166 CLR 161; *Bienke v Minister for Industries and Energy* (1996) 63 FCR 567.
- 88 For example *Minister for Foreign Affairs v Magno* (1992) 112 ALR 529; *New South Wales v Macquarie Bank* (1992) 30 NSWLR 307. In both cases the dissenting judges (Einfield J and Kirby P respectively) applied the test correctly.
- 89 *R v Toohey; Ex Parte Northern Land Council* (1979) 151 CLR 170; *Da Silva v Minister for Immigration and Multicultural Affairs* (1989) 89 FCR 502.
- 90 *ibid.*
- 91 See, for example, *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707 at [567] (Weinberg J).

Chapter 15

- 1 For a contemporary expression of this judicial reluctance, see *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 177 ALR 473 at 481 (McHugh J).
- 2 *Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59 at [55] (McHugh and Gummow JJ).

- 3 M Aronson, B Dyer, and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 2004) at 179 and 184ff.
- 4 Explained, for example, in H Jones and R Thomas, ‘The “No Evidence” Doctrine and the Limits of Judicial Review’ (1999) 8 *Griffith Law Review* 102 at 104.
- 5 (2003) 198 ALR 59 at 84, referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1990) 162 CLR 24 at 40–1 Mason CJ stated that it is generally for the decision maker and not the court to determine the weight to be given to any relevant matters which the administrative decision maker is required to take account of. Similarly and in the context of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) see *Borkovic v Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186 at 188 (Fox J).
- 6 (1990) 170 CLR 321.
- 7 *ibid*, 341.
- 8 (1990) 170 CLR 1.
- 9 *ibid*, 37. See also *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 24–5 where, according to McHugh and Gummow JJ, ‘An 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 legislative function of translating policy into statutory form or the executive function of administration.’
- 10 Discussed later.
- 11 Aronson, Dyer and Groves, n3 above, 240.
- 12 The ‘template’ method of expressing this obligation in statutory form in relation to tribunals is seen in s33 of the *Administrative Appeals Tribunal Act 1975* (Cth).
- 13 Represented in other Australian jurisdictions by the *Judicial Review Act 1991* (Qld) Part 3; *Judicial Review Act 2000* (Tas) and *Administrative Decisions (Judicial Review) Act 1989* (ACT).
- 14 The relevance of this is highlighted by the fact that the ADJR Act and equivalent regimes in other Australia jurisdictions only apply to decisions ‘of an administrative character’ and are thus not applicable in respect of decisions constituting an exercise of judicial power, where the rules of evidence would normally apply.
- 15 See, for example, RJ Allen and MS Pardo, ‘The Myth of the Law-Fact Distinction’ (2003) 97 *North ULR* 1769 and the general discussion in Aronson, Dyer and Groves, n3 above, 184ff.
- 16 *McPhee v Bennett* (1935) 52 WN (NSW) 8 at 9; *The Australian Gaslight Company v The Valuer-General* (1940) 40 SR (NSW) 126 per Jordan CJ at 138; *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 per Glass JA at 155.
- 17 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 355.
- 18 [1965] 1 QB 456
- 19 *Re Pochi v The Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41 (per Brennan J) and *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 688 (per Deane J).
- 20 (1985) 4 NSWLR 139.
- 21 *ibid*, 150 where Kirby P indicated this three-stage process follows that described in CT Emery and B Smythe, ‘Error of law in Administrative Law’ (1984) 100 *Law Quarterly Review* 150.
- 22 *ibid*, 156 (Glass JA, Hope JA agreeing). Note that this view needs to be qualified by reference to the general principle expressed by Mason CJ in *Bond* that an error of law will occur whenever there is no evidence to support a finding or an inference of fact.
- 23 *ibid*, 151.
- 24 *ibid*, 157.
- 25 *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty Ltd* (1953) 88 CLR 100; *Ramah v Government of Ghana* [1968] AC 192.

- 26 (1941) 65 CLR 150.
- 27 *ibid*, 155. According to the High Court, it was open to a taxation review board to adopt a meaning of the phrase which encompassed the activities in question.
- 28 See, for instance, *Australian Gaslight Company v Valuer-General* (1940) 40 SR (New South Wales) 126; *Hope v Bathurst City Council* (1980) 144 CLR 1; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 and *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389.
- 29 These early cases are discussed in RRS Tracey, 'Absence or Insufficiency of Evidence and Jurisdictional Error' (1976) 50 *Australian Law Journal* 568.
- 30 [1922] 2 AC 128.
- 31 *ibid*, 151.
- 32 For instance, in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, a professional body was restrained from de-registering a medical officer on the basis that there was no evidence upon which it could reach a determination that the person's behaviour fulfilled the statutory requirement of 'infamous conduct in a professional respect'. However, *Allinson* pre-dates *Nat Bell* and involved the remedy of injunction.
- 33 See, for example, *R v Ludlow; Ex Parte Barnesley Corporation* [1947] 1 KB 634 per Lord Goddard. Additional authorities are referred to in Tracey, n29 above.
- 34 The jurisdictional fact doctrine – see *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135. For a complete analysis, see M Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17.
- 35 P Craig, *Administrative Law* (2nd edn, 1999) 489.
- 36 [1969] 2 AC 147.
- 37 [1951] 1 KB 711. Certiorari for error of law on the face of the record is consistent with the original purpose of the writ, which commanded that the record of proceedings be brought before the superior court of record for correction of any legal errors. As the High Court decision in *Craig v South Australia* (1995) 184 CLR 163 indicates, certiorari for error of law on the face of the record remains as part of the law in Australia.
- 38 Identifying a 'legal error' and determining what constitutes 'the record' has spawned a large body of case law much of which, in an Australian context, is discussed in Aronson, Dyer and Groves, n3 above, chapter 4, especially at 218.
- 39 [1968] AC 192.
- 40 *ibid*, 257 (Lord Upjohn), 234 (Lord Reid).
- 41 *ibid*, 235 (Lord Reid).
- 42 D Bowman, 'Judicial Review – 'No Evidence' (1984) 14 *Manitoba Law Journal* 195 at 199.
- 43 *Craig* (1995) 184 CLR 163 at 181, citing *R v District Court of Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 480; *Hockey v Yelland* (1984) 157 CLR 124 and *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
- 44 *Craig* (1995) 184 CLR 163 at 181, citing *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
- 45 *ibid*, 181.
- 46 (1990) 170 CLR 321.
- 47 [1969] 2 AC 147.
- 48 See initially *Re Racial Communications Limited* [1981] AC 374 and then *R v Hull University Visitor; ex parte Page* [1993] AC 682; *Boddington v British Transport Police* [1999] 2 AC 143 per Lord Irvine LC at 154.
- 49 See *R v Hull University Visitor; ex parte Page* [1993] AC 682. At the same time, *Anisminic's* effect in rendering all errors of law jurisdictional errors, reduced reliance on certiorari for error of law on face of the record.
- 50 *Craig v South Australia* (1995) 184 CLR 163.

- 51 [1965] 1 WLR 1320.
- 52 *ibid*, 1326.
- 53 The Court of Appeal concluded (Lord Denning at 1327) that whilst the court could receive evidence indicating what material was before the Minister, it could not approach the case *de novo* and decide the matter afresh.
- 54 *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433. See also *R v Governor of Brixton Prisons; Ex parte Armah* [1968] AC 192; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; *Reid v Secretary of State for Scotland* [1999] 2 WLR 28 at 54.
- 55 See HWR Wade and CF Forsyth, *Administrative Law* (8th edn, 2000) 282.
- 56 [1999] 2 AC 330.
- 57 *ibid*, 343 (Lord Slynn).
- 58 [2004] 2 WLR 1351.
- 59 *ibid*, [66].
- 60 In the case of one applicant, the tribunal's conclusion that membership of a certain organisation would not render him subject to persecution was rendered false by two reports made subsequent to the tribunal's decision, which revealed that membership carried a significant risk of detention and torture. In the case of the other applicant, a similar report made subsequent to the decision revealed that, contrary to the tribunal's assumption, a convert from Islam to Christianity would face persecution or death if returned to Afghanistan, even though the Taliban were no longer in power.
- 61 *ibid*, [42].
- 62 P Craig, 'Judicial Review, Appeal and Factual Error' [2004] *Public Law* 788.
- 63 The issue was discussed by Craig, *ibid*, 804ff.
- 64 *ibid*, 797.
- 65 Early authorities are referred to in Tracey, n29 above, 571.
- 66 (1938) 59 CLR 369.
- 67 *ibid*, 388.
- 68 *ibid*, 385.
- 69 *ibid*, 391. It is true that the thrust of Dixon J's judgment is a criticism of what he saw as a tendency on the part of reviewing courts to adopt an excessively interventionist approach in proceedings by way of *certiorari* against magistrates.
- 70 (1953) 88 CLR 100.
- 71 According to the joint judgment of Dixon CJ, Williams, Webb and Fullagar JJ, the Board's opinion was erroneous in law because it had applied the wrong test as to what the legislature intended by the use of the word 'unfit'. In that sense, the Board appeared intent on enforcing a policy, not consistent with the legislation, of requiring employers to maintain close supervision of stevedores.
- 72 (1953) 88 CLR 100 at 119.
- 73 (1975) 132 CLR 473.
- 74 T Jones and R Thomas, 'The "No Evidence" Doctrine and the Limits to Judicial Review' (1999) 8 *Griffith University Law Review* 102 at 109.
- 75 (1975) 132 CLR 473 at 479–80. See also Gibbs J at 483 and Stephen J at 485. Jacobs J took the view that the grant of a lease was not dependent upon the existence of minerals in the relevant areas, such an issue being relevant in determining where the public interest lies (487).
- 76 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 358, noting also that a mere mistake of fact is not a sufficient basis for judicial intervention. See also *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.
- 77 (1986) 13 FCR 511 at 514.
- 78 Particular reference was made to *Smith v General Motor Camp Co Ltd* [1911] AC 188; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41; and *R v Deputy Industrial Injuries Commissioner; Ex-parte Moore* [1965] 1 QB 456 and particularly *Mahon v Air New Zealand Ltd* [1984] AC 808.

- 79 See, for example, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55. For a complete analysis see Aronson, n34 above.
- 80 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82
- 81 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *W375/01 A v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 757.
- 82 *Re Pochi v The Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41 (Brennan J) and *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 688 (Deane J).
- 83 [1984] 1 AC 808.
- 84 *ibid*, 825.
- 85 *ibid*, 824. Their Lordships accepted that the Commissioner was entitled to take the view that evidence given at the inquiry by several witnesses was false.
- 86 *ibid*, 821.
- 87 [1999] 2 AC 330.
- 88 *ibid*, 343.
- 89 P Craig, 'Judicial Review, Appeal and Factual Error' [2004] *Public Law* 788.
- 90 *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346.
- 91 *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 627 (Gleeson CJ and McHugh J), citing *Pulhofer v Hillingdon London Borough Council* [1986] AC 484 at 518 (Lord Brightman).
- 92 *Re Minister for Immigration and Multicultural Affairs; Ex Applicant S20/2002* (2003) 198 ALR 59. Reference was made to the New South Wales Court of Appeal decision in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, where, according to Samuels and Glass JJA, 'patent error, illogicality or perversity' in determining the existence of primary facts will never constitute an error of law. Note that *Azzopardi* involved an appeal on a possible question of law whereas the comments in *Applicant S20/2002* were made in the context of the High Court's judicial review jurisdiction under s75(v) of the Constitution.
- 93 In Canada, for example, see s28 of the *Federal Court Act* RSC 1970 and the discussion in Bowman, n42 above.
- 94 *Judicial Review Act 1991* (Qld) Part 3; *Judicial Review Act 2000* (Tas); *Administrative Decisions (Judicial Review) Act 1989* (ACT).
- 95 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s3.
- 96 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss5 and 6. Arguably, the list of specified grounds of review is not a 'code' in the sense that it does not exclude incorporation of modified or new grounds resulting from common law development – see especially ADJR Act ss5(1)(j) and 6(1)(j) and comments made by the Full Federal Court in *Bond v Australian Broadcasting Tribunal* (1989) 89 ALR 185 at 201.
- 97 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(1)(h). The initial report of the Commonwealth Administrative Review Committee ('Kerr Committee' Report) – Parliamentary Paper No. 144 (AGPS), did not specifically address the possibility of including a 'no evidence' ground of review. A specific recommendation to this effect was made in the subsequent Ellicott Committee Report (Report of the Committee of Review of Prerogative Writ Procedures). The legislative history of the ADJR Act 'no evidence' rule is discussed by Wilcox J in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 at 519.
- 98 *Administrative Decision (Judicial Review) Act 1977* (Cth) s5(3), discussed later.
- 99 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(1)(g).
- 100 Ellicott Committee Report, para 43.
- 101 *ibid*. The legislative history of the ADJR Act 'no evidence' rule is referred to by Wilcox J in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 at 519.

- 102 *ibid.*
- 103 Explanatory Memorandum to the Bill, para 22.
- 104 [1977] AC 1014.
- 105 (1986) 13 FCR 511 at 520.
- 106 (2002) 190 ALR 402.
- 107 *ibid.*, 422.
- 108 (1986) 12 FCR 419.
- 109 *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 419.
- 110 (1990) 170 CLR 321.
- 111 *ibid.*, 357 (Mason CJ) 365 (Brennan J) and 369 (Deane J) agreed with Mason CJ.
- 112 (2002) 190 ALR 402.
- 113 *ibid.*, [49] and [53] (Gaudron and McHugh JJ).
- 114 Sections 476(1) and 476(4) of the *Migration Act 1958* (Cth) corresponded with ss5(1)(h) and 5(3) of the ADJR Act.
- 115 Section 476(1)(e) of the *Migration Act 1958* (Cth) was worded in a significantly different manner than s5(1)(h) of the ADJR Act.
- 116 Mason CJ simply referred to comments by Barwick CJ and Gibbs J in *Sinclair v Mining Warden* (1975) 132 CLR 473 (at 481 and 483 respectively) as indicative of common law restrictions on the ‘no evidence’ rule without any further explanation of the common law position.
- 117 ADJR Act ss5 and 6.
- 118 As indicated earlier, the list of specified grounds of review in ss5 and 6 of the ADJR Act does not exclude incorporation of modified or new grounds resulting from common law development – see ADJR Act ss5(1)(j) and 6(1)(j) and comments made by the Full Federal Court in *Bond v Australian Broadcasting Tribunal* (1989) 89 ALR 185 at 201. See also WMC Gummow, ‘Reflections on the Current Operation of the ADJR Act’ (1991) 20 *Federal Law Review* 129.
- 119 (2002) 190 ALR 402 at [54].
- 120 (1986) 12 FCR 419.
- 121 *ibid.*, 429.
- 122 (1986) 13 FCR 511.
- 123 *ibid.*, 515. Wilcox J observed (at 414) that in all cases of this nature, the making of a decision depended upon the prior establishment of a particular fact in circumstances where there was no evidence that that fact existed.
- 124 *Broadcasting and Television Act 1942* (Cth) s83(9).
- 125 *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414 at 429.
- 126 *ibid.*, 515.
- 127 See, for example, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154.
- 128 Aronson, Dyer and Groves, n3 above, 240.
- 129 (1990) 170 CLR 321 at 359–60.
- 130 See *Re Pochi v The Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41 (Brennan J) and *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 688 (Deane J).
- 131 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358 (Mason CJ).
- 132 Aronson, Dyer and Groves, n3 above, 243.
- 133 Explained in the context of s5(3) of the ADJR Act by Finklestein J in *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865 at [52] (Sundberg J agreeing).
- 134 *ibid.*, [55].
- 135 At least this appears to have been the position adopted by Finklestein J in *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865 at [52].
- 136 (1985) 4 NSWLR 139.
- 137 *ibid.*, 156 (Glass JA, Hope JA agreeing).

- 138 (1992) 34 FCR 212 at 223.
- 139 (1990) 170 CLR 321 at 357–8.
- 140 *ibid*, 358.
- 141 (2002) 190 ALR 402 at [33] (Gleeson CJ). According to Callinan J (at [155]), ‘based on’ implies more than ‘had regard to’ or ‘took into account’ and requires a finding that the non-existent fact was the ‘base’ or ‘foundation’ for the decision. In this case the High Court in this case was dealing with both an ‘error of law’ and a ‘no evidence’ ground of judicial review contained in the *Migration Act 1958* (Cth). Although the ‘error of law’ ground was significantly different than its ADJR Act counterpart in s5(1)(f), the ‘no evidence’ ground was identical to that found in ss5(1)(h) and 5(3) of the ADJR Act, hence the comments are apposite.
- 142 *Luu v Renevier* (1989) 91 ALR 39 at 47.
- 143 *ibid*, [35].
- 144 (1992) 34 FCR 212 at 223.
- 145 *ibid*, 220. See also *Fernando v Minister for Immigration and Multicultural Affairs* [1999] FCA 962 at [26] per Heery J who notes a preference for the metaphor of the ‘net’, rather than that of the ‘chain’ or ‘fork in the road’.
- 146 (2002) 190 ALR 402.
- 147 *ibid*, 414.
- 148 *ibid*.
- 149 *ibid*.
- 150 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 223.
- 151 (2002) 190 ALR 402.
- 152 *Migration Act 1958* (Cth) s36(2). Under the statute, the test for determining refugee status is that set forth in the UN Convention on the Protection of Refugees.
- 153 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495 at 506.
- 154 *ibid*, [16] (Gleeson CJ) [70] (Gaudron and McHugh JJ).
- 155 *ibid*.
- 156 *ibid*, [37] (Gleeson CJ). Gaudron and McHugh JJ noted at [70] that the tribunal had considered ‘a range of factors’.
- 157 See, for instance, the discussion in *Sarancharkh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1461 [43] (Hill J). See also comments made in *N258/00A v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 478 at 486 (Katz J).
- 158 *ibid*, [157] (Callinan J). See also comments made by Kirby J at [104].
- 159 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358 (Mason CJ).
- 160 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 223 (Black CJ).
- 161 Citing comments made by Mason CJ in *Bond*, Gleeson CJ warned that the distinction between judicial review and merits review would be obliterated if every step in the process of reasoning towards an ultimate decision was subject to judicial review – *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 170 ALR 402 at [26] (Gleeson CJ).
- 162 *ibid*, [152]–[153].
- 163 The point was emphasised by Wilcox J in *Television Capricornia Pty Ltd* (1986) 70 ALR 147 at 156. See also *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 223 (Black CJ).
- 164 *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 (Wilcox J), referring to comments made in the Ellicott Committee Report. See also *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 223–4 (Black CJ).
- 165 (1986) 13 FCR 511 at 519.
- 166 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357.
- 167 (1992) 34 FCR 212 at 220.

- 168 See also *Xiang Sheng Li v Refugee Review Tribunal* (1996) 45 ALD 193, per Sackville J at 203; *Applicant C* (2001) 66 ALD 1 at 17; *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865; *Fernando v Minister for Immigration and Multicultural Affairs* [1999] FCA 962; *Sarancharkh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1461.
- 169 *Rajamanikkam* (2002) 170 ALR 402 at [34] (Gleeson CJ).
- 170 *ibid.*, [51]–[52] (Gaudron and McHugh JJ).
- 171 *ibid.* Oddly enough, as Aronson, Dyer and Groves, n3 above, 243, point out in a subsequent decision, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 458, Gleeson CJ; McHugh, Gummow, Hayne and Callinan JJ wrote in a joint judgement that the second limb of s5(3) of the ADJR Act was ‘an exegesis of the ground of review in s5(1)(h)’.
- 172 *ibid.*
- 173 *ibid.*, [111] (Kirby J).
- 174 As indicated earlier, see for instance, indications in *Re Minister for Immigration and Multicultural Affairs; Ex Applicant S20/2002* (2003) 198 ALR 59 that ‘manifest illogicality or irrationality’ may be a basis of judicial review. Cf. the New South Wales Court of Appeal decision in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, where, according to Samuels JA and Glass JA concluded (Kirby P dissenting), ‘patent error, illogicality or perversity’ in determining the existence of primary facts will never constitute an error of law’. (Again, note that *Azzopardi* involved an appeal on a possible question of law, whereas the comments in *Applicant S20/2002* were made in the context of the High Court’s judicial review jurisdiction under s75(v) of the Constitution.)

Chapter 16

- 1 For example, the *Radiocommunications Act 1992* (Cth) s100(1) provides that the relevant decision maker ‘may issue to the applicant an apparatus licence . . .’ (emphasis added).
- 2 For example, the *Migration Act 1958* (Cth) s189 provides: ‘If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer *must* detain the person’ [emphasis added].
- 3 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69–70 (Deane and Toohey JJ), *Lang v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.
- 4 *Egan v Willis* (1998) 195 CLR 424 at 451 (Gaudron, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 402–3 (Gleeson CJ) 460 (Gummow and Hayne JJ).
- 5 This is discussed in the main text at 258–90.
- 6 See also ADJR Act 1977 ss6(1)(e) with ss6(2)(e) re: conduct. See also *Administrative Decisions (Judicial Review) Act 1989* (ACT), ss5(1)(e) with ss5(2)(e) and ss6(1)(e) with ss6(2)(e); *Judicial Review Act 1991* (Qld), ss20(2)(e) and s21(2)(e) with ss23(e); *Judicial Review Act 2000* (Tas), ss17(2)(e) and ss18(2)(e) with ss20(e).
- 7 [1970] 1 WLR 1231 (Willis J).
- 8 *ibid.*, 1240.
- 9 *ibid.*, 1241. Compare this to the approach of Windeyer J in *Ipec*, below in the text accompanying n19–22.
- 10 (1965) 113 CLR 177.
- 11 *Ipec*’s application for a charter licence to carry air freight was also refused on the basis that *Ipec* would not be in a position to provide the necessary aircraft.
- 12 (1965) 113 CLR 177 at 200–1 (Taylor and Owen JJ), 204–6 (Windeyer J). Kitto and Menzies JJ in dissent held that the evidence showed that the decision was in fact that of the government (Kitto J at 193; Menzies J at 202).

- 13 Their Honours were in the minority on the facts.
- 14 (1965) 113 CLR 177 at 193 (Kitto J), 202 (Menzies J).
- 15 *ibid*, 192 (Kitto J), 202 (Menzies J).
- 16 *ibid*, 192 (Kitto J), 202 (Menzies J).
- 17 *ibid*, 202 (Menzies J).
- 18 *ibid*, 200 (Taylor and Owen JJ).
- 19 *ibid*, 205 (Windeyer J).
- 20 *ibid*, 204 (Windeyer J). Compare this to the decision in *Lavender* which explicitly stated that a policy could *not* be applied so that it is the only material consideration, see n9 above.
- 21 *ibid*, 206 (Windeyer J).
- 22 *ibid*, 204–6 (Windeyer J).
- 23 (1977) 139 CLR 54.
- 24 *ibid*, 61 (Barwick CJ), 87 (Murphy J).
- 25 *ibid*, 87 (Murphy J).
- 26 *ibid*, 115 (Aickin J).
- 27 *ibid*, 62 (Gibbs J).
- 28 *ibid*, 83 (Mason J).
- 29 *ibid*.
- 30 *ibid*.
- 31 *ibid*, 82 (Mason J).
- 32 *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 (Gibbs CJ, Mason, Murphy, Aickin and Wilson JJ).
- 33 *ibid*, 418–20 (Gibbs CJ), 439–40 (Mason and Wilson JJ), 441 (Murphy J). But see Aickin J's qualification at n34 below.
- 34 *ibid*, 418 (Gibbs CJ). See also Mason and Wilson JJ at 430. However, Aickin J noted that it would *not* be proper for the Commission to 'sound out' the Minister before making a decision in order to avoid the exercise of his or her veto power (at 446).
- 35 *ibid*, 429 (Mason and Wilson JJ), cited with approval by the NSW Court of Appeal in *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 (Kirby P, Priestley and Clarke JJA).
- 36 See, for example, *Migration Act 1958* (Cth) s499; *Australian Securities and Investment Commission Act 2001* (Cth) s12.
- 37 See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Law Book Co, 2004) 285.
- 38 On this point, see R Creyke and J McMillan, *Control of Government Action* (Lexis Nexis Butterworths, 2005) 628.
- 39 See, for example, *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443 at 449. See also *Zayen Nominees Pty Ltd v Minister for Health* (1983) 47 ALR 158 and *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 139 ALR 577.
- 40 See, for example, *NSW Farmers' Association v Minister for Primary Industries and Energy* (1990) 21 FCR 332 (Bowen CJ, Lockhart and von Doussa JJ) where a minister was held not to have acted *ultra vires* by directing the Australian Wool Corporation to set the price for wool at no more than a certain level.
- 41 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122 at 131.
- 42 See, for example, *Bropho v Tickner and Anor* (1993) 40 FCR 165; *Adams v Minister for Immigration and Multicultural Affairs* (1997) 70 FCR 591.
- 43 *Telstra Corp Ltd v Kendall* (1995) 55 FCR 221 at 231.
- 44 See, for example, K C Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1969) 221; *Drake No 2* (1979) 2 ALD 634 at 640 (Brennan J).
- 45 See, for example, *Green v Daniels* (1977) 13 ALR 1 and *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 289 (Gleeson CJ).

- 46 The scope of this ground is explained in chapter 12.
- 47 See also *ADJR Act 1977* ss6(1)(e) with ss6(2)(f) re: conduct. See also *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss5(1)(e) with ss6(1)(f) and ss6(1)(e) with 6(1)(f); *Judicial Review Act 1991* (Qld) ss20(2)(e) and s21(2)(e) with ss23(e); *Judicial Review Act 2000* (Tas) ss17(2)(e) and ss18(2)(e) with ss20(f).
- 48 [1971] AC 601. In Australia, the approach in *British Oxygen* has been cited extensively. See, for example, *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443; *NCA (Brisbane) Pty Ltd v Simpson* (1986) 13 FCR 207; *Lofthouse v Australian Securities and Investments Commission* (2004) 82 ALD 481.
- 49 *British Oxygen* [1971] AC 601 at 625 (Lord Reid, with whom Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Diplock agreed).
- 50 *ibid*, 625.
- 51 (1977) 13 ALR 1. *Green* has been applied in a number of later cases, see, for example, *Cummeragunga Pty Ltd (in liquidation) v Aboriginal and Torres Strait Islander Commission* (2004) 210 ALR 612 at 630 [151]–[155]; *Save our Suburbs (SOS) NSW Incorporated v Electoral Commissioner of New South Wales* (2002) 55 NSWLR 642 at 655.
- 52 *Green v Daniels* (1977) 13 ALR 1 at 9 (Stephen J).
- 53 *ibid*.
- 54 See, for example, *Cummeragunga* (2004) 210 ALR 612 at [155].
- 55 *Khan v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, Federal Court, 11 December 1987, Gummow J) at [25]. This has been emphasised in a number of other Federal Court cases, see, for example, *Le v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 521 at 539 (Full Federal Court).
- 56 *Rendell v Release on Licence Board* (1987) 10 NSWLR 499 at 505. However, in a later NSW Court of Appeal decision, a condition imposed by a mining registrar on a mining claim pursuant to the directions of the relevant department was held to be lawful: *Wetzel v District Court of NSW* (1998) 48 NSWLR 687. Mason P placed great reliance on ministerial responsibility and ‘line management’ accountability (at 688).
- 57 The effect of such provisions is explained in *Drake v Minister for Immigration* (1979) 24 ALR 577 at 590–1 and *Drake No 2* (1979) 2 ALD 634 at 644–5. See also chapter 5 of this book.
- 58 (1990) 21 FCR 193 (Nieves, Ryan and Gummow JJ). However, Gummow J noted that estoppel could possibly be applied to ‘operational decisions’ (at 215).
- 59 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
- 60 See chapter 17 of this book.
- 61 ‘Sub-delegation’ refers to where the decision maker acting as delegate proposes to further delegate that power to another person.
- 62 See also *ADJR Act 1977* s6(1)(c) and s6(1)(d). See also *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss5(1)(c), ss5(1)(d), ss6(1)(c) and ss6(1)(d); *Judicial Review Act 1991* (Qld) ss20(2)(c), ss20(2)(d), ss21(2)(c) and ss21(2)(d); *Judicial Review Act 2000* (Tas) ss17(2)(c), ss17(2)(d), ss18(2)(c) and ss18(2)(d).
- 63 [1963] SR (NSW) 723.
- 64 *ibid*, 733.
- 65 *ibid*, 733.
- 66 *ibid*, 734.
- 67 (1982) 153 CLR 1.
- 68 *ibid*, 30 (Gibbs CJ, Wilson and Murphy JJ agreeing).
- 69 [1943] 2 All ER 560 (Lord Greene MR, with whom the two other judges concurred).
- 70 *ibid*.
- 71 *ibid*.
- 72 *O’Reilly* (1982) 153 CLR 1 at 11 (Gibbs CJ). See also Wilson J at 31.
- 73 *ibid*, 11 (Gibbs CJ). See also Wilson J at 31.
- 74 *ibid*, 31 (Wilson J).
- 75 *ibid*, 31 (Wilson J). Mason J dissented, holding that the doctrine of ministerial responsibility ‘has no application to the Deputy Commissioner’ (at 20).

- 76 *ibid*, 12 (emphasis added).
- 77 *ibid*, 12 (Gibbs CJ), 32 (Wilson J).
- 78 See the terms of this ground in ADJR Act s7. See also *Administrative Decisions (Judicial Review) Act 1989* (ACT) s7; *Judicial Review Act 1991* (Qld) s22; *Judicial Review Act 2000* (Tas) s19.
- 79 ADJR Act s7(1).
- 80 See *N AIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367.
- 81 See, for example, *Ipec Air* (1965) 113 CLR 177 at 204–6 (Windeyer J) and *Ansett* (1977) 139 CLR 54 at 87 (Murphy J).
- 82 See, for example, Sir Anthony Mason, n41 above, at 129 who explained that ‘in Australia the doctrine of individual ministerial responsibility, which was once a valuable sanction compelling sound administrative action, is in decline’.
- 83 *O’Reilly* (1982) 153 CLR 1 at 12.
- 84 *Perder Investments Pty Ltd v Elmer* (1991) 23 ALD 545 at 549 (Pincus J).

Chapter 17

- 1 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 489 (Gleeson CJ).
- 2 The rule against bias is explained in the next chapter.
- 3 (1985) 159 CLR 550 at 584.
- 4 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.
- 5 *Ridge v Baldwin* [1964] AC 40.
- 6 *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
- 7 I Holloway, *Natural Justice and the High Court of Australia* (Ashgate, 2002).
- 8 See, for example, M Aronson, B Dyer and M Groves *Judicial Review of Administrative Action* (3rd edn, LBC Information Services, 2004) Chapters 7–9.
- 9 *ibid*, 379.
- 10 [1964] AC 40.
- 11 [1967] 2 AC 337.
- 12 (1968) 119 CLR 222.
- 13 (1985) 159 CLR 550 at 582.
- 14 Aronson, Dyer and Groves, n8 above, 389.
- 15 Aronson, Dyer and Groves, n8 above, cite as examples *Bates v Lord Hailsham* [1972] 1 WLR 1373; *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446.
- 16 (1985) 159 CLR 550 at 583.
- 17 *ibid*, 585.
- 18 For example, R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 517.
- 19 Aronson, Dyer and Groves, n8 above, 378, quoting Brennan J in *Kioa v West* (1985) 159 CLR 550 at 616.
- 20 (1990) 169 CLR 648 at 653 (citations omitted).
- 21 (2003) 214 CLR 1.
- 22 *ibid*, 27 quoting from *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311–12.
- 23 Commencing with his judgment in *Kioa v West* (1985) 159 CLR 550, and repeated in *South Australia v O’Shea* (1987) 163 CLR 378 at 411, *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 34, and *Annetts v McCann* (1990) 170 CLR 596 at 606.
- 24 (2003) 214 CLR 1 at 13.
- 25 [1911] AC 179 at 182.
- 26 Creyke and McMillan, n18 above, 523.

- 27 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
- 28 (1985) 159 CLR 550 at 615.
- 29 Aronson, Dyer and Groves, n8 above, 382–4.
- 30 (1985) 159 CLR 500 at 619.
- 31 The relevant cases are *South Australia v O’Shea* (1987) 163 CLR 378, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. An exception was *Annetts v McCann* (1990) 170 CLR 596, in which Brennan J and Mason J differed in substantial respects including the final result of the case.
- 32 (2000) 204 CLR 82.
- 33 (1985) 159 CLR 550 at 584.
- 34 (1985) 159 CLR 500 at 619.
- 35 (2001) 206 CLR 57.
- 36 This is the term increasingly used to refer to remedies sought in applications made in the original jurisdiction of the High Court in s75(v) of the Constitution.
- 37 *ibid*, 84.
- 38 *ibid*, 74.
- 39 *ibid*, 95.
- 40 See, for example, *WAJR v MIMIA* (2002) 204 ALR 624 (French J), *Moradian v MIMIA* (2004) 142 FCR 170.
- 41 See, for example, *NAQF v MIMIA* (2003) 130 FCR 456; *Wu v MIMIA* (2003) 133 FCR 221; *VXDC v MIMIA* (2005) 146 FCR 562; *SZEGT v MIMIA* [2005] FCA 1514; *SZBDF v MIMA* (2005) 148 FCR 302.
- 42 [2006] FCAFC 61.
- 43 *ibid*, [66]. The bias rule is not excluded: *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562.
- 44 *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62.
- 45 See C Beaton-Wells, ‘Judicial Review of Migration Decisions: Life After S157’ (2005) 33 *Federal Law Review* 141 at 144–7.
- 46 *Annetts v McCann* (1990) 170 CLR 596 at 599 (Mason CJ, Deane and McHugh JJ).
- 47 (2001) 206 CLR 57 at 99–102.
- 48 *A de novo* rehearing refers to one in which the review body may consider new evidence rather than just whatever evidence was before the original decision maker.
- 49 (1976) 136 CLR 106.
- 50 G Brennan, ‘The Purpose and Scope of Judicial Review’ in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 18 at 28.
- 51 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (Tucker LJ).
- 52 Discussed in Holloway, n7 above, 121–53. For the broader context, see also B Schwartz, *Lions over the Throne: The Judicial Revolution in English Administrative Law* (New York University Press, 1987).
- 53 G Ganz, *Administrative Procedures* (Sweet and Maxwell, 1974) 1.
- 54 *ibid*.
- 55 [1911] AC 179 at 182.
- 56 Holloway, n7 above, 58.
- 57 [1915] AC 120.
- 58 *ibid*, 62.
- 59 See S Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Univ of Michigan Press, 1997).
- 60 The Board of Education comprised a President appointed by the Crown; the President of the Privy Council; ‘Her Majesty’s Principal Secretaries of State, the First Commissioner of her Majesty’s Treasury, and the Chancellor of Her Majesty’s Exchequer’: *Board of Education Act 1899* (62 and 63 Vict. 33) s1(2). The Local Government Board was

- similarly constituted, with the Lord Privy Seal instead of the First Commissioner of Her Majesty's Treasury: *Local Government Board Act 1871* (34 and 35 Vict. 70) s3.
- 61 *Board of Education v Rice* [1911] AC 179 at 182. This is not unlike the comments of Callinan and Heydon JJ in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367 at [172] where their Honours noted that unfairness could arise by the denial of an opportunity to either present or consider a case.
- 62 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118.
- 63 Creyke and McMillan, n18 above, 572.
- 64 The broader dimensions of judicial review of migration decision-making is traced in J McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1; J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.
- 65 In 2004–5, forty percent of decisions of the RRT were subject to judicial review: *Annual Report 2004–5*, i.
- 66 *Migration Reform Act 1992* (Cth).
- 67 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).
- 68 [1999] FCA 615 at [3]–[4].
- 69 (2005) 80 ALJR 228.
- 70 (2005) 80 ALJR 367 at [14].
- 71 *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16 at [72].
- 72 *Craig v South Australia* (1995) 184 CLR 163.
- 73 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.
- 74 See, for example, *South Australia v Slipper* [2004] FCAFC 164, where the focus was on whether the circumstances demonstrated such urgency that the special hearing process set out in the statute could be dispensed with, rather than the fact that it was the minister making the decision.
- 75 Aronson, Dyer and Groves, n8 above, 489.
- 76 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (AIJA, 2006) 43–4.
- 77 *ibid*, 35–45.
- 78 (1994) 49 FCR 576 at 591–2.
- 79 *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57 at 69 (Gummow and Hayne JJ).
- 80 *Re Refugee Review Tribunal and Anor; ex parte Aala* (2000) 204 CLR 82 at 115–16 (Gaudron and Gummow JJ).
- 81 An example is *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339, where the majority held that the minister's delegate was required to disclose to the applicant the conclusion that his sole purpose in sending a letter to the Iranian Embassy was to enhance his claim for refugee status.
- 82 *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.
- 83 (1995) 183 CLR 273 at 311.
- 84 *Administrative Decisions Tribunal Act 1997* (NSW) s73(4)(a).
- 85 [2005] FCA 1514.
- 86 *ibid*, [29].
- 87 [2006] FCAFC 16.
- 88 *ibid*, [76].
- 89 *ibid*, [171].
- 90 (1994) 49 FCR 576 at 592.
- 91 (1985) 159 CLR 550 at 629.
- 92 (2005) 80 ALJR 228 [18] (emphasis added).
- 93 (2005) 80 ALJR 367.
- 94 *ibid*, [172].

- 95 (2003) 77 ALJR 1088.
- 96 *ibid*, [78].
- 97 (2000) 204 CLR 82.
- 98 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 99 (2003) 203 CLR 1.
- 100 A test derived from *Stead v State Government Insurance Commission* (1986) 161 CLR 141.
- 101 (1985) 159 CLR 550 at 603.
- 102 *ibid*, 633.
- 103 See *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541; *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340.
- 104 *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541; *NARV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 494.
- 105 (2001) 204 CLR 82 at 109.
- 106 (2003) 214 CLR 1 at 14.

Chapter 18

- 1 For a discussion of the rule of law concept see C Stewart, 'The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 135.
- 2 [2000] 2 WLR 622.
- 3 *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.
- 4 M Robert, 'Public Law Representations and Substantive Legitimate Expectations' (2001) 64 *Modern Law Review* 112 at 112–13; M Allars, *Australian Administrative Law: Cases and Materials* (1997) 458. Also note *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410–11 (Lord Diplock).
- 5 (1985) 159 CLR 550.
- 6 *ibid*, 563.
- 7 J Spigelman, 'The Integrity Branch of Government' (AIAL National Lecture Series, 2004) 1 at 7.
- 8 P Craig, *Administrative Law* (5th edn, Thomson, 2003) 641.
- 9 *ibid*, 639–41.
- 10 H Woolf and J Jowell, *De Smith Woolf and Jowell's Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) 417.
- 11 [1898] 2 QB 91.
- 12 *ibid*, 99–101.
- 13 [1972] 2 QB 299.
- 14 *ibid*, 308.
- 15 [1983] 2 AC 629.
- 16 [1977] QB 643.
- 17 M Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 254.
- 18 [1976] ICR 170.
- 19 *ibid*, 185.
- 20 [1984] 1 WLR 1337.
- 21 *ibid*, 1347.
- 22 [1985] AC 835.
- 23 *ibid*, 866–7 (Lord Templeman).
- 24 *ibid*, 866.
- 25 [1990] 1 All ER 91.
- 26 [1996] STC 681
- 27 *ibid*, 695.
- 28 [1995] 2 All ER 714.

- 29 [1997] 1 WLR 906.
- 30 [1997] 1 WLR 906 at 920.
- 31 See also C Stewart, 'Substantive Unfairness: A New Species of Abuse of Power?' (2000) 28 *Federal Law Review* 618–635.
- 32 *Coughlan* [2000] 2 WLR 622 at 649.
- 33 *ibid*, 648–9.
- 34 *ibid*, 649.
- 35 *ibid*, 654.
- 36 For example, rights to accommodation and care in *Coughlan* or a right to not be reassessed for tax in *R v IRC; Ex parte Preston* [1985] AC 835.
- 37 *Laker Airways Ltd v Department of Trade* [1977] QB 643.
- 38 *HTV v Price Commission* [1976] ICR 170.
- 39 *Coughlan* [2000] 2 WLR 622 at 655; *R v IRC; Ex parte Preston* [1985] AC 835.
- 40 *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.
- 41 *Coughlan* [2000] 2 WLR 622 at 656.
- 42 *Matrix Securities Ltd v Inland Revenue Commissioners* [1994] 1 WLR 334.
- 43 *Coughlan* [2000] 2 WLR 622 at 656.
- 44 *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.
- 45 *Coughlan* [2000] 2 WLR 622 at 656.
- 46 *Liverpool Taxis* [1972] 2 QB 299.
- 47 *Coughlan* [2000] 2 WLR 622 at 656–7.
- 48 [2001] *Lloyds Law Reports Medical* 73.
- 49 [2001] EWCA Civ 1779.
- 50 [2001] EWHC Admin 479.
- 51 [2002] EWHC 181(Admin).
- 52 [2001] EWCA Civ 607.
- 53 [2001] EWCA Civ 607 [31]–[55].
- 54 [2001] 1 WLR 1115.
- 55 *ibid*, 1129.
- 56 *ibid*, 1130–1
- 57 *R v Secretary of State for the Home Department; Ex Parte Hindley* [2000] UKHL 21.
- 58 [2004] EWHC 2251.
- 59 [2000] UKHL 22.
- 60 [2002] EWHC 230 (Admin).
- 61 [2002] EWHC 2119.
- 62 *ibid*, [38].
- 63 [2002] UKHL 8.
- 64 *ibid*, [34].
- 65 [2003] EWCA Civ 1885.
- 66 *ibid*, [120].
- 67 [2002] UKHL 3.
- 68 *ibid*, [44].
- 69 [2005] EWCA Civ 744.
- 70 [2005] EWHC 2720.
- 71 [2005] EWHC 1378 (Admin).
- 72 [2005] EWCA Civ 1363.
- 73 *ibid*, [67].
- 74 *ibid*, [68].
- 75 *ibid*, [69].
- 76 *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121; *David Jones Finance and Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484; *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154.
- 77 (1990) 170 CLR 1.
- 78 *ibid*, 23.

- 79 *ibid.*
 80 *ibid.*, 35–6.
 81 (1990) 21 FCR 193.
 82 *ibid.* 228.
 83 (1995) 183 CLR 273 at 291 (Mason CJ and Deane J).
 84 (1997) 73 FCR 303.
 85 *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 325.
 86 (2000) 170 ALR 529.
 87 *ibid.*, 546.
 88 [2000] FCA 1658.
 89 [2000] FCA 1420 [97].
 90 (2003) 195 ALR 502.
 91 *ibid.*, [37].
 92 *ibid.*, [73].
 93 See, for example, *McWilliam v Civil Aviation Safety Authority* [2004] FCA 1701.
 94 *Rush v Commissioner of Police* [2006] FCA 12.
 95 Though the chapter in this book by Airo-Farulla (chapter 14) suggests that the role of judges in this ground might now not be as limited as was previously the case.
 96 C Stewart, ‘Health Care and Judicial Review: A further role for the courts?’ (1999) 7 *Journal of Law and Medicine* 212.
 97 *Quin* (1990) 170 CLR 1 at 39–40.
 98 Hon M Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4 at 11.

Chapter 19

- * The author thanks Sarah Finin for her helpful research assistance in preparing this chapter.
- 1 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
 - 2 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
 - 3 G Griffiths and C Evans, ‘*Teoh* and Visions of International Law’ (2000) 21 *Australian Yearbook of International Law* 75.
 - 4 Opened for signature 20 November 1989, 1577 UNTS 44, 28 ILM 1457 (entered into force 2 September 1990).
 - 5 C Beaton-Wells, ‘Australian Administrative Law: The Asylum-Seeker Legacy’ [2005] *Public Law* 267.
 - 6 For example, *Migration Act 1958* (Cth) s474 and s486A.
 - 7 See the High Court’s decision in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
 - 8 The relevant sections of the policy are reproduced in *Teoh* (1995) 183 CLR 273 at 279–80.
 - 9 This outline of the facts is taken from the judgment of Mason CJ and Deane J in *Teoh* (1995) 183 CLR 273 at 279–80.
 - 10 *ibid.*, 281.
 - 11 *ibid.*, 281.
 - 12 *ibid.*, 291–2 (Mason CJ and Deane J), 302 (Toohey J).
 - 13 *ibid.*, 292 (Mason CJ and Deane J), 302–3 (Toohey J).
 - 14 See below at Part 3(b).
 - 15 This provision was introduced in 1998 by an amendment to the *Migration Act 1958* (Cth). See *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth), referred to in *Lam* (2003) 214 CLR 1 at 15–16.
 - 16 This summary of the facts is taken from the judgment of Gleeson CJ in *Lam* (2003) 214 CLR 1 at 4–8.
 - 17 *ibid.*, 9.

- 18 See, for example, *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; and *Bradley v Commonwealth* (1973) 128 CLR 557 at 582. There are possible exceptions to this rule, for example, a treaty of peace may be directly enforceable in the courts: *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478.
- 19 *Dietrich v The Queen* (1992) 177 CLR 292 at 306.
- 20 J Perry, 'At the Intersection – Australian and International Law' (1997) 71 *Australian Law Journal* 841.
- 21 *Polites v Commonwealth* (1945) 70 CLR 60 at 68–9.
- 22 *Kruger v Commonwealth* 190 CLR 1 at 71 (Dawson J), and *Teoh* at 287 (Mason CJ and Deane J).
- 23 See *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558 at 569 (Kirby P).
- 24 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
- 25 *ibid.*, 29.
- 26 *Teoh* (1995) 183 CLR 273 at 286–8 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J) and 315 (McHugh J).
- 27 *ibid.*, 291–2 (Mason CJ and Deane J). See also Toohey J at 302.
- 28 [1994] 2 NZLR 257 at 266.
- 29 *ibid.*, 300.
- 30 *ibid.*, 304 (Gaudron J).
- 31 *ibid.*, 316.
- 32 *ibid.*
- 33 M Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204.
- 34 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
- 35 *Kioa v West* (1985) 159 CLR 550.
- 36 International Covenant on Civil and Political Rights, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 198 UNTS 150 (entered into force 22 April 1954), and Protocol relating to the Status of Refugees, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).
- 37 *Lim* (1992) 176 CLR 1 at 38.
- 38 *Kioa* (1985) 159 CLR 550 at 570.
- 39 *ibid.*, 630.
- 40 *ibid.*, 571.
- 41 *Teoh* (1995) 183 CLR 273 at 292. See also *Lam* at 33.
- 42 Allars, n33 above, at 205.
- 43 Joint statement by the Minister for Foreign Affairs and the Attorney-General, *International Treaties and the High Court Decision in Teoh*, 10 May 1995 (1995 joint statement).
- 44 H Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in P Alston and M Chiam (eds), *Treaty-Making and Australia* (1995) 130; and A Duxbury, 'The Anti-*Teoh* Bill Revisited' (1997) *International Law News* 28, 29.
- 45 1995 joint statement.
- 46 See Senate Legal and Constitutional Legislation Committee, *Administrative Decisions (Effect of International Instruments) Bill 1995* (1995) 20. Following the introduction of a second Bill in 1997, the Committee produced another report – Senate Legal and Constitutional Legislation Committee, *Administrative Decisions (Effect of International Instruments) Bill 1997* (1997).
- 47 Duxbury, n44 above, at 29.
- 48 Joint statement by the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, 'The Effect of Treaties in Administrative Decision-Making', 25 February 1997 (1997 joint statement).
- 49 *ibid.*, at para 3.
- 50 See footnote 70 and accompanying text.

- 51 Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) cl5; and Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth) cl5. For differences between the two Bills see Duxbury, n44 above, 31–3.
- 52 South Australia was the only state to enact such legislation. At the time there was some confusion as to whether *Teoh* applied to state as well as federal administrative decision makers, however, it would appear that these concerns were not warranted. See K Walker, 'Treaties and the Internationalisation of Australian Law' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 224.
- 53 *Collins v The State of South Australia* (1999) 74 SASR 200 at 207 ('Collins').
- 54 *ibid*, 208.
- 55 Article 10 2(a) of the ICCPR provides that 'Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to treatment appropriate to their status as unconvicted persons.'
- 56 *Collins* (1999) 74 SASR 200 at 213. Millhouse J (at 209) suggested that the ICCPR was binding on the Commonwealth by virtue of its reproduction to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). This view was flatly rejected by the Full Court of the Federal Court in *Minogue v Williams* (2000) 60 ALD 366 at 373.
- 57 For example, Allars, n33 above, 239–41.
- 58 (1995) 38 ALD 435 at 440–1.
- 59 For example, *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 50 ALD 690, and *Holani v Department of Immigration and Ethnic Affairs* (1996) 44 ALD 370. For a further list of similar cases see Griffith and Evans, n3 above, 78.
- 60 (1996) 69 FCR 431 at 437–8.
- 61 *Lam* (2003) 211 CLR 1 at 32–3.
- 62 *ibid*, 33.
- 63 *ibid*, 38.
- 64 *ibid*, 45.
- 65 *ibid*, 49.
- 66 *Sanders v Snell* (1998) 196 CLR 329 at 351 (Callinan J).
- 67 L Ruddle and S Nicholes, 'Case Note: *B and B and MIMIA*: Can International Treaties Release Children from Immigration Detention Centres' (2004) 5 *Melbourne Journal of International Law* 256 at 265.
- 68 H Charlesworth, M Chiam, D Hovell and G Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423 at 446.
- 69 *ibid*.
- 70 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalism' (2001) 1 *Oxford University Commonwealth Law Journal* 5 at 11.
- 71 *Lam* (2003) 214 CLR 1 at 32.
- 72 *ibid*, 34.
- 73 *ibid*, 48.
- 74 For example, see comments by Ewing of the Australian Mining Industry Council and Hadler of the National Farmers' Federation in Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) 94.
- 75 *ibid*. See Duxbury, n44 above, 30.
- 76 *Kioa v West* (1985) 159 CLR 550 at 582.
- 77 *ibid*, 610 (Brennan J).
- 78 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co, 2004) at 395.
- 79 *ibid*, 395.
- 80 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 672 ('Haoucher')
- 81 Aronson, Dyer and Groves, n3 above, at 396.
- 82 *Teoh* (1995) 183 CLR 273 at 291.

- 83 *ibid*, 291–2.
 84 *ibid*, 311.
 85 *ibid*, 311.
 86 *Kioa* (1985) 159 CLR 550.
 87 [1969] 2 Ch D 149.
 88 *Kioa* (1985) 159 CLR 550 at 617.
 89 *ibid*, 617–18.
 90 See, for example, Aronson, Dyer and Groves, n3 above, 409.
 91 *Lam* (2003) 214 CLR 1 at 45.
 92 *ibid*, 38.
 93 *ibid*, 34.
 94 *Teoh* (1995) 183 CLR 273 at 291.
 95 *Haoucher* (1990) 169 CLR 648 at 683–4.
 96 *Lam* (2003) 214 CLR 1 at 32 (McHugh and Gummow JJ). Hayne J (at 38) also suggested that *Teoh* may not stand beside *Haoucher*, but expressly left the issue undecided.
 97 *ibid*, 32.
 98 *ibid*, 13.
 99 *ibid*, 45.
 100 *ibid*, 47.
 101 B Dyer, ‘Legitimate Expectations in Procedural Fairness After *Lam*’, in M Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 207.
 102 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 22.
 103 [2001] QB 213. The English position is discussed in HRW Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, 2004) 500–6.
 104 *Lam* (2003) 214 CLR 1 at 10.
 105 *ibid*, 23.
 106 *Kioa* (1985) 159 CLR 550 at 622.
 107 H Burmester, ‘*Teoh* Revisited After *Lam*’ (2004) *AIAL Forum No 40* 33 at 38.
 108 *Lam* (2003) 214 CLR 1 at 12–13.
 109 *ibid*, 14.
 110 *ibid*, 36.
 111 See generally B Dyer, ‘Determining the Content of Procedural Fairness’ (1993) 19 *Monash University Law Review* 165.
 112 *Kioa* (1985) 159 CLR 550 at 612.
 113 *ibid*, 563.
 114 *ibid*, 585.
 115 *Lam* (2003) 214 CLR 1 at 35 (McHugh and Gummow JJ), 48 (Callinan J).
 116 W Lacey, ‘Case Commentary: A Prelude to the Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*’ (2004) 26 *Sydney Law Review* 131 at 142.
 117 *Lam* (2003) 214 CLR 1 at 14.
 118 *ibid*, 35.
 119 Lacey, n116 above, 142.
 120 *ibid*, 151.
 121 Dyer, n111 above, 192.
 122 (2004) 221 CLR 1 (*‘Applicant NAFF of 2002’*).
 123 *ibid*, 14.
 124 *ibid*, 15.
 125 *ibid*, 11–14. See also Dyer, n111 above, 211.
 126 *Lam* (2003) 214 CLR 1 at 23.
 127 *Applicant NAFF of 2002* (2004) 221 CLR 1 at 23.
 128 *ibid*, 24.
 129 *ibid*, 25.
 130 *ibid*, 25 (per Kirby J).

- 131 (2003) 77 ALD 1 at 13 ('WACO').
- 132 *ibid*, 13.
- 133 *ibid*, 13–14 (emphasis added).
- 134 *ibid*, 10.
- 135 *ibid*, 13.
- 136 [2006] FCAFC 53 at [55].
- 137 *ibid*, [56].
- 138 *ibid*.
- 139 *Expo-Trade Pty Ltd v Minister for Justice and Customs and Another* (2003) 134 FCR 189 (*Expo-Trade Pty Ltd*). The non-injurious price is a mechanism under s269TACA of the *Customs Act 1901* (Cth) for determining the price that could be achieved in the absence of dumping or a subsidy: see *Customs Manual* reproduced at (2003) 134 FCR 189, 202.
- 140 *ibid*, 206.
- 141 *ibid*, 207.
- 142 Dyer, n101 above, 205.
- 143 *Le v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 84 ALD 17 at 38 (Jacobson and Bennett JJ).
- 144 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [79–80] (footnotes omitted).
- 145 *ibid*, [75–78].
- 146 S French, 'How "Legitimate" are Legitimate Expectations?' (2006) 80 *Law Institute Journal* 54, 57 (March).
- 147 Dyer, n101 above, 191.

Chapter 20

- 1 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367 at [172].
- 2 Allegations of actual bias remain rare, particularly against judicial officers, but they are often now raised in migration decision-making because amendments to the *Migration Act 1958* (Cth) restricting the potential grounds of judicial review have limited the scope of judicial review on the ground of bias to actual and not apprehended bias.
- 3 See, for example, *Sun v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505 at 551–2; *Gamaethige v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 424 at 443.
- 4 Apprehended bias is sometimes also referred to as 'imputed' or 'suspected' bias: *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414.
- 5 See, for example, *R v Luskink; Ex parte Shaw* (1980) 32 ALR 47 at 50 (Gibbs CJ).
- 6 Migration law is an exception. Amendments to the procedures governing refugee applications have restricted the ground of judicial review for bias to claims of actual bias only. Not surprisingly, the number of claims for actual bias in refugee applications dramatically rose after these amendments.
- 7 *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507 at 541.
- 8 A point conceded by Callinan J in *Johnson v Johnson* (2000) 201 CLR 488 at 517.
- 9 This conception of fairness might also support the grant of differing procedural rights to parties, if that places the parties on a more equal footing. For example, the grant of legal or other representation to a layperson may allow that person to better his or her case. An experienced administrative official might have such knowledge and experience of administrative review that the requirements of procedural fairness do not warrant a reciprocal grant of legal or other representation.

- 10 In the context of judicial decision-making it has been suggested that bias will be established if it is clear the judge's mind is, or appears to be, incapable of alteration: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J). On this view, perceptions and predispositions on the part of the judge are permissible so long as they do not preclude the judge from reaching a conclusion different to those views in an appropriate case. A judge who brings pre-existing views to an issue, even strongly-held ones, will not necessarily fall afoul of the rule against bias. A similar view has been adopted in many other contexts. See, for example, *Ferguson v Cole* (2002) 121 FCR 402 at 422–3 [views aired by a royal commissioner in an interim report did not indicate an unalterable mindset by the commissioner, so any predispositions evidenced in the interim report was insufficient to establish bias]; *Eaton v Overland* (2001) 67 ALD 671 at 728 [senior police officer involved in disciplinary proceedings was not required to 'entirely lack' preconceived views on the matter].
- 11 See, for example, *Ebner v Official Trustee* (2000) 205 CLR 337 at 362–5 (Gaudron J). Kirby J also accepted that requirement of impartiality might, for judges, have a constitutional foundation and suggested that this might extend to state judges: 373. See also *Smits v Roach* [2006] HCA 36 at [121] (Kirby J).
- 12 The issue of waiver, which is discussed later in this chapter, would also become more complex if the rule against bias had a constitutional basis. At present parties may waive a claim of bias, but it would be difficult to imagine that the bias rule could be waived if it was a constitutional requirement. But a similar argument can be made even if the rule does not have a constitutional basis. If the rule against bias operates to promote public confidence in the judiciary, it can be argued that this element of public interest is not one for the parties to waive. See B Toy-Cronin, 'Waiver of the Rule Against Bias' (2002) 9 *Auckland University Law Review* 850 at 864 where it is argued that bias may constitute a jurisdictional error, the consequences of which cannot be waived by a party.
- 13 *Kable v DPP (NSW)* (1996) 189 CLR 51.
- 14 Gaudron J thought otherwise in *Ebner v Official Trustee* (2002) 205 CLR 337 at 363, but her Honour's view has not been adopted in later cases.
- 15 The classic statement comes from *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 where Lord Hewart CJ said that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. The case involved a solicitor who was acting for a client suing a motorist for damages caused in a car accident. The solicitor also worked as a clerk to the justices, and he stayed with the justices when they adjourned to decide their verdict on the motorist's charges. It emerged that the justices did not know of the conflict of solicitor/clerk (who had not made prejudicial statements while the justices deliberated) but the conviction was overturned. The court was not only about whether impropriety had occurred, but also 'what might appear' from the actions of the clerk.
- 16 A point affirmed by the House of Lords in *Gillies v Secretary of State for Work and Pensions* [2005] 1 All ER 731 at 739.
- 17 *Ebner v Official Trustee* (2000) 205 CLR 337 at 381 (Kirby J).
- 18 (1852) 3 HLC 759.
- 19 The many cases to this effect were reviewed by Kirby J in *Ebner v Official Trustee* (2000) 205 CLR 337 at 376–87.
- 20 *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119.
- 21 *R v Bow Street Magistrate; Ex parte Pinochet (No 1)* [2000] 1 AC 61.
- 22 *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119.
- 23 *Pinochet (No 2)* 1 AC 119 at 135 (Lord Browne-Wilkinson, Lord Nolan agreeing), 143 (Lord Hope).
- 24 (2000) 205 CLR 337.
- 25 *ibid*, 356 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing). Kirby J disagreed strongly with that approach, which he described as an 'ahistorical reinterpretation' of *Dimes*: 378.

- 26 *ibid*, 356–7. On this point the majority effectively agreed with the suggestion in *Pinochet (No 2)* that financial and other interests were conceptually similar for the purposes of the rule against bias, but took a quite different view as to whether such interests should lead to automatic disqualification.
- 27 *ibid*, 349.
- 28 *ibid*, 345. The references to jurors were no doubt inspired by *Webb v R* (1994) 181 CLR 41, where a claim of bias succeeded against a juror.
- 29 Gleeson CJ appeared to support a similar approach to the requirements of procedural fairness in the *Lam* case. His Honour rejected the claim of the applicant (*Lam*) because he had failed to explain how the alleged denial of natural justice had actually affected his case. The Chief Justice stressed the practical nature of fairness and concluded that *Lam* had not demonstrated any ‘practical injustice’ by reason of the alleged denial of procedural fairness: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 14. This approach is similar to that of *Ebner* because it compels an applicant to explain the effect of the alleged source of unfairness.
- 30 A point emphasised by the High Court in *Smits v Roach* [2006] HCA 36.
- 31 To echo Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 1 AC 532 at 548 where his Lordship commented that ‘In law context is everything.’
- 32 *Ebner v Official Trustee* (2000) 205 CLR 337 at 344.
- 33 *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507.
- 34 There was little doubt that if the court had held otherwise, the minister would certainly have been disqualified from determining Mr *Jia*’s case and possibly many others.
- 35 (2001) 205 CLR 507, 539 (Gleeson CJ and Gummow J, Hayne J agreeing).
- 36 *ibid*, 583.
- 37 *ibid*, 584.
- 38 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128.
- 39 *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518.
- 40 (2002) 210 CLR 438.
- 41 *ibid*, 460. Callinan J agreed with Gaudron, Gummow and Hayne JJ, but pointedly declined to decide this point because he concluded that the involvement of the officers whose interest was alleged to give rise to the apprehension of bias was so peripheral that it could not have supported a reasonable apprehension of bias: 489.
- 42 *ibid*, 455.
- 43 [1993] AC 646.
- 44 *ibid*, 670.
- 45 (1994) 181 CLR 41 at 50–3 (Mason CJ and McHugh J), 68 (Deane J).
- 46 This approach was regarded as settled law in *Ebner v Official Trustee* (2000) 205 CLR 337 at 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing). That approach has since been accepted in England: *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at 726–7 and *Porter v Magill* [2002] 2 AC 357. The evolution of recent English law is traced in HWR Wade and CF Forsyth, *Administrative Law* (9th edn, OUP, 2004) 464–7.
- 47 A point acknowledged by the Privy Council in *Man O’War Station Ltd v Auckland Council (No 1)* [2002] 3 NZLR 577. The Council was invited to adjust the bias test in New Zealand, by adopting the ‘real possibility’ test of bias accepted in *Porter v Magill* [2002] 2 AC 357. The Council refused the invitation because the issue had not been argued before the Court of Appeal of New Zealand, but it also noted that the difference between the two tests was ‘a fine one’ that could not arguably influence the case at hand: 3 NZLR 577 at 583.
- 48 *Johnson v Johnson* (2000) 200 CLR 488 at 509.
- 49 (2002) 210 CLR 438.
- 50 *ibid*, 480.

- 51 *ibid*, 484.
- 52 A point conceded by Kirby J when he admitted that the ‘reasonable person’ test was often ‘invoked . . . to give the allure of objectivity beyond the opinions of the actual judges who make the decision’: *Smits v Roach* [2006] HCA 36 at [97].
- 53 (1994) 181 CLR 41.
- 54 *ibid*, 74.
- 55 [2000] 1 AC 119.
- 56 [2000] QB 451. The judgment had particular status because the court was comprised of the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor.
- 57 It has long been clear that parties cannot choose their judge: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.
- 58 A criticism made cogently in K Malleson, ‘Safeguarding Judicial Impartiality’ (2002) 22 *Legal Studies* 53.
- 59 The description of the *Locobail* decision as dogmatic is made in M Taggart, ‘Administrative Law’ [2003] *New Zealand Law Review* 99 at 101.
- 60 See, for example, *Hoekstra v Lord Advocate* [2001] 1 AC 216 (complaint of bias in a human rights case upheld against a judge who had written a very negative newspaper article about human rights legislation). See also E Campbell, ‘Judges’ Freedom of Speech’ (2002) 76 *Australian Law Journal* 499 where it is argued that judges should accept that the demands of judicial office might require judges to speak carefully or stay silent on some issues, to guard against future claims of bias.
- 61 See, for example, *Brown v Police* (1999) 74 SASR 402 (magistrate disqualified from hearing a charge against a defendant whom he had previously convicted of offences of violence because the second charge raised similar issues).
- 62 This conception of the judicial role is not affected by the rise of an increasingly assertive form of case management in most Australian courts. Even the most active style of case management is consistent with traditional judicial neutrality.
- 63 An instrumental rationale is one that justifies the rule against bias by reference to direct outcomes, such as the greater quality and accuracy of decisions caused by observance of the rule. A non-instrumental rationale places greater weight on more indirect outcomes or values, such as increased participation by parties and the greater level of respect the parties might receive through observance of the rule.
- 64 See, for example, *Huang v University of NSW (No 3)* [2006] FCA 626 (apprehension of bias found when magistrate introduced affidavit evidence on his own motion).
- 65 *Vakauta v Kelly* (1989) 167 CLR 568.
- 66 A problem recognised by Callinan J in *Johnson v Johnson* (2000) 201 CLR 488 at 517–19.
- 67 But some cases suggest it is better to object prematurely than not at all because a failed objection may be revived on appeal: *Hutchinson v RTA* [2000] NSWCA 332.
- 68 *Johnson v Johnson* (2000) 201 CLR 488 at 517. See also K Mason, ‘Unconscious Judicial Prejudice’ (2001) 75 *Australian Law Journal* 676 at 681.
- 69 See, for example, *Heap, in the matter of an Application for Writs of Prohibition, Certiorari and Mandamus against the Australian Industrial Relations Commission* [2003] FCAFC 36 at [33]; *Magazzu v Business Licensing Authority* [2001] VSC 5 at [16]–[19].
- 70 *Smits v Roach* [2006] HCA 36 at [46] (Gleeson CJ, Heydon and Crennan JJ, Gummow and Hayne JJ agreeing); *Jones v ACCC* [2002] FCA 1054 at [126].
- 71 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 138–9 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing).
- 72 The cases on this are reviewed in *Metropolitan Fire and Emergency Services Board v Churchill* (1998) 14 VAR 9 at 27–9.
- 73 See, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172; *Builders’ Registration Board (Qld) v Rauber* (1983) 47 ALR 55.
- 74 (1998) 14 VAR 9 at 31.
- 75 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 70 at 88–9 (Mason CJ and Brennan J). Deane J agreed with this proposition but took a stricter view of the

- circumstances in which necessity could excuse compliance with the rule against bias: 95–6.
- 76 See, for example, *Builders' Registration Board (Qld) v Rauber* (1983) 43 ALR 55; *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296.
- 77 A classic example is a local council that has previously rejected planning applications from a person. The council might be precluded from considering further applications from that person, but it may not be if no other body may approve applications. See, for example, *R v City of Whyalla; Ex parte Kittel* (1979) 20 SASR 386; *IW v City of Perth* (1997) 191 CLR 1 at 50.
- 78 See, for example, *R v Optical Board; Ex parte Qurban* [1933] SASR 1 (necessity failed where a medical board sent its members to visit a doctor to test whether he would assault patients as alleged in a complaint before the Board. The removal of members who had visited the doctor left the Board without a quorum but the court held that the Board could have used people other than adjudicators to investigate the doctor).
- 79 See, for example, *Sidney Harrison Pty Ltd v City Of Tea Tree Gully* (2001) 112 LGERA 320 at 326.

Chapter 21

- 1 Several judges have said that taken alone, 'jurisdiction' is a 'slippery' word: *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607 at [235] (Finkelstein J); and *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130 at [106] (Gummow, Hayne and Heydon JJ).
- 2 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 122–3, references omitted.
- 3 That is how the Federal Court now treats it. See Hill, Branson and Stone JJ in *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 at [27]: 'The statement that a particular error is a "jurisdictional error" is a statement of conclusion.'
- 4 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657; and *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [36].
- 5 This extension is an historical inheritance from England. It is curious because of its greater tolerance of latent (as opposed to patent) legal errors, and because by definition, the decision maker's legal error was in a field in which the decision maker was entitled to decide rightly or wrongly. A further curiosity is that certiorari usually quashes the challenged decision retrospectively (i.e., from its inception), even where the error was a non-jurisdictional patent error of law: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 424–5.
- 6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 7 Namely, s179 of the *Industrial Relations Act 1996* (NSW). The *Industrial Relations Amendment Act 2005* (NSW) plugged one of s179's few loopholes, which had allowed judicial review applications to be brought ahead of the making of a purported decision. In a concession to the judicial structure, however, the Act now allows judicial review of Industrial Court decisions, effectively postponing 'external scrutiny' until the completion of the appeal processes within the industrial tribunal system. The *Migration Litigation Reform Act 2005* (Cth) tries to achieve a similar result, but it is unclear whether that will withstand constitutional challenge.
- 8 Mr M Orkopoulos, NSW Legislative Assembly, *Hansard* 17 November 2005, p 20010.
- 9 A federal clause forbidding High Court review of a 'purported decision' would be unconstitutional: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506.
- 10 *Fish v Solution 6 Holdings Ltd* [2006] HCA 22; *Batterham v QSR Ltd* [2006] HCA 23; and *Old UGC Inc v Industrial Relations Commission (NSW)* [2006] HCA 24.

- 11 *Batterham v QSR Ltd* [2006] HCA 23 at [26], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ.
- 12 *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* [2006] NSWCA 172 at [31] and [83].
- 13 *Ousley v R* (1997) 192 CLR 69.
- 14 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
- 15 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339 and 350–2.
- 16 R Creyke and J McMillan, *Control of Government Action* (LexisNexis Butterworths, 2005) 790–5.
- 17 *Fingleton v R* (2005) 216 ALR 474. See also *Fleet v Royal Society for the Prevention of Cruelty to Animals (NSW)* [2005] NSWSC 926.
- 18 See *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132.
- 19 Creyke and McMillan, n16 above, 295.
- 20 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.
- 21 *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 787 at 792–3; and *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 204 ALR 55 at [44].
- 22 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93, Gaudron and Gummow JJ.
- 23 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, 2004) 29.
- 24 Supreme Court judges had issued the surveillance warrants in *Ousley v R* (1997) 192 CLR 69, but their validity could be reviewed on the theory that the judges had been acting in an administrative role, rather than as Supreme Court judges.
- 25 See *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 638–40; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93, 134, 140; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177, 184–6, 248, 274–6; *Continental Venture Capital Ltd v Amann Aviation Pty Ltd (In Liq)* (2001) 53 NSWLR 687 at 696; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645–6; and *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 at [11] and [88].
- 26 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93, Gaudron and Gummow JJ.
- 27 Aronson, Dyer and Groves, n23 above, 24–5.
- 28 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 156–7; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 403–4, 438–9, 466, 471–2; and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 520–5.
- 29 See: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657; and *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [36].
- 30 Statutory requirements must always be observed, but not all of them are so important that their breach will result in invalidity. We used to be able to describe those provisions whose breach resulted in invalidity as ‘mandatory’, and those whose breach did not have that result as ‘directory’. The terms are conclusory, and this has led the High Court in one case to frown on their usage as a potential source of distraction from the real issue, which is to ascertain the true legislative meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390. Others are not so easily distracted; see: Aronson, Dyer and Groves, n23 above, 325; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 488 (Gleeson CJ) and 533 (Callinan J); and J Spigelman, ‘Integrity and Privative Clauses’, in *AIAL National Lecture Series on Administrative Law No 2* (2004) 43 at 48.
- 31 Their Honours might well allow some level of entrenchment when it comes to the requirements of natural justice in the context of courts exercising the judicial power of the Commonwealth. They might also imply some of the grounds as regards the exercise

- of non-statutory Executive power, although one might doubt whether they would also entrench any ground so implied.
- 32 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [154].
- 33 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 122.
- 34 See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 470–1; and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 522–3.
- 35 (1995) 184 CLR 163 at 176–80, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
- 36 *Craig v South Australia* (1995) 184 CLR 163 at 177.
- 37 Aronson, Dyer and Groves, n23 above, 214–16.
- 38 [1969] 2 AC 147 at 171.
- 39 There is a curious line in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 509 that injunctive relief for ‘fraud, dishonesty or other improper purpose’ might extend beyond jurisdictional error. A similar passage appeared earlier (at 508), although the reference there was to the availability of injunctive relief for ‘fraud, bribery, dishonesty or other improper purpose’ (emphasis added). Their Honours may have had in mind only those cases of visa applicants improperly procuring favourable decisions which the Minister might want to challenge.
- 40 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- 41 ‘Want’ or ‘excess’ of ‘jurisdiction’ were the terms commonly used in the High Court in the early days; see *Mooney v Commissioners of Taxation (NSW)* (1905) 3 CLR 221. Earlier still, Mr WC Wentworth argued that a Visitor’s immunity from judicial scrutiny ceased to apply if there were ‘want of jurisdiction’ which would be established if he acted in excess of jurisdiction, which would result in his proceedings being *coram non iudice*: *Walker v Scott (No 1)* [1825] NSWSupC 60. The actual term ‘jurisdictional error’ did not make its first High Court appearance until *R v Coldham; Ex parte Australian Workers’ Union* (1983) 153 CLR 415.
- 42 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 (Gaudron and Gummow JJ) and 132 (Kirby J).
- 43 *ibid*, 141.
- 44 *ibid*, 143.
- 45 See: *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Products Manufacturing Employees Union* [1981] AC 363; *Re Racal Communications Ltd* [1981] AC 374; and *O’Reilly v Mackman* [1983] 2 AC 237 at 278.
- 46 *R v Hull University Visitor; Ex parte Page* [1993] AC 682; and *Boddington v British Transport Police* [1999] 2 AC 143 at 154.
- 47 SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, 1995) 223–56. Kirby J referred without qualification to the death of the English distinction between jurisdictional and non-jurisdictional errors: for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439–40.
- 48 For example, HWR Wade and CF Forsyth, *Administrative Law* (9th edn, 2004) 280.
- 49 *E v Secretary of State for the Home Department* [2004] QB 1044.
- 50 *E v Secretary of State for the Home Department* [2004] QB 1044 at 1064.
- 51 P Craig, *Administrative Law* (5th edn, 2003) 492–501 and 511–19.
- 52 Aronson, Dyer and Groves, n23 above, 179–202.
- 53 Indeed, the High Court rejected a government argument that all of the grounds of judicial review had to be errors of law in one way or another: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [54] (McHugh and Gummow JJ) and [120] (Kirby J).
- 54 *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171.
- 55 *Darling Casino Ltd v Casino Control Authority (NSW)* (1997) 191 CLR 602 at 634 note 52 (Gaudron and Gummow JJ).

- 56 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 (McHugh, Gummow and Hayne JJ). One could point to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 as proof that the common law is still capable of generating new grounds of judicial review or, at the very least, re-labelling old grounds. *S20* narrowed *Wednesbury* unreasonableness so as to apply only to the review of the exercise of discretionary power, and gave recognition to serious irrationality or illogicality as a ground for reviewing the fact-finding process.
- 57 *Craig v South Australia* (1995) 184 CLR 163 at 177.
- 58 *ibid*, 178.
- 59 See: *Rv Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267–9 (Aickin J); *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 227 (Kirby J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 (Gummow and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 615 (Gaudron and Gummow JJ); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339–40 (Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 61 (Gleeson CJ and Hayne J), 81 (Gaudron J), and 89 (McHugh J); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439–40 (Kirby J); and *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [122] (Kirby J).
- 60 (1947) 47 SR (NSW) 416 at 420.
- 61 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81.
- 62 *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 (Jordan CJ) emphasis added.
- 63 DM Gordon, ‘The Relation of Facts to Jurisdiction’ (1929) 45 *Law Quarterly Review* 459; ‘*Tithe Redemption Commission v Gwynne*’ (1944) 60 *Law Quarterly Review* 250; ‘Conditional or Contingent Jurisdiction of Tribunals’ (1960) 1 *UBC Law Review* 185; ‘Book Review of SA de Smith, *Judicial Review of Administrative Action*’ (Stevens, 1959) (1960) 76 *Law Quarterly Review* 306; ‘Book Review of A Rubinstein, *Jurisdiction and Illegality*’ (OUP, 1965) (1966) 82 *Law Quarterly Review* 263; and ‘Jurisdictional Fact: an Answer’ (1966) 82 *Law Quarterly Review* 515. Gordon’s articles are discussed in: SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn, 1995) 228–9; and P Craig, *Administrative Law* (5th edn, 2003) 479–82.
- 64 [1922] 2 AC 128 at 151.
- 65 *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 149 at 171, 199 and 210.
- 66 [1958] 1 WLR 434.
- 67 *R v Commissioner of Patents; Ex parte Weiss* (1939) 61 CLR 240 at 249; *R v District Court; Ex parte White* (1966) 116 CLR 644 at 658; *R v Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97–8; *Conway v R* (2002) 209 CLR 203 at 209; and *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 463–4.
- 68 Rejecting it as entirely irrational, as if legislative preconditions to validity must always be rational.
- 69 ‘Essential preliminaries’ were used in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 443.
- 70 Spigelman CJ spoke in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at 718 of the ‘extrinsic or ancillary or preliminary nature’ of ‘jurisdictional facts’, and added: ‘The word “preliminary” does not, in this context, refer to a chronological sequence of events, but to matter that is legally antecedent to the decision-making process. A decision maker may well determine whether or not s/he has jurisdiction at the same time as s/he carries out the substantive decision-making process.’
- 71 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 and 391. Distinctions between ‘threshold’ and other issues are similar: *Dranichnikov*

- v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 407 [87] (Kirby J).
- 72 He argued in ‘Conditional or Contingent Jurisdiction of Tribunals’ (1960) 1 UBC Law Review 185 at 203 that it was irrational to require a tribunal to investigate and determine an issue, and yet hold that it had no jurisdiction if the reviewing court disagreed. For a review of cases allowing tribunals and specialist courts of limited jurisdiction to determine challenges to their jurisdiction, see *Radio 2UE Sydney Pty Ltd v Burns* [2005] NSWADTAP 69.
- 73 For an historical account of ultra vires, see H A Street, *A Treatise on the Doctrine of Ultra Vires: Being an Investigation of the Principles which Limit the Powers and Liabilities of Corporations, Quasi-Corporate Bodies and Non-Sovereign Legislatures* (1930, Sweet and Maxwell, formerly by S B Brice).
- 74 As in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 91.
- 75 ‘The Relation of Facts to Jurisdiction’ (1929) 45 *Law Quarterly Review* 459.
- 76 ‘The Relation of Facts to Jurisdiction’ (1929) 45 *Law Quarterly Review* 459.
- 77 ‘Conditional or Contingent Jurisdiction of Tribunals’ (1960) 1 UBC Law Review 185 at 307.
- 78 Three meanings were noted in *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 at [30].
- 79 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389.
- 80 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [122]; 77 ALJR 1165. A better term might be ‘merely conclusory’. See Hill, Branson and Stone JJ in *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 at [27]: ‘The statement that a particular error is a “jurisdictional error” is a statement of conclusion.’
- 81 On the assumption that *Craig v South Australia* (1995) 184 CLR 163 is not overruled.
- 82 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123.
- 83 See S Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?’ (2000) 28 *Federal Law Review* 303; B Selway, ‘The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues’ (2002) 30 *Federal Law Review* 217 at 235; K Mason, ‘What is Wrong with Top-down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574; and M Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2004) 15 *Public Law Review* 202.
- 84 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23–4 (McHugh and Gummow JJ); and *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 at [14]–[16] (Gummow J). Cf *Combet v Commonwealth* [2005] HCA 61 at [4] (Gleeson CJ).
- 85 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [161]–[170].
- 86 For example, *Public Service Act 1999* (Cth) s10.
- 87 It appears that no one has even pleaded the point. The ‘values’ lists get a very occasional mention in other contexts, such as the ‘public interest’ test in FOI; for example, *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 at [78]. See M Groves, ‘Ethics in Public Administration’, in C Finn (ed), *Shaping Administrative Law for the Next Generation* (AIAL, Canberra, 2005) 60.
- 88 *Lustig-Prean v United Kingdom (No 1)* (2000) 29 EHRR 548, on appeal from *R v Ministry of Defence; Ex parte Smith* [1996] QB 517. See Aronson, Dyer and Groves, n23 above, 336–8.
- 89 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213; *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115; and *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348.

- 90 *E v Secretary of State for the Home Department* [2004] QB 1044.
- 91 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23, McHugh and Gummow JJ. But query the effect of ADJR's explicit 'abuse of power' ground in s5(2)(j).
- 92 (2005) 223 ALR 171.
- 93 *ibid*, [90] and [98].
- 94 *ibid*, [107].
- 95 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 341 and 372; *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [169]; and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 460.
- 96 (2003) 204 ALR 55 at [45] (Gray and Downes JJ), [68] and [78] (Kenny J).
- 97 See also *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 at [21] and [39], where Gummow J noted the ADJR's relative generosity to challengers complaining of bureaucratic delay.
- 98 *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1.

Chapter 22

- 1 G Brennan, 'The Pursuit and Scope of Judicial Review' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) at 19.
- 2 Various other terms are used to denote this statutory device. They are discussed later in the chapter.
- 3 See, for example, *R v Gray; Ex parte Marsh* 1985 157 CLR 351; and *Fish and Ors v Solution 6 Holdings Limited* [2006] HCA 22.
- 4 For a recent review of issues raised by privative clauses, see Administrative Review Council (ARC), *The Scope of Judicial Review: Report to the Attorney General* (ARC, Report No 47, 2006).
- 5 See the discussion of the doctrine of jurisdictional error below, and to the discussion of what constitutes an error of law in Chapter 21.
- 6 J Stone, *Precedent and the Law: Dynamics of Common Law Growth* (Butterworths, 1984), ch 4. See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, Law Book Company, 2004), 167; and TRS Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *Public Law* 429.
- 7 For a recent example, see the High Court's ruling in *Plaintiff S134 v Minister for Immigration and Multicultural Affairs* (2003) 211 CLR 441.
- 8 This is illustrated most starkly by the highly critical response from a number of senior judges in the United Kingdom to a Bill which, if it had been enacted, would have inserted a new, draconian privative clause into UK migration law. See, for instance: J Steyn, 'Speech to Inner Temple' (speech delivered at the Inner Temple, London, 3 March 2004); H Woolf, 'The Rule of Law and a Change in the Constitution' (speech delivered at the Squire Centenary Lecture, Cambridge University, 3 March 2004). This issue is dealt with in detail in pp. 363–4 of this chapter.
- 9 J Steyn, 'The Weakest and Least Dangerous Department of Government' [1997] *Public Law* 84 at 86.
- 10 See B Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action: The Search Continues' (2002) 30 *Federal Law Review* 217 at 222 and 235; P Craig, 'Ultra Vires and the Foundations of Judicial Review' in C Forsyth (ed), *Judicial Review and the Constitution* (Oxford University Press, 2000), 47; the comments of Brennan J in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 26; and G Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in R Creyke and

- P Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (Federation Press, 2002) at 23.
- 11 See, for example, the approach taken by Mason J (as he then was) in cases such as *Kioa v West* (1985) 159 CLR 550; and A Mason, 'The Foundations and Limitations of Judicial Review' (2001) 31 *AIAL Forum* 1.
 - 12 See, for example, *Industrial Relations Act 1996* (NSW) s179, which limits review of rulings by the Industrial Relations Commission of NSW sitting in court session. See further below.
 - 13 R Creyke and J McMillan, *Control of Government Action* (LexisNexis Butterworths, 2005) at 3.
 - 14 In Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney General* (Canberra: ARC, Report No 47, 2006), the Administrative Review Council (ARC) identified twelve factors 'impinging on the availability and scope of judicial review': see 'Justifications put forward for reducing the scope of judicial review', chapter 5, part 5.2.
 - 15 Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney General* (ARC, Report No 47, 2006), part 5.2.4.
 - 16 In this context, it is common to use the example of aspiring migrants attempting to delay or avoid removal from Australia: see Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney General* (Canberra: ARC, Report No 47, 2006), part 5.2.6. Note, however, that judicial review has been used as a delaying tactic in many other contexts. Examples include the many judicial review applications by disgraced businessman, Alan Bond, in the 1980s and the procedural points taken frequently in industrial relations cases. See, for example, *Australian Broadcasting Commission v Bond* (1990) 170 CLR 321; and (in industrial relations) *Miller v Australian Industrial Relations Commission* (2001) 108 FCR 192.
 - 17 See M Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17; and JJ Spigelman, 'Jurisdiction and Integrity' (2004) AIAL National Lecture Series on Administrative Law No 2, Lecture 2, 25, 31. See also *City of Enfield Corporation v Development Assessment Corporation* (2000) 199 CLR 135.
 - 18 See, for example, *R v Connell; Ex parte the Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *Buck v Bavone* (1976) 135 CLR 110; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 276.
 - 19 See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; and *Silveira v Australian Institute of Management (AIM)* (2001) 113 FCR 218. For analyses of the decision in *NEAT* see: C Mantziaris, 'A "Wrong Turn" on the Public/Private Distinction – Case Note; *NEAT Domestic Trading Pty Ltd v AWB Ltd*' (2003) 14(4) *Public Law Review* 197; M Allars, 'Public Administration In Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126; and G Hill, 'The Administrative Decisions (Judicial Review) Act and "under an enactment": Can NEAT Domestic be reconciled with Glasson?' (2004) 11 *Australian Journal of Administrative Law* 135.
 - 20 'Ouster clause' is the term preferred in the United Kingdom; 'preclusive clause' and 'finality clause' are used most frequently in the United States.
 - 21 A more comprehensive list of the various types of privative clauses is available in Administrative Review Council, *The Scope of Judicial Review: Discussion Paper*, 2003, Appendix 2 at 160–7; and in Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney General* (Canberra: ARC, Report No 47, 2006), chapter 3.
 - 22 Compare the similarity of approach taken in relation to the privative clauses variants in, for example, *R v Hurst ex parte Smith* [1960] 2 QB 133 (consideration of a 'no certiorari' clause); *Minister of Health v R, ex parte Yaffé* [1931] AC 494 (consideration of an 'as if enacted clause'); *Attorney-General v Ryan* [1980] AC 718 (consideration of

- a clause stating that certain administrative decisions ‘shall not be subject to appeal or review in any court’).
- 23 In Australia, see for example, *Plaintiff S157/2002 v Commonwealth* (2003) 201 CLR 323 at [165]; and E Campbell and M Groves, ‘Time Limitations on Applications for Judicial Review’ (2004) 32 *Federal Law Review* 29; and E Campbell and M Groves, ‘Privative Clauses and the Australian Constitution’ (2004) 4 *Oxford University Commonwealth Law Journal* 51. In the United Kingdom, the courts have taken a case-by-case approach. A twenty-one day period was found to be ineffective (*Pollway Nominees Ltd v Croydon LBC* [1987] 1 AC 79) but a six-week period was permitted (*Smith v East Elloe RDC* [1956] AC 736). The European Court of Human Rights found that a limitation period does not violate the European Convention on Human Rights provided the restriction does not impair ‘the very essence of the . . . right’ of access to the courts: *Stubbings v UK* (1996) 23 EHRR 213 at 233. Therefore, courts must decide whether the particular time limit is ‘reasonable’: HWR Wade and CF Forsyth, *Administrative Law* (8th edn, Oxford University Press, 2000) at 719.
 - 24 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [164]–[176] (Callinan J).
 - 25 For an example in point, see *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47, where a police disciplinary tribunal was found to have no jurisdiction to entertain complaints about a police officer who was still under probation.
 - 26 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
 - 27 Interpreted to include Ministers of the Crown in some cases.
 - 28 D Kerr and G Williams, ‘Review of Executive Action and the Rule of Law under the Australian Constitution’ (2003) 14 *Public Law Review* 219 at 225. A great many articles have been written on this case. See, for example, E Campbell and M Groves, ‘Privative Clauses and the Australian Constitution’ (2004) 4 *Oxford University Commonwealth Law Journal* 51; J Basten, ‘Constitutional Elements of Judicial Review’ (2004) 15 *Public Law Review* 187; C Beaton-Wells, ‘Restoring the Rule of Law – *Plaintiff S157/2002 v Commonwealth of Australia*’, (2003) 10 *Australian Journal of Administrative Law* 125; C Beaton-Wells, ‘Judicial Review of Migration Decisions: Life After S157’ (2005) 33 *Federal Law Review* 141.
 - 29 D Gifford, *Statutory Interpretation* (Law Book Company, 1990) at 3.
 - 30 This is consistent with the approach taken in other comparable jurisdictions. In the United Kingdom, see J Bell and G Engle (eds), *Cross on Statutory Interpretation* (3rd edn, Butterworths, 1995) at 57; in the United States, see *Cabell v Markham* 148 F 2 d 737 (1945).
 - 31 See especially the extra-judicial writings of Lord Steyn. For instance, J Steyn, ‘Dynamic Interpretation Amidst an Orgy of Statutes’ (2004) 3 *European Human Rights Law Review* 245 at 252; J Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25 *Sydney Law Review* 5. In the latter article, he states at 13: ‘In the Westminster Parliament exchanges sometimes take place late at night in nearly empty chambers whilst places of liquid refreshment are open. Sometimes there is a party political debate with whips on. The questions are often difficult but political warfare sometimes leaves little time for reflection. These are not the ideal conditions for the making of authoritative statements about the meaning of a clause in a Bill.’
 - 32 Such was the case with the privative clause in *Migration Act 1958* (Cth) s474(1), which was considered by the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
 - 33 HWR Wade and CF Forsyth, *Administrative Law* (8th edn, Oxford University Press, 2000) at 700. See also M Elliott, *The Constitutional Foundations of Judicial Review* (Oxford, 2001) at 28.
 - 34 (1760) 2 Burr 1040.
 - 35 [1957] 1 QB 574.

- 36 [1957] 1 QB 574 at 587.
- 37 See, for example, *Hockey v Yelland* (1984) 157 CLR 124.
- 38 Contrast, for example, *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (where no jurisdictional error was found to have occurred) and *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 (where the error in question was found not to be a jurisdictional error). Moreover, the continued relevance of the distinction between jurisdictional errors and non-jurisdictional errors was affirmed by the High Court in *Craig v South Australia* (1995) 184 CLR 163.
- 39 See for example, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Co* (1910) 11 CLR 1 (Griffith CJ, Barton and O'Connor JJ).
- 40 See *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 at 69–70.
- 41 (1984) 157 CLR 124.
- 42 See (1984) 157 CLR 124 at 130 (Gibbs J). The tendency to restrict the range of material that can be scrutinised by a court in the judicial review of decisions affected by a privative clause is seen again in the more recent case of *Craig v South Australia* (1995) 184 CLR 163 at 176–7.
- 43 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) at 203 (emphasis in original).
- 44 On this point, see the more detailed discussion in E Campbell and M Groves, 'Privative Clauses and the Australian Constitution' (2004) 4 *Oxford University Commonwealth Law Journal* 51.
- 45 This is most evident in privative clauses stating that the administrative decision maker's decision represents 'conclusive evidence' of fulfilment of the legislative requirements. See JF McEldowney, *Public Law* (2nd edn, Sweet and Maxwell, 1998) 543–4.
- 46 The *Hickman* doctrine derived from *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598 at 617 (Dixon J). His Honour there stated, in obiter, that administrative decisions are not considered 'invalid' provided that they meet certain requirements: that 'they do not upon their face exceed the . . . authority [conferred by the legislation in question]; that they . . . amount to a bona fide attempt to exercise powers [conferred]; and [that they] relate to the subject matter of the legislation'.
- 47 RS French, 'Judicial Review Rights' (2001) 28 *AIAL Forum* 33 at 40.
- 48 In M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd edn, LBC, 2004), the authors observed at 842 that 'a logician might protest that the one is the corollary of the other'.
- 49 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 502.
- 50 Cth Parl Deb (House of Representatives), 26 September 2001 at 31559 (Philip Ruddock).
- 51 Explanatory Memorandum, Migration Legislation Amendment (Judicial Review) Bill 1998 at [15] (emphasis added).
- 52 *Plaintiff S157 v Commonwealth* (transcript of proceedings before the High Court of Australia, 3–4 September 2002) at 94 (David Bennett, QC SG).
- 53 *Plaintiff S157 v Commonwealth* (transcript of proceedings before the High Court of Australia, 3–4 September 2002) at 89 (David Bennett, QC SG).
- 54 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 276 at 499.
- 55 Cth Parl Deb (Senate), 27 June 2002 at 3005 (Sen Andrew Bartlett).
- 56 J Laws, 'Law and Democracy' [1995] *Public Law* 72 at 79.
- 57 C Forsyth, 'Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' [1996] *Cambridge Law Journal* 122 at 136.
- 58 See, for example, *Coal Miners Industrial Union of Workers of WA v Amalgamated Collieries of WA* (1960) 104 CLR 437.
- 59 See *Anisimic v Foreign Compensation Commission* [1969] 2 AC 147. In this case the House of Lords considered a clause stating that a determination of the Foreign Compensation Commission 'shall not be called into question in any court of law'. Their Lordships

- held unanimously that the clause did not preclude judicial review of determinations resulting from jurisdictional error. Further, by majority, it held that a misconstruction of the Order in Council applied by the Foreign Compensation Commission.
- 60 See *Craig v South Australia* (1995) 184 CLR 163. Compare the comments of Kirby P (as he then was) in *Kriticos v State of NSW* (1996) 40 NSWLR 297. The case of *Plaintiff S157* is another example of this approach.
- 61 See, for example, *Hockey v Yelland* (1984) 157 CLR 124.
- 62 This was first noted by Dennis Pearce in 'Executive Versus the Judiciary' (1991) 2 *Public Law Review* 179. See also M Crock, 'Administrative Law and Immigration Control in Australia: Actions and Reactions', Unpublished PhD Thesis, Melbourne University, 1994 (Available at Melbourne University and the National Library of Australia).
- 63 For a history of privative clauses in New South Wales labour legislation, see *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88.
- 64 The president and judicial commission members have the status of New South Wales Supreme Court judges.
- 65 *Industrial Arbitration Act 1912–1952* (WA) s108 provided that proceedings in the Court of Arbitration or before the President of that Court shall not be impeached or held bad for want of form, nor shall the same be removable to any court by certiorari or otherwise; and no award, order or proceeding of the Court or before the President shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court of judicature on any account whatever.
- 66 (1960) 104 CLR 437 at 442 (footnotes omitted).
- 67 (1960) 104 CLR 437 at 447.
- 68 (1945) 70 CLR 598 (hereinafter *Hickman*).
- 69 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.
- 70 See *Powercoal Pty Ltd and Anor v Industrial Relations Commission of NSW and Anor* (2005) 145 IR 327 (NSWCA). See also, R McCallum, 'The Role of the Criminal Law in 21st Century Occupation Health and Safety Regulation' in *AMPLA Yearbook 2005* (Melbourne, AMPLA 2006) at 184–98.
- 71 [2006] HCA 22. In fact, the High Court considered an earlier version of s179. Although s179 has been amended since the dispute in this case arose, the differences between the two versions of the privative clause are irrelevant for present purposes.
- 72 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558.
- 73 *Fish v Solution 6 Holdings Limited* [2006] HCA 22. The majority consisted of a joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ. Kirby and Heydon JJ wrote separate dissenting judgments.
- 74 *ibid*, [44].
- 75 *ibid*, [139], citing *Ultra Tune (Aust) Pty Ltd v Swann* (1983) 8 IR 122; *Maltais v Industrial Commission (NSW)* (1986) 14 IR 367.
- 76 *ibid*, [169]. His Honour cites the comments of Brennan J in *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 219–20.
- 77 *ibid*, [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).
- 78 *ibid*, [146]. The significance of the inclusion of 'purported' decisions within the ambit of a privative clause is considered in greater detail later in this chapter.
- 79 See M Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998), ch 12.
- 80 H Martin, *Angels and Arrogant Gods* (AGPS Press, 1989).
- 81 See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Plaintiff S134 v Minister for Immigration and Multicultural Affairs* (2003) 211 CLR 441.
- 82 On the effect of moving from objective criteria to an 'is satisfied' test in refugee decision-making, see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 276.

- 83 These are clauses that empower the minister to make rulings in circumstances where the minister cannot be compelled to make a decision and if she or he chooses to do so, the decision cannot be reviewed. In practice, successive ministers have used these powers when minded to intervene on behalf of an applicant. Where the minister does not wish to intervene, she or he simply signals that the power is not to be exercised. See, for example, ss357 and 417, considered in *Ozmanian v Minister for Immigration and Multicultural Affairs* [1997] 256 FCA (17 April 1997). See J Hohmann, 'Report on the Senate Select Committee on Ministerial Discretion in Migration Matters: Inconclusive Witch Hunt or Valuable Contribution to the Australian Migration Debate?' (2004) 19 *Immigration Review* 5.
- 84 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.
- 85 See M Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998), ch 13; and J McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 22; and J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.
- 86 The Joint Standing Committee on Migration, which addressed concerns arising from the Part 8 legislative reforms, stated: 'The tightly defined framework for judicial review . . . is intended to provide a guard against de facto merits review by the courts, and to remove the fluidity or uncertainty which has characterised the grounds for review under the common law and AD(JR)': Parliament of the Commonwealth of Australia, *Asylum, Border Control and Detention*: Joint Standing Committee on Migration (AGPS, 1994) at 95.
- 87 M Crock, 'Judicial review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267.
- 88 (1999) 197 CLR 510 (hereinafter *Abebe*).
- 89 The majority consisted of Gleeson CJ, McHugh, Callinan and Kirby JJ.
- 90 The majority held that the word 'matter' could validly imply a part thereof, and thus some grounds (or some 'matters' of a legal dispute) could be excluded from judicial review. See *Abebe* at [28] (Gleeson CJ and McHugh J).
- 91 On the face of things, it is beyond the power of the Parliament to withdraw any matter from the grant of jurisdiction or to abrogate or qualify the grant: see *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482; *Australian Coal and Shale Employees' Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161; and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.
- 92 As stated earlier, the High Court refused to accept the minister's gloss on the *Hickman Principle* in *Plaintiff S157*.
- 93 Further, the High Court took pains to make clear that the construction of s474 has implications for remitter of actions by it to both the Federal Court and the Federal Magistrates Court. See *Plaintiff S157/2002 v Commonwealth* (2003) 201 CLR 323 at [96]–[97]: 'The limitation . . . of the jurisdiction otherwise enjoyed by the Federal Court and the Federal Magistrates Court . . . will be controlled by the construction given to s474. Decisions which are not protected by s474 such as that in this case . . . will not be within the terms of the jurisdictional limitations just described; jurisdiction otherwise conferred upon federal courts . . . will remain, to be given full effect in accordance with the terms of that conferral.'
- 94 *Plaintiff S157/2002 v Commonwealth* (2003) 201 CLR 323 at [76]–[77] (citations omitted).
- 95 On a practical level, it is important to note that while the High Court's decision in *S157* has been hailed as a victory for the institution of judicial review, it is not necessarily a victory for individual applicants. *S157* was handed down with a companion case, *Plaintiff S134 v Minister for Immigration and Multicultural Affairs* (2003) 211 CLR 441, and it is notable that this companion case did not result in success for the applicants, despite the expanded grounds of review once again available.

- 96 See, for example, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162; *Applicant VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411.
- 97 Clause 10(7), which contained the privative clause, was removed at the second reading: United Kingdom Parl Deb (House of Lords), 15 March 2004, col. 51.
- 98 (Emphasis added.) This proposed legislation was introduced in the House of Commons on 27 November 2003 as clause 10(7) of the Asylum and Immigration (Treatment of Claimants, etc.) Bill. If it had been adopted, the Bill would have inserted a new s108A into the *Nationality, Immigration and Asylum Act 2002* (UK).
- 99 See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
- 100 J Jowell, 'Heading for constitutional crisis?' 154 (7120) *New Law Journal* 401 at 401.
- 101 Migration Amendment (Judicial Review) Bill 2004 (Cth).
- 102 *ibid*, cl 2 (emphasis added).
- 103 Explanatory Memorandum, Migration Amendment (Judicial Review) Bill 2004, [7].
- 104 Commonwealth of Australia, 'Migration Amendment (Judicial Review) Bill 2004' in *Bills Digest*, Parl Paper No 118 (2003–4) at 8.
- 105 Explanatory Memorandum, Migration Amendment (Judicial Review) Bill 2004, [8].
- 106 H Woolf, 'The Rule of Law and a Change in the Constitution' (speech delivered at the Squire Centenary Lecture, Cambridge University, 3 March 2004).
- 107 5 US (1 Cranch) 137 (1803). In this case, the US Supreme Court held that it could declare void legislation that was 'repugnant to the constitution'.
- 108 See, for example, *Pickin v British Railways Board* [1974] AC 765 at 789 (Lord Morris).
- 109 *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558; affirmed by the High Court in *Fish v Solution 6 Holdings Limited* [2006] HCA 22.
- 110 C de Secondat (Baron de Montesquieu), *The Spirit of Laws* (Nugent translation, Nourse, 1773) at 174.
- 111 See, for example, *R v Kirby, Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254 (affirmed by the Privy Council: [1957] AC 288).
- 112 See, for example, J Jowell, 'Heading for constitutional crisis?' 154 (7120) *New Law Journal* 401 at 401.
- 113 Indeed, this was partly the rationale for their being proposed in the first place.
- 114 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 102.
- 115 For an early, and oft-cited, articulation of this aspect of the rule of law, see J Locke, *The Second Treatise of Civil Government* (Blackwell, first published in 1690, revised edn 1948) at 68 [136]: '[t]he legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges.'
- 116 *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 at 586.
- 117 J Steyn, 'Speech to Inner Temple' (speech delivered at the Inner Temple, London, 3 March 2004).
- 118 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.
- 119 In *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381, Gummow and Hayne JJ noted that 'the occasion has yet to arise for consideration of all that may follow from Dixon J's statement'.
- 120 *Fish v Solution 6 Holdings Limited* [2006] HCA 22. Although Kirby J dissented in this case, the issue to which he referred did not arise for consideration by the majority judges.
- 121 *Fish v Solution 6 Holdings Limited* [2006] HCA 22 at [146].

Chapter 23

- 1 *Davey v Spelthorne* [1984] AC 262 at 276 quoted in J Laws, 'Judicial remedies and the Constitution' (1994) 57 *Modern Law Review* 213.
- 2 FW Maitland, *The Forms of Action at Common Law* (1968) at 1.
- 3 W Paterson, *A Treatise on the Law and Practice of Injunctions* (5th edn, 1914) 1.
- 4 *Judicature Act 1873* (UK).
- 5 FW Maitland, *The Forms of Action at Common Law* (1968) 66.
- 6 *Pavey and Mathews Pty Ltd v Paul* (1987) 162 CLR 221.
- 7 HWR Wade and CF Forsyth, *Administrative Law* (9th edn, 2004) 647.
- 8 FW Maitland, *Collected Papers I*, 478, quoted in HWR Wade and CF Forsyth, *Administrative Law* (9th edn, 2004) 606.
- 9 A Denning, *Freedom under Law* (1949) 126.
- 10 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242–3.
- 11 *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* (1920) Ltd [1924] 1 KB 171 at 205; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 158–9.
- 12 *Ridge v Baldwin* [1964] AC 40 at 75.
- 13 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338.
- 14 [1969] 2 AC 147.
- 15 *O'Reilly v Mackman* [1983] 2 AC 237 at 278.
- 16 *Dyson v Attorney-General* [1911] 1 KB 410.
- 17 HWR Wade and CF Forsyth, *Administrative Law* (9th edn, 2004) 648–50.
- 18 *Boyce v Paddington Borough Council* [1903] 1 Ch 109; *Gouriet v Union Post Office Workers* [1978] AC 435.
- 19 Law Commission, *Report on Remedies in Administrative Law* (Cmnd 6407, 1976) quoted in D Feldman (ed), *English Public Law* (2004) at [18.03].
- 20 *Administration of Justice (Miscellaneous Provisions) Act 1933* (UK).
- 21 RSC Ord 53; confirmed by the *Supreme Court Act 1981* (UK).
- 22 [1983] 2 AC 237.
- 23 *ibid.*, 285.
- 24 *ibid.*
- 25 *R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.
- 26 *M v Home Office* [1994] 1 AC 377.
- 27 RSC Ord 54; now Civil Procedure Rule 8.
- 28 D Feldman (ed), *English Public Law* (2004) at [18.14]–[18.23].
- 29 HWR Wade and CF Forsyth, *Administrative Law* (9th edn, 2004) at 661–78.
- 30 *Davey v Spelthorne Borough Council* [1984] AC 262 at 278.
- 31 D Feldman (ed), *English Public Law* (2004) at [1.08].
- 32 *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115 at 1129.
- 33 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 247.
- 34 Section 69(1) and (2).
- 35 Section 69(3) and (4).
- 36 Section 65.
- 37 Section 75.
- 38 *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 82–4.
- 39 Based on the report by R Ellicott (et al), *Prerogative Writ Procedures: Report of Committee of Review* (Par Pap No 56, 1973).
- 40 An equivalent provision exists in *Judicial Review Act 1991* (Qld) s30; *Administrative Decisions (Judicial Review) Act 1989* (ACT) s17; *Judicial Review Act 2000* (Tas) s27.
- 41 (1989) 167 CLR 637 at 644.
- 42 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 434.
- 43 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
- 44 Section 39B(1).

- 45 Section 39B(1A).
- 46 Section 31.
- 47 Section 33(1)(c).
- 48 For example, *Salemi v Mackellar (No 2)* (1977) 137 CLR 396; *Reg v Collins*; *Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471.
- 49 *Migration Act 1958* (Cth), s474. The section was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).
- 50 (2003) 211 CLR 476.
- 51 (1945) 70 CLR 598 at 616.
- 52 (1914) 18 CLR 17 at 59.
- 53 For example, *The Queen v Federal Court of Australia*; *Ex parte WA National Football League* (1979) 143 CLR 190.
- 54 *Re McJannet*; *Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 653 (in the case of a judicial officer); *Re Refugee Review Tribunal*; *Ex parte Aala* (2000) 204 CLR 82 at 100–1, 134, 140–1 (in the case of an executive or administrative officer).
- 55 (1995) 184 CLR 163 at 179–90.
- 56 *Re Jarman*; *Ex parte Cook* (1997) 188 CLR 595 at 604; *Ex parte Durairajasingham* (2000) 168 ALR 407 at 415.
- 57 *Craig v South Australia* (1995) 184 CLR 163 at 180–2.
- 58 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558.
- 59 See, for example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
- 60 *Batemans's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 261.
- 61 *Commonwealth v Mewett* (1997) 191 CLR 471.
- 62 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 144–5.
- 63 *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *Ex parte Lam* (2003) 214 CLR 1 at 24–5.

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